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MUNICIPAL INSTITUTIONS

IN ENGLAND AND CANADA.

A municipal corporation may be described as a body-politic created by royal charter or Act of Parliament (*a*), and entrusted with the functions of local government within certain territorial limits, such as those of a city or town(*b*). Incorporation is granted at the request, express or implied, of the inhabitants of the territory or district over which the grant operates, and is intended to promote the convenience and welfare of the community.

Municipal corporations are chiefly distinguished from that species of artificial personality called quasi-corporations, first, because the former are incorporated by the consent of the people living within the municipal boundaries, and, secondly, because the sphere of their corporate operations extends itself wholly within the domain of local self-government; while the latter are

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(*a*) In Canada municipal corporations are now exclusively created by the authority of the legislature. In England, however, by the provisions of the Municipal Corporations Act, 1882, ss. 210, 259, the ancient prerogative of the Crown to grant charters of incorporation to municipalities is expressly conserved; but the grant can only be made upon the advice of the privy council and after petition made therefor by the inhabitants of the district sought to be erected into a municipality, notice of the petition having to be published in the *London Gazette* one month before it is taken into consideration (s. 211).

(*b*) See *Cuddon* v. *Eastwick,* Salk. 193, where it is said "A municipal corporation is properly an investing of the people of the place with the local government thereof, and therefore their law shall bind strangers; but a fraternity is some people of a place united together, in respect of a mystery and business, into a company, and their laws and ordinances cannot bind strangers, for they have not a local power of government." Cf. s. 7 of the English Municipal Corporations Act, 1882.

created by the legislature without reference to the wishes of the inhabitants of the territory over which such corporations have jurisdiction, and are simply intended to act as agencies, or auxiliaries, of the State government in administering its business within such territory. Instances of quasi-corporations in Canada are the boards of School Trustees and License Commissioners constituted by provincial statutes respecting public education, and the regulation of the liquor traffic; and board of Harbour Commissioners created by, or existing under the authority of, federal legislation. While these bodies are given certain corporate powers by the statutes creating them, yet such powers are limited to the administration of governmental duties of a public character, and beyond that they have no characteristics of a corporation(*c*). In some of the American courts it has been held that as corporations of this class merely represent the State they are not responsible for negligence in the discharge of such public duties as are entrusted to them(*d*); and some of the earlier English cases would appear to give countenance to this view(*e*). But it is now settled law in England that unpaid statutory trustees for public purposes (such as maintaining public docks, improving streets, and the like) are responsible in their corporate, or quasi-corporate, capacity for damages arising from the negligent performance of their statutory duty by themselves or their servants(*f*).

(*c*) The English law affords many, and our American law more numerous, examples of persons and collective bodies of men endowed with a corporate capacity, in some particulars declared, and without having in any other respect the capacities incident to a corporation. 2 Kent's Comm. pt. IV., p. 274 (14th ed.).

(*d*) See ***Bartlett* v. *Crozier*,** 17 Johns. 439; ***Morey* v. *Newfane*,** 8 Barb. 645; ***Mower* v *Leicester*,** 9 Mass. 247; ***Hill* v. *Boston*,** 122 Mass. 344; ***Brown* v. *Vinalhaven*,** 65 Me. 402.

(*e*) See ***Russell* v. *Men of Devon*,** 2 T.R. 667.

(*f*) See ***Mersey Docks Trustees* v. *Gibbs*,** L.R. 1 H.L. 93; ***Coe* v. *Wise*,** L.R. 1 Q.B. 711, reversing S.C. in 5 B. & S. 460; ***Ohrby* v. *Ryde Commissioners*,** 5 B. & S. 743; ***Collins* v. *Middle Level Commissioners*,** L.R. 4 C.P. 279.

Thus the law relating to the liability of municipal corporations for negligence is rendered more or less intricate by the fact that they possess a dual character—on the one hand, representing the State in respect of the administration of local government, and so able to invoke the immunity of the Sovereign power from legal responsibility quoad hoc; on the other hand, representing definite groups or communities of people in the conduct and enjoyment of their pecuniary and proprietary interests, and subject to the same legal responsibility as natural persons. In a word the elements of both the private and public species of corporations are combined in the municipal corporation; and the social history of England shews us how the resultant of this combination achieved its present distinctive place in our political institutions.

The origin of Municipal Corporations carries us back to so early a date in legal history as the Laws of the XII Tables (A.V.C. 304). Blackstone imputes to Numa Pompilius the honour of inventing them (*g*); while others ascribe their origin to the Greeks (*h*). Whatever their origin, this much is certain, that after the subjection of Italy, as a whole, to Roman rule the term 'municipum' was used to designate a free provincial town whose citizens enjoyed the plenary rights of Roman citizenship. The inhabitants of these municipia enacted their own local laws and usages, which were called leges municipales (*i*). As colonization progressed in the transmontane provinces new municipia were established, and the Germanic peoples found this system of local self-government admirably suited to their political genius. In Roman Britain thirty-three townships were established within a territory bounded by Winchester on the South and Inverness on the North (*j*). These were undoubtedly

(*g*) 1 Bl. Com. 468.

(*h*) See Angell & Ames on Corp. Introd. s. 15; and cf. Domat, Droit Civ. ii. 457.

(*i*) Adam's Rom. Antiq. 73; and Hunter's Rom. Law, 3rd ed., p. 32.

(*j*) Sir James Mackintosh, Hist. Eng. i., 30.

a modified form of the true municipium, the magistrates being entrusted with the administration of local police and certain judicial functions. Under the Saxons, the territory of England was broadly parcelled out into counties, or shires and hundreds(*k*) for civil purposes. Towards the close of the Saxon period the 'burh,' a civil division of territory called into existence by military exigencies(*l*) foreshadows, both etymologically and politically, the 'borough,' of paramount importance in the municipal development of a later period. Concerning the 'burh,' Gneist says: "Discerning rulers like Ælfred made use of the remains of old civitates and castra and other advantageous positions for such fortifications, and the protection which these afforded was readily sought by the neighbouring freeholders, tenants, and vassels, and also by the landless men and small tradespeople who were living among the servants and followers of the landlords. The difference in the legal position of the people thus crowded together rendered expedient the appointment of a special royal magistrate ('gerefa'), who was also endowed with extraordinary military, police and financial functions. At the close of the Anglo-Saxon period the burgenses, and in later times the constitution of the English municipal boroughs, arose from these beginnings(*m*)." Green, however, is of the opinion that in their origin 'boroughs' were not military units of the people, but mainly gatherings of persons engaged in agricultural pursuits; and he supports this view by reference to the fact that the first 'Dooms' of London provide especially for the recovery of cattle belonging to the citizens(*n*). Still, whatever their origin, it is in the constitution of the boroughs(*o*) of post-Conquest times that we must look for the prototype of the

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(*k*) Gneist (Const. Hist. Eng. c. iii.) demonstrates that the 'tithing' which some authorities regard as a third civil sub-division of territory, was nothing but a military arrangement.

(*l*) Burh, byrig, a fortified building.

(*m*) Const. Hist. Eng., i., c. iv.

(*n*) Hist. Eng. People i., Bk. III., 300.

(*o*) Hall. Mid. Ages ii, 389, 402.

modern municipal corporation. Under the early fiscal system of the Normans no discrimination was made in the method of collecting tallage (tallagium) between the towns, or boroughs, and the rural portions of the shire,—the sheriff, as the tallager, or chief executive officer of the shire in matters of finance, having unlimited jurisdiction over both. As the dues and rents were in many instances 'farmed' by the Crown to the sheriffs(p)., it is not surprising to find that the levies upon the towns were larger in proportion, and exploited with greater vigour, than in the case of the rural districts(q). Consequently the towns were not slow to seek relief from this system of oppression, and by the time of Henry I. we find the citizens of London obtaining a charter from the King, which, while not conferring upon them all the elements of a commune, or perfect municipality, yet freed them from arbitary and oppressive taxation and gave them the nucleus of local autonomy(r). Such an example as this could not but stimulate the other centres of trade and population in the realm, and so history records that by the time of John it had become a common practice for the Crown to grant to the towns the right to farm their own taxes. By means of a royal charter (firma burgi)(s) the towns or boroughs were endowed with the privilege of taxing their own citizens in their own appointed way, and free from the interference of the sheriff, to meet the levy of a lump sum imposed by the charter upon the town or borough(t). In addition to this, the borough ultimately

(p) Gneist, Hist. Eng. Const. 2nd ed. i, pp. 144, 145.

(q) Cf. Stubbs' Const. Hist. Eng. i., c. xi.

(r) This charter is to be found in Stubbs' Select Charters, p. 108.

(s) See Madox, Firma Burgi, 28, 116, 136, 139. The firma burgi was a grant of a thing incorporeal; it did not convey any title in the lands of the borough to the burgesses. Pollock & Maitland, History Eng. Law, 2nd ed. p. 652.

