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LAW-MAKING IN ALBERTA.

Three years ago Alberta was admitted into Confederation. It was received not upon the "terms of the union" but practically upon its own stipulations. The country had reached that stage of development where it was in a position to demand "better terms" and get them. The government of the day was entrusted to the Hon. A. C. Rutherford who with a strong, common-sense cabinet, began at once the enactment of such legislation as the conditions of the country called for.

The early territorial legislation may have been more or less imperfect, but such as it was, it constitutes the superstructure upon which the new provinces are to-day building for the future. With the passing of the old regime, there passed the most stirring period in the annals of the West. A new epoch opened. The old order of things had to be garbed in new raiment, and the work is not yet finished. Expansion is the keynote of Western Canada, and where there is expansion the making of laws knows no end.

To the legislators of the old territorial parliament those of the new provincial legislature must ever feel indebted. The Hon. F. G. W. Haultain, who, for eighteen years, was Premier and Attorney-General, left to his successors a monumental legacy. It was he, more than any other, that brought order out of chaos, that established peace, order and good government in a country which was almost universally believed to be only a fit home for the Indian and the buffalo.

The first consolidation of the territorial statutes was made in 1898, and the next immediately after the provinces were granted autonomy. The consolidation of 1905 shews how assiduously our early legislators had wrought for the welfare of

the country over which they had been placed to govern. It gives us a compensation Act, the administration of estates, agricultural societies, arbitration, assignments, bills of sale, brands, coal mines, joint stock companies, controverted elections, insurance, irrigation, liens, liquor license, herding, partnerships, public health, schools, succession duties, Lord's Day, telephones, local districts and so on. The Municipal Telephone Act also went through that year, 1906. Under it Alberta has come to possess several hundred miles of long distance wires and a net-work of rural or domestic lines. It is the purpose of the government to bring, eventually, all parts of the province into touch with one another. Alberta prides itself on being the first province in Canada to adopt a system of government owned telephones.

Perhaps the greatest of all the legislation handed down to us has been the Judicature Ordinances. The Act provides a complete machinery, and save in the Small Debt procedure, it remains unchanged. The English practice is followed with a weather eye on the Ontario procedure. The best results have thus been obtained. The District Court and the Small Debt Acts place the administration of justice within easy reach of every section of the province. In the eastern provinces clients must come to justice; in Alberta, justice goes to the clients. In Nova Scotia, for instance, magistrates have almost wholly to do with the trial of small debt cases. In Alberta this function is discharged by the District Court judge, and this explains why court sits one week at Edmonton and the next, maybe, in a frontier village or away four or five hundred miles in the north country. A few weeks ago there was a sitting of the court at Fort McMurray, where the Athabasca and Clearwater rivers join streams to flow on to the Arctic ocean. It was the first occasion upon which the majesty of the law was exercised in those regions by a constitutionally appointed judge. The gold lace of the Royal Mounted Police was the wig of judicial authority to which the people there had been accustomed, but in these itineraries we see the beginning of the end. A quarter

of a century hence, perhaps not so long, and the barracks of the Mounted Police will be mementoes of the past. Indeed the prancing steed has already been turned toward his last trail.

The first year of the legislature put into force much legislation that was creative in character. Statutes were passed providing for the administration of justice by police magistrates, commissioners and notaries public were provided for, the Torrens system of land transfers was introduced and a Mechanics' Lien Act passed. Important statutes were also enacted with respect to the public services. In these we get the machinery for the government of the province, the conspicuous feature of which is the centralization of power at the Capitol. The Governor-in-Council and the Ministers do business direct with the remotest school district in the province. This is an arterial service quite unique in the administration of provincial affairs in Canada.

Alberta is primarily an agricultural province, and it is only natural that a good deal of the country's legislation should be directed in the interests of the farmer. The second session saw such measures enacted as made for the establishment of government creameries, an industry which has had remarkable success. The farmer was protected against noxious weeds, and his burden of taxation shifted to the railway corporations. The local improvement district Act was amended and so modified as to bring it into harmony with the growing requirements of the rural sections. The third year was devoted to what might be called "industrial" legislation. We have an Act respecting compensation to workmen for injuries sustained in connection with their employment. The coal mines Act was amended to provide for an eight hour day from bank to bank. The mechanics and literary institutes Act was passed to provide means for the intellectual improvement of men engaged in industrial pursuits. The drainage Act makes it possible to reclaim vast stretches of country now useless for farming purposes. Land thus obtained becomes the property of the local government, the public domains being vested in the federal authorities.

The charitable institutions have not been overlooked. Provisions have been made for the establishment of an industrial school for incorrigible boys and girls and a hospital is now in course of erection for the treatment of the insane. The farm system will be followed in both these cases.

Not the least among the important pieces of legislation passed by the province has been that providing for higher education. The old territorial government had in mind one university, but the setting apart of the two provinces rendered this scheme, however meritorious, impracticable. The University Act has already resolved itself into concrete form in that the University of Alberta was formally launched in September last, a large class of students from all different parts of the province being under instruction. In connection with the work of the college a university extension system of lecture courses has been adopted under which free lectures are given at the more important towns and cities. The founding of the University of Alberta is only one of the many footprints of progress found in Western Canada.

Alberta, although yet wrapped in swaddling clothes, has contributed a great deal to advanced legislation. It has set a pace worthy of the emulation of some of the older provinces. The province contains a cosmopolitan people, its reaches of territory are enormous, its interests are varied, its possibilities illimitable, and, it must be said to the credit of its present and past legislators, that the foundation stone has been well and truly laid.

J. GEDDIE MORRISON.

EMPLOYERS' LIABILITY TO WORKMEN.

At a recent meeting of the English Law Society held at Liverpool an interesting paper was read by Sir John Gray Hill in which he dealt exhaustively with the modern legislation in England with regard to compelling employers to make compensation to their employees, or, in case of their death, to their representatives, in respect of injuries sustained in the course of their

employment. He adduced strong evidence to shew that in many cases the law as it at present stands in England is not only unduly oppressive to the employer, but has also a reflex action fatally injurious to the very class it was intended to benefit. With the general principle that where a workman receives any injury through any negligence either of his employer or anyone standing in the employer's place in regard to the injured workman, the employer ought in justice to make compensation. We do not quarrel. The master having the benefit of the servant's labour should certainly bear some share of the personal risks and damages which that labour involves, and to throw the whole burden on the servant is neither just nor equitable. Legislation for the compensation of injured workmen started with that principle in England in 1880, and it was from the Act then passed that the Ontario Act was framed.

But while we in Ontario have patiently worked out that Act, and, on the whole, have found it a reasonable and sufficient protection to the workingman, in England they have cast the principle on which the Act of 1880 was founded to the winds, and have, in fact, made nearly all employers insurers of all servants doing manual labour, including domestic and agricultural servants, against any injury sustained by them in the course of their employment, entirely irrespective of whether it was due to any negligence of the employer, or to contributory negligence of the servant; so that nothing but the actual and wilful misconduct of the workman in himself causing the accident, will now exonerate the employer; and not only in case of death is the employer required to compensate the legitimate dependents of the deceased, but he is also in England required to make compensation to his illegitimate dependents! Legislation of this kind is nothing less than a pandering to a class which is supposed to be powerful in votes, regardless of justice to the rest of the community.

Under the present English statute it has been held that the representatives of a workman who happens to contract disease in the course of his work from which he dies, are entitled to compensation from the employers though there was no negli-

gence on the latter's part: *Brintons* v. *Turvey* (1905) A.C. 230. In that case anthrax was contracted from handling infected wool. But a workman who contracted typhoid fever from inhaling sewer gas in the course of his employment was held not entitled to recover against his employers: *Broderick* v. *London County Council*, 24 Times L.R. 822. An hostler while eating his dinner in the stable being bitten by the stable cat which occasioned blood poisoning was held to be entitled to recover against his master: *Rowland* v. *Wright*, 24 Times L.R. 852. A ship's steward, partially drunk, who returned to his ship by means of the cargo skid in order to escape the notice of his superior officers and in doing so fell down the hatch and was killed, was held to have met his death in the course of his employment and his employers were held liable to make compensation to his representatives: *Robertson* v. *Allan Line*, 98 L.T. 821.

Furthermore, a workman who undertakes to do work which he is physically unfit for, may render his employer liable to make compensation to his representative should he succumb while engaged in his work which would not be injurious to a man in normal health. For instance, if a workman in a weak condition engages to do the work of a stoker and is overcome by the heat so that he dies, his employer must, according to the English law, compensate his dependents legitimate and illegitimate: *Ismay* v. *Williamson*, Times, Aug. 1, 1906.

