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In recently conferring the degree of Doctor of Laws upon Hannis Taylor, both the University of Dublin and the University of Edinburgh have done one of the ablest of living publicists a deserved honour. Dr. Taylor's "Origin and Growth of the English Constitution" is one, perhaps, the very best book on the subject for the purposes of the student, and answers all requirements in ways of conciseness, lucidity and reliability, for a text-book. In 1901 he published a treatise on International Public Law, so excellent in its matter and method as to rank its author with Hall, Von Martens and Rivier, in the exposition of this abstruse subject. Dr. Taylor, at present, occupies the chair of constitutional and international law at the Columbia University, in Washington, D.C.

The legal profession as well as legal journalism have suffered a great loss in the death of ex-Judge Seymour Dwight Thompson, who died at his residence in New Jersey in August last. He was born in 1842. In 1868, after seeing service in the Civil War, he was admitted to the Bar. From 1881 to 1893 he was Associate Judge of the St. Louis Court of Appeal. Upon his retirement from the Bench he devoted much of his time to legal literary work, his best known treatises being on the Law of Negligence, a work on Homesteads and Exemptions and one on Juries. His latest and perhaps his principal contribution to legal lore was the treatise on corporations which appeared in vol. 10 of the Cyclopædia of law and procedure published by the American Law Book Company. He was recently appointed by the President of the United States a delegate to the Congress of Law and Jurists now meeting at St. Louis.

It may not be amiss to pass on, for the benefit of those whom it may concern, an illustration of the proposition, that in the management of cases in Court, counsel ought not to be permitted to do indirectly that which they would not be permitted to do directly. In the case of *Manigold* v. *Black River Traction Company*, 80 N.Y. Supp. 861, an action was brought by a passenger

against a carrier to recover damages for personal injury. The defendants had a policy in an insurance company to cover any loss in such cases as that in question. At the trial the plaintiff's counsel asked a question intended to elicit the fact of the insurance company being at the back of the defendant's company. The question was objected to and the objection was sustained; but the fact of the insurance necessarily came to the knowledge of the jury. The trial judge directed that all that had been said on the subject by counsel should be stricken out and disregarded by the jury. It was held that the verdict obtained under such circumstances could not be held. The learned judge who spoke for the Appellate Division, when the case was sent back for a new trial, said (we quote from the *American Law Notes*):—"The law is well settled that it is improper to show in an action of negligence that the defendant is insured against loss in case of recovery against it on account of its negligence. This was expressly held in *Wildrick* v. *Moore*, 66 Hun. 630. It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action." There was a similar ruling in *Cosselmon* v. *Dunfee*, 172 N.Y. 507, in which case the verdict for the plaintiff was also set aside and a new trial ordered. A reference to the law as above stated is very desirable at the present time as the objectionable practice referred to by our contemporary is said to be too common in negligence cases in this country, though the rule here is the same. See ante p. 79.

The *Medico-legal Journal* of New York under the able editorial management of Mr. Clarke Bell, L.L.D., a member of the United States Bar, takes up and deals with the subject of preventive legislation in tuberculosis cases in connection with the American International Congress on this subject to be held at the St. Louis Exposition this month. This matter has been placed on the list of International Congresses, and a committee of organization of leading men of various nationalities, including this Dominion, has been appointed.

Preventive legislation in this direction is so important as to demand attention not only from the medical profession and philanthrophists but also from the legislator and the lawyer. It has now become rather a legal question than a medical one. The medical

profession has done its part of the work in arousing public sentiment and educating the public mind to action and has called attention to the communicability of this dread disease, but they cannot be asked to frame laws. This branch of work necessarily demands high intelligence, large experience and special legal training.

It is most desirable that legislation should be, as far as circumstances permit, of the same character in the various countries whose governments have awakened to a sense of their responsibility in the matter. Something has been done in the Dominion, but much more remains to be done both here and elsewhere.

The circular issued by the Congress and addressed to the members of the professions of law and medicine and others states the issues that concern preventive legislation as follows:—(1) How far legislation can be devised that would arrest, avert or diminish mortality resulting from this disease. (2) How can the coming Congress devise means that will educate the public mind to the recognition of the imperative necessity of legislative action and devise its scope and field. (3) What legislation would be most likely to accomplish the desired result.

The work of the Congress has the recognition of the Government of the United States which has sent out invitations through the Secretary of State to other governments in the western hemisphere to send delegates to the Congress. We shall watch with interest what is done, and shall hope for helpful and practical suggestions for speedy legislation on this most important subject. Any suggestions that may occur to those who have studied this and kindred subjects would be welcomed by the Congress and receive due consideration.

TRUST COMPANIES.

Trust Companies have now been established for a quarter of a century in Canada; they have proved their usefulness and are well supported by the profession, but, as is pointed out by the author of "The Trust Company idea and its development" noticed in our review column, legislation has been tentative and experimental, and there is a danger that companies may be multiplied beyond the needs of the community, so that some may be compelled to depart from legitimate trustee business in order to make divi-

dends for their shareholders. Any tendency of this kind should be nipped in the bud; and it is just as much in the interests of the companies themselves as of the public that every possible safeguard should be imposed by law so as to firmly establish public confidence, for the business of the companies would be thereby increased, and the public have important interests to entrust to their care.

We might well copy some of the States across the border in having regular government inspection of the books, and we might follow the example of Australia in making directors of Trust Companies personally responsible for any misfeasance or breach of trust by the company, and in requiring a deposit of securities to be made with the government as security for the proper fulfilment of fiduciary obligations.

Of necessity wide incidental powers are given to these companies to enable them to carry on the business of executor and trustee, but they should be used only for this purpose. Trust Companies should be trust companies—expert trustees first and last, not banks, loan companies or underwriting concerns doing trust business on the side, and it should not be necessary for any solicitor to make enquiries concerning the policy of a trust company that solicits his business to ascertain whether it is safe and likely always to be safe, or whether it is properly equipped with officials who are experts in the management of estates.

The history of Australian Trust Companies is particularly interesting as a comparison to the financial departmental store of the United States. We are apt to copy the United States in many things, but if "the well earned significance and prestige which attaches to the name of trust company" in this Country is to be maintained, Canada would do well to keep her eyes on Australia.

The difficulty of limiting the number of trust companies so as not to exceed the requirements of the community is increased by the fact that Trust Companies are incorporated by the Dominion as well as the Provincial Governments. There should, as to this, be a definite arrangement between the two Governments. Our Trust Company Act needs intelligent revision; and the laws in all the Provinces should be the same. There is no excuse now for tentative or experimental legislation. We have our own experience and the experience of other countries to serve as a guide.

IMPLIED WARRANTY OF AUTHORITY.

A STUDY IN COMMON LAW DEVELOPMENT.

"Flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."

"Whatever disadvantages," said Sir A. Cockburn, "attach to a system of unwritten law—and of these we are fully sensible—it has, at least, the advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements of the age in which we live, so as to avoid the inconveniences and injustice which arise when the law is no longer in harmony with the wants, usages and interests of the generation to which it is immediately applied:" *Mason* v. *Walton* L.R. 4 Q.B. 73.

This elasticity of the common law and its capacity for growth and adaptation, so as to meet various conditions as they arise is, perhaps, nowhere better studied, or more easily seen than in the cases bearing upon the above subject, the fountain head of which is the important decision of *Collen* v. *Wright* (1857) 8 E. & B. 647.

The proposition affirmed in *Collen* v. *Wright* may be summed up in the following words of Cockburn, C.J.:—"By the law of England a party making a contract, as agent, in the name of a principal, impliedly contracts with the other contracting party, that he has authority from the alleged principal to make the contract, and if it turns out that he has not the authority, he is liable in an action on such implied contract."

It was stated by Willes, J., thus:—"A person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does, in point of fact, exist."

"Under the Roman law, if a person made a contract, professing to act as agent for another, who was either non-existent, or who had not, in fact, given him authority, the agent was personally liable on the contract. That contract was primarily his own, whatever he might profess; and if there was in fact no person against whom the relaxations of the law could be invoked, the professing agent remained a principal:" 18 L.Q. Rev. 365.

Early cases in England held that an agent professing to make

an agreement for a principal, when he really had no principal, or who exceeded his authority as agent, might be proceeded against in one of two ways:—

(1) He might be sued on the contract as if he were, in fact principal himself, and had made the contract as principal, without pretending to be an agent at all. In *Collen* v. *Wright*, supra during the argument, Watson, B., said:—"In the argument in *Jenkins* v. *Hutchinson* you will find a great mass of authority to shew that, in such a case as this, the person professing to be an agent is liable personally on the contract. Till that case it was generally supposed that the manner in which he might be made liable was by treating him as principal in the contract he professed to make."

The doctrine of Story that "wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for on account of his principal," was held by the Court of Queen's Bench, in an action ex contractu, to be "supported by numerous authorities" and "founded on plain justice:" *Jones* v. *Downman* (1843) 4 Q.B. 235.

(2) He might, as an alternative, be sued for damages in an action on the case for false representation. See *Randall* v. *Trimen* (1856) 18 C.B. 786, and judgment of Cockburn, C.J., in *Collen* v. *Wright*, supra.

