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We publish in another place an article, by an occasional contributor, discussing the relation of judges to Grand Juries. It is well there should be no departure from the well recognized maxim, with which he concludes his observations. It is not safe, however, to rely upon newspaper reports as to matters of this sort, and we should be more inclined to think that the report was incorrect than that the learned and careful judge who tried the Kennedy case at Brantford, went beyond the true line of demarcation in his charge to the Grand Jury. It is, as we understand it, usual and proper for the judge, when necessary, to state shortly the evidence as it appears in the depositions placed in his hand, but this is not generally called for, except for the purpose of giving an intelligent summary of the law affecting the crime. The judge usually concludes with a reminder that it is the responsibility of the jury to see that the evidence is sufficient to warrant the accused being put by his trial; also giving a caution to the jurors not to be influenced in coming to their conclusion by anything but the evidence of the witnesses who may be brought before them in their own room. It would be quite objectionable for a judge to comment on the preliminary evidence or to express his own opinion as to it. Any language, moreover, that he might use in reference to it should always be carefully guarded, inasmuch as jurors might easily receive an unconscious bias from a thoughtless expression, or an unintentional coloring given to the case by one occupying the position of a judge. This seems to be the conclusion properly derivable from the authorities collected in this article referred to.

In the *Confederation Life* v. *Moore*, 6 O.L.R. 648, an attempt was made by both the learned Master in Chambers and Mr. Justice Meredith to harmonize the apparent inconsistencies of some of the Rules affecting a point of practice in the High Court of Ontario, but

it appears to us, with out much success. The defendant had, within the time allowed for appearance, filed his appearance and also his defence in which he stated that he did not require any statement of claim as he was entitled to do under Rules 171 and 247. He took out the usual order to produce documents, with which the plaintiffs complied, and thereafter the plaintiffs delivered a statement of claim which the defendant moved to set aside for irregularity (1) on the ground that the plaintiffs had no right to deliver a statement of claim after a defence had been filed, and (2) because, as was alleged, the statement of claim went beyond the claim made in the indorsement on the writ. The Master dismissed the motion, holding that notwithstanding the defendant had dispensed with a statement of claim, the plaintiffs were nevertheless entitled to deliver one within the ordinary time after appearance under Rule 243 (b). Mr. Justice Meredith came to the conclusion that when the defendant dispenses with a statement of claim, the indorsement on the writ becomes the statement of claim, and is amendable, as of course, like an ordinary statement of claim under Rule 300. So far so good, and with that conclusion we have no fault to find. Where we venture to think the learned Judge erred was in not following out his own reasoning to its legitimate conclusion, having regard to the provisions of Rule 309, "a proceeding shall not be defeated by any formal objection." Granted that the indorsement was the statement of claim, granted that it might be amended under Rule 300, does it not follow that the statement of claim sought to be set aside, ought to have been treated, as what in substance it actually was, viz.: an amended statement of claim. Surely it is going back to the days of technical objections to set aside a pleading merely because it omits to state on its face that it is an amended pleading when that fact is visible in every line of its contents. If this document had been indorsed "amended statement of claim" it would, according to Mr. Justice Meredith's reasoning have been all right and unassailable, but because it happened to omit the word "amended" it was set aside. This seems like a step in a retrograde direction and not like the forward view generally characteristic of that excellent Judge.

PROPERTY IN DOGS.

Though at first sight but a matter of small importance, the legal status of the dog has been the subject of much litigation, and the object of much controversy, and of many judicial opinions. That there should be any doubt upon the matter seems surprising when we consider how important a part the dog has played at all times in human affairs. There is no part of the world, and no condition of society, in which men, whether savage or civilized, have not made use of him. In the Arctic Regions he serves as a beast of burden where no other can be used. He promotes the cause of science by enabling the searcher for the North Pole to prosecute his adventurous quest He is the mail-carrier for the Hudson's Bay Company, and is in the daily employ of the Eskimo and the Indian in their hunting expeditions, or winter journeys of any kind. In the Torrid Zone he is less useful, but even there does good work as a scavenger.

In temperate climates the dog fulfills a great number of useful functions. He is the friend and pet of man, whether rich or poor, from the lap-dog of the lady of fashion, more tenderly cared for than many of the human race, to the half-starved mongrel who shares the crust of the beggar. What would society be without its sports, and how could the sports be carried on without the dog? But he has an actual money value as well. He is the private policeman of every family, and protects their lives and their property. To the farmer he saves a man's wages in helping him to manage his cattle and his sheep, and in many other ways the dog is an animal for use as well as amusement.

Why then, with all these qualities and qualifications, is the dog regarded in the eye of the law as differing from, and altogether on a lower scale than the horse, the mule or the ass? Why for instance cannot a suit be maintained against a railway company for the negligent killing of a dog? Such nevertheless was the recent judgment on appeal to the Supreme Court of Georgia in a case reported in 37 Central Law Journal, p. 389. Following the accepted law on the subject Cobb, J., with much regret gave judgment as above stated, at the same time saying that for himself he saw no good reason why the dog should not have the same status before the law as any other domestic animal.

By the common law of England it would appear that the legal status of the dog rests entirely with himself. He is mercifully

assumed to belong to the class *mansuetæ naturæ*, and is therefore ranked with other domestic animals. But if he allows his angry passions to rise, and wantonly does mischief to either man or beast, he falls into the ranks of animals *feræ naturæ*, and is treated accordingly. But not only is he liable in his proper person to various pains and penalties, but he involves his owner also in serious liabilities for the consequences of his misconduct. Consistently, however, with the assumption above stated the owner must be shewn to have become acquainted with the change of character from that of a domestic animal to that of a wild beast, and that knowledge must be pleaded in any proceedings taken.

By the old law there could not be larceny of a dog. The theft of a dog might be the subject of a civil action, but not of a criminal prosecution. Now, under the Larceny Act of 1861, special provision is made for the punishment of dog-stealing, or the receiving of stolen dogs. A dog is now also held to be *goods*, and his delivery may be ordered if unlawfully detained. And although a railway company cannot be held liable for running over a dog, the company must carry them as it would their passengers, subject to certain specified conditions. See post p. .

The humane spirit of modern legislation has been extended to the dog as well as to his master, and cruelty to dogs is punishable by law.

The special liking which the dog has for mutton, whether in the shape of the roast leg which he snatches from the oven, or in the hunting and killing of the sheep when at large, has involved him in very serious trouble. Punishment for the more venial offence rests with the cook or the housekeeper, but the more serious one is severely dealt with. Sheep worrying, both in England and this country, has been legislated against by various enactments, both parliamentary and municipal. It is the one offence which is unpardonable, and the death penalty is inflicted often upon mere suspicion of the crime. Nothing is more harrowing to the feelings of the owner of some pet animal, in all other respects entitled to the warmest affection, than to have the faithful friend and companion charged with having committed, or being suspected of having committed, an assault upon such a helpless victim as a poor sheep, even where its life was not taken. Once begun, the habit is incurable and no mercy can be shewn

The cases bearing upon dog law are numerous, from the days of the earliest records of our courts down to the present time, and such jurists as Chief Justices Hale and Holt can be quoted as giving decisions on the subject which we have only had space to deal with in the most general terms.

LIABILITY OF MUNICIPALITY FOR FAILURE OF ITS OFFICERS TO ENFORCE ORDINANCES.

Referring to the article from the *Central Law Journal* which appears in this journal, ante p. 183, there is an interesting phase of the subject which counsel unsuccessfully urged on behalf of the plaintiff in the case of *Brown* v. *City of Hamilton*, 4 O.L.R. 249, and which, it seems to the writer, has not generally received the consideration it deserves. We refer to nuisances on the streets and roads, prohibited by ordinance or by-law, but permitted by the authorities to continue, considered from a ***nuisance*** standpoint.

In Ontario the soil of the road or street is vested in the municipal corporation under the Municipal Act R.S.O. (1897), c. 223, ss. 532 (2), 599-601. See also *Ricketts* v. *Markdale*, 31 O.R. 610; *De La Chevrotiere* v. *City of Montreal*, 12 A.C. 149 (1886), per Lord Fitzgerald, at p. 159; *Town of Sarnia* v. *G.W. Ry. Co.*, 21 U.C.Q.B. 59 (1861), per McLean, J., at p. 62.

In the United States the condition of the highway much resembles that which obtains in Ontario. The American authorities should therefore have weight here.

All wrongs "which arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, working an obstruction of or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume consequent damage" are nuisances at common law: Wood on Nuisances, s. 1. And common law is "a system of elementary principles and of general judicial truths which are continually expanding with the progress of society and adapting themselves to the gradual changes of trade and commerce and mechanical arts and the exigencies and usages of the country": *Pierce* v. *Swan Point Cemetery*, 10 R.I. 227, 14 Am. Rep. 667; *Jacob* v. *State*, 3 Humph. 495; *Hightower* v. *Fitzpatrick*, 42 Ala. 597. A municipality is liable just as an individual would be for allowing a nuisance on his property: per Mason, J., in *Baltimore* v. *Marriott*, 9 Md. 160; *Cochrane* v. *Frostburg*, 27 L.R.A. 728.

It has been held that where a corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety or impairs the convenience of its citizens, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it: Wood on Nuisances, 2nd ed., s. 749; *Baltimore* v. *Marriott*, 9 Md. 160; *Flynn* v. *Canton Co. of Baltimore*, 40 Md. 312, 17 Am. Rep. 603; *Taylor* v. *Cumberland*, 64 Md. 68, 54 Am. Rep. 759.

