THE CANADA LAW JOURNAL

EDITOR:
HENRY O'BRIEN, K.C.

ASSOCIATE EDITOR:
C. B. LABATT

VOL. XLIV.

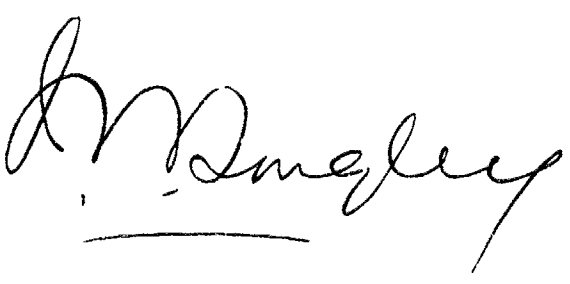
FROM JANUARY 1 TO DECEMBER 31,

1908

TORONTO:
CANADA LAW BOOK COMPANY, LIMITED,
LAW PUBLISHERS,
32-34 TORONTO STREET.

TABLE OF CASES

REPORTED AND NOTED IN THIS VOLUME.



Canada Law Journal.

VOL. XLIV. JANUARY. NOS. 1 AND 2.

HON. MR. JUSTICE LONGLEY.

None of His Majesty's judges have been so much in the public eye, for the past three months, as Mr. Justice Longley of the Supreme Court of Nova Scotia. This arises from the fact that the action of the Dominion Steel Company and the National Trust Company against the Dominion Coal Company was tried before him at Sydney; and his judgment was watched with keen interest.

This action so far as the number of persons pecuniarly interested effects the question, and the amount of money involved, is one of the greatest actions ever tried in any English speaking country. The existence of both the Steel and the Coal Companies was said to depend upon the result. This is probably an exaggeration, but it indicates the magnitude of the interests that depended upon the judge's decision. The Coal Company in bonds and stocks represents $23,000,000, and the Steel Company $35,000,000. These stocks and bonds are held in every part of Canada and the owners watched the proceedings closely. The Coal Company employs about 7,000 men, the Steel Company about 5,000. The question at issue finally resolved itself into a very narrow one, whether, under a contract for the supply of coal to the Steel Company for making steel, the latter had the right to name the seam from which the coal was to come, and named the Phalen seam—could the Coal Company supply coal from one part of that seam unfit for use in steel making, when it was mining and could supply from other pits on that seam coal that was fit. In other words was coal from the Phalen seam a specific description under the rule in *Chanter* v. *Hopkins*, 4 M. & W. 399, or was the Coal Company bound under the contract to supply coal fit for the purpose of steel making.

Reviewing the whole contract the judge held that it was a

contract to coal the Steel Company and that the primary and supreme object of the contract was the supply of coal for use in steel making. The principle adopted in applying the different provisions of the contract to attain the result was the classical words of Lord Bowen that the object of Courts is "to give efficacy to the transaction and prevent such a failure of consideration as cannot have been within the contemplation of the parties." Hence it followed that neither of the parties contemplated that under the contract coal could be supplied even from a seam specified that was absolutely useless to the Steel Company and which under the contract they could not sell.

The judgment in the Steel-Coal suit is under appeal, but its manner is in the best form of a judicial decision. First, the facts are set out with clearness, then come the findings from these facts, then a statement of the principles of law applicable to the findings followed by a brief review of the leading authorities that govern, and concluding by a statement of the remedies.

Mr. Justice Longley has been the subject of the highest enconiums from the Bar and the press, both as to the manner in which he tried the case and the reasoning upon which his judgment is based.

The judge has been an interesting figure among the public men of Canada for the past 30 years. He is about 57 years of age, and has been in the legislature of Nova Scotia since 1882. He was Attorney-General since 1884, and until his appointment to the bench in 1905. Nothing pleased the judge, when an active politician, more than an election, and nowhere was he so much at home as on the public platform. Perfectly conscious of his ability and knowledge of public questions he was always ready to meet in public debate the strongest men on the other side. Personality like his was sure to impress its mark on the policy of his party and, though he was only a provincial politician, it was he who persuaded the whole Liberal party to take up Unrestricted Reciprocity as its policy in the Dominion election of 1891.

The judge is a frequent and welcome contributor to periodi-

cals, and writes in a charming style. His life of Joseph Howe in "Morang's Makers of Canada" series is his best effort, and is a worthy tribute to that great Nova Scotian. He will have ready, in a short time, a political history of Canada since 1867, after the style of McCarthy's "History of Our Own Times," and no man in Canada has the political instinct necessary to write such a history in as high a degree as the versatile judge.

It is too soon yet to write of Mr. Justice Longley's work as a judge. That is in the making, but, undoubtedly, he will attain eminence in his judicial career. He is a man of untiring industry, perfectly fearless, and has a wide knowledge of men and of business, with a keen intellect and a judicial mind. What better equipment can a man have to attain the very highest place among judges who have made and are making the common law.

ENGLISH LAW CODIFIED—THE WHOLE LAW OF ENGLAND.

LORD HALSBURY, EDITOR-IN-CHIEF.

The first volume of this work has been issued. It is proposed to complete the work in 22 volumes The object of this publication is as stated on the title page, "A complete statement of the whole law of England by the Right Hon. the Earl of Halsbury and other lawyers." His Lordship occupies the position of active editor-in-chief, and the revising editors include such men as the Hon. Sir Chas. Swinfen Eady, one of the Chancery Judges, assisted by T. H. Carson, K.C., Arthur Underhill, a leading conveyancing counsel, T. Willes Chitty, barrister, and William Mackenzie, barrister. There are besides these editors a number of sub-editors of prominence in the legal profession.

The titles of the first volume have been contributed by very prominent and eminent members of the Bench and Bar, and regard has been manifestly had with reference to the special qualification of the writer of each particular subject.

The volume contains about 650 pages, in addition to the index, which is very full and very carefully prepared.

Dealing with the general scope of the work, it may be useful to point out that heretofore the editor or compiler of this class of legal publications has confined himself to one or two things, first, an encyclopædia, which is more or less an enlarged digest of case law, but which was somewhat more extended in the American and English Encyclopædia, or, secondly, to a list of leading cases annotated. While these methods render reference comparatively easy, they fall short of being a complete compendium of the law of the country to which they relate. The present work opens up a wider field, and consists of a series of carefully written articles upon practically every subject known to the law, and combines all the benefits to be derived from text-books, encyclopædias, and digests of case law. Instead of being a mere collection of references, the text deals with principles, collected from the authorities, and, for ordinary purposes, gives in a compact form all the law relating to any matter likely to arise in the course of one's practice. In other words the work is a comprehensive codification of principles of the English law.

The difficulty heretofore met with in works of this nature has been that the results of the decisions of courts have been stated, rather than the principles upon which such decisions are based, and it is often found on reading the report referred to, that the case turned largely on the facts, and thus in no way aided the enquiry as to the law applicable to facts more or less different. Here, however, the general principles governing all facts are succinctly and clearly stated, and special distinction is made where exceptions arise or certain facts have to be considered.

To illustrate this more clearly, a paragraph may be taken at random from any page of the first volume, say, the head of "Agency,"—a title dealt with in about one hundred pages. At page 212, there will be found the following:—

"Wherever a principal has authorized an agent to do 'a particular class of acts on his behalf, he is responsible' for any act even though felonious (*Osborn* v. *Gillett* (1873) L.R. 8

Exch. 88), done by the agent which falls within the scope of his authority as measured by reference to his ordinary duties (*Cheshire* v. *Bailey* (1905) 1 K.B. 237, per Mathew, L.J., at p. 245.) The onus of proof is on the plaintiff (*Beard* v. *Lon. Gen. Omnibus Co.* (1900) 2 Q.B. 530) however improper (compare *Udell* v. *Atherton* (1861) 7 H. & N. 172, with *British Mutual Bank* v. *Charnwood Forest Rail Co.* (1887) 18 Q.B.D. 714 (fraud) and several other cases noted), or imperfect (compare *Whatman* v. *Pearson* (1868) L.R. 3 C.P. 422, with *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, and other cases noted), the manner in which the authority is carried out, provided that the act is done for the principal's benefit (compare *Mackay* v. *Commercial Bank of New Brunswick* (1874) L.R. 5 P.C. 394, with *British Mutual Bank* v. *Charnwood Forest Rail Co.*, supra) and not for that of the agent (*Coleman* v. *Riches* (1855) 3 C.L.R. 795). It is immaterial that the act in question has been expressly prohibited by the principal (*Limpus* v. *Lon. Gen. Omnibus Co.* (1862) and other noted cases)."

The law as it stands is very clearly and concisely put, and the text is not burdened with dissertations or arguments by the authors. They content themselves with setting forth in plain language what the courts have decided and declared to be the law under the various divisions and sub-divisions freed from incidental and surplus matter. The work, as to completeness, lucidity and practical advantage, may be designated as monumental.

The work is published by Messrs. Butterworth & Co., of London, jointly with the Canada Law Book Company, Limited, of Toronto, Canada, who control the sale of it in Canada and the United States.

WHY NOT ABOLISH "DIRECTORS."

The natural meaning of "director" is one who directs. But the legal signification of the word is quite different from the popular idea. This is not the only example of law not being quite in line with the ideas of the man in the street. Jurisprudence however takes notice of conditions which laymen fail to appreciate. Under modern business methods the "control" of any corporation is essential to its success. That means that the executive officers, and not the directors or the shareholders, run (to use an expressive metaphor) the company. It generally happens that the executive officers are directors. If so, then they, as directors, expect their fellow directors to agree with them. And the former generally do so, and the bigger the company the less can they do otherwise.

One cannot shut one's eyes to the fact that no one, other than those in constant touch with the details of the management, bookkeeping and financial methods of a company, can possibly understood what is going on, much less, effectively or usefully interfere. Hence directors as a rule do not and cannot direct, and in a business sense ought not to direct. Those who manage should be the "directors" and the rest of the Board should disappear or cease to bear this misleading and useless title.

Keeping in view then that the law looks at actualities and not popular impressions, and with due regret that they almost inevitably differ, it is easy to understand why Courts of justice hesitate to throw responsibilities for the millions that are lost by the executive officer or officers upon those who are designated by an inappropriate title, and who have fulfilled faithfully, at all events, the limited duties that are permitted to outside directors.

