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CHAIRMAN OF THE BOARD OF RAILWAY COMMISSIONERS.

Hon. James Pitt Mabee, one of the justices of the Supreme Court of Judicature for the Province of Ontario, has been appointed to succeed the late Hon. A. C. Killam as Chairman of the Board of Railway Commissioners. The appointment is commended in all quarters as an excellent one.

The new Chief Commissioner was appointed to the High Court Bench of Ontario less than three years ago, and during that period his rulings have been marked with strong common sense and a sound appreciation of the principles of law applicable to the business affairs of this country. Being free from all prejudices or fads he may safely be relied upon in his new sphere to do what is right in the interest of the country, without unjustly imposing too onerous burdens on the public service corporations which are under the control of the Board.

A not unimportant matter is the fact that Mr. Mabee, since his promotion to the Bench, has evinced the desirable judicial qualities of industry, patience and courtesy. He was a judge who listened, without talking, and then quietly and definitely made up his mind. It may be that he has not all the gifts which made his predecessor, Mr. Killam, so distinguished as a pure lawyer; but his many other qualifications will, we venture to think, be found eminently in keeping with the functions of the important and responsible tribunal over which he has been called upon to preside. Its duties, moreover, will fit in with his personal inclinations as to work, so that he will at once find himself at home in the business atmosphere that will surround him.

The Government is to be congratulated upon its selection. Mr. Mabee is in the prime of life and has contracted the invaluable habit of deciding matters promptly. He has happily a strong constitution and possesses in this respect as well as in others the characteristics which the position demands.

MEMORIAL OF THE LATE CHRISTOPHER ROBINSON, K.C.

Shortly after the death of the late Christopher Robinson, K.C., a meeting of the Bar was called to consider the best means of perpetuating his memory, and it was decided that a fitting commemoration would be (1) a brass tablet with suitable inscription placed in Osgoode Hall, Toronto; (2) a scholarship founded in connection with the Law Society of Upper Canada to be known as "The Christopher Robinson Scholarship." In order that the profession generally might have the opportunity of contributing to the necessary fund, subscriptions were limited to the amount of five dollars each.

The matter was set on foot without delay, with the result, that the tablet has now been placed in the east wing of Osgoode Hall, opposite to the memorial of Attorney-General Macdonnell, who fell beside Brock at the battle of Queenston Heights. The inscription is as follows:—

"This tablet is placed here by the Bench and Bar of the Province of Ontario, in loving memory of Christopher Robinson, K.C. Born January 21, 1828. Died October 31, 1905."

Through the courtesy of Mr. Angus MacMurchy, K.C., who has acted as honourary secretary of the committee, we have received a copy of the committee's final report and statement. The subscriptions to the scholarship fund were received, not only from the Bench and Bar in the Province of Ontario, but also from those in other provinces of the Dominion, shewing the wide-spread interest taken in the proposed scheme, and testifying to the universal feeling of regret at the loss which the profession had sustained by Mr. Robinson's death. Here, it is pleasing also, to record the debt which we all owe to Mr. MacMurchy for his untiring zeal in bringing the matter to a successful issue.

A deed of trust has been executed whereby the fund, less the cost of tablet, etc., has been delivered to a trust company for investment, to secure the annual amount required for the scholarship.

This scholarship, which is to be open for competition every year to students of the graduating class of the Law School, is to be awarded partly in books and partly in money, for the best essay on a selected subject within three months after the final examinations of the school. The names of successful candidates, from time to time, are to be entered in the curriculum of the Law School, under the heading of "Christopher Robinson Prizemen," and their names are to be placed on a suitable board or tablet to be provided for that purpose in Osgoode Hall.

It is most fitting that the name of one so beloved and respected by the profession should thus be perpetuated for coming generations among students of the law, as an incentive to the attainment of the like great learning and high ideals of professional character which were the distinctive features of the career of that great and good man, so long a leader of the profession in Canada, and always to be remembered as one of its most notable ornaments.

ELECTION OF BENCHERS IN ONTARIO.

Years ago we called attention to this subject, (1901, pp. 177, 257). We then referred to the unsatisfactory system handed down from the dim past, and suggested a change, saying:—"All this points to the desirability of giving a freer choice, by having nominations made, as we have already suggested. There should not be, as there is in fact now, a canvass made by the retiring Benchers for their re-election, by the very simple but effectual process of sending, as is now required, a list of the retiring Benchers to the whole profession. This should cease, and nominations should be sent in to the secretary, who should then send to those entitled to vote the list of names on the nomination papers. This is what is done in connection with elections for the Senate of the University, and other bodies where it is desired to secure the best representation."

A bill has now been introduced by the Attorney-General providing for the nominations of candidates (the word is objec-

tionable, but used for want of a more appropriate one) whose names are to be sent to the Bar wherefrom to elect the required thirty Benchers. Various clauses of the bill provide the appropriate machinery and safeguards in connection with the proposed change. This new departure coming from the source it does and being so reasonable and desirable will doubtless be carried out. The Bar will, we feel sure, appreciate the action of Hon. Mr. Foy.

PREMATURE BURIALS.

We have a suggestion for those of our legislators who desire to justify to their constituents their existence as such. In our various legislatures are annually introduced innumerable undigested ideas in the way of bills, which generally find their resting place in the waste-paper basket. In the Province of Ontario, many members who know very little of the statutes other than the Municipal and Assessment Acts exploit what they know on those subjects by petty amendments, which would not infrequently spoil the symmetry of the existing legislation, and introduce greater defects than they would cure.

The legislation we refer to as being desirable ought to be fathered by the Government, but perhaps like many other valuable reforms it may, properly enough, be initiated by some private member.

It has been established, lately, beyond question, that many persons buried under the supposition of their being dead, have vainly recovered consciousness in their last resting places. The subject is a gruesome one, but this should not prevent due attention being paid to it.

It is undeniable that physicians too often give certificates of death without realizing the importance of their act, or the responsibility attaching thereto. They certify to somebody being dead, who very possibly may only be in a trance. If there is any truth in the stories we read, and notably a recent case of resuscitation by electrical treatment, it is high time that some attention was paid to this matter. There should be some strin-

gent legislation to prevent the signing of death certificates without having exhausted all means of ascertaining that death has actually taken place. This evil has so impressed itself upon the minds of some persons that they make provision in their wills to prevent themselves being buried alive.

It has been asserted by those who have made a study of this subject that the medical profession is inclined to minimize the result of its perfunctory performance of its duties in connection with this matter, but the facts disclosed by recent statistics, and the investigations of scientists, shew that there is need of legislation to enforce a more careful scrutiny. Carelessness in this matter on the part of those responsible is akin to murder.

NO EQUITIES AS BETWEEN ROGUES.

"He who comes into equity must come with clean hands" is a good maxim. Mr. Justice Houghton, sitting in the Appellate Division of the New York Supreme Court in the case of *Fay* v. *Herbert*, is the author of another equally trenchant maxim, which goes a little further in the same direction. He crystalizes his views on a case recently before him in the words: "Equity does not adjust differences between rogues." He considered that the plaintiffs were not entitled to legal protection in that they were engaged in a business which was a deceiving of the public for the sake of gain. He also laid down the rule that in equity proceedings the complainant is first to be judged, and until he has been found free from taint a Court of equity will not proceed to determine whether or not he has been wronged. These rules are wholesome and calculated to protect the public against itself, for people do certainly love to be humbugged.