(t) The obligations of the 'fee-farm' are still extant. In the *Attorney-General* v. *Corp. of Exeter*, 2 Russ. 53, Lord Eldon held that if a fee-farm rent was chargeable on the whole of the city, it might be demanded of any one who held property in it, and he would have a right of contribution from the other inhabitants.

obtained the right, conditioned, as might be expected, upon the payment of a further tax, to hold a Court leet(*u*) within the territorial limits of the borough which should exclude therefrom the jurisdiction of the sheriff's tourn or general Court leet of the shire. To put off the galling yoke of the sheriff and his tourn was the primary object of the burgesses in acquiring the firma burgi and the borough Court leet. But the idea gradually spread among the freeholders(*v*) that the sessions of the Court leet were adapted for other purposes than the purely judicial; and soon we see the beginnings of a legislative assembly. "This body at first is rather a judicial than a governing body, for the powers entrusted to the burgesses by their charter are much rather justiciary than governmental. But municipal life grows intenser and more complex; the court has to ordain and to tax as well as to adjudge, and it is apt to become a council, the governing body of the borough. Then, as trial by jury penetrates the boroughs, it sets up an important change. The old pattern of a court with doomsmen who are there to declare the law gives way before the new pattern with jurors who bear witness to facts. In the town, as in the realm at large, 'court' and 'council' are slowly differentiated; the borough court becomes a mere tribunal, and by its side a distinctly conciliar organ is developed"(*w*).

In that period of English social development in the thirteenth century when the grant of local police jurisdiction (the Court leet) became co-existent with the grant of local taxation (firma burgi) historians profess to find the embryonic stages of British municipal institutions as they exist to-day(*x*). It was reserved

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(*u*) Derivation obscure, probably from A. S. 'lathian' to assemble.

(*v*) All the resident freeholders within the borough "paying Scot and bearing lot" were entitled and obliged to be present at the annual session of the Court leet. See Broom & Hadley's Comm. iv. pp. 358, 359; Gneist's Const. Hist. Eng. 2nd ed. i., 153, note C.

(*w*) Pollock & Maitland Hist. Eng. Law, 2nd ed. i., 659.

for that astute statesman Edward I. fully to apprehend the usefulness of incorporated boroughs in shielding the Crown from the popular odium against taxation. He perceived that the old right of the freeholder "paying Scot and bearing lot" to take his part in the Court leet, or borough assembly, had, by his time, been undermined by the influence of the industrial and mercantile guilds, and that instead of municipal business being discharged by the mass of freeholders it was tacitly entrusted to a 'leet jury,' a select committee of capital burgesses, membership in which was controlled by the guilds and perpetuated by a system of coöptation, the 'leet jury' arrogating to itself the right to determine the qualifications of its own members(*y*). In the oligarchy of the leet jury the greatest of the Plantagenets saw a ready means for obtaining the consent of the boroughs to increased taxation for the royal revenues, without too great a sacrifice to democratic influences. By conceding to the boroughs the right of representation in the commune consilium regni(*z*) and by making Parliament responsible for the borough assessments, he was persuaded that he might exploit a general system of tolls and imposts within the realm which would yield him far larger returns than the old system of arbitrary taxation. On the other hand, the danger of popular aggression would be minimized by

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(*x*) Gneist, Const. Hist. Eng., 2nd ed., i., pp. 152, 153, note c. Stubbs, Const. Hist. Eng., 4th ed., at p. 446, says: "Gneist distinctly regards the commune, the origin of the corporation, as the result of a combination of the firma burgi with the leet jurisdiction. This I entirely agree with, but the adjustment of the relation of these two elements with the guild presents some difficulties as to its universal applicability."

(*y*) In this way the guilds, although they were distinct corporations from incorporated boroughs, practically controlled municipal affairs. See Poll. & Maitl. Hist. Eng. Law, 2nd ed., vol. 1, 666, 667; Hallam's Mid. Ages, iii., 120; "Beverly Town Documents," Selden Society, vol. 14, Introd. XVII.

(*z*) The 'Common Council of the realm' is first called 'parliament' in the preamble of the statute of Westminster I. (1275). Parliament, however, in its present constituent parts did not sit until twenty years later. See Stubbs' Const. Hist., 3rd ed., ii., 133.

the fact that the election of burgesses to parliament would be controlled by the leet jury, which, in its turn, could be easily made to respond to the wishes of the Crown. Hence we find that in the year 1295 writs were issued to the sheriffs directing the return to parliament of two knights from each county, two citizens from each city, and two burgesses from each borough, "ad faciendum quod tunc de communi consilio ordinabitur in praemissis"(*a*). Thus by one sovereign act municipal institutions were given a definite place in the polity of the Kingdom, and the British Parliament, "the archetype of all the representative assemblies which now meet, either in the old or new world"(*b*) was created. But while posterity's meed of praise is undoubtedly due to Edward I. for his great constitutional achievements, we must not allow the eulogies of historians to obscure the fact that they were motived by the exigencies of the royal purse rather than by any grand and deliberate scheme of constitution-building(*c*). That he had the wit to measure the political bearings of his experiment, and the courage to crystallize into a broad principle of statecraft that which he had tentatively exploited as a mere scheme of finance, stamps him as one of the world's greatest men.

How amenable the boroughs were to the Crown's will is best described by the historian Green: "It was easy indeed to control them, for the selection of boroughs to be represented remained wholly in the King's hands, and their numbers could be increased or diminished at the King's pleasure. The determination was left to the sheriff, and at a hint from the royal council a sheriff of Wilts could cut down the number of represented boroughs in his shire from eleven to three, or a sheriff of Bucks declare he could only find a single borough, that of Wycombe, within the bounds of his county"(*d*).

(*a*) Taswell-Langmead Const. Hist. Eng., 4th ed., p. 261.

(*b*) Macaulay's Hist. Eng. i., c. i.

(*c*) Compare in this connection, Stubbs' Const. Hist., 2nd ed., ii., 306, and Green's Hist. Eng. People, iii., c. iv., p. 152, with S. R. Gardiner's Hist. Eng., i., p. 21.

(*d*) Hist. Eng. People, iii., c. iv.

How mischievous the system of local government by means of 'select bodies' had become in the time of the Tudors, and later, is fully described by Sir T. E. May (Const. History Eng., iii., 279, 283). He tells us that in the reign of Henry VII. the burgesses, for the purposes of national as well as local government, were put beyond the pale of the constitution. By the creation of the office of 'High Steward,' a prototype of the modern political boss in America, the borough franchise was so manipulated that only the 'proper sort,' from the point of view of the corruptionists, were sent to Parliament. Thus the power of the Crown and aristocracy was increased at the expense of the basic liberties of the people.

The boroughs continued their existence in history as the puppets of the Crown down to the second quarter of the nineteenth century, when the democratic tendencies of the age could no longer brook municipal government by a select body chosen at the bidding of the King. In the year 1835 the Municipal Corporations Reform Act (5 & 6 Wm. IV. c. 76) was passed, the object of which was to restore municipal corporations to their original basis, namely, as institutions entrusted with powers of local self-government and controlled by the general suffrages of those resident within the jurisdiction, and not by a chosen few. Between 1835 and 1882 the needs of municipal reform demanded some thirty-two legislative enactments. These are now consolidated in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which is thus described in a recent work of high authority: "In substance it is the outcome of Anglo-Saxon characteristics. Law and liberty are happily blended in it, and the result has been that in the municipal borough of to-day we have the evolution of the highest type of local self-government, a type admirably adapted to secure the well-being of the inhabitants, and to train them to discharge the duties of citizenship in a larger and imperial sphere"(*e*).

Within the Dominion of Canada the growth of popular municipal institutions has been a slow one.

(*e*) Ency. of the Law of England, IX., 29.

In Lower Canada from the early days of the French occupation down to a comparatively recent date local self-government was an unknown quantity. Two causes were chiefly responsible for this. The oligarchy established by the French King in 1663 scrupulously excluded from the management of public affairs every semblance of popular dictation. The Intendant, in many ways the chief protagonist of this comédie politique, apparently cared not who made the songs for the settlers of His Most Christian Majesty so be it he could make their local laws(*f*). In the next place the *habitants* evinced a deep-rooted prejudice against any system of local taxation, a matter which would naturally be involved in the establishment of any measure of democratic municipal government(*g*). Later on in the history of New France the colony was parcelled out into parishes with a seigneur in authority over each, whose power in the main was a reflex, and no feeble one, of that of the Intendant over the whole colony. These parishes were first given a civil status by an edict of the Council dated 2nd March, 1722; but, as will be gathered from what we have already said, they in no sense brought the people nearer the goal of local self-government.

During the military régime which supervened upon the conquest of Canada by Great Britain, it was not to be expected that matters of merely local concern would occupy the attention of the rulers of the colony; but even in the Quebec Act, passed more than ten years after the cession, no provision was made for the establishment of local self-government in a territory which then comprised among its inhabitants not only French-Canadians, but many settlers who were of English birth. How far the United Empire Loyalists succeeded in pushing forward democratic municipal government in spite of this lack of legislative

(*f*) See an interesting account of the Intendant's powers in a monograph by R. S. Weir, D.C.L. on "Municipal Institutions in Canada," contained in Hopkins' "*Canada; an Encyclopædia,*" vol. 5, p. 452. Dr. Weir quotes De Toqueville's opinion that the Canadian Intendant had much greater power than the French functionary who bore the same title.