In neither of these forms of action did it make any difference whether he honestly believed that he had the authority of the principal to make the agreement in question or not. Fraud or dishonesty was not then considered so essential an element in an action for false representation as it is at the present day. To make an agreement, as an agent for another, when no agency existed, or when although it existed, the agreement was in excess of the actual authority, was treated as a false representation of authority, even when the party honestly believed that he had the full authority he professed to have.

The plaintiff thus had two remedies open to him.

But the situation was illogical as far as the remedy in contract was concerned. When the contract was made there was no intention that the professed agent should be treated or bound as principal, or held to performance of the contract. The intention,

evidently, was to have a contract with the principal, therefore, the court, in treating the agent as a principal, and inflicting on him performance of the contract, or damages for the non-performance of it, were making a new contract for the parties, a contract which neither of them intended to make.

As to the remedy in case for false representation there was this difficulty. It was, in effect, holding a man guilty of a wrong who might not only be perfectly honest in his intentions, but perfectly free from any blame whatever. Take for example, a case where an agent had originally authority to contract, but it turned out that, unknown to both parties, the principal had died, so that in contemplation of law, as it then stood, there existed no principal. To hold the agent guilty of false representation in such a case would be obviously unjust.

Then came *Jenkins* v. *Hutchinson* (1849) 13 Q.B. 744, in which the remedy in contract was expressly denied. This was an action upon a charter party, signed by the defendant as agent for another person, without authority, but innocently. The court laid down the proposition broadly that he could not be sued upon the contract, whatever other rights the other contracting party might have.

Now, as regards the remedy in case for misrepresentation, the current of authority had been steadily setting in the direction of requiring some degree of fraud or dishonesty to be shewn before a party could be treated as a wrongdoer, and be made liable for damages in tort for false representations or deceit.

To support such an action, it was held to be necessary to shew, at least, that the representation was not only not true, but also that it was false to the knowledge of the party making it or, at all events, that he did not honestly believe it to be true.

Upon this state of the authorities, where a party had contracted as agent of another, without authority to do so, the other party had no remedy unless the alleged agent had either (1) expressly warranted or promised that he had authority or, (2) unless he was aware when he made the contract that he had no authority, or did it recklessly, in ignorance of whether he had any authority or not.

If he made the contract in good faith, honestly believing that he had the authority, he could not be made liable in the absence of an express warranty that he had the authority.

In the year 1852 the case of *Lewis* v. *Nicholson*, 18 Q.B. 503, was decided. The court held that the defendant was not liable as principal on a contract which he had entered into in good faith as an agent, but without authority to do so. "In no case," said Lord Campbell, C.J., "where it appears that a man did not intend to bind himself but only to make a contract for a principal, can he be sued as principal, merely because there was no authority." But the court incidentally threw out the suggestion that in such a case the defendant might be liable "on an implied contract that he had authority, whether there was fraud or not."

Then came the important case of *Collen* v. *Wright*, (supra) in which this suggestion was adopted and authoritatively crystallized into a rule of law. The defendants were the executors of one Wright, deceased, who was land agent for one Gardener. Wright, in the belief that he had authority to do so, made an agreement with the plaintiff for a lease of a farm belonging to Gardener, on the strength of which plaintiff entered into possession. Gardener refused to give the lease, alleging, accurately, as it turned out, that he had conferred on Wright no authority to agree for so long a term. The plaintiff brought an action against Gardener for specific performance, which was dismissed with costs, on the ground of the absence of authority. The plaintiff then brought the present action claiming damages. The action being against personal representatives, it was necessary to plaintiff's success to establish a cause of action based on contract, in order to escape the effect of the "iniquitous maxim" (to borrow Sir F. Pollock's expression) actio personalis moritur cum persona, which would have been a fatal bar had the action been based upon false representation. Accordingly it was not argued that the deceased had acted otherwise than innocently, and in good faith. The Court of Queen's Bench held that the deceased was liable in damages for breach of an implied warranty, or collateral contract of his own, that he had authority to make the contract in question, and this decision was affirmed in the Court of Exchequer Chamber, notwithstanding the emphatic dissent of Sir Alexander Cockburn, C.J. "My view is" (said he), "that this implied contract, which we are called upon to establish in this case, is a thing unknown to our law; that we are dealing not with a mere mode whereby an acknowledged liability may be

enforced, but, a supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, as to a warranty of authority, which, if the party now to be charged had been required expressly to give, he would probably have refused. If it is desirable to establish such a rule, it seems to me it should be done by legislative enactment; and that to establish it by judicial decision is to make the law, which it is only our province to expound."

This decision, which has been repeatedly followed, in later cases (see II Smith's L.C., 11th ed., p. 394), dealt, it should be noticed, only with a case of contract, the action being based solely upon contract.

In *Dickson* v. *Reuter's Telegraph Co.* (1877) 3 C.P.D. 1, the Court of Appeal refused to extend the principle of *Collen* v. *Wright*, so as to support an action for damages, caused by the negligence of defendants, a telegraph company, who delivered to the plaintiff a telegraph ordering a large shipment of barley, no such message having been, in fact, sent to the plaintiff. It was held that, inasmuch as the erroneous statement was not fraudulent, and there was no duty owing by the defendants to the plaintiffs in the matter, no action would lie. It was pointed out by Bramwell, L.J., that *Collen* v. *Wright*, properly understood, was not an exception to the general rule at law "that no action is maintainable for a mere statement, although untrue and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it," "but establishes a separate and independent rule."

Collen v. *Wright* was again considered, and its principle extended in the case of *Firbank's executors* v. *Humphreys* (1886) 18 Q.B.D. 54, where the question arose, whether the principle of *Colllen* v. *Wright* was restricted to cases of contract, or no. Plaintiff was a contractor who had entered into a contract with a railway company to do certain work, for which he was to be paid in cash. Subsequently to the contract he agreed to waive his right to a cash payment, and to accept part of the payment in debenture stock which was issued to him by the directors. At the time when the new agreement was made, and the certificates were issued, the borrowing powers of the company were exhausted, although the directors were not aware of this, the facts having been mis-

represented to them by the secretary of the company, and the stock given to the plaintiff was worthless. The company, subsequently, went into liquidation, and plaintiff brought this action against the directors seeking to hold them personally liable for the amount of the debenture stock which should have been issued to the plaintiff under the agreement. For the plaintiff it was argued that there was an implied warranty that the stock so issued was a good and binding security, and that by issuing the certificates it must be implied that the directors had affirmed that they had power to issue them. The Court of Appeal held that *Collen* v. *Wright* applied, and was not restricted to cases of contract.

Lord Esher, M.R., said:—"The principle of *Collen* v. *Wright* extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it understood that it was true, and he is liable personally for the damage that has occurred."

"Speaking generally," said Lindley, L.J., "an action for damages will not lie against a person who honestly makes a representation which misleads another. But to this general rule there is at least one well-established exception, viz, where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes. The present case is within this exception, and the directors are liable to the contractor for the misrepresentation they made to him."

The rule in *Collen* v. *Wright* and its extension in *Firbank's executors* v. *Humphreys* came up for consideration by the House of Lords in the recent case of *Starkey* v. *Bank of England* (1903) A.C. 114, in appeal from the decision of the Court of Appeal in *Oliver* v. *Bank of England* (1902) 1 Chy. 610. F. W. Oliver, one of two trustees of stock, standing in their joint names in the books of the Bank of England, sold it under a power of attorney, to which the signature of his co-trustee, E. Oliver, was forged. The appellant, Starkey, was a stockbroker, who had been instructed

by F. W. Oliver to sell the stock, and who innocently acted under the power of attorney, and was allowed by the bank to transfer the stock to other persons. On the death of F. W. Oliver, the fraud was discovered, and an action was brought by the surviving trustee, E. Oliver, against the bank for restitution; to this action the appellant was made a third party upon a claim for indemnity by the bank. The action was tried before Kekewich, J., whose judgment declared that the transfers were invalid, and ordered the bank to place equivalent amounts of consols and bank stock in the name of E. Oliver in the bank books, and to pay him a sum equal to the dividends which had accrued since the transfers; and also ordered the appellant to indemnify the bank by similar transfers and payment to the bank: [1901] 1 Chy. 652.

This decision was affirmed by the Court of Appeal (1902 1 Chy. 610). An interesting criticism upon the decision of the Court of Appeal is to be found in an article in 18 L.Q. Rev. 364, the learned writer of which considers the judgments to be "wholly unwarranted by legal principles." The House of Lords unhesitatingly affirmed the decisions appealed from, and approved of *Collen* v. *Wright* and *Firbank's executors* v. *Humphrey*, holding that the principle in *Collen* v. *Wright* was not confined to cases where the transaction with the person representing himself to be an agent, results in a contract.

Lord Davey repeated Lord Bramwell's statement that it was a fallacy to treat *Collen* v. *Wright* as "an exception from the law relating to actions of deceit, that it really and truly was a separate and independent rule of law." And he added:—"As a separate and independent rule of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person." (pp. 118, 119.) The House of Lords have thus definitely established the rule that where a person, by representing that he is authorized to act for a principal, induces another to enter into a transaction, and that assertion turns out to be untrue, to the injury of that other, he must be deemed to have *warranted* the truth of the assertion. It is now "unquestionable law that an innocent agent may be liable for the consequences of a fraud, which he had no knowledge of, or means of detecting."

We thus see a doctrine, which, in 1857, was repudiated by so high an authority as Sir A. Cockburn, C.J., as a new departure and judicial legislation, definitely affirmed by the highest court in Great Britain, as an independent and unimpeachable rule of English law.

