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MISCARRIAGES OF JUSTICE.

The results of certain recent criminal trials deserve very careful consideration, not so much on the part of the judiciary as of the public at large. Juries, governed apparently by sentiment rather than by any sense of public duty, have given verdicts neither in accordance with the facts as disclosed by the evidence, nor according to the law as laid down by the judge before whom the trials were held.

In one case a verdict of manslaughter was rendered where, if the evidence was to be taken into account, a deliberate cold-blooded murder had been committed. The verdict itself shewed that the jury were convinced of the fact that the accused had put to death an infant of which she had taken charge, and yet from a sentimental dislike to the idea of a woman being hanged, they accepted a theory of the possible cause of death so absurd on the face of it, as only to be mentioned to be rejected. It would be difficult to conceive a case in which there was less scope for sentimental considerations, or less justification for allowing pity to usurp the place of justice. We have the spectacle of a mother handing over her new-born child to a woman of whom she knew nothing, in order to avoid the cares of maternity, preferring to pay in lieu thereof the sum of $100; and we have the woman who accepted this charge deliberately putting the child to death in order that she might keep this paltry sum without having the trouble of earning it.

In the revolting case of the Robinson family, in which repeated acts of murder, rape, and incest were proved to have been committed, the principal actor finds a large body of sympathizers chiefly of her own sex, who demand the exercise of mercy on the ground that her share in the criminal acts was due to the compulsion of her brute of a husband. How any woman—a wife and a mother—unless utterly depraved or lost to every feeling of

humanity, could, under any stress of violence, have acted as this woman did, it is hard to conceive. So far as the woman was concerned the jury did their duty, but that the man, the instigator of the crime of murder, and the perpetrator of the other two criminal actions, should escape with his life does seem to shock our sense of justice. In fact the sympathy aroused for the woman in this case has had the effect of diverting public opinion from the horrible condition of things prevailing in this lonely backwoods family.

We thus find jurors in one case, and a portion of the public, chiefly women, in the other, declaring that women, as women, shall not be liable for the legal penalties of their crimes, and therefore shall not be on the same legal plane with men. We have found from another quarter a demand that women shall, as regards the rights and privileges of citizenship, be at least equal with men, and share their duties and responsibilities. Let the suffragists reconcile these conflicting principles if they can.

In the case of Walter Blythe, the man convicted of beating his wife to death with a poker, but whom the jury only found guilty of manslaughter, a very important legal question is involved. When the case was first tried the jury found the accused guilty of murder; the judge accepted the finding, and awarded the penalty of death. But as it appeared that the man had been drinking (though to what extent was not clear) when he committed the crime, though the fact was not discussed at the trial, his counsel contended that, on that account, he was not in his proper senses, and so far not accountable for his actions, and there being no proof of intent to take the life of his victim, the verdict of murder should not be sustained, but should be reduced to manslaughter.

It is not necessary to follow the series of reprieves, and legal contentions which followed, resulting, after long delay, in a new trial being granted, and a verdict of manslaughter recorded against the prisoner, who was sentenced to eighteen years in the penitentiary. It may, however, not be amiss to say a word as to the effect upon the public mind of the law that intoxication may

under a certain state of facts relieve a criminal from the responsibility that would otherwise attach to his actions; but, before doing so, it may be well to refer to the law in relation to this subject as to which there is now no question. The law used to be as laid down in 1 Hawk. Pleas of the Crown, c. 1, s. 6, where it is said: "And he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober." This is not so now. The most recent case on this subject lays down the rule definitely. It is said by Darling, J., in *Rex* v. *Meade*, L.R. 1 K.B. (1909) p. 898, that the law stood as above expressed for many years and was first decided in a contrary sense in *Rex* v. *Grindley*, 1 Rus. on Crime, 6th ed., 144, decided in 1819. The learned judge continues as follows: "Since then there have been many decisions in which judges have attempted to express the doctrine that where intent is of the essence of a crime with which a person is charged, that intent may be disproved by shewing that at the time of the commission of the act charged, the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent. Different judges have expressed themselves differently, but not so differently as to be irreconcilable, and to prevent the court from saying that they were expressing the same doctrine."

The facts of the *Meade* case were very similar to those in the one we are discussing. It was proved that the prisoner brutally ill-treated the deceased woman during the greater part of the night on which she died. He said that he would give her a good hiding and broke a broom-stick over her and gave her a violent blow with his fist on the lower part of her body which caused a rupture. The defence was that the prisoner did not intend to cause the death of, or cause grievous bodily harm to, the dead woman. In that case the jury returned the verdict of murder.

Every case must be considered in relation to its own peculiar circumstances. An imaginary case might be that a man who wishes to dispose of his wife, but who has an objection to being hanged, has only to drink a certain quantity of hard cider, which seems to be the beverage best suited to the purpose, and he may then beat her with a poker to his heart's content, and, if she

dies under the process, a mercifully inclined jury may find a verdict which will save him from the gallows, and the judge will be compelled to say, if there were no evidence to shew his object in getting drunk, that such a verdict was strictly according to law. In such a case there might be no evidence of an intention to commit murder, but the presumption from the two actions taken together—the getting drunk and subsequent killing, might perhaps be considered sufficiently strong to render such evidence unnecessary.

There was one feature of this case which does not seem to have received the prominence to which it was entitled, though not overlooked. It was said that the blows were not inflicted upon a vital part and that therefore the presumption of intent did not arise. Whilst this is true to a degree, intent would come into sight as a factor should the beating on the part of the body not generally spoken of as vital be unduly continued, as it was in the *Meade* case. That, of course, was a question for the jury.

So much has been said about the large proportion of the crimes committed being due to intoxication that it has become the regular thing for the criminal, no matter what his offence, to plead, by way of palliation, that he was drunk when he committed it. To this pernicious notion, and its mischievous consequences, a check should be given, or many repetitions of the *Blythe* case may be expected.

So far as juries are concerned it should be the effort of the Bench and of the Bar and of all who have any means of influencing public opinion to shew them the danger of going outside of their proper function. They seem inclined to forget that in the administration of justice their duty, as defined by their oath, is a true verdict to give according to the evidence, leaving to the judge the duty of expounding the law, and to the Sovereign the exercise of clemency

STATUTE REVISION—CONSOLIDATION AND GROUPING OF SUBJECTS.

In the revision of the Ontario Statutes which is now being made, it is to be hoped that the propriety of consolidating statutes or parts of statutes dealing with the same subject-matter will not be lost sight of.

The limitation of time for bringing actions is one of those subjects respecting which this consolidation seems especially to be needed. At the present time there are no less than four separate general Statutes of Limitations, besides several other special enactments scattered through the statutes relating to the same subject, as applied to certain specific cases. This is a very inconvenient arrangement, and it would be infinitely preferable that there should be one Statute of Limitations, which should cover all possible cases.

The inconvenience of the present arrangement may be illustrated by the fact that if you want to find the time for bringing actions for slander, assault, battery, imprisonment, or for trespass to goods, or lands, debt, rent, detinue replevin, etc., you must go to the 3rd volume, c. 324. If you want to find the period of limitation for actions for rent upon an indenture of demise, or upon bonds, specialties, mortgages, recognizances, awards, or for escape, or for money levied on execution, or penalties to the Crown, you must consult R.S.O. c. 72; and as to other penalties, 4 Edw. VII. c. 10. Then, as to the effect of acknowledgments and payments in case of money demands you must go to c. 146; and if you want to find out the limitation for bringing actions concerning land you must go to R.S.O. c. 133. Besides these, there are the Municipal Act, and other Acts, which create special periods of limitation. In a scientific arrangement of the statutes it seems reasonable to say that the whole subject of the limitation of actions should be treated of in one enactment, which should be so framed as to cover all cases. We notice that in England those who are responsible are being urged to do there what we are now urging here.