(*g*) See Bourinot: "How Canada is Governed," p. 219.

authority, and the frank hostility of those who ruled the country, will appear when we deal more particularly with the history of the subject in Upper Canada.

To return to the history of Lower Canada, although the attainment of representative municipal institutions there was delayed to an extent hardly explicable by the troubles appearing on the political record of the province—retarding as their influence was in this behalf, notwithstanding—yet we think Sir John Bourinot's dicta(*h*) that "Until 1841 the legislature of Quebec was practically a municipal council for the whole province," and that "The Union of 1841 led to the introduction of municipal institutions in both the provinces [Upper and Lower Canada]" cannot be unreservedly accepted as correct. The cities of Montreal and Quebec received their first municipal charters in 1832; and so early as the year 1799 (39 Geo. III. c. 5) the legislature of the province had clothed the Justices of the Peace of Quebec and Montreal, convened in their Courts of Quarter Sessions, with a very large measure of municipal jurisdiction in respect of the several country districts into which the province was at that time divided. In view of these facts it is hardly accurate to say that the legislature discharged the functions of a conciliar body in municipal matters down to 1841. Furthermore, the legislation in which inhere the origo et fons of local self-government in Quebec was passed in the year 1840; in no wise was it post-union legislation, but, on the contrary, it was an Ordinance of the Special Council (4 Vict. c. 41) "to provide for the better internal Government of this Province [Lower Canada] by the establishment of local or municipal authorities therein."

The last-mentioned enactment, among other things, provided for (1) the division of the province into districts, each district to be a body-corporate; (2) the existence of a council in and for each district, composed of a Warden and councillors; (3) the appointment of the Warden to be made by the Governor under the great seal of the province; (4) *the election of councillors to be made by the inhabitant householders;* (5) the right of

(*h*) "How Canada is Governed," p. 219.

every parish and township having a population of 3,000 and upwards to elect two councillors for the district in which they were situated; (6) the qualifications of councillors; (7) the making of by-laws by each district council with respect to roads, bridges and public buildings, the purchase and sale of real property, the establishment and maintenance of schools, the assessment and levying of taxes for district purposes, the remuneration of parish and district officers, and for the maintenance of a system of police. Provision was also made for the incorporation of parishes and townships within the district. Beyond peradventure the student of democratic municipal institutions may rest his labours of research into the matter of their beginnings in Lower Canada when he puts his hand upon the Ordinance, 4 Vict. c. 4.

The next important piece of legislation touching the matter in hand was the 8 Vict. c. 40, which made the office of mayor elective; and two years later by 10 & 11 Vict. c. 7, any town or village comprising not less than forty houses, within an area of not more than thirty arpents was enabled to become incorporated; but the most notable measure for which the last-mentioned Act was responsible was the abolition of parish and township municipalities and the erection of county municipalities in lieu thereof. In 1855 (18 Vict. c. 100), the Lower Canada Municipal and Roads Act was passed, which was a very general revision and amendment of previous enactments on the subject. It re-organized the whole municipal system of the province, and in lieu of the old subdivision established (1) county, (2) parish and township, (3) town and village, municipalities, all of which were to be governed by *elective* councils. This enactment is for the most part in force to-day, and its amended provisions will be found, in connection with cognate legislation, in Arts. 4178 to 4640 of Rev. Stats. Quebec. Together with the Municipal Code these Articles constitute the corpus of local law, binding upon all municipal corporations in the province other than those cities and towns which enjoy the privilege of special incorporation.

This is, in brief, the story of the rise of local self-government in the Province of Quebec.

Dealing, now, with the growth of popular municipal institutions in the Province of Ontario, we remarked at a previous place that we should have something to say here concerning the part played by the United Empire Loyalists in the struggle for democratic municipal institutions in the unpropitious days of the Quebec Act and British distrust of popular bodies in the colonies.

It was largely owing to the actively manifested dislike of the Loyalists to the provisions of French private and proprietary law, imposed on them by the Quebec Act, together with their demands for representative institutions, that the British Parliament passed the Constitutional Act of 1791. But even under the restrictions of the Quebec Act these builders of Canadian political liberty, stimulated thereto by their knowledge of the value of local institutions in the revolted colonies whence they came(*i*), had broken up the desert and prepared the ground for the sowing of the seed of local self-government in the western part of the colony. Soon after their arrival commissions of the peace were issued to several prominent Loyalists for the preservation of order in the newly-settled districts(*j*); and in 1785 an Ordinance was passed by the Governor and Council "for granting a limited civil power and jurisdiction to His Majesty's Justices of the Peace in the remote parts of the Province(*k*). Following upon this, and in pursuance of the authority of an Ordinance passed in 1787, Lord Dorchester issued a proclamation creating four districts, namely, Lunenburg, Mecklenburg, Nassau and Hesse, in the territory of what was afterwards called the Province of Upper Canada, and at the same time made provision for the organization of Courts of Sessions of the Peace in and for the several districts above named(*l*).

(*i*) See Shortt: "Municipal Government in Ontario," Toronto University Studies in Hist. and Econ., vol. II., No. 2, p. 2; and cf. McEvoy's "Ontario Township," p. 20.

(*j*) Can. Archives, B. vol. 65, p. 28.

(*k*) Laws of Lower Canada, vol. 1, p. 103.

(*l*) Canadian Arch., Q. vol. 37, p. 178; Q. vol. 39, pp. 134, 139.

This was the origin of the Courts of Quarter Sessions in Upper Canada, and they, like their kindred institutions in Lower Canada, formed a stepping-stone between the oligarchic rule of the Governor and Council in matters of purely local concern, and the full measure of municipal self-government which the people were privileged to obtain under the Baldwin Act of 1849. How closely these Courts of Quarter Sessions repeated the history of the old English Court leet in respect of superimposing local legislative and administrative jurisdiction upon what was originally a grant of local judicial functions only, is apparent from the following0I observations of Professor Shortt, in his Municipal Government in Ontario(*n*): "The duties of the Courts of Quarter Sessions, as interpreted and exercised, were partly judicial, as in connection with the maintenance of the peace; partly legislative, as in prescribing what animals should not run at large, or what conditions should be observed by those who held tavern licences; and partly administrative, as in appointing certain officials and in laying out and superintending the highways." But there was this all-important difference between the Court leet and these Courts of Quarter Sessions from the view point of local self-government, the former was a popular body composed, as we have shown, of freeholders "paying Scot and bearing lot," while the latter was composed of mere nominees of the Crown.

Prior to the passing of the Constitutional Act of 1791 it appears (*o*) that the settlers in the townships of Fredericksburg and Adolphustown had attempted to hold town meetings; and one of the first demands for legislation after the organization of the Province of Upper Canada was embodied in a Bill "to authorize town meetings for the purpose of appoint[illegible] divers parish officers." This Bill met with the opposition of Governor

(*n*) University of Toronto Studies in History and Economics, vol. 2, p. 4

(*o*) See Appendix to Report of Ontario Bureau of Industries, 1897; and Canniff's "History of Ontario," 454.

Simcoe who, true to his theory that "an aristocracy [was] most necessary in this country"(*p*) viewed with distrust "the elective principle in town affairs"(*q*). But in the second session of the Parliament of Upper Canada (1793) the Act 33 Geo. III. c. 2, entitled "An Act to provide for the Nomination and Appointment of Parish and Town Officers within the Province" was duly passed. This Act has been called "the germ of our democratic system of municipal institutions"(*r*) in Ontario, and truly so; but the germ was not allowed to flourish and become robust without an attempt being made by the adherents of aristocratical local government to provide an antiseptic. The 'germ,' subsisting in the provisions of the last-mentioned Act, was the concession of the right to the "inhabitant householders" (*i.e.*, rate-payers) of electing certain officers, such as parish or township clerks, assesors and collectors of taxes, etc.; the 'antiseptic' was supplied by 46 Geo. III. c. 5, which enacted that if no town meetings were held on a single given date in any township the Justices in Quarter Sessions were to nominate and appoint the parish and town officers.

Beyond the innocuous power, conferred by the Act of 1793, of determining the height of lawful fences, and the right acquired in the following year of limiting the times and seasons for horned cattle and certain other animals to run at large(*s*), the town meetings enjoyed no legislative functions; but, as Mr. McEvoy says(*t*): "Public sentiment on the largest public questions was here fostered. This, however, was not so important or valuable as thet quality of mind which was developed. Little as was their law-making power, it was enough to show every man present the real necessity for laws how laws were made, that laws were simply

(*p*) See Canadian Arch., Q. vol. 279-1, p. 85.

(*q*) See his report to the Home Government in Canadian Arch., Q. vol. 279-1, p. 83.

(*r*) Biggar's Municipal Manual, p. 3.

(*s*) 34 Geo. III., c. 8.