The doctrine of *Collen* v. *Wright* that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, has been held not applicable to a public servant acting on behalf of the Crown: *Dunn* v. *Macdonald* (1897) 1 Q.B. 401, 555.

"The liabilities of public agents," said Lopes, L.J., "in contracts made by them, in their public capacity, are on a different footing from the liability of ordinary agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a government is not liable for breach of a contract made in his public capacity, even though he would, by the terms of the contract be bound, if it were an agency of a private nature."

N. W. HOYLES.

Toronto.

Mr. J. C. Hamilton of the Toronto Bar has given to the public a very interesting volume, entitled, "Osgoode Hall Reminisences of the Bench and Bar" (with illustrations). It deals mainly with men and manners anent the legal profession as it existed in old Upper Canada and Ontario. The Bar owes a debt of gratitude to Mr. Hamilton for this most interesting collection of information and incident contained in this book. It brings back to the older practitioners remembrances of days fast fading into the dim past; whilst to the younger ones it is a well written and interesting repertoire from which to learn something of the history and salient points of those with whose name they are more or less familiar. His sketches and anecdotes, some new and some old, bring these personages before us as living realities. The historical record which we have of the Bench and Bar of old Upper Canada is all too limited. Mr. Hamilton, with all his industry and research, has by no means exhausted the subject, but has laid a good foundation for himself or others to build upon.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—NEW TRIAL—EXCESSIVE DAMAGES—PERSONAL INJURY—PROSPECTIVE LOSS OF INCOME.

Johnston v. *Great Western Ry.* (1904) 2 K.B. 250, was an action to recover damages for personal injury sustained through the negligence of the defendants' servants. The plaintiff was an engineer and at the time of the accident was earning £3 per week. He was a young man of 28, of good ability and had prospects of obtaining an appointment as engineer worth from £750 to £1,500 a year. The plaintiff proved an actual loss of salary and expenditure for medical attendance to the amount of £450. At the time of the trial the plaintiff was earning in temporary employment £2.10 a week. The jury gave a verdict for £3,000, which the defendants moved to set aside, asking for a new trial on the ground of excessive damages. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), refused the application, at the same time saying that the rule laid down in *Praed* v. *Graham* (1889) 24 Q.B.D. 53 that a new trial will not be granted on the ground of excessive damages, unless the Court can come to the conclusion that the amount is so large that twelve men could not have reasonably given it, is subject to the rule laid down in other cases, where without imputing perversity to the jury the Court is able to see that they have taken into consideration matters which ought not to have been considered. The Court also approved of *Rowley* v. *London & N. W. Ry.* (1873) L.R. 8 Ex. 221, to the effect that, in computing damages for a prospective loss of income, the jury ought not to give the plaintiff a sum which, if invested, would produce the prospective income, but ought to take into account the accidents of life and other matters.

PRACTICE—COSTS OF APPLICATION FOR NEW TRIAL.

In *Hamilton* v. *Seal* (1904) 2 K.B. 262, the sole point considered is, in what way the Court should exercise its discretion in regard to the costs of a successful application for a new trial in a common

law case which was opposed. The Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) declare that there is no rule of practice that such costs should abide the event of the new trial, and that in the absence of special circumstances the applicant should get them.

SLANDER—CHARGE OF BRINGING BLACKMAILING ACTION—ACTIONABLE WORDS—SPECIAL DAMAGE.

Marks v. *Samuel* (1904) 2 K.B. 287, was an action for slander. The words complained of were that the plaintiff had brought a blackmailing action. The words were proved, but no special damage was shown; the jury however gave a verdict for the defendant. The plaintiff applied for a new trial, which was granted by the Court of Appeal (Williams, Stirling, and Cozens-Hardy L.JJ.), on the ground that the words imputed a crime and were actionable without proving special damage, and because the Judge at the trial had not properly explained to the jury the issues to be tried.

LIBEL—FAIR COMMENT—IMPUTATION OF DISHONEST MOTIVES—MATTERS OF PUBLIC INTEREST.

Joynt v. *Cycle Trade Publishing Co.* (1904) 2 K.B. 292, was an action for libel contained in a newspaper. The alleged libel was a discussion of a matter of public interest in which the plaintiff had been professionally concerned as a solicitor, in the course of which article the defendants imputed to the plaintiff sordid and improper motives for his action. The jury gave a verdict for the plaintiff for £500 which the Court of Appeal (Williams, Stirling, and Cozens-Hardy L. JJ.) refused to disturb, on the ground that the imputation of improper motives could not be regarded as "fair comment," such imputation not being warranted by the facts.

RAILWAY—CARRIAGE OF GOODS—CONTRACT—OWNER'S RISK.

Foster v. *Great Western Ry.* (1904) 2 K.B. 306, was an action for damages for delay in the carriage of goods by a railway company. The contract provided that, in consideration of the goods being carried at a less rate than ordinary, the plaintiffs relieved the defendants from all liability for delay, except upon proof that such delay arose from wilful misconduct on the part of the defendants' servants. By mistake the defendants carried the goods past the station at which they ought to have been transferred to another

train, and on discovery of the mistake, and finding that it was too late to send the goods back to the station to catch that train, the defendants forwarded the goods to their destination by another route (which was admitted to be the best alternative). In consequence, there was delay in the delivery of the goods and the plaintiff suffered damage. The County Court Judge who tried the action considered himself bound by the case of *Mallet* v. *Great Eastern Ry.* (1899) 1 Q.B. 309 (noted vol. 35, p. 273), but the Divisional Court (Lord Alverstone, C.J., and Wills, and Kennedy, JJ.) distinguished that case, because there the goods were forwarded by a different route to that specified, although in that case also a part of the route traversed was that intended, but Lord Alverstone significantly remarks: "I think the extent of the authority of that case, if it is supposed to lay down the principle that the condition cannot apply if the damage happens, or the injury to the goods happens, on some part of the route not contemplated by the parties at the time the condition was signed, may require further consideration," and Kennedy, J., says "I should desire to reserve any question about that case, or its correctness."

RAILWAY — CONTRACT FOR CARRIAGE OF PASSENGER — RIGHT TO BREAK JOURNEY.

Ashton v. *Lancashire & Yorkshire Ry.* (1904) 2 K.B. 313, was also an action against a railway company, to recover money paid by the plaintiff under protest. The plaintiff bought a return ticket from Chorley to Manchester. On the same day she started back on a train from Manchester to Bolton, but which diverged at Bolton and went on to Blackburn. No question was raised as to the plaintiff's right to travel on that train as far as Bolton. At Bolton she alighted, and half an hour after a train left Bolton for Chorley, but the plaintiff, desiring to pay a visit in Bolton, left that station and on doing so was required to give up her ticket. She left Bolton the same day by a late train for Chorley, and was charged 11½d. for the journey, which she claimed to recover in the present action. Judgment was given in the County Court for the plaintiff, but the Divisional Court (Lord Alverstone, C.J., and Kennedy, J.) set it aside, holding that the plaintiff was not entitled to stop over at Bolton, but was bound to take the next train for Chorley after her arrival at Bolton, the contract being for a continuous journey.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Meredith, J.] [April 13.

ST. MARY'S CREAMERY CO. *v.* GRAND TRUNK RAILWAY CO.

Railway—Shipping bill—Bill of lading—Condition requiring insurance—Breach of—Loss of goods—Negligence.

Under s. 246 of the Dominion Railway Act, 51 Vict., a railway company is precluded from setting up a condition endorsed on a bill of lading, relieving the company from liability for damage sustained to goods while in transit, where damage is occasioned through negligence.

Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of a bill of lading given by the railway company on the shipment of goods required the consignors to effect an insurance thereon, which in case of loss or damage, the company were to have the benefit of.

Held, affirming the judgment of MEREDITH, J., that the contract being one for exemption for total liability, even where, as here, the damage to the goods was occasioned by negligence, the defendants are precluded, under the above section, from setting up the breach of such condition as aforesaid, as a ground of relief from liability. *Vogel* v. *Grand Trunk R. W. Co.* (1885) 11 S.C.R., followed. *Robertson* v. *Grand Trunk R. W. Co.* (1895) 24 S.C.R. 611, distinguished.

From Britton, J.] [June 29.

HEWSON *v.* ONTARIO POWER CO. OF NIAGARA FALLS.

Constitutional law—Statutes—Dominion legislation—Preamble—"Work for the general advantage of Canada"—Public property—Expropriation of private land.

The preamble to an act of the Dominion Parliament recited, "that it was desirable for 'the general advantage of Canada' that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the Province of Ontario, with the object of . . . ," and then expressly authorized the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts, extending beyond the limits of the Province.

Held, 1. The recital was clearly a declaration by Parliament that the work it authorized was a work for the general benefit of Canada within sub-s. 10 (c.) of s. 92 B.N.A. Act, and that the powers granted by s. 2 thereof made the work authorized, a work or undertaking extending beyond the limits of the Province within sub-s. 10 (a.) and therefore excluded it from the jurisdiction of the Legislature of the Province.

2. The power given to make the terminus of a canal in the words "above or south of the Whirlpool" did not restrict the company to the selection of a point about or near the Whirlpool and that to construe them that a point two and one half miles south of it was not within the language used would be to construe them as if they had been above *and* south.