Hagerstown v. *Klotz*, 54 L.R.A. 940, goes perhaps farther than any other case in asserting the doctrine that a by-law prohibiting nuisances on public streets must not be allowed to become a dead letter but must be vigorously enforced, and that municipal corporations must take ordinary care and diligence to protect the public and prevent nuisances dangerous to the public has also the support of *Cochrane* v. *Frostburg*, 27 L.R.A. 728; *Spier* v. *Brooklyn*, 21 L.R.A. 641, and *Forget* v. *City of Montreal*, Mont. L.R. 4 Sup. Ct. 77. And an unlawful use of a street subjects the corporation to an action for damages: *Porterfield* v. *Bond*, 38 Fed. R. 391; Elliott on Roads and Streets, 267 and 677 and cases there cited; Wood on Nuisances, p. 749.

According to this theory we might go a step farther and contend that the existence of a prohibitory ordinance is not a condition precedent to a right of action wherein it would seem to differ from the principles necessarily applicable to non-enforcement cases not considered from a nuisance point of view.

The gist of the action is the permitting of the nuisance, not the failure to enforce the ordinance or by-law; but the municipality must do some corporate act to abate the nuisance, and the passing of the ordinance is the first corporate step in the means. It could hardly be contended that an isolated infraction of the ordinance would constitute a nuisance, but the act complained of to constitute such must be continuous or frequent, openly committed and allowed to continue without any effort on the part of the municipality to abate it.

These are merely some detached ideas which may be useful as furnishing food for thought even if too advanced or visionary to be safely followed in view of the great weight of authority to the contrary.

Hamilton. JOHN G. FARMER.

THE RELATION OF JUDGES TO GRAND JURIES.

The institution of the grand jury is acknowledged to be of ancient origin, and constitutes for the subject a valuable heritage. In the necessity for a presentment by them against a person charged exists the barrier which the law's foresight places between him and the final umpire as to guilt and innocence, technically designated "the country". Approved as they find it by the test of centuries, it behooves possessors of the boon to show fitting appreciation of its worth.

Consideration of this topic is opportune at this juncture in view of Mr. Justice Street's charge to the grand inquest on the Kennedy murder trial at Brantford; its nature making it pertinent to enquire to what extent a judge in directing the body may discuss matters of fact. Can he undertake at best more than the duty of enlightening them as to how these may bear upon the law?

No English text book clearly defines the judge's province with regard to instructions vouchsafed to a grand jury. Chitty's Criminal Law puts it in this way, "When they (the grand jury) appear, the judge gives them such a charge as he thinks the circumstances before them will most particularly require." Mr. Harris in his book on criminal law speaks as follows:—"The object of this charge is to assist the grand jury in coming to a right conclusion, by directing their attention to points in the various cases about to be considered by them which require special attention." Neither observation, it will be noted, gives the line of demarcation.

Burn's Justice affords the estimate of Mr. Sergeant Talfourd in this regard. "That charge, for the most part, consists of remarks tending to explain and elucidate any cases which the calendar may disclose and requiring more than ordinary attention, either from the complicated nature of the facts, or from the law applicable to them happening to be of recent enactment, or of infrequent use. When parties have been committed, or held to bail on charges arising upon any recent Act of Parliament, it becomes absolutely necessary that the statute should be stated and explained." Thompson and Merriam on Juries contains, also, a judgment or two of importance, to one of which subsequent reference will be made.

A rather convincing utterance on the subject is that of Lord Chief Justice Eyre in Howell's State Trials, in the case of *Reg.* v.

Thomas Hardy, 24 How. 214. That primate in the field of criminal jurisprudence delivers himself in these words: "It will be your duty to examine them (the facts) in a regular judicial course, that is, by hearing the evidence, and forming your own judgment upon it." In a fresh connection, he observes: "I am apprehensive that I shall not be thought to have fulfilled the duty which the judge owes to the grand jury, when questions in the criminal law arise on new and extraordinary cases of fact, if I did not plainly and distinctly state what I conceive the law to be, or what doubts may arise in law, upon the facts that are likely to be laid before you, according to the different points of view in which those facts may appear to you." Again, as to the withdrawal of considerations of fact from judicial examination, he proceeds:—"My present duty is to inform you what the law is upon the matter of fact, which, in your judgment, shall be the result of the evidence." This point he impresses anew: "Upon this last statement of the facts of the case, I am not called upon, and therefore, it would not be proper for me to say more." His luminous exposition terminates as follows:—"Gentlemen, I dismiss you with confident expectation that your judgment will be directed to those conclusions which may clear innocent men from all suspicions of guilt, bring the guilty to condign punishment, preserve the life of our gracious Sovereign, secure the stability of our government, and maintain the public peace, in which comprehensive term is included the welfare and happiness of the people under the protection of the laws and liberties of the people."

But the most sweeping determination on the question before us is furnished by a United States case, *Shattuck* v. *State*, 11 Ind. 473, where Hanna J., in delivering judgment in the Circuit Court, says: "By that law and practice (the English Common Law) from which we derived the main features of our grand jury system, the jury could call upon the prosecuting attorney for legal advice. But under that law and practice the advice given by the Court or prosecutor could not legitimately be upon questions of fact, but was confined to questions of law."

It may be added that Dickenson's Quarter Sessions, a guide whose reliability can be vouched for, lends its high authority to the proposition that the counsel which a judge, as expressed by this decision, may afford the grand jury, on request by them, should be

confined to the sphere of law. It announces, "if any doubts occur on points of law, or with respect to the propriety of admitting any part of the evidence offered to them, they should come into Court, and pray the advice of the Chairman or Recorder."

In *Reg.* v. *Nelson* and *Brand*, the historic Jamaica riots affair, Lord Chief Justice Cockburn, in explaining with great fulness and power the raison d'etre of martial law in a colony, and estimating the character and extent of disorder that would justify its proclamation, might at first glance seem, here and there, to have transgressed the canon set up in this regard; and to have charged adversely to the prisoners. The writer is unable, however, to perceive that he does more, at any time, than elucidate mixed questions of fact and law which the exigency of the hour supplied in abundance. Language of his own, just before concluding his brilliant resumé of the subject, confirms this understanding: "Gentlemen, it may be that all I have said upon the subject of the law will have left you, as I own candidly it still leaves me, not having the advantage of judicial authority to guide me, nor of forensic argument and disputation to instruct me, in some degree of doubt. Let me therefore add that if you are of opinion, upon the whole, that the jurisdiction to exercise martial law is not satisfactorily made out, and that it is a matter which ought to be submitted to further consideration, on the trial of the accused before a competent court, where all the questions of law incident to the discussion and decision of the case may be fully raised and authoritatively and definitely considered and decided, I must say I think the safe course will be to let this matter go forward. If, however, upon the review of the authorities to which I have called your attention, and of the enactments of the Jamaica statutes, and the recognition and reservation of the power of the Crown in the Acts of Parliament, you think the accused ought not further to be harassed by criminal proceedings, and that the case against them ought not to be submitted to the consideration of a jury, you will say so by ignoring this indictment."

The doctrine being as jurists lay it down, did not the learned judge in the Kennedy case, by dwelling (if the newspaper reports be correct) on various tokens of guilt, stray from the path marked out for a judge of Assize in respect of his duty to the jury. Recognizing, as the writer does, the faculty of discrimination that very able occupant of the Bench applies to matters claiming

his attention, this criticism of his action on that occasion is offered with much diffidence. It is difficult, however, to see what other effect his treatment of the facts as then elicited could have than to induce the panel to give a sinister complexion to the matters canvassed.

While exhorting them, more than once, to exercise their own judgment, his comments on the evidence likely to come before them would, it is submitted, tend to influence that judgment; and any prejudicial utterances would scarcely be neutralized by his admonitions. In *Reg.* v. *Coleman*, 30 O.R. 93, damage from the improper calling of the attention of a jury to the neglect by a prisoner to testify on his own behalf was held not to have been rectified by a subsequent mention of the error.

Ad quæstionem facti respondent juratores; ad quæstionem juris respondent judices is maintained by Sir Michael Dalton, in his elaborate work on Justices of the Peace, to be as true with regard to the grand, as the petit jury.

J. B. MACKENZIE.

Correspondence.

TORONTO, March 11, 1904.

To the Editor CANADA LAW JOURNAL:

DEAR SIR,—It should be unnecessary to call attention to the ridiculously inadequate telephone accommodation at Osgoode Hall. A little money spent in making this more complete would be a great boon to the members of the profession who have to do business there. There should be a switch board to connect with the principal departments as is usual in all up-to-date business establishments. Surely this convenience is not still too modern to commend itself to the highly respectable but somewhat conservative element that has charge of such matters in that venerable institution.

Yours truly,

SOLICITOR.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPENSATION FOR INJURY TO PROPERTY—ASSIGNMENT OF CHOSE IN ACTION ARISING FROM TORT—RIGHT OF ASSIGNEE OF CHOSE OF ACTION TO SUE IN HIS OWN NAME—JUD. ACT 1873 (36 & 37 VICT. C. 66) S. 25—(ONT. JUD. ACT, S. 58 (5)).

In *Dawson* v. *Great Northern Ry. Co.* (1904) 1 K.B. 277, the plaintiff was assignee of a claim for compensation, which the owners of certain houses were entitled to recover from the defendant company, owing to a subsidence caused by the company having erected a tunnel under their statutory powers. After the damage had been incurred the claim, together with the houses which had been injured, had been assigned to the plaintiff, who had, pursuant to the provisions of a statute, got the damages assessed before Ridley, J., and a jury, and the present action was brought to recover the damages so assessed. The defendants contended that this was not a chose in action which could be assigned so as to enable the assignee to sue in his own name. Wright, J., so held, and dismissed the action. In *King* v. *Victoria Ins. Co.* (1896) A.C. 250, the Judicial Committee of the Privy Council held that a right to recover damages for negligence was a chose in action within the Act, to recover which an assignee might sue in his own name. This seems to be another instance in which there is a difference of opinion between our final Court of Appeal and the ordinary English Courts as to what is the law of England.