(*t*) "The Ontario Township"; Toronto University Studies in Pol. Science, 1st ser., No. 1.

rules which ought to be the most advantageous that could be devised for the community, and that the community had an undoubted right to change these laws if they saw that a change would be an improvement. It was the conception of law that was fostered in the men of Ontario by their town meetings which led in a large measure to the establishment of responsible government in this province." In this passage Mr. McEvoy says as much for the early Ontario town as a factor in achieving political freedom as Professor Bryce said for its New England prototype, viz.: "Towns . . . are to this day the true units of political life in New England; the solid foundation of that well-compacted structure of self-government which European philosophers have admired and the new States of the West have sought to reproduce.(*u*)". Moreover, both writers justify the correctness of De Toqueville's opinion that "local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it"(*v*).

The principle of election to all town offices in Ontario gradually developed after the period we have just been considering. In process of time the Courts of Quarter Sessions were relieved of their power to legislate in respect of markets, roads and streets, nuisances, fire protection, etc., and representative bodies annually elected by the rate-payers succeeded to their functions both legislative and administrative. The towns began to agitate for autonomy in the first quarter of the last century; and while Kingston did not obtain its charter of incorporation until 1838 (four years after that granted to Toronto) yet it was the first town to obtain *a measure of local government*. In 1816 the legislature passed 56 Geo. III. c. 33, to enable the magistrates in Quarter Sessions to regulate matters of police in the town of Kingston; and a similar privilege was extended to the towns of York, Sandwich and Amherstburg in the following year (57 Geo. III. c. 2). But the first general measure of local self-govern-

(*u*) "The American Commonwealth," vol. 1, p. 562.

(*v*) "Democracy in America," vol. 1, c. 5.

ment passed after the Parish and Town Officers Act of 1793 was the 56 Geo. III. c. 36, establishing common schools in the province. By section 2 thereof the inhabitants of any town, township, village, "or place," were empowered "to meet together for the purpose of making arrangements for common schools." Professor Shortt very pointedly comments(*w*) upon so important a function as that of selecting school-trustees being entrusted to men who were presumably deemed incompetent by the legislature to elect representatives to look after streets, carters, nuisances, and the like.

We have said that Toronto was incorporated and given local self-government in 1834, and that Kingston secured its charter in 1838. About this period many other towns had sought special Acts in the nature of local government. While the Bills had no difficulty in passing the popular chamber, some were defeated in the legislative council, whose attitude at that time was invariably one of hostility to popular institutions. On the other hand, down to the union of the provinces in 1841, the rural municipalities had not materially advanced beyond the measure of local self-government which they had obtained in 1793. In 1837 the Act 33 Geo. III. c. 2 (Parish and Town Officers Act), with its amendments, was consolidated and re-enacted as The Township Officers Act (1 Vict. c. 21), but it was not until the passage of The District Councils Act, 1841, that the real foundation stone of the present municipal system in Ontario was laid. This Act transferred the local government powers of the Justices in Quarter Sessions to elective District Councils; and was followed by a more complete reconstructive measure in 1849 (The Baldwin Municipal Act), which is practically the frame-work of the present Municipal Act.

"The Baldwin Act," says Mr. Biggar, in his exhaustive and able work(*x*) to which we have previously referred, "and its lineal descendants have in their turn become the progenitors and paradigms of the Municipal Institutions Acts in force to-day in nearly every province of the Dominion."

CHARLES MORSE.

(*w*) Op. cit., at p. 17.

(*x*) The Municipal Manual, p. 9.

MEASURE OF DAMAGES IN ACTIONS BASED ON FRAUDULENT REPRESENTATIONS.

If A. sells B. for $20,000 a large tract of wild land which he represents to contain forty-three sections, which, in fact, however, only contains thirty-two sections, what is the measure of B.'s damages in case he recovers in a suit against A. for injury caused by the latter's fraudulent representations? That was the exact question which perplexed and divided the United States Circuit Court of Appeals for the Fifth Circuit in the recent case of *Walker* v. *Walbridge*, 136 Fed. Rep. 19. The majority of the Court hold that a declaration in an action of deceit which alleges that plaintiffs purchased from defendant a ranch for the lump sum of $20,000 in reliance upon defendant's representations, which were supported by an abstract of title produced by him, and the certificate of a county clerk, that the ranch contained 43 sections of land, which representation was false, in that defendant had no title to 11 of such sections, and that plaintiff obtained none, states a cause of action for the recovery of the value of said 11 sections, had defendant held title thereto as represented.

It seems that the decision of the Court is contrary to the controlling decisions of the United States Supreme Court in *Smith* v. *Bolles,* 132 U.S. 125, 10 Sup. Ct. Rep. 39, and *Sigafus* v. *Porter,* 179 U.S. 122, 21 Sup. Ct. Rep. 34. In the first of these cases the plaintiff had purchased 4,000 shares of stock in a corporation, at $1.50 per share, for which he had paid the purchase price, $6,000, which he alleged he was induced to do by the false and fraudulent representations of the seller as to the value of the stock, which he averred was at the time of the purchase and of his pleading wholly worthless, and that, had the same been as represented by the defendant, it would have been worth at least $10 per share. The ruling in that case was that "the measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have

gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. . . . If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation." In *Sigafus* v. *Porter* it is said: "There are adjudged cases holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase, and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued if the seller's representations concerning it had been true. . . We held in *Smith* v. *Bolles* that such was not the proper measure of damages; that case being like this, in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith* v. *Bolles*."

The Court in the principal case in distinguishing these decisions, said: "It seems clear to us that these cases do not apply to the case we have before us. It is not a supposed speculative profit which this action seeks to recover, but the actual value, be it more or less, of a large quantity of land which the plaintiffs were induced to purchase and pay for and were induced to believe they had actually received and entered into possession of, which in point of fact they never received, but which they might have received and would have received if the defendant had truly been the owner thereof, as he represented himself to be, and which at that time certainly had some substantial value, be it the amount claimed or any lesser amount, as may be easily ascertained by a proper inquiry before the

Court and jury. They seek only to recover this excess cash payment made to the defendant on his false representation of physical facts." The dissenting opinion of Shelby, J., is forcible and earnest. The learned judge reasons as follows: "A declaration in a suit for damages shews no cause of action unless it states facts which, if true, shew that the plaintiff has been damaged. It is averred that the plaintiffs have paid to the defendant the agreed price of $20,000, and have possession of the ranch. There is no offer to rescind the sale. The suit,, in effect, ratifies and confirms the sale, and seeks damages for the deceit as to the quantity of the land. On proof of the deceit, the plaintiffs would be entitled to recover, on proper allegations, the amount of their loss. If the land which they received was worth $20,000 it seems clear that they have lost nothing. If it was worth more than $20,000, they have profited to the amount of the excess by the purchase. In *Sigafus* v. *Porter*, 179 U.S. 116, at page 123, 21 Sup. Ct. Rep. 34, at page 37, 45 L. Ed. 113, which was an action for deceit in the sale of real estate, the Supreme Court has laid down the rule for the measure of damages in such cases: 'The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract.' The question in such case is, how much worse off are the plaintiffs than if they had not bought the land? If they had not bought the land, they would have in their pockets $20,000. It is clear that, to ascertain their loss, we must deduct from that amount the real value of the land they received. There is no other way in which to ascertain the loss which the plaintiffs have sustained by acting on the alleged representation of the defendant. That is the distinct rule established by the Supreme Court of the United States, by the English Court of Appeal, and by many state Courts of last resort: *Sigafus* v. *Porter*, supra, and cases there cited; *Smith* v. *Bolles*, 132 U.S. 125, 10 Sup. Ct. Rep. 39, 33 L. Ed. 279; *Peek* v. *Derry*, 37 Ch. Div. 541, 591, 594."—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PRACTICE—DISCOVERY—DEFAMATION—PRIVILEGE — INFORMATION ON WHICH DEFAMATORY STATEMENT BASED—NAMES OF INFORMANTS—NAMES OF PERSONS TO WHOM LIBEL PUBLISHED.

White v. *Credit Reform Association* (1905) 1 K.B. 653 was an action against a trade protection society, for libel, and on the examination for discovery the plaintiffs claimed to interrogate the defendants as to what inquiries they had made as to the truth of the statements before publishing them, and from whence they obtained the information, and the Court of Appeal (Collins, M.R., and Mathew, L.J.) held that such questions were admissible, affirming the ruling of Bray, J. But Bray, J., also held that the plaintiffs were entitled to require the defendants by examination of their books, to state to whom the defamatory statements were published, but the Court of Appeal held that such an interrogatory was oppressive and ought not to be allowed. Mathew, L.J., says: "In order to answer it the defendants might have to enter into an almost interminable inquiry as to what their various agents might have done in the matter and there does not appear to me to be any sufficient ground shewn for submitting them to such an oppressive requirement."

BILL OF EXCHANGE — CONFLICT OF LAWS — CHEQUE STOLEN ABROAD — FORGED INDORSEMENT — TRANSFER IN FOREIGN COUNTRY —BILLS OF EXCHANGE ACT 1882 (45 & 46 VICT. C. 61), S. 24—(53 VICT. C. 33, SS. 29, 71 (D.)).