It is true that the shareholders of a limited or unlimited company correspond, in some senses, to the members of an ordinary partnership. But there were essential differences between the two classes (quite apart from those arising from the constitution of joint stock companies) even before the enactments which settled the formation and conduct of these cor-

porations. See for example of an old-fashioned joint stock company the case of *Womersley* v. *Merritt* (1867) L.R. 4 Eq. 695. The most important difference was the inability of the shareholders, except at stated intervals in general meeting, to interfere with its concerns or to bind the company; a power belonging to members of a partnership. In fact joint stock companies were formed with the expressed idea of allowing their members to participate in the profits without being liable for the losses, a condition of affairs naturally following from the fact that they had no real voice in the management and no control as to who should or who should not be admitted into the concern.

The relationship of the shareholders inter se is not identical with their rights and obligations towards the entity known as the company, nor are the rights and obligations of the company enforceable against the individual shareholders in a limited company. Each partner is the agent of his co-partners, but no such position is enjoyed by shareholders towards each other, nor is a shareholder the agent of the company: *Burnes* v. *Pennell* (1849) 2 H.L.C. 497. The shareholder has merely a defined and aliquot part in the assets which belong in law to the company as such, and his interference is limited to such matters as are permitted by the special or general Act which governs his company. The immediate superintendence of the company's affairs is delegated to a portion of the members called directors. Their position is that of agents merely and they are the only agents competent to bind the company. But they are joint agents and can only bind the company, speaking generally, when they act in a duly constituted meeting, and then by a majority when such a provision exists for their governance. It is true that in certain corporations and under certain conditions the acts of some directors holding defined positions, which carry with them stated powers, can, within the scope of these powers, bind the company. The relation of the directors to the company, and through it to the shareholders, do include matters which are not merely affairs of agency; but the principle of agency runs through all ideas of their responsibility and must

be the final test by which they are to be judged. Kekewich, J., in *Re Liverpool Household Stores* (1890) 59 L.J. Ch. 616, says that the responsibility of directors rests for its ultimate sanction on the broad basis of the law respecting principal and agent.

To accept the position of agent is to burden oneself with many responsibilities. But they are limited to such as come within the scope of the agency. If an agent is elected as one of a number it is fairly obvious that all cannot act in everything. Each must have his assigned duty and if due care is taken in allocating the work and in seeing that it is performed, the joint executive action would seem to be fairly outside the realm of criticism. Where there are hundreds of shareholders, having each a defined share in the company's assets, the employment of the aggregate capital means, if money is to be made, an infinite multiplication of small operations, each of which involves in its turn smaller details of work either manual, executive, financial, or co-operative. The consequences of these have to be worked out with infinite patience and skill and the results presented for ultimate action.

If this is all done by ideal persons and in a flawless manner the final outcome must be good. The work described cannot, however, be all done by directors; they must act through and by others; they must necessarily trust those others, not merely for the financial results, but for the practical doing of the work and for its faithful report. Even those who are actually the executive officers and who have to take a part antecedent to the final action, must rely on those under them. The chain of responsibility ends somewhere and must also begin somewhere. Where then is exactly to be found the actual responsibility? That is the weak point in the cable, a weakness almost inevitable in all concerted human action. What also is the exact measure of that responsibility? It must be admitted that both vary according to the position, means of knowledge, honesty, actual participation and time of those involved. And, as they do vary, then the law, looking into the actual facts, must determine with due regard to what really exists, and not upon the popular and probably very natural generalization from broad premises.

It must be remembered that the shareholder while helping to elect his agents is not, by the very constitution of the company, liable for that agent's mistakes and only suffers where they are serious enough to involve his individual share. He reaps the benefit however of that agent's successes to the full. Can he then quarrel with an exact distribution of the liability for the losses when he insists upon having the profit which flows from the aggregate ability and faithfulness of all his agents and their co-workers?

This may serve as an explanation of the views laid down by judges in determining liability in case of losses caused, not by all, but by some of the agents to whom has been rightfully given a certain, and perhaps a controlling share, in the actual management of a company's affairs.

Speaking generally the test of liability must, for its solution, involve a consideration not only of the actual facts which occur, but of the method of dealing with them at the time they do occur, and the knowledge, actual or imputed, then possessed by those who have to determine the action taken. And this test must not be based on what one learned judge calls "the easy but fallacious standard of subsequent events."

The position of directors has been likened to that of trustees. That their office is one of trust, which, if undertaken, must be performed fully and entirely, is the statement of Lord Romilly in *York and North Midland Railway Company* v. *Hudson* (1853) 16 Beav. 485, 491; and, in respect to the capital of the company which is under their management, it has been said that they are "quasi-trustees": *Flitcroft's Case* (1882) 21 C.D. 519, 534. These somewhat general definitions are more fully explained in other cases. In *Great Eastern Railway Company* v. *Turner* (1872) 8 Ch. 149, 152, Lord Selborne thus expresses his view:—

"The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company,"

The American standpoint is put in *Bloom* v. *National United Company* (1897) 152 N.Y. 114, "Directors are trustees in their relations towards the corporation but not in their relations towards the shareholders."

Jessel, M. R., expresses the opinion that if there has been any error at all in the course taken by the Courts of Equity it has been in pressing honest trustees too far. He therefore leans to the view (*In re Forest of Dean Mining Company* (1878) 10 C.D. 450) that directors are commercial men, managing a trading concern for the benefit of themselves and of all the other shareholders of it. They are no doubt trustees, he says, of assets which have come into their hands.

In a subsequent case, *Smith* v. *Anderson* (1880) 15 C D. 247, Lord Justice James points out what he calls the broad distinction between trustee and director, an essential distinction founded on the nature of things:—"A trustee," he says, "is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his cestuis que trustent. The same individual may fill the office of director and also be a trustee holding property, but that is a rare, exceptional and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company for whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority."

Lord Justice Brett concurs in this distinction. Stirling, J., in *Leeds Estate Co.* v. *Sheppard* (1887) 36 C.D. 787, considers directors as trustees or quasi-trustees of the capital of the company and liable for any breach of duty as regards the application of it. In *Re Faure Electric, etc., Co.* (1888) 40 C.D. 141 Kay, J., says that directors are certainly not trustees in the sense of those words as used with reference to an instrument of trust such as a marriage settlement or a will: "One obvious

distinction is that the property of the company is not legally vested in them. Another, and perhaps still broader difference, is that they are the managing agents of a trading association and such control as they have over its property and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of managing agent of a mercantile house to whom the control of its property and very large powers of management of its business are confided, but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control, except the action of the shareholders of the company. However it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent." (pp. 150-1).

He cites with approval the earlier opinion of Lord Justice James in *Marzetti's Case* (1880) 28 W.R. 541, 543, that, "a director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable. Directors are not to be made liable on those strict rules which have been applied to trustees."

In *Re Sheffield etc., Co.* v. *Aizlewood* (1889) 44 C.D. 412, at p. 452, Stirling, J., says that he takes it as established law that directors of trading companies are not trustees in the sense in which that term is used in settlements and wills, and that the rule laid down in *Re Faure Electric Co.*, is applicable to the directors of building societies. He quotes, also, with approval, the remarks of Lord Justice Cotton in *Marzetti's Case*. "Trustees are liable, whatever trouble they take, if the fund in their care goes not according to the trust. Opinions of counsel, bonâ fides, or care do not protect them. Now directors

are confidential agents with the liabilities of trustees, but they have a large discretion, and if they act bonâ fide they are relieved, and are not liable for want of judgment or error if they make a payment which is in fact not for the purposes of the company."

In *Re Sharpe* (1892) 1 Ch. 154, directors were held liable for ultra vires payments, and, being in the position of trustees, were not entitled to set up the Statute of Limitations. This was before the recent legislation allowing them to do so.

In *Re Lands Allotment Co.* (1894) 1 Ch. 616, 631, Lindley, L.J., says: "Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which comes into their hands or which is actually under their control, and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust and are in respect of such moneys to be treated as trustees."

In *Percival* v. *Wright* (1902) 2 Ch. 421, Swinfen-Eady, J., declined to hold that directors were trustees for individual shareholders. In *Turquand* v. *Marshall* (1869) L.R. 4 Ch. 376, Hatherly, L.C., decided that the whole body of shareholders could not maintain an action against the directors to recover the money they had lost by the misrepresentation of the directors but that each must bring his separate action. But this as pointed out in *Re National Bank of Wales* (1899) 2 Ch. 629, by Wright, J., and by Lindley, L.J,, at p. 652, was because the company was not incorporated. Where the right of a shareholder to sue comes through the corporation it must, if it declines to litigate, be made a defendant: *Henderson* v. *Blain* (1891) 14 P.R. 308.

This latter position is dealt with in *Hamilton* v. *Des-Jardins Canal Co.* (1849) 1 Gr. 1, and in *Burland* v. *Earle* (1902) A.C. 83. In the former case it was held that individual corporators,

even when described as proceeding on behalf of themselves and all other corporators, could not sue unless they could shew that no means existed of setting the corporation in motion, and this whether the acts complained of were void or merely voidable. The complaint was the disposition of the entire funds of the company even in a manner not permitted in trustees. In the latter case it was decided that the acts questioned must be shewn to be either fraudulent or ultra vires and that the majority of the company's shares were controlled by those against whom relief was sought and that no mere informality or irregularity which could be remedied by the majority would entitle the minority to sue. It will be observed that this restricts the rule to cases where the acts are illegal or ultra vires and in that sense void.

Some specific instances in which directors have been treated as if they were trustees under special circumstances may be quoted.

In the case of the *Land Credit Co.* v. *Lord Fermoy* (1870) 8 Eq. 7, 5 Ch. 763, directors were held liable to repay amounts paid out of the company's funds to purchase shares in the company, knowledge being brought home to the directors. In *Re Faure Electric Co.* (1888) 40 C.D. 141, payment of brokerage or commission to a stockholder for placing the company's shares was held to be illegal and the directors liable as for a breach of trust, they not being authorized even by a power given by the memorandum of association to do whatever might be "conducive to" the specific objects of the company. But they were exonerated from responsibility as for a misfeasance for consenting to a transfer to a shareholder of the shares so placed, there being no dishonest dealing charged. This liability for brokerage has, however, been denied by the Court of Appeal in a subsequent case; *Metropolitan Coal Consumers Co.* v. *Scrimgeour* (1895) 2 Q.B. 604. In *F Iron Clay Brick Co., Turner's Case* (1889) 19 O.R. 113, a director was made responsible either as a trustee for, or as agent of the company for the profit upon a resale of a property of the company bought

by him under a judgment and execution against the company held by himself. In *Re Geo. Newman & Co.* (1895) 1 Ch. 674, directors were compelled to repay amounts paid to them, as for services rendered, by resolution of the directors, sanctioned by all the shareholders, but which were held to be presents to them, the articles not containing any power to make such presents to directors.