HUSBAND AND WIFE—PRACTICE—ACTION AGAINST HUSBAND AND WIFE FOR WIFE'S TORT—PLEADING—PAYMENT INTO COURT—DENIAL OF LIABILITY—RULE 255—(ONT. RULES 419, 420).

Beaumont v. *Kaye* (1904) 1 K.B. 292, was an action against husband and wife to recover damages in respect of an alleged libel by the wife. The husband paid money into Court in satisfaction of the claim, and the wife put in a defence denying the alleged libel. The plaintiff moved to strike out the wife's defence. Under the English Rule 255 payment into Court together with a defence denying liability is not permitted in an action of libel. Bucknill, J., therefore struck out the wife's defence, and the Court of Appeal

(Collins, M.R., and Romer, L.J.,) held that he was right. But this decision would appear not to be applicable to the practice in Ontario, where payment into Court and a denial of liability is allowed even in actions of libel: see Rules 419, 420.

SHIP—BILL OF LADING—EXCEPTIONS—WARRANTY OF SEAWORTHINESS.

Borthwick v. *Elderslie S.S. Co.* (1904) 1 K.B. 319, was an action by the holders of a bill of lading to recover damages for damage to the goods (frozen meat) occasioned by the ship being tainted with carbolic acid. The bill of lading contained a clause exempting the shipowners from liability from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any cause whatever, whether arising from a defect existing at the commencement of the voyage, or at the time of the shipment of the goods or not, or for any act, negligence, default or error of judgment of the master or officers of the ship, or "from any other cause whatsoever." It also contained a clause exempting the shipowners from liability for damage occasioned by any cause beyond the control of the owners or charterers, or from any defects, latent or otherwise, in hull, tackle, etc., whether or not existing at the time of the goods being loaded, or the commencement of the voyage, "if reasonable means have been taken to provide against such defects or unseaworthiness." On a previous trip the ship had carried horses, and a large quantity of carbolic acid had been used for disinfecting purposes before the meat was shipped When the ship arrived at her destination the meat was tainted with carbolic acid. Walton, J., who tried the action, held that the damage arose from the condition of the ship at the com mencement of the voyage and that if proper care had been taken in cleansing the ship the damage would not have occurred, but he held that the defendants were exempt from liability under the first clause and dismissed the action. On appeal, however, the Court of Appeal (Lord Alverstone, C.J., and Collins, M.R., and Romer, L.J.,) reversed his decision on the ground that the loss was due to the unseaworthiness of the vessel, and that the implied warranty of seaworthiness must be held not to be excepted by the conditions of a bill of lading unless it plainly appears that it was intended to except it; that in the present case it did not so appear; and that the general words of the exemption clauses were restricted to matters ejusdem generis as the preceding words, viz., failure or breakdown of machinery, etc.

"ACCIDENT"—DISEASE CONTRACTED FROM HANDLING INFECTED WOOL.

Higgins v. *Campbell* (1904) 1 K.B. 328, may be noted as giving a legal definition of an "accident." The plaintiff was a workman engaged in a wool combing factory, and in the course of his employment had contracted anthrax from handling wool infected with the anthrax bacillus. The question was whether this could be said to be "a personal injury by accident" in the course of his employment. The County judge who tried the case thought it could not; but the Court of Appeal (Collins, M.R., Mathew, and Cozens-Hardy, L.JJ.), following *Fenton* v. *Thorley* (1903) A.C. 443, held that it was "an unlooked for mishap, or an untoward event not expected or designed," and, therefore, an accident within the meaning of the Workmen's Compensation Act, 1897.

LEASE—COVENANTS—ASSIGNMENT OF REVERSION—LIABILITY OF ASSIGNOR OF REVERSION ON COVENANTS IN LEASE—32 HEN. 8, C. 34, SS. 1, 2.—(R.S.O. C. 330, SS. 12, 13).

Stuart v. *Joy* (1904) 1 K.B. 362, was an action brought by lessees against their lessor for damages for breach of a covenant contained in the lease. The covenant was one which ran with the land, and the lessors had assigned the reversion, and the simple question was whether they remained liable on their covenant notwithstanding the assignment, and the Court of Appeal (Lord Halsbury, L.C., Lord Alverstone, C.J., and Cozens-Hardy, L.J.,) held that they did, and affirmed the judgment of Wright, J., in favour of the plaintiff. Cozens-Hardy, L.J., says: "I assume, in favour of the appellants, that the covenant to execute repairs on the demised premises in obedience to the award to be made was a covenant running with the reversion to which the statute 32 Hen. 8, ch. 34, (R.S.O. c. 330, ss. 12, 13) applies. If so, s. 2 (Ont. Act s. 13) gives the lessees a right of action against the assignees of the reversion for breach of the covenant. But it is difficult to see why the enactment should release the lessors from the express covenant. There is nothing in the language of the section to lead to this conclusion."

LIQUOR LICENSE ACT—KEEPING OPEN DURING PROHIBITED HOURS—LICENSING ACT, 1874 (37 & 38 VICT. C. 49) S. 9—(R.S.O. C. 245, S. 54).

Commissioners of Police v. *Roberts* (1904) 1 K.B. 369, was a prosecution under the Liquor License Act, 1874, s. 9, for keeping open the license premises during prohibited hours. The evidence

was that there was singing going on on the premises for eight minutes after the appointed hour, and within fifteen minutes after the appointed hour for closing thirty-eight persons came out of the premises. The doors were closed at the proper time, and there was no evidence that anyone was admitted or served with liquor after the appointed time. The justices dismissed the information, but stated a case. The Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.,) dismissed the appeal, holding that in order to justify a conviction there must be a keeping open of the premises in the sense that people can get in from the outside to have intoxicating liquor, or that they can get it supplied to them when outside.

DEBT — ASSIGNMENT — REQUEST BY CREDITOR TO DEBTOR TO AGREE TO PAY DEBT TO THIRD PARTY—JUDICATURE ACT 1873, S. 25, SUB-S. 6.—(ONT. JUD. ACT, S. 58 (5).)

In *Brandts* v. *Dunlop Rubber Co.* (1904) 1 K.B. 387, the facts stated in the report are somewhat complicated, but are really quite simple. The plaintiffs were sureties for a firm of Kramrisch & Co., who had sold a quantity of rubber to the defendants, and at the plaintiffs' request Kramrisch & Co. addressed a letter to the defendants requesting them to agree to pay the price to the plaintiffs for Kramrisch & Co.'s account. The defendants' manager without authority signed an agreement to that effect, and the defendants in ignorance of what he had done, paid the price to Kramrisch & Co., who had since become bankrupt. The plaintiff contended that the request of Kramrisch & Co. to the defendants to agree to pay the plaintiffs was an assignment of the debt to the plaintiffs, entitling them to sue therefor in their own names, under the Jud. Act, s. 25 (6), (Ont. Jud. Act, s. 58 (5)), but the Court of Appeal (Lord Alverston, C.J., Collins, M.R., and Romer, L.J.,) were of opinion that the document relied on did not amount to an assignment of the debt, and the judgment of Walton, J., in favour of the plaintiff was reversed.

CARRIER — CONTRACT — EXEMPTION FROM LIABILITY FOR LOSS OF GOODS WHICH CAN BE COVERED BY INSURANCE—NEGLIGENCE OF CARRIER.

Price v. *Union Lighterage Co.* (1904) 1 K.B. 412, was an action against carriers for loss of goods entrusted to them: the contract exempted the defendants from liability for "any loss or damage to goods which can be covered by insurance." The goods were

lost through the negligence of the defendants' servants. Walton, J., gave judgment for the plaintiffs, and the Court of Appeal (Lord Alverstone, C. J., Collins, M. R., and Romer, L. J.,) affirmed his decision on the ground that where a clause in a contract, such as that in question, is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, the latter construction is not to be adopted unless there be special words clearly making the clause cover non-liability in case of negligence.

LANDLORD AND TENANT — CONSTRUCTION — AGREEMENT FOR TENANCY AT YEARLY RENT—THREE MONTHS' NOTICE—EXPIRATION OF NOTICE.

Dixon v. *Bradford & D. Ry. Supply Society* (1904) 1 K.B. 444, was an action by a landlord for rent. The tenancy was created by agreement whereby the premises were let to the defendants at "£25 per ann. from 1 October, 1894; the tenant to pay rates and taxes in addition; three months' notice on either side to terminate this agreement." On 24 Sept., 1902, defendants gave notice to quit and they went out of possession before the end of 1902. The rent had been paid quarterly, and plaintiffs, notwithstanding the defendants had quitted possession, claimed rent for the quarter ending 31 March, 1903. The County Court judge who tried the action dismissed it on the ground that the tenancy had been duly determined. The Divisional Court (Lord Alverstone, C. J., and Kennedy, J.,) reversed his decision on the ground that the tenancy was a yearly tenancy and could only be terminated by three months' notice expiring with a year of the tenancy; but for the express stipulation as to three months' notice, six months' notice would have been necessary.

LANDLORD AND TENANT—TENANCY FOR THREE YEARS—AGREEMENT TO PAY OUTGOINGS—ORDER BY SANITARY AUTHORITY TO RECONSTRUCT DRAIN.