A workman may receive an injury which a surgical operation would remedy or remove, but if the workman be of a lazy disposition and prefers to continue to draw compensation in the character of a disabled workman, he may do so, and cannot be required to submit to an operation which any reasonable man would, in order to be restored to an efficient condition: *Rothwell* v. *Davis*, 19 Times L.R. 423.

The present state of the law on this subject in England has been found to give rise to no little fraud, and malingering on the part of workmen to the destruction of their honour and self-respect; and when to this is added a tendency on the part of employers only to employ men in the prime of life and to reject

all men who shew any sign of physical or mental weakness, it is not very difficult to see that the army of the unemployed is likely to swell. The conclusion seems inevitable, therefore, that this course of legislation is not after all so beneficial for the working classes as it was, no doubt, intended to be.

The promoters of this legislation it appears artfully suggested that its effect would be to relieve the poor rates, inasmuch as it was said the burden of supporting workmen injured or killed by accident and their families would now have to be borne by the employers, and not by the public at large, which was merely an ingenious piece of sophistry and an appeal to public selfishness which was only too easily swallowed; as though the public could prevent employers adding the additional cost of the insurance of their workmen to the price of the goods which they sell, and which the public have in the long run to pay. This class of employers are quite able, and we are quite sure do, as a matter of fact, take into account in fixing the price of their goods this additional burden which is thrown on them; but it is different with the small householder whose servant, through no fault or negligence on his part, falls and breaks her leg. He has to shoulder the burden of compensating her for her injury, without being able to call on anyone else to share it with him. Such legislation we should think is well calculated to have the effect of throwing a large class of domestic servants out of employment altogether.

The key-note of the Ontario Act, as we have intimated, is that in order to give rise to liability on the part of the employer the injury to the workman must arise from some negligence for which the master is responsible, whether it be in his plant, or works, or ways, or in the order of persons in authority to which the injured workmen was bound to conform. This seems as we have said a reasonable basis for such legislation, whereas that in England, which goes beyond, appears to be ill-conceived and detrimental to the class intended to be benefited, as well as unjust in principle. It is no wonder that Sir John Gray Hill's deliberate opinion is that the whole policy of the existing Work-

men's Compensation Acts in England is wrong, and that he has come to the conclusion that in the interests of the working classes the two later English Acts should be repealed. He remarks that it is only to a comparatively limited class that the manifold imperfections of those Acts are known, viz., to the legal profession to whose mill they bring grist in the way of litigation, to the medical profession who also pecuniarily profit thereby, and to the insurance companies which also make business thereout; but the public in general is in the dark. His remarks, therefore, are disinterested and deserve attention not only in England, but in every other country where such litigation is contemplated.

LIABILITY OF MANUFACTURERS OF FOOD PRODUCTS FOR INJURIES TO THIRD PERSONS.

An important decision has recently been given by the Court of Error and Appeal, New Jersey, U.S., on this subject (*Tomlinson* v. *Armour*). The plaintiff brought an action against the well-known pork packers in Chicago, Armour & Co., for damages in respect of his purchase of some canned meat, which, as he alleged, was so carelessly, negligently and improperly put up as to cause deleterious and poisonous results; the plaintiff, having eaten a piece of ham taken from one of these cans had been taken ill from ptomaine poison. The Supreme Court of the State held that there was no liability on the part of the defendants, there being at common law no implied warranty by a manufacturer or dealer as to the wholesomeness of food supplied, and that, assuming a different rule to exist in case of such dealer and a consumer, yet the consumer in the absence of a statute could not hold a manufacturer or original vendor to a higher degree of duty than t... cast upon him by common law with respect to his own vendee.

The Appellate Court reversed this decision. Pitney, C., who delivered the judgment of the court thus concludes his judgment: "Upon both reason and authority we are clearly of the opin-

ion that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured —make a case that renders the defendant liable for the damages sustained by the plaintiff thereby."

There is given in the *Central Law Journal*, where the case is reported, a valuable note discussing the question under two heads. The first of these is as to an implied warranty by a manufacturer in the sale of injurious foods, etc. The writer deals with it as follows:—

"The decision in the principal case was decided in the Court of Errors upon a different ground from that which was considered by the Supreme Court below. Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreement. Hence, the limits of liability for negligence are not the limits of liability for breaches of contracts and actions for negligence, often accrued where actions upon contracts did not arise and vice versa.

"In the principal case, the court is careful to say that the question whether or not a liability would exist upon an implied warranty is one that they do not decide. In the court below (65 Atl. 833) the court lays down the doctrine that at common law on a

sale of food articles between a dealer in provisions and a retailer there was no implied warranty of wholesomeness. Assuming that a different rule exists in a case of the sale by such a dealer to a consumer, the latter, in the absence of statute cannot hold the original vendee to a higher decree of duty than that cast upon him by the common law, with respect to his own vendee. And further that to select out of the entire class of transactions covered by a well established rule of the common law a single mode for the imposition of a different rule, based upon considertions of public welfare, is essentially a legislative function and that therefore the facts set forth in the declaration that the defendant had packed diseased ham in a can and had sold it to a retail dealer, of whom it was bought by plaintiff, who from eating a piece of such ham became sick, that these facts do not constitute a cause of action. Whether or not, as has been before stated, this rule of the court below was a correct statement of the law, the higher court does not pass upon.

"While the English authorities would seem to support the doctrine that there is no implied warranty in such a case, yet that great old master of common law, Blackstone, vol. 3, p. 165, laid down the doctrine that in contracts for provisions it was always implied that they are wholesome, and that if they are not wholesome, an action on a case for deceit lies against the vendor. He cites no authority for this proposition and it may be safely assumed that it probably appeared to him to be a doctrine founded upon sound common sense, and public policy, so manifestly just that citations were not required. That there is no implied warranty, it is said in the American & English Encyclopedia of Law, second edition, page 1237, is the rule adopted in the United States, at least to this extent that there is no implied warranty of soundness or wholesomeness arising from sale of food provisions to a dealer or middleman, who buys on the market not for consumption, but for sale to others. As illustrations of this doctrine a case is given where a live cow is sold by a farmer to a retail butcher, there being no implied warranty that she is fit for food, although the seller knows that the animal is bought to be

cut up for meat or immediate domestic consumption. *Howard* v. *Emerson*, 110 Mass. 320. And in another case, where a drover sold beef cattle to a butcher, it was held that he did not impliedly warrant that they were not bruised. But even the doctrine announced in the two latter illustrations, is not followed by all courts or at least has been somewhat limited. Thus, in the case of *Sinclair* v. *Hathaway*, 57 Mich. 60, it was held that a baker who sold bread to a peddler, whom he knew was to retail it, impliedly warranted the bread to be wholesome, and while the doctrine of this case seems to be somewhat in the minority, yet it seems to express the true rule which ought to be, if it is not, supported by authority, *i.e.*: That where a person sells an article to another, which he knows or ought to know is to be used for a particular purpose, he impliedly warrants no matter whether the purchaser is a wholesaler, retailer, or a consumer, that the article is fit for the purpose for which he knows it will be used. Especially is this true where the seller knows or ought to know that the article is not fit for the use intended. If a person sold cattle to a butcher, which were diseased, not knowing that fact, or having no means of knowing such fact, then there might possibly be some excuse for holding that there is no implied warranty, but where the seller prepares the article himself, then he knows or should know, how the article is prepared, and if not properly prepared, there certainly would be no injustice in holding that he is responsible, on an implied warranty. In the Encyclopedia before referred to, page 1238, the doctrine is laid down that in all cases in the sales of food by a retail dealer for domestic use, an implied warranty exists, that they are fit for use and wholesome. However upon this doctrine there is a distinction drawn where the purchaser has no right to assume that the middleman who is acting as seller, knew the quality of the article. *Julian* v. *Laudenberger*, 16 Misc. (N.Y.) 646. Even in such a case it seems that the retailer ought to be held responsible because if he does not know, he ought to know, whether the article is fit for use."