The plaintiffs in the above case were husband and wife, giving entertainments through the country under the name of "The Fays." The principal performances consisted of alleged mind-reading and telling of future events, interspersed with sleight-of-hand tricks. The defendants were former employees,

who having learned the tricks of the trade themselves gave performances, explaining the plaintiffs' performances and exposing their alleged occult powers. In their advertising notices they gave prominence to the words, "The Fays" to such an extent that certain persons were deceived, and went to the defendants' performances thinking they were going to see the plaintiffs. The suit was for an injunction restraining the defendants from thus misleading the public. The judgment of the learned judge before whom the matter came on appeal is reported in *Albany Law Journal*, 1908, page 46. He says:—

"The situation disclosed is such that equity should not interfere at all. The plaintiffs are engaged in deceiving the public, and the most entertaining part of their performance is in effect fortune telling. In such a business they can get no property rights in a name or appellation which a Court of equity will protect. The property right which the plaintiffs assert they have in the term 'The Fays,' and which they would have if their business was without deception, is similar to the right to the use of a trade-mark. Equity will not interfere to protect a party in the use of a trade-mark where the name or phrase claimed as such is intended and calculated to deceive the public: *Fetridge* v. *Wells*, 4 App. Pr. 144; *Gluckmar* v. *Strauch*, 99 App. Div. 361. A party invoking the aid of equity to restrain the infringement of a trade-mark must himself be free from fraud in his representations to the public: *P. M. Co.* v. *P. M. P. Co.*, 135 N. Y. 24. Persons who pretend to tell fortunes are defined to be disorderly persons (Criminal Code, section 899). The pretense of occult powers and the ability to answer confidential questions from spiritual aid is as bad as fortune telling and a species of it, and is a fraud upon the public. It is no answer so far as the plaintiffs are concerned that no one ought to believe the pretenses. It is the half doubt and the half belief of a certain class of people that make and hold the audiences. If every one wholly disbelieved curiosity would soon be satisfied and the entertainment lose its attraction. Nor is it any answer to say that the defendants are themselves

guilty of wrong. Equity does not adjust the differences between rogues. The complainant is first judged, and not until he has been found free from taint does equity proceed to determine whether or not he has been wronged. The injunction should not have been granted. The judgment is reversed and a new trial granted, with costs to the appellant to abide the event."

THE CRIME OF PERJURY.

That the crime of perjury is much in evidence, and apparently on the increase, has been asserted and is probably correct. Articles many have been written on the subject in legal journals, calling attention to the evil. The Bench declaims against it, but nothing is done. Suggestions are not wanting. One is that if lawyers would discountenance false swearing on the part of their own clients and ask for judicial protection when committed by their adversaries, the crime would at once grow less. Others say that justice should be meted out to false witnesses by summary action or the part of the presiding judge, one writer saying, "the perjurer would no more dare to come forward in our Courts than in the English Courts, if he knew that our trial judges were in the habit of committing perjurers on the spot, nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his disbarment." He continues by saying that "the chief responsibility for perjury in the Courts is with the trial judges themselves, because they have the power to stop it, and do not."

It is much easier to dilate upon an evil than to suggest a remedy, for the difficulties attendant upon this question are many, and need not at present be enlarged upon. Must it be left to the advancement of civilization and the supposed growing morality of the world in the future, as to which it clearly must stand till the millenium; or are the judges to take a hand in, running the risk of doing an occasional act of injustice for the benefit of the community? The law is clear enough, the application of it is the difficulty.

AMENDMENT TO COPYRIGHT ACT.

A useful and practical amendment of the Copyright Act, introduced in the House of Commons by Mr. A. C. Macdonell, K.C., became law on March 17th. Under the old section, which has been in force for many years, the notice for copyright was in the following words:—"Entered according to Act of the Parliament of Canada in the year 1908, by A. B., at the Department of Agriculture." This form, while comparatively unobjectionable in books, was cumbersome and disfiguring on engravings, photographs, and art postcards. The new wording is very simple, viz:—"Copyright, Canada, 1908, by A. B.," and indicates sufficiently the fact of copyright, the country, the date, and the owner of the copyright. Publishers and others will appreciate Mr. Macdonell's amendment.

VALUATION OF THE PROPERTY OF PUBLIC SERVICE COMPANIES.

When the property of a public service company is taken by a state or municipality under condemnation proceedings, *Matter of Brooklyn* (1894), 143 N.Y. 596, or under contract leaving the purchase price to be subsequently determined, *Matter of Water Com'rs.* (N.Y. 1902), 71 App. Div. 544, the problem of ascertaining the fair and just compensation has proven to be most vexatious and one upon which the Courts have shewn no little divergence of opinion. Several theories, none of them exclusive, have been advanced: first, the original cost of the plant to the company; *Montgomery County* v. *Schuylkill Bridge Co.* (1885), 110 Pa. St. 64; *West Chester, etc., Co.* v. *Chester County* (1897), 182 Pa. St. 40, second, the present cost of reproduction; *Brunswick, etc., Water Dist.* v. *Maine Water Co.* (1904), 99 Me. 371, 382; *Matter of Water Com'rs.*, supra; third, the capitalized value of its net income; *Nat'l Water Works Co.* v. *Kansas City* (1894), 62 Fed. 853; and fourth, the market value of its stock. *Mifflin Bridge Co.* v. *Juniata County* (1891), 144 Pa. St. 365; *Montgomery County* v. *Schuylkill Bridge Co.*, supra. The first consideration—that of original cost—has received considerable attention from the Courts. In order, however, for it

to have any bearing upon present value, the extent of depreciation of the plant must be considered; *Kennebec Water Dist.* v. *Waterville* (1902), 97 Me. 185; moreover, there must be assurance that there were no fraudulent transactions and that the money was legitimately and wisely spent in the construction. *Brunswick, etc., Water Dist.* v. *Maine Water Co.*, supra. In the few cases in which original cost is considered to be the controlling element, the value of the franchise is added. *Montgomery County* v. *Schuylkill Bridge Co.*, supra; *Clarion Turnpike Co.* v. *Clarion County* (1896), 172 Pa. St. 243; *West Chester, etc., Co.* v. *Chester County*, supra. The objection to this test is that it may force the State to pay for an antiquated plant an amount greatly exceeding the cost of a modern and more efficient system. The second test—cost of reproduction—has received less consideration from the Courts, seemingly on account of its severity; see, *Matter of Water Com'rs.* (1903), 176 N.Y. 239, and in some cases has been entirely rejected. *Montgomery County* v. *Schuylkill Bridge Co.*, supra; *Metropolitan Trust Co.* v. *H. & T. C. Ry. Co.* (1898), 90 Fed. 683. Value is thus determined in the competitive business field, but this rule is less applicable to public service callings because the capital can generally be less easily diverted to other channels, and more especially because they are subject to regulation and supervision. Here, likewise, the franchise must be separately considered. See, *Nat'l. Water Works Co.* v. *Kansas City*, supra. The third and fourth tests are very similar and both superficial, though sometimes considered. *Mifflin Bridge Co.* v. *Juniata County*, supra. Under these tests value depends upon the income received, which is governed by the rates charged. But since the rates which may lawfully be charged may only be a fair return upon the value of the property, it is begging the question to say that value then depends upon rates. See *Brunswick, etc., Water Dist.* v. *Maine Water Co.*, supra. If the rates are assumed reasonable, the results reached by these methods will, of course, approximate the valuation upon which the rates are theoretically based. The fact that the plant is a "going concern" is