There are other statutes which also seem to demand amalgamation. For instance, under the head of statutes relating to the constitution of the courts we have at present the Judicature Act, which deals not only with the constitution of the court, but also with various matters of procedure. Then there is another group also dealing with the procedure in civil matters in the Supreme Court of Judicature, whereas the natural arrangement would be that all the procedure in the Supreme Court of Judicature as to all matters within its jurisdiction should be gathered into one compendious statute. In the same way the whole procedure of the respective inferior courts might well be similarly grouped.

When we come to the law of property, all the statutes relating to mortmain and charitable uses, including the law relating to the property of religious institutions, should be grouped together. At present we have an attempt at consolidation in 9 Edw. VII. c. 58, but this, we submit, does not go far enough, inasmuch as it still leaves the Religious Institutions Act to be dealt with as a separate enactment, whereas it is a cognate branch of the same subject as that covered by 9 Edw. VII. c. 58.

The Act respecting escheats and forfeitures (R.S.O. c. 114) has been revised by 9 Edw. VII. c. 57, but this Act does not cover the whole statute law of the subject, and we have still to go to the Judicature Act to find out that the High Court has jurisdiction to relieve against all penalties and forfeitures.

In the Act relating to the transfer of property we might expect to find all the provisions for short forms of conveyances, but at present we do not; they form separate Acts. Transfer of property we should also think ought to cover "assurances of estates tail" and mortgages, but it does not. Transfer of property is a subject which we might think included the transfer of personal as well as real property, but it does not, according to the present arrangement, and we have to hunt for statutes relating to the transfer and mortgage of personal property, under the head of "Mercantile Law." The fraudulent conveyances of lands and goods seems to be a subject which should be embraced in one statute, but we have the Act relating to voluntary and

fraudulent conveyances in R.S.O. c. 115, and another Act in vol. 3, c. 334, and still another Act under the head of "Mercantile Law," relating to assignments and preferences by insolvents.

Compensation for injuries to workmen and the Fatal Accidents Act seem to be related subjects, but we have to look for the latter Act under a group of statutes relating to "Husband and Wife." These are defects which will, we trust, be removed by the learned commissioners who have charge of the revision. Some such changes as we have outlined will greatly facilitate the study of the statute law and be a great boon to those of the profession engaged in active practice.

SUCCESSION DUTIES IN ONTARIO.

This mode of raising money for public purposes has some strong points in its favour; but in many cases has been found to be very oppressive and often unfair, both as to the tax itself and also to the manner of working it out.

As to the latter point there have of late been many mutterings among lawyers, trust companies, and clients at the uncompromising attitude adopted by the Ontario Government in regard to the collection of these dues in reference to a certain class of cases.

Upon the principle of mobilia sequuntur personam the government claim duty upon personalty situate in the United States. Decided cases go to shew that this claim is ultra vires. Whether this be so or not it is often at best a bare right, for in many foreign countries and in most states of the Union the law provides that an alien cannot obtain probate of a will. It is therefore necessary to have probate taken out by some person domiciled in the country or state in which the securities belonging to the Canadian testator are situate. This executor can distribute directly to the beneficiaries under the will and the government here cannot in practice touch him or follow the money. The government gets over this difficulty by holding a pistol to the head of the Canadian executor, for if the government insists

upon payment it is a case of pay or take your case to the Privy Council. The duty amounts perhaps only to a few hundred dollars, and as the prospective litigation might cost several thousand dollars a wise lawyer will always advise the prudent course.

The following case was recently brought to our attention:—

A. B. domiciled in Ontario died leaving by will estate in Ontario and personalty in United States. A relative of the deceased, living in the United States, took out probate with the will annexed and distributed the personalty after paying American duty, but without paying duty to the Ontario Government. The Ontario Government now demand that the duty which they could not collect be made good out of the Canadian realty, and the beneficiaries in Canada, who cannot afford to go to the Privy Council, are compelled to pay several hundred dollars in addition to their proper succession duty, which they have already paid. This is not an isolated case.

It will be remembered that the Succession Duty Act was amended this year, s. 18 of the Act of 1909 providing as follows:—"The executor of the deceased shall pay at the time or times mentioned in this Act, to the extent of the property coming into his hands, the succession duty in respect of the property in Ontario and the personalty wheresoever situate, of which the deceased was competent to dispose at his death, and of the existence of which the executor has knowledge, and may pay in like manner the duty in respect of any other property passing on such death, which by any testamentary disposition of the deceased is under the control of the executor, or in case of property not under his control, if the person accountable for the duty in respect thereof requests him to make such payment."

If the collection of succession duty upon personalty in a foreign country is ultra vires the principle is not changed by this section. If succession duty cannot be collected through a foreign executor from the beneficiary who is technically liable, can the government legally super-impose an additional tax upon

the beneficiaries of the Canadian estate whose total liability for succession duty is fixed by the same statute and compel the Canadian executor to collect it, notwithstanding the fact that in the wording of this section the property in the United States did not "come into his hands" is not "under his control" and he is not "requested to make such payment?"

This subject has been referred to and this mode of taxation criticised (so far as England is concerned; his remarks, however, having their application here), by one whose opinion is most valuable on such a subject from a business point of view. We refer to Mr. B. E. Walker, president of the Canadian Bank of Commerce. He is reported as saying:—"As to the working out of taxation generally a moderate part of the income is taken and may be spent by the state without intrenching on the nation's saved capital. With death duties, however, if a government takes from an estate one-fifth of the entire capital and spends it for current expenses, which do not return a money income, so much of the nation's productive capital is lost. This cannot go on very long, for the nation is living on its capital, and must soon pay the penalty of such folly. The growth of population demands the creation of new suburbs in the cities and the building of new houses yearly, but the budget in other ways almost warns the real estate dealer that the government will see that he does not make any money. Owners of estates say that they are practically debarred from making improvements, the punishment for doing so being so great."

BANKS AND BROKERS.

A case of interest to banks, brokers and business men was recently decided in the Supreme Court of Louisiana (*First National Bank of Birmingham* v. *Gilbert and Clay*, 49 So. 593).

The note of the case as reported is as follows:—When money transferred to an honest taker has been obtained through a felony by the one transferring it, the honest taker who receives it without knowledge of the felony and in due course of business acquires a good title to it as against the one from whom it was stolen. Bad faith will alone defeat the right of the taker. Mere ground of suspicion or defect of title, or knowledge of circumstances which would create suspicion in the mind of a prudent man or gross negligence on the part of the taker will not defeat his title. Bad faith alone will defeat the right of the taker without knowledge. The test is honesty and good faith, not diligence.

The facts were that the money was taken by the teller in bundles out of the vault of the bank and passed through the paying teller's window and handed to the broker, just as it would be passed in the payment of a cheque in the ordinary course of business, but no cheque was presented nor any cheque signed or stated by the teller to be in existence. The broker was invited by the teller to come to his cage and receive the money from him upon the representation of the teller that it was to be invested for a third party on margin. So far as the defendants knew the money may have been simply stolen by the teller in full sight of the taker and passed to him, though the taker may not actually have known it was being stolen, nor, so far as his evidence went, was there any suspicion that it was being stolen.