The second head taken by the writer of the article above referred to deals with the general rule as to contractual liability

of manufacturers of injurious foods to consumers, in the following language:—

"It is a general rule, that a contractor, manufacturer or vendor is not liable to third parties, who have no contractual relations with him, for negligence in the construction, manufacture or sale of the articles he handles. Where this doctrine is applied it is because the makers, vendors or furnishers owed no duty to strangers, in their contracts of construction, sales or furnishing: Examples of this holding are as follows: A stage coach,—*Winterbottom* v. *Wright*, 10 Mees. & W. 109; a leaky lamp,—*Longmeid* v. *Holliday*, 6 Exch. 764, 65; a defective chain furnished one to load stone,—*Blakemore* v. *Bristol & E.R. Co.*, 8 El. & Bl. 1035; an improperly hung chandelier,—*Collins* v. *Selden*, L.R. 3 C.P. 495, 497; an attorney's certificate of title,—*National Sav. Bank* v. *Ward*, 100 U.S. 195, 204, 25 L. Ed. 621, 624; a defective valve in an oil car,—*Goodlander Mill Co.* v. *Standard Oil Co.*, 27 L.R.A. 583, 11 C.C.A. 253, 259, 24 U.S. App. 7, 63 Fed. 401, 406; a porch on a hotel,—*Curtin* v. *Somerset*, 140 Pa. 70, 12 L.R.A. 322, 21 Atl. 244; a defective side saddle,—*Bragdon* v. *Perkins-Campbell Co.*, 30 C.C.A. 567, 58 U.S. App. 1, 87 Fed. 109; a defective rim in a balance wheel,—*Loop* v. *Litchfield*, 42 N.Y.S. 351, 359, 1 Am. Rep. 513; a defective boiler,—*Losee* v. *Clute*, 51 N.Y.S. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine,—*Heizer* v. *Kingsland & D. Mfg. Co.*, 110 Mo. 605, 617, 15 L.R.A. 821, 19 S.W. 630; a defective wall which fell on a pedestrian,—*Daugherty* v. *Herzog*, 145 Ind. 255, 32 L.R.A. 837, 44 N.E. 457; a defective rope on a derrick,—*Burke* v. *De Castro & Sugar Ref. Co.*, 11 Hun. 354; a defective shelf for a workman to stand upon in placing ice in a box,—*Swan* v. *Jackson*, 55 Hun. 194, 7 N.Y.S. 821; a defective hoisting rope of an elevator,—*Barrett* v. *Singer Mfg. Co.*, 1 Sweeny 545; a runaway horse,—*Carter* v. *Harden*, 78 Me. 528, 7 Atl. 302; a defective hook holding a heavy weight in a drop press,—*McCaffrey* v. *Mossberg & G. Mfg. Co.*, 23 R.I. 581, 55 L.R.A. 822, 50 Atl. 651; a defective bridge,—*Marvin Safe Co.* v. *Ward*, N.J.L. 19; shelves in a dry-goods store whose fall injured a customer,—*Burdick* v. *Cheadle*,

26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employees,— *McGuire* v. *McGee* (Pa.), 13 Atl. 551; defective wheels,—*J. I. Case Plow Works* v. *Niles & S. Co.*, 90 Wis. 590, 63 N.W. 1013.

"To this general doctrine, Federal Circuit Judge Sanborn, in *Huset* v. *Case Threshing Machine Co.*, 120 Fed. 865, says that there are three exceptions The first is that an act of negligence of a manufacturer or vendor, which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of the article intended to preserve, destroy or affect human life, is actually to third parties who suffer from the negligence, citing: *Dixon* v. *Bell*, 5 Maule & S. 198; *Thomas* v. *Winchester*, 6 N.Y. 397, 57 Am. Dec. 455; *Norton* v. *Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins* v. *McKean*, 79 Pa. 493, 502; *Bishop* v. *Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N.E. 154; *Perers* v. *Johnson*, 50 W. Va. 644, 57 L.R.A. 428, 41 S.E. 190, 191. The second exception, is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises, may form the basis of the action against the owner, citing: *Coughtry* v. *Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387; *Bright* v. *Barnett & R. Co.*, 88 Wis. 299, 26 L.R.A. 524, 60 N.W. 418, 420; *Heaven* v. *Pender*, L. R. 11 Q.B. Div. 503; *Roddy* v. *Missouri P. R. Co.*, 104 Mo. 234, 241, 12 L.R.A. 746, 15 S.W. 112. The third exception to the rule is that one who sells or delivers an article which he knows to be eminently dangerous to life or limb of another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated whether there were any contractual relations between the parties or not, citing: *Langridge* v. *Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Wellington* v. *Downer Kerosene Oil Co.*, 104 Mass. 64, 67; *Lewis* v. *Terry*, 111 Cal. 39, 31 L.R.A. 220, 43 Pac. 398.

"The principal case rather comes under the first exception made to the general rule, although it might likewise be founded upon the third exception, but whether founded either upon the first or third exception, there is no doubt but what the doctrine

sustained by the Court of Errors in the principal case is correct and sound. Especially is this true when it is based upon the doctrine that where a manufacturer produces an article of food that he owes a duty to the public or any purchaser that the article is wholesome and fit for consumption, but it seems to the writer that the principal case might not only be upheld upon the doctrine that the manufacturer owes a duty of that character, but it might also be sustained upon the doctrine that in such cases there is an implied warranty upon the part of the manufacturer that the article is of the character it should be and that this warranty is for the benefit of whoever may ultimately use this article for the purpose for which it was manufactured and that not only the retailer, or the middle man, would have a right of recovery against the manufacturer, that it was not such as it should be, but that the consumer while having no contractual relations with the manufacturer would have a right to recover from the manufacturer on an implied warranty. And that such right of action directly against the producer, would be justified further to prevent a circuity of action. If the retailer is responsible, as the matter of justice, he should be permitted, being innocent in the matter, to recover from the person who sold him the goods, and so on ad infinitum."

LAW OF MOTOR CARS.

Under the law of motor cars as at present developing an automobile is apparently a carriage or not a carriage according to circumstances. The New Jersey Court of Chancery recently held in *Trenton* v. *Toman*, 70 Atl. Rep. 606, that an automobile is a "carriage" within the meaning of a covenant in a deed reserving a strip of land for a carriage way forever. The Vice-Chancellor said: "No particular kind of carriage or waggon is mentioned. Although automobiles had not been invented at that time the easement was created, yet the language of the grant is unrestricted, and must be held to include any vehicle on wheels then or thereafter to be used. A carriage has been defined

to be 'that which carries, especially on wheels; a vehicle.'" As noted on a previous occasion (ante, p. 680), an automobile is not a carriage within the meaning of a statute requiring towns to keep their highways reasonably safe and convenient for travellers with their horses and carriages, and that the town is not liable for failure to make any special provision for automobiles if its highways are reasonably safe and convenient for travel generally.

UNFRUITFUL LAWSUITS.

Many men, level-headed enough about other things, seem to lose their wits entirely when they get tangled up in a lawsuit. In a case recently concluded in the German courts a Berlin business man paid out over $900 to recover the value of a five-cent postage stamp, and now everybody is laughing at him because he didn't even get the stamp back. It seems as if this claimant had justice on his side, too; he had written a polite letter asking for an address and enclosing postage for reply. Failing to get an answer, he sued for the stamp.

The famous Missouri watermelon case was just as trifling and even more disastrous. The seed was planted on one farm, but the vine crept through a crack in the rail fence and the melon grew on the outer side. Both farmers claimed it, and instead of seeing the joke they went to law. To add to the puzzle of ownership an additional complication, the fence was on a county line, and a question of the jurisdiction, of course, was involved. The farmers bankrupted themselves without deciding the question of ownership. The melon worth about ten cents in the first place, had disappeared long before.

The Iowa case which concerned the identity of a red and white heifer calf, was equally disastrous, says the Chicago "Tribune." It is said that subpœnas were issued for more than two hundred witnesses, who attended court after court and received their fees and mileage. The question of who owned the calf grew from a joke into a neighbourhood tragedy. Per-

fectly honest men and women took the witness stand and swore against each other. So great was the puzzle that jury after jury was unable to agree, and no man knows to this day whether there were two spotted calves that looked just alike, or whether one man tried to steal the other's calf. After they had spent all their money in litigation the rival owners met one day and tossed a coin to settle the case.

One of the celebrated French cases was over a two-cent toy balloon, and the litigants were Baron de Sibert and the Paris Metropolitan Railway. The balloon belonged to the baron's little girl, and the railway employees, on account of some rule they felt obliged to enforce, would not permit it to be brought into the passenger car. The baron stormed and threatened, but the guard was obdurate, and the toy was left behind while the child wept. The next day the nobleman sued the company for the two cents.

Some of the smartest lawyers in Paris were engaged in the case. It was proved that the balloon was filled with gas, and that it was likely to explode at any time, and the wise court held that even if its explosion could not possibly be attended by danger, it might "create a panic among the passengers," and the decision was against the baron. He spent hundreds of dollars trying to get even with the company, and the more he lost the less satisfaction he obtained.

The most expensive lawsuit in the world is said to have been that over the will of Antonio Traversa, a merchant who lived in Milan. He left a fortune of $3,000,000, and there were a large number of heirs with conflicting interests. The case was in the different courts of Italy for years and the 105 lawyers engaged in it ran up costs aggregating more than $2,000,000. The estate lost in value, too, during the contest; so that the winning heirs found themselves with a small sum to their share when the final decision was rendered.