Stockdale v. *Ascherberg* (1904) 1 K. B. 447, was also an action between landlord and tenant. In this case the tenancy was for three years, and the tenant had agreed to pay in addition to his rent "all outgoings in respect of the premises." Six months after the tenancy had commenced, the plaintiff was notified that the drains on the premises were a nuisance, and he was required to reconstruct them, which he accordingly did in pursuance of the

order of the sanitary authority at a cost of £83 10s., which he claimed to recover from the defendant as an outgoing. The Court of Appeal (Collins, M. R., and Romer and Mathew, L.JJ.,) were clear that it was, and that the tenant was liable therefor, and affirmed the judgment of Wright, J., in the plaintiff's favour, though expressing some sympathy for the defendant.

MARITIME LAW—SALVAGE—VALUE OF SALVED VESSEL FOR PURPOSES OF AWARD.

The Germania (1904) P. 131, was a claim for salvage in which the question to be determined was the value of the salved vessel for the purposes of the award of salvage. The plaintiff's steamer had fallen in with the Germania in distress off the coast of Scotland and about thirty miles from Aberdeen bay. The Germania was taken in tow and brought to Aberdeen bay, and the master of the plaintiff's steamer then suggested that a tug should be engaged to take her into the bay. Not being able to come to terms with a tug the master of the plaintiff's ship was directed to take the Germania in, but the hawser parted. The Germania's anchor failed to hold and she was driven ashore. Before going ashore she was worth £8,500, but the expense of floating her off and repairing her amounted to £6,750, and her owners claimed that for salvage purposes her value should be taken as £1,750. Barnes, J., however, held that it was a case of towage and that the plaintiffs were entitled to salvage on £8,500, the value at the time the vessel was safely brought within reach of the tug, the subsequent calamity to the vessel not being attributable to the plaintiffs.

EVIDENCE—REGISTER KEPT PURSUANT TO STATUTE—DATE OF BIRTH.

In re Goodrich, Payne v. Bennett (1904) P. 138, Jeune, P.P.D., held that the certified copy of an entry in a register of births kept pursuant to a statute is evidence, not merely of the fact of birth, but of birth on the date therein mentioned.

HUSBAND AND WIFE—DESERTION—CONDONATION.

Williams v. *Williams* (1904) P. 145, was an appeal from an order made by justices at the sessions. The proceedings were instituted by a wife for a judicial separation on the ground of desertion, and during an adjournment of the hearing of the summons, the complainant resumed cohabitation with her husband

and subsequently and before the date appointed for the adjourned hearing separated from him, and at the adjourned hearing obtained an order for separation and allowance for maintenance. The Divisional Court (Jeune, P., and Barnes, J.) reversed the order, holding that there had been a condonation which had put an end to the cause of complaint.

WILL—CONSTRUCTION—INVESTMENTS—SECURITIES—SHARES IN COMPANIES.

In re Rayner, Rayner v. *Rayner* (1904) 1 Ch. 176, a testator by his will declared that "all moneys liable to be invested under this my will may be invested in such securities as my trustees, in their absolute discretion, shall think fit: and I authorize my trustees to continue or have any moneys invested at my death in or upon the same securities." The question submitted to Farwell, J., was, what was the proper meaning of "securities," did it include shares in incorporated companies? He determined that the word "securities" had a well defined primary meaning of "money secured on property," and, although he admitted it also had a secondary meaning, yet he held that the word must be construed according to its primary meaning, and, therefore, it did not include shares and stock in companies, and he rejected, as inadmissable evidence, that the greater part of the testator's estate was, at the time of his death, invested in shares and other property not coming within the primary meaning of "securities." The Court of Appeal (Williams, Romer and Stirling, L.JJ.), however, reversed his decision, holding that the whole clause shewed that the testator used the word "securities" in the sense of "investments," and that in that sense it included shares and stocks in companies.

MORTGAGE—TACKING—CONSOLIDATION—TWO MORTGAGES—COVENANT BY TENANT FOR LIFE OF EQUITY OF REDEMPTION TO PAY ONE OF TWO MORTGAGES—RESERVATION OF RIGHTS AS SURETY.

Nicholas v. *Ridley* (1904) 1 Ch. 192, is a case in which both the doctrine of tacking and of consolidation are involved. So far as tacking is concerned that right is abolished in Ontario and other Provinces where registration of deeds prevails. Mr. Fisher has explained the difference between tacking and consolidation and shewn that they are distinct rights, and yet as this case shews tacking, sometimes involves consolidation, though consolidation does not necessarily involve the doctrine of tacking. Shortly stated, the facts were as follows: By deed of 2 July, 1821, Richard Ridley mortgaged certain copyhold lands to one Stringer to secure

£1,500. By deed of 21 April, 1842, George Ridley, a subsequent owner of the same estate, mortgaged the equity of redemption and certain additional land to one William Nicholas to secure £2,500. Nicholas paid off the first mortgage and took an assignment to himself in 1874, and by the same deed Samuel Ridley, who was tenant for life of all the mortgaged property, covenanted with Nicholas to pay the principal and interest of the first mortgage, but reserving his rights as surety against the owners of the mortgaged estates, and stipulating that as between him and them the lands should be deemed the primary security and his covenant only a collateral security. The representatives of Nicholas brought the present action against the representative of Samuel Ridley on his covenant, and against the owners of the equity of redemption for foreclosure. The representative of the covenantor Samuel Ridley claimed that on payment of the first mortgage he was entitled to an assignment thereof, claiming as between himself and the plaintiffs to stand in the position of a surety. The plaintiffs, on the other hand, contended that they were not bound to assign one mortgage without being also paid the amount due on the other. Byrne, J., who tried the action, considered that it was governed by *Farebrother* v. *Wodehouse* 23 Beav. 18, and that the plaintiff's contention must prevail, and that, although Samuel Ridley's representatives stood in the position of sureties, their rights as sureties could not interfere with the plaintiff's right to tack or consolidate their securities. On appeal Williams, L.J., agreed that they were sureties, and considered that the only way their rights could be carried out in accordance with the covenant given by Samuel Ridley was by an assignment to them of the first mortgage on payment thereof: Stirling and Romer, L.JJ., however, affirmed the judgment of Byrne, J., but on the ground that Samuel Ridley was not a surety as between himself and Nicholas, but a principal debtor. The case, therefore, presents quite a conflict of judicial opinion. Per Byrne, J., Samuel Ridley was a surety, but his rights as surety could not interfere with the plaintiff's right to consolidation. Per Williams, L.J., Samuel Ridley was a surety, and the plaintiffs were not, owing to the terms of his covenant, entitled to consolidate their securities as against him. Per Stirling and Romer, L.JJ., Samuel Ridley was not a surety as regards the plaintiffs, but a principal debtor, ergo plaintiffs had a right to consolidate their securities as against him.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] LOWENBERG *v.* DUNSMUIR. [Nov. 30, 1903

Finding of jury—New trial—Principal and agent—Qualification of juror—Waiver of objection—Written contract—Collateral agreement by parol.

An agent employed to sell a mine for a commission failed to effect a sale but brought action based on a verbal collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found in answer to a question by the judge that "we believe there was a promise of fair treatment in case of no sale."

Held, reversing the judgment in appeal (9 B.C.R. 303), TASCHEREAU, C.J., and KILLAM, J., dissenting, that this finding did not establish the collateral agreement but was, if anything, opposed to it and the real issue not having been passed upon there must be a new trial.

If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not per se a ground for setting aside the verdict on the latter.

Appeal allowed with costs.

Sir C. H. Tupper, K.C., for appellant. *Bodwell*, K.C., for respondents.

Man.] DAVIDSON *v.* STUART. [Nov. 30, 1903.

Negligence—Electric plant—Defective appliances—Master and servant — Electric shock — Engagement of skilled manager — Contributory negligence.

An electrician engaged with defendants as manager of their electric lighting plant and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house which had been there the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated.

Held, that there was no breach of duty on the part of the defendants towards deceased who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him.

The judgment appealed from (14 Man. L.R. 74) ordering a new trial was affirmed, but for reasons different from those stated in the court below.

Appeal dismissed with costs.

Haggart, K.C., for appellant. *Coutlee*, K.C., and *Phippen* for respondent.

B.C.] HOSKING *v.* LE ROI No. 2. [Dec. 9, 1903.

Mining plans and surveys—Negligence of higher officials—Duty of absent owners — Operation of metalliferous mines — Common law liability—Employers Liability Act—R.S.B.C. c. 69, s. 3.

The provisions of the third section of the "Inspection of Metalliferous Mines Act, 1897," of British Columbia, do not impose upon an absent mine owner the absolute duty of ascertaining that the plans for the working of the mine are accurate and sufficient and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys.

The defendant company acquired a mine which had been previously worked by another company, and provided a proper system of surveys and operation and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans according to surveys made up to date, the inaccurate plans misleading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted platting the information on the plans had left the employ of the company prior to the engagement of the deceased, who was killed in the accident.

Held, TASCHEREAU, C.J., contra, that the employers not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could not be held responsible for the consequences of failure to provide complete and accurate plans of the mine.

Held, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia "Employers' Liability Act" (R.S.B.C. c. 69, s. 3), for negligence on the part of the superintendent.

Judgment appealed from reversed and a new trial ordered; TASCHEREAU, C.J., being of opinion that a judgment should be entered in favour of the plaintiffs.

Per TASCHEREAU, C.J. An employee who has left the service of the common master cannot be regarded as a fellow workman of servants engaged subsequently.

Appeal allowed with costs.

J. Travers Lewis, for appellants. *Davis*, K.C., for respondents.

Que.] [Dec. 11, 1903.

ATTORNEY-GENERAL FOR QUEBEC AND CITY OF HULL *v.* SCOTT.