3. As the average depth of the canal was seventeen and one half feet the company were within their rights in claiming to expropriate one hundred yards in width under s. 8 of the Dominion Railway Act, R.S.C. c. 109, made applicable to the company by s. 29 of their own Act. 50 & 51 Vict. c. 120 (D.).

4. The company had not abandoned their work as the time for completion had been extended for six years from July 7, 1900, by 63 & 64 Vict. c. 113 (D.). Judgment of BRITTON, J., affirmed.

H.S. Osler, K.C. and *Britton Osler*, for the appeal. *Walter Cassels*, K.C., and *F.W. Hill*, contra.

From Osler, J.A.] CLERGUE *v.* PRESTON. [June 29.

Vendor and purchaser—Offer to sell—Purchaser pendente lite—Certificate of lis pendens—Registration—Specific performance—Delay—Damages.

An appeal and cross appeal from the judgment of OSLER, J.A., reported sub. nom. *Clergue* v. *McKay* 39 C.L.J. 528, dismissed with costs.

Watson, K.C., for defendant's appeal. *James Bicknell*, K.C., for plaintiff's cross appeal.

From Boyd, C.] IN RE MCCRAE AND VILLAGE OF BRUSSELS. [June 29.

Municipal Corporations—Local improvement by-law—Personal service of notice—Waiver—Court of Revision.

It is a fatal objection to the validity of a municipal by-law authorizing a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the properties benefited thereby, by personal service, etc., as provided by s. 669 (1a) of the Municipal Act, 1903.

Semble, that an owner might waive such notice; but held, that in this case there was no conduct amounting to waiver.

Semble, also, that while the direction of the statute (s. 64 of the Assessment Act, R.S.O. 1897 c. 224), that the members of the Court of

Division are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void.

Order of Boyd, C., 7 O.L.R. 146, reversed.

Proudfoot, K.C., for appellants. *W. M. Sinclair*, for respondents.

From Meredith, C.J.] [June 29.

LONDON LIFE INS. CO. *v.* MOLSONS BANK.

Banks and banking — Cheques—Life insurance—Fraud of agent—Payment by bank—Right of company to recover amounts paid—"Fictitious person"—53 Vict. c. 33, s. 7 sub-s. 3. (D.)

N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance—afterwards N. representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, when cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank were sent to N. whose duty it was, on the receipt to see the payees and procure discharges from them. The endorsements of the payees names were forged by N. the genuiness of the signatures on most of the cheques being certified to by his attestation. The cheques were presented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account.

Held, in this disagreeing with the judgment of MEREDITH, C.J.C.P., at the trial, (MACLAREN, J.A., dissenting) that there was no evidence that the bank was aware that N. had any connection with the transactions out of which the cheques arose and that they were not entitled to rely on his identification of the payees or attestation of their signatures. But:—

Held, however that under the circumstances the cheques must be regarded as payable to fictitious or non existent persons and therefore, under sub-s. 3 of s. 7 of 53 Vict. c. 33 (D)., payable to bearer, and that the bank had the right to pay and charge the company with the amounts. *Governor & Co. of Bank of England* v. *Vagliano Brothers* (1891) A.C. 107, followed.

Per MACLAREN, J.A. By drawing the cheques payable to order, the company would be estopped from denying the existence of the payees and their then capacity to endorse. The identification of the payees or the genuiness of the endorsements would be a matter between the bank and the holders of the cheques. N.'s agency and the facts proved and mentioned in the judgment of the trial judge, without more, were not sufficient to relieve the bank from the responsibility which it voluntarily assumed.

Aylesworth, K.C., and *Edgar Jeffery*, for appeal. *Hellmuth*, K.C., and *Ivey*, contra.

HIGH COURT OF JUSTICE.

Teetzel, J.] HASLEM *v.* EQUITY FIRE INS. CO. [May 5.

Insurance—Loss if any payable to mortgagees—Ascertainment of lesser amount by mortgagor and company—Mortgagees refusal to accept—Action by mortgagees for amount of policy — Interest limited to the amount ascertained—Absence of fraud or collusion—Statutory conditions.

Plaintiffs were mortgagees of a certain property with a covenant in the mortgage from the mortgagor to insure for $2,000 pursuant to which a policy was issued by the defendants to the mortgagor, the loss being made payable to the plaintiffs, mortgagees, as their interest may appear. A loss having occurred, the mortgagor and the company not being able to agree upon the amount of the loss, appraisers were appointed under statutory condition 16 (R.S.O. 1897, c. 203 s. 168) and an award made fixing the amount at $1,012, about which the plaintiffs were not consulted. Plaintiffs refused to accept that amount and brought action to recover the $2,000.

Held, that the effect of the covenant to insure, the application referring to the mortgage and the issue of the policy with the loss made payable to the plaintiff as their interest may appear, was to give the plaintiffs an equitable lien on the money secured by the policy to the extent of their interest, that as soon as all things had been done by the assured to make the defendants liable to pay, the money was stamped with a trust in favour of the mortgagees and they had a direct beneficial interest in and a lien upon it in the defendant's hands as soon as it became applicable to the payment of the loss, and were entitled to bring an action against the company for it. But

Held, also, that in view of the terms of statutory conditions 12 & 16, and as no fraud or collusion between the mortgagor and the company was alleged, the amount of the award as ascertained between them was "the loss, if any," to which the plaintiffs were entitled, and their rights were limited to the recovery of that amount.

O'Connell, for plaintiff. *B. Morton Jones*, for defendants.

Meredith J.] MACDONALD *v.* GRUNDY. [June 2.

Chattel mortgage—Mortgage on lands as additional security—Appropriation of goods by mortgagee—Statute of limitations

Where a mortgage on lands was given merely as additional security for the amount secured by a chattel mortgage, and on default in payment a warrant was issued under the chattel mortgage, and the goods seized and taken out of the mortgagor's possession, and, though a form of sale was gone through with, no sale actually took place; but the goods were taken possession of by the mortgagee and appropriated to his own use, and where

the statutory period had elapsed without the mortgagor's possession of the land being in any way interfered with, an attempted exercise of the power of sale under the mortgage on the lands was restrained.

E. L. Dicken on, for plaintiffs. *Proudfoot*, K.C., for defendant.

Falconbridge, C.J.K.B., Street, J., Britton, J.,] [June 3.

BANK OF HAMILTON *v.* ANDERSON.

Parties—Joinder of plaintiffs—Causes of action—Pleading—Lease—Action to set aside—Fraud on creditors—Right of assignee for creditor—Termination of.

One of the defendants mortgaged land to the plaintiff bank and then made an assignment under R.S.O. 1877, c. 147, to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily, when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors.

Held, that the right to relief upon the latter ground could be claimed only by the assignee under s. 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff.

Semble, that the proper order would be to strike out the name of the assignee as plaintiff and the claim to set aside the lease as fraudulent against creditors.

The order made below, 7 O.L.R. 613, was, however, affirmed.

Riddell, K.C., for plaintiffs. *Kilmer*, for defendant J.H. Anderson.

Street, J.] EARLE *v.* BURLAND. [June 3.

Costs—Appeal to Privy Council—Costs incurred in Canada—Taxation—Rule 1256—Non-retroactivity.

Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment, entitling a party to costs, was entered before the rule was made. The quantum of costs, as well as the right to them, is ascertained at the time of the judgment, and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment.

D.L. McCarthy, for plaintiffs. *Middleton*, for defendants.

Boyd, C.] McDONALD *v* DAWSON. [June 6.

Venue—Preponderance of convenience—Undertaking.

The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about fifty dollars in favour of a trial at that place.

Held, that this difference in expense and the fact that the cause of action arose at Welland were not sufficient to do away with the plaintiff's prima facie right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary.

Held, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue for that would not be of any advantage until the trial was over and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point.

Judgment of Master in Chambers reversed.

A. R. Clute, for plaintiff. *Douglas*, K.C., for defendant.

MacMahon, J.] [June 7.

VILLAGE OF SOUTHAMPTON AND COUNTY OF BRUCE.

Municipal corporations — Village — Detachment of lands therefrom and annexing to township—Petition—Description of area detached and metes and bounds of new limits—Setting out in schedules.

Under s. 18 of Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), which provides for the detachment of a special area in a village and for its annexation to an adjoining township, it is not essential that the whole area sought to be detached should be set out in one petition, but there may be separate petitions setting out distinctive portions; nor is it essential that the area so detached, and the metes and bounds of the new limits, should be set out in the by-law, but they may be set out in schedules attached thereto.

Kilmer, for Southampton. *J. H. Scott*, for Bruce. *Middleton*, for Saugeen.

Divisional Court.] [June 8.

WILLIAMSON *v.* TOWNSHIP OF ELIZABETHTOWN

Municipal corporations—Audit of accounts.

A person appointed by the Provincial Auditor, pursuant to the provisions of the Act respecting the audit of municipal accounts, R.S.O. 1897, c. 228, to audit the accounts of a municipality, has no right of action

against the municipality for his fees and expenses until three months after the amount thereof has been specifically determined by the Provincial Auditor, with the approval of the Attorney General or other Minister, as required by s. 16 of the Act. The approval by the Attorney General of a tarriff according to which the fees and expenses are made up and allowed by the Provincial Auditor is not sufficient. Judgment of BOYD, C., reversed.

