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Should the Chancellor and Chief Justice Falconbridge act on the Royal Commission to try the bribery charges against a member of the Government of Ontario, as it is said they will, the present congestion in the litigation of the country will be much increased. Mr. Justice Robertson and Mr. Justice Lount are both absent. The six months' leave of the former has, we believe, expired, but whether he will return to work is not yet announced. The health of Mr. Justice Lount is, we regret to say, still in an unsatisfactory condition and his return cannot be expected for some time to come. Mr. Justice Ferguson is back at work, but it would be impossible for him to attempt anything in the nature of extra work. The loss of the services of two more judges at the present would be serious. The circuits are beginning, and the absence of so many judges must of necessity cause delays and loss to litigants.

It may not be out of place here to remark that the Divisional Courts ought to sit with three judges. As a rule now-a-days the number is reduced to two. This occasionally requires cases to be re-argued as some times the judges differ in opinion. The provision of the Judicature Act is as follows: "Every Divisional Court of the High Court shall be composed of three judges unless from illness or other unavoidable cause a third cannot be obtained, in which case it may be composed of two members, provided that in case of divided opinion upon any matter argued, the same shall, at the election of either party, be reargued before a Court of three members." As to the words "unavoidable cause," there may be a question whether they cover the case of the absence of judges undertaking work outside the regular official duties, for it must be remembered that although they are selected because they are judges of eminence, they do not act as judges compellable to do duty as such, but as commissioners. If they do take the burden of this enquiry it will doubtless be because they consider they ought so to do for the public benefit. There are, however, many who doubt the wisdom of such action, and who for many reasons will regret that such a decision should have been arrived at.

THE JUDICIAL COMMITTEE—ITS PAST, PRESENT AND FUTURE.

I. INTRODUCTORY.

This body is the Supreme Court of Appeal for the British Dominions beyond the seas. "Cases come before it from all quarters of the globe, and it has to act as the final interpreter of almost every known system of law—English, Colonial, Hindu and Mohammedan—and even the still more intricate system of customary or tribal law, by which most of the native races are governed." A more multifarious jurisdiction than that of the Privy Council it would be difficult to imagine.

"When cases are appealed from the highest courts in India to the Privy Council in England, that respectable body determines the true construction to be put on the Koran and the Islamic traditions, or on passages from the Mythical Manu, in the same business—like way as it would the meaning of an Australian statute."

The following anecdote is often quoted as showing the faith in this body, which has been inspired into the distant peoples; it is told of a traveller who had penetrated into a remote part of India that he found the natives offering up a sacrifice to a far-off but all-powerful god who had just restored to the tribe the land which the government of the day had taken from it. He asked the name of the god. The reply was: "We know nothing of him but that he is a good god, and that his name is the Judicial Committee of the Privy Council."

Every intelligent citizen should know something about this great central tribunal which, while knitting together the uttermost parts of the king's dominions, it is yet strictly speaking not a court at all. Its jurisdiction arises simply out of the right of every British subject, who believes that a wrong has been done to him, to petition his sovereign personally for redress. It is proposed to

discuss briefly in this article the origin, the present position and the possible future of this great court.

II. THE ORIGIN OF THE JURISDICTION.

The origin of the jurisdiction of the Privy Council is a question upon which learned writers differ widely. Partly by reason of the absence of records, partly by reason of their ambiguity, partly owing to the confusion of names in such materials as we do possess, partly from the fact that the same institution has from time to time performed different functions and in each case under a different name, the history of the Council is involved in great obscurity and perplexity.

The Judicial Committe is a development of the Curia Regis, or Aula Regia, and represents the earliest and most ancient of our Judicial institutions, the origin and parent of all the rest. The Jurisdiction of the King in Council—undoubtedly the earliest exercised by the sovereign—was, according to the best authorities on our legal history, the origin of all the Courts of Justice in the realm; in Sir Matthew Hale's words, the "common mother" of those great Courts, the Chancery, the King's Bench, the Exchequer and the Common Pleas, which for so many ages exercised their jurisdiction, and have now been united in the High Court of Judicature.

This jurisdiction was a necessary consequence of the great fundamental principle of our law and constitution that the sovereign is, over all persons and in all causes within the dominions, supreme, and that it is the first duty of the sovereign to see that justice is administered to all his subjects; the exercise of judicial power is a royal prerogative. In early times when sovereignty was personal, it was laid down that the first duty of the sovereign was to judge. Originally he doubtless really presided, and administered justice. This duty was naturally exercised in council, and hence the jurisdiction of "the King in Council," which was the earliest exercised and still continues to exist: Finlason, p. 1, 2.

We read of "divers councils" with which "for the better discharge of his royal duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath armed the king," but Blackstone tells us that: "The principal council belonging to the sovereign is his Privy Council, which is generally called, by way

of eminence, the Council. And this, according to Sir Edward Coke's description of it, is a noble, honourable and reverend assembly of the king, and such as he wills to be of his Privy Council, in the king's court or palace. The sovereign's will is the sole constituent of a Privy Councillor; and this also regulates their number, which of ancient time was twelve or thereabout.

The duty of a Privy Councillor appears from the oath of office, which consists of seven articles:—1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt or dread. 3. To keep the king's council secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep and do all that a good and true councillor ought to do to his sovereign lord."

"The council was nothing more than an assembly of royal officials. It made no claim to independent authority. Its very existence was derived from the king's pleasure and hence it was dissolved, ipso facto, by his demise. The council at all times acted in the king's name, with a scrupulosity which reaches the height of pedantic absurdity, when Henry VI. (at the age of five years) is made to assure the chancellor that if we are negligent in learning, or commit any fault, we give our cousin (Earl of Warwick) full power, authority, license and direction to chastise us, from time to time, according to his discretion, without being impeded or molested by us or any other person, in future, for so doing." Dicey's Privy Council, p. 29. It is not until the reign of Henry VI. that the term "Privy Council" makes its appearance, applied to a select body distinct from and a development from the general or "ordinary" council: Dicey, p. 45.

It may be noted in passing that the number of Privy Councillors is now indefinite. No inconvenience arises from this as, with the exception of such of them as are called Cabinet Ministers, the Privy Councillors are not in modern practice ordinarily summoned to advise the sovereign on affairs of state. The cabinet ministers (or cabinet council) are those Privy Councillors who, being more immediately honoured with the sovereign's confidence, actually conduct the business of Government. It is this body that is understood when mention is made of the "King's Administration,"

though strangely enough it is a body unknown to the law and one whose members are never officially made known to the public, nor its proceedings recorded: 2 Steph., Com. p. 451.

The pressure of state business soon made it impossible for the sovereign to perform all his duties in his own person. By degrees, as need arose, many of the matters which were once dealt with by the King in Council were delegated to regular courts, as "emanations from the parent jurisdiction of the King in Council." The power of the Court of King's Bench to supervise the proceedings of other tribunals, even of the Judicial Committee itself was derived from the fact that the King himself was supposed, theoretically, to be present at and to take part in its decisions, which were pronounced as if coram ipso Rege in consilio.

When regular courts of law were established there arose a great jealousy at the jurisdiction of the King in Council, which then became extraordinary, and continued to be exercised, as it originally had been, as a kind of extraordinary and corrective jurisdiction to prevent failure of justice in the ordinary courts by fraud or violence, corruption or intimidation; and especially by combination and conspiracy to obstruct or prevent justice. To some extent this extraordinary jurisdiction was salutary and necessary: Finlason, pp. 6, 7.

In the reign of Charles I., first by the Petition of Right in 1628, and afterwards in 1640, any judicial jurisdiction of the council in matters arising within the realm was distinctly declared illegal. The consequence was that the King in Council could only exercise appellate jurisdiction over the colonies or dependencies, or foreign dominions of the crown. (ib. p. 37.) These appeals came to the King in Council from necessity—there being no other tribunal open to them, and by virtue of the fundamental principle, that is the duty of the crown to see that justice is administered to all its subjects.

"The general rule with regard to appeals from the colonies, appears to be, wherever no limitations have been imposed upon them by orders in council, the charters of the courts, instructions to the governors, or acts of parliament, they are received on petition to the King in Council, from all courts in the King's dominions abroad, on the ground that it is the right of subjects to appeal to the sovereign to redress all wrongs done to them in any court of judicature." (2 Knapp's P. C. Reports, App. IV.) The appeals were heard before a committee of the council appointed for that

purpose, which reported to the King in Council its decision thereon.

This committee was composed solely of the judicial or legal members of the council, and assumed in all respects a judicial character. It really was a "Judicial Committee," though not so designated in any statute.

In the year 1828, Lord Brougham, when advocating the transfer to the "King in Council" of the powers of the Court of Delegates, which then dealt with appeals in ecclesiastical and maritime causes, used the following language in regard to the Judges of the then Judicial Committee of the Privy Council:—"They are made the Supreme Judges in the last resort, over every one of our foreign settlements, whether situated in the immense territories which you possess in the East, where you and a trading company rule together over not less than seventy millions of subjects—or established among those rich and populous islands in the Indian ocean and which form the Eastern Archipelago—and have their stations in those lands, part lying within the tropics, partly stretching toward the Pole, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the New World are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all questions growing out of so vast and varied a province is exercised by the Privy Council unaided and alone."

