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TO OUR READERS.

At the beginning of the twentieth century this journal enters upon the forty-seventh year of its existence. The past century has been one of the greater intellectual development and greater material prosperity probably than any before. Discoveries have been made in the scientific world little dreamt of a comparatively few years ago. As to legal matters, although essentially conservative in their character, development and improvement have there been almost as remarkable (at least so far as the Anglo-Saxon race is concerned) as in other lines. Cobwebs have been brushed away, red tape largely discarded, and the evils so powerfully portrayed by Dickens and others largely remedied. That there is much yet to be done may be admitted, but that a great advance has been made cannot be denied. We have sought from time to time to contribute our quota to this result, and are glad to know that our subscription list shews that our effort to keep abreast of the times in all that concerns legal journalism has been appreciated. And, so far as our sphere is concerned, we challenge criticism with any other legal journal either in her Majesty's Dominions or elsewhere. May the coming year be one of prosperity to our readers.

His Honor Judge Chapple contributes some interesting remarks to the much debated jury question. At the opening of the last District Court at Rat Portage it was remarked that it was the first sittings of either a High Court or a District Court in that locality at which a jury had not been summoned. In the Act respecting Unorganized Territories it is not necessary to issue precepts for the return of panels of grand or petit jurors if it appears to the judge that there would be no business to be brought before such juries. On this occasion he was enabled to do without the assistance of this ancient body, and thereby was the means, as he states, of saving to the Province at least $500. The condition of things in unorganized territories may be somewhat different from those in the more settled parts of the country, but the

question of expense is an important one, though it should not be allowed to carry too much weight provided the money is well spent. There is, however, a growing feeling that the day of juries is passing away; and the judiciary and the profession are at one with the public in thinking that the more their use is limited the better

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Speaking of juries an attempt was recently made at the Winchester Assizes in England, as we learn from our English name sake, to introduce into England the Scotch verdict of "not proven." It was a case of rape. The jury after being out some time brought in a verdict of "not proven" which very properly was not accepted by Mr. Justice Ridley, who directed the jury to return in lieu of their finding a verdict of "not guilty." Whilst there may be something to be said in favour of the Scotch usage in this matter, it is of course entirely foreign to the law in other parts of the British Empire, the theory being that the prisoner is entitled to the full benefit of the fact that the jury feel a doubt as to his guilt, and if the evidence is not sufficient to find him guilty he is to be declared innocent. There certainly must be a good deal more discussion on the subject than takes place in a jury room before the change which some people think desirable can take place.

THE ADMINISTRATION OF JUSTICE IN YUKON.

Our attention has been called to some matters concerning the administration of justice in the Yukon Territory, as to which the condition of things at the present time is in some respects unsatisfactory. The crying need of more judicial power has partly been met by the appointment of Mr. Craig, late of Renfrew. He and Judge Dugas, who has for some time past been overwhelmed with work, are now zealously struggling to reduce the arrears that have necessarily accumulated during the past eighteen months. It is said however, that the necessities of the case are not yet met.

The Yukon District, of all places in Her Majesty's Dominions, is one where speedy justice is a matter of absolute necessity. The population is constantly changing, litigants and witnesses here to-day and gone to-morrow. Parties to suits are heavy losers, and are often put to great inconvenience and expense, by the present and past impossibility of having their causes heard before they

perhaps have to leave the locality, or who find, when their cases are called, that their witnesses are scattered to the four winds. In this part of the Dominion we can scarcely appreciate the conditions of the Yukon Country, and the necessity for much more prompt justice than is required in this part of the country, and being a new country with peculiar conditions litigation is greatly in excess of that in older localities.

It is not to be gathered from what has been said that the volume of business is so great or that there are not sufficient force of professional men to bring cases to trial. There is ample in this respect, but the need is said to be still further judicial help.

This brings us to a practical suggestion, which must be introduced with some explanatory remarks. At present appeals from a single judge lie only to the Supreme Court of Canada or to the Supreme Court of British Columbia, and in mining cases to the Minister of the Interior. As long as this remains it is manifest that speedy finality of litigation is impossible. The remedy advocated by those living in the territory is to have a *local* Court of Appeal.

The Gold Commissioner, Mr. Senkler, is said to be an excellent official. He is a lawyer and sits as a judge in mining cases. He has other duties of an executive and administrative character to perform. Many of these could be undertaken and appropriately dealt with by the assistant commissioner. In connection with the suggestion which we shall venture to make it is urged that owing to the peculiar circumstances of the country an intelligent view of many of the points coming up for adjudication cannot well be formed by a Court of Appeal necessarily more or less ignorant of the detail of daily life and the condition of business and things generally in that far distant territory. At the same time however, it may be remarked that the Judicial Committee of the Privy Council hears appeals from India, where everything differs even more widely from the state of things with which the Committee is familiar than anything in Dawson can differ from other business which the Appellate Courts have to do.

In mining cases the appeal is to the Minister of the Interior. He doubtless does his best, but is engaged in active politics. It in no way reflects upon the present Minister to say that any one holding a political position would be apt to be lacking in the

judicial temperament and judicial knowledge required to satisfactorily dispose of litigation, and there is no certainty that any successor in that office would be a lawyer, as Mr. Sifton is.

The suggestion is as follows: Let the Court of Appeal be composed of three judges—the present judges and the Gold Commissioner. Let these three have co-ordinate jurisdiction in all matters, including mining cases. Do away with appeals to the Supreme Court of Canada, the Supreme Court of British Columbia and to the Minister of the Interior, except perhaps in cases where very large amounts are at stake, or under such circumstances as might be thought to warrant the delay of an appeal to some court outside the territory, for it might not be well entirely to release both judge and bar from criticism, and so facilitate the growth of those errors which a competent oversight is well calculated to restrain. The three judges having original jurisdiction, and sitting as an appellate Court, would, in the great majority of cases, soon get rid of arrears, and thereafter dispose with despatch of litigation as it should arise.

Men holding judicial positions in such a country and so far away from centres of thought and criticism should of course be selected by the Government with extra care; and it goes without saying that professional men living in a country labouring under many disadvantages and far removed from old associations and having (or who ought to have) the necessary characteristics of strength of character, honesty of purpose, and a sound knowledge of law, should be well paid. And here it must be remarked that what would be a good salary in other parts of the Dominion is a pittance in the Yukon. In a place where 25 cents is paid for a daily paper, $60 a month for a three-roomed cabin, and other expenses in proportion, it is clear that the salaries should be very much in excess of those paid to judges in other places.

We shall be glad if the above observations will in any way help towards a better condition of things in a district which, from its peculiar conditions, and from the fact that it contributes largely to the country's wealth, deserves the most generous treatment in the administration of justice.

CROSSED CHEQUES.

By the Bills of Exchange Act of 1890 (53 Vict., c. 33, D.), the English practice of crossing cheques was formally recognized as part of the law of Canada which was codified by that enactment, and yet, probably, neither prior to, nor since that statute, has the practice of crossing cheques ever very generally prevailed in Canada.

It may, therefore, be worth while to consider what are the advantages of the practice, and what is to be gained by its adoption.

In the first place, it may be observed that by the Bills of Exchange Act, a cheque is defined to be a bill of exchange drawn on a bank, payable on demand: s. 72.

It differs from an ordinary bill of exchange in that it is rarely, if ever, accepted by the drawee except by the act of payment—unless the marking the cheque good is to be deemed to be an acceptance. It has, however, like ordinary bills of exchange, all the incidents of a negotiable instrument, in that, in the absence of any special indorsement, the holder for the time being is presumed to be the rightful owner and entitled to demand payment by the drawee.

This circumstance, though convenient in some respects, is proved by experience to be somewhat a disadvantage in others, in that it may enable fraudulent or wrongful holders of the instrument to obtain payment of it in fraud of the rightful owner.

The practice of crossing cheques seems to have been introduced in England with the view of obviating this difficulty, and as a means of imposing some restriction on the fraudulent use of cheques by persons having no right thereto.

According to Parke, B., the custom of crossing cheques with the name of a bank originated in the London Clearing House, and is of comparatively recent date, and in 1852 witnesses were still living who were able to recollect the commencement of the practice. It had originally nothing whatever to do with restraining the negotiability of cheques, but appears to have been done more as a matter of convenience, and for the purpose of shewing by what particular bank the cheque had been deposited, so as to facilitate the adjustment of accounts in the clearing house. It afterwards became a common practice to cross cheques, which were

not intended to go through the clearing house at all, with the name of a banker, or the words "& Co.;" to which the holder might add the name of some banking company; and where a cheque was so indorsed, bankers generally refused to pay it to any one except a banker, and if they paid it to a person not a banker, they considered they did so at their peril, in case the party to whom the payment was made should afterwards be proved not to have been entitled to receive it. The object being not to secure payment to any particular banker, but simply to a banker, in order that it might be more easily traced for whose use the money was received; and it was not intended thereby to restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit. At common law it was held that the crossing was a mere memorandum on the face of the cheque, and formed no part of the instrument itself and in no way altered its effect: see *Bellamy* v. *Marjoribanks*, 7 Ex. 389.

It may be remembered that when the practice of crossing cheques originated in England outside the clearing house, cheques were usually made payable to bearer in order to escape stamp duty—the Stamp Act, 55 Geo. 3, c. 184, sched. part 1, exempting only cheques of that description from the duty; cheques payable to order being liable to stamp duty. But cheques payable to bearer were liable to get into the hands of persons not entitled thereto, and the crossing of the cheque was therefore designed as a protection to the true owner of the cheque, so that in case of its loss by theft or otherwise, he might be able to trace the person to whom the cheque had been paid; and where a banker, in disregard of the crossing, paid a cheque to a private individual, he was deemed to be guilty of negligence, and responsible to the true owner if it should turn out that the person to whom he paid it was not entitled.

In the case of *Bellamy* v. *Marjoribanks*, to which reference has already been made, it was held that although the crossing was made by the drawer of the cheque, it had no restrictive effect upon the negotiability of the instrument, and had in fact no greater effect than if made by the holder. In that case the drawer of the cheque intended that the cheque should be paid over to the Accountant General, and crossed the cheque with the words "Bank of England for account of Accountant General," which

words were struck out by his solicitor, to whom he gave the cheque, and the solicitor substituted the name of his own banker, with whom he deposited it, and to whom it was paid, the proceeds being placed to the credit of the solicitor, who subsequently converted them to his own use in fraud of the drawer of the cheque; but it was held that the bank on which the cheque was drawn was justified in paying it to the bank to which the solicitor had crossed it. Under the Bills of Exchange Act, however, if the drawer of the cheque specially crosses it with the name of a bank, no subsequent holder is now at liberty to strike out such crossing or substitute another, and where such prior crossing is struck out or another substituted, the bank on which the cheque is drawn is to refuse payment: s. 78; and the crossing of a cheque is now by the statute made a material part of the instrument.

In the case of a cheque originally payable to bearer, or which has become so by general indorsement, crossing it may be a protection to some extent against payment to a wrongful holder, but it is not absolutely so. If it is paid by the bank on which it is drawn otherwise than to the bank to which it is crossed, the paying bank becomes responsible to the true owner of the cheque for any loss he may sustain by reason of such payment: s. 78 (2); unless at the time of presentment it does not appear to be crossed, or to have a crossing which has been obliterated, and it is paid in good faith and without negligence: s. 78 (3).

In a recent case an attempt was made to make a bank responsible for payment of a crossed cheque under circumstances which would seem to have justified the expectation that the crossing of the cheque would have afforded protection, but it did not. The case is that of *Great Western Railway Co.* v. *London and County Bank* (1899), 2 Q.B. 172; (1900), 2 Q.B. 464, which has been noted ante vol. 35, p. 704, and vol. 36 p. 701.

The facts were, that the drawers of the cheque had been induced by misrepresentation to send a cheque, for taxes claimed to be due, to a collector. They crossed the cheque generally, and marked it "not negotiable." The collector took the cheque to a bank with which he had occasional dealings and got it cashed; this bank crossed it to itself, and subsequently presented the cheque to the bank on which it was drawn and received payment. The drawers having found out that they had been deceived by the collector, and that there were really no taxes due, claimed to

recover the money from the bank which had cashed the cheque for the collector, but the Court of Appeal affirmed the judge of first instance in holding that the latter bank was protected by the section from which s. 81 of the Canadian Act is taken, which provides that "when a bank in good faith and without negligence receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received payment of the cheque."

From this case it would seem that a wrongful holder of a crossed cheque may take it to any bank with which he has had any previous dealings, sufficient to warrant a finding that he is a customer of such bank, and if he can get that bank to cash the cheque, the bank incurs no liability to inquire into the title of the person who presents it; nor, after collecting it, any liability to refund the proceeds to the true owner. A mere stranger bringing a cheque to a bank for collection, however, has been held not to be "a customer" within the meaning of section 81 so as to entitle the bank to the protection of that section: *Matthews* v. *Williams*, (1894) 10 R. 210.

In addition to crossing a cheque, the statute also enables its negotiability to be restricted by adding the words "not negotiable," and by s. 80 it is provided that "when a person takes a cheque so marked he shall not have, and shall not be capable of giving, a better title to the cheque than that which had the person from whom he took it." These words are very general, and would seem to apply to bankers as well as all other persons; but the recent decision of the Court of Appeal in *Great Western Ry.* v. *London and County Bank* supra, is that although the words "not negotiable" are on a cheque collected by a bank for a customer, they do not prevent the bank from getting the protection of s. 81. In that case the majority of the Court of Appeal (viz., Smith and Romer, L.JJ.) held that the bank, after cashing the cheque for Huggins, the collector, and in subsequently presenting it and collecting the proceeds, were acting for him, and therefore within the protection of s. 82 (s. 81 of our Act), and that although they had cashed it, they had done so not as purchasers but merely as a matter of accommodation, and without waiving their right to look to Huggins in case the cheque should have been dishonoured.