universally conceded to be a proper subject for compensation. *Edinburg, etc., Co.* v. *Edinburg* (1894), 71 L.T. Rep. 301; *Gloucester, etc., Co.* v. *Gloucester* (1901), 179 Mass. 365, 383; *Newburgport, etc., Co.* v. *Newburgport* (1897), 168 Mass. 541. Good will might well be considered if competition exists, but not if the company has a monopoly, for its customers have no choice. *Kennebec Water Dist.* v. *Waterville*, supra. For the most part, the Courts have refused to confine themselves to any single test, but say that all must be taken into consideration. This amounts to a practical confession that they are helpless to formulate a rule to cover a difficult and intricate situation and is simply an attempt to reach an equitable result in each case. See *Nat'l Water Works Co.* v. *Kansas City*, supra; *Brunswick, etc., Water Dist.* v. *Maine Water Co.*, supra; *Kennebec Water Dist.* v. *Waterville*, supra.

The question of valuation of the franchise is usually separately considered. That it is property, *West River Bridge Co.* v. *Dix* (1848), 6 How. 507, and may not be directly taken without compensation, is generally recognized, *Monongahela Navigation Co.* v. *United States* (1892), 148 U.S. 312; *People* v. *O'Brien* (1888), 111 N.Y. 1, though the same result can be indirectly reached by granting other franchises so that the resulting competition would be ruinous. *Charles River Bridge* v. *Warren Bridge* (Mass. 1837), 11 Pet. 420; *Syracuse Water Co.* v. *City of Syracuse* (1889), 116 N.Y. 167. In computing its value, consideration must be taken as to its character, whether it be exclusive or non-exclusive, *Brunswick, etc., Water Dist.* v. *Maine Water Co.*, supra; *Gloucester, etc., Co.* v. *Gloucester*, supra, the length of time it is to run, *Kennebec Water Dist.* v. *Waterville*, supra; *Sunderland Bridge Case* (1877), 122 Mass. 459, 466, and whether or not it be subject to forfeiture. See *Kennebec Water Dist.* v. *Waterville*, supra; *Bridge Co.* v. *United States* (1881), 105 U.S. 470, 482. If but part of a franchise is condemned, compensation must be made to the extent to which it has been impaired. *United States* v. *Gettysburg Electric R.R.* (1896), 160 U.S. 688. Franchise valuation is generally meas-

ured with reference to rates which the company has charged, in order to compute what its revenue would probably have been during the unexpired period. *Sunderland Bridge Case*, supra; *Montgomery County* v. *Schuylkill Bridge Co.*, supra. In a recent English case, a municipality entered into a contract to purchase a street railway when it should be constructed. It was held that the price paid should be the value as a structure, including the element of a going concern, but excluding the franchise value. *Mayor, etc., of Dudley* v. *Dudley, etc., Ry. Co.* (1907), 97 L.T. Rep. 556. This result was reached upon the interpretation of the contract, but under the Tramways Act of 1870, similar results have been reached in the absence of contract, *Stockton, etc., Water Board* v. *Kirkleatham Local Board* (1894), 69 L.T. Rep. 661; *Edinburg, etc., Co.* v. *Edinburg*, supra, though in estimating value for the purpose of taxation, the franchise has been considered. *Pimlico, etc., Co.* v. *Assessment Committee* (1874), 29 L.T. Rep. 605; *The King* v. *Lower Mitton* (1829), 9 B. & C. 810. This distinction is not illogical, for retaking without compensation would proceed on the ground that the franchise was granted gratuitously on the ground of benefits received.—*Columbia Law Review.*

A young Russian artist has recently been sentenced, in St. Petersburg, to fifteen years' penal servitude for caricaturing the Czar. From our point of view in this country any such effort would be quite unnecessary as almost every item of news from that barbarous country connected with their "Little Father" brings him increasingly into contempt. A Frenchman once collected from the comic press of the world some hundreds of caricatures of King Edward. The latter was pleased to accept a copy, and was doubtless much amused at seeing himself portrayed in unexpected and undignified attitudes. We object on principle to the use of bombs for educational or reformatory purposes, quite apart from the fact that they too often kill the wrong man; but such a sentence for such an offence takes off the edge of pity when the right man is reached.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

NULLITY OF MARRIAGE—MARRIAGE IN ENGLAND BETWEEN ENGLISHWOMAN AND DOMICILED FRENCHMAN—IRREGULARITY BY FRENCH LAW—DECREE OF NULLITY BY FRENCH COURT ON GROUNDS NOT RECOGNIZED BY ENGLISH LAW—CONFLICT OF LAWS—LEX LOCI CONTRACTUS—BIGAMY.

In *Ogden* v. *Ogden* (1908) P. 46 the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have affirmed the judgment of Deane, J. (1907) P. 107 (noted ante, vol. 43, p. 352). The action was brought for a declaration of nullity of marriage on the ground that the defendant, at the time of the pretended marriage, was in fact the wife of another man. The facts were that in September, 1898, the defendant, an Englishwoman, married in England a Frenchman then temporarily resident in England but who was domiciled in France. According to French law the husband, being then 19 years of age, could not validly contract marriage without the consent of his father. The parties cohabited and a child was born on July 7, 1899. The husband's father afterwards instituted proceedings in a French Court and the marriage was annulled on the ground of want of consent of the father, it appearing by the decree of the Court that the wife claimed that the marriage should take civil effect, and that she should be allowed alimony, and an allowance for the support of the child, which claims, except that for support of the child, were disallowed. After this decree the husband married again in France, and the defendant married the plaintiff. The question therefore was whether the decree of the French Court annulling the marriage of September, 1898, was valid according to English law. Deane, J., held that it was not, and his decision is now affirmed. It appears by the report that after the French decree of nullity, the wife commenced a suit for divorce in England which had been dismissed because the husband was domiciled in France; and it further appeared that the French Court could not grant a divorce because it had already declared the marriage null. The wife was, therefore, in a very anomalous position, she was married in England but not in France, her husband had married again and was living with another woman and yet in neither country could

his wife get any relief. The Court of Appeal suggest that such a state of facts ought to constitute an exception to the ordinary rule that the Court will not exercise jurisdiction to grant a divorce except when the parties are domiciled within its jurisdiction.

SHIP—CONTRACT OF AFFREIGHTMENT—DAMAGE TO GOODS—UNSEAWORTHINESS—CAUSE OF DAMAGE.