In 1833 an act was passed which took away from the Privy Council as a whole the judicial powers which it had acquired in regard to colonial appeals, but which in fact the whole body had not exercised, and assigned them to a special committee called "The Judicial Committee."

"Thus, statute has produced the same effect upon the council's legal authority which custom has had on its political powers. In each case the functions of the whole body have passed into the hands of a smaller committee, connected with the Privy Council by little more than its name. Out of the ancient judicial functions of the crown and of the council which advised the crown, functions which a century ago seemed lapsing into desuetude, there has been involved a new system of judicature. A body called the Judicial

Committee of the Privy Council, somewhat resembling the consistory of the Roman Emperors, has been created and now acts as a Supreme Court of Appeal for all the transmarine possessions of Britain, whether Indian or Colonial:" Bryce, Studies, I., p. 172.

The political powers of the Privy Council have long centred in the Cabinet, which is in theory nothing but a Committee of the Privy Council, and yet has in reality nothing whatever to do with it. "Thus the extraordinary result has taken place, that the Government of England is in the hands of men whose position is legally undefined; that while the Cabinet is a word of every-day use, no lawyer can say what a Cabinet is; that while no ordinary Englishman knows who the Lords of the Council are, the Church of England prays, Sunday by Sunday, that these Lords may be 'endued with wisdom and understanding!'": Dicey, The Privy Council, p. 143.

The appellate functions had, as we have seen, been previously exercised by what was in fact a Judicial Committee of the Privy Council, but Lord Brougham speaks of the Act of 1833 as if he had been the creator of such a Committee. "When I established it," he says, (British Constitution, p. 378), and he speaks with a parent's satisfaction of "the universal testimony borne to the excellent working of the Judicial Committee for Appeals in Colonial causes," as shewing the "expediency of retaining that appellate jurisdiction on its present footing and also of taking its construction as an example": ib. p. 364.

It may be interesting to compare with this his account of the working of the House of Lords as an appellate tribunal in his times. "One branch of the Legislature is the Supreme Court of Justice—civil as well as criminal. The House of Lords is the Court of ultimate Appeal in all questions of law whatever, provided they are raised on any record, and in all questions of fact, and all questions of law whatever, which arise in courts of equity. Every English peer, on attaining the age of twenty-one years, has as much voice on all these great questions as the Lord Chief Justice of England, or the Lord High Chancellor himself. Such is the theory of the constitution and it may on any one occasion be made the practice. In practice, however, all is quite different. The usage is, and for above a century has been followed with a single exception, for all but the law Lords to abstain from taking part. Hence only four or five of the Lords, and generally speak-

ing only one—the Chancellor—exercises this high jurisdiction. The appeal too, from the Lord Chancellor's decrees is heard by himself; and until very lately, he alone sitting regularly in the house of which he is speaker or president, all the appeals from himself were disposed of by himself. For five years Lord Eldon sat alone in judgment on the appeals from his own decrees. That they were few in number may be easily imagined:" British Constitution, pp. 359, 360.

III. THE PRESENT POSITION OF THE JUDICIAL COMMITTEE.

One of Lord Brougham's great aims in establishing the Judicial Committee was to have in it Judges "who should be men of the largest legal and general information, accustomed to study other systems of law besides their own, and associated with lawyers who have practised or presided in Colonial courts."

It is only recently that the latter part of his ideal has been to any extent realized, by the appointment (in 1897) of Sir Henry Strong, Chief Justice of the Supreme Court of Canada, the Chief Justice of the Cape of Good Hope, and the Chief Justice of Southern Australia, to be Privy Councillors. They thus became members of "The Judicial Committee" by virtue of the Judicial Committee Amendment Act, 1895, which provided that any person being or having been Chief Justice or a Judge of the Supreme Court of the Dominion of Canada, or of a Supreme Court in any Province of Canada, or of the Australian Colonies, or of the Cape of Good Hope or Natal, who is a member of the Privy Council, shall be a member of the Judicial Committee of the Privy Council. Such members are not to exceed five at any one time.

The composition of the Judicial Committee has been altered from time to time. It now consists of the Lord President, such members of the Privy Council as hold, or have held, "high judicial office," the Lords Justices of Appeal (whose number is limited to four), and two other persons being Privy Councillors, whom the King may appoint by sign manual warrant. Besides these, there may be two paid members who have held the office of Judge in the East Indies. In addition to these, as already mentioned, the Chief Justices of Canada, Cape Colony, and South Australia, have been appointed to the Committee. It is necessary that four members should be present at the hearing of a cause.

In Safford and Wheeler's new book on Privy Council practice, the learned authors use the following language in regard to the Judicial Committee as at present constituted;—"With this one exception (i.e. India) it is difficult to see in what way a stronger tribunal can be constituted than the present Judicial Committee of the Privy Council. Beyond including among its members all the Judges of the House of Lords, it comprises eminent Judges from the Court of Appeal and the High Court of England, from Ireland, from Scotland, and from India and the leading colonies, and certain illustrious laymen. Its authority is probably unique. Its jurisdiction is undoubtedly more extensive, whether measured by area, population, variety of nations, creeds, languages, laws or customs, than hitherto enjoyed by any court known to civilization."

The stranger seeking for the habitat of this august tribunal is surprised when directed to a low, shabby looking building in Downing Street where its sittings are held. The Court holds its sessions in a very unpretentious room upstairs, the acoustic properties of which are poor. "The Councillors present do not wear wigs or robes; they do not sit as a bench of Judges sitting in state, but as a small group of elderly gentlemen in plain clothes on either side of an oblong table, separated from the rest of the room by a wooden barrier, in the middle of which is placed a desk (like that from which an Episcopal clergyman reads 'the lesson') and from behind this Counsel, attired in gowns and wigs, addresses the court."

This appellate tribunal sitting "in a shabby room up a dirty staircase off Downing Street" with its wide jurisdiction and complex appeals, maintains the even balance of civil procedure and criminal justice over a fifth of the human race and for a fifth of the territory allotted to man on this planet.

The following extract from a letter written, now many years ago, by a Montreal advocate, giving his impressions of the Privy Council, is still of interest:—"L'on n'est past formaliste au Conseil Privé. Les Judges siégent habillés comme de braves bourgeois, dans la vie ordinaire; c'est-à-dire que la plupart portent des pantalons gris plus ou moins foncé. Sir Robert Collier portait une cravate grise. Tous les Juges avaient un surtout (walking coat) noir. Le greffier lui-même avait un pantalon gris. Les Solicitors assistent en cravates de couleur. En fin l'impression que j'ai rapportée du Conseil Privé, c'est que c'est un beau tribunal arbitral, éclairé par les plus hautes lumierès de la science géneralé, appliquée

au conditions les plus variées de l'humanité, inspiré par nul autre sentiment que celui d'être juste et parvenant a ses fins, sans s'embarrasser d'un formalisme qui n'est qu'une concession aux faiblesses des hommes. Mais hélas! C'est une Justice qui coûte cher! C'est un luxe qui n'appartient qu' aux riches, ou à ceux qui jouent tout pour tout." (2 Revue Critique, 467.) This is not unlike the verdict of Captain Fullalove in "Hard Cash." In rambling over London with the coloured man Vespasian, whom he was trying to educate and enlighten, they passed Westminster Hall. The Captain pointed it out to Vespasian, with the remark, "There's where you can buy British justice. It comes high, but it's prime."

Limits have been imposed by various colonial legislatures as to the nature and value of the cases in which an appeal to His Majesty in Council is allowed, but when it is allowed it takes the form of a petition to the sovereign, and the order upon the petition or appeal is made by the King in Council. The petition is addressed "to the King's Most Excellent Majesty in Council." In the Province of Ontario appeals lie either (1) direct from the Court of Appeal for Ontario "in cases where the matters in controversy exceed the sum or value of $4,000, or where the matter in question relates to the taking of an annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights of what value or amount soever the same may be." (R.S.O.C. 48, § 1.) Or, (2) from the Supreme Court of Canada, by special leave of the Privy Council. There is no appeal as of right from the Supreme Court, but the royal prerogative is preserved.

This special leave is very rarely granted, and only in "cases of gravity involving matters of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character." There is no appeal to the Judicial Committee from the Courts of Canada in criminal cases: Criminal Code, sec. 751.

In addition to its ordinary appellate functions, the Privy Council has authority under 3 & 4 Will. IV. c. 41, to consider "any other matters whatever" which may be referred to it by the crown, and matters of great importance have from time to time been referred to it under this power.

"The result of the deliberations of the Committee is recorded,

not in the form of the decree of the Court, but merely as 'humble advice' to His Majesty to take certain action. It is needless to say that His Majesty always does act on the advice given, but the whole procedure is a curious illustration of the affection of the English constitution for old forms long after the substance has completely changed.'"