Williams, L.J., on the other hand, appears to intimate that by cashing the cheque the bank became purchasers of it, and the words "not negotiable" prevented their acquiring any better title to the cheque than Huggins had.

It must be confessed it is somewhat difficult to see how any other decision could have been arrived at than that of the majority of the Court without imposing an insuperable difficulty in the way of banks dealing at all with cheques marked "not negotiable."

Assume that a customer of a bank deposits with it a cheque so marked. It is passed to his credit in the ordinary course, and presented by the bank for collection, and paid. It is obvious that any further responsibility on the part of the bank should be at an end; even if it should be held that in such a case the bank should only receive the cheque for collection and not give credit to its customer therefor until it is actually paid, such a holding would not be of much practical benefit to the true owner, because questions as to the rightful ownership of such cheques do not generally arise until after they have been presented and paid, and it is sought to get the money back from some one—and while the bank which has received the money may be well able to refund, the customer for whom it has received the money may be quite unable to do so—no doubt the man who has been wrongfully deprived of his money would naturally prefer to fasten a liability on the bank, rather than on its customer, but the Bills of Exchange Act, clearly intended to relieve banks from this liability when they act bona-fide and without negligence. This was the conclusion arrived at where a bank received on deposit a crossed cheque, the depositor's account being overdrawn, and the bank collected the cheque and applied part of the proceeds to the liquidation of the overdrawn account, and it was held that the bank were entitled to the protection of s. 82 (s. 81 of the Can. Act): *Clerke* v. *London and County Bank* (1897), 76 L.T. 293.

From the cases referred to, therefore, it will be seen that the crossing of a cheque is only a partial protection against the payment of it to a wrongful holder; and it may be doubted whether it affords as much protection to the rightful owner as a special indorsement. In the case of a cheque payable to bearer crossing is desirable, as it enables a rightful owner to trace to whom or for whose benefit it has been paid, in order to pursue such person for the recovery of the money.

GENERAL SESSIONS OF THE PEACE.

In deciding a question which arose in a case recently heard before me, it became necessary to consider the constitution of the Court of General Sessions of the Peace in this Province as it existed in Canada before Confederation. Many inquiries have been made as to the history and status of these courts in this country, but so far as I am aware the subject has not been discussed at any length, or from an historical point of view.

In the case referred to there was an appeal by the defendant from a conviction made by a justice of the peace for malicious injury to property, an offence punishable on summary conviction under sec. 511 of the Criminal Code. By sec. 879 an appeal lies from such conviction to the Court of General Sessions. The appellant claimed that he had the right to have the appeal tried by a jury, notwithstanding sec. 881 of the Code, the contention being that this section so far as it purported to deprive the appellant of a jury was ultra vires of the Dominion Parliament, the jury being an integral part of the Court of General Sessions and therefore a part of the constitution of the court.

It will be remembered that the British North America Act, sec. 92 sub.-s. 14, grants exclusively to the local legislatures power to constitute, maintain and organize the provincial courts both civil and criminal, hence if a jury or a right to a jury was fundamental and formed part of the constitution of the court, and its allowance or disallowance was not a mere matter of procedure, the local legislature has the power to legislate in respect thereto, and, therefore, the only legislature which could by an enactment deprive an appellant of his right to have his appeal tried by a jury.

There is nothing in R.S.O. 1897, chaps. 56 and 58 (the two Acts in the Revised Statutes purporting to relate to the General Sessions of the Peace, which in any way attempts to define the constitution of the Court of General Sessions. Sec. 2 of c. 56 simply confirms former commissions and courts. Sec. 4 directs that sittings of the court shall be held semi-annually in all counties in Ontario except in York, where there shall be four sittings. Sec. 6 enacts that the County Judge shall preside as Chairman. Sec. 7 provides that, if the Judge or Junior or Deputy Judge presides, no associate justice need be present to constitute the court. Chapter 58, R.S.O., merely limits the jurisdiction of the court in certain cases.

There is no legislation by the province since Confederation affecting the courts of criminal jurisdiction, or which defines more closely the constitution of the several courts. Any statutory provisions purport to prescribe regulations as to the sittings of the several courts, and as to the judicial officers who are to preside over and conduct the business of the said courts.

This brings us to some interesting historical research. It is clear that the office of Justice of the Peace and Court of General Sessions, or Court of General Quarter Sessions, as it was formerly called, were in existence in Canada before the meeting of the first Parliament of the Province of Upper Canada, that is, prior to September 17, 1792. In this first Parliament, chapter 5 of the statutes enacted that the magistrates in each and every district of the Province in Quarter Sessions assembled were empowered to make orders and regulations for the prevention of accidental fires. By chap. 6 any two or more Justices of the Peace acting under and by virtue of His Majesty's commission within the respective limits of their said commissions were empowered to hold Courts of Request within their respective divisions, which divisions were to be ascertained and limited by the justices assembled in General Quarter Sessions, etc., etc. By statutes passed in subsequent sessions of the same Parliament, the time for holding these courts were fixed and changed. By subsequent Parliaments the existence of these courts was recognized. On the 29th May, 1801, the statute 41 Geo. III. c. 6, was passed. It recited that doubts had arisen with respect to the authority under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the Province, and also the authority under which commissions of the Peace, commissions of Assize and Nisi Prius, commissions of Oyer and Terminer, commissions to Sheriffs and other persons concerned in the administration of Justice had been issued in and for the said districts respectively, and then proceeds to enact: "That the authority under which the said courts and commissions had been erected, holden and issued, and also all matters and things done by, or by virtue of the same are, so far as relates to the authority under which the same have been so erected, holden, issued and done, good and valid to all intents and purposes whatsoever, and that the provisions of the Acts of the Legislature of the Province respecting the said

courts and commissions, or any of them, are hereby declared to extend and be in force, except as hereinafter mentioned, in each and every the said districts respectively."

This enactment so far as it relates to the authority under which commissions had been issued and the courts of General Quarter Sessions of the Peace had been held was embodied in the Con. Stat. U. C. c. 17, s. 1, and have been repeated in the various Revised Statutes of Ontario down to R.S.O. 1897, c. 56, s 2.

The late learned Judge Senkler, County Judge of Lincoln, in a paper he prepared, and which was read before a meeting of the County Judges, commenting on the foregoing statutes remarked: "It will be observed that this enactment (41 Geo. III. c. 6) did not create the courts or even define their jurisdiction. It simply gave the sanction of the Legislature to the courts and to the authority under which they were held, and did not indicate what that authority was." "I think, however," he adds, "there can be little doubt but that the first commissions of the Peace were issued in what is now Ontario in consequence of the introduction of the English criminal law and as part of that system."

The criminal Law of England was introduced into the Province of Quebec by Royal Proclamation in 1763, and subsequently extended by 14 Geo. III. c. 83, to what is now Ontario. After the erection of what is now Ontario into a separate province, the Provincial legislature after reciting the Imperial Act 13 Geo. III. c. 83, passed 40 Geo. III. c. 81 in July 1800, enacting that the criminal law of England as it stood on the 17th September, 1792 should be declared to be the criminal law of this Province.

From this it will be seen that the Courts of General Quarter Sessions of the peace in this Province possessed whatever jurisdiction the same courts had in England on the 17th September, 1792. If we examine the jurisdiction of the General Sessions in England we find that prior to that period they had jurisdiction to try all felonies and misdemeanours with a very few exceptions. We also find it was part of the jurisdiction of justices to try appeals from acts of justices done out of sessions in certain cases. This right of appeal was a qualified right, it could not arise by implication or exist without express enactment; whereas the common law remedy of certiorari always lay except when expressly taken away by statute. The appeal was usually given to the next Quarter Sessions. The Justices of the Sessions in all cases of an authorized

appeal to them were the absolute judges of the facts as a jury, and could not, if they would, remit any question of that kind to a superior tribunal: Dickenson Quarter Sessions, 650, 6th ed., 1845.

From the foregoing it is clear that under the English law all appeals from summary convictions made by the Justices in Sessions assembled were without the intervention of a jury—in other words, except by express enactment so declaring it—a jury formed no part of the constitution of the Court of General Sessions for the trial of appeals. If at any time the Legislature thought fit to confer upon parties to an appeal the privilege of a jury, its force and object was to effect an alteration in the procedure governing the trial of appeals and was to that extent an innovation of modern times. As a matter of fact the first enactment in Canada to vary the long established practice and rule of the Quarter Sessions both in England and in this country of trying appeals from summary convictions and orders without a jury was made by the Parliament of the united provinces of Upper and Lower Canada in 1850, 13 & 14 Vict., c. 54, consolidated afterwards in the Con. Stat. U. C c. 114.

The preamble of the original Act reads: "Whereas it is expedient to extend the right of appeal in certain cases in Upper Canada; Be it, therefore, enacted, etc.: That from and after the passing of this Act any person, complainant or respondent, who shall think himself aggrieved by any conviction or decision before one or more Justices of the Peace, Mayor, or Police Magistrate in matters cognizable by such Justices of the Peace, etc., etc., not a crime, may appeal to the next Court of General Sessions of the Peace, etc. for the county wherein the cause of complant shall have arisen, etc."

Then follow the formalities to be observed as to giving notice, security, etc. in order to perfect the appeal. Sec. 2 then enacts, for the first time, that either the appellant or the respondent may request a jury to try the matter, gives the form of oath to be administered to the jury, and concludes as follows: "And the Court upon the finding of the jury shall thereupon give such judgment as the circumstances of the case may require," etc.

It will be seen that the legislature first largely extended the right of appeal against summary convictions and orders, and then followed this remedial provision by granting an optional change of procedure at the trial of such appeals. It is too manifest to be

stated that if sec. 2 of the Act of 1850 had not been added, all appeals provided for by the first section of the Act would have been tried and disposed of, both as to facts and law, by the justices assembled in Quarter Sessions without a jury. Sec. 2, however, amended the procedure and declared that as to all appeals, hereafter they were to be tried in the old way unless one of the parties to the appeal desired a jury, but if he wished a jury he must make the formal request before it would be granted.

Departing a moment from the matter of appeals, and for the purpose of making the inquiry into the history of the constitution and powers of the Quarter Sessions complete, I call attention to 24 Vict., c 14 (1861). This Act abolished "all powers and jurisdiction of the Court of Quarter Sessions of the Peace to try treasons and felonies for conviction whereof the punishment of death could be imposed, and which powers and jurisdictions are by any law or statute whatsoever granted or confirmed, or which are in any other manner vested in or exercised by any Court of Quarter Sessions and Recorder's Court of this Province." It is curious to note this legislation, for it seems to assume that prior to that date the Quarter Sessions had jurisdiction to try all felonies even when punishable with death unless the particular Act creating the offence directed that the same should not be tried at the Quarter Sessions.

In 1869 the Dominion Parliament revised the whole law relating to summary convictions by 32 & 33 Vict., c. 31. By sec. 35 of that Act the general right of appeal from summary convictions was restricted to cases where the sum adjudged to be paid exceeded ten dollars or the punishment exceeded one month, unless an appeal was otherwise provided for in any special Act. The clause allowing either of the parties to any appeal to ask for a jury was re-enacted in sec. 66 with some slight verbal changes. In 1870, by 33 Vict., c. 27, the above-mentioned restrictions or limitations as to certain appeals was repealed and the full right restored allowing an appeal from all summary convictions unless otherwise provided in some special Act. In 1886 all these provisions were consolidated and appear in the revised statutes of Canada c. 178. In 1890, 53 Vict., c. 37, s. 25 repealed sec. 78 of the Revised Statutes of Canada allowing the parties to an appeal to request a jury and substituted a new section (25), the clause under consideration in the appeal before me, which in effect restored the procedure upon trials of appeal from summary convictions and orders, to the system

that prevailed from the earliest times down to 1850. This is now sec. 881 of the Code.

This brief review of the history and introduction of the Court of Quarter Sessions into Canada establishes that the right to have a jury to hear an appeal from a summary conviction was first conferred by the Legislature of the United Provinces of Upper and Lower Canada, a body having the power to deal with the constitution of the court as well with the procedure to be followed by the courts possessing criminal jurisdiction. In making the change the legislature could only have regarded it as an alteration in the matter of procedure, as it made it a conditional change only: the Court could still try the appeal without a jury, and pronounce the appropriate judgment unless one of the parties intervened and requested a different mode of trial. It is analagous to the procedure existing in reference to the trial of civil cases in this Province, where, unless a jury notice is given by one of the parties, most causes of action will be disposed of by the court without a jury. It is to be noted that all the special sections relating to jury and non-jury trials are arranged in the Judicature Act under the subhead "Trial, Procedure and Place of Trial." (R.S. O. c. 51, ss. 102 to 110).

It may also be observed that the offence, in respect of which the conviction under consideration in the case before me was made, was created by a Dominion statute, which same statute authorizes a justice of the peace to try summarily an offender against its prohibition. It was the same legislature which authorized an appeal to the General Sessions of the Peace, and which purported to regulate the procedure to be followed at the trial of any such appeal. If the Dominion Parliament had the power to permit or deny the right of appeal, it seems hardly arguable to contend that it could not attach such conditions and limitations as to the mode of trial of any such appeal as it might deem proper. Any directions made by the statute as to the mode of trial in my opinion amounted only to regulating procedure.