The Europa (1908) P. 84 was an action by the charterers of a ship against the ship owners on a contract of affreightment. The case raised the question whether seaworthiness is a condition precedent in a contract of affreightment, to the extent, that if the ship be unseaworthy, the shipowner is reduced to the position of a common carrier, and liable for all damages occasioned to the cargo to which the contract relates, even if such damage be solely caused by an excepted peril and not by the unseaworthiness. This question a Divisional Court (Deane and Bucknill, JJ.) answered in the negative.

WILL—CONSTRUCTION—LIFE INTEREST TO WIFE "IF SHE SHALL SO LONG CONTINUE MY WIDOW"—BIGAMOUS MARRIAGE—"WIDOW."

In re Wagstaff, Wagstaff v. *Jalland* (1908) 1 Ch. 162. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of the late Kekewich, J. (1907) 2 Ch. 35 (noted ante, vol. 43, p. 616). A testator who at the time he went through a form of marriage with a Mrs. Josephine Jalland, knew that her husband was still living. Mrs. Jalland thereafter lived with him as his wife till his death. By his will he gave certain of his chattel property to his "dear wife, Dorothy Josephine Wagstaff," the same person as Josephine Jalland, and also devised and bequeathed the residue of his real and personal estate to his "said wife" during her life "if she so long continue my widow," and upon her decease or second marriage then over. The question was whether Josephine Jalland could take under the residuary devise and bequest as widow of the testator. Kekewich, J., held that the word had obtained a secondary meaning in the will, and sufficiently designated the person intended to be benefitted, and that Mrs. Jalland was consequently entitled to a life estate in the residue until she contracted another marriage subsequent to the death of the testator.

ANCIENT LIGHT—ENJOYMENT—"CONSENT OR AGREEMENT"—CONSENT OR AGREEMENT AS TO LIGHTS BY TENANT—PRESCRIPTION ACT 1832 (2-3 WM. IV. c. 71) ss. 3, 4—(R.S.O. c. 133, s. 35.)

Hyman v. *Van Den Burgh* (1908) 1 Ch. 167. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Parker, J. (1907) 2 Ch. 516 (noted ante, p. 25). The Court of Appeal point out that under the Prescription Act a right to access of light is not absolute and indefeasible, even after twenty years' enjoyment, unless and until some action is brought in which the right is called in question, and that until such action is brought the right remains inchoate and if within twenty years prior to any such action it can be shewn that the light in question was enjoyed by consent or agreement the inchoate right would be defeated. In this case after twenty years' enjoyment but within twenty years before action a tenant in possession of the premises had agreed to avoid the blocking up the lights in question to pay one-half a year therefor. He never paid the one-half but it was held that this amounted to an enjoyment by "consent or agreement" within the statute so as to prevent the acquisition of an absolute right under the statute.

APPOINTMENT OF NEW TRUSTEE—APPOINTMENT BY ACTING EXECUTOR OF LAST SURVIVING TRUSTEE—TRUSTEE ACT (23-24 VICT. c. 145) s. 27—(R.S.O. c. 129, s. 4.)

In re Boucherett, Barne v. *Erskine* (1908) 1 Ch. 180. The question to be decided was whether a new trustee of a will had been validly appointed. A testator by his will made in 1875 devised his real estate to trustees. The will contained no power to appoint new trustees, but in effect referred to the powers given by 23-24 Vict. c. 145, (R.S.O. c. 129). The last surviving trustee died in 1888 having by his will appointed three executors. Probate was granted to one of the executors power to prove being reserved to the other two. In 1894 the proving executor appointed a new trustee of the first mentioned will. The other two executors were then alive, but died without taking probate. Joyce, J., held that the appointment was valid under 23-24 Vict. c. 145, (R.S.O. c. 129, s. 4) as having been made by the "acting executor" of the last surviving trustee; the saving clause in s. 76 of the Conveyancing Act, 1881, which had

repealed 23 and 24 Vict. c. 145, s. 27, having left that statute in operation as regards cases where it was incorporated expressly, or by implication, in prior instruments.

WILL—CONSTRUCTION — SPECIFIC DEVISE—COMPLETE GENERAL DESCRIPTION—SUBSEQUENT IMPERFECT ENUMERATION—FALSA DEMONSTRATIO.

In re Brocket, Dawes v. *Miller* (1908) 1 Ch. 185. A testatrix by her will devised the real estate to which she became entitled under the codicil of her father's will "namely the residence known as Orford House in the parish of Oakley and lands and hereditaments" (in certain parishes) "in the same country," to her sister for life with remainder over. In addition to the properties enumerated, the testatrix had also acquired under the codicil of her father's will a residence in London, to which she was entitled at the date of the will. There was no evidence whether she knew that it formed part of the property passing under the codicil. The question which Joyce, J., was called on to determine was whether the London house passed under the devise to the testatrix's sister, and he held that it did not, and that the specification of the properties introduced by the word "namely" was not a mere imperfect enumeration of the property intended to be devised, but formed the leading description of the property intended to be dealt with, and consequently the London house did not pass under the general introductory words.

LUNATIC—ACTION BY COMMITTEE—LUNATIC PLAINTIFF—"LUNATIC SO FOUND."

In re Townshend, Townshend v. *Robins* (1908) 1 Ch. 201. This was an action instituted by the committee of a lunatic so found, and the point was raised whether the lunatic should not be a co-plaintiff, and Eady, J., held that he should. He also held that where under the Lunacy Act after inquiry it was found that the alleged lunatic "is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself, or others," that such finding constitutes him "a lunatic so found by inquisition."

SOLICITOR AND CLIENT—SETTLED ACCOUNTS—OVER CHARGES—OPENING SETTLED ACCOUNTS—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16) S. 3—(R.S.O. C. 324, S. 38.)

Cheese v. *Keen* (1908) 1 Ch. 245 is a case of some interest to solicitors. The defendant was a builder and from 1883 to 1904 had employed one Cheese as his solicitor, who financed him in various transactions. No bills of costs were ever delivered, but from time to time accounts were stated and the amount due to Cheese for loans, interest and costs were agreed, and Cheese took mortgages for the agreed amounts. By 1904 all the mortgages except two were paid off. In 1905, Cheese died, and the present action was brought by his executors on the two mortgages remaining unpaid. Keen counterclaimed for an account of all transactions between himself and his deceased solicitor, and he alleged that he had no independent advice and that he had been charged profit costs prior to the Mortgagees' Legal Costs Act, 1895 (58-59 Vict. c. 25), and he also proved errors in respect of charges for interest. The plaintiffs relied on the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, (R.S.O. c. 324, s. 38). Neville, J., held that the statute was no bar, and that the defendant was entitled to relief for which he counterclaimed, and he made an order for taxation and to take the accounts with leave to the defendant to surcharge and falsify.

AIR—EASEMENT—DEROGATION FROM GRANT.