One of the most persistent complainants on record was an aged Belgian lawyer, who once tried to ride in an Antwerp street car, or tramway, on a ticket which he maintained was

good but which the company refused to honour. He brought suit against them next day and the court decided against him. He paid his costs, only a trifle, and the next time he got on the car he offered the same ticket. It was refused, and again he haled the company into court.

As he was his own lawyer and the ticket was his witness, it was not an expensive course of litigation for him, but it cost the company something. As often as he would be thrown out of court he would offer the ticket again and establish grounds for a new case. At last the tramway company saw a great light. They accepted the ticket one day and let the lawyer ride.—*Law Notes.*

THE FIDUCIARY RELATION OF A PROMOTER.

A promoter bears a fiduciary relation both to the corporation and to the subscriber. As regards the corporation his position of advantage in dealing therewith creates this relation. 1 Morawetz, Priv. Corp, s. 545. His duty is to disclose the facts of such transactions in behalf of the corporation as it may adopt. *Yale Gas Stove Co.* v. *Wilcox* (1894) 64 Conn. 101. There is, however, no obligation to disclose dealings made before he became a promoter. *McElhenny's Appeal* (1869) 61 Penn. St. 188. The remedies open to a corporation for a breach of this obligation are rescission, or a suit in equity to recover the secret profits. *Cortes Co.* v. *Thannhauser* (1891) 45 Fed. 730.

Among cases in which a corporation has sought to recover profits made by promoters from a sale of property, clearly the sale may be avoided or secret profits recovered if the majority stockholders without knowledge of the facts adopted the transaction. Even though the majority knew the facts, if their action be not bonâ fide the corporation can recover by a minority stockholder's suit. *Hebgen* v. *Koeffler* (1897) 97 Wis. 313. But the promoters are not liable where they constitute the sole stockholders during the life of the corporation, *Salomon* v. *Salomon & Co.*, [1897] L.R. App. Cas. 22, or where, having organized

and taken property with the view of continuing sole stockholders, after a considerable interval of time issue new stock to the public. *In re British, etc., Box Co.* (1881) L.R. 17 Ch. Div. 467. Fraud cannot be predicated of such a dealing. Midway, lie two groups of cases. First, the promoters or their dummies become incorporators or directors of the newly formed corporation, make the sale before complete organization, and then call for subscriptions from outsiders. Here they have generally been held liable. *Hayward* v. *Leeson* (1900) 176 Mass. 310; *Erlanger* v. *New Sombrero, etc., Co.* (1878) L.R. 3 App. Cas. 1218. Second, the promoters, having designedly issued a few shares of stock to themselves, adopt the sale, and immediately offer the remander to the public. In a case of the latter sort the United States Supreme Court has recently held, contrary to the view in England, *Society of Practical Knowledge* v. *Abbott* (1840) 2 Beav. 559; (*semble*), *In re British, etc., Co.* (1881) L.R. 17 Ch. Div. 467, and in Massachusetts on the same facts, *Old Dominion, etc., Co.* v. *Bigelow* (1905) 188 Mass. 315, that the corporation has no remedy. *Old Dominion Copper Mining and Smelting Co.* v. *Lewisohn* (1908) 28 Sup. Ct. Rep. 634. The decision stands on the ground that, since all the stockholders for the time being knew the facts, their unanimous act cannot be a fraud upon the corporation. The court properly distinguishes on its facts *Erlanger* v. *New Sombrero, etc., Co.*, supra (belonging to the first group), though its reasoning would undoubtedly cover the principal case.

Two other courses were open to the court. In the first, the court would be called upon to exaggerate the accepted distinction between the corporate entity and its stockholders. It was suggested in *Society of Practical Knowledge* v. *Abbott*, supra, and argued in *Salomon* v. *Salomon & Co.*, supra, that the corporation is an entity so distinct, that it may be defrauded by the unanimous act of its stockholders. Hence, for a fraud upon the corporate interests, a new stockholder, like a minority stockholder, could sue in the name of the corporation. The argument is specious in assuming the interests of the corporation distinct

from those of its stockholders. No court, it is believed, is prepared to go to this extent. It would lead to inextricable difficulties in the determination of the corporate interests, and to the result, rejected in *Salomon* v. *Salomon & Co.*, supra, that the receiver of a corporation, whose stock was exclusively owned by the promoters during the entire life of the corporation, could recover profits made by them in a sale of their property to the corporation.

The court might more properly have looked beneath the technical distinction between the first and second groups of cases, and, viewing the transactions as in essence the same, have administered equitable relief. Cf. *Erlanger* v. *New Sombrero, etc., Co.*, supra. This apparently is the underlying basis of the Massachusetts decision. But that court professed to adopt the business view that the real corporation was one composed of the contemplated stockholders and that the knowledge of the promoter before the completion of such a corporation was not the knowledge of the entity. This theory, however, is logically open to criticism, and is unnecessary to support the true ratio decidendi. It might also, perhaps, be argued that, under the circumstances of the principal case, the corporate interests should be determined by the interests of the contemplated stockholders as well as by those of the present stockholders. This would be a modification of the extreme entity theory, and perhaps represents the view of the English Court of Appeals in *In re British, etc., Box Co.*, supra, holding that an issue of stock to the public directly after the adoption of the transaction would be conclusive evidence of fraud on the corporation. It could hardly be regretted had the Supreme Court, exercising its equitable powers, brushed aside its technical argument and allowed the corporation relief.

It is probable, however, that, on the facts of the case, the subscribers had an individual remedy against the promoters. Though in most cases in which personal relief has been given the subscriber, the facts shew misrepresentation, the broad ground of decision is that the promoter does not treat with the subscriber at arm's length, but in a fiduciary relation by virtue of which

the promoter is bound to disclose all the facts. *Brewster* v. *Hatch* (1890) 122 N.Y. 349; *Teachout* v. *Van Hosen* (1888) 76 Ia. 116. The duty of the promoter to the subscriber is based upon the confidence the latter is likely to repose in the organizer of a corporation. 1 Morawetz, Priv. Corp. s. 545. That duty should therefore continue so long as he in effect acts in such a capacity, and should exist in the principal case, despite the fact that the promoter had also become a stockholder. If this be true, the refusal of the Supreme Court to relax sound legal theory in order to grant an additional remedy, may be supported.—*Columbia Law Review.*

Complaints have been made both in this country and elsewhere that judges are occasionally not as prompt as they might be in the disposition of causes heard before them. A curious provision of the California constitution has recently been brought into notice. It is this, that the salaries of Supreme Court judges may be withheld when a decision in any case argued and submitted to them is not reached in ninety days, and there is to be no more pay for the members of the Court until disposition is made of that case. The practical operation of such a provision would be greatly facilitated if the portion of salary withholden from the judge were to go to the litigant whose cause had not received attention within the specified time. We would suggest that the judges should consider and draft an appropriate enactment based on the above suggestion.

The meaning of the expression "an ordinarily prudent man" recently came up for adjudication in the Supreme Court of Vermont. The question of contributory negligence having arisen, the jury were told that if they could say that the plaintiff exercised the care and prudence of an ordinarily prudent man he was not chargeable with contributory negligence. This standard was held on appeal to be too low to meet the requirements of the law: *Drown* v. *New England Telephone Co.*, 70 Atl. Rep. 599.

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—LEGACY—FORFEITURE CLAUSE — SUBSTITUTED LEGACY—INCIDENTS OF ORIGINAL LEGACY WHETHER APPLICABLE TO SUBSTITUTED LEGACY.

In re Joseph, Pain v. *Joseph* (1908) 2 Ch. 507. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have reversed the decision of Eve, J., upon the construction of the will in question in this case (1908) 1 Ch. 599 (noted ante, p. 354). The point it may be remembered was whether a substituted legacy was subject to the same condition as was attached to the original legacy for which it was substituted. In this case the original legacy was subject to a condition of forfeiture in the event of the legatee marrying a Christian. The substituted legacy was not expressly made subject to that condition, but Eve, J., held that it was impliedly so, upon a proper construction, but from this view the Court of Appeal dissent on the ground that the substituted legacy was given to other persons besides the original legatee, and that the legacy in question was therefore not strictly a substituted legacy, but a new and independent one.

SEWERS—DRAINAGE—STATUTORY POWERS — NUISANCE—INJUNCTION.