A good criticism of this case appears in the *Central Law Journal* and the reasoning of the writer commends itself to us rather than that of the Court which decided the case. It certainly is difficult to come to the conclusion that the taker acted honestly and in good faith, and, if not, was he not a joint tort feasor? The following is the criticism referred to:—

"There is nothing here whatever to shew that a bank's lack of proper supervision over its teller affected that kind of situation. Every teller has bundles of money in his possession to pay across a counter, and no bank is expected to have an additional officer present to see that he is paying it on paper properly presentable at his window. But every one knows he is there to hand it across the counter for no other purpose. The Louisiana court says: 'If the paying teller had such a cheque in his possession the counter of the teller was the proper place for its payment.' But to whom? The court does not answer this important question. But the court does say in effect, that the teller could merely say to the taker of the money that he had such a cheque, and if the taker believed him he would be justified in receiving the money. Let us suppose the teller handed the taker a forged cheque and the taker, as by custom is usually done, indorsed it and cashed it. Would he not be liable? Undoubtedly, because the teller would be known by the taker as not then to be acting for the bank and the taker would be presenting the forged paper because he believed in its genuineness as represented by one not an agent of the bank in that particular. Would the case stand any better if the teller had told the taker he held such a cheque? Ordinarily a taker would say: 'Let me see the cheque. You are taking money out of bundles you pay to choques on the bank. Let me see this one?' So it is obliged to be said that the taker, not the bank, was trusting the teller as to his disposal of that which was apparently the property of another in a way he was, apparently, not allowed to dispose of it. The court seems to think that the taker should have been held liable, if he did not believe the teller had a cheque from the supposed customer, and who in fact was fictitious, and yet it allows the taker to escape because of his mere supposition, that the teller had such a cheque. It certainly does not appear the teller even represented that he had a cheque. The court says: 'All monies paid over the counter are supposed and expected to be monies of the bank.' This money was so paid. What was it paid for? Not for anything given to the bank's representative by the taker or by any one else for him. The

taker got money 'supposed and expected to be monies of the bank' for no consideration whatever, and used it, knowingly, not for the bank's benefit. From beginning to end of this opinion only one authority is cited, to wit, that of *Merchant's Loan & Trust Co.* v. *Lawson*, 90 Ill. App. 18. That case shews that a bank teller was the apparent possessor of money, which he delivered to brokers not in the precincts of the bank but in the broker's office, conducting such transaction in the ordinary way that any other thief, or any honest man would have conducted it. In the Lousiana case the teller was ostensibly and simply the handler of money in the apparent possession of the bank, and recognized, as the court says, as 'monies of the bank.' Verily, is poverty of authority disclosed, when sole resort is to a case like that! There is no question here of money having no earmarks, for even the brief of defendant says: 'Of course, it is true, that one can no more rightfully receive from another money than any other property which one knows does not belong to that other.' It all comes done to the question whether or not one can take money from another which apparently belongs to a third party, when the extent of the other's apparent authority is known by the taker not to embrace such a transaction. The Supreme Court of Kansas, in *Hier* v. *Miller*, 75 Pac. 77, said: 'By placing an officer at the window to do its business, a bank publishes to the world that he is there to do its business, that he has no power to do any act outside the legitimate prosecution of the corporate enterprise, and that it will not be bound by any perversion of the corporate funds to his use.' In *Campbell* v. *Bank*, 51 Atl. 497, the New Jersey Supreme Court said: 'The test of the transaction is whether it is with the bank and in its business or with the cashier personally and in his business . . . Upon proof that it was known to the claimant to be an individual transaction and not one for the bank, the burden is cast upon the claimant to establish by proof that the act of the cashier, thus done for his own individual benefit, was authorized or ratified.' Why do not these principles control here, whether there was a real or fictitious party behind the teller? The principle is, that, if it is not a transaction for the

bank, the burden is to shew it was authorized or ratified by the bank in the usual manner. The teller in this case was either acting for himself or for another, but he did not profess to act for the bank, while using monies of the bank. In *Shaw* v. *Railroad*, 101 U.S. 556, it was said: 'There was reason to believe K. (the thief) had no right to negotiate this bill. This falls very little, if any, short of knowledge. It may be fairly assumed that one who has reason to believe a fact exists, knows it exists. Certainly if he is a reasonable being.' Does one who gets what he knows to be a bank's money without giving the teller what is usual to give therefor, have reason to believe he is not getting it as he should get it? When a man of business, acquainted with all business usages, participates in such a transaction not once but repeatedly, and receives money in different sums month after month in this irregular manner until the taking amounts to nearly one hundred thousand dollars and all the while the matter is secret between the giver and the taker of the money, the giver speculating in margins, through the taker, and losing as he goes, it beggars credulity to affirm he had no suspicion that the teller was using the bank's money for his own use and profit."

RETIREMENTS FROM THE MANITOBA BENCH.

By the retirement of Mr. Justice Phippen some months ago and by Chief Justice Dubuc, a few days ago, Manitoba has lost two of her most efficient and trusty public servants. It is not surprising that new countries are so commonly blessed with men of ability and enterprise, for it is just that sort who find their way there. It was so when this country was first settled, and it is the same, though probably to a somewhat less marked degree, when new territories are developed in such a country from time to time. It is men of this kind who have been lost to the Province of Manitoba.

Mr. F. H. Phippen, K.C., who originally hailed from Belleville, was appointed direct from the Bar to the Manitoba Court of Appeal, which came into being on July 21st, 1906. Though his

occupancy of the judicial seat was only for a short period it became evident that a life of judicial usefulness was before him had he thought fit to retain the position; but, preferring a more stirring life, he returned to the Bar in April last, and his services were then secured by the Canadian Northern Railway to act with Mr. Lash as counsel for that company. His well-known business ability and pleasant personality, as well as his legal attainments, will doubtless be of great service to the enterprising men at the head of that great third transcontinental line.

This retirement has been followed by that of Chief Justice Dubuc, of whom also there is nothing but what is complimentary to be recorded. A courteous gentleman—an impartial judge, always desiring to be absolutely fair—a sound lawyer, specially strong on facts, and whose judgments were seldom reversed on appeal—he retired after a judicial service of thirty years, beloved by the Bar and respected by the people. He was born in the Province of Quebec in 1840, where he became versed in civil law, a helpful addition, by the way, to common law learning. He removed to Winnipeg in 1871, and eight years later became a puisne judge of the Queen's Bench. On the promotion of Mr. Justice Killam, he was made Chief Justice of Manitoba. We trust he may have many years to enjoy his well-earned rest.

ABSOLUTE IMMUNITY IN DEFAMATION.

JUDICIAL PROCEDURE.