I found only one case in the reports since 1867 in which the present question had been at all considered, *Reg.* v. *Bradshaw*, 38 U.C.R. 564. In that case, tried in 1875, the respondent, who was the prosecutor before the magistrate, had not asked for a jury at the hearing of the appeal at the General Sessions; indeed, though urged by the court to do so, he refused to demand a jury. The appellant

likewise declined to have a jury. The court then tried the appeal without a jury and quashed the conviction with costs. The respondent then removed the proceedings by certiorari to the Queen's Bench and moved to quash all the proceedings at the Sessions on the ground that the Court of General Sessions had no power to try the appeal without a jury. The motion was refused. The Court, composed of Harrison, C.J., Gwynne, J. and Wilson, J., refused the rule. Gwynne, J., delivered the judgment of the Court. He said:

"It was suggested that s. 66 of 32 & 33 Vict. c. 31, which authorizes the Court to proceed without a jury when neither party demands one is ultra vires of the B.N.A. Act, which places under the jurisdiction of the local legislature, the constitution, maintenance and organization of Provincial courts both civil or criminal, but s. 66 of 32 & 33 Vict., c. 31, comes, in my opinion, within the subject numbered 27 reserved for the jurisdiction of the Dominion Parliament, namely "Criminal Law," except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

The above being the opinion of a superior court, and a decision which has not been reversed or re-considered, settled the question before me against the contention of the appellant who claimed the right to have a jury to try his appeal.

JOSEPH E. MCDOUGALL.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VOLUNTARY SETTLEMENT—INTENT TO DEFEAT AND DELAY FUTURE CREDITORS—13 ELIZ. C. 5.

In re Lane Fox (1900) 2 Q.B. 508, although a bankruptcy case deserves attention here. By a voluntary settlement made shortly after attaining twenty-one a lady vested the whole of her property in trustees, with an absolute discretionary trust to apply either capital or income in payment of her existing or future debts, and a further discretion to apply the income during her life for the benefit of herself or any husband or children. The deed contained

a power of revocation with the consent of the trustees. The few debts she had at the date of the settlement were paid,—on two subsequent occasions the settlor executed partial revocation, of the settlement, and portions of the settled funds were applied in payment of the settlor's debts; but the trustees having refused a third time to pay her debts she was adjudicated bankrupt, and her trustee claimed that the settlement was void, under 13 Eliz. c. 5. Wright, J., however, held that as it was honestly entered into at the time it was made, it could not be adjudged fraudulent and void because some years afterwards it is found to have the effect of defeating and delaying subsequent creditors.

RESTRICTIVE COVENANTS—COVENANT RUNNING WITH THE LAND—COVENANT WITH EQUITABLE OWNER—ENFORCING RESTRICTIVE COVENANT—"ONE MESSUAGE"—"HOUSE"—"PRIVATE RESIDENCE"—RESIDENTIAL FLATS.

Rogers v. *Hosegood* (1900) 2 Ch. 388, is an interesting case on the law relating to restrictive covenants. An estate was owned by four partners subject to a mortgage. Two parcels were sold, the mortgagee joining in the conveyance, and the grantee entered into restrictive covenants with the mortgagors only, with intent that the covenants should bind the lands thereby conveyed, and enure to the benefit of the mortgagors, their heirs and assigns, and whereby the covenantor covenanted that no more than one messuage or dwelling house with suitable out-houses should be erected on each plot. Subsequently another parcel of the estate was sold to the late Sir John Millais and conveyed, "with all the rights, covenants, or appurtenances belonging, or reputed to belong thereto," but with no express reference to the restrictive covenants of the grantee of the other two parcels, and of which Sir John Millais had no knowledge. The plaintiff Rogers, had become the owner of the rest of the estate, and he and the real representatives of Sir John Millais brought the present action to restrain the present owner of the first two parcels, who had purchased with notice of the restrictive covenants, from erecting a block of buildings to be used as residential flats. Rogers, prior to the action, had released the defendant's grantor from the covenant so far as it restricted the number of dwellings to be erected on each parcel, but such release was not to prejudice or affect any of the other covenants, and the defendant's grantor had at the same time covenanted with Rogers that every messuage to be erected on the said two parcels should be adapted and used as and for a

private residence only. It was claimed by the plaintiffs that the erection of the residential flats was a breach of both the original covenants, to the benefit of which Millais' representatives claimed to be entitled, and also of the subsequent covenant which Rogers claimed to enforce. One technical difficulty in the case arose from the fact that the covenants had not been made with the owners of the legal estate, but with the equitable owners, and, therefore, in contemplation of law with strangers to the land. The Court of Appeal (Lord Alverston, M.R., and Rigby and Collins, L.JJ.), however, held, that though such a covenant might not at law run with the land, yet a Court of Equity would not permit such an objection to defeat the clear intention of the parties and, therefore, "when a covenant was clearly made for the benefit of certain land with a person who, in contemplation of such court, was the true owner of it, it would be regarded as annexed to and running with the land, just as it would have run at law, but for that difficulty." Although it is subsequently conceded by the Court that though a grantee of the estate of the covenantor, if he acquires an equitable title only, would be bound by the covenant whether he had notice of it or not, yet if he acquires the legal title he is not bound thereby unless he has notice. The covenants in question were, therefore, held to be annexed to the land, and the plaintiffs as grantees thereof were held entitled to enforce them, and no actual assignment of the benefit thereof by the grantors was considered necessary, and the fact that Millais was ignorant of their existence when he received his conveyance was held to be immaterial. The Court of Appeal also agreed with Farwell, J., that the erection of flats was a breach of both the original and subsequent covenant, that the buildings to be erected should be adapted and used as and for "private residences." On this latter point the decision of Cozens-Hardy, J., in *Kimber* v. *Adams*, noted ante vol. 36, p. 367, was not referred to. The two cases would seem to establish that although the erection of "flats" may be no breach of a covenant against erecting more than one house, yet such an erection is a breach of a covenant not to erect a building except for use as a private residence.

CONFLICT OF LAWS—MARRIAGE—DOMICIL—CHANGE OF DOMICIL.—COMMITY OF GOODS—FRENCH LAW—INMOVABLES—STATUTE OF FRAUDS.

In re De Nicols, De Nicols v. *Curlier* (1900) 2 Ch. 410, is an old friend (see ante vol. 34, pp. 374, 655, and vol. 36, p. 283). The

previous decision had the effect simply of determining that the moveables of the estate in question were governed by the French law of community of goods, and the present case is a decision of Kekewich, J., that the leaseholds and real estates of the deceased were governed by that law. The facts are stated in our previous note, p. 283. Kekewich, J., was of opinion that the French law of community of goods had the same binding effect as an express marriage contract, and bound the real and leasehold estates thereafter acquired by the spouses in England, and he held that it was not necessary that there should be any writing as the Statute of Frauds did not apply to such a contract, which was in substance one of partnership, and the property acquired for the purposes of the partnership was by operation of law held for those purposes. In the result the widow of the deceased was held entitled to half the real and leasehold estates notwithstanding the disposition thereof made by the will of the deceased husband.

SHAREHOLDERS' MEETING—EVIDENCE—DECLARATION OF CHAIRMAN OF MEETING—COMPANIES' ACT, 1862, (25 & 26 VICT., C. 89) S. 51.

In re Hadleigh Castle Gold Mines (1900) 2 Ch. 419, an application was made by two shareholders of a company for a winding-up order, notwithstanding a resolution of the shareholders for a voluntary winding-up of the company. On the motion it was contended that the chairman's decision that the resolution in question was carried by a majority of those present was erroneous, but Cozens-Hardy, J., held, that, in the absence of fraud, the declaration of the chairman was conclusive, and he refused to entertain the question whether the resolution was carried by the requisite majority, as under The Companies Act, 1862, s. 51, it is provided that "unless a poll is demanded by at least four members a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour or against the same." Kekewich, J., in *Young* v. *South African & A. Syndicate* (1896) 2 Ch. 268, had held that evidence is admissible to shew as a fact that, nothwithstanding the chairman's declaration, the resolution was not carried; but Cozens-Hardy, J., declined to follow that case.

RECEIVER—RAILWAY—"WORKING EXPENSES AND OTHER PROPER OUTGOINGS."

In re Wrexham M. & C. Q. Ry. Co. (1900) 2 Ch. 436. A receiver having been appointed of a railway company under the English

Railway Act, 1867, s. 4, which provides that all money received by the receiver shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied in payment of the claims of the creditors, of the railway according to their priority. Certain judgment creditors whose judgment had been recovered against the railway for damages to a ship loading goods at the railway company's wharf, owing to the breach of an implied contract by the company to keep the wharf in proper repair, claimed that their debt came under the head either of a working expense, or a proper outgoing, and as such entitled to priority over the claims of other creditors of the railway. Farwell, J., however rejected the claim and dismissed their application for prior payment with costs.

Correspondence.

UNDUE INFLUENCE.

To the Editor CANADA LAW JOURNAL.

SIR,—As supplementary to my remarks on the subject of undue influence which appeared in the last number of your journal (vol. 36, p. 690), it would be well to refer to a recent decision of the Court of Appeal wherein that Court endorsed its earlier opinion by a still more emphatic declaration of its adherence to the principle that the relation of husband and wife is not exempt from the application of the doctrine of *Huguenin* v. *Baseley*. The case is *Hopkins* v. *Hopkins* (see post p. 27) to which I have been referred through the courtesy of Mr. Christopher Robinson, Q.C. The plaintiff and defendant were married in 1892, the husband being almost twice the age of the wife. In 1899 the plaintiff made a settlement on the defendant, his wife, of 300 shares of bank stock (valued at $22,500), and a month thereafter the parties separated, a deed of separation having been drawn up. Shortly after the separation the husband brought suit to recover these shares from his wife. The action was dismissed by Chief Justice Falconbridge, but the Chancery Divisional Court (Boyd, C., Robertson and Meredith, JJ., the latter dissenting,) reversed the judgment on the ground of the exercise of undue influence by the wife. The learned Chancellor very graphically describes the position of the

parties: "It is the case of an old man, lonely, terrified and very sick, overborne (contrary to his natural bias of acquisition) by the threats and violence and importunities of an unsatisfied woman against whom no check was interposed by the solicitor who drew the papers." He held (with the concurrence of Mr. Justice Robertson) that the onus was on the wife to support the gift. The Court of Appeal affirmed this decision, the learned Chief Justice stating clearly that "the onus of proving that a gift obtained under such circumstances was the spontaneous offspring of a free and unbiased mind lay upon the defendant, and it was essential to the validity of a gift obtained under such circumstances that the donor should have had competent and independent advice, but he had none."

JOHN G. O'DONOGHUE.

Toronto.

EXAMINATION ON JUDGMENT SUMMONS.

To the Editor of the CANADA LAW JOURNAL:

SIR,—In a recent case (*Re Lucas, Tanner & Co.*, 36 C.L.J. 384) it was argued for the defendant that sec. 36 of chap. 147, R.S.O. 1897, was unconstitutional. The note of this case reminds me of a Division Court case in which I had some interest a year or two ago, though not engaged in it, the result of which—the imprisonment of the debtor—induced me to look into the provisions of sec. 247 of the Division Courts Act, which is almost identical with sec. 36 above mentioned. It seemed to me then, that, whether ultra vires or not, the greater part of the section should never have been enacted.

Whatever may be said in the defence of the imprisonment of a debtor who is possessed of property and refuses to apply it in payment of his debts, or who is earning good wages and will not use any part of them for that purpose, I do not think any defence can be made of the clauses providing for such imprisonment, even if it appears from the examination of the judgment debtor or other evidence that he has disposed of his chattels with intent to defraud his creditors, or that he obtained credit from the plaintiff or incurred the debt under false pretences or by means of fraud. Here is a debtor ordered to attend, and not only to be examined as to what property he has and as to what has become of the property he once had, but also, if he has been guilty of fraud, to accuse himself of it.

In an ordinary criminal case (suppose under sec. 368 of the Criminal Code, which provides for the punishment of similar offences) the accused is protected from accusing himself without full consideration and deliberation. If, in a civil case any one is compelled to give answers which would criminate him if prosecuted, those answers must not be used against him on such prosecution. But in the Division Court, the debtor must answer his creditors' questions. If he refuses to do so, he is sent to gaol for such refusal; if he admits his guilt, he is sent down for fraud. And this incriminating evidence is wormed out of him by his creditor's lawyer, who, of course does his best by the usual means, to bully or entice him into a confession. The debtor has no notice of what is to be brought against him and probably expects nothing but the ordinary examination as to his means of paying the debt, and if the creditor's solicitor understands his business, everything is carefully concealed, so that the charge is a complete surprise, the witnesses are unknown, the debtor has no opportunity to contradicting them, and if he has no counsel, as is most likely the case, no means of cross-examining them.

In a word the whole proceeding is that of a criminal charge brought and pressed against the accused, who is given no proper opportunity for defence—not by the Crown, in the interest of justice and for the protection of the community, but by a private person, solely with a money end in view, and practically in most cases with the idea of squeezing the debtor's relatives and friends, who, it is expected, will pay the debt rather than see him sent to prison. The real character of the whole prodeedings is shewn by the provision that at any time on payment of the debt and costs the debtor is to be released.

I do not think it is using too strong language to call these provisions of the Division Courts Act unjust and opposed to the whole spirit of English law, both in their real object and in the means by which that object is attained, and therefore, at all events in the broadest sense of the word, unconstitutional.

W. BURGESS.

Port Elgin.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] ST. JEAN BAPTISTE *v.* BRAULT. [Oct. 8, 1900.

Constitutional law—Legislative powers—B. N. A. Act, 1867—Criminal Code—R. S. C. c. 139—R. S. Q. art. 2920—53 Vict., c. 36 (Que.)—Lottery—Indictable offences—Contract—Illegal consideration—Corelative agreement—Nullity—Judicial notice of invalidity.