In *Embericos* v. *Anglo-Austrian Bank* (1905) 1 K.B. 677 the Court of Appeal (Williams, Romer and Stirling, L.JJ.) affirmed the judgment of Walton, J. (1904), 2 K.B. 870 (noted ante, p. 249).

COMPANY—DIRECTORS' REMUNERATION—TRAVELLING EXPENSES OF DIRECTORS TO AND FROM BOARD MEETINGS—ULTRA VIRES—LIABILITY OF DIRECTORS FOR UNLAWFUL PAYMENTS TO CO-DIRECTOR.

Young v. *Naval & Military Co-operative Society* (1905) 1 K.B. 687 was an action brought by a director of a company, against the company to recover remuneration and travelling expenses for attending Board meetings, in which the company

set up that the resolution under which the plaintiff claimed travelling expenses was ultra vires of the directors, and the company also counterclaimed to recover from the plaintiff sums previously paid for travelling expenses to him and his co-directors. The articles of association provided that the directors were to be paid each £200 for their remuneration, but were silent as to any allowance for travelling expenses; the directors, however, had passed a resolution authorizing the payment of the travelling expenses of directors to and from Board meetings. Farwell, J., held that the provision for remuneration, in the articles, must be deemed to cover travelling expenses, and the resolution was therefore not warranted by the articles, and was ultra vires, and therefore that the plaintiff was not entitled to recover his travelling expenses as claimed, but was liable to refund to the company the travelling expenses he had himself received; but as regarded payments to co-directors for travelling expenses, he was not generally liable for them, but only for such as he had himself signed cheques for.

UNREGISTERED DENTIST—RIGHT TO SUE FOR FEES—DEBTOR AND CREDITOR—APPROPRIATION OF PAYMENTS BY CREDITOR.

Seymour v. *Pickett* (1905) 1 K.B. 715 was an action on a cheque for £25. The plaintiff was an unregistered dentist and as such not entitled to sue for fees. He had operated on the defendant as a dentist and had supplied him with false teeth, for which he made a total charge of £45. The defendant gave him two cheques, one for £20, which had been paid, and the other for £25, which was the one sued on. At the trial in the County Court the judge found that the value of gold and material supplied by the plaintiff was £21, and the plaintiff on his examination as a witness claimed to appropriate the £20 he had received to the payment of his professional fees, no appropriation having been made by the defendant, and the County Court judge gave judgment for the plaintiff for £21, which was subsequently reversed by the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.). The Court of Appeal (Williams, Romer and Stirling, L.JJ.), however, have reversed the decision of the Divisional Court holding that a creditor is entitled up to the last moment to appropriate a payment by his debtor, where the latter has made no appropriation of it, and that the appropriation by the plaintiff in the witness box was in time, and that although the plaintiff was not entitled to sue for professional services he might nevertheless recover for the value of materials supplied, and the judgment of the County Court was therefore affirmed.

Whether the plaintiff would have been entitled to recover the further sum of £4 on the cheque, the Court of Appeal declined to express an opinion, as the plaintiff, on the appeal, abandoned it. That question depending on whether the statute prohibiting an unregistered dentist from suing for fees would also prevent him from recovering on a cheque given therefor.

CHEQUE—FORGED INDORSEMENT—"FICTITIOUS" PAYEE—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT. C. 61), S. 7. SUB-S. 3—(53 VICT. C. 33, S. 7, SUB-S. 3 (D.)).

In *Vinden* v. *Hughes* (1905) 1 K.B. 795 the plaintiffs had in their employ a confidential clerk, whose duty it was to fill up cheques with the names of customers and the amounts payable to them, and get the plaintiffs' signature thereto. During the years 1901 to 1903 he filled up cheques to the order of several customers amounting in all to £487, and obtained the plaintiffs' signature thereto, he then forged the names of the payees to indorsements thereon and negotiated them with the defendant who bonâ fide gave full value for them and obtained payment from the plantiff's bankers. Some of the cheques were drawn for more than was actually owed, and some were drawn in favour of customers to whom nothing was owed. The question therefore was, whether under the circumstances the payees could be regarded as "fictitious" or non-existing persons, and under s. 7, sub-s. 3, of the Bills of Exchange Act, the cheques could be treated as payable to bearer. Warrington, J., came to the conclusion that they could not be regarded as fictitious persons, the plaintiffs believing, when the cheques were signed, that the amounts thereof were due to the payees; he therefore held that the plaintiffs were entitled to recover.

FATAL ACCIDENTS ACT, 1846 (9 & 10 VICT. C. 93), S. 1—(R.S.O. C. 166, S. 5)—LIMITATION OF ACTIONS—DECEASED'S RIGHT BARRED—NO NEW RIGHT OF ACTION IN REPRESENTATIVE OF DECEASED.

In *Williams* v. *Mersey Docks* (1905) 1 K.B. 804 the Court of Appeal (Mathew and Cozens-Hardy, L.JJ.) have decided a question which has been surrounded by some difficulty and occasioned some conflict of opinion. The action was brought under the Fatal Accidents' Act (9 & 10 Vict. c. 93) (see R.S.O. c. 106) to recover damages for the death of the plaintiff's husband. At the time of his death the husband was barred of any right of action for the injury which caused his death by a Statute of Limitations. The action was brought within the time limited by the Fatal Acci-

dents Act, and the simple point was whether the deceased being barred, any right of action accrued to his representatives on his decease. This question the Court of Appeal answer in the negative: in their opinion the right of action of the representatives depends on whether or not the deceased at the time of his death had any right of action for the injury.

ARCHITECT—PLANS—PROPERTY IN PLANS—CUSTOM—REASONABLENESS.

In *Gibbon* v. *Pease* (1905) 1 K.B. 810 the plaintiff had employed the defendant who was an architect to alter certain buildings of the plaintiff for which he drew plans, and superintended the execution of the work. The plaintiff paid the defendant his stipulated remuneration and demanded the plans, which the defendant claimed, by custom of architects, he was entitled to retain. The action was brought to recover them and Ridley, J., who tried the action gave judgment for the plaintiff which the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.JJ.) affirmed, holding that the alleged custom was unreasonable.

WILL—LATENT AMBIGUITY—GIFT TO "MY GRANDDAUGHTER—" —PAROL EVIDENCE.

In re Hubbuck (1905) P. 129 was an application for administration with the will annexed by the next of kin of the deceased on the ground that the will was void for uncertainty. By the will in question the testatrix had left all her property "to my granddaughter—." It appeared by the evidence that the deceased left three granddaughters, but that she had informed the person who drew the will that she desired to leave her property to her granddaughter "Polly." It was contended for the applicant that because a blank had been left after the word granddaughter it would be adding to the will to fill in the name, but Barnes, P.P.D., held that it was simply a case of a latent ambiguity and that the presence of the blank after the word granddaughter did not prevent the admission of parol evidence to shew which of the three granddaughters the testatrix intended, and probate was accordingly granted to "Polly."

WILL — CONSTRUCTION — SPINSTER — "CHILDREN BELONGING TO ME"—ILLEGITIMATE CHILD—PROBATE GRANTED TO ILLEGITIMATE CHILD BORN AFTER DATE OF WILL.

In re Frogley (1905) P. 137. A spinster had made a will in 1876 whereby she left her property in trust for all the children

who might belong to her at the date of her death. In 1878 she gave birth to an illegitimate child who survived her and the question was whether the gift was valid. Deane, J., held that it was, and that a distinction is to be drawn between gifts by deed or will by a man in favour of future illegitimate children, and gifts by a mother in favour of her future illegitimate child or children, and while the former may be void on the ground of public policy, the latter are not.

ADMINISTRATION—GRANT—WIDOW PASSED OVER ON GROUND OF MISCONDUCT—21 HEN. 8, C. 5, S. 2—(R.S.O. C. 337, S. 5)—CITATION.

In re Frost (1905) P. 140. A grant of administration to an intestate's estate was made by Deane, J., in favour of a son of the deceased, without citing the widow who had been guilty of marital misconduct which had been established in a suit by the intestate.

PRACTICE — CONSTRUCTION OF WILL — TRUSTEES SERVED WITH NOTICE OF APPEAL—COSTS.

Carroll v. *Graham* (1905) 1 Ch. 478 deals with a point of practice, and the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) declare that where upon an appeal upon the question of the construction of a will the trustees are served, and they hold a merely neutral position and have no desire or intention to take part in the argument, and are not likely to be called on to assist the Court, they ought not to appear by separate counsel; at the same time though the Court protested that the trustees' appearance by separate counsel was unnecessary, they were given their costs of the appeal.

ANCIENT LIGHTS — OBSTRUCTION — NUISANCE — INJUNCTION OR DAMAGES.