Price's Patent Candle Co. v. *London County Council* (1908) 2 Ch. 526. The plaintiffs in this case were the owners of the banks of a creek and complained that the defendants had for the purpose of relieving their sewers erected a pumping station at the mouth of the creek for the purpose of pumping when necessary the storm overflow into the creek, whereby sewage matter contained in such storm water adhered to the banks and created a nuisance, and they claimed an injunction. The sewage works were constructed and carried on under statutory authority, but the statutes expressly provided that they were to be carried on so as not to create a nuisance; and it was held by Neville, J., that the defendants could not justify their acts on the ground that they were carrying out their statutory obligations, and that the plaintiffs were entitled to an injunction as prayed; and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) affirmed his decision.

POWER—GENERAL TESTAMENTARY POWER—EXECUTION OF POWER —EXPRESS REFERENCE TO POWER REQUIRED—GENERAL REFERENCE TO ALL TESTAMENTARY POWERS.

In re Lane, Belli v. *Lane* (1908) 2 Ch. 581. In this case the question was whether a power had been duly executed. A fund was settled in trust for such persons as the settlor should by will, "expressly referring to this power," appoint. The settlor made a will disposing of all property "over which I shall have any power of disposition by will." Eady, J., held on the authority of *In re Waterhouse* (1907) 96 L.T. 688, 98 L.T. 30, and *In re Roll* (1908) W.N. 76, that this was an "express reference" to the power, and therefore that it was well executed. *In re Teapes*, L.R. 16 Eq. 442, was distinguished on the ground that the power there in question was a special limited one.

HIGHWAY—DEDICATION—USER BY PUBLIC—LAND IN SETTLEMENT —TENANCY FOR LIFE WITH REMAINDER IN FEE—PRESUMPTION —ACQUIESCENCE.

Farquhar v. *Newbury Rural District Council* (1908) 2 Ch. 586. In this case the question was whether or not a roadway had been dedicated as a public highway. The land formed part of an estate which was settled to the use of one Dr. Penrose for life, with remainder in fee to one Eyre. In 1842 Eyre, Penrose being still alive, was in the actual occupation of the estate, and laid out the road in question. Penrose was no party to this, and survived till Feb., 1851. In 1849 Eyre resettled the estate whereby he became tenant for life with remainder over to other persons in fee. Eyre consented to the user of the road in question by the public, and in 1851, before the death of Penrose, had signed a minute in the vestry book whereby the road was declared to be a public road. Public money was from time to time expended in the maintenance of the road. In these circumstances Warrington, J., held that there had been an effectual dedication of the road as a highway.

TRADE UNION—RIGHT TO SUE—BRANCH UNION—SECESSION OF BRANCH UNION—RESOLUTION FOR DISTRIBUTION OF FUNDS—ULTRA VIRES—RELIEF GRANTABLE TO TRADE UNION—JURISDICTION—TRADE UNION ACT, 1871 (34-35 VICT. C. 31) S. 4 (3A) —(R.S.C. C. 125, S. 4(I)).

Cope v. *Crossingham* (1908) 2 Ch. 624 was an action brought by the officers of a trade union against a branch union. The

latter had seceded from the main body represented by the plaintiffs and had refused to pay over to the central body the funds of the branch, as required by the rules of the society, and had passed a resolution to distribute the funds amongst the members of the branch. The plaintiff claimed a declaration that this resolution was ultra vires of the branch, and an injunction to restrain the defendants from carrying it into effect, and they also claimed judgment for the payment of the money to the plaintiffs. Eve, J., held that the plaintiffs were entitled to the declaration and to an injunction if necessary, but not to an order to pay over, because in his opinion the jurisdiction of the court was excluded by reason of the Trade Union Act, 1871, s. 4 (3*a*) (R.S.C. c. 125, s. 4 (*i*)), which precluded the court from entertaining an action with the object of inter alia providing benefits to members. He therefore made a declaration that the distribution of the funds in accordance with the resolution would be ultra vires, and contrary to the rules of the society, and that the defendants hold the funds upon trust to apply the same in accordance with the rules of the society; and gave leave to apply generally.

PARTITION ACTION—ORDER FOR SALE—CONVERSION OF REALTY—DEATH OF PERSON ENTITLED BEFORE SALE—DEVOLUTION OF SHARE.

In re Dodson, Yates v. *Morton* (1908) 2 Ch. 638. This was a partition action in which an order for sale had been made, but before it was carried into execution one of the parties interested, and who was sui juris, died intestate, and the question arose whether his share devolved as realty or personalty. Eve, J., held that from the date of the making of the order for sale, a conversion was effected, and thenceforth the estate must be regarded as personalty, and that the share of the deceased accordingly devolved upon his next of kin.

BANKRUPTCY—LANDLORD AND TENANT—DISCLAIMER OF LEASE BY TRUSTEE—MORTGAGE BY DEMISE OF PART OF LEASEHOLD—VESTING ORDER.

In re Holmes (1908) 2 K.B. 812. although a bankruptcy case, calls for a brief notice, inasmuch as it illustrates the remedy provided in England in a case for which none seems to exist under our law in Ontario. The facts were that a bankrupt was entitled

to a leasehold four-fifths of which he had mortgaged by way of demise; and the remaining one-fifth was unmortgaged, the whole premises were subject to a rent of £150. The trustee in bankruptcy disclaimed the lease, whereupon the mortgagee of the four-fifths applied for a vesting order to vest the bankrupt's interest in the lease including the unmortgaged one-fifth part in him. The application was resisted by the lessor, who claimed that the bankrupt's interest in the one-fifth part should be vested in him, to which the mortgagee objected that to do so would have the effect of leaving the four-fifths liable for the whole rent. The judge of the County Court to whom the application was made, granted the order as asked by the mortgagee, and Bigham and Jelf, JJ., affirmed his decision. We do not think any provision is to be found to meet such a case either in our Winding-up Acts, or in the Assignments and Preferences Act (R.S.O. c. 147).

BANKRUPTCY—PARTNERSHIP—BREACH OF TRUST—DIRECTOR OF COMPANY AND MEMBER OF PARTNERSHIP—MISAPPROPRIATION BY PARTNERSHIP OF COMPANY'S ASSETS—PROOF AGAINST FIRM'S AND INDIVIDUAL PARTNER'S ESTATES.

In re McFadyen (1908) 2 K.B. 817 is another bankruptcy case, which we also think deserving of attention. McFadyen, the bankrupt, was a director of the Vizianagaram Mining Co., and also a member of a firm of P. McFadyen & Co., which consisted of himself and one Arbuthnot. This firm were the general managers and agents of the company. Certain bills of lading for ore of the company which came to the hands of P. McFadyen & Co., were misappropriated by McFadyen, the bankrupt, to the extent of £13,000. The mining company lodged a proof for £13,000 against the joint estate of P. McFadyen & Co., and also a proof for the same amount against the separate estate of McFadyen. Bigham, J., rejected the proof against the separate estate, but the Divisional Court (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) considered that he had erred and reversed his decision, and in doing so their Lordships took occasion to emphasize the fact that the liability for a breach of trust is founded on contract and not on tort, and that the property in question having actually come to the hands of a person filling the position of a director he became as to it a trustee, notwithstanding that at the time he also filled the dual position of an agent.

SAVAGE DOG—SCIENTER—LIABILITY OF OWNER OF DOG—MASTER AND SERVANT — SCOPE OF EMPLOYMENT — REMOTENESS OF DAMAGE.

In *Baker* v. *Snell* (1908) 2 K.B. 825 the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of the Divisional Court (1908) 2 K.B. 352 (noted ante, p. 531) whereby a new trial was ordered. Kennedy, L.J., however, thinks that the intervening criminal act of a third person may in some cases exonerate the keeper of a vicious animal for damages occasioned thereby.

LIBEL—TRADE PROTECTION SOCIETY—MERCANTILE AGENCY—COMMUNICATIONS BY MERCANTILE AGENCY TO CUSTOMERS NOT PRIVILEGED—PRIVILEGE FOUNDED ON GENERAL INTEREST OF SOCIETY.

Macintosh v. *Dun* (1908) A.C. 390 is an important decision on the subject of the liability of mercantile agencies for libel in respect of communications made by them to their customers in the course of their business. The action was brought in Australia, and at the trial the plaintiff obtained a verdict and judgment in his favour, the Full Court in New South Wales ordered a new trial, and the High Court of Australia set that order aside, and directed judgment to be entered for the defendants, holding that the communication was privileged. The Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Ashbourne, Macnaghten, Robertson, Atkinson and Collins) reversed both orders, and gave judgment for the plaintiff on the ground that the communication which had been found to be injurious to the plaintiff, could not be said to have been made in the general interests of society, in which case it would have been privileged, but was made from motives of self interest by the defendants, who, for the benefit of a class, traded for profit in the characters of other persons, and who offered for sale information as to their credit, etc., which is not privileged, however carefully and cautiously it may have been obtained, and for which they were liable in damages if it proved to be defamatory. In arriving at this conclusion their Lordships declined to follow the decision of the New York Court of Appeals in *Ormsby* v. *Douglas* (1868), 37 N.Y. 477. Some other American cases may also be found referred to in vol. 29 of this Journal, p. 516, where it was held that such communications if made to actual

creditors of the person libelled, may be privileged, but not if made generally to all customers of the agency. This case would seem to be a very fitting illustration of the value of an appeal to His Majesty in Council, but for the ruling of the Privy Council the mercantile community in Australia would have been left to the tender mercies of the mercantile agencies.