The advice of the Judicial Committee is a statement at length, contained in a single judgment read in open court, of the reasons which determine them in "humbly advising" the King to give effect to their decision. These reasons are not stated in the report to the King; this merely sets forth their conclusion and the method proposed for giving effect to it. If there is any difference of opinion no notice is taken of it in the judgment or in the report to his Majesty. This is not a mere matter of policy. It is one of the "orders to be observed in assemblies of council" made in 1627 and runs thus:—"In voting of any cause the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices, because every Councillor hath equal vote there; and when the business is carried according to most voices, no publication is afterwards to be made by any man how the particular voices and opinions went:" Anson, Constitution, p. 471.

In the case of *Ridsdale* v. *Clifton* (1877) 2 P.D. 276, Chief Baron Kelly maintained that he had the right to let it be known that he did not agree with the report; this right was disputed by the Lord Chancellor. The action of the Chief Baron led to a voluminous controversy, but by an Order in Council of Feb. 4, 1878, the old order of 1628 was confirmed, and it was directed that the "ancient rule and practice of the Privy Council" should be observed in the Judicial Committee, and that no publication should be made how the particular voices and opinions went.

IV. WHAT WILL BE THE FUTURE STATUS OF THIS TRIBUNAL.

Some change is inevitable. The position of the two great appellate tribunals of the Empire is illogical and inconsistent. Some of the anomalies have been pointed out by Mr. Justice Hodges (in an article to be again referred to) as follows:—"There are at present two tribunals of final appeal, the House of Lords and the Judicial Committee of the Privy Council; the former may be described briefly as the Home, the latter as the Indian and

Colonial Court of Appeal. To the former are sent appeals from the Courts of England, Ireland, and Scotland; to the latter appeals from India and the colonies. Each tribunal is independent of the other, each is final. Each states authoritatively and as a court of last resort what the law is. No matter how utterly a decision of the Privy Council may differ from one in the House of Lords, there is an end of the matter. The Judicial Committee's decision is final. A proposition may be affirmed as law by the Judicial Committee; it may be negatived by the House of Lords. The law is as the Judicial Committee declares it, and also as the House of Lords declares it. Theoretically the affirmative and negative of the same proposition are each true for different parts of the Empire. And there is no judicial authority to get rid of the absurdity."

As a result a law suit between a merchant resident in Liverpool and one resident in Toronto may be finally determined in favour of the Liverpool merchant if he brings his action in England, in which case it would go in the last resort to the House of Lords, or in favour of the Toronto merchant if he institutes proceedings in Canada, in which case the ultimate appeal may be to the Privy Council. It is exceedingly unsatisfactory that the final decision in a legal controversy should depend upon where the proceedings happen to be commenced. Misera est servitus ubi jus est vagum.

Moreover, the Judicial Committee of the Privy Council, "that far-reaching engine of Imperial Justice, which examines impartially the legality of the actions of the Queen's meanest subject and the Queen's Imperial Government," is yet, strange to say, not on a level for practical purposes with the House of Lords, and its decisions, though regarded with respect, are not considered as binding by the Municipal Courts of Great Britain and Ireland.

Bramwell, L.J., in giving judgment in a case in the Court of Appeal thus refers to a decision of the Judicial Committee relied on by Counsel: "We think that case justifies his argument and is in point. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot." *Leask* v. *Scott*, L.R. 2, Q.B.D. 376. And the Judges of the Exchequer Division in Ireland speak of a decision of the Privy Council as one which "possibly, were there no decision the other way," they would "from courtesy, defer to," but as one "which, in

strictness, is not binding on this Court." *Bell* v. *Great Northern Railway Co.*, 26 L.R. Ir. 428. See also *Smith* v. *Brown*, L.R. 6, Q.B. 736; *Dulieu* v. *White*, 1901, 2 K.B. 669. So e converso, judgments of the House of Lords are not binding on colonial courts. This is pointed out in the case of *Healy* v. *Bank of New South Wales*, 24 Victorian L.R., p 694.

"We are quite conscious (says Mr. Justice Williams) "that in later cases the House of Lords has not apparently applied the same rule; but while decisions of the House of Lords are justly entitled to our highest respect, they are not binding on us. Those of the Privy Council are." "Of course" (says Mr. Justice Holroyd), "if the Privy Council should alter its opinion, we should have to alter our practice in the same way, but until that happens we have to follow our own practice, and not to follow the opinion of the House of Lords."

In June, 1902, a conference met in London to discuss measures looking to the strengthening of the Final Court of Appeal for the colonies. At the request of Mr. Chamberlain, the various colonial governments appointed delegates for that purpose. A suggestion had apparently been made that four additional Law Lords should be created, with seats in the House of Lords as well as on the Judicial Committee, these to be chosen by the self-governing colonies. This proposition, to which there are very strong objections, did not commend itself to the Canadian Government, which expressed itself as not dissatisfied with the manner in which the Judicial Committee is at present constituted, and also stated that in their opinion the 'creation of the four Colonial Law Lords suggested would not inspire any additional confidence in the Judicial Committee." As a result of the conference, the majority of the delegates made the following recommendations:—That appeals continue to lie to the King in Council; that appointments to the Judicial Committee should be made from time to time from the colonies, both crown and self-governing, the appointees to vacate any judicial office which they might hold at the time of their appointment to the Judicial Committee; the selection not to be restricted to Judges and ex-Judges; the appointment to be for life or for a term of years, with provision for suitable salaries and pensions. The New Zealand representative (Sir James Pendergast) did not concur in the recommendation as to the colonial appointments, being unable to find "sufficient reason for any colonial

representation, at any rate from colonies where the legal systems are substantially the same as that of England."

Mr. Justice Hodges, of the Supreme Court of Victoria (representing the Commonwealth of Australia) also dissented in an elaborate memorandum, in which he urged very strongly that instead of the present system of separate courts for home and colonial appeals, the House of Lords and the Judicial Committee, the two should be fused and should constitute "His Majesty's Imperial Court of Final Appeal" for the whole empire. This proposition he has since embodied in a magazine article already quoted from.

Mr. Chamberlain, in a subsequent despatch to the different governments represented, has summarized the proceedings of the conference and pointed out that it would be impossible without practical unanimity on the part of the colonies in their recommendations to make any drastic changes in the constitution or procedure of the existing Courts of Appeal, and that it was apparent that the majority of the delegates were satisfied with the existing system. In consequence "His Majesty's Government do not propose to make any material changes for the establishment of an Imperial Court of Appeal."

The able and interesting article by Mr. Justice Hodges already referred to, on "An Imperial Court of Final Appeal," is to be found in the Nineteenth Century for October last. He points out what he considers defects in the Judicial Committee as at present constituted, the uncertainty as to the personnel of the court so that a decision given by the court on one occasion may, when a later appeal comes on to be heard, be reversed by a court differently constituted, owing to the fact that members who were not present on the earlier occasion may be present; these, "while not expressly overruling the previous case, may have recourse to the process known to lawyers as 'distinguishing' it, which in some instances is little other than a polite way of indicating that it is overruled." There is, he says, a very strong feeling that the Judicial Committee is an inferior tribunal to the House of Lords. It is defective from its very composition; from the appointment of men who have retired from the discharge of judicial duties in the East Indies, whose qualifications and mental vigour "do not seem to be exactly those that specially qualify a man to determine a Canadian or Australian or South African appeal;" from the fact that it is the first duty of the Lords of Appeal in ordinary to attend to the

hearing and determination of appeals in the House of Lords, while the Judicial Committee is only entitled to their services after the discharge of their obligations to the House of Lords.

There is further no recognition of the self-governing colonies such as is given to retired East Indians, for while, as stated above, some colonial judges have been appointed to the Privy Council, they are actively engaged in the discharge of their official duties in the colonial courts, and can seldom attend meetings of the Judicial Committee.

The above are the principal reasons for the charge of inferiority. In the learned judge's opinion there is "only one sound and satisfactory solution of the difficulty, and that is that there should be only one Court of Final Appeal for the whole of His Majesty's subjects," whether that be the House of Lords, or the Privy Council, or a new creation. This court should shew by its composition that it is not merely an English, or Scotch, or Irish, or Indian, or colonial court, but that it is an Imperial one and that the area of selection of its judges should be as wide as the jurisdiction of the court.

The writer of the present article ventures, with much diffidence, to express an opinion in regard to this important question. He agrees with Sir James Pendergast in the opinion that there is no advantage to be gained by making additions to the Judicial Committee from those colonies where the English common law prevails, for the purpose merely of colonial representation. But there should be only one final Court of Appeal for the Empire; that court should be made as strong as possible by the appointment to it of the best legal talent in the empire, whether British or colonial. The judges appointed should have as their sole duty to attend the sittings of this great appellate court, and should always be present there, just as all the judges of that august tribunal, the Supreme Court of the United States, are always present at its sessions. This gives certainty and solemnity to its decisions and obviates the danger pointed out by Mr. Justice Hodges of variableness in decisions owing to a kaleidescopic constitution of the court.