A writer in the *Columbia Law Review* is giving a series of articles on the subject of absolute immunity in defamation. The particular matter to which he directs attention in the last issue of that journal speaks of the doctrine in reference to judicial proceedings. We now reproduce it, not, however, giving the large number of citations and lengthy notes, which can, however, be seen by reference to the original article. The general propositions as laid down by the learned writer are as follows:—

Some restrictions upon the application of the doctrine of absolute immunity have been advanced. It has been asserted that

the purpose with which a publication in the course of a judicial proceeding is made, may be, under certain circumstances, a material consideration. In other words, it is said that a protected publication must be made not only in the course, but for the purpose, of a judicial proceeding. It is the universal rule that when the circumstances are such as to raise doubts whether a publication was made in the course of a judicial proceeding, this issue of fact must be submitted to the jury. A complaint may, however, be made in the course of a judicial proceeding, and yet the circumstances may indicate that it was made, not with the purpose of pursuing a judicial remedy in the regular course, but as a pretence to promulgate slander, or to serve some other unlawful purpose. It has been asserted that no privilege extends to such a misuse of the forms of law; otherwise, in view of the restricted scope of the action for malicious prosecution, such a wrong would be without a remedy. But this qualification of the general rule excluding all inquiry into good faith in relation to publications made in the course of judicial proceedings has been declared to be unsound. If pleadings were shewn to be false and malicious it might well be concluded by a jury that they were employed as a cover for defamation. The proof that would establish the facts of malice and falsity would also establish the other fact of a fictitious suit; and thus the distinction between absolute and conditional immunity would be lost.

It is commonly stated in this country that the court or tribunal must have jurisdiction of the proceeding. But there is no modern case in which immunity was denied for want of jurisdiction. In England it was held in an early case that a charge made before a tribunal having no jurisdiction is actionable; but the contrary view was also asserted. In England, at all events, it would now seem to be sufficient if the proceeding, so far as the party defaming has any reason to believe, is lawful and conducted with apparent regularity. Extreme cases may be suggested, in which, however, the irregularity would be apparent. On the other hand, any requirement in this respect would seem to bear heavily upon judge, counsel and party, and in less degree

upon jurors and witnesses. It is again necessary, in this connection, to call attention to the distinction between questions of jurisdiction and of the proper exercise of jurisdiction.

It was formerly the rule in England that publications in judicial proceedings were absolutely privileged only when they were relevant or pertinent to the proceeding. But this limitation has now been abandoned in England, and immunity attaches, as pointed out above, to every publication in the course of judicial proceedings which has reference or relation thereto, although it may be immaterial or irrelevant to the issues involved. In this country, however, it is almost universally held that the publication must be relevant or material to be absolutely protected. The only exceptions are that in Maryland the English doctrine has been adopted with respect to witnesses, and in Vermont with respect to jurors, although the courts of Kentucky, Alabama and Texas have expressed opinions favourable to that view. Much judicial eloquence has been expended in support of the American doctrine. Judges have been startled to think that a court of justice should be the only place where reputation may be assailed with impunity. It is freely admitted that freedom of speech is nowhere more needed than in the courts, where it has been the immemorial privilege of participants, and the guaranty of the faithful and fearless performance of their duties. But freedom of speech does not mean licentiousness. The cause of justice can never be served by the perpetration of palpable injustice, and no just rule of public policy can fail to distinguish between reasonable freedom of speech and wanton malice. A person defamed ought to be able to vindicate his reputation in the courts instead of taking the law into his own hands. The law would be a vain thing indeed to shut the gates of justice in his face, and at the same time fetter his hands. The short answer to this line of reasoning, from the English point of view, is that the requirement of relevancy deprives the immunity of its real value. If participants in judicial proceedings may be sued for utterances assumed to be irrelevant to the inquiry, they would be subjected to the expense and vexation incident to the defense of

such an action, even though they succeed in demonstrating the pertinency of the language complained of. The liability to suit will fetter them quite as much as any apprehension of the consequences of an action. They cannot know with certainty what may be considered irrelevant, and the mere fact that they are liable to action at all deprives them of the freedom which the administration of justice demands.

In the practical application of the relevancy doctrine, the apprehensions which led to its abandonment in England have not been realized. Litigation has not been promoted, and in comparatively few cases has immunity been denied on the ground of irrelevance. On the other hand, it can hardly be asserted that an examination of the cases in which the relevancy of publications was involved demonstrates conclusively the utility of the rule. In almost every instance it would seem that the harm done could have been overcome, or at least materially minimized, in the exercise of the lawful powers of the presiding judge. Moreover, this restriction has entailed further confusion in terminology. Although the original, and still the usual, term is "relevant," or "pertinent," the tendency is toward a broader terminology. "Having reference or relation" to the subject-matter is the statement of the American rule made by some courts; which, it is to be observed, is precisely the manner in which the broader English rule is stated by later authorities. Some of the applications of the rule reveal the vanishing point of relevancy, in the ordinary sense of that term, and seem to justify a broader and less technical terminology. At all events, it is held that doubts are to be resolved in favour of relevancy and pertinency; that is to say, the matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that there can be no reasonable doubt of its impropriety. Mere coarseness of expression will not destroy the immunity.

Some presumptions have been formulated which are of material assistance in the practical application of the rule to witnesses and counsel. The disinterested witness occupies a position which requires the widest latitude in administering the rule. Witnesses

usually appear in the compulsory performance of a public duty, and it is essential to the due administration of justice that they should testify fully and freely. The great majority of persons called upon to testify in courts of justice are quite ignorant of the technical rules of evidence by which legal proceedings are governed; and if they were not, they are, in most instances, unacquainted with the true nature of the controversy and the exact condition of the issue between the parties. So they are generally in no position to determine for themselves the materiality or pertinency of answers to particular questions. Moreover, it is not for them to decide such questions. The law has imposed that duty exclusively upon the courts. Hence the rule is universal that a witness is primâ facie protected in all cases. Where the answers given by him are in direct response to questions propounded to him by court or counsel, he is absolutely protected. If the question was put by the court, there could be no liability for answering it; if put by the plaintiff's counsel, the plaintiff can have no ground of complaint that it was answered; if put by the defendant's counsel, objection should have been made, and, if improper, it would have been excluded. A witness is not answerable, therefore, for statements which he may make in direct response to questions put to him which are not objected to and excluded by the court, or concerning the impertinency or impropriety of which he receives no advice from the court. Witnesses testify under the guidance of the court, and they may safely rely upon the silence of the court or the absence of objection on the part of counsel. The question of materiality is waived and concluded by counsel's failure to object to the question or answer, or to move to exclude the testimony. For statements volunteered, or not in response to questions by court or counsel, the witness is also protected so long as such statements are relevant and material to the issue; but he will be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry.

The doctrine has necessarily been applied with similar latitude in relation to comments by counsel. The position of an advocate would be perilous if he were held strictly responsible for the

exercise of his judgment. The matter to which his immunity does not extend must be so palpably wanting in relation to the subject-matter of the controversy that its irrelevance and impropriety are plainly apparent. Advocacy implies argument. A wide latitude is necessarily allowed in the interest of truth and justice, for no counsel could perform his duty if he were personally responsible for the force of his deductions or inferences and the strength of his expression. That they are extreme or only specious or colourable, is not the test, but whether they are pertinent. This is but the principle of free speech in the administration of justice. It protects persons defamed by providing redress for accusations without foundation in fact, and it protects the advocate by assuring to him the play of his reason within the facts. The advocate does not speak mindful of another day when he will be called upon to justify his inferences as if they had been charged as facts, or to vindicate his conclusions by the axioms of logic. His conclusions may be lame and impotent, his inferences far-fetched and feeble, but so long as they can possibly be deemed to be pertinent they are not actionable.

It does not necessarily follow, however, that every publication in judicial proceedings which is irrelevant to the issue is actionable. Such a publication, although not absolutely protected, may nevertheless be the subject of conditional immunity under the ordinary doctrine of interest or duty upon which conditional immunity is based. The question of malice then becomes the controlling factor. But the inference of malice is not drawn, as a matter of law, because the publication on such an occasion was irrelevant; it must affirmatively appear that it was also malicious. In other words, a publication in the course of a judicial proceeding, if relevant, will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that it was relevant, and had reasonable grounds for so believing. The same rule applies to publications not made "in office," and, presumably, to publications made in the course of judicial proceedings where the court was without jurisdiction.