Appeal—Time for bringing appeal—Delays occasioned by the court—Jurisdiction—Controversy involved—Title to land.

An action au pétitoire was brought by the city of Hull against the respondents claiming certain real property which the government of Quebec had sold and granted to the city for the sum of $1,000. The Attorney-General for Quebec was permitted to intervene and take up the fait et cause of the plaintiffs without being formally summoned in warranty. The judgment appealed from was pronounced on Sept. 25, 1903. Notice of appeal on behalf of both the plaintiff and the intervenant were given on November 3rd, and notice that securities would be put in on Nov. 10, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before WURTELE, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from and, on Nov. 25, 1903, granted leave for the appeals and approved the securities filed.

Held, that the appellants could not be prejudiced by the delay of the judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals and, following *Couture* v. *Bouchard*, 21 S.C.R. 281, that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken en délibéré.

Held, also, that as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000. Motion to quash dismissed with costs.

Ayles, K.C., for motion. *Belcourt*, K.C., contra.

Ex. Court.] [Feb. 16.

ATTORNEY-GENERAL FOR MANITOBA *v.* ATTORNEY-GENERAL FOR CANADA.

Crown lands—Settlement of Manitoba claims—Construction of statute—Title to lands—Operation of grant—Transfer in præsenti—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements—Constitutional law.

The first section of the Act for the final settlement of the claims of the Province of Manitoba on the Dominion (48 & 49 Vict., c. 50) enacts that "all Crown Lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the province and enure wholly to its benefit and uses."

Held, affirming the judgment appealed from, (8 Ex. C.R. 337,) GIROUARD and KILLAM, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General-in-Council, and that, in the meantime, the Government of Canada remained entitled to the administration thereof and that the revenues derived therefrom enured wholly to the benefit and use of the Dominion. Appeal dismissed with costs.

Lewis, for appellant. *Newcombe*, K.C., for respondent.

N.S.] DRYSDALE *v.* DOMINION COAL CO. [Feb. 16.

Commissioner of Mines—Appeal from decision—Quashing appeal—Trial judgment—Estoppel—Mandamus.

Where an appeal from a decision of the Commissioner of Mines for Nova Scotia on an application for a lease of mining land is quashed by the Supreme Court of the Province on the ground that it was not a decision from which an appeal could be asserted, the judgment of the Supreme Court is final and binding on the applicant and also on the commissioner even if he is not a party to it.

The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable if the ground had not been stated.

In the present case the quashing of the appeal precluded the commissioner or his successor in office from afterwards claiming that the decision was appealable.

If the commissioner after such appeal is quashed refuses to decide again upon the application for a lease the applicant may compel him to do so by writ of mandamus.

Appeal dismissed with costs.

W. B. A. Ritchie, K.C., and *Mackay*, for appellant. *Lovett*, for respondent.

N.S.] DAY *v.* DOMINION IRON AND STEEL CO. [Feb. 16.

Negligence — Employers' Liability Act — Injury to servant — Proximate cause — R.S.N.S. (1900) c. 79.

Day was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher and had to be taken past an unused chute about 200 feet away supported by a post placed seven and a half inches from the track. D. having loaded a car found that it failed to move as usual after unbraking, and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started and he climbed up the steps at the side to get to the brake on top, but was crushed between the car and the said post. He could have got on rear of the car instead of using the steps or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post, but had done nothing to obviate it.

Held, reversing the judgment appealed from, (36 N.S.R. 113,) DAVIES and KILLAM, JJ., dissenting, that D.'s own negligence was the cause of his injury and the company were not liable.

Held, per DAVIES and KILLAM, JJ., that the position of the post was a defect in the company's works under the Employee's Liability Act which was evidence of negligence.

Appeal allowed with costs.

Lovett, for appellants. *Harris*, K.C., for respondent.

N.S.] MARKS *v.* DARTMOUTH FERRY CO. [Feb. 16.

Master and servant — Contract of service — Termination by notice — Incapacity of servant — Permanent disability — Findings of jury — Weight of evidence.

Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor or by the employer paying or the employee forfeiting a month's wages :

Held, reversing the judgment appealed from, (36 N.S.R. 158.) that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract.

Held, also, KILLAM, J., dissenting, that an illness terminating in the employee's death and during the whole period of which he is incapacitated for service is a permanent illness though both the employee and his physician believed that it was only temporary.

By a rule of the employer an employee was only to be paid for the time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages from which the pay for two days on which he was absent from duty was deducted, and his conversations with

other employees showed that he was aware of the rule but no formal notice of the same was ever given him. Having died after a long illness his executrix brought an action for his wages during such period, and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in the terms thereof.

Held, that such finding was against evidence and must be set aside.

Appeal allowed with costs.

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

N.S.] PAZSON *v.* HUBERT. [Feb. 16.

Constitutional law—Legislative Assembly—Powers of speaker—Precincts of House—Expulsion from.

The public have access to the Legislative Chambers and precincts of the House of Assembly as a matter of privilege only, under license either tacit or express which can be revoked whenever necessary in the interest of order and decorum.

The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting.

A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed.

Judgment of the Supreme Court of Nova Scotia, (36 N.S.R. 211,) reversed and a new trial ordered.

Appeal allowed with costs.

Newcombe, K.C., and *McInnes*, for appellant. *Lovett* and *Glyn Osler*, for respondent.

N.S.] MCLENNAN *v.* DOMINION IRON AND STEEL CO. [Feb. 16.

Expropriation of land—Statutory authority—Manufacturing site—Survey—Location—Trespass.

The Town of Sydney was empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the Dominion Iron and Steel Co., a plan shewing such location to be filed in the office for registry of deeds and on the same being filed the title to said lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass, claiming that it included five chains belonging to him, and at the

trial of such action the main contention was as to the boundary of his holding. He obtained a verdict which was affirmed by the full court.

Held, reversing the judgment appealed from, (36 N.S.R. 28,) that the only question to be decided was whether or not the land claimed by him was a part of that indicated on the plan filed, that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M.'s land or not was immaterial as the town could take it without regard to boundaries. Appeal allowed with costs.

Lovett, for appellants. *Newcombe*, K.C., and *McInnes*, for respondent.

Que.] BEAUCHEMIN *v.* ARMSTRONG. [Feb. 25.

Appeal—Jurisdiction—Amount in controversy.

Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action but varied it by ordering the defendant to pay a portion of the costs:—

Held, that though $2,117 was demanded by the action the defendant had no appeal to the Supreme Court of Canada as the amount of the costs which he was ordered to pay was less than $2,000. *Allan* v. *Pratt*, 13 App. Cas. 780, and *Monette* v. *Lefebvre*, 16 S.C.R. 387, followed. Appeal quashed with costs.

Laflamme, for motion. *Perron*, contra.

Que.] ST. LOUIS *v.* CITIZENS' LIGHT AND POWER CO. [Mar. 25.

Action—Confession of judgment—Pleading—Estoppel by record—Municipal corporation—Contract—By-law—Resolution of council—Questions of fact—Concurrent findings in courts below.

A confession of judgment, for a portion of plaintiff's claim, is a judicial admission of the plaintiff's right of action and constitutes complete proof against the party making it. Judgment appealed from reserved and judgment at the trial (Q.R. 21 S.C.R. 241) restored: *Hudon Cotton Co.* v. *Canada Shipping Co.*, 13 S.C.R. 401, followed: *Great North-West Central R. Co.* v. *Charlebois* (1899) A.C. 114; 26 S.C.R. 221, distinguished. Appeal allowed with costs.

R. C. Smith, K.C., for appellants. *Bisaillon*, K.C., and *H. R. Bisaillon*, for respondents.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] SPILLING *v.* O'KELLY. [March 7.

Trade-mark—Infringement — Prior use—"King" cigars—Application to rectify register—Counterclaim—Title in trade-mark—Defence.

1. A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to registration, of a specific trade-mark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term with the likeness of other kings. *Spilling* v. *Ryall*, 8 Ex. C.R. 195, explained.

2. An application to rectify the register of trade-marks cannot be made by counterclaim. (Secus now, under General Order of 7th March, 1904; sic.)

3. In an action for the infringement of a trade-mark, the defendant may attack the legal title of the plaintiff's to the exclusive use of the trade-mark they have registered. *Partlo* v. *Todd*, 17 S.C.R. 196, referred to; *Provident Chemical Works* v. *Canadian Chemical Manufacturing Co.*, 4 O.L.R. 548, approved.

R. G. Code, and *E. F. Burritt*, for plaintiffs. *W. R. White*, and *A. W. Fraser*, for defendant.

Burbidge, J.] [March 7.

GORHAM MANUFACTURING CO. *v.* P. W. ELLIS & CO.

Trade-mark — Infringement — Sterling silver "hall-mark" — Right to register when goods bearing mark on Canadian market.

1. If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for anyone to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade-marks, but marks used to comply with statutes of the country of origin would not in that respect in any way alter the case.

Quære, Whether anyone would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade-mark, where there was no importation into Canada of goods bearing the prescribed foreign marks?

2. The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to the goods manufactured by

them from sterling silver, which, it was thought, so resembled a "British hall-mark," or a hall-mark, as to be calculated to deceive or mislead the public, and it appeared that during the time that the plaintiffs' goods, bearing such mark, were upon the Canadian market, goods bearing a "British hall-mark" were also upon the market.

Held, that the plaintiff could not, under the circumstances, exercise the exclusive right to the use of such mark as a trade-mark.

Aylesworth, K.C., and *C. A. Moss*, for plaintiffs. *Blackstock*, K.C., *Riddell*, K.C., and *Fasken*, for defendants.