While not believing that there is any feeling in Canada that the Judicial Committee is inferior to the House of Lords as an appellate tribunal, it is certainly due to colonial appellate courts, composed now for the most part of very able jurists, that the court which is to sit in appeal from their decisions should be one recognized, respected and followed by the courts of Great Britain and

not one to which among English courts there is "none so poor to do it reverence," as has been already shewn.

Moreover, the colonial courts have been told by the Judicial Committee that where a colonial legislature has passed an act in the same terms as an Imperial statute and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. (*Trimble* v. *Hill* (1879) 5 A.C. 342.) This may sometimes prove embarassing, inasmuch as the Court of Appeal in England pays no respect to a decision of the Judicial Committee by which colonial courts are bound.

The procedure in appeals to the final Court of Appeal whatever it be, should be simplified and the costs in colonial appeals very much reduced; at present they are prohibitive except to corporations or very wealthy litigants; the sittings should be more frequent and the decisions should be rendered more speedily than they often are at present. With a simplified procedure and a moderate tariff of costs, it might be possible to abolish the Supreme Court of Canada and to make an appeal lie from the final Court of Appeal in each province to the final court for the empire, in cases of sufficient importance by reason of the amount at stake or where, from the difficulty and gravity of the legal questions involved, special leave may be granted by the Provincial Court of Appeal, or in inter-provincial disputes; and only in such cases. It cannot be said that the decisions of the Supreme Court of Canada under its present limitations as to membership are regarded, at any rate by the Ontario Bar, as more weighty than those of the Ontario Court of Appeal.

Even if the proposal to have one final Court of Appeal be rejected for the present, some of the above suggestions should be carried into effect without delay. The venerable but fictitious theory of a merely consultative body should be abolished; the court loses in efficiency and dignity from not having the outward semblance of a court of law. A building, stately and befitting the importance of its judicial work, should be at once assigned to it, or, preferably, erected specially for it, and the sessions of the court itself should be conducted with more of the usual impressive and dignified accessories of a Court of Justice.

These things may be matter of sentiment, but the Imperialistic sentiment is a factor worth regarding and conserving. If it be

true, as has been said, that "in the administration of justice and in the existence of a great but scantily recognized central tribunal, we have one of the most real bonds that can hold together the distant parts of the king's dominions in those relations which only a common heritage can give," and that the appeal to the King in Council is "one of the most important ties connecting the different parts of the empire in common obedience to the courts of law," it is surely worth while to do whatever may add to the dignity and efficiency of that tribunal. It is certain that a stately home for it, and a dignified ceremonial in connection with its sessions will greatly conduce to this result.

Toronto. N. W. HOYLES.

It is not often that law as to clubs is discussed in the Courts nor could the case we refer to take place if their by-laws were carefully prepared. In a county court case in England a west end club decided to raise the subscription originally mentioned in the rules. One of the members declined to pay and was sued. It was held that as there was nothing in the by-laws contemplating a change of rates the subscription could not be increased without the consent of all the members.

A rebuke recently administered to two professional men as counsel in a criminal prosecution in the State of New York may be referred to for the benefit of those whom it may concern. We are told in the *Albany Law Journal* that these lawyers repeatedly stated to the jury their individual and personal opinions as to the prisoner's guilt. The learned judge in his charge commented upon this, saying "it is a grossly unprofessional thing for a lawyer to state to the jury what his belief is. Counsel of experience, reputable counsel, never indulge in it. These gentlemen when they get older and have more experience, and have paid more attention to the ethics of the profession, will not, I think, indulge in that sort of thing. The jury have no right to consider it for a moment, except as an indication that the counsel have not risen to the best standing of their profession." We do not think remarks of this sort are as necessary here as they seem to be to the south of us, but it is well for beginners to be familiar with the rule in such matters.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

SOLICITOR AND CLIENT—GIFT BY CLIENT TO SOLICITOR—SALE BY CLIENT TO SOLICITOR—UNDUE INFLUENCE—INDEPENDENT ADVICE—SEPARATE SOLICITOR.

Wright v. *Carter* (1903) 1 Ch. 27, is an important decision on the effect of a deed of gift made by a client in favour of his solicitor, in which the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) discusses very elaborately the circumstances and evidence which it is necessary to prove in order to support such transactions. Prima facie they hold the presumption arises that such a deed was unduly influenced by the fiduciary relation subsisting between the parties. This presumption, however, is rebuttable, and the onus is on the solicitor to prove that the gift was not influenced by the relation between the parties, but it is held not to be sufficiently rebutted by merely shewing that the client acted on the advice of an independent solicitor, even though the two solicitors acted without any fraud or collusion; for the presumption continues so long as the relation of solicitor and client continues for other purposes outside the gift; or at all events until it can be clearly inferred that the influence arising from the relation no longer exists. In this case the evidence was held to fail to establish that the influence had ceased, even though an independent solicitor was employed and advised the client; and the gift was therefore declared void. A sale from the client to his solicitor was also in question, and it was held by the Court of Appeal that in order to support it, it was necessary for the solicitor to prove (1) that the client was duly informed as to the transaction, (2) that he had competent independent advice, and (3) that the price was a fair one. This onus the solicitor was held not to have discharged, and the sale was set aside. Third parties being beneficially interested in the deed of gift, that deed was set aside only so far as it purported to confer any beneficial interest on the solicitor. Stirling, L.J., adopts the view of Farwell, J., in *Powell* v. *Powell* (1900) 1 Ch. 243, as to the duty of a solicitor called in to advise as to a gift by a client to his solicitor, viz.: "The

solicitor does not discharge his duty by satisfying himself that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists."

VENDOR AND PURCHASER—SALE OF LEASEHOLDS BY EXECUTOR—ACTUAL NOTICE THAT THERE ARE NO DEBTS OF TESTATOR.

In re Verrell's Contract (1903) 1 Ch. 65. This was an application under the Vendors' and Purchasers' Act. The contract in question was for the sale of the leasehold estate belonging to the estate of a deceased testator. The testator appointed his widow his sole trustee and executrix and gave to her all his estate upon trust for sale or conversion for the benefit of herself during life or widowhood, and declared it to be her wish that, unless circumstances otherwise required it, his leasehold should not be converted during the life or widowhood of his wife, and at his death he bequeathed the leasehold to his son. The property was offered for sale eighteen years after the testator's death. The purchaser had actual notice that there were no debts of the testator unpaid, and no reason for selling was suggested. Under the circumstances Kekewich, J., held that the title was not one which ought to be forced on the purchaser.

COMPANY—WINDING UP—CALL—CONTRIBUTORY—SET OFF—COMPANIES' ACT, 1862 (25 & 26 VICT., C. 89) SS. 38, 101. (R.S.C. C. 129, SS. 57, 73.)

In re Maxim Co. (1903) 1 Ch. 70, was a winding-up matter. Before the winding up the company had commenced an action against certain shareholders for the amount of a call in which the defendants had pleaded a set off. While the action was pending the winding up was commenced, and the liquidator took proceedings to compel payment of the call. The shareholders claimed the right to set off a contra account against the company, but Byrne, J., held that under the Companies' Act, s. 101, they were not entitled thereto, and that notwithstanding the set off was pleaded in the action brought by the company, the debts remained separate and distinct debts until judgment, and therefore there had been no effectual set off before the winding up. See *Maritime Bank* v. *Troop*, 16 S. C. R. 456.

CHARITY—BEQUEST FOR GENERAL CHARITABLE PURPOSES—OBJECTS OF CHARITY NOT DEFINED—DISPOSITION OF FUND BEQUEATHED FOR CHARITABLE PURPOSES—SCHEME OF CHARITY—SIGN MANUAL.

In re Pyne, Lilley v. *Attorney-General* (1903) 1 Ch. 83, a testatrix had bequeathed a fund for such charitable purposes as might hereafter be set forth in the codicil to her will. She died without making any codicil, and it was held that the bequest was a valid bequest for general charitable purposes. An application was then made to Byrne, J., to determine whether the disposition of the fund was to be carried out by means of a scheme under the Court, or by the King by warrant under the Sign Manual. The learned Judge held that the fund was subject to the disposition of the King by warrant under the Sign Manual. Query as to the proper authority in Canada to execute such regal powers? *Semble*, the Lieutenant Governors.

CONTEMPT—ATTACHMENT—SERVICE OF ORDER.

In re Seal (1903) 1 Ch. 87, an application was made to attach a solicitor for not delivering a bill of costs pursuant to order. The order was made on 3rd July, 1902, and required delivery of the bill within fourteen days from service. This order was served, but by an order made on 5th August, on the application of the solicitors, the time for delivery was extended to August 26th. This order was not drawn up. The application was to attach for not delivering the bills pursuant to the orders of 3rd July and 5th August. Byrne, J., held that the motion must fail for want of service of the order of 5th August before the time thereby limited had expired, and that it was necessary for the applicants to get out a new order limiting a further time before they would be in a position to apply for an attachment.