When the facts are not in dispute, relevancy, in . . rivilege, is

a question of law for the court. And the burden of proof is upon him who alleges irrelevance, unless such irrelevance is disclosed by the complaint, or otherwise appears on the trial.

THE INFERNO ON THE CONGO.

Under the above heading *The Law Times* in a recent issue gives a sketch of this matter from a lego-historic point of view, taking as its text the pamphlet of Sir Conan Doyle on "The Crime of the Congo." The writer says:—

Simple enough as to its main features is this tragic history in which we all stand more or less condemned. In 1876, thirty-three years ago, King Leopold of Belgium "called a conference of humanitarians and travellers, who met at Brussels for the purpose of debating various plans" by which Central Africa might be opened up. From this conference sprang the International African Association, "which, in spite of its name, was almost entirely a Belgian body, with the Belgian King as president."

Stanley, returning from his great journey in 1878, was pressed into the service of King Leopold, whose intentions he believed to be pure and honourable. Journeying back to Africa, Stanley went to work among the native chiefs, and came back with "450 alleged treaties which transferred land to the association." The chiefs apparently had no notion they were bartering away their land—which, in truth was not theirs to barter.

Armed with his treaties, King Leopold approached the Powers "with high sentiments of humanitarianism, and with a definite proposal that the State which he was forming should receive some recognised status among the nations." The world at large may be said to have allied itself with the King. America was first in its formal recognition of the new State. Great Britain —churches as well as Chambers of Commerce—came next. At the Congress of Berlin the Congo Free State "was created amid general rejoicings"; France and Germany following the lead of the United States and Great Britain.

Two provisions of the Berlin Congress are especially to be noted. (1) It was proclaimed that—

No Power which exercises sovereign rights in the said regions shall be allowed to grant therein either monopoly or privilege of any kind in commercial matters. . . No privileged situation can be created in this respect. The way remains open without any restriction to free competition in the sphere of commerce.

Nothing could well be plainer than this.

(2) This next is Article VI. of the Berlin Congress, over the enforcement of which, "in the name of Almighty God," the signatories bound themselves solemnly to watch. It ran:—

All the Powers exercising sovereign rights or influence in these territories pledge themselves to watch over the preservation of the native populations and the improvement of their moral and material conditions of existence, and to work together for the suppression of slavery and the slave trade.

This, observes Sir Conan Doyle, was the pledge of the united nations of Europe.

With the practical mandate of these nations King Leopold now proceeds to organize the government of the new state. This government, as Sir Conan Doyle makes plain enough, is in reality the King himself. "The origin of everything is the King—always the King." As one of his principal agents informs him, "It is to your Majesty that the state belongs." His Majesty goes forward with his work of organization. Laws were issued for the administration of the state which were never published in Europe. There were secret laws which could at any moment be changed. A Governor-General was elected, who should live at Boma, which was made the capital; under him fifteen district commissaries, to govern the districts into which the whole country was divided.

In 1886 there was a pronouncement upon native lands to the effect that no acts or agreements would be permitted which tended to drive the blacks from their territory. In 1887 an Act was published by which all lands not in the actual occupation of natives became the property of the state. This was the driv-

ing out of the blacks with a vengeance! For no land in these regions is actually occupied by the blacks, save their villages and the patches that surround them. Thus, "at a single stroke of a pen in Brussels everything was taken from them, not only the country, but the produce of the country."

Thus within two years of the establishment of the State by the Treaty of Berlin, it had with one hand seized the whole patrimony of those natives for whose "moral and material advantage" it had been so solicitous, and with the other hand it had torn up that clause in the treaty by which monopolies were forbidden, and equal trade rights guaranteed to all.

The land and its products having been seized, the next step was to obtain labour. Chiefs were bribed to procure slaves, who were entered in the state books as "libérés": this was King Leopold's "special protection of the black." Next, the Belgian Parliament was persuaded to advance ten million francs for the use of the Congo "and thus a direct connection sprang up which has eventually led to annexation." Then the State worked by the King began to tighten its grip upon the land; and presently, in cynical disregard of the Treaty of Berlin, proclaimed itself sole trader. Natives were forbidden to gather the products of their own forests; independent traders—in this country in which there was to be no monopoly whatever—were informed that "they were liable to punishment if they bought anything from the natives." The Englishman Stokes, an independent trader working from a German base, was seized and hanged by the Belgian Captain Lothaire. A young Austrian trader, Rabinek, was mysteriously put out of the way.

The State now went on to compel the natives to gather the whole of the products which it had taken from them. White agents were scattered over the "Free" State whose business it was to superintend the collecting and bringing in of the rubber. Their wretched pay they were allowed to supplement by a bonus on the amount of rubber they sent in. Under these agents were savages armed with firearms, one or more of whom, called "Capitas," were allotted to each village, where they terrorized

it as they pleased. The villages were at the mercy of the Capita, who "beat them, mutilated them, shot them done at his pleasure. . . . The more terror the Capita inspired, the more useful he was, the more eagerly the villagers obeyed him, and the more rubber yielded its commission to the agent."

Then, in this connection, follow three chapters of horrors which Sir Conan Doyle has brought together from many and various sources: Massacres of natives, murders, mutilations, floggings with the raw-hide "chicotte," and tortures of all kinds. As a commentary are appended these words from the lips of King Leopold himself: "Our only programme, I am anxious to repeat, is the work of moral and material regeneration, and we must do this among a population whose degeneration in its inherited conditions it is difficult to measure. The many horrors and atrocities which disgrace humanity give way little by little before our intervention."

The commission on inquiry which the King was at last compelled to appoint published a report wherein may be read, behind the courtly phrases it is stuffed with a confirmation of all the most serious charges that were inquired into. Reforms were promised: how have they been accomplished? Here are some of the concluding notes from the report of Mr. Cassie Murdoch, whose journey of investigation was undertaken in that region of Congoland where lies King Leopold's private estate. "In the Congo hell," observes Sir Conan Doyle, "the most lurid glow is to be found in the Royal Domain." Mr. Murdoch says:—

Individual acts of atrocity have for the most part ceased. The state agents seem to have come to the conclusion that it is a waste of cartridges to shoot down these people. But the whole system is a vast atrocity involving the people in a state of unimaginable misery. One man said to me, "Slaves are happy compared with us. Slaves are protected by their masters; they are fed and clothed. As for us, the Capitas do with us what they like . . . No, we are not even slaves." And he is right. It is not slavery as slavery was generally understood. It is not even the uncivilized African's idea of slavery. There

never was a slavery more absolute in its despotism, or more fiendish in its tyranny.

Sir Conan Doyle adds that—

So far as the people are concerned, the problem is largely solved; the bitterness of death is past. No European intervention can save them. In many places they have been utterly destroyed. But they were the wards of Europe, and surely Europe, if she is not utterly lost to shame, will have something to say to their fate.

Sir Conan Doyle himself has played his part. His pamphlet, which sixpence will buy, is the worthy outcome of a British individual's sense of duty and responsibility. It represents a high public service bravely and splendidly rendered.