The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.

A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful, and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted, and it is the duty of the courts, ex mero motu, to notice the nullity of such contracts at any stage of the case and without pleadings.

Per GIROUARD, J., dissenting. In Canada, before the Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional. Appeal allowed with costs.

Fitzpatrick, Q.C. and *Beique*, Q.C., for appellant. *Belcourt*, Q.C., for respondent.

Ont.] SUTHERLAND-INNES CO. *v.* ROMNEY. [Oct. 8, 1900.

Drainage work—Municipal corporation—Improvement of natural watercourses—Artificial watercourses—Embankments—Dykes—"Benefit" assessment—"Injuring liability"—"Outlet liability"—Assessment of wild lands—Construction of statute.

The Ontario Act, 57 Vict., c. 56 has not abrogated the fundamental principle underlying the provisions of the previous Acts of the Legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners which rests on the maxim, qui sentit commodum sentire debet et onus.

Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for "outlet liability" under said Act.

Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the cost of the work at such outlet.

Every assessment, whether for "injuring liability" or for "outlet liability" must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands to their injury which water is to be carried off by the proposed drainage work.

Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work and other like circumstances.

Sec. 75 of that Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under said section 75, but is a charge upon the general funds of the municipality.

In the present case the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of section 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited. Appeal allowed with costs.

Atkinson, Q.C., and *M. Wilson*, Q.C., for appellant. *Aylesworth*, Q.C., and *Rankin*, Q.C., for respondent.

B. C.] COPLEN *v.* CALLAGHAN. [Oct. 8, 1900.

Mining claim—Recorded description—Error—Adverse action—Certificate of works—R. S. B. C. c. 135, s. 28.

A. C. located the "Cube lode" mining claim describing the direction of the side line as south-easterly both on the post No. 2, and on the claim as recorded. W. C. subsequently located the "Cody" and "Joker" fractions, whereupon A. C. claimed that a portion of the ground covered by the latter was included in the "Cube lode," alleging that the survey of the "Cube lode" was wrong and that the side line ran north-easterly instead of south-easterly. In an "Adverse action" by W. C., sec. 28 of the Mining Act of B. C. (R. S. B. C. c. 135) was relied on by the defendant, who recorded a certificate of work done on the ground. That section was as follows :

"28. Upon any disputes as to the title to any mineral claim, no irregularity happening previous to the date of record of the last certificate of work shall affect the title thereto, and it shall be assumed that, up to that date, the title to such claim was perfect except upon suit by the Attorney-General based upon fraud."

The trial judge held that this section gave A. C. a perfect title to the ground in dispute and dismissed the action (6 B. C. R. 523). His judgment was reversed by the full court and judgment entered for the plaintiff.

Held, affirming the last mentioned judgment, that as the plaintiff was misled by the error in the recorded description, and located the "Cody" and "Joker" fractions in consequence of such error, the same was not cured by the certificate of work done on the ground in dispute by the defendant under section 28 of the Act. Appeal dismissed with costs.

Aylesworth, Q.C., for appellant. *Sir C. H. Tupper*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Meredith, C.J.] [Nov. 13, 1900.

GOLDIE *v.* BANK OF HAMILTON.

Mortgage—Machinery—Vendor's lien—Priorities—Insurance—Subrogation.

Under a contract with the owner of a mill and machinery which was subject to two mortgages, each containing a covenant to insure, the plaintiffs took out the machinery replacing it with new machinery, reserving a lien for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiff's benefit. Before any further insurance was effected the mill and machinery were destroyed by fire:

Held, upon the evidence, MACLENNAN, J.A., dissenting, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified and, as a result of that finding, that the plaintiffs were entitled subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him. Judgment of MEREDITH, C.J., 31 O.R. 142, affirmed.

Aylesworth, Q.C., and *Lees*, for appellants. *Riddell*, Q.C., and *H. E. Rose*, for respondents.

From Divisional Court.] KELLY *v.* DAVIDSON. [Oct. 16, 1900.

Master and servant—Workmen's Compensation Act—Negligence—Foreman—Evidence.

An appeal by the defendant from the judgment of a Divisional Court [BOYD, C., FERGUSON and MEREDITH, JJ.], noted 32 O.R. 8, reversing the judgment at the trial of MACMAHON, J., reported 31 O.R. 521, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, Moss and LISTER, JJ.A., on the 8th of October, 1900, and on the 16th of October, 1900, was dismissed with costs, the Court agreeing that there was some evidence to support the finding of negligence.

Clute, Q.C., and *A. R. Clute*, for appellant. *H. E. Irwin*, and *S. B. Harris*, for the respondent.

From Meredith, C.J.] BAILEY *v.* KING. [Nov. 13, 1900.

Husband and wife—Criminal conversation—Damages—Statute of Limitations.

Criminal conversation is a continuing wrong, and where the original enticing away of the wife takes place more than six years before, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to that period being barred by the Statute of Limitations. Judgment of MEREDITH, C.J., affirmed, ARMOUR, C.J.O., dissenting.

A. F. Lobb, for appellant. *Heyd*, Q.C., for respondent.

From Armour, C.J.] [Nov. 13, 1900.

MOWAT *v.* PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

Insurance—Life insurance—Premium—Mistake—Rescission of contract—Repayment of premiums—Laches.

The court having found upon the evidence that there was a contract when the insurance in question was effected that the annual premium was not to be increased, directed, upon a demand for payment of an increased premium being made after seven annual premiums at the agreed rate had been paid, cancellation of the policy and repayment of the premiums although the policy, which had all the time been in the plaintiff's possession, contained a provision that the premium might be increased, the plaintiff denying that he had noticed this provision or assented to it. Judgment of ARMOUR, C.J., affirmed, MACLENNAN, J.A., dissenting.

Marsh, Q.C., for appellants. *Riddell*, Q.C., and *R. T. Harding*, for respondent.

From Meredith, J.] ASH *v.* METHODIST CHURCH. [Nov. 13, 1900.

Church—Expulsion of minister—Domestic forum.

The court cannot interfere with the action taken by the duly constituted tribunals of a church in expelling a minister when these tribunals have proceeded in accordance with the rules, regulations and discipline of the church, and the accused has had the opportunity of defending himself. Judgment of MEREDITH, J., affirmed.

Riddell, Q.C., and *A. A. Abbott*, for appellant. *Maclaren*, Q.C., for respondents.

From Divisional Court.] HOPKINS *v.* HOPKINS. [Nov. 13, 1900.

Undue influence—Husband and wife—Independent advice.

Held, upon the evidence in this case, affirming the judgment of a Divisional Court, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife and without independent advice, and was rightly set aside.

Robinson, Q.C., and *Teetzel*, Q.C., for appellant. *W. M. Douglas*, Q.C., for respondent.

From Divisional Court.] CRAIG *v.* CROMWELL. [Nov. 13, 1900.

Lien—Mechanics' lien—"Notice in writing" to owner—Letter—R.S.O. c. 153, s. 11, sub-s. 2.

A letter to the owner, from sub-contractors furnishing materials, asking him when making a payment to the contractor for the building in question to "see that a cheque for at least $400.00 is made payable to us on account of brick delivered, as our account is considerably over $700.00, and we shall be obliged to register a lien if payment is not made to-day" is sufficient "notice in writing" of a claim of lien under the Mechanics' Lien Act, R.S.O. c. 153. Judgment of a Divisional Court, 32 O.R. 27, affirmed.

Arnoldi, Q.C., for appellants. *Thomson*, Q.C., for respondents.

From Boyd, C.] [Nov. 13, 1900.

COLLIER *v.* MICHIGAN CENTRAL R. W. COMPANY.

Negligence—License—Master and servant—Railways—Damages—New trial.

The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yard the duties of car checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as

little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given he was killed by an engine of the defendants which was running through the railway yard without the bell being rung though the rules of the defendants required this to be done:

Held, that the deceased was a licensee and not a trespasser; that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his death. Judgment of BOYD, C., affirmed.

The court being of opinion, however, that damages of $3000.00, allowed by the jury, were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept $1500.00.

F. Hellmuth, and *J. Montgomery*, for appellants. *F. A. Anglin*, and *J. E. O'Connor*, for respondent.

From Boyd, C.] YOUNG *v.* OWEN SOUND DREDGE CO. [NOV. 13, 1900.

Negligence—Evidence—Onus of proof.

In an action to recover damages for death caused by alleged negligence the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death.

Where therefore a man employed on the defendant's tug was drowned, and it was shewn that wood had been piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was shewn that there was a safe passage-way on a scow lashed to the tug, and there was no evidence whatever as to the manner of the accident, the action was dismissed. Judgment of BOYD, C., reversed.

A. G. McKay, for appellant. *W. J. Hatton*, for respondent.

From Rose, J.] [NOV. 13, 1900.

MCCRIMMON *v.* TOWNSHIP OF YARMOUTH.

Water and watercourses—Ditches and Watercourses Act—Railway.

An award under the Ditches and Watercourses Act directed that a drain should be built through the land of private owners as far as a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, and then by the railway company along the highway, or across the highway and through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the

award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an enbankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:

Held, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company was concerned, and that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert, and that the defendants were liable therefor. Judgment of ROSE, J., affirmed.

Aylesworth, Q.C., and *J. M. Glenn*, Q.C., for appellants. *W. A. Wilson*, for respondent. *D. W. Saunders*, for the railway company, third parties.

From MacMahon, J.] [Nov. 13, 1900.

BANK OF HAMILTON *v.* IMPERIAL BANK.

Bills of exchange and promissory notes—Cheque—Marking by bank—Alteration—Forgery—Banks and banking—Clearing house.

A customer having a deposit account with the plaintiff bank drew a cheque upon that bank payable to bearer for five dollars and had it "marked" by the ledger-keeper. He then altered it so as to make it apparently a cheque for $500, it being in such form as to enable this to be done readily, and then deposited it with the defendant bank, obtaining from them by his cheques upon them the sum of $500. The defendant bank sent the cheque to the clearing house in the usual course of business and there in adjusting the balances it was charged against the plaintiff bank as a cheque for $500. On the next morning, when in the usual course of banking business at the place in question, the "marked" cheque received on the previous day from the clearing house were being checked with the deposit ledger, the alteration was discovered and the plaintiff bank at once gave notice to the defendant bank and demanded payment of $495:

Held, that the alteration of the cheque by the drawer after it had been "marked" was forgery; that the plaintiff bank was not responsible on the ground of negligence for the subsequent fraud of the drawer; that even if the adjustment of the balances in the clearing house constituted payment of the cheque, the notice given on the following day before the defendant bank altered its position or lost any recourse against other parties was in time, and that therefore the plaintiff bank was entitled to recover. Judgment of MACMAHON, J., 31 O.R. 100, affirmed, ARMOUR, C.J.O., dissenting.

Lash, Q.C., and *George Kappele*, for appellants. *W. M. Douglas*, Q.C., and *A. M. Stewart*, for respondents.

From Boyd, C.] [Nov. 13, 1900.

McDOUGALL *v.* WINDSOR WATERWORKS COMMISSIONERS.

Municipal corporations—Board of commissioners—Contract—Breach—Statutory restrictions—Evasion of statute.

The waterworks system of the city of Windsor is, by 37 Vict., c. 79 (O.), placed under the management of a Board of Commissioners who are authorized to collect the revenue, paying to the city any surplus over ordinary expenditure, and to initiate works for the improvement of the system, the necessary funds in that event to be supplied by the city. The total expenditure is limited to $300,000, to be provided for from time to time by by-law of the council, and not more than $20,000 to be expended in any one year without the assent of the ratepayers. A majority of the commissioners decided to make certain improvements but on finding that the cost would be over $40,000 decided to carry out at the time only one half the proposed scheme, and they entered into a contract with the plaintiffs to do work of the value of $20,000. No by-law had been passed by the council, and at the time more than $280,000 had been expended by the city for waterworks purposes, and the plaintiffs knew these facts. After a small portion of the work had been done a ratepayer threatened litigation and the commissioners instructed their engineer not to issue a progress certificate, and the plaintiffs brought this action to recover the value of the work done:

Held, that the commissioners had in good faith divided the work; that there was therefore no illegal evasion of the statutory restrictions, and that the contract was not invalid on this ground; but,

Held, also, that the commissioners were mere statutory agents of the city, and that as there was no by-law of the council and the statutory limit of the expenditure was to be exceeded, the contract was not binding. Judgment of BOYD, C., reversed.

Aylesworth, Q.C., for appellants. *Riddell*, Q.C., and *J. L. Murphy*, for respondents.

From Armour, C.J.] EARLE *v.* BURLAND. [Nov. 13, 1900.

Company—Reserve fund—Dissentient minority—President—Purchase for company—Secret profit—Directors—Salaries.

An ordinary trading company can, without special authority, set apart a reserve fund, but the majority of the shareholders cannot, against the wishes of the minority, accumulate out of the profits a reserve fund which is far larger than is at all likely to be required to provide for any vicissitudes in the business, and where such a fund had been accumulated and portions of it had from time to time been invested by the directors elected by the majority in unauthorized and hazardous investments, the court, at the

instance of the minority, ordered a reasonable portion to be set aside as a reserve fund and the balance to be distributed among the shareholders by undrawn profits.

The president of a company cannot buy for his own benefit and sell to the company at a profit a property which he knows the company requires and which he brings for the express purpose of selling to it. Judgment of ARMOUR, C. J., affirmed.

When the president and vice-president of a company drew for several years, with the acquiescence of their co-directors, elected by, and closely connected with, the majority of the shareholders, large sums ostensibly as salaries as general manager and managing director respectively, the court held that the propriety of the payments could be inquired into at the instance of dissatisfied shareholders although the majority were prepared to ratify them. Judgment of ARMOUR, C.J., reversed.