It would seem from the above that the position of directors, unless they abuse their fiduciary relationship and either wrongfully part with the assets or receive a profit incompatible with their position, is more that of business agents than legal trustees. The error of trustees for which they are held liable is always absolute and a breach of the trust they have to administer. The error of directors, except when it amounts to personal fraud or misdoing is always excused by the theory that if fair business intelligence, and the usual commercial methods are employed, the agents are not insurers of their employers' property and are not to be judged by the inflexible rule of mere results. The point of view is shifted from the slavish adherence to the law of trusts and its rigid consequences to the broader methods of modern business. Gross neglect takes the place of mere deviation from expressed duty.

This is best seen by considering the cases shewing the consequences of want of enquiry which would have produced knowledge on the one hand and those which involve actual knowledge or fraudulent abstention from enquiry on the other, in relation to such subjects as capital and income, balance sheets, dividends, interest, and borrowing, the principles of which are quite outside the narrow defence which alone is open to a trustee.

It may be said at the outset that constructive default, so easily applied to a trustee, is unknown as a reason for holding a director liable. The Court of Appeal consisting of Jessel, M.R., James and Bagallay, LL.J., affirming Bacon, V.-C., in *Hallmark's Case* (1878) 9 C.D. 329, 332, said that there is no case except *Ex parte Brown*, 19 Beav. 97, which shews that it

is the duty of a director to look at the entries in any of the books, and that it would be extending the doctrine of constructive notice far beyond that, or any case to impute to the director in question the knowledge that his name had been entered on the register for fifty shares. And that although he was a director (no share qualification being necessary) and attended meetings, he was not liable as a contributory. This rule finds expression in both England and America, see *Ex parte Cammell* (1894) 1 Ch. 528, 534, 2 Ch. 392; *Cartmell's Case* (1874) L.R. 9 Ch. 691; *Briggs* v. *Spaulding* (1891) 141 U.S. 132; *Warner* v. *Pennoyer* (1897) 82 Fed. Rep. 181; Cook on Corporations, section 703.

Lord Davey in *Dovey* v. *Cory* (1901) A.C. 477, at p. 493, agrees that directors are not bound to examine entries in the company's books.

Jessel, M.R., in *Re Forest of Dean Co.* (1878) 10 C.D. 450, at p. 451, said that one must be careful not to press so hardly honest directors as to make them liable for constructive defaults. A trustee, he points out, may be liable as for wilful default for neglecting to sue, but not directors by virtue of their discretion as business agents, which must not be too much interfered with by the Court.

In *Denham & Co.* (1883) 25 C.D. 752, Chitty, J., held that as no man is bound to presume a fraud, directors are not bound to examine entries in the company's books; and in *Ex parte Overend, Gurney & Co.* (1869) 4 Ch. 460, Selwyn, L.J., while considering the series of transactions as lamentable and not to be justified on any principles of commercial morality or prudence, held the true test to be whether actual and not merely constructive notice was brought home to Overend, Gurney & Co. And in this judgment Giffard, L.J., agreed. But where positive fraud or actual misapplication of the company's funds is found as in *Northern Navigation Co.* v. *Long* (1905) 11 O.L.R. 230, and in *Re National Funds Assurance Co.* (1878) 10 C.D. 118, the distribution of the moneys among the share-

holders themselves is no answer to a charge of misfeasance at the suit of the company or of a liquidator.

Closely allied to this matter is the crucial question as to what amount of carelessness may be justified and where the line between constructive notice on the one hand and the responsibility arising from wilful abstention from enquiry on the other is to be drawn.

Lord Campbell in *Reg.* v. *Esdaile* (1858) 1 F. & F. 213 held that mere negligence would not sustain a charge of conspiracy to issue false balance sheets. In *Burnes* v. *Pennell* (1849) 2 H.L.C. 497, Lord Brougham laid it down that liability must be traced to some specific fraudulent conduct, some grossly fraudulent conduct, which gave rise to the executed contract in question. Andrews, J., in *Therien* v. *Brodie*, 4 Q.S.C.R. 23, considered that there must be some individual fault on their part personal to themselves before directors can be made liable.

How far has negligence approached grossly fraudulent conduct and to what extent is it an individual fault, and not merely the absence of a positive well-doing?

Turquand v. *Marshall* (1869) 4 Ch. 376 may be said to be the earliest leading case in which the question has been considered. Lord Hatherly, L.C., speaks of it as to a great extent a new case. He laid down the principle that however ridiculous and absurd the conduct of the directors might seem, yet it was the misfortune of the company that they chose such unwise directors and no recovery could be had for unwisdom unaccompanied by fraudulent and improper acts. This decision reversed in part the decree of Lord Romilly, M.R., and covered the carrying on of the company after one-fourth of the capital was lost, including bad debts as good, and allowing directors to overdraw their accounts. The same judge, and Sir W. M. James, J.J., in *Land Credit Co.* v. *Lord Fermoy* (1870) 5 Ch. 763, held a director not liable for mere negligence in not enquiring whether borrowers were solvent and what was to be done with the moneys, and again reversed Lord Romilly who

had held all the directors liable as trustees; responsible as such for the due employment of the funds entrusted to them.

Lord Hatherly in the same case laid down a doctrine, since completely established, that a director cannot be liable for being defrauded; to do so would render his position intolerable.

In *Rance's Case* (1870) 6 Ch. 104 Sir W. M. James, L.J. and Sir G. Mellish, L.J., held directors liable as for gross neglect of duty and a mala fide proceeding in declaring a dividend without a balance sheet which any mercantile man could properly make out. Both held that the case would have been different had a balance sheet been made out by an actuary or by the directors themselves under the deed of association.

Parker v. *McQuesten* (1872) 8 U.C.R. 273 reviews the cases upon fraudulent balance sheets and decides that not only must the balance sheets be false and fraudulent but that the directors must know that they are false and fraudulent.

Jessel, M.R., in *Re National Funds Assurance Co.* (1878) 10 C.D. 118, expresses the view that a bonâ fide act is not made out by shewing that there was no intention to commit a fraud and that when the plain and patent facts are brought to his knowledge a director cannot escape liability by shewing that some one told him that he was not doing wrong or that somehow or other he convinced himself he was not doing wrong. In *Re Denham & Co.* (1883) 25 C.D. 752 Chitty, J., absolved a director, who was a country gentleman and not a skilled accountant from liability, because he was deceived by falsified accounts (certified by an experienced and reputable professional accountant) and by fraudulent verbal statements made to him by the chairman and one of the directors.

Stirling, J., in *Leeds Estate Co.* v. *Shepherd* (1887) 36 C.D. 787, considers *Rance's Case* (ante) as consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital fail to excuse themselves if they have not taken care to secure the preparation of estimates and statements of account such as it is their duty to prepare and submit to the shareholders, and have declared the dividends complained

of without having exercised thereon their judgment as mercantile men upon the estimates and statements of account submitted to them. He decides that while directors were entitled to trust entirely to the secretary, manager and auditor who prepared the statements then in question they must exercise some judgment with regard to them, as the articles of association required them to cause estimates to be prepared and upon those estimates to declare a dividend and they were not justified in delegating that duty to the secretary. He finally held them liable for (1) not requiring the proper mode prescribed by the articles as to estimates to be followed, (2) failing to instruct the auditor to report on them as prescribed by the articles and (3) for acting on the statement of the secretary without any verification, except the audit so imperfectly made.

In *Sheffield Building Society* v. *Aizlewood* (1889) 44 C.D. 412 the same judge refused to hold directors liable for advancing money on a speculative security where they relied on the reports of a valuation by a competent valuator and did not know that the security was in fact an improper one. But in *Re Cardiff Savings Bank* (1890) 45 C.D. 537 he again fixes a director for failing to comply with the rules, which specific default permitted fraud by another, the auditor.

Vaughan Williams, J., in *New Mashonaland Co.* (1892) 3 Ch. 577, agrees with the view of Stirling, J., in the *Leeds Case* (ante) that directors who do not actually exercise their judgment are in the same position as those who are guilty of gross negligence.

In *Re Kingston Cotton Mills* (1896) 2 Ch. 279 an auditor escaped liability where he relied on the manager's certificate as to the amount of stock, on the ground that it was not the auditor's duty to take stock.

The liability of a director was exhaustively considered in a case reported as *Re National Bank of Wales* (1899) 2 Ch. 629 and afterwards in the House of Lords, as *Dovey* v. *Cory* (1901) A.C. 477. Wright, J., held the director, Cory, liable notwithstanding his defence that he knew nothing of what was going

on and trusted the general manager and the chairman who was his brother. The ground of liability was that the representations put forward to the shareholders on which dividends were declared were of matters which, by the articles of association, the latter were precluded from investigating for themselves, and were therefore representations by the directors which implied that they had personally taken reasonable steps to ascertain that the statements were true. But as to moneys improperly advanced to customers he considered that folly and imprudence were not enough and that interest, fraud or bad motive must be shewn. In the Court of Appeal it was held (p. 663) that the new statute of limitations applied and that the director was not liable after his retirement. But upon the main question the Court (Lindley, M.R., Sir F. H. Jeune and Romer, L.J.) declined to adopt the views of Wright, J., saying (p. 667). "But negligence is one thing; fraud is another," and holding that Cory did not act fraudulently in making reports to the shareholders as held by Wright, J. The Court lay down the proposition in this case, as was done in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1899) 2 Ch. 392, that if the directors act within their powers, if they act with such care as can be expected from them, having regard to their knowledge and experience, if they act honestly for the benefit of the company, they discharge their equitable as well as their legal duty to the company. That measure of care is, speaking generally, what the law requires when there is no contract affecting the question.' The real gist of the decision on the point involved is that it was not Cory's legal duty to test the accuracy or completeness of what he was told by the general manager and the managing director and that business could not be carried on upon principles of distrust and that it was too heavy a duty to lay upon a director to charge him with negligence in trusting the officers under him not to conceal what they ought to report to him. "A director (p. 675) does not warrant the truth of his statements; he is not an insurer." But he is liable unless he can shew that he made the statements honestly, believing them to be true, and

took such care to ascertain the truth as was reasonable at the time.