Kine v. *Jolly* (1905) 1 Ch. 480 was an action to restrain interference with the plaintiff's ancient lights. Kekewich, J., who tried the case came to the conclusion that the obstruction complained of had interfered with the enjoyment of one of the rooms of the plaintiff's house, which had been previously exceptionally well lighted, and which, notwithstanding the obstruction, was "still a well-lighted room," but by reason of the obstruction had lost "one of its chief charms and advantages," and he granted a mandatory injunction. On appeal the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) found difficulty in deciding what was the precise effect of the decision of the House of

Lords in *Colls* v. *Home & Colonial Stores* (1904) A.C. 179 (noted ante, vol. 40, p. 502) each of the learned judges taking a different view. The result of the appeal was the majority of the Court (Williams and Cozens-Hardy, L.JJ.) held that Kekewich, J., was right in holding that the plaintiff had a cause of action, but they considered it was a case for damages and not for an injunction; Romer, L.J., on the other hand, was of opinion that the plaintiff had no cause of action, on the finding of Kekewich, J., that the room in question was "still well lighted," by light which could not be interfered with, and with all deference to the other members of the Court, his conclusion appears to be the better reasoned and most in accordance with the *Colls Case*, and if the case were carried further, we should not be surprised to see it reversed.

PRODUCTION OF DOCUMENTS—RIGHT TO TAKE COPIES OF DOCUMENTS PRODUCED FOR DISCOVERY—RULES 357, 1002 (18)—(ONT. RULES 469, 326).

In *Ormerod* v. *St. George's Iron Works* (1905) 1 Ch. 505 the Court of Appeal (Williams and Stirling, L.JJ.) have affirmed the ruling of Joyce, J., to the effect that where documents are produced for discovery, the opposite solicitor is under Rule 357 (Ont. Rule 469) entitled himself to make copies thereof, and is not bound by Rule 1002 (18) (Ont. Rule 326) to require such copies to be furnished by the solicitor of the party producing the document.

COPYRIGHT—PICTURE—INFRINGEMENT—"COPY"—REPRODUCTION OF PART OF COPYRIGHT PICTURE—25 & 26 VICT. c. 68, s. 11—(R.S.C. c. 62, s. 4).

Haufstaengle v. *Smith* (1905) 1 Ch. 519 was an action to restrain the infringement of a copyright of a picture of a winged figure of Psyche. The infringement complained of consisted of a rough photographic illustration which appeared in the advertisement portion of a magazine, sold by the defendants. This illustration was diminutive and devoid of artistic merit and was a rude production of the female figure, but omitted a portion of the background of the picture. The defendants on becoming aware of the infringement, had the illustration torn out before selling any further copies of the magazine. Kekewich, J., held that the illustration was an infringement inasmuch as it was calculated to prevent the sale of the plaintiff's goods by familiarizing the public with a base form of reproduction. Under the

circumstances, however, he gave the plaintiff a farthing damages and costs. Another judge might possibly have withheld costs: see *American Tobacco Co.* v. *Guest* (1892) 1 Ch. 630.

WILL—CHARGE OF DEBTS ON REALTY—NON-EXONERATION OF PERSONALTY FROM DEBTS.

In *Re Banks, Banks* v. *Busbridge* (1905) 1 Ch. 547 the question was whether a testator's personal estate was exonerated from payment of debts. By the will in question the testator gave all his personalty to his widow, but there was no express exoneration of it from debts; and "subject to the payment of his just debts and funeral expenses" he devised certain real estate to trustees for his widow and other persons, expressing a wish that none of his real estate should be sold whilst there was any male descendant of his own surname. Buckley, J., held that this did not amount to an exoneration of the personalty as the primary fund for the payment of debts, and funeral and testamentary expenses.

LITERARY AND SCIENTIFIC INSTITUTIONS—BORROWING POWERS.

In re Badger, Mansell v. *Cobham* (1905) 1 Ch. 568 may be referred to as shewing that where a literary or scientific institution is established under a statute, and is empowered to acquire and hold real estate, it has no general powers of mortgaging its property, or borrowing money, except so far as the statute under which it is established expressly enables it so to do.

COMPANY—DEBENTURES—FLOATING SECURITY—DEBENTURES NOT IN DEFAULT—RECEIVER.

In re London Pressed Hinge Co., Campbell v. *London Pressed Hinge Co.* (1905) 1 Ch. 576. Buckley, J., held, much against his inclination, that debenture holders of a limited company whose debentures are a floating charge on all the property and undertaking of the company, are entitled to the appointment of a receiver on shewing that the security is in jeopardy, although there be nothing present over-due on their debentures, either for principal or interest.

WILL—BRITISH SUBJECT'S WILL EXECUTED ABROAD—LEASEHOLDS —WILLS ACT 1861 (24 & 25 VICT. c. 114) ss. 1, 4—(2 EDW. VII. c. 18 s. 3 (O.)).

In re Grassi, Stubberfield v. *Grassi* (1905) 1 Ch. 584. Buckley, J., held that "personal estate" in the Wills Act 1861 (24 & 25 Vict. c. 114), from which 2 Edw. VII. c. 18 (Ont.), is derived,

includes leaseholds and that the will of a British subject made abroad in accordance with the law of the place is as effective as regards leaseholds in England, thereby disposed of as it would be if made according to the law in England, but the statute does not enable a testator to make dispositions of personal property which he could not make under the law of England; because, as the learned judge points out, the statute does not say that such a will shall be valid for all purposes, but that it shall be valid for the purpose of being admitted to probate, and will then be effectual for such purposes, following on probate as the law of England allows.

COMPANY—BANKRUPTCY OF SHAREHOLDER—PROOF IN BANKRUPTCY FOR LIABILITY IN RESPECT OF FUTURE CALLS—WINDING-UP—SURPLUS ASSETS.

In re West Coast Gold Fields (1905) 1 Ch. 597 was a winding-up proceeding, in which the proper application of surplus assets came in question. Among the shareholders of the company was a holder of partly paid shares who had become bankrupt, the company proved a claim against his etsate in respect of his liability for future calls on his shares, and received a dividend, less than 20s. in the pound on the amount proved; and the trustees in bankruptcy contended that the shares then became fully paid up shares and he was entitled to participate in the surplus equally with the other holders of paid up shares, but Buckley, J., ruled against that contention, and held that until the total amount remaining unpaid on the shares after receipt of the dividend had been paid, the trustee could not be regarded as the holder of fully paid up shares.

VENDOR AND PURCHASER—CONTRACT OF SALE—CONDITION FOR RESCISSION IF OBJECTION TO TITLE INSISTED ON—ABSENCE OF TITLE TO PART OF PROPERTY SOLD—COMPENSATION.

In re Jackson and Harden (1905) 1 Ch. 603 was an application under the Vendors and Purchasers Act. The point submitted to Buckley, J., was as to the right of the vendors to rescind. The conditions of sale inter alia provided that the vendors should be entitled to rescind the contract if the purchaser should "insist on any objection or requisition as to title," which the vendors should "be unable to remove or comply with," and another condition provided that any mis-statement or omission in the particulars should form the subject of compensation. The contract was the sale of a villa under a description which

would include the mines and minerals under it, as a matter of fact the vendors had no title to the mines and minerals. The purchaser by requisition required the vendors to shew a title to the minerals, and the vendors then claimed the right to rescind. This, Buckley, J., held, they were not entitled to do, and that the purchasers were entitled to a performance of the contract except as to the minerals, but with compensation for the excepted property. The objection in regard to the minerals he held was not an objection to the title, because as to them the vendors had no title at all, and "you cannot take an objection to that which has no existence." Such conditions for rescission as that above mentioned, he holds do not apply to cases where no title at all is shewn, and the fact that, in this case, the want of title was only in regard to part of the property sold, he held made no difference.

COMPANY—NOTICE OF MEETING—CONTINGENT MEETING.

In re North of England Steamship Co. (1905) 1 Ch. 609 was an application by a limited company to the Court to confirm a reduction of capital authorized by a special resolution, and the question arose whether the resolution had been duly confirmed at a general meeting of the shareholders, and this depended on whether the meeting which purported to confirm it had been duly called. The articles of association provided that "whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting." The Companies Act provides that "notice of any meeting shall for the purpose of this section be deemed to be duly given, and the meeting be duly held, whenever such notice is given, and meeting held in manner prescribed by the regulations of the company." Notice of the special meeting was duly given and by the same notice the shareholders were informed "should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent general meeting of the company, which will be held (stating time and place)." This contingent notice Buckley, J., held was not sufficient, as according to *Alexander* v. *Simpson*, 43 Ch. D. 139, notice of a contingent meeting is not notice of a meeting; he therefore held that the resolution had not been duly confirmed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] CLIPSHAW *v.* TOWN OF ORILLIA. [May 17.

Leave to appeal—Trivial amount at stake—Special reason.

Application by the plaintiff for leave to appeal to the Court of Appeal from the judgment of a Divisional Court under sec. 76 (1) (*g*) of 4 Edw. VII. c. 11, whereby such leave may be given in cases other than those in which the appeal lies as of right under that section "where there are special reasons for treating the case as exceptional and allowing a further appeal."

Held, that the amount at stake being very small ($75), the fact that the decision on the facts or the law may be thought controvertible was not by itself a special reason for treating the case as exceptional and allowing a further appeal.

F. Hodgins, K.C., for the plaintiffs. *E. F. B. Johnston*, K.C., for the defendants.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Anglin, J.] [May 11.