NUISANCE—RIGHT OF PLAINTIFF TO SUE FOR INTERFERENCE WITH PUBLIC RIGHT—ATTORNEY-GENERAL WHERE UNNECESSARY PARTY—PARTIES—PRACTICE.

Boyce v. *Paddington* (1903) 1 Ch. 109, may be briefly referred to as it involves a discussion of a point of practice, and Buckley, J., reaffirms the rule that a plaintiff suing for an interference with a public right need not join the Attorney-General as a party plaintiff (1) where the interference complained of involves also an interference with some private right of the plaintiff, or (2) where no private right of the plaintiff is involved, but he in respect of his

public right, suffers special damage peculiar to himself from the interference with the public right.

POWER—DURATION OF POWER - ABSOLUTE VESTING OF ESTATE WHICH IS SUBJECT TO A POWER—LUNATIC.

In re Jump, Galloway v. *Hope* (1903) 1 Ch. 129. A testator had devised and bequeathed all his real and personal estate to his executors in trust for his only daughter for life, and after her death in their discretion and of their uncontrollable authority to manage and administer his estate and effects and apply so much as they should think fit for the maintenance or otherwise for the personal benefit of his grandchildren during their lives, whether infants or adults, and whether competent or incompetent to give a discharge, and on the death of the grandchildren to divide the estate among the issue of the grandchildren in equal shares, and the testator empowered the trustees at any time after his decease and whenever they should think necessary to sell and convert his estate into money. The testator died in 1842, leaving his daughter surviving, and she died in 1846, having had three children born in the testator's lifetime, one of whom had died in infancy, and two, Robert and Jane, survived her. Jane died a spinster intestate in 1882, and Robert then became solely entitled in remainder as the heir-at-law of the testator. Robert died a bachelor and intestate in 1902, and was of unsound mind. Sales had been made by the trustees, after the death of Jane, during the life of Robert, and the question was whether the power of sale had been validly exercised after Robert had become absolutely entitled to the estate. The question became important for the purpose of declaring whether the investments of the proceeds of such sales were real or personal estate of the deceased Robert, and this involved the question of the duration of the power. Eady, J., came to the conclusion that it was a question of intention, and that on the will it was manifest that the testator intended that the power should continue during the whole of the lifetime of his grandchild, Robert.

TRUST FOR PERSON "ENTITLED TO POSSESSION OR RECEIPT OF RENTS AND PROFITS" OF SETTLED ESTATE—TENANT IN TAIL IN REMAINDER.

In re Fothergill, Price-Fothergill v. *Price* (1903) 1 Ch. 149. By a will certain specific chattels were bequeathed in trust for the person entitled to the actual possession or receipt of the rents and

profits of an estate. The testator also bequeathed the proceeds of his residuary real and personal estate to trustees on trust to pay the income to the person for the time being "entitled to the possession or receipt of the rents" of the settled estates, and by a codicil he bequeathed a sum of £70,000 to be held on the same trusts as his residuary estate. The words "entitled to the possession or receipt of the rents" were used in numerous other clauses of the will, in all of which they necessarily meant "actual possession," though not so expressed. A tenant in tail in remainder of the settled estate had predeceased the tenant for life of the settled estates, and it was held by Eady, J., that this tenant in tail was absolutely entitled to the £70,000 and the residuary estate, subject to the life tenant's interest therein; but as regards the chattels he was not entitled to them because he had never come into actual possession of the estate, it having been settled by the cases that where the income of a fund is given in perpetuity on the trust of a settled estate, this has the effect of vesting the corpus of the fund in the first tenant in tail, at birth, whether he comes into actual possession or not.

DEBTOR—DEFAULT—CONTEMPT—IMPRISONMENT—RELEASE OF DEBTOR FROM PRISON BY MISTAKE—DEBTORS' ACT, 1869 (32 & 33 VICT. C. 62) S. 4,—(R.S.O. C. 60, SS. 247, 248; ONT. RULE 907).

Church's Trustee v. *Hibbard* (1902) 2 Ch. 784. In this case a debtor had been ordered to be committed to prison for not having paid over money which he held in a fiduciary capacity, pursuant to the order of the Court, he had been duly arrested, but by mistake of the jailer he had been released. The plaintiff thereupon applied to issue a new writ of attachment, and Eady, J., made the order, but on appeal it was held that the imprisonment ordered was in the nature of a punishment, and that a second attachment could not be ordered, because that would be punishing the debtor twice for the same offence, but the Court of Appeal (Williams and Mathew, L.JJ.) intimate that the proper procedure would be to apply for an order to re-arrest the debtor under the first attachment and detain him for the period unexpired, for which that writ authorized his detention.

Correspondence.

WAS THE REFERENDUM VOID?

To the Editor CANADA LAW JOURNAL:

The controvery opened by this question is raised in *Rex* v. *Walsh*, and goes, in *Rex* v. *Foster*, to the Court of Appeal.

Under the constitution, legislative power in the Province of Ontario is vested in two authorities, of equal standing and importance—the Lieutenant-Governor and the House of Assembly. These two are complementary, and the sphere of duty of neither tolerates interference from outside. The people at large have no place in the scheme of the B.N.A. Act, which entitles them to modify, much less govern legislation which the Chamber has under way, or has passed on to the Lieutenant-Governor, as ripe for his approval. The commonalty's influence is not suffered to be anything more than indirect, petitioning the House to enact measures in accord with their views being the chief engine they may summon to their aid.

Two principal grounds of attack upon the feature in question of the Liquor Act, 1902, as embodying something repugnant to the Constitution, would seem to be afforded; the divesting by the legislature itself, through its adoption, of responsibility cast upon it, and the narrowing of the prerogative of assent by the Crown to laws introduced which it causes. First, as to the House's patent evasion of burdens. Representative Government, conforming in essentials with the model in the parent state, has, in this part of the sovereign's dominions, prevailed for some generations. The fundamental point of the system is that the people, guaranteed by it freedom of suffrage, accredit, by a vote in the different localities into which, for the sake of convenience, the country is divided, a particular individual to a central gathering, whom they trust to carry out their formally tabulated wishes. The electors' choice, by their action, obtains every immunity and shoulders every obligation pertaining to superintendence over the community; resignation of authority by the constituency is unqualified.

Legislation should issue from the mould into which it has been run by the House a developed cast which requires nothing beyond the Lieutenant-Governor's impress upon it to become serviceable;

and his duties as a legislator once entered upon, it is not open to a representative, the writer maintains, to abnegate any of his functions. Nor may feelers of the type disclosed by the referendum be thrown out—expedients of such nature for ascertaining whether he will incur blame or excite discontent by some meditated line of action utilized. The foreigner could, no doubt, be naturalized through an amendment to the Constitution, but no step in that direction was taken. Profit may be had from quoting Mr. Goldwin Smith, probably the highest living authority on subjects of this kind on the continent. He says "the referendum will be a legislative act performed by a body at present unknown to the constitution, and extemporised for the purpose of relieving the Government and Legislature of duty which they owe to the people. When the act has been passed, and the time for putting it in operation comes, the real struggle will begin, and the difficulty of enforcement will not be dimished by the constitutional bar-sinister what the act will have as the offspring of a spurious referendum."

So far as the right to sound the people goes what difference is there between the case of a municipality submitting a by-law to be voted upon by its inhabitants, for which no sanction is forthcoming, and the House of Assembly's authorization of what was done here? Mr. Justice Street, in the course of his judgment in *Davies* v. *Toronto*, 15 O.R. 33, says: "Were it now proposed to give to the result of the proposed vote a final and binding effect, there could be no doubt as to the duty of the Court to restrain it, because the attempt then would be to substitute the direct decision of the electors for that of the Council to which the law has referred it, and which every person concerned is entitled to have." Could language more emphatic be used in condemnation of the course pursued with the Liquor Act, 1902? It should be mentioned that some time before this judgment was given, it had been determined by the Supreme Court, in *Canada Atlantic* v. *City of Ottawa*, 11 S.C.R. 365, that a Council was not forced to give effect by a third reading to a favourable vote of the people upon a by-law. And in *Rex* v. *Walsh*, Mr. Justice Street, by asserting that the Legislature here reserved to themselves the right to deal with the question after the vote was taken—a position vigorously disputed by counsel—acknowledges the force of his earlier decision.

Then, as to the hampering of the Lieutenant-Governor's free agency which the departure involves. Here was a measure, assent

by him to a material part of which it was virtually ordained should on a certain event happening, be nugatory. Is not the representative of the King absolutely privileged to demand that every Bill which survives a third reading should be presented to him for his assent, and to anticipate that, when such has been given, it will not be defeated by the interposition of another power? Suppose the Legislature were to provide for its opening or prorogation by the Lieutenant-Governor being dispensed with, could it be questioned that, if such abridgment of his rights had been attempted, any law it should proceed to frame, or had already framed, would be invalid? Does not a similar consequence follow where his assent to a piece of legislation depends for its efficacy on some other body? Take the analogy of a Court of Justice. How would it be should entry by a Judge on the verdict of a jury be contingent upon a third voice being heard? Our polity, it would seem, has been asked to receive, in the person of this intruder, a veto in disguise.