Robinson, Q.C., and *Hogg*, Q.C., for appellants. *Aylesworth*, Q.C., and *Chrysler*, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Boyd, C., Ferguson, J.] —— [Dec. 3, 1900.

HARPER *v.* HAMILTON RETAIL GROCERS' ASSOCIATION.

Libel — Publication — Communication to clerk — General verdict.

Motion by the plaintiff to set aside the verdict and judgment for the defendants in an action for libel tried before STREET, J., and a jury, at Hamilton, and for a new trial, upon the ground of mis-direction, the trial judge having charged the jury that the libel was not proved unless there was express malice. The plaintiff was a street car conductor in the City of Hamilton. The writing complained of was a circular sent by the defendant, Harvey, to the members of the defendant association, reflecting upon the plaintiff's credit and character. The publication relied upon was the giving of the draft of the circular by the defendant, Harvey, secretary of the association, to one, Anderson, a typewriter, not in the regular employment of the defendants, but occasionally employed and paid by Harvey, to copy.

Wallace Nesbitt, Q.C., for the plaintiff, contended that this was publication, and it was not privileged, relying on *Pullman* v. *Hill* (1891) 1 Q. B. 524, and *Robinson* v. *Dun*, 24 A.R. 277, and distinguishing *Boxious* v. *Frere* (1894) 1 Q.B. 842.

Lynch-Staunton, Q.C., for the defendants, shewed cause, and relied principally on *Boxious* v. *Frere* and on *Lawless* v. *Anglo-Egyptian Co.*, L.R. 4 Q.B. 262.

Held, that there was no publication to the typewriter, following the *Lawless* case; and also that the general verdict of the jury declaring that there was no ground for action in effect said that there was no libel. Motion dismissed with costs.

Boyd, C., Ferguson, J.] [Dec. 4, 1900.

WEEKES *v.* UNDERFEED STOKER CO., OF AMERICA.

Injunction—Stay of proceedings—Security for costs.

An order for security for costs made pursuant to Rule 1199, and issued according to form 95, has the effect of staying all further proceedings until security is given; and while such order stands it is not competent for the plaintiff to proceed with a pending motion for an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected.

C. A. Moss, for plaintiff. *W. R. Smyth*, for defendant, Eldred. *Holmested*, for defendant company.

Boyd, C, Ferguson, J., Robertson, J.] [Dec. 5. 1900.

BURNS *v.* CLARK.

Malicious prosecution—Reasonable and probable cause — Nonsuit.

Motion by the plaintiff to set aside a nonsuit entered by ARMOUR, C. J., in an action for malicious prosecution and arrest, and for a new trial. The defendant had the plaintiff arrested on a charge of fraudulently disposing of her property to defeat the defendant's claim for money due. The plaintiff was acquitted. She was a married woman, carrying on business for herself, her husband driving a delivery waggon for her. She denied that she owed the defendant anything. The defendant supplied goods for the plaintiff's business to the husband, who, according to the plaintiff's story, was given the cash for each purchase. Apparently he did not pay it over, as the defendant charged the price of the goods to the plaintiff. She said she had told the defendant not to give her husband any goods for her unless for cash. The defendant told the constable not to arrest the plaintiff if she would pay the amount due, but she refused to do so. The trial judge ruled that there was reasonable and probable cause for the arrest, and dismissed the action at the close of the plaintiff's case.

It was contended on behalf of the plaintiff that where the plaintiff makes out a reasonable case shewing the absence of reasonable and probable cause, the judge must take the opinion of the jury; the credibility of the plaintiff's evidence being for the jury. The motion was not opposed.

Per CUR. The plaintiff gave evidence which, if believed, would go to shew the absence of reasonable and probable cause on the part of the defendant. The credibility and effect of that evidence was for the jury, and the trial should have proceeded in the ordinary way, and not have been withdrawn at the close of the plaintiff's case from the jury. New trial, with costs in the cause to the plaintiff.

Boyd, C., Ferguson, J., Robertson, J.] [Dec. 6, 1900.

MCINTYRE *v.* MCGREGOR.

Principal and surety—Discharge of surety—Extension of time—Promissory note—Fraud—Forgery.

An appeal by the defendant, Robert McGregor, from the judgment of the County Court of Prescott and Russell in favour of the plaintiff in an action upon a promissory note, of which the appellant was a maker along with one of the other defendants, his son, for whose accommodation the note was made. When the note matured it was retired by means of a new note signed by the son, and purporting to be signed by the father. The father's signature was in reality a forgery. The original note was given up by the plaintiff to the son, and was not produced at the trial. Secondary evidence of it was given, and judgment for the plaintiff upon it.

A. C. Macdonell, for the appellant, contended that he was a mere surety, to the knowledge of the plaintiff, and that he was discharged by reason of the extension of time allowed to the principal debtor (the son) by means of the first and subsequent renewals, all of which were forgeries.

J. B. O'Brian, for the plaintiff.

BOYD, C. The appeal must be dismissed. *Irwin* v. *Freeman*, 13 Gr. 465, is decisive.

FERGUSON, J. It is not very clear upon the evidence, but let it be assumed in the appellant's favour, that the creditor knew at the time of the making of the original note that the appellant signed it as surety only. Yet the plea of the discharge of the surety by the extending of time to the principal debtor is not proved or nearly so. What happened was, that a fraud was practiced upon the creditor by giving him a forged note in lieu of the original note, and again another forged note in lieu of that one, and each of these forged notes had the appellant's name upon it. It is not shewn that there ever was a binding agreement made by the creditor for the extension of time to the principal debtor. So far as appears, the right and liabilities of the parties to the original note were at the commencement of this action just the same as they were when that note fell due—speaking apart from accrued interest. The judgment is quite right, and should be affirmed with costs.

ROBERTSON, J., concurred.

Falconbridge, C. J., Street, J.] [Dec. 10, 1900.

REID *v.* WALTERS.

Discovery—Examination of party—Appointment—Service—Enlargement—Default of attendance—Rules 443, 446.

The plaintiff obtained from the proper officer an appointment for the examination for discovery of the defendant; the defendant's solicitor was served with a copy of the appointment more than forty-eight hours before

the time appointed for the examination, but the defendant himself was not served. At the appointed time and place the plaintiff's solicitor attended before the officer, but neither the defendant nor his solicitor attended, and the officer enlarged the appointment till the next day (the 7th), and on the 7th, the defendant still not having been served, and neither he or his solicitor attending, the officer enlarged the appointment till the 8th. On the 7th the defendant was served with the appointment for the 8th, and with a subpœna, and was paid his conduct money, and his solicitor was on the 7th notified by letter of the enlargement till the 8th.

Held, that the defendant was in default for not attending the examination on the 8th. Rules 443 and 446 construed. Orders of MEREDITH, C. J., and the Master in Chambers, affirmed.

W. N. Ferguson, for plaintiff. *Ludwig*, for defendant.

Boyd, C.] LAIRD *v.* KING. [Dec. 11, 1900.

Writ of summons—Renewal—Service—Rule 132.

The time allowed for renewal of a writ of summons is, upon the proper construction of Rule 132, to be reckoned *inclusive* of the date of issue or of a former renewal.

Black v. *Green*, 15 C.B. 262, 3 C.L.R. 38, and *Anon*, 11 W.R. 293; 32 L.J. N.S. Ex. 88; 7 L.T. N.S. 718, followed.

Where the original writ of summons was issued on the 5th November, 1898, and was renewed on the 4th November, 1899, the renewal ran out on the 3rd November, 1900, and service thereafter was of no effect.

H. E. Caston, for plaintiff. *H. L. Drayton*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] IN RE NELLIE MARSHALL. [March 13, 1900.

Infants religious education—Rights of father—Forfeiture of examination of infant by Court—Order as to custody of person—Conditions imposed.

In the year [illegible] M., a Roman Catholic, married L., a Protestant, in the Province of Nova Scotia, and, some years afterward, removed to the Province of British Columbia, where the family resided for a number of years. N., one of the children of the marriage, with her father's assent, was baptised by a Presbyterian minister, and brought up in the religion of her mother. When N. was about twelve years of age her mother died, and she was committed to the care of one of her mother's sisters, and returned to Nova Scotia, where she lived with relatives of her mother for about a year,

during which time she continued to attend and finally became a member of the Presbyterian Church. In 1898 M. returned to Nova Scotia, and, having married again, required N. to return to live with him, and then insisted for the first time upon her attending the Roman Catholic Church, receiving religious instructions with a view to her becoming a member of that church. Up to the time of her father's return to Nova Scotia, and his second marriage N. had never known of his being a member of the Roman Catholic Church. N. objected to comply with her father's wishes, and as soon as she attained the age of fourteen years, left his house and returned to live with her mother's relatives, by whom she was sent to an educational institution connected with the Presbyterian Church. N. having been brought before a judge of the Court in obedience to a writ of habeas corpus, the father applied for an order to have her returned to his custody and control.

The learned judge, following *In re McGrath* (1893) 1 Ch. 142, saw N., as a mode of determining what would be for her welfare, and found her to be a young girl of much intelligence, thoroughly understanding her position, most pronounced in her religious views and strongly opposed to returning to her father's house, even for a period. He was of the opinion that the father's conduct, from the first up to the time of his second marriage, was such as to bring about the conditions of which he complained, by permitting her to be brought up in a faith different from his own until she reached an age when her feelings and convictions were settled and confirmed, and then, to gratify a caprice of his own, seeking to compel her to change the faith in which she has been educated. He refused the order applied for on the ground that the Court ought not to lend its assistance in such a case, and that the father must abide by the consequences of his own indifference at the time when his child's ideas were being formed and matured.

Held, on appeal, Per HENRY, J., GRAHAM, E. J., concurring, under the circumstances disclosed, the judge was right in refusing the order applied for, and that the Court should not aid the father in regaining control of the person of his child except upon his giving an understanding that she should enjoy complete religious freedom, and that she should not be removed out of the jurisdiction of the Court.

Per RITCHIE, J. In view of the circumstances disclosed by the report of the learned judge he was right in making the order he did, and that the appeal should be dismissed.

Per WEATHERBE and MEAGHER, JJ., (who differed in some respects as to the facts.)—As the father had done nothing to waive or forfeit his right to the custody and control of his child and as there was no reason to apprehend that he would act oppressively towards her, or seek unduly to influence her in matters pertaining to her religious views, the order applied for should be granted.

B. Russell, Q.C., and *R. E. Finn*, for appellant. *R. L. Borden*, Q.C., and *J. A. McKinnon*, for respondent.

Full Court.] THE QUEEN *v.* HAWES. [July 18, 1900.

Criminal law—Theft—Power of magistrate to reserve questions for opinion of Court—Code, ss. 742, 785, 900.

The prisoner, H., with his own consent, was tried summarily before the stipendiary magistrate for the city of Halifax, under s. 786 of the Criminal Code, and was convicted of the offence of stealing property of the value of less than $10. At the trial, the magistrate, at the request of the prisoner, reserved a question for the opinion of the Court under s. 742 and following sections of the Code.

Held. 1. Under s. 742 and following sections a reserved case can be stated only by a Court, or a judge having jurisdiction in criminal cases, or by a magistrate in proceedings under s. 785.

2. As s. 785 had no application to the case in question, and the provisions of s. 900 of the Code had, admittedly, not been complied with, there was no proper case before the Court upon which the Court had authority to give an opinion.

A. Morrison, for appellant. *Hon. J. W. Longley*, Q.C., Atty.-Gen., for respondent.

Full Court.] HOLMES *v.* TAYLOR. [July 18, 1900.

Arbitration—Time for making award—Power to extend.

By the terms of an agreement for submission to arbitration, the matters in difference between the parties were referred to the award, etc., of M. and B., and, in case they disagreed, or failed to make their award before the 1st day of August, then next, then to the award, etc., of such umpire as said arbitrators should nominate and appoint, "so as the said arbitrators or umpire do make and publish his and their award ready to be delivered on or before the 10th day of August next, or on or before any other day to which said arbitrators or umpire shall, by writing indorsed on these presents, enlarge the time for making such award or umpirage."

On the 29th July the arbitrators appointed J. as umpire and on the same day, by indorsement on the award, extended the time for making the award by the arbitrators from the 1st to the 25th Aug., and for the umpire from the 10th to the 30th August. On the 25th August the arbitrators further extended the time for making the award by the arbitrators to the 10th September, and for the umpire to the 20th September. On the 20th September the umpire extended the time for making his award to the 30th September, and on that date he again extended the time to the 10th October. On the 7th October he made and published the award on which plaintiff's action was brought.

Held, per RITCHIE, J., GRAHAM, E. J., concurring, that under the terms of the agreement the power of the arbitrators to consider and deal with the questions submitted absolutely terminated on the 1st August, after

which date the umpire was the only person who had authority to make the award.

Held, also, that the arbitrators had no authority to extend the time within which the umpire could make his award, and that as such time, if not legally extended, expired on the 10th August, and the umpire did not attempt to extend it until the 20th September, the award made by him was irregular and void, and plaintiffs could not recover.

Per MEAGHER, J., MCDONALD, C. J., concurring. The power of the arbitrators to make their award, and consequently their authority to extend the time for doing so, did not terminate until they disagreed upon the terms of the award, and in the absence of evidence to shew when this disagreement occurred, the enlargement of time made by them was valid.

Held, also, that under the terms of the Arbitration Act, the umpire had one month after the original or extended time for making the award of the arbitrators, in which to make his award, and that as he had made it within that time it could not be said that he had no authority to do so.