Cable v. *Bryant* (1908) 1 Ch. 259 was an action to restrain the defendants from interfering with the plaintiff's right to the access of air to his premises. The facts were that the plaintiffs had purchased in 1905 from the Hatfield Breweries Company a piece of land with a stable on it. At the time of the purchase the stable was ventilated by apertures to which the air had access over an open yard which the grantors then owned in fee but which was rented to a tenant for an unexpired term of 28 years. After the grant to the plaintiff the Breweries Company sold the yard to the defendant, the tenant joining in the deed to merge the term. The purchaser thereupon proceeded to erect a hoarding which had the effect of entirely closing the ventilators of the plaintiff's stable. Neville, J., granted a mandatory injunction to remove the obstruction on the ground that the action of the defendant was in derogation of the grant which

the Breweries Company had made to the plaintiff, and that neither the company nor the defendant, as their assignee, could lawfully erect anything on the yard which would interfere with the use of the stable as a stable.

SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—EXCEPTION OF PROPERTY SETTLED ON WIFE FOR HER SEPARATE USE—CONTINGENT INTEREST NOT FALLING INTO POSSESSION DURING COVERTURE.

In *Lloyd* v. *Prichard* (1908) 1 Ch. 265, Parker, J., held that, under a covenant in a settlement to settle after acquired property, except such as should be settled to the wife's separate use, property devised to the wife's separate use during the coverture, but which did not fall into possession until after the husband's death, was not bound by the covenant, but that a contingent reversionary interest acquired during the coverture, but which did not fall into possession during the coverture was bound.

COSTS—SOLICITOR AND CLIENT—TAXATION—COUNSEL RETAINED CONTRARY TO CLIENT'S INSTRUCTIONS.

In re Harrisson (1908) 1 Ch. 282. Parker, J., held that where a client had given his solicitor express instructions not to retain a particular counsel, the solicitor could not tax against his client any costs of brief or counsel fee to such counsel notwithstanding according to the rules of etiquette the counsel in question was entitled to be briefed.

WILL—CONSTRUCTION—PERSONAL ESTATE—GIFT TO "SURVIVING CHILDREN AND THEIR RESPECTIVE ISSUE"—ISSUE COMPETING WITH PARENTS.

In re Coulden, Coulden v. *Coulden* (1908) 1 Ch. 320. A testator by his will gave the income of his estate to his seven children in equal shares and provided that on the death of either of his executors that the survivor was "to sell the whole of my real and personal estate and cause the same to be equally divided amongst my then surviving children and their respective issue."

On the death of one of the executors, there were issue of two deceased children and there were four surviving child-

ren, one of whom had issue. No question was raised as to the realty, it being conceded that as to that the word "issue" must be construed as a word of limitation; but as to the personalty it was contended that there was no such rule and on behalf of the issue of one of the surviving children it was claimed they were entitled to share with their parent, and that the issue of children who had died prior to the period fixed for distribution must be excluded; but Parker, J., although holding that in a gift of personalty the word "issue" is not prima facie a word of limitation, although in some cases it may be so, but whether it is or not, is purely a question of construction, in the present case he came to the conclusion that the word "issue" was not used as a word of limitation, but that on the proper construction of the will the "issue" referred to were the issue of children who had died prior to the period of distribution, but the issue of those children living at that time were not included and did not take in competition with their parents.

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

Tillmanns v. *Knutsford* (1908) 1 K.B. 185 was an action for breach of contract contained in a bill of lading. The bill of lading contained certain exemptions from liability by the charterers and ship owners in case of loss arising, inter alia, from error in judgment, negligence or default of . . . master, or other persons in the service of the ship whether in navigating the ship or otherwise. It also provided that should a port be inaccessible on account of ice, the master might discharge the goods intended for such port on the ice, or at some other safe port or place at the risk of the shippers. At the time the bill of lading was signed, the ship was under a time charter which provided that the master (although appointed by the owners) should be under the orders and directions of the charterers as regards employment agency or other arrangements, and the charterers thereby agreed to indemnify the owners against liabilities arising from the act of the master signing bills of lading by the order of the charterers, and were to be responsible for the delivery of cargo. The time charterers signed the bill of lading "for the captain and owners." It was held by Channell, J., that this signature bound the ship owners. It appeared that the vessel arrived within forty miles of the Port

of Vladivostock on February 12, in company with another vessel, but found it impossible to get in on account of ice, and after endeavouring, on that day and the following, without success, on February 14, left for Nagasaki, where the cargo was discharged. The other vessel tried again and got into Vladivostock on February 15, and evidence was given that between January 23 and February 28, Vladivostock was open and vessels were going in and out almost daily. Channell, J., held that inaccessible in the bill of lading did not mean inaccessible at the moment of the ship's arrival, but inaccessible within a reasonable time after the ship arrived off the port and endeavoured to get in, and, therefore, that the master was not justified in not making a more persistent effort to get into that port in the circumstances. He also held, that "error in judgment" by the master, did not include misconstruction by him of the bill of lading, and also, that the words "or other cause" must be taken to mean other causes ejusdem generis as those previously mentioned, and therefore, that the plaintiffs were entitled to recover for the loss occasioned by the non-delivery of the cargo at Vladivostock. This case has been affirmed by the Court of Appeal: see 124 L. T. Jour. 431.

AGREEMENT FOR CURRENT ACCOUNT—GENERAL LIEN FOR CARRIAGE OF GOODS—LICENSE TO TAKE POSSESSION OF GOODS—BANKRUPTCY OF DEBTOR—DAMAGE FOR TRESPASS CAUSING BANKRUPTCY—CAUSE OF ACTION PASSING TO TRUSTEE IN BANKRUPTCY—SET-OFF.

Lord v. *Great Eastern Ry.* (1908) 1 K.B. 195. This was an action by a trustee in bankruptcy of one Lord, to recover damages against the defendants for an alleged trespass committed against the bankrupt, which occasioned his bankruptcy. The facts of the case were that the defendants had agreed with Lord to let to him, at a monthly rental, a parcel of land for stacking coal unloaded from trucks on the defendants' railway sidings. The land was within the defendants' railway yard, and the defendants also agreed with Lord to open a monthly credit account for the carriage of coal, upon the condition that the defendants should have a lien on all the coal conveyed, and on the defendant's waggons, plant, etc., which should, at any time, be upon the defendants' railway or upon the ground rented by Lord from them; and the company was to be at liberty to close the account at any time on giving one day's notice, whereupon the whole account was to become due. The defendants closed the account

by giving the required notice, and thereupon took possession of the coal on the sidings and also the coal and other goods on the rented land, which was the act complained of. The plaintiff contended that the agreement amounted in effect to a bill of sale, and was altogether void because of non-registration, but Phillimore, J., who tried the action, refused to accede to that contention, and held the agreement was valid, and therefore that the plaintiff could not succeed. He was also of the opinion that even if the acts alleged did amount to trespass, the damages claimed therefor, and for causing Lord's bankruptcy, was a personal wrong which would not pass to the trustee. The company had set up that if they were liable to the plaintiff as alleged, they would, nevertheless, be entitled to set-off against any damages the trustee might have recovered, the debt due by Lord for carriage of the coal, etc., but on this point Phillimore, J., was against the defendants, as it was not a case of mutual dealings. This, however, was merely obiter.

STATUTORY POWER TO SUPPLY ELECTRICITY—POWER TO CONTRACT —PENALTY FOR DEFAULT—BREACH OF CONTRACT—REMEDY, WHETHER FOR PENALTY OR DAMAGES FOR BREACH OF CONTRACT.