The *Leeds Case* (ante) was put upon the ground that the directors delegated their duty to their manager and did not even see that he did what he ought to have done. Upon appeal to the House of Lords (1901, A.C. 477) the decision was upon the main principle affirmed and the case forms the most important reference upon the subject. The judgment is, as stated by Lord Halsbury, L.C., entirely upon the question of fact whether or not Cory was guilty of a breach of duty. The nature of the business and the relation of Cory to it and the usual course of business pursued in the bank, are considered as important factors. It appears that the usual course was followed, weekly statements from each branch were sent in, examined by the manager and left in the board room for reference if the report of the manager disclosed anything which required attention. Inspectors reported to the manager on the branch banks. Auditors only saw the head office books and the returns (not the weekly statements) from the branches. What was really sought to be made the test of Cory's responsibility was that he did not find out what was fraudulently withheld from him. The Lord Chancellor makes the pointed observation that if it be the duty of a director to guard against possible fraud, an intelligent devolution of labour is impossible and asks "Was Mr. Cory to turn himself into an auditor, a managing director, a chairman and finds out whether auditors, managing directors and chairmen were all alike deceiving him? Lord Davey agrees in effect with Mr. Justice Stirling in *Re Leeds Estates, etc.*, v. *Shepherd* (8187) 36 C.D. 787 and considers that neglect to cause proper estimates as required by the articles of association amounts to culpable negligence or reckless indifference in the performance of a director's duty.

In the last two cases upon the subject (the source of both Canadian) *Préfontaine* v. *Grenier* (1907) A.C. 101, and *Stavert* v. *Lovitt* (infra) the case of *Dovey* v. *Cory* is followed. In the former it is held that a president of a bank is not liable for neg-

ligence simply by reason of his having in good faith failed to detect the cashier's concealment of overdrafts, the cashier being the executive officer of the bank under the directors and that the fact that the president was remunerated for his services made no difference.

Stavert v. *Lovitt* (1907, Nova Scotia, not yet reported) a case against the directors of the Bank of Yarmouth is to the same effect and Mr. Justice Longley after referring to the leading cases says that "The directors had no reason for doubting the fidelity of Johns up to the final disclosure of his unauthorized and fraudulent conduct and they cannot be held responsible for failing to detect his misrepresentations."

The case is remarkable in this that it clearly covers want of capacity to grasp the situation. Mr. Justice Longley remarks that the evidence sustains all the reasons alleged for contending that the directors should have known (and this, it is submitted, is extremely near to constructive notice) but states that, as he understands the law, "Their failure to grasp the importance of each or any of these indicia will not make them responsible. In the absence of fraud or bad motive of any sort, they must be put down to errors of judgment and want of proper capacity to manage the financies of such an institution."

One interesting case may be referred to, that of *Re Cardiff Savings Bank, Marquis of Bute's Case* (1892) 2 Ch. 100. The Marquis was a mere figurehead and attended no meetings of the company of which he was a director. Stirling, J., discusses his liability owing to his non-attendance at any of the meetings and holds it not to be the same sort of neglect as the omission of the duty to be done at those meetings unless he had notice that there were in fact no meetings held or that none of the duties necessary to be done were performed at them.

A long line of cases upon the effect of knowledge or means of knowledge in regard to statements and prospectuses are only of interest so far as the effect of means of knowledge involves responsibility.

Kekewich, J., in *Re Liverpool Household Stores* (1890) 59

L.J. Ch. 616 required gross negligence to be proved, holding that such abstention from action or such action as the Court would hold to be mischievous and reckless, involving want of bonâ fide or honesty, was necessary. Byrne, J., in *Watts* v. *Bucknall* (1902) 2 Ch. 628, (1903) 1 Ch. 766, says the standard is whether the director can say that he has been defrauded or deceived into giving his sanction to a document which was not his. In *Broome* v. *Speak* (1903) 1 Ch. 586, affirmed, sub nom., *Shepheard* v. *Broome* (1904) A.C. 342 it was held that counsel's opinion was not sufficient to protect if the statement was in fact untrue and that honest though erroneous belief that the section did not apply to a particular contract of which the director knew is likewise ineffective.

The many decisions as to when directors are entitled to pay dividends shew the great difficulty of determining the true rule for ascertaining what is capital and what is income, and accentuate the extreme nicety required in fixing liability upon non-professional directors for acts into which actuarial calculations may enter.

An examination of the cases discussed in this article is most interesting as shewing the evolution of the principle that gross and culpable negligence in fact alone will render a director liable. Mistake, which renders a trustee liable, will not do. In business concerns much latitude must be given in the necessary subdivision of labour and responsibility. Where directors know of and take part in fraudulent acts they are liable and a like fate awaits those who refuse to give to their duties any care or judgment at all. This is gross negligence, but there must be proof of the absence of all attention before liability can attach. Speaking generally they lead to the result pointed out by Mr. Cook in his work on Corporations (section 703 note) where, in referring to the effect of the rules laid down by the Supreme Court of New York in *Bloom* v. *National United Co.* (1897) 152 N.Y. 114, he says that these rules very largely exempt directors of national banks from any liability whatever.

The question at the head of this article needs an answer. If the Courts in dealing with the question of the liability of directors has gone the length of practically absolving them, unless actually guilty of fraud or of such gross neglect as amounts to the same thing, is it not right that the office to which such small legal, and such large ostensible responsibility attaches should be abolished? It is not proper that such a condition of things should exist in any country where most of the business is done by limited liability companies without some effort to terminate it, by doing away with a name which is only a shadow and requiring corporations to be officered only by those who are in reality directors who direct.

FRANK E. HODGINS.

The recent decision of *Watt* v. *Watt* decided by the Supreme Court of British Columbia (noted post, p. 46) has caused some consternation in our western province. Doubtless legislation will be obtained as soon as possible to relieve those who have acted on the supposition that the Imperial Divorce and Matrimonial Causes Act is not in force in that province.

The Royal Arms have been recently placed over the Bench in the Courts of the Common Pleas and Chancery Divisions at Osgoode Hall, Toronto. These insignia of royalty serve to emphasize the fact that in the British Dominions the King is the fountain of justice, and that in his Superior Courts he is present in the person of his judges, to do justice not only between subject and subject, but also between subjects and the Crown itself. They also serve to emphasize the important principle involved in the words, "the King's peace," which forbids high and low, rich or poor, from taking the law into their own hands, and compels all alike to bow to the supremacy of the law as administered in the King's Courts. So long as we are true to the traditions of our forefathers these will be fundamental principles of law and liberty, and fittingly symbolized by the Royal Arms in our Courts of justice.

REVIEW OF CURRENT ENGLISH CASES.

MORTGAGE — VOLUNTARY ASSIGNMENT OF PART OF PROPERTY COVERED BY MORTGAGE—NO COVENANTS FOR TITLE—PARAMOUNT CHARGE—LIABILITY OF ASSIGNEE OF EQUITY TO CONTRIBUTE TO PAYMENT OF MORTGAGE DEBT—PAYMENT OF MORTGAGE DEBT BY EXECUTORS.

In re Darby, Rendall v. *Darby* (1907) 2 Ch. 465. A husband deposited with a bank by way equitable mortgage the title deeds of certain leasehold property together with a policy of life assurance and some dock warrants, as security for a debt. He subsequently by voluntary deed assigned the leasehold to his wife. The deed contained no reference to the equitable mortgage nor any covenant, express or implied, for title. On the death of the husband his executors paid off the mortgage and they claimed that they were entitled to claim contribution from the wife as assignee of the leasehold, but Warrington, J., considered that the husband having himself created the charge it was not, therefore, paramount to his own title, and the widow as assignee of leaseholds was under no liability to contribute to its payment, because the debt was the mortgagors' own, for which his estate was primarily and solely liable.

ANCIENT LIGHTS—ALTERATION OF BUILDING—NEW WINDOW RECEIVING SAME LIGHT AS OLD—ALTERATIONS MADE DURING PERIOD OF ACQUISITION OF RIGHT.

Andrews v. *Waite* (1907) 2 Ch. 500 was an action to restrain interference with the plaintiff's ancient lights. The lights in question had been acquired by user under the statute for upwards of twenty years. Pending the acquisition of the right the plaintiff's premises had been altered, and the original position of the windows changed, the wall having been torn down and re-erected nearer the defendant's buildings and the windows placed on a different level from that which they originally occupied, but as the judge found on the evidence the windows in their altered position still received the same or a portion of the same light as would have passed through the windows in their original position. These alterations, Neville, J., held had not the effect of preventing the acquisition of the right

to light, and, the defendant's erection being found to be a nuisance and obstruction of the plaintiff's lights, a mandatory order for its removal so far as it interfered with the light was granted.

COMPANY—DEBENTURE HOLDER'S ACTION—RECEIVER—DEBTS INCURRED BY RECEIVER AND MANAGER WITHOUT AUTHORITY—BANKRUPTCY OF RECEIVER—INSUFFICIENT ESTATE—COSTS—PRIORITIES.

In re London United Breweries, Smith v. *London United Breweries* (1907) 2 Ch. 511. This was a debenture holder's action in which a receiver and manager had been appointed. In carrying on the business of the company the receiver, without the authority of the Court, incurred liabilities. He subsequently became bankrupt, leaving the liabilities so incurred unpaid. The estate of the company having been realized the trustee of the bankrupt receiver claimed that the funds in Court, less the costs of realization, should be paid to him to apply on the debts incurred by the bankrupt as receiver and manager. The debenture holders claimed that the residue after payment of costs should be divided amongst the debenture holders. Neville, J., held that the funds in Court were applicable first in payment of the costs of realization, and secondly, in payment of the receiver's costs, and that the balance ought not to be paid to the trustee in bankruptcy, but that it should be distributed by the Court subject to an inquiry whether any and what debts outstanding had been properly incurred by the receiver in carrying on the business.