SHIP—BILL OF LADING—CONSTRUCTION—"PORT INACCESSIBLE BY ICE"—"ANY OTHER CAUSE"—EJUSDEM GENERIS—ERROR IN JUDGMENT OF MASTER.

Knutsford v. *Tillmans* (1908) A.C. 406 may be well cited as a case of exceptional judicial despatch. The action is known in the courts below as *Tillmans* v. *Knutsford*, the decision of the court of first instance (1908) 1 K.B. 185 is noted ante, p. 225, and that of the Court of Appeal (1908) 2 K.B. 385 is noted ante, p. 531, and we have now the decision of the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James and Dunedin), all within a year. The case, it may be remembered, turns upon the construction of a bill of lading, and whether it afforded the shipowners a sufficient excuse for not delivering the goods covered thereby. The clause relied on by the defendants exonerated them from delivery at the post of discharge in case it should be inaccessible on account of ice, blockade or interdict, or if entry and discharge at such port should be deemed by the master unsafe in consequence of war disturbance or other cause, and the ship owners were not to be liable for any error of judgment of the master. On arriving at the port of discharge, the ship was prevented from entering by ice, and the master after waiting three days left without making any further effort to enter and landed the goods elsewhere. It was shewn that other ships had entered the port at this time. The courts below held that the defendants were not exonerated from delivering the goods, and the House of Lords affirms that decision and holds that the words "inaccessible" and "unsafe" must be read reasonably and with a view to all the circumstances; and that the words "or any other cause" must be read as being ejusdem generis with war or disturbance, and that as a matter of fact the master was not justified in not delivering the goods at the port for which they were shipped, merely because the port was for three days only inaccessible on account of ice; and that the master never had exercised his judgment within the meaning of the clause relating to errors of judgment on his part.

Correspondence.

REPORTS AND REPORTING.

To the Editor, CANADA LAW JOURNAL:

SIR,—It must be generally admitted that a report of a decision to be of any service to the profession ought distinctly to exhibit the point decided. It ought not to be left to inference, but should be plainly and explicitly expressed. If it involves the overruling of a decision of another judge, it also ought to exhibit distinctly what that decision was. I am inclined to think that these rules are not very well observed in the report of the recent decision in *Cole* v. *Pearson*, 17 O.L.R. 46. This was an appeal from a judge of a County Court on a question arising under the Mechanics' Lien Act, and the report fails to shew precisely what the learned County Court judge's decision was, or in what particular respect it was held to be erroneous. According to the statement of the Appellate Court, as to what he decided it is hard to see in what respect he was thought to have erred. The question at issue was on what principle the percentage is to be calculated in favour of wage earners having a charge on the percentage required to be retained by the owner where the contract is not carried out by the contractor. It is said, "His Honour held that he had to consider only the value of the work done and materials provided under the contract at the time the contractor abandoned it, and thought that it was so held in *French* v. *Russell* (1897) 28 Ont. 215," but whether in ascertaining the value of such work and materials he adopted some other basis of value than that of the contract prices is nowhere stated. The head note states that "it was contended that section 14 (3) lays down a rule for wage earners in a case in which the contract has not been completely fulfilled, different from the rule in any other set of circumstances, and that the only thing to be looked at is the value of the work done and materials furnished by the contractor." But what that

different rule was, does not appear unless it is to be found in the words "that the only thing to be looked at is the value of the work done." But that is not a different rule or an improper rule as far as it goes. The question really was on what basis is the value of such work and materials to be estimated? Is it to be the contract prices, or is the owner to be at liberty to shew that the work, is not really worth what he agreed to pay for it, or on the other hand, may the wage earner shew it is actually worth a great deal more than was agreed to be paid for it? From the fact that the Divisional Court allowed the appeal we infer that the County Court judge in estimating the value of the work, etc., actually done, took some other basis of value than the contract prices, and we conclude, therefore, that the result of the decision is that the rule laid down and acted on for estimating the percentage in *Russell* v. *French* is held to apply to s. 14 (3); but this as we have already intimated is after all a matter of inference, and is not a satisfactory method of reporting.

Yours,

SUBSCRIBER.

[A careful perusal of the report of the case above referred to certainly shews that there is something in our correspondent's criticism. The defect in the report seems to be that it does not set forth the judgment of the county judge nor what was the basis of the calculation he adopted, or in fact what the discussion on that point, if any, was. If that had been made part of the report the reader could more readily understand the reasoning of the appellate judge, and what his judgment as a matter of law really means.—EDITOR, *C. L. J.*]

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Maclaren, J.A.] [Oct. 15.

GOODISON *v.* TOWNSHIP OF MCNAB.

Leave to appeal to Court of Appeal from order of Divisional Court—Question of "general interest"—Traction engines on highways.

Motion by defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court affirming the judgment of ANGLIN, J., at the trial. The action was for damages to a traction engine which broke through a bridge belonging to the municipality. Judgment was given against the township for $750. The judgment, it was contended, involved the proper construction of s. 10 of R.S.O. 1897, c. 242, respecting traction engines on highways as amended by 3 Edw. VII. c. 7, s. 43, and 4 Edw. VII. c. 10, s. 60.

Held, the question is one of "general interest" and affects all municipalities in the province. It fairly comes within clause (*g*) of s. 76 of the Judicature Act, and the application should be granted.

Robinette, K.C., for plaintiff. *Douglas,* K.C., for defendants.

Full Court.] FITZGERALD *v.* BARBER. [Oct. 19.

Landlord and tenant—Covenant by lessee not to sub-let without leave—Breach—Assignment of interest in lease—Right to renewal—Forfeiture.

Appeal by defendant Loveless from the judgment of MEREDITH, C.J., in favour of plaintiffs in an action for possession of land in City of London and for a declaration that defendants are not entitled to a renewal lease. The lease contained the usual covenant that the lessee would not assign or sub-let without leave "to any other person or persons whomsoever," with the accompanying provision for re-entry for breach or non-performance of

covenants. The defendants became the assignees of the lease, having obtained leave and were bound by this covenant and provision by virtue of R.S.O. 1897, c. 125, s. 3. That statute also expressly brings the defendant within the provision for re-entry, R.S.O. 1897, c. 170, s. 13. The lessees were co-partners in a trade for the carrying on of which the demised store was acquired by and let to them. After occupying the demised premises for several years they dissolved the partnership, one of the members retiring entirely from the business and going into a like business in competition, selling out absolutely all his share and interest in the concern, including the lease, to the other member without the leave of the lessor.

Held, under these circumstances that there was a breach of the condition. There was in form as well as in substance an assignment of the lease to which each of the lessees was a party, and the case was within the terms of the condition. "The case of *Barrow* v. *Isaacs* (1901) 1 Q.B. 417 was very different in this respect from this case, for in that case the landlord would willingly have given his consent if it had been asked for, while in this case the parties were at 'daggers drawn,' the lessor watching, if not praying, for an opportunity to re-enter. And it may be here interjected that the enactment before mentioned (R.S.O. 1897, c. 170, s. 13), excepts a covenant against assigning or subletting from its provisions as to relief from forfeiture contained in it. Then it was urged that the transaction was not an assignment, but in law merely a release. This is incorrect, for the lease was that of co-partnership property in regard to which there would be no survivorship and so the case of *Corporation of Bristol* v. *Westcott,* 12 Ch.D. 461, and what was said in it on this subject is inapplicable here, whatever effect they might otherwise have had, so that, however the case is looked at, what was done came within the very words of the contract of the parties that the lessee should not assign without leave, and it was a violation of one of the very things the parties contemplated in making the proviso.

Varley v. *Coppard,* L.R. 7 C.P. 505, followed, and see *Horsey* v. *Stieger* (1898) 2 Q.B. 259, 264, and *Langton* v. *Henson* (1905) 92 L.T. 805.

Gibbons, K.C., and *G. S. Gibson,* for defendants, appellants. *Shepley,* K.C., and *Meredith,* contra.

HIGH COURT OF JUSTICE.