HILLYER *v.* WILKINSON PLOUGH CO.

Trial—Questions to jury—Answers of jury—Accident to workman—Negligence.

... trial ordered in an action by a workman against his emp...er, for personal injuries sustained by him as the result of an explosion caused by a wet sprue being thrown by a fellow workman into a ladle filled with molten iron, because although the jury found negligence imputable to the defendants, and stated in what that negligence consisted, they were asked to and did not find whether such negligence was the cause of the plaintiff's injuries. Nor when asked whether the defendant through its foreman was guilty of negligence, and if so in what

did such negligence consist, were they explicitly directed to confine their findings to such negligence, if any, as, upon the evidence, they should be satisfied, had caused the explosion which injured plaintiff.

DuVernet, for defendants. *R. McKay*, for plaintiff.

Meredith, C.J.C.P.,
Falconbridge, C.J.K.B.] AMES *v.* SUTHERLAND. [May 23.
Anglin, J.

Stock brokers—Carrying stocks on margin—Pledges of stock—Sale without notice—Damages.

Judgment of STREET, J., reported supra, p. 333, affirmed.

Biggs, K.C., for defendant, appellant. *Thomson*, K.C., and *Tilley*, for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Jan. 10.

RICKETTS *v.* SYDNEY AND GLACE BAY RY. CO.

Electric railway—Negligence in operating—Injury to foot passenger—Excessive speed—Burden of shewing means of escape.

Plaintiff was proceeding along the track of the defendant company on a public street in the City of Sydney when he was overtaken, struck and severely injured by an electric car which was being driven at an excessive and dangerous rate of speed.

At the time of the accident plaintiff was prevented from escaping by a car of another line which was obstructing the crossing in front of him and by banks of snow which had been thrown up by defendants' plow at the side of the track upon which he was standing.

Held, 1. Setting aside the judgment for defendant and ordering a new trial, that the burden of shewing that plaintiff had means of escape was upon the defendant company.

2. Plaintiff having the right to be where he was, and the whole event, from the moment he discovered his danger to the

time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape.

Covert, for appeal. *Drysdale*, K.C., and *Burchell*, contra.

Full Court.] [Jan. 10.

MCCORMACK *v.* SYDNEY AND GLACE BAY RY. CO.

Electric Railway Co.—Dangerous condition of car steps during storm—Duty of passenger to exercise more than ordinary caution.

The steps of an electric car owned and operated by the defendant company were in a slippery condition in consequence of exposure while in use to snow followed by rain, sleet and cold. The evidence shewed that the car had been thoroughly cleaned in the morning before being sent out and that it would not have been practicable to operate it in such weather as that which prevailed at the time and to send it back constantly to the barn to have the snow and ice removed.

Held, that passengers boarding and leaving the car at such a time were bound to exercise more than ordinary caution, and that it would not be reasonable to hold the company accountable for injuries sustained by plaintiff a passenger who in getting off the car slipped and fell.

Fullerton and *Foley*, for appeal. *Mellish*, K.C., and *Burchell*, contra.

Full Court.] MILLER *v.* BLAIR. [Jan. 10.

Purchase and hiring agreement—Failure to record under Bills of Sale Act, R.S. 1900, c. 142, s. 8—Not good as against bonâ fide purchaser for value.

Plaintiffs through their agent K. sold to F. a piano for the sum of $300, F. paying a portion of the purchase money in cash and giving his promissory notes for the balance extending over a period of thirty-four months. Immediately after the sale and after receiving delivery of the piano F. signed a purchase and hiring agreement under which, upon completion of the payments to be made by him he was to become owner of the piano, the title

to which, in the meantime, remained in the vendors. It was further agreed that in the event of F. becoming insolvent or attempting to sell or part with the possession of the piano all rights of F. should cease and the vendors should be at liberty to retake possession. F. sold the piano to defendant while about one-half of the purchase money was still unpaid.

Held, that the agreement signed by F. having been taken by way of security should have been filed under the provisions of the Bills of Sale Act, R.S. (1900) c. 142, s. 8, in order to be valid against creditors or an innocent purchaser for value and not having been so filed plaintiffs could not recover.

One of the clauses of the agreement contained a number of blanks which by inadvertence were not filled up at the time the agreement was executed.

Held, that the Court could not give effect to the clause in question, but must deal with the agreement as if the clause were not there at all.

J. J. Ritchie, K.C., for appeal. *W. F. O'Connor* and *R. F. Phalen*, contra.

Full Court.] HANRIGHT *v.* LAKEVIEW MINING CO. [Jan. 10.

Mines and minerals—Rental—Payment by cheque afterwards dishonoured—Rights of third parties intervening—Commissioner—No jurisdiction to deal with equities.

The rentals payable by defendant company for gold mining arrears held by them under lease fell due July 2nd, 1904, and continued unpaid for 30 days thereafter. On the last day for payment the solicitor for A., holder of a judgment lien against the company, acting under the provisions of R.S. 1900, c. 18, s. 43, went to the Mines Office and made out and gave to the clerk there his cheque in payment of the rental and an entry of payment was made opposite the lease in the books in the office and a receipt was prepared. On the following day the cheque was presented for payment and was returned indorsed "no funds," and the entry in the books and the receipt (still not delivered) were cancelled.

Held, assuming that payment by cheque would be good (as to which quære), that the cheque having been dishonoured, the Commissioner of Mines could not subsequently, as against the intervening rights of third parties, accept payment from A. or his

solicitor, for the purpose of preserving the rights of A., whether by good cheque or otherwise.

Held, affirming the judgment of the Commissioner of Mines on this point that he (Commissioner) had no jurisdiction to deal with the supposed equities of A. as against plaintiff, a member of the company, who had filed an application on the theory that H. as a member of the Company could not allow the lease to be forfeited and take a fresh title in himself as against A.

W. B. A. Ritchie, K.C., for appeal. *H. A. Lovett*, contra.

Full Court.] MOSHER *v.* O'BRIEN. [Jan. 10.

Bill of sale—Absence of fraudulent circumstances—Possession—Effect of—Affidavit—Indicative rule not applicable.

A bill of sale given in connection with the sale of a business was held by the vendor for the benefit and protection of plaintiff who had indorsed certain promissory notes given by the vendee in payment of the purchase money. This bill of sale having expired in consequence of failure to renew it under the provisions of the Act, plaintiff, in pursuance of an agreement made at the time of the sale, demanded and received a second bill of sale to secure the amount for which he remained liable in respect of the original indorsements, as well as certain amounts for which he had become liable as indorser of other promissory notes. There being no question of insolvency on the part of the maker at the time the second bill of sale was given, and no fraudulent purpose, and the terms of the agreement being accurately set forth,

Held, 1. There was no pretence for holding the bill of sale void under the Statute of Elizabeth.

2. The fact that plaintiff had taken possession under his bill of sale and was in possession at the time the sheriff made his levy was sufficient in the absence of fraud to enable plaintiff to maintain his action.

3. Following *Creighton* v. *Reid*, 27 N.S.R. 72, that the affidavit to the bill of sale was not bad because it had been sworn before the solicitor by whom the bill of sale was prepared, the rule in the Judicature Act (O. 36, R. 16) referring only to letters litigated in Court and not to outside matters such as affidavits to bills of sale.

W. F. O'Connor and *F. L. Davidson*, in support of appeal. *J. A. Kenny*, contra.

Full Court] REX *v.* JODREY. [April 29.

Criminal law—Election of prisoner as to trial—Power of prosecuting officer to receive—Depositions—Perusal of—Magistrate's signature.

Where there is no judge of the County Court residing in a county the prosecuting officer or counsel appointed under the provisions of R.S. (1900) c. 165, s. 1, is empowered to take the election of a prisoner under the Code, s. 766, to be tried before the judge of the County Court.

The power given to such officers to conduct all criminal business on behalf of the Crown includes all process necessary to bring the prisoner to trial, and the making of his election is one necessary act in these proceedings.

Where all the depositions, or copies thereof, taken against the prisoner and returned into the Court before the trial were handed to the prisoner's counsel for perusal,

Held, that it was no cause of complaint that the papers so handed were mixed up with other papers, there being no serious difficulty in understanding those applicable to the particular offence with which the prisoner was charged.

Held, also, that depositions to which the magistrate had affixed his signature were not to be rejected because such signature was possibly not placed in the most correct place.

Quære, whether an indictment found by the grand jury should be quashed because depositions are improperly taken.

The King v. *Traynor*, 4 Can. Cr. Cas. 410, questioned.

J. Philip Bill, for prisoner. *V. J. Paton*, for the Crown.

Full Court.] REX *v.* MCMULLIN. [April 29.

Canada Temperance Act—Word "county"—Incorporation of city—Does not effect reduction of area.

The word "county" for the purposes of the Canada Temperance Act simply means "geographical area," and there is therefore no reason for construing the Act in such a way as to effect a reduction of the prohibited area when a city, incorporated under provincial legislation, is carved out of it.