Du Vernet, for appellants. *Kilmer*, for respondent.

Boyd, C., Meredith, J., Anglin, J.] [June 8.

REX *v.* HORNING.

Constitutional law—Powers of Provincial Legislature—Fraudulent entry of horses at exhibitions.

The Act to prevent the fraudulent entry of horses at Exhibitions, R.S.O. 1897, c. 254, is within the powers of the Ontario Legislature.

A conviction of the defendant for an offence against the Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed.

Du Vernet, for defendant. *Cartwright*, K.C., for Crown. *Masten*, for complainant.

Falconbridge, C. J.] RAJOTTE *v.* WILSON. [June 8.

Partition—Ante-nuptial settlement—Consent of life tenant.

Under an ante-nuptial settlement lands were settled in trust for successively the lives of the plaintiff, the settlor and his intended wife, and at their death to the children of the intended marriage for such estates or estate as the plaintiff and the intended wife should appoint, and in default of appointment to the children in equal shares with powers of maintenance during minority. After the marriage the plaintiff conveyed all his interest in the lands to one W., who conveyed to the wife. The wife predeceased the plaintiff, having by her will devised the lands to one E. W., who had been appointed the trustee under the settlement in trust to receive and pay over the income from the said lands to the children during their minority, and on their attaining their majority to hand over to them their shares. There were three children, one of whom died prior to, another subsequent to, the death of the said wife, leaving one surviving. The plaintiff, on his wife's death, claimed to be entitled to a share in the said lands as one of the heirs of the child who had died subsequently to his said wife, and brought an action to have the same partitioned or sold, but to which E. W. objected.

Held, that in the face of the objection of E. W., the trustee and representative of the life estate, the action was premature of her consent, being a prerequisite to its maintenance.

J. Lorn Macdougall and *E. J. Daly*, for plaintiff. *T. A. Beament*, for defendant Wilson. *C. J. R. Bethune*, for infant and for Toronto General Trust Corporation.

Street J.] RE SERGEANT. [June 10.

Will—Executors—Discretion—Refusal of Court to interfere—Lunatic—Setting apart moneys for.

Where, under the terms of a will, executors and trustees were required to retain in their hands a sufficient sum to provide for the support of a lunatic, the Court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose.

Patterson, K.C., for executors and trustees. *Harcourt*, for lunatic.

Street, J.] [June 10.

KINGSTON HEAT AND POWER CO. *v.* CITY OF KINGSTON.

Municipal corporations—Purchase of property of light etc., company—Property subject to mortgage—Application to vary terms of—Refusal.

Where the corporation of a city acquired the property of a light, heat and power company, which was subject to a mortgage for a large sum, the Court refused, in the exercise of the powers conferred upon it by ss. 15 & 16 of the Act respecting the law and transfer of property (R.S.O. 1897 c. 119), to require the company to accept on an existing mortgage three per cent., the Court rate of interest, instead of five per cent., the rate secured by the mortgage for the unexpired period thereof, and to authorize the corporation to deduct the amount of the mortgage so computed from the purchase money.

D. M. McIntyre, for city. *Walkem*, K.C., for company. *Shepley*, K.C., for unsecured creditors. *Mickle*, for bondholders.

Anglin, J.] REX *v.* MCDOUGALL. [June 10.

Criminal law—Speedy trial—Election—Absence of accused.

A prisoner charged with theft waived preliminary examinations and was committed for trial. Upon then being arraigned before the Junior Judge of the County Court he consented to be tried by "the said Judge without a Jury."

Held. 1. Sec. 767 of the Criminal Code, as amended by 63 & 64 Vict. c. 46 (D) contemplates an election to be tried in a certain way, and not necessarily by the Judge before whom the election is made; that the election in question having been given in a limited form was void, and that the Senior Judge could not proceed with the trial of the accused.

2. A person accused, by waiving preliminary investigation and thus accepting committal without depositions taken, foregoes his right to a

speedy trial and cannot make an election effectual to confer jurisdiction.

3. Unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request, and with the permission of the Court, the trial of a person accused of felony cannot proceed in his absence.

Du Vernet, for prisoner. *Cartwright*, K.C., and *Biggs*, K.C., for Crown.

Boyd, C., Meredith, J., Anglin, J.] [June 10.

BOGART *v.* ROBERTSON.

Bills and notes—Joint and several—Release of co-maker—Reservation of rights—Subsequent deed—Implication.

One of five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note. There was no reservation of rights against the other makers, but the plaintiff sought to recover against one of them, upon the ground that it was intended that there should be a reservation, and that this was recognized by a subsequent instrument under seal, to which the maker who had been released was not a party but the defendant was, whereby it was stipulated that the individual liabilities and indebtedness of the defendant to the plaintiff should not be abandoned.

Held, that the defendant was discharged by the release of his co-maker, and that the effect was not changed by the subsequent instrument. Judgment of STREET, J., affirmed.

Bicknell, K.C., and *T. H. Lloyd*, for plaintiff. *Du Vernet*, for defendant Trench.

Falconbridge, C.J.K.B.] [June 11.

IN RE KELLY AND TOWN OF TORONTO JUNCTION.

Municipal corporations—Meetings of council—Procedure—Local option by-law—Second reading without formal motion—Approval by vote of ratepayers—Motion to quash—Discretion—Delay.

A local option by-law was introduced in a town council on Oct. 5, 1903, and a motion that it be read a first time was carried, after discussion on a division of eight to two. On Nov. 17, a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of the whole and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On Jan. 11, 1904, the by-law was, on motion, read a third time in the council, and, also on motion, adopted as final. On April 23, 1904, a

motion to quash the by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of Parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council.

Held, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, the motion should be refused.

Johnston, K.C., and *Haverson*, K.C., for applicant. *Du Vernet*, and *Raney*, for town corporation.

Street, J.] [June 11.

RE CHANTLER AND THE CLERK OF THE PEACE, MIDDLESEX.

Criminal law—Receiving stolen property—Indictment for—Prior conviction for stealing—Right to inspect informations and depositions.

By s. 11 of R.S.O. 1892 c. 324, "A person affected by any record in any Court in this province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer."

The applicant was committed for trial at the sessions upon three charges of receiving cattle stolen from C. and two other persons, knowing them to have been stolen. At the previous sessions three persons were convicted of having stolen cattle from C., one of whom, and two others, were also convicted at the same sessions of having stolen cattle from S. No charge was pending against the applicant of having received cattle stolen from S.

Held, that in such cases the question is, whether the applicant would be affected by the records which he sought to examine, and that while he might be so affected as regards the cattle stolen from C., and so entitled to the instructions asked for, he was not as regards those stolen from S.

Arnoldi, K.C., for applicant. *Cartwright*, K.C., for Clerk of the Peace.

Divisional Court.] [June 14.

NEILLY *v.* PARRY SOUND RIVER IMPROVEMENT CO.

Costs—High Court—Trespass—Flooding land—Title brought in question—Verdict for $100—Parry Sound District.

Where an action for damages for flooding and for other trespasses to the plaintiff's lands, situated in the Parry Sound district, was brought in the High Court, and the title thereto was brought in question, and, though

no evidence was given as to its value, it could not reasonably be contended that it did not exceed $200, and clause (d) of sub-s. 2, of s. 9 of the R.S.O. c. 109, giving jurisdiction to inferior courts, where the land is under such value, not applying to such district, and the judge at the trial having found for the plaintiff and directed judgment to be entered for him for $100 damages, with the costs of the Court having jurisdiction to such amount, without any set off, the plaintiff was held entitled to tax his costs on the High Court scale.

W. H. Blake, K.C., for plaintiff. *Falconbridge*, for defendants.

Anglin, J.] MASON *v.* GRAND TRUNK R.W. Co. [June 22.

Parties—Joinder of plaintiffs—"Series of transactions"—Common motive.

The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs is not sufficient to constitute the transactions a "series" within the meaning of Con. Rule 185 so as to enable the plaintiffs to join in one action. Judgment of the Master in Chambers, affirmed.

Raney, for plaintiffs. *D. L. McCarthy*, for defendants.

Divisional Court.] KAY *v.* STORRY. [June 15.

Division Court—After judgment summons—Committal—"Ability to pay"—Prohibition.

Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently the defendant was examined upon an after judgment summons and was ordered to pay $15 a month. Default having occurred he was again brought before the Judge on a shew cause summons and committed to gaol for twenty days.

Held, that it was to be assumed, in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal and that prohibition would not lie. Judgment of ANGLIN, J., affirmed.

Per MEREDITH, C.J.—"Ability to pay" in sub-s. 5, s. 247 of the Division Courts Act R.S.O. 1897, c. 60, covers the case of a dishonest debtor who can by working earn the means to pay the debt and contumaciously refuses to do anything.

Per ANGLIN, J.—An order for committal is not made as punishment for disobedience of a specific order for payment, and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having the means and ability to pay. It is, therefore, not necessary before a committal order can be made that there should be an

order on and after judgment summons and disobedience of that order. The judgment itself is sufficient foundation for the order to commit.

McCullough, for defendant. *S. B. Woods*, for plaintiff.

Meredith, C.J.C.P., Street, J., Anglin, J.] [June 29.

HOPKINSON *v.* PERDUE.

Evidence of assault—Circumstances of rape or indecent assault—Complaints by wife to husband after assaults—Admissibility of.