J. M. Townshend, Q.C., for appellant. *J. J. Power*, for respondent.

Full Court.] IN RE ESTATE OF CURRY. [July 18, 1900.

Tenant for life — Executors of held entitled to insurance money as against devisee of remainderman.

S. C., the tenant for life of a house and lot of land, insured the house against loss or damage by fire, paying the insurance premiums out of her own funds, and taking the policy in her own name. S. C. was not in any way bound to repair or rebuild, or to insure. The house was totally destroyed by fire and the amount of the insurance paid over to S. C. who placed it in the bank on deposit receipt to her own credit.

Held, that the amount received from the insurance company belonged exclusively to S. C., and that her executors were entitled to judgment for the amount of the deposit receipt, with interest from date and costs, against the devisee of W. C., to whom the lot and house were devised subject to the life estate of S.C.

W. M. Christie, for appellant. *A. Drysdale*, Q.C., for respondent.

Full Court.] ARCHIBALD *v.* TOWN OF TRURO. [July 18, 1900.

Municipal corporation — Damages awarded against for trespass — Finding of jury — Effect of — Towns Incorporation Act of 1895, s. 295 — Continuing trespass not barred by.

In an action brought by plaintiff against defendant for entering upon his land and cutting a drain or trench through the same, etc., the jury found in answer to a question submitted, that the town constructed the drain in 1886 "by virtue of the Streets Commissioner's power of office."

It appeared that plaintiff knew of the drain at the time and made no objection until the latter part of 1896, when the land caved in and repair work was undertaken, and plaintiff demanded compensation.

Held. 1. The clear meaning of the words "by virtue of the Streets Commissioner's power of office" was that the town constructed the drain in question by their agent, the streets commissioner, one of whose duties it was to construct drains.

2. The trespass being a continuing one was not barred by the Towns Incorporation Act of 1895, Acts of 1895, c. 4, s. 295, which provides that "no action ex delicto shall be brought against any town incorporated under the Act . . . unless within twelve months next after the cause of action shall have accrued, except as to damages suffered more than one year before action brought.

Full Court.] ARENBURG *v.* WAGNER. [July 18, 1900.

Contract relating to land — Mutual and dependent obligations — Cause transferred from County Court where jurisdiction of latter to afford relief doubtful — Costs — Taxation of.

By an agreement entered into between plaintiff and defendant for the sale of land, it was provided that if the purchase money was paid by instalments the deed was to be given when and not before the last instalment was paid. If defendant exercised his option and paid the whole purchase money at any time within four years, then the deed was to be given when the money was paid.

Held, that the obligations were mutual and dependent, and the acts were to be performed concurrently.

By the terms of the agreement a good title was to be given and this could not be done as the release of dower could not be obtained, but defendant signified his willingness to retain possession and to accept compensation. The matter being a small one, and there being some question as to the jurisdiction of the County Court to afford relief;

Held. 1. The matter should be transferred to this Court, and the judgment for defendant in the County Court set aside, that the plaintiff should have leave to apply at Chambers to ascertain the value of the dower, and that the balance of the purchase money should be paid into court within one month after the ascertainment of the value of the dower, otherwise defendant should be taken to have abandoned his option and plaintiff should have judgment for the amount of his claim with costs.

2. If the balance of purchase money were so paid in by defendant, defendant should be entitled to the costs of the action up to the appeal and that plaintiff must bear his own costs of the application at Chambers and of ascertaining the value of the dower.

3. The plaintiff's claim being for an amount under $80, costs must be taxed according to the scale of the County Court in such cases.

J. A. McLean, Q.C., for plaintiff. *Wade*, Q.C., and *Paton*, for defendant.

Full Court.] BROWN *v.* MOORE. [July 18, 1900.

Liquor License Act of 1895—Provision requiring wholesale licenses—Held ultra vires—Sale without license held illegal.

In an action to recover the price of a quantity of liquor sold by plaintiff to J., payment for which was guaranteed by the defendant M., it appeared that at the time of the sale plaintiff carried on business in Truro where no licenses for the sale of liquor were issued.

By the Liquor License Act of 1895, Acts of 1895, c. 2, s. 56, it is enacted that "no person shall sell by wholesale or by retail any liquors without having first obtained a license under this Act authorizing him to do so."

It was contended on behalf of plaintiff that this section was ultra vires the provincial legislature, so far as it related to wholesale licenses.

Held, that the result of the authorities is clear as to the power of the local legislature to enact laws requiring dealers in intoxicating liquors, whether wholesale or retail, to take out licenses, and that this not having been done in the present case, the sale was illegal and plaintiff could not recover.

J. A. Chisholm, for appellant. *H. A. Lovett*, for respondent.

Full Court.] DARROW *v.* MILLARD. [July 18, 1900.

Payment into court — Non-compliance with O. 22, R. 2 — Imposing conditions.

Defendant paid into Court a sum of money to be paid out only upon the execution and delivery by plaintiff of a good and sufficient deed with the usual covenants. There being no way in which plaintiff could take the money out of court, in settlement of the suit, without going to trial,

Held. 1. There was no reason for interfering with the judgment of the trial judge giving plaintiff costs, in addition to the amount paid into Court.

2. The payment into Court was bad for non-compliance with O. 22, R. 2 which requires the payment into Court to be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made, to be specified therein. Appeal dismissed with costs.

F. B. Wade, Q.C., for appellant. *J. A. McLean*, Q.C., for respondent.

Full Court.] [July 18, 1900.

UNION BANK *v.* EUREKA WOOLEN MFG. CO.

Bills and notes — Accommodation acceptance — Authority of secretary of company to make—Knowledge of party claiming under.

The secretary of defendant company whose authority was limited to the acceptance of drafts, indorsed in the company's name a number of drafts in which the company had no interest, for the accommodation of C.

The learned trial judge found that the bank had knowledge that the indorsements were made for the accommodation of C.

Held, dismissing plaintiff's appeal with costs, that defendant was not liable.

Semble, that where the directors might under the power given them delegate to the secretary power to indorse for the company, the bank taking the paper bona fide would be entitled to assume that the secretary had such power, although it had not, as a matter of fact, been delegated.

R. E. Harris, Q.C., and *C. H. Cahan*, for appellant. *H. Mellish*, for respondent.

Full Court.] MILLER *v.* GREEN. [Nov. 17, 1900.

Libel—Privileged communication—Actual malice—Evidence—Mis-direction —Non-direction—Materiality.

Defendant was general manager and plaintiff local agent of a life insurance company. Plaintiff was dissatisfied with the remuneration that he was receiving and decided to retire from the agency, and a new agent was appointed to succeed him. Shortly afterwards defendant wrote to a policy holder in the company and a client of plaintiff's, a letter in which he stated that he had relieved plaintiff from the local agency, and that without entering into details as to the causes which compelled him to take this action said, "we have tried for a considerable time to get him to attend to the business of the company and it was only because it was clearly necessary that the change was made." He added that the attention of certain matters was left in plaintiff's hands, on the understanding that he was to attend to them and remit to defendant as the company's representative, and then went on to say, "I now find that he has collected money, which, up to the present time, we have been unable to get him to report." Defendant then enquired of the person to whom the letter was addressed whether she had paid plaintiff the premium due on her policy. At the time that the letter complained of was written it was untrue to the knowledge of defendant that plaintiff had been dismissed from his office as agent of the company, or that he had collected any of the moneys of the company for which the company had been unable to get him to account.

On the trial, counsel for plaintiff asked the learned trial judge, in charging the jury, to instruct them that if it was proved that defendant stated in the letter that which he knew to be false it was evidence from which actual malice might be inferred. The learned trial judge declined to do so on the ground that the point was already sufficiently covered.

Held, that the letter was clearly libellous, but, if it was written bona fide, to a policy holder in the company, even though the charges against plaintiff contained in it were false, and could not be justified, the occasion was privileged, and defendant would not be liable.

Per WEATHERBE and RITCHIE, JJ., GRAHAM, E. J., concurring. The point upon which the trial judge was asked to direct the jury involved a point material for their consideration, and that as the judge had not directed the jury as asked, there must be a new trial.

Per TOWNSHEND, J., dissenting. In all material aspects of the case, the charge dealt with the matters suggested, and that the omission, if there was an omission, did not affect the issues submitted to the jury.

Held, also, that mere non-direction was not a ground for a new trial, unless the want of it produced a verdict against evidence, which, in his opinion, was not the case here.

Per WEATHERBE, J. Evidence of altercations between plaintiff and defendant was a fit subject for submission to the jury as evidence of malice.

Held, also. Knowledge on the part of defendant that plaintiff had used abusive language with respect to him in connection with their business relations, was evidence from which an inference of malice might be drawn.

2. The trial judge erred in directing the jury that it was not open to plaintiff to put another construction upon the word "report" than the sense in which it would be understood by plaintiff and defendant themselves.

3. The trial judge erred in his definition of "malice" in connecting it with the idea of "wreaking petty spite" upon plaintiff, from which the jury was likely to understand that defendant was not liable unless there was evidence of spitefulness on the part of defendant.

4. The learned judge erred in leaving the jury under the impression that defendant's evidence as to the state of mind in which he wrote the letter complained of was conclusive on that point.

5. The jury should have been instructed that the evidence in question was comparatively unimportant or that it should be received with caution.

W. E. Roscoe, Q. C., for appellant. *W. B. A. Ritchie*, Q. C., for respondent.

Full Court.] [Nov. 17, 1900.

DOMINION COAL CO. *v.* KINGSWELL S.S. Co.

Charter party — Option to renew — Sufficiency of notice — Agency to receive — Burden of proof — Refusal of judge to submit question to jury.

A charter party made between the plaintiff and defendant companies provided that plaintiffs should have the right of renewal upon giving notice on or before a specified date. On the date specified plaintiffs gave notice of renewal to M. K. & Co., who had acted as agents of defendants in connection with the negotiation of the charter party and the receipt and remittance of the hire of the vessel. Defendants refused to renew on the ground that the notice required had not been given.

Held, that the authority given by defendants to M. K. & Co. was a special authority, and that the duty devolved upon plaintiffs of shewing that

by usage or otherwise they had authority to receive notice in connection with the extension of the time, such notice not being incidental or necessary to their original authority.

The learned trial judge having refused to submit to the jury a question tendered on behalf of plaintiffs as to the authority of M. K. & Co.,

Held, GRAHAM, E. J., dissenting, that he was right in doing so.

Held, that the learned judge was justified in deciding as matter of law that there was no proof of agency, and, therefore, nothing that could properly be submitted to the jury.

H. Mellish, for appellant. *C. S. Harrington*, Q.C., and *J. M. Chisholm*, for respondent.

Province of New Brunswick.

SUPREME COURT.

In Equity, Barker, J.]

Interrogatories—Answer—Ambiguity—Knowledge, information and belief—Document in public office.

An answer to an interrogation must be in plain and positive language, and clear in meaning, so that it may safely be put in evidence.

It is not sufficient for the plaintiff, in answer to an interrogation, to deny having any knowledge, without stating his information and belief.

Where a plaintiff was properly interrogated as to the existence of a document in a public office it was held that he was not bound to seek knowledge as to the fact, but that if he had such knowledge or information or belief upon the subject, he should answer fully as to his knowledge, information or belief.

A. S. White, Q.C., and *L. Allison*, Q.C., in support of exceptions. *G. H. V. Belyea*, contra.

IN RE DEAN ARBITRATION.

Arbitrators' fees—Attendances—Adjournments—Review by judge.

Where each of three arbitrators charged $5.00 for each of a number of attendances at meetings which were adjourned without any business being despatched, owing to causes for which the arbitrators were not responsible, a review judge held the charge not to be unreasonable.

Where arbitrators each charged $10.00 for each of their sittings at which evidence was taken or the matter of the arbitration was proceeded with, a review judge refused to reduce the charge.

C. N. Skinner, Q. C., for city of St. John. *W. Pugsley*, Q.C., for arbitrators.

BROWN *v.* SUMNER.

Security for costs—Form of security—Bond—Recognizance—Act 53 Vict., c. 4, s. 286.

Quære, whether security for costs of suit may be by recognizance under s. 286 of Act 53 Vict., c. 4, instead of by bond.

Security for costs of suit was ordered to be by recognizance. Security not being given it was ordered that the bill should stand dismissed unless security for costs was put in within a limited time. Before the expiration of the time security was put in by bond in the usual form. Upon an application to set the bond aside and for its removal from the files of the court on the ground that the security should be by recognizance:

Held, that in view of the second order, security was properly put in by bond.

W. B. Chandler, Q.C., for plaintiff. *D. I. Welch*, for defendants.

IN RE WIGGINS' ESTATE.

Trustees—Commission—Personal estate—Income—Investments.

No fixed rule can be laid down as to the commission trustees will be allowed by the court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate.

Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of 5 per cent. on income, a commission on the estate was refused, but a commission of 1 per cent. was allowed on investments made by them.

A. O. Earle, Q.C., for trustees. *G. C. Coster*, for Mrs. A. B. Wiggins.

En Banc.] EX PARTE TRENHOLM. [Nov. 29, 1900.

Canada Temperance Act—Delivery of liquor C.O.D.

A consignment of liquor was shipped by Dominion Express from Amherst to Moncton, C.O.D., and delivered to the purchaser at the latter place by the agent of the Company upon payment of the price.

Held, that the agent was not guilty of an offence against the Canada Temperance Act. Rule absolute for certiorari to remove conviction.

H. H. McLean, Q.C., in support of rule. *M. G. Teed*, contra.

En Banc.] GALLAGHER *v.* WILSON. [Nov. 29, 1900.

Practice—Judgment quasi nonsuit.

Plaintiff resisted a motion for judgment quasi nonsuit on the ground that no replication had been filed, though one had been served.