Morris v. *Loughborough* (1908) 1 K.B. 205 is a case in which the defendant unsuccessfully endeavoured to apply the rule which was acted on recently by the Judicial Committee of the Privy Council in *Toronto* v. *Toronto Ry.*, viz., that where an act confers statutory powers and provides a penalty for breach of duty thereunder, that that is the only remedy which can ordinarily be pursued in case of breach. In this case the defendants were a municipal body and were by statute empowered and required to furnish to the inhabitants within a certain area, electricity when required, and in case of neglect to do so the statute imposed a penalty. The statute also empowered the defendants to enter into contracts with other persons not resident within the specified area to supply them with electricity. In pursuance of this latter power, the defendants contracted to supply the plaintiffs with electricity, and the present action was brought to recover damages for breach of that contract. The defendants contended that the only remedy was for the penalty, and Bigham, J., so held, but the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) came to the conclusion that the penalty only applied to cases where the defendants failed to supply electricity within the defined area, and did

not have the effect of limiting the defendants' liability under contracts made with persons outside of the defined area. The judgment of Bigham, J., was therefore reversed.

FACTOR—MERCANTILE AGENT—AUTHORITY OF FACTOR TO PLEDGE—CUSTOM OF PARTICULAR TRADE—FACTORS ACT 1889 (52-53 VICT. C. 45) SS. 1, 2—(R.S.O. C. 150, S. 2).

In *Oppenheimer* v. *Attenborough* (1908) 1 K.B. 221, the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have affirmed the decision of Channell, J., (1907) 1 K.B. 510 (noted ante, vol. 43, p. 396) to the effect that the authority conferred on a mercantile agent by the Factors Act, 1889, ss. 1, 2 (R.S.O. c. 150, s. 2) to pledge goods entrusted to them by the owner is unaffected by the custom of any particular trade that an agent employed to sell goods shall have no authority to pledge them.

HUSBAND AND WIFE—GUARANTY SIGNED BY WIFE FOR HUSBAND'S DEBT—UNDUE INFLUENCE OF HUSBAND—WANT OF INDEPENDENT ADVICE—NOTICE TO CREDITOR OF RELATIONSHIP—CREDITOR PROCURING GUARANTY THROUGH HUSBAND OF GUARANTOR.

Chaplin v. *Brammall* (1908) 1 K.B. 233 was an action against a married woman upon a guaranty given by her for her husband's debt. The facts were that the plaintiffs had agreed to supply goods to the defendant's husband on credit if his wife would guarantee payment of the price, and they sent the husband a form of guaranty in order that he might obtain his wife's signature to it, leaving the matter entirely to him. The husband obtained his wife's signature to the guaranty, but gave her no sufficient explanation as to the nature and effect of the document, and she signed it without any independent advice and without understanding it when she signed it. Goods were supplied on the faith of the guaranty and the price had not been paid. Ridley, J., who tried the action, being satisfied on the evidence that the defendant did not understand the nature of the document when she signed it, gave judgment for the defendant on the authority of *Bischoffs' Trustee* v. *Frank*, 89 L. T. 188, and *Turnbull* v. *Duval*, 1902, A.C. 429, and the Court of Appeal (Williams, L.J., and Barnes, P.P.D., and Bigham, J.) affirmed his decision.

Railway company—Carrier—Just and reasonable condition—Declaration of value—Extra charge for dogs worth more than £2.

Williams v. *Midland Ry. Co.* (1908) 1 K.B. 252 was an action to recover damages for the loss of a dog worth £300 entrusted to the defendants for carriage, which had been lost through the negligence of the defendants' servants. The plaintiff's agent had signed a contract note on which was indorsed a printed condition that the company was not to be liable for more than £2 for any dog, unless a higher value was declared and an extra charge paid of 1¼ per cent. on the excess of value. The defendants relied on this condition as limiting their liability for the dog in question to £2; and the Court of Appeal (Lord Halsbury, Barnes, P.P.D., and Bigham, J.) held that condition was "just and reasonable" within an act authorizing railway companies to make such conditions, and therefore reversed the judgment of Walton, J., in favour of the plaintiffs for £300.

Bill of exchange—Indorsement by way of security—Bill not complete or regular on its face—Right of prior indorser to sue subsequent indorser.

In *Glenie* v. *Bruce Smith* (1908) 1 K.B. 263 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Lawrance, J. (1907) 2 K.B. 507 (noted ante, vol. 43, p. 731). Glenie the plaintiff had sold pigs to one Tucker, the payment of which Bruce Smith agreed to guarantee. For this purpose Tucker accepted the bill of exchange now sued on, and Bruce Smith indorsed it, and in this state the bill was handed to the plaintiff who filled in his own name as payee and signed it as drawer, and then indorsed it. Lawrance, J., held that notwithstanding the form of the instrument in which the plaintiff appeared to be the drawer and a prior indorser, he was entitled to recover against the subsequent indorser, who would have no remedy over against the plaintiff either as drawer or indorser, because the plaintiff must, in the circumstances, be presumed to have indorsed without value, and the plaintiff was holder in due course.

Sale of goods—Contract to insure against "all risks"—Policy exempting the insurer from liability for "capture, seizure, or detention"—Liability of seller.

In *Yuill* v. *Scott* (1908) 1 K.B. 270, the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have

affirmed the decision of Channell, J. (1907) 1 K.B. 685 (noted ante, vol. 43, p. 402). The point decided being shortly this, that where a vendor of cattle contracted to insure them against "all risks," (the cattle being purchased in Buenos Ayres for shipment to Durban in South Africa) the contract was not fulfilled by the vendors procuring an "all risks" Lloyd policy, whereby the insurers were exempted from liability for loss by "capture, seizure and detention." On the cattle in question arriving at Durban, the authorities forbade them being landed, disease having broken out amongst them on the voyage, and they were consequently slaughtered and the purchaser suffered loss, which the insurers refused to pay, as not being covered by the policy. In these circumstances the sellers were held liable.

PRACTICE—NEW TRIAL—TIME FOR MOVING FOR A NEW TRIAL.

Greene v. *Croome* (1908) 1 K.B. 277 was an application for a new trial. The case had been tried by a jury who answered certain questions submitted to them and were discharged. The judge then referred the question of the amount due to the plaintiff upon the findings of the jury to be ascertained by a referee. Upon further consideration the judge gave judgment for a certain amount. Four days after this judgment, but a year after the verdict the defendants gave notice of motion for a new trial, but the Court of Appeal (Williams, L.J., and Barnes, P.P.D.) held that it was too late and that the time for moving for a new trial began to run from the date of the verdict.

CONTRACT—CONSIDERATION—BREACH OF DUTY TO TAKE CARE—OFFER OF NEWSPAPER TO GIVE ADVICE—DAMAGES—REMOTENESS—FRAUD OF THIRD PARTY.