In an action for damages by husband and wife for assaults alleged to have been committed on the wife under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault.

Held, that evidence of statements and complaints made by the wife to the husband after the alleged assaults took place was properly received.

Dumble, K.C., for plaintiff. *O'Leary*, K.C., for defendant.

Divsional Court.] MUTCHMOR *v.* MUTCHMOR. [June 30.

Will—Election—Life insurance.

A testator, upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children and the other payable to his executors for the behoof of his wife and children, directed by his will his whole estate, including insurance moneys, to be divided one half to his wife and the other half to his children. By a codicil he directed that, "in lieu of the house and premises (describing them) deeded to my beloved wife, but since disposed of, and the proceeds used in the business, I give, devise, bequeath and hereby direct, instruct and empower my executors to pay over to my beloved wife the whole amount of my two life policies." The house and premises had not, in fact, been disposed of, but were vested in the wife at the time of the testator's death:—

Held, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one half given by the codicil and the house; the two elements essential to a case of election being wanting, viz.: the disposition by the testator of something belonging to a person taking a benefit under the will,—while in this case there was merely an erroneous statement of fact,—and a gift to that person of something in the absolute control of the testator—while the insurance money was not. Judgment of BRITTON, J., affirmed.

H. M. Mowat, K.C., for appellant. *Middleton*, for respondent. *Harcourt*, for infants.

Divisional Court.] MORIARITY *v.* HARRIS. [July 2.

Municipal corporations—Market clerk—Constable—Acting bonâ fide in supposed performance of duty—Absence of malice—Liability.

The defendant, a police constable of a city, on being directed by the clerk of the market, having the superintendence of the market grounds and buildings, and of the persons, horses and vehicles frequenting it,

acting in the supposed performance of, and with a bonâ fide intention of discharging his duty and without any malice, compelled the plaintiff, a driver of a watering cart, to move with his cart from the position he had taken in the market place, in consequence of which a scuffle ensued, whereby the injuries complained of were caused.

Held, that no liability was imposed on the defendant in that he came within the protection afforded by the R.S.O. 1897, c. 85, which applies even to officers acting illegally, where they do so in the supposed performance of, and with a bonâ fide intention of discharging their duty.

MacKelcan, K.C., and *Lynch Staunton*, K.C., for appellants. *Cerscallen*, K.C., for respondent.

Divisional Court.] [July 2.

BROWN *v.* WATEROUS ENGINE WORKS CO.

Negligence—Evidence—Defect—Want of guard.

The plaintiff's husband, who was working on a platform projecting a few feet from a gallery in the defendants' workshop, fell from the platform and was killed, there being no evidence to shew how he fell. There was no railing or guard to the platform, but when the deceased was last seen he was standing on the platform next to the gallery in a place of safety, and after that, up to the time when he was found lying on the floor, nothing had happened in connection with his work to make it necessary for him to change his position :—

Held, MEREDITH, C.J., dissenting, that there was no case to go to the jury, it being merely at best a matter of conjecture that the accident had happened because of the want of a guard. Judgment of BRITTON, J., reversed.

Du Vernet, for appellants. *Brewster*, K.C., for respondent.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [July 4.

TURNER *v.* TOURANGEAU.

Division Courts—Execution against lands—Previous nulla bona return by bailiff in the court in which the judgment recovered.

Since the revision of the Statutes in 1897 incorporating sub-s. 5 of s. 8 of 57 Vict. c. 23 (O.) into s. 230 of c. 60 of R.S.O. 1897, it is not necessary to have a nulla bona return made by a bailiff *of* the Division Court in which the judgment was recovered before an execution against lands can be issued, a return of nulla bona by a bailiff *in* such Division Court being sufficient. Judgment of FERGUSON, J., reversed.

F. E. Hodgins, K.C., for the appeal. *A. H. Clarke*, K.C., contra.

Divisional Court.] IN RE MUMBY. [July 4.

Will—Construction—Gift during widowhood.

A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added "The real property while the said (wife) remains my widow. But in case my wife should again marry I request my executors to sell all my real and personal estate when my youngest child shall come of age, and that they, my executors, shall divide the proceeds between my six younger children." The widow did not marry again, and left a will devising all her real and personal estate.—

Held, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the case of the widows' marriage, and that the real estate passed under her will. Judgment of STREET, J., affirmed.

Kilmer, for appellants. *M. Wright*, for respondents. *D. L. McCarthy*, for Official Guardian.

Divisional Court.] AGAR *v.* ESCOTT. [July 6.

Joinder of actions—Defamation—Pleading—Striking out pleading.

The plaintiffs, a married man and an unmarried woman, brought the action for damages in respect of alleged statements by the defendant on three different occasions that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff, as shewing no cause of action or as embarrassing was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both damages in respect of another allegation to the same effect on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of R.S.O. 1897, c. 68, s. 5.

Held, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff was improper, and that this claim unless amended so as to be simply one in aggravation of damages, should be struck out as embarassing. Judgment of BRITTON, J., as to the joinder of parties, affirmed, and judgment of ANGLIN, J., as to the pleadings, varied.

C. A. Moss, for appellant. *Middleton*, for respondents.

Divisional Court.] BRIDGE *v.* JOHNSTON. [July 7.

Indians—Indian lands—Sale of timber—Registration—Notice.

The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of

such an assignment, even though the assignment had not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Judgment of FERGUSON, J., 6 O.L.R. 370, affirmed.

Armour, K.C., for appellant. *Tucker*, for respondent.

MacMahon, J.] [July 7.

GRATTAN *v.* OTTAWA SEPARATE SCHOOL TRUSTEES.

Separate schools — Christian Brothers — House for teachers — Contract extending beyond a year.

The Ottawa Separate School Trustees entered into an agreement to secure the services of Christian Brothers as teachers in a proposed separate school for boys, the agreement, among other things, providing for the erection by the trustees of a house or residence with the chapel, etc., for the Brothers, and the advance of $100 for each of the Brothers for furniture, this furniture to become the property of the Brothers at the rate of one-fifth each year; the contract to be in force for ten years unless previously put an end to by notice in a prescribed way:—

Held, that the agreement was invalid because (1) Christian Brothers, as such, are not qualified to teach in separate schools in Ontario; (2) school trustees have no authority to expend money in erecting a house for teachers; or, (3) to enter into a contract with a teacher extending beyond a year.

G. F. Henderson, for plaintiff. *Belcourt*, K.C., for defendants.

Divisional Court.] BRADLEY *v.* WILSON. [July 7.

Division Court—Appeal—Notice of setting down.

The giving of the notice of setting down for argument and of the appeal and of the grounds thereof, required by s. 158 of the Division Courts Act, is a condition precedent to the right to appeal to a Divisional Court from a judgment in the Division Court, and where this notice has not been given the Divisional Court has no jurisdiction to deal with the appeal.

W. H. Blake, K.C., for appellant. *Mickle*, for respondent.

Divisional Court.] LEE *v.* CULP. [July 8.

Sale of goods—Ascertainment of quantity—Culling.

The plaintiff sold to the defendant all the apples of first and second quality on the trees, in the plaintiff's orchard, at a rate per barrel, the plaintiff to pick the apples and place them in piles, the defendant to supply barrels and pack the apples, and the plaintiff to take the apples, when in barrels, to the railway station. There was no agreement as to the time

and mode of culling and packing, or the time for payment. The plaintiff picked the apples and placed them in piles, and told the defendant that they were ready for packing. The defendant was not at the time able to obtain barrels. About three weeks later, however, he took delivery of twelve barrels of apples. Two weeks after this a severe frost occurred, and the rest of the apples were destroyed, neither the plaintiff nor the defendant having taken any steps to protect them:—

Held, that the inference from the circumstances was that the culling was to be done by the defendant, with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the apples intended to be sold; that the property had, therefore, not passed; and and that the loss must fall on the plaintiff. Judgment of the County Court of Lincoln, reversed.

Middleton, for appellant. *Collier*, K.C., for respondent.

Divisional Court.] SMITH *v.* CLARKSON. [July 9.

Staying proceedings—Vexatious action—Security for costs.

An appeal by the plaintiff from the judgment of ANGLIN, J., reported ante p. 394, was argued before a Divisional Court (MEREDITH, C.J., MACMAHON, and TEETZEL, JJ.,) on the 13th of June, 1904.

The appeal was dismissed with costs, the Court being of opinion that under the circumstances set out in the judgment below, the term of giving security was rightly imposed.

F. E. Hodgins, K.C., for plaintiff. *Middleton*, for defendant.

Meredith, J.] [July 12.

BELL TELEPHONE CO. *v.* TOWN OF OWEN SOUND.

Municipal corporations—Highways—Bell Telephone Company.

The plaintiffs, whose system of communication had been in operation in the town of Owen Sound for some years, changed their office, and, in connection with the change, wished to carry their wires to that office across the street in which it was situated underground in a conduit, instead of overhead by poles, and the defendants refused to consent:—

Held, on the evidence, that no danger of injury to the street or inconvenience to the public having been shewn, the defendants were not justified in fact in refusing their consent.

Held, also, that there was no justification in law for the refusal, since s. 3 of the plaintiffs' Act of incorporation, 43 Vict. c. 67 (D.), does not as was contended by the defendants, empower municipal councils to determine, as they may see fit, where and how the plaintiffs shall construct their lines.