Boyd, C.] METALLIC ROOFING COMPANY *v.* JOSE. [Sept. 17.

Costs—Appeal to Privy Council—Practice—Execution—Stay—Set-off of other costs or damages.

When costs of appeal to the Judicial Committee of the Privy Council have been awarded by the judgment of that tribunal, they are not subject to the rules of practice of the lower courts; there is no right of set-off, and no right to modify the direction to pay, which means forthwith after the amount is fixed, unless by application made before final judgment is completed. *Russell* v. *Russell* (1898) A.C. 307 applied and followed.

The plaintiffs, having been ordered by the Judicial Committee to pay the costs of the defendants' appeal to that tribunal, were held not entitled to a stay of execution for such costs in the court below (the High Court), with a view to a set-off of other costs or of damages to be recovered upon a new trial ordered by the Judicial Committee.

Strachan Johnston, for plaintiffs. *W. T. J. Lee*, for defendants.

Boyd, C.] LANG *v.* PROVINCIAL NATURAL GAS CO. [Sept. 17.

Contract—Construction—Lease of oil rights—Condition—Time—Well to be "commenced"—Preparations for drilling.

An "oil lease," or agreement under which the lessee was to have the right to take oil from the land of the lessors, provided that "if within six months from date a well has not been commenced on said promises, this lease shall be null and void." The well contemplated involved drilling into the ground or through rock several hundred feet. When the six months had expired, it was found that the lessee had done no work on the ground, but had put upon the place where the well was to be drilled some plant suitable for the contemplated operation, at an expense of $200.

Held, that this did not amount to a commencement of the well; the terms of the lease imported that some work was contemplated upon and in the ground—"breaking the ground" in order to the commencement of a well.

German, K.C., for Lang. *Douglas*, K.C., for the company. *T. D. Cowper*, for Utz.

Cartwright, Master.] [Oct. 15.

HEES CO. *v.* ONTARIO WIND ENGINE CO.

Discovery—Examination of officer of the company—Motion for leave to examine servant as well—Examination of officer not completed.

Motion by plaintiff for an order for leave to examine for discovery a servant of the defendant company. The president of the company had been examined at considerable length and such examination was not concluded but stood adjourned sine die, presumably to enable him to inform himself on some points of which he was ignorant. Rule 439(*a*) (2) says that after an examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of a court or a judge. It was contended that what had been done here satisfied that condition and that it was necessary that the first examination should be concluded before the rule could be applied.

Held, the meaning of the word "after," as given in the Century dictionary is, "later in time—in succession to—at the close of"—and if the contention is right there may be two or perhaps more examinations all going on at the same time. "With the present inclination of the court to restrict (if not discourage) examinations for discovery, I do not think such result is possible. I have read the lengthy examination of over 50 typewritten pages. The main ground of plaintiff's attack seems to be the alleged weakness of the foundation piers on which the tank was supported. The president could and should obtain all necessary information and all other relevant points. *Clarkson* v. *Bank of Montreal*, 9 O.L.R. 317, and cases cited. If on further examination the plaintiffs think that they have not got all they are entitled to the motion could be renewed. I make no order at present and reserve the costs unless the parties agree to a dismissal without prejudice as above and with costs in the cause.

Middleton, K.C., for plaintiffs. *Grayson Smith*, for defendants.

COUNTY COURT—PERTH.

Ermatinger, Co. J.] [Acting for Barron, Co. J.

DOHERTY *v.* SCHOOL TRUSTEES, LOGAN.

Public Schools Act, R.S.O. c. 292, s. 62, sub-s. 4—Providing school premises—Neglect by trustees—Liability.

Under the above section it is the duty of school trustees to

purchase or rent school sites or premises and to build, repair, furnish and keep them in order. A boy, aged ten, standing on a platform in front of the schoolhouse in question, was amusing himself during the noon-hour, and when dodging a snow-ball fell off the platform a distance of about 3 feet and broke his leg. The platform was in front of the school house extending its entire width, except on the west side, where it fell short by the width of one plank, which was missing.

Held, 1. The platform was not in such a state of repair and good order as it was the duty of the school board to keep it.

2. The doctrine of contributory negligence is not to be applied to a child of tender years; or, at most, only such reasonable care as ought to be expected from one of his years is required of him, and that boy was not of the age or understanding sufficient to guard himself against the danger, and the doctrine of contributory negligence had no application in this case.

3. The fact that the platform had been unguarded on the side in question for 25 years, and that the missing plank had been gone for 4 or 5 years and that no accident had occurred there before afforded no better defence to the action than did the fact or probability that there are many school platforms in a like condition throughout the country.

The defendants were therefore held liable for the injuries suffered by the plaintiff.

Thompson, K.C., for plaintiff. *Makins*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Richards, J.A.] [July 23.

EMPEROR OF RUSSIA v. PROSKOURIAKOFF.

Appeal to Supreme Court—Consolidating two appeals in one—Supreme Court Act, s. 73, rules 8 and 14.

In this case an order was made consolidating two appeals to the Supreme Court of Canada from the judgment of the Court of Appeal for Manitoba, pronounced on June 8, 1908, reported ante, p. 506 and in 18 M.R. 56, and giving the plaintiff leave to print one appeal case for the Supreme Court, and directing

that the judgment of the Court of Appeal referred to on the plaintiff's appeals from the orders of MATHERS, J., dated March 28 and April 15, 1908, should be taken as one judgment on one appeal for the purpose of the appeal to the Supreme Court.

Blackwood, for plaintiff. *Levinson*, for defendants.

Full Court.] REX *v.* PORTE. [Oct. 3.

Criminal law—Crim. Code, s. 517—Information, sufficiency of—Charge of doing "an unlawful act."

The prisoner was convicted before a police magistrate at a summary trial of an indictable offence under section 517 of the Criminal Code for that he "did unlawfully in a manner likely to cause danger to valuable property without endangering life or person *do an unlawful act* in the Canadian Pacific Railway yards in the city of Winnipeg," and was sentenced to three months in jail. There was nothing in the information or conviction to shew the nature of the alleged unlawful act, but the evidence shewed that the prisoner had put stones in the journal of a car on the railway track.

Held, that the conviction was bad because it did not shew at all the nature of the unlawful act charged and therefore did not disclose any offence, and that the prisoner was entitled to a writ of habeas corpus and to be discharged; the order to contain a clause protecting the magistrate against any action.

Patterson, D.A.G., for the Crown. *Locke*, for the prisoner.

Macdonald, J.] ST. VITAL *v.* MAGER. [Oct. 12.

Highway—Width of great highways in Manitoba—R.S.C. 1906, *c.* 19, *s.* 9.

The plaintiff municipality contended that the public travelled road through the defendant's property should be 99 feet wide instead of 66 feet and brought this action for a declaration to that effect and an injunction to forbid the defendant from continuing to keep 33 feet of the alleged width of the road fenced off for his own benefit.

All the evidence, according to the finding of the trial judge, shewed that the road in question was only 66 feet wide for many years prior to May, 1886; but in that year, pursuant to s. 3 of 49 Vict. (D.), now R.S.C. 1906, c. 99, s. 9, a provincial

order in council was passed requesting the Governor-General in Council to pass an order directing the road in question to be surveyed by a Dominion Land Surveyor. This was done, but the Surveyor-General in authorizing a surveyor to survey the road directed him to make it 99 feet wide. The survey was made as directed and, in 1900, an order in council was passed at Ottawa approving the survey and transferring to and vesting the road in the Province of Manitoba for the purposes of a public highway.

Held, that there was no authority in the Surveyor-General to make the road of a greater width than it had been or to deprive the defendant of any of his land by giving such directions as he had done. The Dominion Government could not by legislation interfere with private rights, nor would it attempt to do so by order in council, and the approval of the survey by the Dominion Government could not deprive the defendant of any of his land.

Action dismissed with costs.

Appleck and *Kemp*, for plaintiffs. *Dubuc*, A.J.H., for defendant.

Phippen, J.A.] ROSENBERG *v.* TYMCHORAK. [Oct. 13.

Costs—Verdict in King's Bench action for amount within County Court jurisdiction—Statutes affecting procedure apply to pending litigation—Increase of jurisdiction after commencement of action—Certificate for costs on King's Bench scale.

This action was commenced in the King's Bench to recover damages for illegal distress. At the trial the plaintiff got a verdict for $450 damages. After the commencement of the action and before the trial the jurisdiction of the County Courts in such actions was increased from $250 to $500. The plaintiff applied under Rule 933 of the King's Bench Act for a certificate to enable him to tax his costs on the King's Bench scale.