In *De la Bere* v. *Pearson* (1908) 1 K.B. 280, the Court of Appeal (Williams, L.J., Barnes, P.P.D., and Bigham, J.) have affirmed the judgment of Lord Alverstone, C.J. (1907) 1 K.B. 483 (noted ante, vol. 43, p. 363). The case, it may be remembered, arose out of an offer on the part of a newspaper to give financial advice to its correspondents. The plaintiff, accordingly wrote to the editor asking advice as to the investment of £800, and the editor recommended a stock broker who was an undischarged bankrupt, to whom the plaintiff entrusted £1,300

for investment, which the broker fraudulently appropriated to his own use. Lord Alverstone, C.J., held that the proprietor of the newspaper was liable for the full amount of the loss, and that the damage was not too remote. The majority of the Court of Appeal, Williams, L.J., and Barnes, P.P.D., agreed with this decision, but Bigham, J., doubted whether the defendants were liable for more than the £800, the amount originally named by the plaintiff in his letter to the editor.

BANKER—CHEQUE—COUNTERMAND OF CHEQUE BY TELEGRAM—NOTICE OF COUNTERMAND—ACTION FOR MONEY HAD AND RECEIVED—BILLS OF EXCHANGE ACT 1882 (45-46 VICT. c. 61) s. 75(1)—(R.S.C. c. 119, s. 167.)

Curtice v. *London City and M. Bank* (1908) 1 K.B. 293 was an action by a customer of the defendant bank to recover the amount of a cheque which had been paid by the defendants after they had notice as alleged of the plaintiff's countermand of payment. The cheque in question was for £63, and was drawn on October 31, 1906. On the same day after business hours the plaintiff telegraphed to the defendants countermanding its payment. The telegram was delivered on the evening of the same day by the post office, and it being after office hours was placed in the letter box of the bank. By an oversight on the part of the defendants' servants this telegram was not brought to the notice of the defendants' manager till the 2nd of November. On November 1, the cheque was presented and paid. Judgment was given in the County Court in favour of the plaintiff, but on appeal to a Divisional Court (Darling and Lawrance, JJ.) the Court was divided in opinion and the appeal was dismissed. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) were unanimous that the countermand, not having in fact come to the knowledge of the defendants before the cheque was paid, was not a sufficient countermand within s. 75(1) of the Bill of Exchange Act (R.S.C. c. 119, s. 167); and though the defendants might be liable for negligence in not having received the telegram, still the measure of damages for that neglect would not necessarily be the same as in an action for money had and received. Cozens-Hardy, M.R., said: "A telegram may reasonably and in the ordinary course of business be acted upon by the bank at least to the extent of postponing the honouring of the

cheque until further inquiry can be made. But I am not satisfied that the bank is bound, as a matter of law, to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque.''

SHIP—CONTRACT OF CARRIAGE—CONSTRUCTION—UNSEAWORTHINESS—EXCEPTION.

Nelson v. *Nelson* (1908) A.C. 16. In this case the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten, and Atkinson) have affirmed the judgment of the Court of Appeal (1907) 1 K.B. 769 (noted ante, vol. 43, p. 774) on the ground that the agreement being ill-expressed, and self-contradictory, it could not displace the prima facie liability of the ship-owners to provide a seaworthy ship, and to take reasonable care; and the damage in question having resulted from the unseaworthiness of the ship, the defendants were liable theref- there being no clear and express exemption from such liabil...

DAMAGE—SUBSIDENCE—MEASURE OF DAMAGES—RISK OF FUTURE SUBSIDENCE—REMOTENESS.

In *West Leigh Colliery Co.* v. *Tunnicliffe* (1907) A.C. 27, it may be remembered that the Court of Appeal (reversing Eady, J.), held, that in assessing damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, it was proper to allow for the depreciation of the market value of the property owing to the risk of future subsidence (1906) 2 Ch. 22, (noted ante, vol. 42, p. 598). The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Ashbourne, Hereford and Atkinson) have now reversed the decision of the Court of Appeal and restored that of Eady, J., (1905) 2 Ch. 390 (noted ante, vol. 42, p. 101). Their Lordships were of the opinion that the case was governed by the decisions of the House of Lords in *Backhouse* v. *Bonomi*, 9 H.L.C. 503, and *Darby Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

SALE OF GOODS—SHIP—PASSING OF PROPERTY IN GOODS—SALE OF GOODS ACT, 1893 (56-57 VICT. C. 71) SS. 16, 18, 62.

Laing v. *Barclay* (1908) A.C. 35, although an appeal from a Scotch Court deserves attention, because it deals with a point

of law arising under the Sales of Goods Act 1893 (56 & 57 Vict, c. 71), which, as has been said before, is mainly declaratory of the common law. The respondents, Barclay & Co., agreed to build two ships for an Italian firm, according to specifications, and under the superintendence of an agent appointed by the Italian firm, for a certain price, payable by instalments, some of which were to be paid during the progress of construction, but delivery of the ships was not to be considered to be completed till they had passed trials at Greenock, and off the Italian coast. Before the ships were fully completed, but after several instalments of purchase money had been paid, the vessels were seized in Scotland at the instance of creditors of the Italian firm, but, on the application of the builders, the Scotch Court of Session recalled the arrest. The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten, Hereford, Robinson and Atkinson) affirmed this decision on the ground that under the contract the property in the ships was not intended to pass until the ships had been completed and passed the specified trials.

British North America Act, s. 91(29); s. 92(10)—Dominion Railway Act 1888, ss. 187, 188, intra vires—R.S.C. 1886, c. 1, s. 7(2)—"Person."

Toronto v. *Canadian Pacific Ry.* (1908) A.C. 54 was an appeal by the City of Toronto from a judgment of the Court of Appeal for Ontario, whereby it was determined that the city was bound to pay the amount apportioned by the Railway Committee under ss. 187 and 188 of the Dominion Railway Act 1888, as its share of the cost of the protection of the public in traversing certain level crossings of the Canadian Pacific Railway at points within the city limits. On behalf of the city it was contended that the Dominion Parliament had no power to enact any legislation which would have the effect of imposing any pecuniary charge upon the city because it was not subject to the legislative jurisdiction. It was conceded that the defendant railway was a work within the jurisdiction of the Dominion Parliament, but it was claimed that the city was subject to Provincial legislation, and could only be authorized; or required to spend money by the Provincial Legislature. Counsel for the city also urged that the city was not "a person" interested within the meaning of section 188. The Judicial Committee (Lords Robertson and Collins, and Sir A. Wilson and Sir A.

Wills), it is not very surprising to find, overruled all these contentions, and adhered to the fairly well established rule that in matters within the jurisdiction of the Dominion Parliament it has the amplest legislative power, and for the purpose of effectively legislating it may if need be deal with matters that otherwise are within Provincial control, and as to such matters though the Provincial and Dominion legislation may overlap, yet in case of conflict the Dominion legislation must prevail.

REGISTRY ACT (R.S.O. 1897 c. 136) s. 87—STATUTE OF LIMITATIONS (R.S.O. 1897, c. 133) ss. 4, 22—UNREGISTERED CONVEYANCE—SUBSEQUENT MORTGAGE—PRIORITY.