J. B. MACKENZIE.

An English contemporary (*The Law Times*) in referring to Mr. Balfour's amusing slip in his speech on the Church Discipline Bill when he addressed the members of the House of Commons instead of Mr. Speaker, as "My lords," takes occasion to refer to some other mistakes of the same kind. The late Mr. R. R. Warren, who was President of the Probate and Matrimonial Division of the High Court of Ireland, in speaking in the House of Commons in 1868, addressed his audience as "Gentlemen of the Jury." Mr. Justice Kenny, when speaking in the House of Commons in 1893 on the Home Rule Bill, addressed Mr. Mellor, the Chairman of Committees, as "My lords." A brother barrister on the other side of the house, amid laughter, suggested that Mr. Kenny should apply for the costs of his motion. Mr. Bodkin, K.C., of the Irish bar, who sat in the House of Commons in 1892-1894, was often accused of having addressed Mr. Speaker Peel as "Your Reverence," an accusation which however had for its foundation the remark "I submit, Sir, with reverence."

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BLACKBURN *v.* MCCALLUM. [Feb. 17.

Will—Devise—Restraint on alienation.

A devisee of real estate under a will was restrained from selling or encumbering it for a period of twenty-five years after the testator's death.

Held, that as the restraint, if general, would have been void, the limitation as to time did not make it valid. Appeal allowed without costs.

Armour, K.C., for appellant. *J. Travers Lewis*, for respondent.

Ont.] [Feb. 17.

LIVERPOOL, LONDON & GLOBE INSURANCE CO. *v.* AGRICULTURAL SAVINGS & LOAN CO.

Fire insurance—Void policy—Renewal—Mortgage clause.

By Ontario Insurance Act, s. 167, a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy.

Held, reversing the judgment of the Court of Appeal (3 Ont. L.R. 127) and restoring that at the trial (32 O.R. 369) GIROUARD, J., contra, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance the renewal was likewise a nullity though the prior insurance had ceased to exist in the interval.

Held, per GIROUARD, J., that the renewal was a new contract, which was avoided by non-disclosure of the concealment in the application for the original policy.

The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy.

Quære. Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy?

Appeal allowed with costs.

Riddell, K.C., and *Hoskin*, for appellants. *Aylesworth*, K.C., and *Bayly*, K.C., for respondents.

Ont.] GRAND TRUNK R. W. Co. *v.* FRANKEL. [Feb. 17.

Railway company—Carriage of goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.

F. Bros., dealers in scrap iron at Toronto for some time prior to and after 1897, had sold iron to a Rolling Mills Co. at Sunnyside, in Toronto West. The G.T.R. had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G.T.R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company, and shipped to them at various times up to January 2nd, 1900, five cars, one addressed to the company and the others to themselves at Sunnyside. On January 10th the company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for, and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars, and the remainder before the end of January. On Feb. 4th the cars were placed on a siding to be out of the way and were there frozen in. On Feb. 9th F. Bros. were notified that the cars were there subject to their orders, and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April, when the price of the iron had fallen, and F. Bros. would not accept them, but after considerable correspondence and negotiation they took them away in the following October and brought an action against the G.T.R. Co., founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the Rolling Mills on receipt of an order therefrom from the company, but sometimes they were sent without instructions, and on Feb. 3rd the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the Rolling Mills.

Held, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised

such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive the iron. The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen, and ordered a reference to ascertain the damages on that head.

Held, reversing such decision, MILLS, J., dissenting, that as the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence, and the question of negligence had never been raised nor tried, the action must be dismissed in toto with reservation of the right of F. Bros. to bring a further action should they see fit. Appeal allowed with costs.

W. Nesbitt, K.C., for appellants, *Shepley*, K.C., and *Baird*, for respondents.

N. S.] McDONALD *v.* McDONALD. [Feb. 17.

Donatio mortis causâ—Deposit receipts—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.

McD. being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000, which he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for $2,000 each, payable out of the deposit receipt, to the respective beneficiaries, which McD. signed and returned to his brother who handed to McD.'s wife the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt. McD died eight days afterwards.

Held, affirming the judgment appealed against (35 N.S. Rep. 205), SEDGEWICK and ARMOUR, JJ., dissenting, that this was a valid donatio mortis causâ of the deposit receipt and the sum it represented, notwithstanding there was a small amount for interest not specified in the gift.

By R.S.N.S. (1900) c. 163, sec. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife, or both, unless it is corroborated by other material evidence.

Held, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. Appeal dismissed with costs.

W. B. A. Ritchie, K.C., for appellants. *Russell*, K.C., and *Harris*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] HOLDEN *v.* GRAND TRUNK R.W. Co. [Jan. 26.

Negligence—Railway accident—Death of engine driver—Disobedience to orders—Contributory negligence—Signals.

Appeal from judgment of FALCONBRIDGE, C.J. at the trial.

This was an action by the widow of one of the defendants' engine drivers who lost his life by reason, as alleged, of the defendants' negligence. It appeared that at the point where the accident occurred there was a switch for a siding from the defendants' main line running up to the works of a smelting company. Under the orders of the Railway Committee of the Privy Council an interlocking, derailing and signal apparatus was to be constructed and operated at this point. Such apparatus, if complete and in good working order, would enable workmen in a tower or cabin at some distance from the rails, by means of a mechanical device, to move or shift and lock securely the points of the switch, and at the same time to display the signals which were intended to guide the engine drivers in the management of their trains, by indicating whether the switch or the main line was open. One of the signals was known as the Home signal, situate 500 feet from the switch and containing two arms of which the upper would be dropped if it indicated that the main line was open, while if the lower was dropped it indicated that the siding was open. If both were dropped it would indicate nothing, the one being inconsistent with the other. On the morning of the accident, the defendants' signal engineer reporting the apparatus as ready to be operated, the plaintiff's husband with other engine drivers was notified that it was in working order, and that all the trains should be governed by rules governing interlocking and derailing appliances. As a fact, however, the apparatus was not in working order, and when the train, of which the plaintiff's husband was the driver, approached the point in question, both arms of the Home signal were down. A switchman, whom the defendants sent to take charge of the interlocker, failed to give notice to his superiors as to the interlocker not being in working order, though he remained at the switch all day, and had flag signals to use in case of necessity. When the train in question approached this switchman asked the men who were still working on the interlocking apparatus if it was all right, and they replied that it was all right, meaning that the switch had been set for the main line, accordingly he did not flag the train to stop. As a matter of fact the switch had not been properly fastened, and the engine passing over the point displaced it, and the train was derailed and thrown down the embankment, and the driver was killed.

The rules governing the conduct of engine drivers provided that when in doubt as to the meaning of a signal they must stop and ascertain the cause, also that a signal improperly displayed must be regarded as a danger signal, and that in all cases of doubt or uncertainty they were to take the safe course and run no risks. There were also special instructions on the employees' time table, that if an interlocker was out of order, trains were to be flagged through by the signal men.

Held, that the plaintiff was properly non-suited in that her husband could not have maintained an action on account of his negligence, if he had survived, because he had disobeyed his orders as contained in the rules, and had proceeded with his train in spite of the condition of the Home signal. He could not properly regard the main line signal as a safety signal, because the adding signal as displayed was inconsistent with it.

Lynch-Staunton, K.C., for plaintiff. *W. Cassels*, K.C., and *W. Nesbitt*, K.C., for defendants.

From Britton, J.] WILSON *v.* HOWE. [Jan. 26.

Limitation of actions—Claim against estate of deceased person—Corroboration—Special agreement—Running account—Terms of credit—Demand—Fraud upon creditors—Pleading.

The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on May 16, 1895. This action was begun on May 4th, 1901. The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money and to leave it in the hands of the deceased, who said he would save it for the plaintiff, and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinctly, was given by another witness.

Held, 1. There was sufficient corroboration of the plaintiff's statement.

2. The plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to

hold the money at least until the plaintiff demanded it; and, as therewas no demand before the 16th May, 1895, the action was in time.

3. The agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it. *Day* v. *Day*, 17 A.R. 157. Judgment of BRITTON, J., reversed.

Mabee, K.C., for plaintiff (appellants). *Idington*, K.C., for defendants.

From MacMahon, J.] [Jan. 26.

MCKAY *v.* GRAND TRUNK R.W. CO.

Railway—Crossing—Speed of trains—Fences—Statutory requirements—Negligence—Injury to person crossing track—Contributory negligence—Findings of jury.

By the Dominion Railway Act, 1888, s. 197, as amended by 55 & 56 Vict., c. 27, s. 6, it is provided that "at every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." By s. 259 of the former Act, as amended by s. 8 of the latter, it is provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act."

Held, that the words "in the manner prescribed by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specificially prescribed in the railway legislation the meaning of s. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns and villages, is six miles an hour.

The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was travelling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere. Judgment of MACMAHON, J., affirmed.

Riddell, K.C., for defendants (appellants). *Hellmuth*, K.C., for plaintiff.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B.] BODWELL *v.* MCNIVEN. [Dec. 12, 1902.