ANCIENT LIGHT — ENJOYMENT — "CONSENT OR AGREEMENT" — PRESCRIPTION ACT, 1832 (2 & 3 WM. IV. C. 71), SS. 3, 4— (R.S.O. C. 133, S. 35).

Hyman v. *Van Den Bergh* (1907) 2 Ch. 516 was also an action to restrain interference with the plaintiff's alleged ancient lights. It appeared that the plaintiff's lessee had in 1896 had nineteen years' possession of a certain cowshed having eight windows to which light came from over the defendant's premises: and that in that year the defendant placed an obstruction over the windows, the tenant removed the obstruction, and the windows remained unobstructed till 1898, when the defendant again obstructed them. The tenant again removed that obstruction, but being under the erroneous impression that he was not

entitled to an injunction to prevent the obstruction, the tenant sent to the defendant a letter agreeing to pay him a shilling a year for the lights. No answer was sent to the letter, but it was stamped as an agreement and the defendant relying on it refrained from re-erecting the obstruction. The promised shilling was never paid. In 1903 payment of arrears was demanded, but they were not paid. In 1906 the defendant having again obstructed the windows the present action was brought by the owner of the freehold of the dominant tenement, and Parker, J., held that it could not be maintained as the letter of 1898 was a "consent or agreement" within the meaning of the statute, 2 & 3 Wm. IV. c. 71, s. 3, (R.S.O. c. 133, s. 35), and consequently that there had not been an uninterrupted user for twenty years before action without such consent or agreement; and the agreement, though signed by only one of the parties, and he merely the lessee of the dominant tenement, was held to be a sufficient agreement within the statute.

STATUTE OF LIMITATIONS — MORTGAGE — EXTINGUISHMENT OF TITLE OF SECOND MORTGAGEE—PRIOR MORTGAGEE IN POSSESSION—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 WM. IV. C. 27), S. 2—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. C. 57), SS. 1, 2—(R.S.O. C. 133, S. 23).

In *Johnson* v. *Brock* (1907) 2 Ch. 533, Parker, J., has decided that a second mortgagee may be barred under the Statute of Limitations (see R.S.O. c. 133, s. 23), as against his mortgagor after the lapse of the statutory period before action, in the absence of payment or acknowledgment by the mortgagor, notwithstanding that during such period a prior mortgagee may have been in possession of the mortgaged property.

CONTRACT—ACTION OF DECEIT—FRAUDULENT REPRESENTATIONS BY AGENT—PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56-57 VICT. C. 61), S. 1—(R.S.O. C. 88, S. 1).

Pearson v. *Dublin* (1907) A.C. 351 is an important decision of the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Ashbourne, Macnaghten, James, Robertson, Atkinson and Collins), in which they have reversed the decision of the Lord Chief Baron of Ireland, and the Irish Court of Appeal. The action was for deceit and was brought in the following circum-

stances. The defendants, the corporation of Dublin, invited tenders for certain harbour works. The plans and specifications prepared by the defendants' engineer contained a representation as to the existence of a certain wall at a certain depth below the surface, and the plaintiffs tendered on the faith that such representation was true. The contract subsequently entered into by the plaintiffs provided that they were to verify all representations for themselves as to the levels and nature of all existing works and other things connected with the contract works. At the trial of the action the plaintiffs adduced evidence which their Lordships held was primâ facie sufficient to submit to a jury, to the effect that the representations as to the work in question had been made by the defendants' agents fraudulently and without any reasonable ground for believing them to be true, and for the purpose of inducing low tenders to be made for the work required to be done. The learned Chief Baron, who tried the action, though agreeing to that view, nevertheless thought that the clause in the contract requiring the plaintiffs to verify for themselves all representations, exonerated the defendants from liability for erroneous statements however made, and he therefore withdrew the case from the jury and nonsuited the plaintiffs, and his judgment was affirmed by the Irish Court of Appeal. The House of Lords, however, took the wider and juster view that the clause in the contract only protected the defendants from liability for erroneous statements made honestly and in good faith and did not relieve them from liability for deceit where they or their agents had made fraudulent representations. All the Courts agreed that the Public Authorities Protection Act (see R.S.O. c. 88, s. 1) did not apply to such a case, as the act complained of was not done in the exercise of any public duty.

PATENT—AMBIGUOUS DESCRIPTION OF LAND—USER—EVIDENCE.

Attorney-General v. *Vandeleur* (1907) A.C. 369 may be [illegible] referred as throwing light on the effect of ambiguous words in a Crown patent. The Attorney-General for Ireland claimed on behalf of the Crown to be entitled to the merchants' quay at Kilrush. The defendant claimed under a Crown grant made in 1621. Admittedly the land adjacent to this foreshore was included in the grant, it did not in terms include it, but the language used may or may not have included it. In these circumstances the House of Lords (Lord Loreburn, L.C., and Lords

James and Collins) held that evidence as to user might be legitimately adduced to solve its meaning, and it appearing by the evidence that the defendant and his predecessors in title had had possession of the land and had erected the quay in question between fifty and sixty years ago; that it had originally been commenced by the Crown as a public work, but that the work had been subsequently abandoned by the Crown, and the defendant had repaid to the Crown all its expenditure and had himself proceeded and completed the quay at his own expense; it was therefore held that the grant in question ought to be construed as covering the locus in quo.

SHIP—SEAMAN—CONTRACT FOR SERVICE FOR ORDINARY VOYAGE—CARRIAGE OF CONTRABAND—REFUSAL TO PROCEED TO BELLIGERENT PORT—WAGES.

Palace Shipping Co. v. *Caine* (1907) A.C. 386 is the case known as *Caine* v. *Palace Steam Shipping Co.* (1907) 1 K.B. 670 (noted ante, vol. 43, p. 402, under the erroneous name of *Carrie* v. *Palace Steam Shipping Co.*). The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson and Atkinson) have affirmed the decision of the Court of Appeal, that a seaman contracting for an ordinary voyage cannot be compelled to proceed to a belligerent port in a ship carrying contraband of war, but is entitled to claim his discharge and wages up to the final adjudication of his claim. Lord Atkinson differed as to the amount recoverable.

RAILWAY COMPANY—OMNIBUS BUSINESS—INCIDENTAL POWERS—ULTRA VIRES.

In *Attorney-General* v. *Mersey Ry. Co.* (1907) A.C. 415 the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Macnaghten, James and Atkinson) have reversed the decision of the Court of Appeal (1907) 1 Ch. 81. The action was in the nature of an information on the part of the Crown to restrain the defendant company from carrying on as incidental to their railway business, the business of carrying passengers by omnibuses. Warrington, J. (1906) 1 Ch. 811 (noted ante, vol. 42, p. 561), decided that it was ultra vires of the company to carry on an omnibus business. The Court of Appeal, however, dissolved the injunction upon the defendants undertaking not to carry by their omnibuses any persons who were not intending

passengers on their railway, but the House of Lord holds that such an undertaking is impracticable and restored the judgment of Warrington, J.

LIGHT—PRESCRIPTION—DOMINANT AND SERVIENT TENEMENT HELD BY DIFFERENT LESSEES UNDER SAME LANDLORD—PRESCRIPTION ACT, 1832 (2 & 3 WM. IV. C. 71), S. 3—(R.S.O. C. 133, SS. 35, 36).

In *Morgan* v. *Fear* (1907) A.C. 425 the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson, Atkinson and Collins) have unanimously affirmed the decision of the Court of Appeal (1906) 2 Ch. 406 (noted ante, vol. 43, 14). It may, therefore, be considered to be now settled law that one lessee may effectually acquire by prescription an easement of light as against another lessee of the same landlord. In Ontario, however, this only applies to the past, as since the 5th March, 1880, it has not been possible in this province to acquire by prescription an easement of light. See R.S.O. c. 133, s. 36.

TRADE NAME—INJUNCTION—SIMILARITY OF NAME.

The Dunlop Pneumatic Tyre Company v. *Dunlop Motor Co.* (1907) A.C. 430 seems somewhat to conflict with the case of *Fine Cotton Spinners* v. *Harwood* recently noted (see ante, p. 646). In this case two brothers under the style of R. & J. F. Dunlop carried on the business of selling and repairing bicycles, tricycles and motors. In 1904 the brothers registered a company called the Dunlop Motor Co., which company took over the business of R. & J. F. Dunlop and carried on a similar business to that previously carried on by that firm. The plaintiffs, who carried on a similar business, claimed that the name of the defendant company was an interference with their rights and they claimed an injunction against the use of the name of "The Dunlop Motor Co.," or any other name comprising the word "Dunlop," as being an infringement of the plaintiffs' trade name. The Scotch Court of Session on the evidence held that there was no proof that any one would be misled into thinking that the two companies were the same; and also that the plaintiffs had no exclusive right to the name of "Dunlop," which decision was affirmed by the House of Lords (Lord Loreburn, L.C., and Lords Robertson and Collins).

PROBATE DUTIES—SHARE OF DECEASED PARTNER—BUSINESS CARRIED ON IN A COLONY.

In *Commissioner of Stamp Duties* v. *Salting* (1907) A.C. 449, the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Ashbourne and Macnaghten and Sir A. Wilson and Sir A. Wills) reversed the judgment of the Supreme Court of New South Wales. The question was whether the probate duties imposed by an Australian statute were payable in respect of the share of a deceased person in a business carried on by him in partnership in Australia, he having been domiciled and having died in England. The Colonial Court held that it was not, but the Judicial Committee decide that it was; that the liability of the estate to duty depends on its local situation and that the share of a deceased partner is situate where the business has been carried on at the time of his death.

STATUTORY POWERS — NEGLIGENCE IN EXERCISING STATUTORY POWERS—EVIDENCE.

Dumphy v. *Montreal Light, H. & P. Co.* (1907) A.C. 454 was an appeal from the Court of King's Bench of Quebec. The plaintiff's husband had been killed by reason of a derrick he was using having come in contact with an overhead electric wire of the defendants. The defendants were authorized by a Quebec statute in the alternative to carry their wires overhead or underground. The plaintiff claimed that they were guilty of negligence in not having put the wire which caused the accident underground; but the Judicial Committee of the Privy Council (Lords Robertson and Collins, and Wilson, Taschereau, and Wills, Knts.) agreed with the Quebec Court that the defendants were not guilty of negligence in adopting one of the alternatives authorized by the statute. The Judicial Committee also held that the defendants' omission to insulate or guard the wire in question could not be regarded as negligence on their part in the absence of evidence that such precaution would have been effectual to avert the accident.