By Order-in-Council dated October 15th, 1881, the second part of the Canada Temperance Act, 1878, was declared to be in force and take effect in the County of Cape Breton. In the year 1904, by Act of the Legislature of Nova Scotia passed in that

year, the City of Sydney was incorporated. Defendant was convicted of having unlawfully kept intoxicating liquor for sale in the City of Sydney contrary to the provisions of the second part of the Canada Temperance Act then in force in said city.

Held, affirming the conviction, that so far as the Canada Temperance Act was concerned the word "county" was to be read as applying to the county as it existed when the Act was brought into force by Order-in-Council and that the incorporation by the provincial legislature of a portion of the territory as a town or city would not have the effect of displacing the operation of the Act.

J. S. Madden, for defendant. *H. S. Ross*, contra.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] [May 15.

IN RE CASWELL AND SOUTH NORFOLK.

Liquor License Act—Separate petitions—Proof of signature by sufficient number—Adjournment of time appointed for summing up votes—Time when by-law to come into operation—Mistake in clerk's certificate as to result of vote.

Application to quash by-law No. 367 of the municipality, being a local option by-law passed under the provisions of ss. 61-73 of the Liquor License Act, R.S.M. 1902, c. 101, also by-law No. 368, providing for the taking of the votes of the electors or by-law No. 367.

PERDUE, J.:—Where there has been a virtual compliance with the statute and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has discretion in determining whether there has been a sufficient compliance and whether effect should be given to the objections on an application to quash: *Lawson* v. *Corporation of Reach*, 19 U.C.R. 591; *White* v. *East Sandwich*, 1 O.R. 530; *Milloy* v. *Onondaga*, 6 O.R. 573; *Young* v. *Binbrook*, 31 O.R. 108. As Cameron, J., observed in *White* v. *East Sandwich*, "the Court is not to be astute in finding grounds in which the by-law might be held defective."

Acting on this principle the learned judge refused to hold that any of the following objections were fatal to the by-law:

1. That, instead of one petition signed by at least twenty-five per cent. of the resident electors whose names appeared on the last revised municipal voters' list asking the council to submit the by-law to be voted on as required by section 62 of the Act, some 13 papers, all with the same printed heading, each paper having a number of signatures attached, were tied up in a roll, the sheets not being fastened together, and presented to the council, it being admitted that the separate printed headings all contained matters sufficient for the petition.

2. That there was no proof that the petitions altogether were signed by twenty-five per cent. of the electors. It was for the council to satisfy itself that this condition had been complied with and it must be assumed that it performed its duty in that respect.

3. That there was no entry in the minutes of the proceedings of the council shewing receipt of the petition.

The receipt of the petition was recited in by-law No. 368, and that was sufficient.

4. That, instead of preparing and posting up "a list of those entitled to vote on such by-law" as required by section 67 of the Act, the clerk of the municipality posted up and supplied to the deputy returning officer merely copies of the list of electors of the municipality for this year, certified by him to be true copies of the last revised voters' list of the municipality.

Persons desiring to vote should know or should inform themselves that, under section 63 of the Act, all whose names are on the last revised voters' list are entitled to vote on such a by-law, so that what was done was a substantial compliance with the Act.

5. That the certificate of the clerk as to the result of the voting by mistake, referred in the body of it to the by-law as No. 348 instead of No. 367.

The heading of the certificate, however, sufficiently shewed what by-law was referred to.

6. That, instead of summing up the votes on the day appointed by the by-law, the clerk, on account of the non-receipt of one of the ballot boxes, adjourned the proceeding to a future day, for which adjournment there is no statutory authority.

7. That the by-law received its third reading in 27th December, 1904, and, although passed in the afternoon of that day, was declared to be in force on that day, that is, as alleged, from the beginning of that day.

Application refused with costs.

Potts, for applicant. *A. J. Andrews*, for the municipality.

Perdue, J.] McCAUL *v.* CHRISTIE. [May 22.

Practice—Setting aside judgment—Leave to defend—King's Bench Act, Rules 347, 664—Error of solicitor's clerk.

Appeal from the order of the referee setting aside the judgment entered herein in default of a defence and allowing a defence to be put in. A firm of solicitors had been instructed to defend the action, but, by the error of their clerk in not carrying out his instructions, the judgment was allowed to be entered.

Held, that, when a final judgment has been regularly entered, and the defendant applies to be let in to defend, the general rule is that he must shew a good defence on the merits: *Watt* v. *Barnett,* 3 Q.B.D. 363; but, under Rules 347 and 664 of the King's Bench Act, the referee has a discretion to set aside the judgment if he thinks any possible defence is shewn, and that the exercise of that discretion in defendant's favour should not, under the circumstance of this case, be interfered with, although the learned judge was of the opinion that, if the motion had been made to him in the first instance, the defence shewn was so weak that he would not have opened up the judgment: *More* v. *Kennedy,* 12 M.R. 173, followed.

Appeal dismissed, with the addition, however, of a term to the order that the defendant should waive any right to security for costs as a condition to being let in to defend.

Costs of the appeal to be costs in the cause.

T. R. Ferguson, for plaintiff. *E. L. Howell,* for defendant.

Province of British Columbia.

COUNTY COURT.

Bole, Co. J.] PAISLEY *v.* NELMES. [May 30.

Partnership Act—Registration—Real estate agent.

Real estate agents or brokers in partnership in the business of selling real estate on commission are not persons associated in a general partnership for trading, manufacturing or mining purposes within the meaning of the Partnership Act. See *Harris* v.*Amory,* L.R. 1 C.P. 148; *R.* v. *Sylvester,* 33 L.J.M.C. 80; *Caledonian Ry. Co.* v. *N.B. Ry. Co.,* 6 App. Cas. 131.

Pelly, for plaintiffs. *Brown,* for defendants.

Book Reviews.

A Concise Treatise on the Law of Landlord and Tenant, by WILLIAM MITCHELL FAWCETT, of Lincolns Inn, Barrister-at-law. 3rd edition, by William Donaldson Rawlins, K.C., London: Butterworth & Co., 12 Bell Yard, Temple Bar, W.C., law publishers, 1905. 680 pages.

In the preface to the 3rd edition Mr. Rawlins remarks: "Law books are like children, in that, if they live, they generally grow. So it is hoped that the increased bulk of this edition will be accepted as a normal symptom of healthy vitality."

There is no question of the vitality of this treatise. It is one of the best the profession have on the subject of landlord and tenant. The additions to this edition are considerable. Some of them of not much interest to us, but others are—especially the new section treating of mineral leases and license, and the amplification of the subject of specific performance. With these exceptions the work remains much as it was in the previous edition. We are glad to notice that an alteration has been made in the quotation of statutes, the actual words of material statutory provisions having been in many cases substituted for the author's condensation of their effect. The benefit of this needs no comment. The printer's work is of the very best. It is a pleasure to read a book so well got up as this is.

Flotsam and Jetsam.

The number of *The Living Age* just published gives in extenso Professor Holland's article in "The Fortnightly" on "Neutral Duties in a Marine War, as illustrated by recent events." This will be read with much interest. It is a valuable addition to the difficult but most important subject of international law. We trust so far as the present war is concerned there may be no need to discuss the views there expressed by that great authority. If Russia's rulers would only learn the lessons they are being taught, the hand of the "Scourge of God" (for so has Japan been aptly described) would doubtless be stayed and the present horrors cease.

There is much to be said in commendation of the proverbial exhortation "be always correct to a t," of which we are reminded by a recent incident. It was declared in the document embodying a conditon in a contract that the same should be construed "literally in favour of its continuance." This contract and the word above quoted were confirmed by Act of Parliament. The circumstances surrounding the case and internal evidence seemed to indicate that a clerical error lurked in the sentence quoted, and that the word "literally" should have been written "liberally." The mistake proved to be an expensive one. Of all of which stenographers may well take due notice.

Punch deals with automobile fiends in an article under the heading: "Should motorists be shot?" The inspiration came from the enquiry made last month by the Marquis of Queensberry of the West London Police Magistrate, as the result of two narrow escapes within ten days. He asked leave to carry a revolver to protect himself from these manslayers. If the Marquis were in this country he would appear to have much more reason for reverting to the primal law of self-preservation. We not only have countless narrow escapes, but occasionally these "road-hogs" kill some one, as was done in Toronto recently, whose the fault we know not. Of course the dead man was only a poor printer and so it did not make much matter. If it had been the mayor or an alderman or the chief of police, or even a millionaire who was killed, it would have created some excitement, and perhaps induced someone to do something. On the whole *Punch* deprecates the suggestion of citizens carrying pistols to abate the nuisance: "The inhabitants of West Kensington are not all adept shots at the 'running deer,' which in this instance takes the form of a scorching road-hog." . . "It would also be unsportsmanlike to take pot shots at motorists sitting, in the case of a break down, unless recognized as dangerous specimens of feræ naturæ." There is something to be said in favour of the danger of the promiscuous shooting of these "road-hogs," but there seems to be no better suggestion as yet than that of the Marquis. A few of these animals treated to a dose of cold lead and carried home on a shutter would in time be found to have a curative effect.