Lynch-Staunton, K.C., for plaintiffs. *Aylesworth*, K.C., for defendants.

Divisional Court.] MILLOY *v.* WELLINGTON. [July 15.

Husband and wife—Divorce—Foreign divorce—Crim. con.—Alienation of affections—Damages.

The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained, in the United States, a divorce from him, not valid, according to the law of this Province. She then went through the ceremony of marriage with the defendant, and lived with him as his wife for some years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum:—

Held, MACMAHON, J., dissenting, that notwithstanding the separation and the divorce the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence, a new trial was granted.

Per MACMAHON, J.: The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff, and were a bar to the action. Judgment of ANGLIN, J., reversed.

Ritchie, K.C., and *Ryckman*, for appellant. *W. R. Smyth*, for respondent.

MacMahon, J.] [July 20.

ELGIN LOAN, ETC. CO. *v.* LONDON GUARANTEE CO.

Guarantee—Condition modifying liability—Necessity to set out in contract—Change in nature of business—Liability.

By s. 144 (1.) of the Insurance Act R.S.O. 1897, c. 203, all the terms and conditions modifying and impairing the effect of an Insurance contract must be set out in full on the face or on the back thereof; otherwise the same shall have no effect; but by sub-s. 1 (a) this is not to exclude the application of the insured from being considered as part of the contract.

Where, therefore, on the application of the manager of a loan company a guarantee agreement was entered into guaranteeing the company against any loss which might be sustained in case of the defalcations of such manager, statements made at the time of the making of the agreement, not by the applicant, but by the president of the company, as to the safeguarding of the funds, and as to there being an effective audit, which, though recited in the agreement, were not set out in full as required, cannot be set up as an answer to a claim under the guarantee.

Where, however, the guarantee provided that any change made in the nature of the business without the guarantee company's consent in writing would vitiate the agreement, and it appeared that the loan company had subsequently obtained a charter enabling them to carry on the business of buying and selling stocks, and pending the issue to them of the required license therefor, and authorized the manager to carry on such business in

his own name, and stocks were bought on margin and large losses ensued, this vitiated the guarantee and absolved the guarantee company from liability.

W. K. Cameron and *Maxwell*, for plaintiff. *J. B. Clarke*, K.C., and *Crothers*, for defendants.

Anglin J.] KING *v.* WHITESIDE. [July 28.

Habeas corpus — Arrest in outside county — Omission to have warrant backed—Crim Code ss. 505, 848—Right to discharge—Reference of argument to Divisional Court—No power to direct—Jud. Act, s. 81.

The prisoner had been convicted by the police magistrate of Bowmanville of a violation of the Liquor License Act, by the sale of liquor without a license, and, it being a second offence, was sentenced to imprisonment in the common gaol of the united counties of Northumberland and Durham for a term of four months at hard labour.

On the motion for his discharge from custody on the ground that the warrant of commitment had been executed by a constable of the adjoining county of Ontario without a backing having been first procured, it was held, disapproving of *Reg.* v. *Jones*, decided by Robertson, J., in 1888, that a prisoner could not be released from gaol on habeas corpus for mere irregularity in the caption the warrant returned to the writ showing a valid cause of detention, and that imprisonment wrongful in the manner of the taking would, so far as relief under habeas corpus was concerned, only be vitiated where it was directed by civil process. (2) That by reason of a difference of opinion between two judges of co-ordinate authority the matter should be referred to a Divisional Court.

Sept. 20.—Upon a direction being asked from the Divisional Court (Meredith, C.J., Idington, J., Magee, J.,) as to the above reference, it was held that the jurisdiction of the Court on habeas corpus was purely statutory, and was limited to a case where the writ had been made returnable before it, instead of a Judge in Chambers.

J. W. McCullough, for the prisoner. *Cartwright*, K.C., for the Crown.

Idington, J.] KING *v.* WHITESIDE. [August 4.

Habeas corpus—Remand of prisoner to custody — Application for bail — Hab. Cor. Act, R.S.C. c. 83, ss. 1, 4.

The prisoner, confined in goal, as shown in *King* v. *Whiteside* above, applied to the presiding judge in chambers, by leave of the judge hearing the motion, for his discharge, to be released on bail pending the argument of the reference directed by him to be made.

Held, that, either the Judge seized of the motion or the Divisional Court was vested with power to bail, the case being one of a commitment in execution.

Quære, whether bail could be granted in the case of a commitment in execution.

Tremeear, for the prisoner. *Dymond*, K.C., for the Crown.

Idington, J.] KING *v.* WYNN. [August 14.

Habeas corpus—Crim. Code s. 785 & 786—Election to be tried by police magistrate—Option of trial by jury—Necessity of informing prisoner of date of earliest sittings—Further detention—Crim. Code s. 752.

The prisoner was charged before the Police Magistrate for the City of Hamilton with theft, and, on coming before him, and being asked, how and where he wished to be tried, replied: "Now, before your Worship."

He was not informed of his right of being tried by a jury or told when the sittings of the Court, at which he might earliest be tried would occur. On objection taken by counsel after the trial, but on the day to which it had been adjourned for giving sentence, that his consent had not been validly obtained, the Magistrate declined to withhold sentence, and he was ordered to be imprisoned for two months.

On application by way of habeas corpus for his discharge from custody, it was held, (1) following *Rex* v. *Walsh & Lamont*, 7 O.L.R., that a mistrial had taken place; (2) that further detention under s. 752 of the Code was proper, but that prisoner should, within 48 hours of the service of the order, be brought before the Police Magistrate in order that he should be committed for trial for the offence at the next court of competent jurisdiction, and, in the meantime, be admitted to bail, his own bail, in the opinion of the Judge, to suffice.

Farmer, for the prisoner. *Dymond*, K.C., for the Crown.

Province of Manitoba.

KING'S BENCH.

Richards, J.] CURLE *v.* BRANDON. [June 2.

Municipal corporation—Non-repair of bridge—Use of bridge by heavy traction engine—Notice of action—Meaning of "happening of the alleged negligence"—Misfeasance in not stopping up holes in timbers—Expectation of pecuniary benefit from continuance of life.

Plaintiff was the widow and administratrix of William Curle, who was killed in consequence of a traction engine, on which he was riding, breaking through the approach to the bridge over the Assiniboine River, in the defendant municipality. She brought her action on behalf of herself, a son old enough to earn his own living, a grandson at an age to require educa-

tion and maintenance, who lived with the deceased, and was being reared as one of his family, and of a nephew and an adopted child of the deceased. It was proved that traction engines of equal weight had for some years, to the knowledge of the city officials, crossed over the bridge in question; that that bridge was the strongest one across the river for many miles; that one of the timbers in the approach had rotted more than the others in consequence of water getting into an unplugged spike hole in it, and that the bridge formed part of a public highway in the city on which work had been performed, and public improvements made by the city; also that the approach referred to was not safe for the heaviest part of the traffic which, to the knowledge of the city officials, had been passing over it for the previous two years, and that no attempt had been made to stop such traffic, or to warn those in charge of it of any danger.

Held, following *Manley* v. *St. Helens*, 2 H. & N. 840, and *Lucas* v. *Moore*, 3 O.R. 602, that under s. 667 of The Municipal Act, R.S.M. 1902, c. 116, the defendants were liable for the damages resulting from their negligence in not having the bridge and its approaches strong enough for the passage of the traction engine referred to.

Plaintiffs' counsel argued that defendants were guilty of negligence amounting to misfeasance, so as to make them liable in damages, independently of the statute, because they had not stopped up the spike hole, referred to, so as to prevent water lodging in it, and cited the case of *Patterson* v. *City of Victoria*, 5 B.C. 628; but the Judge distinguished that case on the ground that there an augur hole, an inch and a quarter in diameter, had been purposely bored to test the wood, and left open.

Held, also, that the notice of action required by the section quoted, to be given to the municipality need not be signed by the claimant personally, or shew that she was claiming in her representative capacity.

It was contended, on behalf of defendants, that, the negligence relied on, if proved, having existed for nearly two years, notice of the action had not been given "within one month after the happening of the alleged negligence," as required by the same section.

Held, that, to give effect to the manifest intention of the Legislature, the words quoted should be construed to read "after the happening of the injury or damages, resulting from the alleged negligence," or it might be held that the negligence continued to "happen" up to the time that the damages resulted from it, otherwise no notice of the action or claims could be given to comply with the statute, in any case, where the negligence had existed for more than a month before the injury resulted from it.

The Judge allowed the plaintiff $2,000 for herself, $300 for the grandson; but nothing for the son, who, in the circumstances and position of his father, had no reasonable expectation of pecuniary advantage from the continuance of the life, and nothing for the nephew or adopted child, who

did not come within the provisions of R.S.M. 1902, c. 31, or any other enabling Act.

Wilson, and *A. Howden*, for plaintiff. *Howell*, K.C., and *H. E. Henderson*, for defendants.

Province of British Columbia.

IN ADMIRALTY.

Martin, Lo. J.] [April 13.

VERMONT STEAMSHIP CO. *v.* THE ABBY PALMER.

Admiralty law—Bail—Cash deposit—Retention of pending appeal to increase salvage award—Arrest of property to answer extravagant claims.

Motion by defendant for payment out of court of security. This was a salvage action and to obtain release of his ship defendant had paid into court $25,000.00. Plaintiff recovered judgment for $4,200.00 and costs, and was appealing to the Exchequer Court with a view to having the salvage award increased.