Held, following *Todd* v. *Union Bank*, 6 M.R. 457, that the statute increasing the jurisdiction was one relating to procedure and applied to pending litigation and, therefore, the plaintiff could not tax King's Bench costs without getting a certificate from the judge under Rule 933, but that, under the circumstances, such certificate should be granted, preventing, also, any set-off of costs by the defendant.

Trueman and *Green*, for plaintiff. *Manchan* and *Condé*, for defendant.

Full Court.] SIMPKIN *v.* PATON. [Oct. 14.

Contract—Claim against estate of deceased person—Corroboration—Executor and administrator.

The plaintiff sued the executors of one Reid for services rendered in taking care of a child of Reid after his death. She had been engaged by Reid as a nurse to attend him in his last illness, and her evidence was that Reid, previous to his death, asked her to continue in the house and to look after his wife and child, and that deceased had said: "If anything happens will you promise that you will stop with her." There was no corroboration of the plaintiff's testimony as to the promises made her by the deceased.

Held, allowing an appeal from the verdict of a County Court in plaintiff's favour, that the evidence of the alleged contract was open to two constructions: (1) that the plaintiff was to stay with Mrs. Reid if anything happened to the testator, (2) that she was to take care of the child; and, the plaintiff having contended that Reid meant she was to stay with the child and take care of it, each may have intended a different thing and consequently no contract was clearly proved, also that corroboration of the plaintiff's evidence was necessary in this case.

Deacon, for plaintiff. *Blackwood*, for defendants.

Full Court.] [Oct. 26.

VULCA IRON WORKS *v.* WINNIPEG LODGE NO. 122.

Practice—Production of documents—Striking out defence for non-production.

Action for $25,000 damages for intimidation, coercion and conspiracy, arising out of a strike at the Vulcan Iron Works in 1906. By an order of the court the defence of the defendant, Thomas Howe, was made to stand as the defence of all the members of the Iron Moulders' Union of North America Lodge No. 174. It appeared during the suit that a bill of grievances and certain pay rolls used during the strike of 1906 were sent to the parent organization of the iron moulders at Cincinnati, Howe, on his examination for discovery, refused to produce these on the ground that they were not under his control and were outside the jurisdiction of the court.

Held, allowing an appeal from DUBUC, C.J., that the plaintiff had no right to an order striking out the defence of Thomas

Howe in so far as it was on behalf of the members constituting the Iron Moulders' Union of North America, No. 174, because the documents whose production was demanded were outside the jurisdiction of the court, and in the custody and control of the parent organization of the iron moulders at Cincinnati, who were not parties to the action.

Kearsley v. *Philips*, 10 Q.B.D. 36, and *Fraser* v. *Burrows*, 2 Q.B.D. 624, followed.

O'Connor and *Blackwood*, for plaintiffs. *Manhan*, for defendants.

KING'S BENCH.

Mathers, J.] WILLEY *v.* WILLEY. [Oct. 20.

Alimony—Husband and wife—Real Property Limitation Act—Pleading.

The plaintiff's claim was for alimony. The wife left her husband's home in April, 1908. She complained of legal cruelty, but the trial judge found that the defendant had not been guilty of such conduct as would under the principles followed in *Russell* v. *Russell* (1897) A.C. 395, and *Lovell* v. *Lovell*, 13 O.L.R. 569, entitle a married woman to leave her husband. The defendant, in 1892, in settlement of an alimony suit commenced in that year, agreed to pay the plaintiff $3 per week during her life, for her separate use and benefit, such payment not to relieve the defendant from his duty to support her according to his station in life. In 1900, in order to permit him to raise a loan on the land charged by the former agreement, the plaintiff gave him a quit claim deed of it, on the understanding that another agreement of a like effect would at once be executed and registered after the mortgage which was to be given as security for the loan. This was done, the new agreement bearing date the 17th day of October, 1900. Nothing had ever been paid under either of these agreements.

Held, 1. The agreement of 1900 did not operate as a discharge of the money that had accrued due under the former agreement, and that the plaintiff was entitled to be paid $3 a week, from the 6th day of July, 1892, and interest at 5 per cent. per annum for six years, calculated on all moneys overdue, and to a charge on the land mentioned in the agreements for the amount.

2. Sections 4 and 29 of the Real Property Limitation Act, R.S.M. 1902, c. 100, ss. 4 and 29, do not apply to such a claim, but that s. 24 of the Act would, if it had been pleaded, bar the action, except as to the ten years preceding its commencement; but, as it had not been pleaded, the plaintiff was entitled to recover all the arrears.

Kilgour, for plaintiff. *McKay*, for defendant.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] LITTLE *v.* HANBURY. [Oct. 10.

Contract—Negotiation—Incompleteness—Acceptance of offer not proved.

Defendant telegraphed "Propose to go in from Alert Bay over to West Coast of Island hunt elk; guarantee one month's engagement at least from arrival here, take earliest date you could arrive here; Paget recommends; state terms; wire reply." Plaintiff telegraphed in reply: "Five dollars per day and expenses," upon which the defendant telegraphed, "All right, please start on Friday," but received no reply, and on the same day telegraphed the plaintiff: "Sincerely regret obliged to change plans and therefore will not be able to avail myself of your services. Kindly acknowledge receipt of this wire, collect."

Held, that there was no contract. The telegram from plaintiff to defendant was not an acceptance of defendant's offer, but was merely a quotation of terms and could not bind plaintiff except as to terms. The acceptance of the defendant's offer of an engagement must be expressed and could not be implied. *Harvey* v. *Facey* (1893) A.C. 552, followed.

Fell, for plaintiff. *Langley*, for defendant.

Full Court.] [Oct. 31.

ESQUIMALT & NANAIMO RY. CO. *v.* HOGGAN.

Costs—Where suit is defended by the Crown—Vancouver Island Settlers' Rights Act, 1904.

In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action at-

tacking such rights should be defended by and at the expense of the Crown. On action taken by plaintiff company to test the statute, judgment was given in favour of defendant. The company appealed, and the appeal was dismissed.

Held, as to costs, that defendant was not in a position to claim any costs against the plaintiffs as his rights were being asserted by and defended at the expense of the Crown.

Luxton, K.C., for plaintiffs, appellants. *A. E. McPhillips*, K.C., for defendant, respondent.

Clement, J.] RAYLANCE v. CANADIAN PACIFIC RY. CO. [Nov. 2.

Workmen's Compensation Act, 1902—*Master and servant—Injury affecting claimant's earning power—Measure of damages.*

In estimating compensation under the Workmen's Compensation Act for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened and his earning powers consequently reduced.

S. S. Taylor, K.C., for plaintiff. *Macdonald*, K.C., for defendant company.

Full Court.] EMBREE v. MCKEE. [Nov. 11.

Contract—Construction of—Surrounding circumstances—Extrinsic evidence.

Plaintiff agreed to sell to defendant, who agreed to purchase, 75 tons of hay, more or less. The hay in question was to be the hay in a certain barn, less some 30 tons which had already been sold. To bind the bargain plaintiff gave a receipt in the form "Received from D. A. McKee $10 on account of 75 tons of hay, more or less, at $17.50 per ton delivered on cars." There were some 122 tons in the barn, and evidence was given that the parties negotiated as to "all the hay in Brown's barn," except 30 tons sold.

Held, on appeal, affirming the judgment of Howay, Co.J., that parol evidence could be given to shew what particular hay the parties were dealing for.

Sir C. H. Tupper, K.C., for plaintiff, appellant. *Reid*, K.C., contra.

Book Reviews.

The Drainage Acts of Ontario. By FRANK B. PROCTOR, LL.B., Barrister-at-law. Toronto: Arthur Poole & Co., Law Book Sellers and Publishers. 1908. 373 pp. $5.

After a short introductory chapter the author gives the Municipal Drainage Act of Ontario, appending to it notes to the various sections which have received judicial construction. He then gives the rules of practice under these Acts. Then follow the statutes of British Columbia and Manitoba on the same subject. The Ditches and Watercourses Act and the Stone and Timber Drainage Act of the Province of Ontario are also published. We have no doubt that this work will be found useful to those of the profession who need information on this subject.

Flotsam and Jetsam.

"The difficulty which I feel as a judge, and always felt at the Bar, is this: a defendant is entitled to put his back against the wall and to fight with every available point of advantage."—Kekewich, J., *Blank* v. *Footman & Co.* (1888) 57 L.J. (N.S.) C.D. 914.

In a case recently before him in an English County Court Sir William Selfe decided that it was still the law in England that gowns and other wearing apparel given a wife by her husband remained the property of the husband. The proceeding grew out of an attempt to seize the wardrobe of a Chelsea woman for her debts, and it was held that the clothing could not be seized under process or otherwise disposed of without the husband's consent.