Province of Ontario.

COURT OF APPEAL.

Teetzel, J.] RE WILLIAMS. Dec. 24, 1903.

Statute of limitations — Promissory note—Insolvency — Bank — Current account—Equity of redemption—Dower.

After the expiration of six years from the making of certain promissory notes, the maker wrote to the payee's solicitor stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the statute of limitations, and that in no event would it have made any difference, for statute or no statute the debt was one he would pay, if it took his last penny. He enclosed a letter to the payee himself, stating that he thereby begged to acknowledge his liability to him on the notes, and that the acknowledgment was made by him to prevent the running of the statute of limitations. The maker died a couple of years afterwards.

Held, that the claim was taken out of the operation of the statute, both as to principal and also as to interest due, not only at the maturity of the notes, but also after maturity, by way of damages.

A bank has a lien on all moneys, funds and securities, deposited for the general balance of a customer's account. Where, therefore, a bank held two promissory notes of a customer, one payable three months after date, and secured by an endorser, and another payable on demand without any endorser, upon which a customer had made a payment, nothing being paid on the endorsed note. On the customer's death there was a credit balance in his favour in the bank, which the bank applied towards payment of the unendorsed note.

Held, that the bank was justified in doing so, notwithstanding that it appeared at such time that the customer was insolvent.

The testator in his lifetime purchased property subject to a $10,000 mortgage, which he assumed, but subsequently procured a new mortgage, in which his wife joined to bar dower and paid this mortgage off. He afterwards procured a further mortgage of $1,650.58, in which his wife also joined to bar dower. He subsequently entered into an agreement for the

sale of the property for $16,000, receiving $500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance of $2,150 52.

Held, that the wife was only entitled to dower out of the residue of the estate after satisfying the charges; and that such balance must not be treated as merely personal estate so as to prevent the widow from claiming her dower therein.

Marsh, K.C., for prisoner. *Mowat*, K.C., for Plaxton. *Wardrope*, K.C., for Standard Bank. *Ludwig*, for creditor.

From Police Magistrate.] REX *v.* WALSH. [Jan. 5.

Indictable offence—Police magistrate—Summary jurisdiction—Election—Amendment after commencement of trial—Necessity for further election.

Appeal from the Police Magistrate at Hamilton. In order to give a Police Magistrate jurisdiction to try an indictable offence, namely, a charge of assault and robbing prosecutor of 30 cents, not triable summarily by the magistrate except with the prisoner's consent, the magistrate, in putting the prisoner to his election, either of being tried before him or by jury, must expressly name the court at which the charge can probably be soonest heard; and it is immaterial that the election is made by counsel representing the prisoner.

MACLAREN, J.A., dissented.

Regina v. *Cockshutt* (1898) 1 Q.B. 582, approved.

After the election by the prisoner to be tried summarily on such charge, and after the magistrate has entered upon the trial thereof, he has no power to amend the indictment so as to cause a further charge to be preferred against the prisoner, unless the prisoner is again put to his election and consents to be so tried.

Counsell and *E. N. Armour*, for prisoner. *Cartwright*, K.C., for Crown.

From Falconbridge, C.J.K.B.] [Jan. 25.

RE PUBLISHERS' SYNDICATE.

Publishing company—Contract to supply books, etc., for a fixed period—Liquidation of company—Before expiration of—Damages for residue of period—Right to recover.

On payment of a subscription fee of $10.50 to a publishing company certificates were issued by the company to the subscribers guaranteeing to such purchasers the privileges for five years of purchasing all books, magazines and periodicals and other printed matter at the price quoted in the company's catalogues and bulletins, but subject to ordinary trade

fluctuations, and undertaking to act for such subscribers, as purchasing agents, at lowest possible prices, the books, etc., not contained in such catalogue. The certificates were not transferable and were only available to subscribers for their personal and family use and benefit. Before the expiry of the above period a liquidation order was obtained for the winding up of the company, whereupon certain subscribers claimed to be placed on the list of contributors for damages alleged to have been sustained by them through the company's failure to supply them with books, etc., during the residue of the term.

Held, that only nominal damages were recoverable, for beyond this the damages were too speculative or conjectural to be maintained; nor could any part of the subscriptions be recovered back on the ground of it being unearned.

H. T. Canniff, for appellants. *J. T. Scott*, for liquidator.

From Divisional Court.] BISNAW *v.* SHIELDS. [Jan. 25.

Negligence—Coal derrick—Unfenced sides—Falling coal—Accident.

The defendant was the owner of a derrick for hoisting coal from vessels, which was drawn up by a bucket, and emptied into a hopper at the top of the derrick. Under the hopper was a platform with an opening in it across which there were rails for a tram car into which the coal was loaded, when it was desired to weight it, the coal being then dropped through the opening into a lower hopper; but when the weight car was not in use the coal fell directly from the upper hopper through the opening into the lower hopper. The sides of the platform were three feet nine inches from the opening, and were not fenced so as to prevent coal from falling over its edge. There was a ladder from the corner of the platform to the ground, and though not the ordinary means of access to and from the derrick, was being properly used by the deceased, one of the employees, who, when on his way to inspect a vessel then being unloaded, was struck on the head and killed by a piece of coal, which had fallen from the platform. The derrick had been in use for fifteen years without the occurrence of any similar accident, or proof of any coal having previously fallen from, though occasionally falling on, the platform. In an action by the administrator to recover damages by reason of the death of the deceased,

Held, that the unfenced sides of the platform were obviously a cause of danger, which was necessarily increased by the existence of the rails across the opening, causing coal striking them to be driven outward, and that the plaintiff was therefore entitled to recover. Judgment of the Divisional Court affirmed.

Du Vernet, for appellants. *J. B. Clarke*, K.C., for respondents.

Full Court.] BANK OF MONTREAL *v.* LINGHAM. [Jan. 25.

Statute of limitations—Simple contract debt—Conversion into specialty debt —Payment or acknowledgment of debt—Evidence of.

Two promissory notes payable to a bank not having been paid, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustees to sell the lands on one month's default in payment and notice in writing of the trustee's intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay the same. In 1893, on the plaintiffs pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debt had been paid, whereby after referring to the recitals in the deed of 1884, and reciting that the leases were given to save the expense of a sale, they released to the plaintiffs all their interest in the said lands, and subsequently $5,500 was realized by the plaintiffs from a sale of a portion of the lands or the timber thereon.

Held, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference to the recitals in a deed of 1884 or the deed of 1893 so incorporate them in the latter as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives; nor did the receipt by the bank of the $5,500 constitute a payment by the defendant on account of the debt, so that no bar was created by the running of the statute of limitations, and that it could, therefore, be validly set up by the defendant as a defence to an action brought by the plaintiffs in 1902.

MACLENNAN, J.A., dissented.

Walter Cassels, K.C., and *A. W. Anglin*, for appellants. *Ritchie*, K.C., and *Northrop*, K.C., for respondents.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] RE GRUNDY STOVE COMPANY. [Feb. 3.

Winding-up — Material supporting petition — Necessity for proof of insolvency.

To enable a company to be wound up under the Winding-up Act, R.S.C. c. 129, it is not sufficient for the company to appear by counsel

and admit insolvency and consent to be wound up, but the fact of such insolvency must be disclosed on the material on which the petition is based.

F. E. Hodgins, K.C., for the petitioner and the company.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.] [March 19.

LAMBERT *v.* CLARK.

Division Court—Appeal from—Amount in dispute—Quashing appeal.

The plaintiff brought an action in a Division Court for $100.75, the amount of a promissory note for $64.87 and $35.38 interest on it, and recovered a judgment for $83.90; the trial Judge finding against an alleged release set up by the defendant, but only allowing $13.13 for interest instead of $35.38 as claimed. A motion for a new trial was refused. On an appeal to a Divisional Court, it was

Held, that "the sum in dispute upon the appeal" under s. 154 of the Division Courts Act, R.S.O. 1897, c. 60, was the $83.90, and as it did not exceed $100, a motion to quash the appeal was allowed.

Petrie v. *Machan* (1897), 28 O.R. 504, distinguished.

Middleton, for the appeal. *C. A. Moss*, contra.

Province of Manitoba.

KING'S BENCH.

Full Court.] McDONALD *v.* FRASER. [Feb. 1.

Landlord and tenant—Distress—Second distress for rent due at date of first distress—Appraisement—Appraisers not sworn.

The landlord distrained on 2nd February for balance of rent due on 29th December preceding, and on 3rd February he put in a second distress for a month's rent due on 29th January.

Held, following Woodfall on Landlord and Tenant, 16 ed, p. 523, that the second distress, being for a different gale of rent, was not illegal.

The goods were appraised by two appraisers but they had not been sworn as required by the Statute 2 W. and M., sess. 1, c. 5, and the plaintiff claimed that the sale of the distrained goods was therefore illegal.

Held, that, under 11 Geo. 2, c. 19, s. 19, the want of a sworn appraisement was only an irregularity in the proceedings and that the plaintiff could only recover such special damages as he could shew to have resulted, and that he had shown none.

Lucas v. *Tarlton*, 3 H.N. 116, and *Rodgers* v. *Parker*, 18 C.B. 112, followed.

Monkmon, for plaintiff. *Mulock*, K.C., for defendants.

Full Court. HUXTABLE *v.* COUN. [Feb. 1.

County Courts Act—Interpleader—Plaintiff acting for bailiff in seizing goods under execution—Onus of proof at trial of interpleader issue——Estoppel—Sale of Goods Act.