"The task of a law writer can very rarely be light, if he undertakes personally to read the cases reported, and to state the effect of them. To ascertain the decision in a single case very frequently requires much patient thought and investigation; and it will readily therefore be apprehended that to gather the law that results from a series of cases, beginning perhaps at a distant period, and most usually determined in different courts and by judges of unequal eminence, is sometimes impracticable, and is constantly exposed to the danger of error. The authority of a case often depends on the court in which, or the learning of the judge by whom, it was decided. The authority of a case may, moreover, be strengthened by the circumstance that it was determined by a 'strong' court, by a court composed of judges of great reputation, or by, or with the concurrence of, a single judge distinguished for his learning; and be weakened by the circumstance that the court were equally divided, or were not unanimous. One authority, or one series of authorities, is contradicted by another; a modern case and one determined some years ago, or even two recent cases, are found to be much, if not directly at variance; and cases that for years have uniformly flowed in a particular direction, are not infrequently met by an opposing stream, strong enough to stem the older current."—*Ram on Assets.*

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court--K.B.] [Oct. 28.

BEAL *v.* MICHIGAN CENTRAL R.R. Co.

Railway—Fire from engine—Evidence—Right of appellate court to reverse trial judge's finding when evidence misapprehended.

Appeal by defendant from the judgment of MACMAHON, J., who tried the case without a jury, and gave a verdict for plaintiff for $500. The action was for damages to premises destroyed by fire from engine.

Held, that upon an appeal from the finding of a judge who tries a case without a jury the court appealed to does not and cannot abdicate its right and its duty to consider the evidence. Subject to the exception referred to in *Lodge* v. *Wednesbury Corporation* (1908) A.C. 323, and *Coghlan* v. *Cumberland* (1908) 1 Ch. 704, if it appears from the reasons given by the trial judge that he has misapprehended the effect of the evidence or failed to consider a material part of it, and that the evidence leads the appellate court to a clear conclusion that the findings of the trial judge were erroneous, it is the plain duty of the court to reverse these findings.

Reference was made to *Connacher* v. *City of Toronto*, Mar. 4, 1893, Q.B. Divisional Court, unreported; *Campbell* v. *Acton Tannery Co.*, June 29, 1900, Court of Appeal, unreported; *Shields* v. *City of Toronto* (1897), Court of Appeal, unreported.

Saunders, K.C., and *W. B. Kingsmill*, for defendants. *G. G. McPherson*, K.C., for plaintiff.

Meredith, C.J.C.P.] [Oct. 28.

RE ST. PATRICK'S MARKET.

Deed—Construction—Condition subsequent—Contingent reversionary interest.

Appeal from the Referee under Quieting Titles Act. The land in question was conveyed by D'Arcy Boulton to the City of

Toronto by deed dated June 8, 1837. The grant was to the corporation for the purpose of a public market. The habendum was to the corporation and their successors "in trust for the use and purpose of establishing, keeping and maintaining a public market for the benefit and advantage of the citizens of Toronto and others resorting thereto, and for the public sale of all such articles and things as may be brought to the same subject nevertheless to such rules and regulations, etc." After the habendum was the following proviso: "Provided always that if the said City of Toronto shall at any time hereafter alienate the said piece or parcel of land or any part thereof, or use or apply the same to any other use or purpose than for a public market as hereinbefore mentioned, then these presents and every matter and thing herein contained shall be utterly null and void to all intents and purposes whatsoever, and the said piece or parcel of land hereby conveyed shall from thenceforth revert to the said D'Arcy Boulton, his heirs and assigns, in as full and ample manner as if these presents had not been made." The appellants claimed to be entitled to a contingent reversionary interest in the land as heirs of the grantor.

Held, that the Referee of titles properly disallowed the appellants' claim, following *In re Trustees of Hollis Hospital and Hague's Contract* (1899), 2 Ch. 540, where it was held that such a proviso was an express common law condition subsequent, and obnoxious to the rule against perpetuities which was applicable to such condition and therefore void. The grant in this case was of the whole estate of the grantor subject to a condition that the grant should revert to the grantor, his heirs and assigns upon the happening of the event with which it deals and was not a conveyance granting the land to the corporation so long as it should be used as a public market. See *In re Ashworth* (1905) 1 Ch. 535; Law Quarterly Review, vol. 16, p. 10; *Attorney-General* v. *Pyle*, 1 Atk. 435.

Beck, for appellants. *Armour*, K.C., and *H. Howitt*, for City.

Divisional Court—Chy.] WEBB *v.* BOX. [Oct. 28.

Landlord and tenant—Illegal distress—Double value of goods—Costs.

Appeal by plaintiff from judgment of TEETZEL, J. Action for illegal and excessive distress for rent. The trial judge gave judgment for plaintiff for the appraised value of the goods and

for the defendant on a counterclaim, directing the amounts to be set off pro tanto and the balance to be paid to plaintiff with costs. The action was based on R.S.O. 1897, c. 342, s. 18, sub-s. 2, which, with slight verbal variation is taken from 2 W. & M., Sess. I., c. 5, s. 4. The Imperial Act says the owner "shall and may" recover double value. The R.S.O. simply says "may."

Held, 1. The pruning of expletives or superfluous words does not work a change in the effect of a statute. The English and Canadian cases expository of the statute before its adoption in this province are still binding; and the direction to a jury to find the value of the goods, and then give double the value, is still correct and applicable where a case is not tried by a judge without a jury.

2. There is no power under the Judicature Act, s. 57(3), enabling the High Court to relieve against this double value on the ground of its being a penalty or forfeiture. That would be to repeal what the legislature has distinctly provided for not so much in the way of a penalty, as to afford protection to tenants against unwarranted seizures and sales of property to the detriment of the tenant's rights. See *Stanley* v. *Wharton*, 9 Pri., p. 310.

3. The costs provided for are not in the position of ordinary costs of litigation, but are fixed by the statute itself, and the discretionary power given by rules of courts as to costs is not exercised in regard to costs given by statute: *Reen* v. *Gibson* (1891) 1 Q.B.D. 660.

4. The right to recover double value extends not only to the landlord but to the officials and bailiffs engaged in the illegal proceedings. See *Hope* v. *White*, 17 C.P. 52, and *Potter* v. *Bradley*, 10 Times L.R. 445.

Masten, K.C., and *Wadsworth*, for plaintiff. *G. S. Kerr*, K.C., and *Makins*, for defendant.

Divisional Court—Chy.] [Oct. 28.

WHITEHORN *v.* CANADIAN GUARDIAN LIFE INCE. CO.

Life insurance—Default in payment of premiums—Days of grace—Extension by conduct—Waiver.

Action by widow of deceased on a policy of insurance on his life. Policy was subject to conditions of prompt payment with a right to one month's grace, but void for non-payment unless reinstated. It was found that the defendants by their practice

through their agents, with the consent of the superior officers, took money whenever it was given to them, whether the days of grace were up or not. The plaintiff had made all reasonable exertions to pay the premium, but was frustrated by the conduct and inaction of the company.

Held, that the defendants were estopped from saying that the policy was not current, and that the plaintiff had a reasonable time to complete the payment of the premium, even though death previously ensued. If the strict right of forfeiture was waived, the company could not without specific warning revive that right for non-payment of the small balance. See *Redmond* v. *Canadian Mutual Aid Association*, 18 A.R. 335; *Dilleber* v. *Knickerbocker Insurance Co*, 76 N.Y. 567; *Black* v. *Allan*, 17 C.P. 240, 248; *Manhattan Life Insurance Co.* v. *Hoclyle*, 8 Ins. Law Journal 226.

Divisional Court—C.P.] [Oct. 28.