PATENT—APPLICATION TO EXTEND PATENT—NON-COMPLIANCE WITH STATUTORY CONDITIONS—DISPENSING WITH STATUTE.

In re Frieze-Green's Patent (1907) A.C. 460. An application was made to extend a patent of invention under the Patents Act, 1883. The statute prescribed, as a preliminary to such

applications, that advertisements shall be published. The applicant had inadvertently omitted to advertise. The Judicial Committee decided that it had no power to dispense with the express provisions of a statute, and refused the application.

SPECIAL LEAVE TO APPEAL—COLONIAL STATUTE.

In *Tilonko* v. *Attorney-General* (1907) A.C. 461 an application was made to the Judicial Committee of the Privy Council for special leave to appeal from a decision of the Supreme Court of Natal. But it appearing that the question sought to be raised on the appeal had been settled by a colonial statute, the application was refused, it not being considered within the province of the Board to discuss or consider the policy, expediency or wisdom of a statute, or to do anything beyond deciding whether the Act applies.

BRITISH COLUMBIA—POWERS OF LOCAL LEGISLATURE—VANCOUVER ISLAND SETTLERS' RIGHTS ACT, 1904 — CONSTRUCTION—B.N.A. ACT, S 92(10).

McGregor v. *Esquimalt & Nanaimo Ry.* (1907) A.C. 462 strikes us as a somewhat peculiar case. The facts appear to be as follows. By an Act of the Legislature of B.C., 47 Vict. c. 14, the lands in question, with other lands, were vested in the Dominion Government for the purpose of being granted to the defendant railway as an aid to its construction. At that time there were settlers on this railway belt of whom the appellant was one, no provision appears to have been made protecting their rights. The Dominion Government granted the lands in question with others to the respondents as intended on 21st April, 1887. In 1904 the Legislature of British Columbia passed the Vancouver Island Settlers' Rights Act, whereby it was provided that those settlers within the railway belt prior to the Act 47 Vict. c. 14, should be entitled to grants in fee simple of the lots of which they were in possession, and under this latter Act a grant of the lot in question was made to the appellant. It seems to have been conceded that the appellant was entitled under this grant to the surface rights of the lot, but the respondents claimed that they were entitled to all mines and minerals on the lot. The patent issued under the Act of 1904 contained no reservation of mines and minerals. Martin, J., who tried the action held that the Act of 1904 was within the powers of the local

Legislature as being in relation to property and civil rights within the meaning of B.N.A. Act, s. 92(13), and the grant made thereunder was valid. The Supreme Court of British Columbia, however, reversed his decision, considering the Act of 1904 ineffectual to divest the rights of the respondents under the grant from the Dominion Government. The Judicial Committee (the Lord Chancellor, Lords Halsbury, Ashbourne, Macnaghten, and Collins, and Wilson and Wills, Knts.) have reversed the decision of the Supreme Court of British Columbia and hold the Act of 1904 to be intra vires; and the respondents' railway as being a purely local undertaking within the jurisdiction of the local Legislature under B.N.A. Act, s. 92 (10). The result seems to be that land granted by the Crown as a subsidy to a railway undertaking, may afterwards be taken away from the railway and given to someone else by a subsequent statute. The only justification for such a course, however, would appear to be the fact, as in the present case, that the subsequent grantee had at the time of the prior grant some equitable claim to the land in question which had not been protected. One would imagine, however, that in such circumstances the railway, thus deprived, would have an equitable claim to compensation against the Crown.

ELECTRIC LIGHT — STATUTE — CONSTRUCTION — PREFERENCE — EQUALITY.

Attorney-General v. *Melbourne* (1907) A.C. 469. This was an appeal from the High Court of Australia. By an Australian statute the respondents were empowered to supply electricity within the City of Melbourne. The Act provided that every person within the area of the city should be entitled to a supply on equal terms and that no preference should be given to any person. The respondents gave customers an option to take electricity under two different systems of charge—one at a fixed rate and the other at a rate varying with the amount consumed. The High Court held that this was not a contravention of the provisions above referred to, and the Judicial Committee of the Privy Council (the Lord Chancellor, and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) affirmed their decision. The preference prohibited being as between customers dealing under the same system and not as between customers dealing under different systems.

CONTRACT—LESSOR AND LESSEE—IMPLIED OBLIGATIONS AS TO QUIET ENJOYMENT—INTENTION OF PARTIES—NOISE AND VIBRATION—INJUNCTION.

Lyttleton Times v. *Warners* (1907) A.C. 476 was an action by lessees against their lessors for an injunction to enforce an implied covenant for quiet enjoyment of the demised premises. The facts were, that the defendants owned a printing establishment adjoining hotel premises occupied by the plaintiffs and it was agreed that the defendants should reconstruct their premises so as to provide rooms above their printing office which could be used as bed rooms for the plaintiffs' hotel, of which rooms they were to become lessees. The premises were accordingly reconstructed and the rooms above leased to the plaintiffs, but it was found that the enjoyment thereof was disturbed by the noise and vibration consequent on carrying on the printing business below them. The plaintiffs claimed an injunction against the working of the defendants' machinery between 9 p.m. and 8 a.m. The Court of Appeal for New Zealand decided in favour of the plaintiffs, the lessees; but the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Robertson and Collins, and Sir F. North and Sir A. Wilson) reversed that decision, holding that the implied obligation for quiet enjoyment was controlled by the common intention of the parties that the defendants' printing business should continue to be carried on.

COVENANT TO PAY ANNUITY FOR WIFE'S SUPPORT—RESTRAINT AGAINST ANTICIPATION—RIGHT TO ANNUL COVENANT ON NOTICE TO TRUSTEE—WIFE'S WAIVER OF NOTICE.

Mcnaghten v. *Paterson* (1907) A.C. 483. This was an appeal from the High Court of Australia. By a separation deed made in 1894 a husband covenanted to pay an annuity to trustees for his wife's benefit without power of anticipation, but it was provided that if the husband gave notice to the trustees after the expiration of twelve months from the date of the deed, of his intention to pay a reduced amount, in such case, unless all parties agreed as to the reduced amount to be paid, all covenants in the deed should be null and void. Before the expiration of the twelve months the husband notified the wife's solicitors of his intention to pay a reduced amount, and the wife instructed her solicitors to waive the stipulated notice to the trustees. No agreement appeared to have been made as to the reduced

amount to be paid, but in 1904 the trustees brought the present action claiming arrears under the covenant as a still subsisting covenant. The High Court held that the action was not maintainable, and that the wife's waiver of the notice to the trustees was sufficient; and on the true construction of the restraint clause, that applied to the annuity so long as it was payable, but not to the notice as contended by the appellant. The Judicial Committee (The Lord Chancellor and Lords Ashbourne and Macnaghten and Sir A. Wilson and Sir A. Wills) affirmed the decision.

WILL—ALTERNATIVE ABSOLUTE GIFTS—CONSTRUCTION.

McCormick v. *Simpson* (1907) A.C. 494, though a Quebec case, involves a point of general interest. A testator by his will devised land to his widow for life after her death to his eldest son John for life, and "thereafter to become the absolute property of John's eldest son," and alternatively "to become the property of my son James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue. James and his son, who predeceased him, survived the widow. The question was, what estate James took. The Judicial Committee of the Privy Council (Lords Robertson and Collins, and Sir A. Wilson, Sir H. Taschereau and Sir A. Wills) agreed with the Quebec Court of King's Bench, that the gift to John's eldest son being an absolute interest, the alternative gift to James and his son must in the absence of words importing a different intention be construed as also absolute, and the gift over in the case of the death of James without male issue was defeated if either James or his son lived to take absolutely.

CANADA TEMPERANCE ACT, 1888 (51 VICT. C. 34), S. 10—SEARCH WARRANT BEFORE PROSECUTION.

In *Townsend* v. *Cox* (1907) A.C. 514 the Judicial Committee of the Privy Council affirmed the judgment of the Supreme Court of Nova Scotia, holding that under the Canada Temperance Act, 1888, it is competent to issue a search warrant without previously instituting a prosecution for breach of the Act.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [Oct. 17, 1907.

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

Negligence—Electric lighting—Dangerous currents—Trespass—Breach of contract—Surreptitious installations—Liability for damages.

P. obtained electric lighting service for his dwelling only, and signed a contract with the company whereby he agreed to use the supply for that purpose only, to make no new connections without permission, and to provide and maintain the house-wiring and appliances "in efficient condition, with proper protective devices, the whole according to Fire Underwriters' requirements." He surreptitiously connected wires with the house-wiring and carried the current into an adjacent building for the purpose of lighting other premises by means of a portable electric lamp. On one occasion, while attempting to use this portable lamp, he sustained an electric shock which caused his death. In an action by his widow to recover damages from the company for negligently allowing dangerous currents of electricity to escape from a defective transformer through which the current was passed into the dwelling.

Held, reversing the judgment appealed from, that there was no duty owing by the company towards deceased in respect of the installation so made by him without their knowledge and in breach of his contract and that, as the accident occurred through contact with the wiring which he had so connected without their permission, the company could not be held liable in damages.

Appeal allowed with costs.

Archer, K.C., and *G. H. Montgomery*, for appellants. *Henry J. Elliott* and *H. R. Bisaillon*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Court of Appeal.] RE GIBSON. [Oct. 4, 1907.

Lunatic—Detention in asylum—Informalities in certificate—Habeas corpus—Application for discharge under—Affidavit shewing it to be dangerous for alleged lunatic to be at large—Direction of trial of issue as to sanity.

Where the discharge of a person detained in a lunatic asylum as a lunatic was moved for under a writ of habeas corpus, by reason of alleged informalities in the certificate, on which the alleged lunatic had been admitted; but it appearing from the affidavit filed by the superintendent and others in the asylum that it would be dangerous to allow him to be at large, the Court directed the trial of an issue as to his sanity; the application for the discharge to stand over, pending the result of the issue or other order of the Court.

Re Shuttleworth (1846) 2 Q.B. 651, approved.

Judgment of TEETZEL, J., vared.