At the trial of an interpleader issue in a County Court as to the ownership of certain wood seized under the execution therein by the plaintiff acting under authority from the bailiff and claimed by the claimant, it was contended on his behalf that the seizure was irregular and invalid because it was made by the plaintiff himself and not by the bailiff, also that the seizure had been abandoned, as, after notices being stuck upon the wood piles, no one had been left in charge. On appeal to this Court from a verdict in favour of the claimant,

Held, RICHARDS, J., dissenting:—

1. Under ss. 82, 83 of the County Courts Act, R S.M. 1902, c. 38, the seizure by the plaintiff under the authority of the bailiff was not unlawful or invalid, although it is undesirable that such a practice should be followed. (Sec. 83 was amended at the session of 1904 so as to take away the right of the bailiff to employ other persons to execute warrants or writs for him.—Ed.)

2. The evidence did not shew that the seizure had been abandoned, as the plaintiff, after putting up the notices of seizure on the wood piles, had asked a person living near to look after the wood, and a week or two later the bailiff came himself and placed the same person in charge.

Per DUBUC, C. The property in the wood never passed to the claimant, for, although he had contracted to buy it from the judgment debtor and had paid him $100 on account, it had not been measured and was not to be measured until brought by railway to Carman, and therefore under rule 3 of s. 20 of the Sale of Goods Act, R. S. M. 1902, c. 152, the property had not passed when the seizure was made. The plaintiff was not estopped from enforcing his execution by the fact that he had issued and served upon the claimant a garnishing order attaching any money that might have been due by the claimant to the judgment debtor on a sale of the wood, as he was entitled to take out the garnishing order as a precautionary measure in case it might be proved that there had been a valid sale.

Per PERDUE, J. Under s. 290 of the Act, it was not open to the claimant, on the trial of the interpleader issue, to raise any objections as to the validity of the seizure or as to its abandonment, but he could only take advantage of any such matter by making an application to set aside the interpleader summons; and, on the hearing of the latter, the judges should confine the investigation to the question whether the goods seized were the property of the claimant as against the execution creditor; and the onus rests on the claimant, in the first instance, of proving his ownership. If the bailiff attempts to take goods (not exempt) which he had no lega

authority to take, the claimant should, after protesting against the wrongful act, bring an action against the bailiff to recover the goods, or damages for taking them. It would not be a case for interpleader, which is based on the hypothesis that a seizure under protest has been made by a bailiff or other officer charged with the execution of the process. The claimant failed to establish his right to the wood, as the provisions of the Bill of Sale and Chattel Mortgage Act had not been complied with.

Per RICHARDS, J. 1. In the County Courts there is no preliminary application by the bailiff upon notice to the claimant for an order for the trial of an interpleader issue, but the bailiff takes out a summons and serves it on the claimant who is thereby required to attend at a certain time and place and "establish his claim" to the property seized, and it would be productive of great hardship and expense to the claimant if he were precluded on the hearing of this summons from raising any question as to the validity of the seizure and had to make a special application beforehand to the judge in order to get the interpleader summons set aside. He should therefore be allowed to raise the question at the trial of the interpleader issue.

2. The claimant had a contract for the purchase of the wood sufficient to satisfy the Statute of Frauds, and that gave him an interest in the property that entitled him to claim it as against the plaintiff, whose seizure was invalid, as he had no right to act as his own bailiff, and who for that reason was only a trespasser.

Appeal allowed with costs.

Howell, K.C., for plaintiff. *Huggard* for claimant.

Full Court.] SCHOOL DISTRICT OF YOUVILLE *v.* BELLEMERE. [Feb. 1.

Public Schools Act, R.S.M., 1902, c. 143, ss. 32 and 243—Election of School trustees—Powers of inspector—Practice.

This was an action of replevin to recover school furniture which had been taken away by the defendants after breaking open the door of the school house, defendants claiming that they were the legal trustees of the school district. In Dec., 1902, the trustees of the school district were Zolique Clement, Joseph Proulx and Josephat Proulx, Clement being chairman of the board. Joseph Proulx had been elected a trustee on Jan. 17, 1901, and Josephat Proulx on Dec. 2, 1901. Sec. 32 of the Public Schools Act provides as follows: "When complaint is made to the inspector by any ratepayer that the eleetion of any trustee for a rural school district, or that the proceedings or any part thereof of any rural school meeting have not been in conformity with the provisions of this Act, the inspector shall investigate the same and confirm or set aside the election or proceedings, and appoint the time and place for a new election, or for the reconsideration of a school question; but no complaint in regard to any election or

proceeding at a school meeting shall be entertained by any inspector unless made to him in writing within thirty days after the holding of the election or meeting." Under this provision the school inspector on Dec. 29, 1902, held an investigation in respect of the election of Clement which had taken place on the 1st of the same month. On this investigation the inspector called upon the other trustees to produce their declarations of office, and as these were not produced he declared both the Proulx not to be trustees and directed the calling of a meeting of the ratepayers for the election of two new trustees in their places. At the subsequent meeting of ratepayers so called two of the defendants were elected as trustees and they subsequently, with the other defendants, took away the school furniture referred to. These proceedings and this action were taken to settle the question whether such two defendants or the Proulx were lawfully two of the trustees of the school district.

Held, that, under the above quoted section of the Public Schools Act, the inspector had no power to investigate or decide upon the right of the Proulx to hold the office of school trustees, as the declaration of office is no part either of the election of the school trustee or of the proceedings at the school meeting. It is true that, under s. 243 of the Act, the neglect or refusal of a trustee to take the declaration of office within one month after his election is to be construed as a refusal, and that after such refusal another person should be elected to fill the place, but no power is given to the inspector to unseat a trustee for any such neglect or refusal. The two Proulx therefore still remained the legally qualified and acting trustees and the election of two defendants who claimed to be trustees was illegal and void, and they were guilty of a trespass in seizing and removing the school furniture.

Quære, whether the defendants could set up a defence to an action brought, as this was, in the name of the school corporation, the acknowledged owners of the goods. Their proper course would have been to apply to the County Court Judge to stay proceedings in the action or to have it dismissed on the ground that the use of the name of the corporation as plaintiff was not authorized by those who were lawfully the trustees.

Appeal from judgment of the County Court allowed with costs, and verdict entered for plaintiff in the County Court for the goods and $5.00 damages, with the costs of the action in the County Court.

Munson, K.C., and *Laird*, for plaintiffs. *A. J. Andrews* and *Joseph Bernin*, for defendants.

Richards, J.] SHIELS *v.* ADAMSON. [Feb. 15.

Practice—Parties to action—Amendment—Fraudulent conveyance.

This action was brought against defendant alone for the sale of land vested in the defendant's wife by an unregistered deed, and which the plaintiff claimed was bound by a registered certificate of judgment against

defendant. After the case was set down for trial the plaintiff applied to the referee in Chambers for leave to amend his statement of claim by adding the defendant's wife as a party and by alleging that the land in question was the defendant's property and had been mortgaged by the defendant with other lands to a bank; that after the bank had commenced an action for foreclosure of the mortgage, it was agreed between it and the defendant that the bank should take a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept in actual satisfaction of its claim the mortgaged lands other than the parcel in question and should hold the latter for the defendant; that such agreement was carried out; and that after getting such final order the bank at the defendant's request conveyed the parcel in question to defendant's wife who gave no consideration for it, but received and has always since held it solely as a trustee for the defendant. When he began the action the plaintiff had knowledge of the facts thus sought to be set up by amendment. The referee dismissed the application with costs.

Held, that the application should have been granted and the amendment asked for allowed on payment of costs. If the plaintiff had originally brought the action in the form in which he now seeks to put it the defendant and his wife should both have been made parties. The wife would not be brought in as having derived title through her husband's deed, but would appear as having acquired her title through parties who, so far as the apparent or registered claim of title is concerned, had acquired title adversely to and in extinguishment of, that of the husband. *Bank of Montreal* v. *Black*, 9 M.R. 439, distinguished, as in that case the grantor was held not to be a necessary party because he would be estopped by his own deed. Here, however, there was nothing that would prevent the husband from claiming that the wife held the land as a trustee for him or that would protect her from possible liability to him if she were sued alone and did not claim that he should be made a party. The fact that the husband in his statement of defence had denied that he had any interest in the land could not afterwards be set up as an estoppel against him in favour of his wife or even in favour of the plaintiff, but would only be evidence that at one time, and for certain purposes, he had repudiated having any such interest.

Amendment allowed on terms of paying defendant's costs of the application to the referee against which should be set off the plaintiff's costs of the appeal. Costs of the day and all other costs reserved until the trial.

Elliott, for plaintiff. *Phillips*, for defendant.

Full Court.] McKELLAR *v.* C.P.R. Co. [Mar. 5.

Railway—Obligation to fence—Liability for death of animal not actually struck by train or engine.

Verdict for plaintiff in a County Court for damages for the loss of a horse under the following circumstances: The horse got on the railway track through a defect in defendants' fence where the right of way passed through plaintiff's land, when a train came along and alarmed the horse which fled along the track for some distance and then rushed to the north side and tried to break through the fence. A strand of barbed wire from the fence became entangled round the horse's neck and cut it so badly that the horse was dead when found shortly afterwards. Sub-s. 3 of s. 194 of the Railway Act, as re-enacted by 53 Vict., c. 28, provides that, under such circumstances, "the company shall be liable to the owner of the animal for all damages in respect of it caused by any of the company's trains or engines."

Held, on appeal to this Court, that the death of the animal could not be said to have been "caused by" the train within the meaning of that enactment, but was caused by its coming into contact with the barbed wire, and that the liability of the railway company is limited to cases where the animal is actually struck or run over by a train or engine. Dicta of the judges in *Young* v. *Erie and Huron Ry. Co.*, 27 O.R. 530, and *James* v. *G. T. R. Co.*, 1 O.L.R. 1.7, 31 S.C.R. 420, and decision in *Winspear* v. *Accident Insurance Co.*, 6 Q.B.D. 42, followed.