BRADLEY *v.* BRADLEY.

Contract—Implied—Services to near relative—Remuneration—Promise of widower not to re-marry void as against public policy.

Cross appeals from the judgment of the judge of the County Court of Essex sitting for ANGLIN, J., on March 19.

The plaintiff (unmarried) was the sister of the defendant, a widower. She sought to recover for services rendered to defendant as his housekeeper and for money expended by her on his behalf. Defendant's wife died August 28, 1895, leaving two small children. The plaintiff, at defendant's request, had taken up her residence with him, he promising that in consideration of her doing so and taking care of the household and children, he would provide her with a comfortable home for her life, and, as she alleged, he promised never to re-marry. She performed these duties until Jan. 18, 1898, when the defendant re-married and ceased to support her. She claimed remuneration for her services and for moneys said to have been expended by her for household expenses and clothing for the children. The plaintiff admitted that there was no agreement as to the payment of wages, but that she relied on the verbal statement of the defendant. The trial judge found in favour of the plaintiff $5 a week for six years, $1,530, but that the money expended was expended

voluntarily and without the request of the defendant. Judgment for $1,530 only.

Held, 1. The plaintiff was entitled to a verdict on a quantum meruit for the last six years of her services, but the claim for money expended was properly disallowed.

2. The promise of the defendant that he would not marry again was merely an expression of opinion. Any agreement to that effect would have been void: *Law* v. *Peers*, 4 Bur. 22-25; *Jones* v. Jones, 1 Q.B.D., p. 222.

R. F. Sutherland, K.C., for plaintiff. *A. H. Clarke*, K.C., for defendant.

Britton, J.] KELLY *v.* ROSS. [Oct. 29.

Libel—Newspaper—Security for costs refused by Master in Chambers—Appeal.

Action for libel. Application by the defendant for leave to appeal to a Divisional Court from the order of FALCONBRIDGE, C.J.K.B., in Chambers, dismissing an appeal from the order of the Master in Chambers, who dismissed a motion for security for costs made by the defendants in this action. R.S.O. c. 68, s. 15, provides that "an order made under s. 10 by a judge of the High Court granting or refusing security for costs in an action for libel contained in a newspaper shall be final, and shall not be subject to appeal; and when the order is made by a local judge the same may be appealed from to a judge of the High Court sitting in Chambers, whose order shall be final and shall not be subject to appeal." This section is re-enacted almost verbatim in s. 12, sub-s. 4, c. 40, 9 Edw. VII. (O.).

Held, 1. It is not merely an order granting security that can be appealed from, notwithstanding *Robinson* v. *Mills*, 19 O.L.R. 172, 173.

2. The Master in Chambers though not specifically referred to in the above section is covered by the words "a judge of the High Court" so that the statute does not give an appeal in this case.

Mowat, K.C., for defendant. *Wadsworth*, for plaintiff.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] THE KING *v.* PEPPER. [Oct. 22.

Criminal law—Summary conviction—Vagrancy—Prostitute not giving a satisfactory account of herself—Habeas corpus.

An information under paragraph (*i*) of s. 238 of Crim. Code, charging the accused with being a common prostitute or night walker not giving a satisfactory account of herself and being thereby a loose, idle and disorderly person and a vagrant, is not sufficient without also alleging that she had been asked to give an account of herself, and no criminal offence is stated without such allegation.

A conviction on a plea of guilty to such charge does not sufficiently disclose any criminal offence and the accused will be entitled to be released upon habeas corpus from imprisonment under a sentence following such conviction.

Regina v. *Levecque*, 30 U.C.Q.B. 509, and *King* v. *Harris*, 13 Can Cr. Cas. 393, followed.

Hagel, for the prisoner. *Whitla*, for the Crown.

Metcalfe, J.] ADAMS *v.* WOODS. [Oct. 29.

Liquor license—Local option—Petition of twenty-five per cent. of resident electors—Detaching signatures from heading of petitions and pasting them below the signatures on another petition—Injunction to prevent submission of by-law.

A number of petitions to the council of the municipality asking for the passage of a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by s. 2 of c. 31 of 9 Edw. VII., were signed by persons aggregating more than twenty-five per cent. of the resident electors whose names appeared in the last revised municipal voters' list, but before being handed to the clerk, the printed headings of all but one of the petitions were cut off, and the rest of the sheets of paper containing only the signatures pasted successfully below the

signatures on the one petition not thus mutilated. These latter signatures were not themselves sufficiently numerous.

Held, following *Re Williams and Brampton*, 17 O.L.R. 398, that the document presented to the council was not such a petition as the Act requires, and that an injunction should issue on the application of an owner of a licensed hotel to prevent the reeve and councillors from submitting a by-law to the electors as prayed for. *Little* v. *McCartney*, 18 M.R. 323, distinguished.

Andrews, K.C., and *Burbidge*, for applicant. *Taylor*, K.C., for the council.

Metcalfe, J.] HATCH *v.* RATHWELL. [Oct. 29.

Liquor License Act—Local option—Petition to council for submission of by-law, using petition of previous year not then acted upon—Injunction to prevent.

A petition to the council of a municipality to submit to the vote of the electors a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, as re-enacted by 9 Edw. VII. c. 31, s. 2, filed with the clerk in one calendar year, with the intention that it should be acted upon in that year, but not so acted upon, cannot be treated as a valid petition for the submission of such a by-law in any subsequent calendar year, especially in a case where a portion of the territory of the municipality in which some of the petitioners resided has, in the meantime, been incorporated into a separate village; and in such a case an injunction should, on the application of an owner of a licensed hotel, issue to prevent the council from proceeding to submit such by-law.

Andrews, K.C., and *Burbidge*, for applicant. *Taylor*, K.C., for the council.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Oct. 30.

BARNES *v.* BRITISH COLUMBIA COPPER CO.

Master and servant—Dangerous works—Knowledge of—Structural defects—Risk voluntarily incurred—Negligence—Contributory negligence.

The plaintiff, whilst engaged as a switchman on the defen-

dants' electric motor tramway, running between their ore-bins and smelter furnaces, having crossed the track, set the switch for the motor which was about to return from the furnaces, started back over the track in order to take his usual seat on the head end of the motor and got his foot caught in a hole in the floor between the rails. He shouted to the motorman, who immediately cut off the current and applied the brakes, but the motor did not stop quickly enough to prevent the accident, with the result that the motor ran upon the plaintiff, breaking his leg in three places. The evidence disclosed the facts that the hole in question had been there some time previous to the accident; that the accident occurred just previous to daybreak, and that the plaintiff had not been at work for more than one shift. There was also some suggestion in the evidence that the hole was left there for the purpose of making room for a bar connecting the two rails in the track.

Held, on appeal (affirming the judgment of IRVING, J., at the trial), that the accident was caused by a structural defect in the ways of the defendant company, and that the plaintiff was entitled to recover.

Davis, K.C., for defendants (appellants). *S. S. Taylor*, K.C., for plaintiff (respondent).

Full Court.] WHITE *v.* VICTORIA LUMBER CO. [Oct. 30.

Master and servant—Locomotive engineer—Death of, caused by jumping from train—Equipment of train—Efficiency of—Negligence of driver—Competency of fellow servants—Damages, excessive—New trial—Costs.

Plaintiffs sued defendant company for damages for the death of their son, a locomotive engineer in the defendants' employ, who was killed by having jumped from a train over which he had lost control. The jury found $6,000 common law damages.