Held, that though the failure to file was the plaintiff's default, it was the defendant's duty to search the clerk's office, and to see that the issue was complete before moving.

A. J. Gregory, for plaintiff. *L. A. Currey*, Q.C., for defendant.

Province of Manitoba.

QUEEN'S BENCH

Killam, C. J.] [Nov. 17, 1900.

MANITOBA FARMERS' MUTUAL HAIL INS. CO. *v.* LINDSAY.

Mutual insurance—Assessment on premium notes—Discount for prompt payment—Mutual Hail Insurance Act, R.S.M., c. 106, s. 35.

Appeal from the judgment of a County Court in favour of defendant, a member of the plaintiff company in an action to recover the amount of an assessment on a premium note given by defendant for an insurance against loss by hail.

Sec. 35 of The Mutual Insurance Act, R.S.M. c 106, under which the plaintiff company was incorporated, provides that the assessment upon premium notes or undertakings shall always be in proportion to the amounts of such notes or undertakings. In making the assessment of five per cent. upon the amount of each policy the directors added a proviso that all members and policy holders, who should pay the full amount of the assessment on or before 1st November, 1899, should be entitled to and should receive a discount of 25 per cent. upon the amount of such assessment.

Held, that the effect of the resolution was to assess seventy-five per cent. of five per cent. upon those who should pay on or before Nov. 1, 1899, and the full five per cent. on those who should not, and that the assessment was therefore void, as being in contravention of s. 35 of the Act.

The company had no power to impose penalties for default in prompt payment. It was a mutual company, and the directors must strictly observe the requirements of the Act, and preserve an equality among the members in assessing them. Appeal dismissed with costs.

Wilson, for plaintiffs. *Howell*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Sept. 17, 1900.

BANK OF BRITISH COLUMBIA *v.* TRAPP.

Practice—Examination for discovery—Nature of—Whether or not cross-examination allowed—Rule 703.

Upon the examination for discovery of the defendants certain questions were objected to on the ground that they were in the nature of cross-examination. The examination was adjourned for the purpose of bringing the matter before a Judge in Chambers, and on May 30th, 1900, MARTIN, J., made an order requiring the defendants to answer the questions objected to. The defendants appealed to the Full Court. Owing to some doubt as to the construction to be placed on the rules for examination for discovery, on the 15th June, 1900, rule 703 was amended expressly sanctioning cross-examination. The appeal was argued before the Full Court on 17th September.

Held, dismissing the appeal, that the examination for discovery under rule 703 (even before the amendment) was in the nature of a cross-examination but limited to the issues raised in the pleadings.

Carroll v. *The Golden Cache Mines Company* (1899) 6 B.C. 354; 35 C.L.J. 208, overruled.

The amendment of 15th June, 1900, is retroactive.

Howay (*Dockrill*, with him), for appellants. *Davis*, Q.C., for respondents.

Martin, J.] SEHL v. TUGWELL. [Oct. 29, 1900.

Practice—Costs—Security for—Two appeals included in one notice of appeal.

On 12th October, 1900, the defendant by one notice of appeal appealed from two orders made by DRAKE, J., the one granting leave to the plaintiff to amend the writ of summons and the other dismissing the defendant's application to set aside the said writ. After the plaintiff's summons to amend the writ was issued, the defendant took out a summons to set aside the writ, returnable by special leave at the same time as plaintiff's summons. Plaintiff demanded security for costs in the sum of $75 for each appeal, but the defendant contended there was only one appeal and filed a bond in the sum of $75.

Held, that as there were two separate appeals security for costs as of one appeal was insufficient.

Belyea, Q.C., for the summons. *Fell*, contra.

Full Court.] COURTNAY *v.* CANADIAN DEVELOPMENT CO. [Nov. 5, 1900.

Practice—Appeal—Right to in Yukon cases—62 & 63 Vict., c. 11, s. 7—Application to pending case tried and decided after passing of.

Motion to quash an appeal to the Full Court from a judgment of DUGAS, J., pronounced 17th April, 1900, in the Territorial Court of the Yukon Territory. The following dates are material: Writ issued at Dawson, North-West Territories, 28th September, 1898, statement of claim filed same day, statement of defence delivered 30th September, 1899, trial 1st February, 1900, judgment 17th April, 1900, and notice of appeal to the Full Court of the Supreme Court of British Columbia 1st May, 1900. The Yukon Territory Act, 61 Vict., c. 6, separated the Yukon Territory from the North-West Territories and constituted for it a Territorial Court. By the North-West Territories Act, R.S.C., 1866, c. 50, s. 50, the Supreme Court of the North-West Territories was constituted a Court in Banc to hear appeals from all Courts of the North-West Territories. The Yukon Territory Act does not expressly refer to the subjects of appeals.

By an Act to amend the Yukon Territory Act (62 & 63 Vict., c. 11), assented to on 11th August, 1899, it was enacted that appeals should lie from final judgments of the Territorial Court to the Judges of the Supreme Court of British Columbia sitting together as a Full Court. The amendment also gives an alternative appeal to the Supreme Court of Canada.

Held, dismissing the motion, that the Act, 62 & 63 Vict., c. 11, s. 7, applies to an action pending when the Act came into force, but tried and decided afterwards. Motion dismissed with costs.

Peters, Q.C., for the motion. *Duff*, contra.

NOTE.—On 6th March, 1900, the Full Court quashed the appeal in the Yukon case of *Canadian and Yukon Prospecting and Mining Company* v. *Casey*. In it the trial took place in May, 1899, but the judgment was not delivered until October, 1899.

Full Court.] [Nov. 20, 1900.

B. C. FURNITURE COMPANY *v.* TUGWELL.

Practice—Amendment of style of cause—Irregularity or nullity.

One Jacob Sehl, trading under the name of the B. C. Furniture Co., commenced on March 10, 1899, an action in such firm name in respect of a promissory note dated Jan. 20, 1893, and payable sixty days after its date. A summons for judgment under order XIV., having been dismissed on the ground that one person cannot sue in a firm name, plaintiff obtained on Oct. 5, 1900, an order amending the style of cause by prefixing thereto "Jacob Sehl trading under the name of the———." Defendant applied for an order setting aside the writ on the ground that it was a nullity, but the summons was dismissed. If the writ had been set aside and a fresh

action commenced the Statute of Limitations would have been a bar to the action. Defendant appealed from both of the orders which were made by DRAKE, J.

Held, dismissing the appeal, that the writ was not a nullity and that the irregularity was properly amended.

Fell, for appellant. *Belyea*, Q.C., for respondent.

Full Court.] BANKS *v.* WOODWORTH. [Nov. 20, 1900.

Practice—Appeal from Yukon—Extension of time for—Costs—Security for—Appeal books.

Motion to the Full Court at Vancouver for an extension of time for appealing from a judgment of the Territorial Court of the Yukon on the ground that it was impossible as yet to get the notes of the evidence.

Davis, Q.C., for motion. *Peters*, Q.C., for respondent, asked as a condition precedent that security for costs be put up and also that the respondent be furnished with a copy of the appeal book.

Per Curiam: Let the time be extended and security in the sum of $150.00 be put up before the first day of the first sitting in Vancouver, otherwise the appeal is dismissed without further order. It is the practice of this court that a copy of the appeal book should be given to the other side.

McColl, J.C.] [Nov. 30, 1900, 1900.

PROVINCIAL ELECTIONS ACT AND TOMEY HOMMA.

Provincial Elections Act, R.S.B.C. 1897, c. 67, s. 8—Validity of—Right of naturalized Japanese to be registered as voters.

Appeal to the County Court from a decision of the Collector of Votes of Vancouver, whereby he refused to put the appellant's name on the Register of Voters because of s. 8 of the Provincial Elections Act which prohibits Japanese from being placed on the Voters' List or from voting. Homma, a Japanese, was a naturalized British subject.

Held, allowing the appeal that s. 8 is ultra vires. *Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899) A.C. 580, considered and followed.

Harris, for appellant. *Wilson*, Q.C., for respondent.

Book Reviews.

The Shareholders' and Directors' Manual. By J. D. WARDE, of the Provincial Secretary's Department, Toronto. Sixth edition; price $3.00. Toronto: Canada Railway News Company, Publishers. 1900.

This is a revised and enlarged edition of Mr. Warde's compendium of the laws relating to joint stock companies, giving information as to the steps to be taken in applying for charters of incorporation and licenses under the Act of the Dominion of Canada, and of the various provinces thereof, relating to joint stock companies, as well as much valuable information respecting the organization and management of such companies. Mr. Warde, though not a professional man, and not attempting to write a law book, has done his work in a way that is useful to lawyers as well as to laymen. The special provisions for insertions in charters will be found valuable, and appear for the first time. A number of valuable forms are given. We should have been glad to see many more, and would suggest that in another edition their number might be added to. Forms appropriate to debenture loans, purchase of stock in other companies, and other matters coming within the purview of the Act would be acceptable. The book has grown from 98 pages in the first edition to 534 pages in the present one.

UNITED STATES DECISIONS.

RAILWAY LAW.—A street passenger who was injured after leaving the car and while attempting to pass behind it in the dark, by falling over a fender which had become disarranged without the knowledge of the company, and was projecting from the rear of the car, is, in *Gargan* v. *West End St. R. Co.* (Mass.), 49 L.R.A. 421, denied any right to recover against the street railway company for the injury.

The accidental death of a sick passenger, who was supposed by the railway employees to be intoxicated, and who was helped from the car at the terminus of the route and led to the front of the station, at or near to the public street, and left where the way was open in which he wished to go, but who, after the train had started again on its trip, turned and went toward the back of the station and slipped between the wheels of a car moving on a track, is held, in *Bageard* v. *Consolidated Traction Co.* (N.J.), 49 L.R.A. 424, to create no right of action against the carrier.

A rule of a street railway company requiring passengers to board the cars within a station, and compelling one who does not to pay fare, even though he had previously paid in the station, is held, in *Nashville Street Railway* v. *Griffin* (Tenn.), 49 L.R.A. 451, to be a reasonable regulation, but one which must be enforced in a reasonable manner, and therefore unenforceable as against one who, after paying fare in the station, is obliged to go outside to take a car about ready to start, or else wait twenty minutes for another car.

The Queen.

On the evening of the twenty-second day of January last, Her Most Gracious Majesty, Queen Victoria, passed from her earthly kingdom into the presence of the King of Kings; and what has been in many respects the most memorable reign in the history of the British Empire, and perhaps of the world has come to an end.

As Queen she has lived under a solemn sense of her responsibility to the Divine axiom that "Righteouness exalteth a nation." As a woman her deep religious convictions were well recorded in her own words on the mausoleum at Frogmore, which contains the remains of the Prince Consort, and where will soon be laid all that is mortal of his faithful and devoted wife:—

"Victoria—Albert.
Here at last I shall rest with thee;
With thee in Christ shall rise again."

Her wise and temperate attitude in regard to religious matters may be said in no fanciful sense to have given a new meaning to her official title of Defender of the Faith; and to have furnished not the least striking illustration of the qualities, which, in a purely political sphere, have rendered her a model Queen, and a pattern for all future constitutional monarchs. It is assuredly a notable achievement to have succeeded so admirably in combining an adequate fulfilment of the obligations incident to her position as head of two state churches, with the toleration which is incumbent upon the ruler of an Empire embracing so many hundreds of diversified sects, that not a single jarring note has troubled the symphony of praise which the representatives of every form of belief has been sounding over her bier.

As our mother Queen, reverenced and loved as such, her memory will remain in the hearts of her people while history lasts. We quote the words of a writer who most aptly expresses the thoughts that must fill all our minds on this subject:—"Mothers in mansions and in hovels, in the stately homes of England, in the cots of Ireland, in the bungalows of India, in the whitewashed cottages of Quebec, cherished the Queen's joys and told at the hearth the tale of her sorrows. Hence devotion to the Queen took on much of reverence and of softness. The hearts of the children became seed plots of patriotism. The home buttressed the throne. All over the empire affection for the woman nestled at the very core of loyalty to the Sovereign."

It needs not, however, that we should repeat the praises so universal throughout her vast Empire and which have been echoed across the oceans from the continents to the islands of the sea. The best testimony to her virtues and her wisdom is not so much the voice of the civilized world joining in the same note of praise, but rather what she has helped to accomplish during her long and eventful reign. Of no one of even her rank and station can it be more truly said, *Si monumentum quæris, circumspice.* The progress and prosperity of hundreds of millions who called her Queen and of the many lands over which her sway extended is the best tribute to the beneficent influence of her life. So splendid an embodiment was she of the greatness of her age and so powerful her quiet influence for good, that no matter how long the world lasts Victoria will stand in the van of the rulers of men, and the Victorian age will be an abiding stimulus to all nations in their efforts to attain to the highest plane of living compassed by the social state.

Not the least important advancement during the reign that has just closed has been the growth of law and order and the increased security of life and property throughout the empire. Perhaps the greatest blessing and the one most essential to the welfare of any nation is the strong, sleepless and impartial administration of justice. Since the Chartist riots in 1839 there has been no serious popular outbreak, and there now exists amongst her people, to a degree unknown in almost any other nation, that sense of safety and security so necessary to human happiness, and so indicative of a high order of civilization. The criminal and dangerous classes have learned to realize that the arm of the law is stronger than they, and that it reaches to the ends of the earth. Perhaps the sight so often seen in the crowded thoroughfares of London may in a simple way illustrate this majesty of the law. A quiet man in simple uniform steps slowly forward and lifts his hand, and at once every vehicle, whether it be the Queen's carriage, the Prime Minister's brougham or the costermonger's cart, becomes motionless. A wave of the same hand and the roar of traffic begins again. The man is only a police constable, but behind him is the whole power of the empire.