J. W. McCullough, for the appellant. *J. R. Cartwright*, K.C., for the respondent.

Court of Appeal.] IREDALE *v.* LOUDON. [Nov. 2, 1907.

Limitation of actions—Possession—Exclusive prescription—Adverse possession of a portion of a building.

Appeal from judgment in this case reported 14 O.L.R. 17, allowed, and action dismissed and counter-claim allowed with costs. It is very doubtful if the Statute of Limitations is applicable to possession of an upper room or flat in a building, but at any rate the plaintiff is not entitled to annex to what he may acquire by force of the statute any further right or implied obligation of support; and it is doubtful if he can acquire easement of support even by a possession of twenty years.

W. D. McPherson, for defendant, appellant. *Tilley* and *Parmenter*, for plaintiff.

Full Court.] REX *v.* SUNFIELD. [Dec. 7, 1907.

Criminal law—Evidence—Dying declaration—Threats—Improper admission of evidence—No substantial wrong or miscarriage—Criminal Code, s. 1019.

Upon the trial of the prisoner for the murder of a foreigner, the evidence shewed that the deceased was found lying on the floor of a bedroom in his house. He was lifted up and laid upon the bed, when it appeared that he had received a wound from a pistol bullet, and it was subsequently shewn that this wound was the cause of his death. A man testified that shortly afterwards he entered the room and asked the deceased, "Who cut you," to which the deceased answered, "No cut, Jake shoot." The witness then said to the deceased that he would send for a doctor, and the deceased answered, "No doctor, Billy, me die."

Held, that the statement of the deceased "Jake shoot," that is, that the prisoner shot him, as related by the witness, was properly received in evidence as a dying declaration, the words "No doctor, me die," being sufficient to shew that the deceased spoke under a belief without hope that he was about to die from the wound that had been inflicted upon him; and it made no difference that the words incriminating the prisoner preceded the words shewing the expectation of death.

Held, also, that there was no reason for excluding testimony proving quarrels between the deceased and the prisoner and threats made by the latter.

Evidence of threats made by the prisoner to another person was improperly admitted, but, in the circumstances, no substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence, and therefore, under s. 1019 of the Criminal Code, the conviction should not be set aside or a new trial directed.

J. G. Farmer and *J. L. Counsell,* for prisoner. *J. R. Cartwright,* K.C., for Crown.

Full Court.] REX *v.* LEE GUEY. [Dec. 13, 1907.

Criminal law—Keeping common gaming house—Summary trial—Police magistrate—Right of accused to elect to be tried by jury—Criminal Code, ss. 773, 774.

A police magistrate has not absolute and summary jurisdiction under ss. 773 and 774 of the Criminal Code to try, without

their consent, persons accused [illegible]ing a common gaming house; such persons have the right to elect to be tried by a jury; the words "disorderly house" in s. 773 do not include "common gaming house," but are limited by the words which immediately follow them, "house of ill fame or bawdy house." *The Queen* v. *France* (1898) 1 Can. Crim. Cas. 32 approved and followed.

The accused having been illegally tried and convicted before a magistrate, their conviction was quashed, and it was directed that they should be accorded the right of election to be tried by or without a jury, and that they should be tried accordingly.

A. M. Lewis, for the accused. *Cartwright*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Divisional Court.] McCANN *v.* MARTIN. [Oct. 30, 1907.

Chattel mortgage—Renewal—Time of filing—Computation of time.

A chattel mortgage filed on April 26th, 1904, at the hour of 10 a.m. is renewed within time if the renewal be filed on April 26th, 1905, at the hour of 10 a.m.

W. R. Smyth, for plaintiff, appellant.

Divisional Court, Q.B.D.] [Nov. 5, 1907.

REX *v.* LOWERY.

Habeas corpus—Discharge of prisoner—Condition of not bringing action being against magistrate.

Where a prisoner is entitled to his discharge, under habeas corpus, by reason of no offence being disclosed in the papers under which he was committed, such discharge cannot be made conditional on no action being brought against the magistrate, or other person in respect of the conviction, or anything done thereunder.

D. O. Cameron, for prisoner. *Cartwright*, K.C., for Crown.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Nov. 12, 1907.

BELLEVILLE BRIDGE CO. *v.* TOWNSHIP OF AMELIASBURG.

Assessment—Toll bridge over navigable waters—Liability to assessment—Real property—Easement—Exemptions — Interest of Crown—Bridge forming part of toll road—Public road or way.

A toll bridge across the waters of the Bay of Quinté, and its approaches, erected by a company incorporated by 50 & 51 Vict. c. 97(D.), and acquired by the plaintiffs, who were incorporated by 62 & 63 Vict. c. 95 (D.), was held to be liable to assessment, as regards the part situate in the township of Ameliasburg, as real property, within the meaning of the Ontario Assessment Act, 4 Edw. VII. c. 23.

The effect of the two Dominion statutes referred to is to confer a perpetual right in the nature of an easement to construct and maintain the bridge across the navigable waters of the Bay of Quinté; the words "real property," in s. 2 (7), of the Assessment Act, by virtue of s. 2 (8), of the Municipal Act, 1903, include an easement; and the bridge comes within none of the exemptions mentioned in the Assessment Act. The interest of the Crown, liable under the general words of the statute; and the plaintiffs were not agents or trustees for the Crown. Sec. 37 of the Act applies only to a bridge forming part of a toll road, and not to this bridge; nor is this bridge a public road or way, within the meaning of s. 5 (5) of the Assessment Act.

Niagara Falls Suspension Bridge Co. v. *Gardner* (1869) 29 U.C.R.94; *In re Queenston Heights Bridge Assessment* (1901) 1 O.L.R. 114, and *International Bridge Co.* v. *Village of Bridgeburg* (1906) 12 O.L.R. 314 followed.

Judgment of BOYD, C., affirmed.

E. G. Porter, for plaintiffs. *W. S. Morden*, for defendants.

Divisional Court, Ch.D.] [Nov. 18, 1907.

REX *v.* BRISBOIS.

Liquor License Act—Selling liquor without a license—Absence of evidence to shew sale by defendant.

Where defendant was convicted and imprisoned for the sale of liquor without a license, but the evidence returned in re-

sponse to certiorari issued in aid of a writ of habeas corpus, while disclosing a sale on the premises, failed to shew a sale by the defendant himself the conviction and imprisonment of the defendant was held to be illegal and an order made for his discharge from custody.

J. B. MacKenzie, for defendant. *Cartwright,* K.C., for Crown and convicting magistrate.

Divisional Court, Ch.D.] [Nov. 18, 1907.

LAWSON *v.* CRAWFORD.

Injunction—Interim—Primâ facie case disclosed—Subsequent displacement.

Sub-section 9 of section 58 of the O. J. Act, R.S.O. 1897, c. 51, does not give any new right to claim an injunction, or extend the jurisdiction of the Court, or alter the principles upon which it gives summary relief by interlocutory injunction.

S. R. Clarke, for defendant. *Watson,* K.C., for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Dec. 9, 1907.

BRYANS *v.* MOFFATT.

Jury notice—Striking out—Discretion exercised before trial—Equitable defence.

The discretion of a judge in Chambers in striking out a jury notice, in an action to be tried outside of Toronto, was held to have been properly exercised where the action was brought by the executors of a deceased mortgagee upon the covenant contained in the mortgage deed, and the defence was that the written documents, the mortgage deed and the deed of conveyance to the mortgagors, did not express the true agreement between the parties.

Semble, per MEREDITH, C.J.C.P., that the rule laid down in *Montgomery* v. *Ryan* (1906) 13 O.L.R. 397 might well be extended to all cases, whether to be tried in Toronto or elsewhere.

Semble, also, that the facts alleged in the defence would not

have been admissible under the plea of non est factum; that the defence was really an equitable one, involving rectification of the instrument sued upon; and in that case the jury notice would be irregular.

Order of BOYD, C., affirmed.

H. E. Rose, for defendants. *A. C. Macdonell*, for plaintiffs.

Boyd, C.] T.—— *v.* B.——. [Dec. 10, 1907.

Marriage—Declaration of nullity—Impotence—Jurisdiction.

The High Court of Justice has no jurisdiction to entertain an action to have a marriage declared null and void by reason of the alleged incapacity and impotence of one of the parties.

Lawless v. *Chamberlain* (1899) 18 O.R. 296 distinguished.

C. W. Thompson, for plaintiff. *H. W. Mickle*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] ROBINSON *v.* MCNEIL. [Nov. 14.

Gaming debt—Action for money borrowed to pay—Notice of assignment of debt — Immaterial slip — Code s. 226*—Statute* 9 *Annc.*

Defendant was a participant in several games of poker at hotels in the City of H., and being a loser and unable to pay, borrowed money for that purpose from L. and A. giving his cheques therefor. The cheques were dishonoured at the bank, and in the case of A., a promissory note was given for the amount, which was also dishonoured at maturity. The claims were assigned to plaintiff who brought action to recover the amount.

Held, 1. Notice of the assignment, signed by plaintiff "by his attorneys," was sufficient.

2. The notice setting forth the assignment accurately, a slip made in post-dating the notice was immaterial.

3. In the absence of evidence to shew that the proprietors of the hotels had any interest in the game or derived profit therefrom or had knowledge that it was going on, the hotel was not "a house, room or place kept for gain to which persons resort for the purpose of playing at any game of chance or at any mixed game of chance and skill" within the meaning of the Criminal Code, s. 226, (R.S.C. vol. 3, c. 146).

4. Assuming the statute 9 Anne to be in force in Nova Scotia (as to which quære) the money advanced by L. and A. at the request of defendant for the purpose of enabling him to pay his losses, was not a gaming debt within the meaning of the statute, but was recoverable at common law.

W. B. A. Ritchie, K.C., and *Mellish*, K.C., for plaintiff *A. A. Mackay*, and *J. M. Chisholm*, for defendant.

Full Bench.] THE KING *v.* BARNES. [Nov. 23, 1907.

Crown case—Matter touching regularity of trial—Power of judge to reserve case.