Specific performance—Taking possession—Acts constituting—Part performance.

Possession is part performance both by and against the stranger and the owner.

On the negotiations for the purchase of land the owner's agent told the defendant that the lot was his. Defendant went on and set in the ground a number of stakes to mark out the foundation of a proposed house and then changed his mind and refused to carry out the purchase.

Held, that what he had done constituted such a taking of possession as to constitute part performance and that the plaintiff was entitled to the usual judgment for specific performance.

Hegler, K.C., and *J. H. Hegler*, for plaintiff. *J. M. McEvoy* and *J. L. Patterson*, for defendant.

Falconbridge, C.J.K.B.] HAY *v.* BINGHAM. [Dec. 22, 1902.

Libel—Pleading—Whole article—Producing and reading at trial—Words tendering immaterial issue—Embarrassing—Striking act.

The very words complained of in an action of defamation must be set out by the plaintiff in order that the Court may judge whether they constitute a cause of action—it is not sufficient to give the substance or purport with innuendoes—it is sufficient to set out the libellous passages provided; that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial and the defendant is entitled to have the whole of it read,

Held, that the plaintiff was entitled to set out in the statement of claim the whole article complained of. But,

Held, also, that certain words in another paragraph which tendered an issue not material, but which might be embarrassing, should be struck out.

Deyo v. *Brandage* (1856) 13 Howard P.R.(S.C.N.Y.) 221, referred to.

Judgment of a local master varied.

McVeity, for the appeal. *Glyn Osler*, contra.

Britton, J.] LOVELL *v.* GIBSON. [Feb. 9.

Practice—Costs—Lower scale—Amount claimed reduced by trial judge.

In an action in the High Court for $340 the balance of a $790 account for logs, $450 of which was paid before action, the trial judge found the

scale was made as contended by the plaintiff, but reduced the amount by $20 for some logs not received by defendant.

Held, on an appeal from a taxing officer that the plaintiff was only entitled to County Court costs and the defendant was entitled to a set off. *Brown* v. *Hose* (1890) 14 P.R. 3, distinguished. Judgment of the taxing officer affirmed.

S. B. Woods, for appeal. *Gamble*, contra.

Street, J., Britton, J.] WHITESELL *v.* REECE. [Feb. 28.

Waste—Charge of annuity—Life tenant and remainderman—Apportionment—Damages.

A testator seized in fee of land, subject to a mortgage, to secure an annuity for his wife, devised the land to one for life remainder over in fee. After his death, the life tenant paid the annuity to the widow. She also sold the timber on the land, and the purchaser having begun to cut the timber this action was begun by the remainderman to restrain waste. The defendant, the life-tenant, claimed that she was entitled to be subrogated to the rights of the mortgagee in respect to so much of the annuity as she had paid, and that being so subrogated, the land was an insufficient security for her claim, and that she therefore had a right to cut down the timber.

Held, following *Yates* v. *Yates*, 28 Beav. 637, that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance, in the proportion which the value of the life estate bore to the value of the reversion.

Held, also, that on the evidence, the land was adequate security for the claim of the life-tenant against it in that regard, and that the purchaser of the timber having purchased in good faith, an injunction could not be granted, but the life tenant was liable for damages in respect of the timber cut.

J. A. Robinson, for defendants. *Donahue*, K.C., for plaintiffs.

Meredith, C.J.C.P.] SMERLING *v.* KENNEDY. [Mar. 2.

Security for costs—Præcipe order—Waiver.

Where it is stated in the writ of summons that the plaintiff resides out of the jurisdiction the defendant may, even after delivering his defence, obtain the usual præcipe order for security for costs.

Proudfoot, K.C., for plaintiff. *J. H. Moss*, for defendant.

Falconbridge, C.J.K.B., Street, J.] [Mar. 6.

LAWRENCE *v.* TOWN OF OWEN SOUND.

Trespass—Compensation—Powers of trial judge—Costs.

The Municipal Act R.S.O. 1897, c. 223, s. 47, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality."

In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work,

Held, that s. 470 did not apply as the plaintiff's claim was for trespass and not for negligence and that the trial judge had full power over costs. Judgment of FERGUSON, J., affirmed.

Shepley, K.C., for appeal. *J. H. Moss*, contra.

Province of Quebec.

KING'S BENCH (APPEAL SIDE).

Lacoste, Bosse, Blanchet and Hall, JJ.] [Dec. 23, 1902.

ANGERS *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION.

Mutual insurance—Principles of, discussed—Assessment of members—Acceptance of contract—Repudiation—Delay—Waiver—Estoppel.

The plaintiff (respondent) took out two policies of insurance in the appellant company, one in 1885, and the other in 1887, and he paid his premiums up to 1898. He then refused to pay the premiums and his policies were declared forfeited. He thereupon brought suit claiming the repayment of the moneys he paid in, with interest, amounting to $6,509,51. He alleged that he was induced to become a member of the Association by the false representations made by its directors and agents in prospectuses and circulars and that the company continued to deceive him in the same manner up to 1898, at which time he discovered the fraud and refused longer to make the payments. The company denied the false representations and set up as a defence that the plaintiff respondent accepted the contract as made, and acquiesced in it by not repudiating it within a reasonable time.

Held.—This being a mutual company each member agrees to indemnify co-members in proportion to the guarantee that he receives from them, and in this lies its difference from insurance on the level premium plan. As each assessment depends upon the aggregate

death losses which have to be paid, the premium is essentially a variable one, and unless there is a clause in the contract, or the by-laws of the company, limiting the liability of the member, it is impossible to fix and determine the maximum that each member may be called upon to pay, and if the liability of the member should be limited, it would frequently be impossible to pay the death claims in full, in view of the fact that the mortuary premiums are the only proportionate share of the death claims properly apportioned to each member. It is possible to conceive of a mutual insurance company in which each member would be required to pay an assessment, the amount of which was fixed in accordance with his age of entry, but such is not the system of the defendant company. According to its constitution and by-laws, it is the natural premium system of life insurance that it has adopted as its foundation principle; that is to say, that the mortuary premiums shall increase as the chances of surviving diminish; and the proportionate share in the payments to be made must consequently increase each year, and the member be assessed according to his current age. The respondent in his factum does not pretend that his contract did not justify the directors in demanding from the members the assessments that he refused to pay, but he seeks to have his contract declared null and void ab initio, on the ground that it was obtained by fraud, and because it was different from the contract that he was led to believe that he was agreeing to. The policy refers to the application for admission to the Association made by the respondent, to the constitution or by-laws of the company, and it therefore may be said that the contract consists of the agreements set forth in the application of the insured, and in the terms and conditions of the policy, constitution and by-laws taken together. There cannot be the slightest doubt that by the terms of this contract the respondent agreed to pay his share of the amount required to meet the mortuary liabilities no matter what it might amount to, and that the payments to be made in this regard were to be apportioned according to the age of the insured at the time of each assessment. The policy of 1885 reads as follows:

"If at such dates as the Board of Directors of the Association may, from time to time, fix or determine, for making an assessment, the death fund is insufficient to pay existing claims by death, an assessment shall then be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates according to the age of each member."

A similiar clause is found in the policy of 1887. One of the articles of the constitution provides:

"On the first week day of the months of February, April, June, August, October and December of each year (or at such other periods as the Board of Directors may from time to time determine) an assessment shall be made upon the entire membership in force at the date at the last death of the audited death claims prior thereto for such a sum as the Executive Com-

mittee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members according to the age of each member."

The by-laws contained the following:

"The basis of the assessment rate for each member, according to the age taken from the nearest birthday, on each $1,000, shall be as follows:"

And then follows a table of rates in accordance with age.

The contract sets forth clearly the liability of the insured in this regard. Was it not his duty to examine it before accepting it? He did not need to possess the special qualifications of an actuary to understand the true character of the contract or the extent of the obligations that the insured assumed. Seeing that the contract was in contradiction of the circulars and required him to assume the duty of making payments, the amount of which should only be limited by the amount of the death claims, was it not the duty of the insured to investigate the matter? This rule applies to all kinds of contracts. From 1885 to 1898 the respondent had the benefit of his insurance. Can he now demand the re-payment of that which he paid in, without being met with his own negligence in accepting a contract without reading it or without understanding it, as a complete defence? But, replies the respondent, I was kept in error continually up to 1895, because assessments were made upon me during that time according to the age at entry and without exceeding the maximum fixed. Let it be conceded, but his contract always provided otherwise. So much the better for him if he was charged less than he might have been required to pay, but in spite of that the contractual obligation still existed. As a matter of fact, the respondent was informed by each notice of assessment sent him that the Association was based upon the system of insurance known as the natural premium system, and the Shields' resolution, to which the respondent makes reference, declares in the very beginning thereof the character of the company: "Whereas, Mutual Reserve Fund Life Association was established upon the natural premium system of life insurance." It was precisely because reliance was placed upon the obligation which rested upon the members to contribute sufficient for the payment of death claims in full that the accumulation of a reserve was opposed, and that it was decided that the assessments should not exceed the maximum according to the age at entry according to the table, and whatever amount was required in excess thereof should be taken from the reserve fund. It could be very easily foreseen that if the reserve became exhausted, the rates would have to be raised, and that is what happened. This decision of the members to maintain the premiums at rates at age at entry without exceeding the maximum did not in any way imply an abandonment of the right to make assessments according to the actual age, in conformity with the contract and the constitution or by-laws, at such time as it might be necessary to do so in order to pay the death claims.