Held, that as defendant was a foreign resident the excess over the amount of the judgment would not be paid out to him pending appeal, but that as the ship had been arrested to answer an extravagant claim (a practice of which the Judge disapproved) only $6,000.00 would be retained in court pending the appeal.

W. J. Taylor, K.C., for the motion. *J. H. Lawson, Jr.*, contra.

Full Court.] IN RE COAL MINES REGULATION ACT. [April 18.

Coal Mines Regulation Act—Employment of Chinamen—Rule prohibiting—Constitutionality of—B.N.A. Act, s. 91, sub-s. 25, and s. 92, sub-s. 10, 13—Naturalization and aliens—R.S.B.C. 1897, c. 138, s. 82, r. 34, and B.C. Stat. 1903, c. 17, s. 2.

Rule 34 of section 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, and which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines is in that respect ultra vires.

So *held* (on a question referred by the Lieutenant-Governor in Council the full court for an opinion as to the constitutionality of the rule) per HUNTER, C.J., and IRVING, J., MARTIN, J., dissenting.

Union Colliery Co. v. *Bryden* (1899) A.C. 580, applied and distinguished from *Cunningham* v. *Tomey Homma* (1903) A.C., 151.

Per IRVING, J., the calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be intra vires.

Wilson, A.-G., and *A. E. McPhillips*, K.C., for the Crown. No one contra.

Full Court.] April 18.

BYRON N. WHITE CO. *v.* SANDON WATER WORKS CO.

Sandon Water Works Act, B.C. Stat. 1896, c. 62—Permission to divert water—Condition precedent— Trespass—Laches—Acquiescence—Costs —Appeal successful on point of law not taken below.

Appeal from judgment of IRVING, J., dismissing an action for a mandatory injunction to compel defendants to remove from plaintiffs' lands a water tank, flume, etc.

By s. 9 of the Sandon Water Works & Light Company Act (B.C. Stat. 1896, c. 62) the company was authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in Council might allow with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in Council. The company got their plans and sites approved and proceeded with the construction of a tank and flume on plaintiffs' lands for the purpose of diverting water:

Held, that the authority of the Lieutenant-Governor in Council to divert was a condition precedent to the company's right to interfere with the plaintiffs' soil, and that plaintiffs were entitled to damages and a mandatory injunction.

Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right; to amount to laches raising equities against the person on whose land the erection was placed there must have been some equivocal conduct on his part including the expenditure by the person erecting it.

Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful and no costs of the appeal will be allowed, but as the appellant should have succeeded at the trial he will be allow the costs of it.

Judgment of IRVING, J., reported ante p. 163, set aside.

E. V. Bodwell, K.C., and *R. S. Lennie*, for appellants. *S. S. Taylor*, K.C., for respondents.

Full Court.] ROBINSON *v.* EMPEY. [June 15.

Bill of sale—Sale of business as a going concern—Chattel mortgage by a new firm covering book debts due to it—Whether debts due old firm included—Creditors' Trust Deeds Act, 1901.

Appeal from HUNTER, C. J., at the trial.

The firm of Vaughan & Cook sold their grocery business including all their stock in trade and book debts to Hamon & Bisson who three days afterwards gave a chattel mortgage to defendant covering the stock in trade of the grocery business and also all book debts due to Hamon & Bisson in the business carried on by them as grocers. Hamon & Bisson assigned to defendant for the benefit of creditors who afterwards removed defendant and appointed plaintiff in his place. The day after his removal defendant paid himself $1,245.00 on account of his mortgage claim, being proceeds of book debts collected by him and originally due to the firm of Vaughan & Cook. Plaintiff sued to set aside the chattel mortgage as being a fraudulent preference and at the trial the Chief Justice held that the mortgage was good but ordered defendant to pay the $1,245.00 into court for distribution among creditors as he held the Vaughan & Cook book debts were not covered by the description in the chattel mortgage.

Held, on appeal that the said book debts were covered by the chattel mortgage.

Quaere, has an assignee a right to pay himself without consulting the other creditors.

J. A. Macdonald, for appellant. *MacNeill*, K.C., for respondent.

Full Court.] BARRETT *v.* ELLIOTT [July 29.

Contract for fire insurance—"Valid in Canada"—Meaning of policy in company not licensed in Canada—Premium paid to—R.S. Canada, 1886, c. 124, s. 4.

The plaintiff who was the proprietor of a hotel in White Horse in the Yukon Territory entered into an agreement with defendants whereby they agreed to procure fire insurance on the hotel in some office valid in Canada. Plaintiff paid part of the premium in advance and the balance when he received the policies of insurance which was for one year. The companies in which the insurance was effected were not licensed in Canada and after the expiration of the year plaintiff sued for a return of the premiums paid.

Held, that the plaintiff had contracted for insurance in a company licensed in Canada and that the premiums paid could be recovered back as upon a failure of consideration.

Judgment of DRAKE, J., reversed.

F. Higgins, for appellant. *Helmcken*, K.C., and *Belyea*, K.C., for respondents.

North-West Territories.

SUPREME COURT.

Scott, J.] GOODE *v.* DOWNING. [Feb. 9.

Master and servant—Improper dismissal of servant—Additional wages for —Jurisdiction of J. P.

A bartender employed by an hotel keeper at a monthly salary from the first of December became temporarily incapacitated through illness on the 5th of June, and procuring a substitute left the hotel returning to work on the 10th, whereupon he was discharged by his employer being paid $10.00 for wages up to the day he had left. He claimed the balance of two months, wages for improper dismissal and on an information before a J. P. under the Master and Servants Ordinance (C. O. 1898, C. 50) which authorizes the justice to order payment of any wages found to be due by the master to the servant, was awarded five days further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice.

Held, on appeal from this order, that the hotel keeper was not entitled to discharge the bartender under the circumstances without notice, also that the latter was entitled to be paid wages up to the time of his dismissal. But, that the J. P. had no jurisdiction under the ordinance to order payment of the additional month's wages which although no doubt the measure of damages for improper dismissal, could not be said to be wages due.

Bown, for appellant. *Biggar*, for defendant.

UNITED STATES DECISIONS.

NEGLIGENCE—LIABILITY OF RAILROADS FOR INJURIES CAUSED BY TRAINS PROJECTING OVER THE PLATFORM.—Several recent cases have called attention to the difference of opinion existing among the authorities on the question of a railroad's liability for injuries caused by trains projecting over the platform of a station. In the recent case of *Lehigh Valley Railroad Co.* v. *Dupont*, 128 Fed. Rep. 840, the United States Circuit Court of Appeals for the second circuit held that a passenger has a right to assume that the platform is so related to the track that the train will not sweep over any part of it. This case is also supported by the cases of *Dobiecki* v. *Sharp*, 88 N. Y. 203, and *Archer* v. *Railroad*, 106 N. Y. 589, 13 N.E. Rep. 318.

A contrary view is taken in the recent case of *Norfolk & Western Ry.* v. *Hawkes*, 9 Va. Law Reg. 1060, where the supreme court of Virginia held that a railroad employee of intelligence whose duty it is to attend passenger trains and receive the mail pouch, and who, seeing a train approaching, stands near the edge of the depot platform, which is

twelve feet wide, cannot recover for an injury inflicted upon him by reason of being struck by the train which projected tortuously from one to ten inches over said platform. The court said: "No man is justified in placing himself near a passing train upon any such idea or presumption. It is inexcusable rashness and folly to do so. The instincts of self-preservation, the dictates of most ordinary prudence, would suggest, and even require, that every person, upon the approach of a train, shall retire far enough to avoid injury, whatever may be the speed of the train or the width of the cars. He must, at his peril, place himself where he cannot be struck by the train so long as it continues upon its track. Of course, the result might be very different where the employee, in remaining on or near the track, is acting under the instructions of the company.

CRIMINAL LAW.—Jurisdiction to impose sentence upon one convicted of crime is held, in *People ex rel. Lenert* v. *Barret* (Ill.) 63 L.R.A. 82, to be lost by permitting him to go at large upon his own recognizance pending a motion for new trial, and taking no further action in the case until after the expiration of several terms of court.

Book Reviews.

The Trust Company Idea and its Development, by ERNEST HEATON, B.A. (Oxon.), Barrister-at-Law. Toronto: The Hunter Rose Co., Limited. 1904.

This little work makes interesting reading for lawyers and law makers, as well as other business men. It is a concise history of the trust company movement, with special chapters given to the subject as it obtains in Canada, England, Australia, New Zealand and the United States, etc. We refer to the legal aspect of the trust companies in this country in our editorial columns.

Flotsam and Jetsam.

Judicial Salaries:—In England the Lords Justices receive $25,000. In the commonwealth of Australia the salaries of the Supreme Court Judges have been fixed at $17,500 and $15,000; in Victoria at $17,000 and $15,000; in Queer sland at $17,500 and $10,000; In Cape Colony at $15,000 and $10,000. In very small province of Tasmania the salaries are $7,500 and $6,000, though the population is only 175,000. In Ireland the Lord Chancellor receives $40,000; the Master of the Rolls and the Vice-Chancellor $20,000 each; the land Judge, $19,500; the Lord Chief Justice, $25,000: the Chief Baron, $23,000; and the eight puisne Judges, $17,500 each.