Defendant was indicted and tried for the offence of rape committed upon the person of a girl a few weeks over the age of 14 years. The jury found him guilty with a recommendation to mercy and he was sentenced to be committed to jail for the term of one year. The prisoner before sentence moved for a reserved case upon the affidavits of his solicitor and two of the jurymen to the effect that while the jury were engaged in deliberating upon the case the sheriff of the county, who had been called into the juryroom, made a statement giving them to understand that if they found the prisoner guilty and recommended him to mercy the judge would impose a light sentence. The trial judge reserved a case for the opinion of the Court finding that the statement alleged was calculated to influence the jury in finding the verdict which they did. On argument the preliminary objection was taken that the judge had no right or authority to enter upon or conduct an enquiry into any matter of fact touching the regularity of the trial, which had been concluded, and that the enquiry made by him and his finding of fact touching the alleged acts of the sheriff were without warrant in law and that no case could be reserved or stated in connection with such enquiry.

Held, that the point was well taken.

RUSSELL, J. (dubitante), dissented in order to enable an appeal to be taken.

Roscoe, K.C., for prisoner. *Cluney*, for Crown.

Full Bench.] THE KING *v.* SAM CHAK. [Nov. 30, 1907.

Chinese Immigration Act—Non-payment of duty—Not a criminal offence—Connection set aside.

Defendant was tried and convicted before a County Court judge for violating the provisions of R.S.C. c. 95, ss. 7, 30, in that the being a person of Chinese origin did enter Canada without paying the tax required by s. 7 of the said Act. The learned judge reserved several questions for the opinion of the Court including the following: "Does the accusation sufficiently charge the defendant with an indictable offence under ss. 7 and 30 of c. 95 of the Revised Statutes of Canada, 1906."

Held, that while the statute imposes a tax upon persons of Chinese origin entering Canada, with certain exceptions, and provides machinery for the collection of the tax, it does not make the entering Canada by such persons without payment of the tax a criminal offence, and that the defendant not being charged with any criminal offence his conviction was unwarranted and must be set aside and that he was entitled to his discharge.

DRYSDALE, J., dissented.

Power, K.C., and *F. McDonald*, for prisoner. *Smith*, for the Crown.

Full Bench.] CRAIG *v.* THOMPSON. [Nov. 30, 1907.

Champerty and maintenance—Agreement to assist party to action—Consideration.

Plaintiff who had been a shareholder and secretary of a mining company for a number of years, and had charge of its books and an intimate knowledge of its affairs, entered into an agreement in writing with defendant, the principal shareholder in the company, to give him certain assistance for the purpose of enabling him to win a suit then pending between defendant and another shareholder in relation to an option upon an adjoining

property originally held by the company, but which defendant had had transferred to himself. In consideration of the proposed assistance, defendant agreed to pay plaintiff a sum of money in cash in the event of his winning the suit and a further sum when a sale of the property was effected.

At the time of the agreement plaintiff had ceased to be a shareholder and had been paid his salary as secretary and no interest either legal or equitable was shewn to justify his interference in the litigation.

Held, allowing defendant's appeal with costs, that the contract was illegal on the ground of maintenance and that plaintiff could not recover.

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

Full Court.] RAFUSE *v.* ERNST. [Nov. 30.

Appeal—Issues of fact—Refusal to disturb findings.

Where the matters in issue between the parties, plaintiff and defendant were entirely matters of fact, the evidence was very contradictory, and the trial judge accepted as true the version of the plaintiff and his witnesses as being the more consonant with reason and the probabilities of the mode of dealing between the parties, the Court refused to disturb the findings and dismisses defendant's appeal with costs.

McLean, K.C., for appellant. *Paton*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] RE HARVIE. [Nov. 25, 1907.

Will—Attestation by witnesses—Affidavit of execution substituted for ordinary attestation clause.

At the execution of the last will of the deceased in Portland, Oregon, the attorney substituted a formal affidavit of execu-

tion at the foot of the will and below the signature of the testatrix for the usual attestation clause. This affidavit extended over part of another page but was signed by the witnesses in the presence of the testatrix and then sworn to by them. Their evidence shewed that they intended to and did witness the will and also intended to subscribe it as witnesses.

Held, that s. 5 of The Wills Act, R.S.M. 1902, had been sufficiently complied with and that the will had been validly executed. *Griffiths* v. *Griffiths*, L.R. 2 P & D. 300, followed.

McLeod, for applicant. *Haggart*, K.C., for contesting parties.

KING'S BENCH.

Macdonald, J.] CATTU *v.* OSBORNE. [Nov. 19, 1907.

Contempt of Court—Release on payment of costs—Purging contempt.

Application for the release of the defendant Litster who had been committed to jail under an attachment for contempt of Court in not producing a certain minute book which he had been ordered to produce. The prisoner swore that he had left the book at the hall of the union and had not since been able to find it. His mother swore that she had burned a minute book, her son having told her there was trouble over it, thinking that, if the cause of the trouble were removed, the trouble itself would cease, and that her son knew nothing about her having destroyed it.

The learned judge was not satisfied that the book burned by the mother was the book the prisoner had been required to produce and believed that the latter had been put out of the way by members of the executive of the union or through their connivance, but that it was now out of the power of the prisoner to produce it.

Held, that the prisoner had not purged his contempt, and should only be released on payment of all costs occasioned by his misconduct in connection with the lost book, unless it were shewn that such costs could not be paid by reason of poverty. *In re M.*, 46 L.J. Ch. 24, followed. *Monkman* v. *Sinnott*, 3 M.R. 170, distinguished.

Knott, for prisoner. *O'Connor* and *Blackwood*, for plaintiffs.

Province of British Columbia.

SUPREME COURT.

Clement, J.] WATT *v.* WATT. [Nov. 10, 1907.

Divorce—Stare decisis—Divorce and Matrimonial Causes Act, 1857 (Imp.), how far in force in British Columbia—Jurisdiction of Supreme Court to grant decree of divorce a vinculo.

The Divorce and Matrimonial Causes Act, 1857 (Imp.), is not in force in British Columbia and the Supreme Court has no jurisdiction to grant a divorce a vinculo.

The decision in *S.* v. *S.* (1877) 1 B.C. (Pt. 1) 25, not being the decision of an appellate tribunal, nor of the Full Court sitting in banc, is not technically binding on the Court even when constituted of a single judge. The view of Begbie, C.J., in *S.* v. *S.*, adopted in preference to that of the other two judges (Crease and Gray, JJ.). That in the circumstances the rule stare decisis could not apply more particularly as the question is one of jurisdiction.

Semble, If the Court has jurisdiction it may be exercised by a single judge sitting as the Court.

Wilson, K.C., for the Attorney-General. *J. A. Russell*, for petitioner. *Woodworth*, for respondent.

Full Court.] BAGSHAWE *v.* ROWLAND. [Nov. 28, 1907.

Principal and agent—Sale of land—Commission for securing purchaser, able and willing to purchase.

In order to earn his commission, the agent must produce to the vendor a party able, ready and willing to purchase on the terms given to the agent by the vendor, and if the transaction is prevented from becoming a binding contract only through the fault or default of the vendor, the agent does not thereby become disentitled.

Dictum of Lord Esher, M.R. in *Grogan* v. *Smith* (1890) 7 T. L. R. 132 followed.

A. E. McPhillips, K.C., for appellant, defendant. *W. J. Taylor*, K.C., for respondent, plaintiff.

Book Reviews.

Negligence in Law. Third edition. (Canadian edition.) By THOMAS BEVEN, of the Inner Temple, Barrister-at-law. London: Stevens & Haynes. Toronto: Canada Law Book Company, Limited, 1908.

The latest edition of Beven's great work on the law of Negligence, which has been in preparati n for the last three or four years, has just issued from the press.

A special feature of this edition is that reference is made to all the important Canadian cases. The learned author has systematically gone through all our Reports, and they have been treated on the same footing as the English Reports. For example, *Blain* v. *Canadian Pacific Railway Co.*, 34 Can. S.C.R. 74, is cited and fully considered as to the extent of the duty of carriers to afford protection to passengers on their trains, and *Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, is cited as to a master's duty to his servant to prevent injury from defective appliances.

It also contains the more important American cases, which serve to illustrate not only the sharp differences which, on particular points, exist between English and American decisions, but also to shew that the broad, general principles of the law, as declared by the judges of both countries, are identical. In the author's own words, American cases must "always have a place in English treatises ambitious of excellence." Special reference is made to American authorities on points not covered by English decisions. Over 1,400 new cases have been cited and considered in this edition.

The fame and authority of Beven on the law of Negligence are such as to need no commendation. His masterly grasp and acute analysis of legal principles is not excelled by any jurist of our time. He is not content to be a mere compiler of cases and to state the law as the reports state it for him, but he has compared case with case, with a view to bringing out the principle involved, and has boldly criticised decisions which he deems to be fundamentally unsound.

The Criminal Code and the Law of Criminal Evidence. Second edition. By W. J. TREMEEAR, Barrister-at-law. Toronto: Canada Law Book Company, Limited, 1908.

Announcement is made that the second edition of this important work is in press, and will be issued shortly. A new edition is necessary by reason of the revision and re-arrangement of the Criminal Code, 1906, and because of the numerous cases that have been decided in the six years which have elapsed since the former edition.

Bench and Bar.

JUDICIAL APPOINTMENTS.

ALBERTA.

Roland Winter, of Calgary, Barrister, to be Judge of the District Court of Lethbridge. Arthur Allan Carpenter, of Innisfail, barrister, to be Judge of the District Court of McLeod. Joseph C. Noel, of Edmonton, barrister, to be Judge of the District Court of Wetaskiwin. Hedley Clarence Taylor, of Edmonton, barrister, to be Judge of the District Court of Edmonton. Charles Richmond Mitchell, of Medicine Hat, to be Judge of the District Court of Calgary. (Nov. 21, 1907.)

SASKATCHEWAN.

Reginald Rimmer, of Regina, barrister, to be Judge of the District Court of Cannington. Alexander Gray Farrell, of Moose Jaw, barrister, to be Judge of the District Court of Moosomin. Thomas Cranston Gordon, of Carnduff, to be Judge of the District Court of Yorkton. Frederick Fraser Forbes, of Regina, barrister, to be Judge of the District Court of Prince Albert. (Nov. 21, 1907.)

Flotsam and Jetsam.

An old farmer, eccentric, reputed to be rich, but who died penniless. His will was short, and in the words following: "The last will and testament of ——. There is only one thing I leave, I leave the earth—my relatives have always wanted that, they can have it."