The statements contained in the circulars that the reserve fund would do away with the increase of premiums, would even permit a decrease in the amount thereof and would end by almost entirely meeting the assessments upon the members of the company, seem to prove the fact that the organizers of the company believed erroneously that the interest on the reserve fund would suffice to pay the premiums. Taken in their entirely these circulars indicate rather a statement of hopes than of facts. They were certainly of a nature to deceive, and a contract entered into under such circumstances by surprise, might perhaps have been repudiated at once, but we do not believe that the respondent having been a member during a period of more than twelve years is justified in demanding the annulment of a contract because he misunderstood, ignored or misinterpreted the constitution or by-laws of the company, or because he was mistaken as to the character of the Association of which he was a member during so long a time.

Appeal sustained. Judgement reversed and case dismissed.

Lafleur, K.C., and *Chase Casgrain*, K.C., for plaintiff. *Beaudin*, K.C., and *Aime Geoffrion*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Forbes, C.J.] THE KING *v.* CHANDLER. [March 5.

Fisheries — Deep sea fish in provincial foreshore waters — Dominion license fee for trap nets — R.S.C., c. 95, s. 14, sub-s. 7, unconstitutional.

Appeal from a summary conviction of the defendant by L. S. Ford, Inspector of Fisheries for Fishery District No. 3 in the Province of Nova Scotia, and ex-officio, J.P., for that "he, the said William Chandler, at or near Fox Point, in St. Margarets Bay, in the county and province aforesaid, did, in the month of July, 1902, use a trap-net for capturing deep sea fish, other than salmon, without having a license then in force, contrary to the provisions of sub-s. 7, s. 14 of the Fisheries Act, c. 95, R.S.O.," and was fined $5.00 and costs.

Held, 1. The license demanded of the defendant and all similar licensees are demanded by virtue of s. 14, sub-s. 7, of R.S.C., c. 95, and by virtue of the exercise of an alleged exclusive right to control the fisheries in the provincial foreshores and not under any regulation made or published by the Department of Marine and Fisheries for controlling the manner of fishing, which regulations would be undoubtedly within the competence of the Dominion Parliament.

2. The Dominion Government has no power or authority to refuse a fisherman the right to set his net or trap in provincial waters unless he first takes out a license, which entails the payment of a fee therefor.

3. The right to set the various kinds of nets and traps and the places and times where they shall be set can satisfactorily be controlled and regulated by the fishery officers at present so that any person can feel sure of his berth and have the full protection of the officers of the Marine and Fisheries Department and be within the law. If the officers allot to the applicants their several berths in a fair manner the officers determine and define, as in a license, the allotted territory, keeping any and all others off one-eighth of a mile or any distance as at present, but not demanding any fee or compelling any license therefor. This would be the carrying out of regulations, either verbal or written, for controlling the matter of fishing, which is within the plenary powers of the Department and its officers.

Conviction set aside.

A. K. Maclean, for the Crown. *Wade*, K.C., and *J. A. Maclean*, K.C., for defendant.

Province of Manitoba.

Full Court.] CARRIERE *v.* CHEVRIER. [March 7.

Cause of action—Alternative claims—Trover—New trial—Erroneous charge to jury—Weight of evidence.

The plaintiffs sued in a county court for the value of script certificates handed to Noe Chevrier for sale and by him sold to his son and co-defendant, Horace Chevrier, less the amount that defendants had paid over. At the trial plaintiffs asked to amend their claim by adding a claim for conversion of the certificates and this was allowed, but the judge in charging the jury directed them not to consider the claim for conversion, holding that, by suing for money had and received, the plaintiffs had debarred themselves from claiming for conversion. There was evidence to go to the jury of such conversion, and also of the value of the certificates, but there was not sufficient evidence to prove the amount the defendants had received for them. The jury returned a verdict for the defendants, but the county court judge afterwards ordered a new trial on the ground that the verdict was against the weight of evidence. Defendants appealed to this court against the order for a new trial.

Held, per RICHARDS, J., following *Bagot* v. *Easton*, 7 Ch. D., that a plaintiff may, in his statement of claim, plead alternative claims inconsistent with each other, but arising out of the same transactions, and the trial judge should, therefore, have allowed the claim for conversion to go to the

jury, and that the order for a new trial could be supported on that ground, although made on another ground, which might not have been sufficient.

DUBUC, J., concurred with RICHARDS, J.

Per KILLAM, C.J., as no objection was made to the judge's charge to the jury at the time, a new trial should not have been granted on the ground of the withdrawal from the jury of the claim for conversion and there was no other sufficient ground for ordering a new trial.

Order for new trial in the county court affirmed, the alternative claim for conversion to be re-instated and the appeal dismissed with costs.

Elliott, for plaintiffs. *Howell*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] BELCHER ET AL *v.* MCDONALD. [NOV 1, 1902.

Yukon appeal—Extension of time—Jurisdiction—Practice—Pleadings—Amendment at trial—Judgment, final and interlocutory—Appeal—Duty of party taking out order.

Appeal from the judgment of DUGAS, J., in the Territorial Court of the Yukon. By the Yukon Act (62 & 63 Vict., c. 11,) the Supreme Court of British Columbia sitting together as a Full Court is constituted a Court of Appeal from final judgments of the Territorial Court, and notice of appeal shall be given within twenty days after judgment. From interlocutory orders or judgments there is no appeal.

Held, by the Supreme Court of British Columbia, sitting as a Full Court, that it has no jurisdiction to extend the time for appealing.

In an action on an alleged promissory note in the Territorial Court of the Yukon, the plaintiff's counsel at the close of his case, asked leave to amend the claim by inserting counts on an account stated, and leave was refused. The trial proceeded and the claim on the note was dismissed and a reference was ordered for the purpose of taking accounts and an order to that effect was taken out on the 30th of May, without specifying the date from which the accounts were to be taken. On taking the accounts, the referee, at the direction of the judge and as to which it did not appear that plaintiff had notice, took the accounts as beginning at a date unsatisfactory to plaintiffs, and the referee's report was confirmed by the judge.

Held, on appeal, that as the plaintiff should have been allowed to amend his pleadings, and although the order of the 23rd of May, being final so far as the claim on the note was concerned, and an appeal from it

had not been brought in time, yet as an amendment had been improperly refused, and the judge in giving his judgment of the 23rd of May, had not made it clear to the plaintiff what his judgment really decided, the case should be examined on the merits.

Held, on the merits, that the judgment of DUGAS, J., must be affirmed.

Per HUNTER, C. J., and DRAKE, J.: In an action embracing several causes of action there may be a judgment or order which is final as to one cause of action and interlocutory as to others, and a party dissatisfied with the part which is final must appeal within the time limited for appealing from final orders and cannot question its correctness in an appeal from the judgment at the conclusion of the whole action.

Per HUNTER, C.J.: It is incumbent on a successful party to take care that an order or judgment in his favour is drawn up in clear and unmistakable language, otherwise the benefit of any doubt as to its scope which cannot be resolved by reference to any prior or contemporaneous record or other competent document, should be given to the party aggrieved.

A man is not bound to say yes or no at once when confronted with a demand for the payment of money about which there may be doubt as to his liability to pay, but he is entitled to a reasonable time according to the circumstances of the case, to consider the position and to make up his mind whether he really owes the money or not, and as to what course he will take

Sir C. H. Tupper, K.C., and *Peters*, K.C., for appellants. *E.P. Davis*, K.C., and *A. Noel* (of the Yukon bar) for respondents.

Martin, J.] LEVER *v.* MCARTHUR. [Dec. 16, 1902.

Master and servant—Employers' Liability Act—Notice of injury—Want of—Reasonable excuse—Defendant prejudiced by want of notice—Evidence of—When to be given.

In an action for damages under the Employers' Liability Act for injuries sustained by plaintiff it was shewn that the plaintiff was without means and for some weeks after the accident was unable to transact any business; and that the defendant's business manager and representative saw the accident and arranged for plaintiff's admission into the hospital where a few days later he discussed with him the cause of the accident.

Held, the circumstances excused the want of notice of injury.

At the close of the plaintiff's case a non-suit was moved for on the ground that plaintiff had not proved notice of injury, and plaintiff then adduced evidence which the judge held shewed a reasonable excuse for the want of notice and the trial proceeded. Before closing his case defendants' counsel tendered evidence of being prejudiced by want of notice.

Held, excluding the evidence, that the proper time to shew prejudice was while the question of reasonable excuse was still open.

Taylor, K.C., for plaintiff. *Macdonald*, K.C., for defendants.