Appeal allowed and nonsuit ordered.

Hoskin, for plaintiff. *Aikins*, K.C., and *Thompson*, for defendants.

Full Court.] BERGMAN *v.* BOND. [Mar. 5.

Medical profession—Electro-therapeutics, a branch of medicine, but massage not.

Verdict in a County Court for $250 for his services as as electro-therapeutist and massagist. Sec. 62 of the Medical Act, R.S.M. 1902, declares that it shall not be lawful for any person not registered under the Act to practice medicine, surgery or widwifery for hire, gain or hope of reward, and s. 63 of the same Act provides that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice or for attendance, or for the performance of any operation, or for any medicine he may prescribe or supply, unless he be registered under the Act. The plaintiff was not registered under the Act.

Held, on appeal to this Court, that electro-therapeutics is a branch of medicine, and a person who administers treatment of a patient by means of electricity thereby practises "medicine" within the meaning of the Act and cannot recover any charges therefor without being registered under the Act. Practising massage by itself is not practising medicine within the meaning of the Act. Appeal allowed with costs.

A. C. Ferguson, for plaintiff. *H. A. Robson*, for defendant.

Full Court.] TEMPLETON *v.* WADDINGTON. [Mar. 5.

Negligence—Liability of stablekeeper for injury to horse kept in his stable —Contract.

Appeal from County Court. Plaintiff's claim was for damages for the loss of a valuable mare kept at defendant's feed stable for reward in the usual way. The mare was kept in an ordinary open stall next to a horse known as the "Harris" horse, which was also in an open stall. A few days before the injuries that resulted in the death of the mare occurred she was found to have a slight injury on one of her legs. Plaintiff's son hearing of this, his father being absent from the city, went to defendant and arranged with him to have the mare put in a box stall, saying that his father would fix it up with defendant on his return to town for the extra charge. The mare was then put in a box stall and kept there some days, but shortly before the fatal injuries occurred defendant put her back into the open stall that she had previously occupied next the "Harris" horse. On the night of the injuries this horse got loose from his stall by breaking his halter shank, and it was assumed that he had kicked the mare and so caused her death.

It was not contended on the trial in the court below that there had been a contract to keep the mare in a box stall. Defendant had tied both animals in their stalls that night, as he thought, securely.

The evidence shewed that it was a common thing for horses to break loose in defendant's stables, as many as five having done so in a single night, and the "Harris" horse had a proclivity, well known to the defendant of breaking loose at night. Defendant also had reason to believe and did believe that it was the same horse that had kicked the mare on the previous occasion while loose.

Held, upholding the nonsuit in the County Court, PERDUE, J., dissenting, that there was no proof of any contract binding on defendant to keep the mare in a box stall, as plaintiff's son had no authority to enter into any such contract, and there was no satisfaction of it by the plaintiff, and that defendant had not been guilty of that degree of negligence which would render him liable for the damages claimed, but had used reasonable and ordinary care with regard to the plaintiff's mare.

Per PERDUE, J., 1. The defendant was bound, under the circumstances, to take special care to see that the "Harris" horse was securely tied in view of his mischievous habit, with a halter strong enough to hold him, and was guilty of such negligence that he ought to be held liable.

2. Defendant after acting on the arrangement as to the box stall made with plaintiff's son, could not dispute the son's authority to act for his father, and was liable in damages for breach of that arrangement.

Mulock, K.C., for plaintiff. *Daly*, K.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] IN RE PEARSE ESTATE. [Feb. 17, 1903.

Mortmain Act—Whether in force in B. C.—Probate duty.

Petition by trustees and executors of a will to obtain the opinion of the Court on questions arising under the will.

Held, 1. The statute, 9 Geo. II., c. 36, relating to charitable uses and commonly known as the Mortmain Act, is not in force in British Columbia.

2. Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate.

Note:—In *Re Brabant* in 1889, Gray, J. held the Mortmain Act not to be in force in B.C., and in *Sweetman* v. *Durieu*, Walkem, J. gave a similar decision in 1897. Neither decision was reported.

Full Court.] NORTH VANCOUVER *v.* KEENE. [Nov. 20, 1903.

Municipal corporation—Officer of—Tenure of office—Removal of officer—Tax sale—Commission on proceeds.

Appeal from judgment of HENDERSON, Co. J., dismissing plaintiff's action and giving defendant judgment on counter claim. Defendant had been treasurer of the municipality and on a dispute arising about his right to charge commission on the purchase price of lands sold at a tax sale he paid himself out of the funds contrary to orders and was dismissed without notice.

Held, allowing the appeal, that under s. 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the Mayor or Council," and so may be removed at any time without notice or cause shewn therefor.

A tax sale by-law provided that the collector should be entitled to a commission on all arrears of taxes collected:

Held, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands the collector was not entitled to a commission on the price of lands so bid in.

Williams, K.C., and *Heisterman*, for appellant. *Wilson*, K.C., Atty.-Gen., for respondent.

Full Court.] CENTRE STAR *v.* ROSSLAND MINERS' UNION. [Jan. 6.

Venue—Change of—Convenience—Fair trial.

The writ was issued in Rossland where all parties resided. The venue was laid in Victoria and defendants applied on the ground of greater con-

venience for a change of venue to Rossland, this application was refused because a fair trial by jury could not be had there on account of the feeling among the mining classes. Defendants then applied for a change to Nelson where they contended a fair trial could be had, but plaintiffs filed affidavits to show that the feeling was the same as in Rossland. An order for the change to Nelson was made by Ferin, Lo. J.

Held, on appeal, reversing the order, that although the expense of a trial at Nelson would be less than at Victoria still the venue should not be changed unless it was clear that an absolutely fair trial could be had.

A. C. Galt, for appellants. *S. S. Taylor*, K.C., for respondents.

Bole, Lo. J. S. C.] IN RE LEE SAN. [Jan. 14.

Chinese Immigration Act, 1900—Deportation of Chinaman refused admittance to United States—Habeas Corpus.

Application for habeas corpus.

Held, that where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on habeas corpus proceedings as the contract is not illegal and under the Chinese Immigration Act, 1900, deportation is proper.

E. A. Jenns for applicant. *R. L. Reid*, *F. W. Howay* and *D. G. Marshall* for other parties.

UNLICENSED CONVEYANCING.

The Bill prepared by the Special Committee of the Ontario Benchers on this subject, and known as "The Conveyancer's Act," was defeated on the motion for a second reading in the Ontario Legislature on April 7th inst. Whilst it is to be regretted that the proposed legislation, which was thought to be beneficial in its provisions both from a public and a professional standpoint, did not pass into law, the vote, however (36 for and 44 against) must be regarded as most encouraging. It is worthy of more than passing remark that the Premier, The Attorney-General, and the Minister of Education all voted for the Bill, which was introduced on the motion of Messrs. H. Carscallen, of Hamilton, and J. J. Foy, of Toronto.

The subject is a very difficult one, but it may fairly be said that this Bill, if it had carried, would have been perhaps the best solution of this vexatious and troublesome question; and it is to be hoped that Mr. W. D. McPherson, chairman of the Bencher's Special Committee, and the other

gentlemen associated with him on the Committee, will see to it that the House be given another opportunity of pronouncing on the Bill next session.

The names of the members of the Legislature who voted against the Bill are as follows:—Messrs. Auld, Barr, Beatty, Brown, Burt, Carnegie, H. Clark, Davis, Dickenson, Downey, Dryden, Duff, Eilber, Evanturel Fox, Gallagher, Graham, Guibord, Hislop, Holmes, Hoyle, Jessop, Joyest, Lackner, Lee, Michand, Munro, McCart, Macdiarmid, McLeod, Pardo, Pettypiece, Preston, Richardson, Rickard, Routledge, Spock, Stratten, Sutherland, Taylor, Thompson, Truax, Tucker, Whitney.

Flotsam and Jetsam.

Chief Justice Story attended a public dinner in Boston at which Edward Everett was present. Desiring to pay a delicate compliment to the latter, the learned judge proposed as a volunteer toast: "Fame follows merit where Everett goes." The brilliant scholar arose and responded: "To whatever heights judicial learning may attain in this country, it will never get above one Story."

The Alaska Commission—A prophecy fulfilled—Sir Richard Jebb, M.P., one of the professors at Cambridge, a year ago published an article in *The Empire Review* which is of special interest in view of what has subsequently taken place. Speaking of the constitution of the Alaska Boundary Commission he says: "We can only hope that our Government has not, in a moment of panic, reverted to the old colonial policy of once more making Canada pay for our blunders beyond the Atlantic. Nothing would more effectively check the movement towards Imperial co operation than to ignore the right of Canada to guide Imperial policy in matters primarily affecting her special interests. That right was recognized by us once for all when four Canadians sat with one Englishman at Quebec to conduct Imperial negotiations with the United States. The same principle demands that in the present case all three British commissioners shall be Canadians. For the American contention will prevail if a single British commissioner can be won over to the American view; therefore to appoint a single Englishman would be unjust to Canada and impolitic for the Empire. For it would be intolerable to Canada if her claim, supported, perhaps, by two Canadian commissioners, were rejected in favour of the Americans by the third, who, being an Englishman, might be thought to have felt more interest in forcing a verdict of some kind than in supporting the claims of justice." This is just where Lord Alverstone put his foot in it, brought discredit upon the Bench and sacrificed Canadian interests.