Held, on appeal, by HUNTER, C.J., that the only verdict reasonably open to the jury on the evidence, was that the deceased lost his life by his own negligence.

Per IRVING, J., that the damages were excessive.

Per MORRISON, J., that the verdict should stand.

New trial ordered; costs of appeal to defendant company in any event; costs of first trial to abide the new trial.

Bodwell, K.C., for defendant (appellant) Co. *McCrossan*, and *Harper*, for respondents.

Bench and Bar.

Judicial Appointments.

Hon. Robert Franklin Sutherland, of the City of Windsor, Province of Ontario, K.C., to be a judge of the Supreme Court of Judicature for Ontario, a justice of the High Court of Justice for Ontario and a member of the Exchequer Division of the said High Court of Justice, vice Anglin, J., appointed to the Supreme Court of Canada. (Oct. 21.)

Hon. Sir Louis Amable Jetté, puisne judge of the Superior Court of Quebec, to be Chief Justice of the Court of King's Bench, vice Hon. Sir Henri Thomas Taschereau, Kt., deceased. (Nov. 16.)

Louis Rodolphe Roy, of the City and Province of Quebec, K.C., to be Judge of the Superior Court of the said Province, vice Hon. Mr. Justice Tourigny, transferred to Arthabaska. (Nov. 17.)

United States Decisions.

At a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is held, in *Bremer* v. *St. Paul City R. Co.* (Minn.), 120 N.W. 382, 21 L.R.A. (N.S.) 887, to be bound to keep a sharp look-out for passengers or other persons who may attempt to cross the tracks behind the other car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as are usually given to protect travellers who are in the exercise of ordinary prudence.

A street car passenger is held, in *Heinze* v. *Interurban R. Co.* (Iowa), 117 N.W. 385, 21 L.R.A. (N.S.) 715, not to be negligent per se, because, after signaling for a stop, and the car has begun to slacken speed as his destination is approached, he takes a position on the step preparatory to alighting when the car stops.

A motorman in charge of a street car is held, in *Riley* v. *Consolidated R. Co.* (Conn.), 72 Atl. 562, 21 L.R.A. (N.S.) 880, not

to be entitled to assume that an adult on the track in the path of the car will remove to a place of safety upon the sounding of a warning.

A PEDESTRIAN is held, in *Lerner* v. *Philadelphia*, 221 Pa. 294, 70 Atl. 755, 21 L.R.A. (N.S.) 614, to have no right to hold the municipality liable for injury received in broad daylight through a defect in a sidewalk, if there was nothing outside of himself to prevent his seeing the defect, or which will excuse his failure to observe it. An elaborate note to this case in L.R.A. reviews all the authorities on the question of contributory negligence as affecting liability of municipal corporations for defects and obstructions in streets.

ONE who intentionally points a gun at another, which is by statute made a misdemeanour, is held, in *McDaniel* v. *State* (Ala.), 46 So. 988, 21 L.R.A. (N.S.) 678, to be guilty of manslaughter in the second degree if the gun, while so pointed, is accidentally discharged, producing the death of the one towards whom it is pointed.

WHERE before the time for performance of a contract, it appears that one party will not be able to perform his agreement upon the precise date stipulated, the other party is held, in *Holt* v. *United Security L. Ins. & T. Co* (N.J.), 72 Atl. 301, 21 L.R.A. (N.S.) 691, not to have the right to repudiate his obligations in advance, unless time is of the essence of the agreement.

A REAL estate broker is held, in *Jepsen* v. *Marohn* (S. D.), 119 N.W. 988, 21 L.R.A. (N.S.) 935, not to earn his commission by producing a customer willing and able to pay the required price in cash for the property, where his authority is to sell for a certain price, payable a certain amount down and the remainder in yearly instalments, with interest.

WHILE it is a general rule that a discharge of the principle releases the surety, it is held, in *Gates* v. *Tebbetts* (Neb.), 119 N.W. 1120, 20 L.R.A. (N.S.) 1,000, that an exception to the rule exists when one becomes surety for a married woman, minor, or other person incapable of contracting.

AN employee engaged in removing earth for the foundation of a building is held, in *Rankel* v. *Buckstaff-Edwards Co.* (Wis.), 120 N.W. 269, 20 L.R.A. (N.S.) 1180, not to be a fellow servant of an expert employed for a short time to break up frozen ground

by blasting, where the former has nothing to do with the placing, packing or discharging of the explosives, although he drills the holes to contain them.

THE case of *Younger* v. *Central Railroad Co.*, 114 N.Y. Supp. 449, holds that delivery of baggage to baggage agent of hotel is delivery to carrier. The court says:

"The evidence conclusively establishes that the trunks were delivered by plaintiff's husband in good condition to the 'baggage agent' at the hotel, and that from such 'baggage agent' he received railway checks to New York for each separate piece of baggage. It is immaterial, for purposes of this inquiry, whether such baggage was received by an employee of the hotel or an employee of the transfer company. The receipt of the baggage in its then good condition, and the delivery of railway checks therefor, which railway checks were merely receipts for baggage to be transported to New York, was ratified and adopted by the defendant railway company, through its connecting carrier, and the baggage so receipted for was transported to New York upon such railway checks and delivered to the plaintiff at its place of destination. This constituted the person who received the baggage and issued the railway checks therefor the agent of the defendant company for that purpose no matter what other relationship he sustained, either to the hotel or to the transfer company; and the delivery of the trunks to him in good condition was, therefore, a delivery to the defendant railway company which either by previous authorization, or by subsequent ratification or adoption of his acts, constituted him its agent for the purpose of receiving baggage and issuing railway checks therefor."—*Chicago Law Journal.*

Flotsam and Jetsam.

A lawyer, who travelled extensively in Asia and Africa, gives this comical example of Oriental justice, of which he was an eyewitness:—

Four men, partners in business, bought some cotton bales. That the rats might not destroy the cotton, they purchased a cat. They agreed that each of the four should own a particular

leg of the cat, and each adorned with beads and other ornaments the leg thus apportioned to him. The cat, by accident, injured one of its legs. The owner of that member wound about it a rag soaked in oil. The cat going too near the fire set the rag on fire, and, being in great pain, rushed in among the cotton bales, where she was accustomed to hunt rats. The cotton thereby took fire and was burned up. It was a total loss. The three other partners brought an action to recover the value of the cotton against the fourth partner, who owned that particular leg of the cat. The judge examined the case and decided thus: "The leg that had the oil rag on it was hurt; the cat could not use that leg · in fact, it held up that leg and ran with the other three legs. The three unhurt legs, therefore, carried the fire to the cotton, and are alone culpable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay the whole value of the bales to the partner who was the proprietor of the injured leg."

Presents from suitors to judges were not uncommon, nor, perhaps, unexpected, in New Hampshire in the eighteenth century under the colonial government, says a writer from whom Charles Warren, in his interesting history of the Harvard Law School, quotes an interesting story:—

On one occasion the Chief Justice, who was also a member of the council, is said to have inquired, rather impatiently of his servant, what cattle those were that had waked him so unseasonably in the morning by their lowing under his window; and to have been somewhat mollified by the answer that they were a yoke of six-feet cattle, which Col. —— had sent as a present to his Honour. "Has he?" said the judge; "I must look into his case—it has been in court long enough."—*Green Bag.*

Two barristers were discussing the Creditor's Relief Act, the point in controversy being the validity of the Act itself, one of them remarked he "never did consider that Act to be sui juris!" As the Act was born on 5th March, 1880, it clearly is now of full age.