When death removes one in authority who has always held sovereignty over our love and veneration as well as over our political conduct, it is difficult to discuss the event from the practical standpoint of the lawyer; our minds are too much filled with the thought of our loss in that one so gracious, so good and so great

has been taken from us.—But we must turn again to matters more specially within our province to refer to.

Of the many functions which pertain to the sovereignty of Great Britain, there are none more honorable, none more important than those which are concerned with the administration of justice. The Sovereign is the fountain of justice, as well as the fountain of honor, and to the Sovereign alone belongs the prerogative of mercy. In early and primitive times the "king sat in the gate," hearing the complaints of his subjects, redressing their wrongs, settling their disputes and awarding punishment to malefactors. So sat David and his illustrious successor, and such is the practice to-day in Eastern countries, and from this practice grew by slow degrees the courts by which in our day justice is administered. In the name of the Sovereign all writs run, and were such a thing as an interregnum to arise all legal proceedings would come to a standstill. More directly than any other officials our judges represent the Sovereign. The Lord Chancellor is "the keeper of the King's conscience," and it is as directly representing the Sovereign that his great functions are performed. In feudal times the "King's Justiciar" was one of the great officers of State, and the courts as originally established, or, as by degrees they were extended and enlarged, were the King's courts. As the King could appoint the judges, so he could remove them, until this power was so frequently abused in later times that the Sovereign was compelled so far to limit his prerogative as to forego the power of removal.

Lawyers are officers of the courts; and though the changes in our constitution have made the supremacy of our Sovereign a matter of form rather than reality, we naturally feel a special interest in the person of the Sovereign. During the reign just ended there is no doubt that the opinion of the Queen had a decided influence in the appointment of the judges. No doubt a negative, rather than a positive influence, for it cannot be supposed that she would have permitted the appointment to the Bench of any man whose character was open to suspicion in any particular. And it is one of the glories of Queen Victoria's reign that the judges of her courts have been of the highest reputation for probity as well as ability.

The accession of Her Majesty found our juridical system freed from many abuses which had grown up around it, and the criminal law deprived of many of the terrors which previously weakened its powers by inflicting penalties so severe that juries failed to convict. In later years still further changes have taken place. The distinction in procedure between law and equity has

been done away with, and the abstruse science of pleading has given way to a simpler and more reasonable method of arriving at the issues. The jurisdiction of the lower courts has been enlarged so as to bring the means of obtaining justice within easy reach of all. Economy and simplicity has been aimed at, and largely attained, and the process has been continually going on. We may claim, therefore, that from the legal standpoint the reign of Queen Victoria has been one of progress, and of progress always tending to the benefit, not of any privileged few, but of the great mass of her subjects. Justice has been more than ever tempered with mercy. Reform rather than punishment has been the object of all the changes in our criminal law, and the prevention of crime by removing the sou of temptation rather than the infliction of penalties when it has been committed.

Space will not permit us to even attempt to deal with many other important matters. We might enlarge upon the growth of the constitutional law, and dilate upon the progress that has been made in regard to the liberty of the subject. We might refer to the Imperial Parliament rolls, which reveal such progressive measures as those for the repeal of the last vestiges of intolerance against Roman Catholics; the admission of Jews to Parliament; the abolition of University tests; the Reform Act, of 1867; the disestablishment of the Irish Church; The British North America Act, 1867; and the Australian Commonwealth Act, of 1900; the two last enactments meaning more for the maintenance and continuity of the Empire than anything that the British parliament has done since the passage of the Act of Settlement in 1700-01.

In our grief at the loss of our Queen, we have consolation in the remembrance of all that we have gained during her long reign, as well as the just expectation that in her successor we may hope to see continued the progress which has produced so much benefit to all classes of the community, and to none more than to the profession in whose interests we are specially concerned.

We would now turn for a moment to point out in the briefest possible way the more important constitutional effects in Canada of the Crown's demise.

Firstly: The demise of the Crown does not dissolve the parliament of Canada, nor the Legislature of Ontario. (See 31 Vict., c. 22, s. 1; R.S.C. c. 11, s. 1; R.S.O. (1897) c. 12, s. 2.) The same is true of the legislatures of Quebec (R.S.Q. Tit. II, s. 78); Nova Scotia (R.S.N.S. 5th ser., c. 3, s. 9); New Brunswick (Con. St. N.B. c. 5, s. 80); P. E. Island (4 Will. IV., c. 12, s. 1); British Columbia

(R.S.B.C. c. 118, s. 2); Manitoba (R.S.M. c. 36, s. 9); North-West Territories (R.S.C. c. 50, s. 11).

Secondly: The Governor-General is continued in office for eighteen months after the demise of the Crown, by virtue of the Imperial Act, 1 Will. IV., c. 12, s. 2.

Thirdly: The Lieutenant-Governors of the several provinces, being appointed (see B.N.A. Act, 1867, s. 58) by the Governor-General-in-Council, are retained in office by the proclamation of the Governor-General, which was made under the provisions of R.S.C. c. 19, s. 3.

It may be noted here that notwithstanding the view expressed by their lordships of the Privy Council in the *Maritime Bank* v. *Receiver-General of New Brunswick* (1892), A.C. 443, to the effect that the Lieutenant-Governor of one of the provinces of Canada is as much the representative of the Sovereign for all purposes of provincial government as the Governor-General himself is for all purposes of the Dominion Government, yet it is submitted that inasmuch as the Lieutenant-Governor is appointed by instrument under the great seal of Canada, he falls within the designation "any functionary in Canada" mentioned in s. 3 of R.S.C. c. 19. On the other hand, assuming that this construction is untenable, and that the act of the Governor-in-Council in appointing the Lieutenant-Governor is practically the act of the Sovereign, then the Lieutenant-Governor falls within the operation of 1 Will. IV., c. 4. s. 2, and like the Governor-General, is continued in office for eighteen months.

Fourthly: Privy Councillors, and all officers, civil and military, are continued in office for six months after the demise of the Crown by 6 Anne, c. 7, s. 8 (1701). The statute is expressly applied to the colonies. There has also been legislation upon this subject by the Parliament of Canada, and most of the provincial legislatures, continuing public officers and functionaries in their commissions, without limitation, upon proclamation in that behalf by the Governor-General in the case of Dominion officials, and by the Lieutenant-Governors with respect to provincial officials.

In such of the Provinces as there is no legislation of the kind, it would seem necessary for the legislatures to pass enactments confirming the officials in their offices under the new Sovereign. See in this connection: R.S.C. c. 19, s. 3; R.S.O. (1897) c. 16, s. 1; R.S.Q. c. 3, Arts. 601, 602; Acts of P. E. Island, 43 Vict., c. 9, s. 1; R.S.B.C. c. 118, s. 2.

Fifthly: The Imperial Act, 1 Geo. III., c. 23, s. 1, which continues the commissions of the judges during their good behaviour,

and notwithstanding the demise of the Crown, became part of the law of Upper Canada by reason of the aforesaid legislation of 1792, which introduced therein the English laws as they existed on the 15th October, 1792, as regards property and civil rights, in so far as they were not inapplicable to the state and condition of the Province. The enactment found in Con. Stat. U.C., c. 10, s. 11, is simply declaratory of the old law in this behalf, and raises no repeal by implication of the Imperial legislation. It was in no sense contrary to the latter, but, within the meaning of the authorities, had simply a "concurrent efficacy." See Maxwell on Stats., pp. 216, 227; Steph. Com., 13th ed., vol. I., pp. 40, 47; *Foster's case*, 11 Rep. 63; *Conservators of the Thames* v. *Ball*, S.R., 1 C.P. 415; *Fitzgerald* v. *Champneys*, 2 J. & H. 31 The B. N. A. Act, 1867, s. 99, in enacting that the judges of the Superior Courts shall hold office during good behaviour, does not repeal the then existing law of Ontario to the effect that the judge's commissions shall not be affected by the Crown's demise. It simply leaves untouched the old provision as to the effect of the Crown's demise. This proposition is based upon two grounds: first, because it is a canon of statutory construction that the legislature does not intend to make any alteration in the existing law beyond what it explicitly declares, or fairly implies (Maxwell, p. 113); and secondly, because s. 129 of the B.N.A. Act, 1867, expressly declares that except as otherwise provided therein all laws in force in the Province of Canada, and the other Provinces, at the union, should continue in force. And, furthermore, this very section expressly prohibits any repeal by the Parliament of Canada, or by the Legislatures of the Provinces, of any laws existing at the union by virtue of Imperial statutes. So, whether or not it was within the competence of the Ontario Legislature in 1877 to repeal s. 11 of c. 10, Con. Stat. U.C. (and we think it was not), that enactment being merely auxiliary to and declaratory of the Imperial statute of 1 Geo. III. c. 23, s. 1, the latter is maintained in full force and effect by the section of the B.N.A. Act last above quoted, so far as the Province of Ontario is concerned.

The Imperial statute last referred to was re-enacted in the other provinces of Canada, before Confederation, but these provincial enactments are now repealed by the Revised Statutes of Canada. It is doubtful, to say the least, whether this Imperial statute obtained in Quebec, Nova Scotia, New Brunswick or Prince Edward Island before Confederation; and so ex abundanti cautelâ, it would be well for the Parliament of Canada to legislate upon the subject, and silence doubts as to the effect of the Crown's demise on the judicial tenure of office, for all time.

HIS EXCELLENCY THE GOVERNOR GENERAL has received with deepest regret the news of the death of Her Majesty Queen Victoria, communicated to His Excellency in the following cable from the Right Honourable the Secretary of State for the Colonies:—

LONDON, January 22, 1901.

"Deeply regret to inform you that the Queen passed away at six thirty this evening."

CHAMBERLAIN.

CANADA.

By His Excellency the Right Honourable Sir GILBERT JOHN ELLIOT, Earl of Minto and Viscount Melgund of Melgund, County of Forfar in the Peerage of the United Kingdom, Baron Minto of Minto, County of Roxburgh in the Peerage of Great Britain, Baronet of Nova Scotia, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, etc., etc., Governor General of Canada.

To all to whom these presents shall come,—GREETING:

WHEREAS it has pleased Almighty God to call to His Mercy Our late Sovereign Lady Queen Victoria of blessed and glorious memory by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland and all other Her late Majesty's Dominions is solely and rightfully come to the High and Mighty Prince Albert Edward Prince of Wales: I, the Sir Gilbert John Elliot, Earl of Minto, Governor General of Canada as aforesaid assisted by His Majesty's Privy Council for Canada, and with their hearty and zealous concurrence, do therefore hereby publish and proclain that the High and Mighty Prince Albert Edward Prince of Wales is now by the death of Our late Sovereign of happy and glorious memory become our only lawful and rightful Liege Lord Edward the Seventh by the Grace of God, King of the United Kingdom of Great Britain and Ireland, Defender of the Faith, to whom are due all faith and constant obedience with all hearty and humble affection. And I do hereby require and command all persons whomsoever to yield obedience and govern themselves accordingly—beseeching God by whom Kings and Queens do reign to bless the Royal Prince Edward the Seventh with long and happy years to reign over us.

Given under my Hand and Seal at Arms, at Ottawa, this twenty-third day of January, in the year of Our Lord one thousand nine hundred and one, and in the first year of His Majesty's reign.

By Command,

R. W. SCOTT,
Secretary of State.

GOD SAVE THE KING.

CANADA.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, etc., etc., etc.

To all to whom these presents shall come,—GREETING:

DAVID MILLS, Attorney General, Canada.

WHEREAS by chapter nineteen of the Revised Statutes of Canada intituled "An Act respecting Public Officers," it is, amongst other things, in effect enacted, that upon the demise of the Crown, it shall not be necessary to renew any commission by virtue whereof any officer of Canada, or any functionary in Canada held his office or profession during the previous reign; but that a proclamation shall be issued by the Governor General authorizing all persons in office as officers of Canada who held commissions under the late Sovereign, and all functionaries who exercised any profession by virtue of such commissions to continue in the due exercise of their respective duties, functions, and professions; and that such proclamation shall suffice and that the incumbents shall, as soon thereafter as possible, take the usual and customary oath of allegiance before the proper officer or officers thereunto appointed,—

Now, therefore, by and with the advice of Our Privy Council for Canada, We do, by this Our Proclamation, authorize all persons in office as officers of Canada who, at the time of the demise of Our late Royal Mother of glorious memory, were duly and lawfully holding or were duly and lawfully possessed of or invested in any office, place or employment, civil or military within Our Dominion of Canada, or who held commissions under the late Sovereign, and all functionaries who exercised any profession by virtue of such commissions, to severally continue in the due exercise of their respective duties, functions and professions; for which this Our Proclamation shall be sufficient warrant.

And We do ordain that all incumbents of such offices and functions and all persons holding commissions as aforesaid shall, as soon hereafter as possible, take the usual and customary oath of allegiance to Us before the proper officer or officers thereunto appointed.

And We do hereby require and command all Our loving subjects to be aiding, helping and assisting all such officers of Canada and other functionaries in the performance and execution of their respective offices and places.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent, and the Great Seal of Canada to be hereunto affixed. WITNESS, Our Right Trusty and Right Well-beloved Cousin the Right Honourable Sir GILBERT JOHN ELLIOT, Earl of Minto, and Viscount Melgund of Melgund, County of Forfar, in the Peerage of the United Kingdom, Baron Minto of Minto, County of Roxburgh, in the Peerage of Great Britain, Baronet of Nova Scotia, Knight Grand Cross of Our Most Distinguished Order of St. Michael and St. George, etc., etc., Governor-General of Canada.

Given, etc., etc., January 23, 1901.