McVity v. *Tranouth* (1907) A.C. 60 is an appeal from the Supreme Court of Canada, on a point arising on the Registry Act of Ontario. It is not often that we find it proper to find fault with the conclusions reached by the Judicial Committee of the Privy Council, but in this case, with the greatest respect for that tribunal we humbly conceive the conclusion it has reached in this case can hardly be said to be satisfactory. The case arose out of the fraud of an unprofessional conveyancer, and is one of those unhappy ones in which Courts of law are called on to say on which of two innocent persons the loss is to fall. The facts of the case were comparatively simple. In June, 1891, Mrs. Tranouth (then Maxfield) being about to marry, and being owner of the land in question, wished to have it vested in herself and intended husband, so she applied to one Sootheran, who turned out to be a rogue, to do the necessary conveyancing, and he thereupon drew a conveyance to himself, and a reconveyance from himself to Mrs. Tranouth and her husband. He registered the deed to himself, but did not register the reconveyance, but led the grantees to suppose it was registered by indorsing a forged certificate of registration thereon. A few days intervened between the date of the reconveyance and the marriage, and thereafter Mrs. Tranouth and her husband had continuously occupied the premises. In 1895, Sootheran, assuming to be owner, executed a mortgage to the plaintiff McVity, for $2,000, which was registered August 30, 1895. The action was commenced by the mortgagee in May, 1903. From the report we gather that McVity had actual notice of the possession of the Tranouths before advancing his money, and took his security with the knowledge that a third person was in adverse possession of the mortgaged premises. This was an

act of such gross carelessness that it might not unreasonably have been thought to preclude him from the benefit of the Registry Act. The Court of Appeal for Ontario held that the Tranouths were entitled to the benefit of the Statute of Limitation from the year 1895, and that they had acquired title by possession as against McVity; the Supreme Court of Canada affirmed this decision; but the Judicial Committee (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) have now reversed that decision. The short ground on which their Lordships proceed is, that the conveyance to the Tranouths though liable to be defeated by a subsequent prior registered instrument, was, nevertheless, valid as between Sootheran and the Tranouths; the latter, consequently, were rightfully in possession and no action could be brought against them, and therefore the Statute of Limitations did not begin to run in their favour until the execution of the mortgage; therefore, as against the mortgagee, they could not set up their possession prior to the mortgage as an adverse possession under the Statute. If this be a sound position, then it seems to follow that if the Tranouths had been in actual occupation 50 years before the execution of the mortgage it would still have been open for Sootheran or someone claiming under him to execute a mortgage which would have the effect of gaining priority over the Tranouths' unregistered deed, and their possession would avail nothing, even though the mortgagee had actual notice of their prior 50 years' possession; a decision which involves such a ridiculous result, may be law, but it can hardly be said to have much common sense in it, and the case would seem to make it plain that some amendment in the Statute of Limitations or Registry Act is urgently needed.

ALGOMA—SALE FOR TAXES—TAX PURCHASER—R.S.O. c. 26, ss. 23, 29—TAX DEED—PRIOR REGISTRATION OF DEED FROM DEFAULTING OWNER—R.S.O. 1887, c. 193, s. 184.

McConnell v. *Beatty* (1908) A.C. 82 was an appeal from the Court of Appeal for Ontario. The case arose out of a sale of mining land for arrears of taxes. At the time of the sale W. H. Beatty was the owner, and one Bull became the purchaser and obtained a certificate as purchaser; his tax deed was dated December 14, 1903, and he subsequently conveyed to McConnell, January 12, 1904; both these deeds were registered. After the

sale W. H. Beatty conveyed the lands to his brother, J. W. Beatty, on October 29, 1903, which was registered prior to the tax deed, and the deed to McConnell. J. W. Beatty, the plaintiff, claimed to have acquired priority over the tax purchaser and his grantee, (1) On the ground of an alleged purchase by W. H. Beatty of Bull's right as tax purchaser, and (2) the prior registrati of the deed from W. H. Beatty to the plaintiff. The Court of Appeal came to the conclusion that there was some evidence of a purchase by W. H. Beatty of Bull's interest, or a redemption by him, and that at the time the deed was made to Bull he was not the holder of, or entitled to the certificate of purchase which was then in W. H. Beatty's possession. On this point the Judicial Committee (Lords Robertson and Collins and Sir A. Wilson, Sir H. E. Taschereau and Sir A. Wills) were unable to agree with the Court of Appeal and were of the opinion that there was no sufficient evidence of any purchase by W. H. Beatty of Bull's interest as tax purchaser, or of any redemption of the land by W. H. Beatty; and on the second point they came to the conclusion that J. W. Beatty was not a purchaser for value but a mere volunteer and therefore the prior registration of his deed gave him no priority over the tax deed.

TAXATION—EXCAVATION—BUSINESS CARRIED ON FROM PONTOONS FLOATING OVER EXCAVATION.

Smith's Dock v. *Tynemouth* (1908) 1 K.B. 315 may be here briefly noted. The plaintiffs were owners of a dock on a tidal river, and for the purpose of their business made an excavation on their premises into which the waters of the river flowed, and over which excavation pontoons were placed and attached to piles driven into the excavation, and from which pontoons an important part of their business of ship repairing was done. On a stated case, Channell and Bray, JJ., held that the place so excavated remained assessable for the purpose of taxation as "land covered by water."

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton, J., Clute, J.] [Feb. 5.

KINZIE *v.* HARPER.

Bills of exchange—Cheque—Consideration—Part payment under unenforceable contract—Statute of Frauds.

A definite oral bargain (good except for the Statute of Frauds) for the sale by the plaintiff to the defendant of an ascertainable and definite parcel of land is a sufficient consideration for a cheque drawn by the defendant upon a bank in favour of the plaintiff for a part of the purchase money; and, the cheque being dishonoured, the plaintiff was held entitled to recover the amount thereof from the defendant, the latter not being in possession, and the plaintiff not having made or tendered a conveyance, but being able and willing to perform his contract.

Judgment of the 4th Division Court, County of Waterloo, reversed.

Clement, K.C., for plaintiff, appellant. *Middleton*, K.C., for defendant, respondent.

NOTE.—See *Collins* v. *Smith*, ante, infra, p, 163.

Meredith, C.J.C.P., Magee, J., Mabee, J.] [Feb. 26.

WILLIAMS *v.* PICKARD.

Water and water-courses—Land bordering on river—Crown grant—Description—Construction—Ownership ad medium filum—Navigable or unnavigable stream—Alluvium—Bed of stream.

Lot 5 in the front concession of Howard was described in the grant from the Crown issued July 8, 1799, as follows: "Beginning at a post marked 4/5 on the bank of the River Thames; then south 45 degrees, east 68 chains; then north-easterly, par-

allel to the said river, 30 chains; then north 45 degrees west to the said river; then along the bank with the stream to the place of beginning":—

Held, MAGEE, J., dubitante, that having regard to section 31 of the Surveys Act, R.S.O. 1897, c. 181, the river formed the northerly boundary, and the lot did not extend usque ad filum aquæ. *Robertson* v. *Watson* (1874), 27 C.P. 579, 599, followed.

The question whether the river at and above and below the locus in quo was navigable or unnavigable need not be determined, in view of the decision of the Court of Appeal in *Keewatin Power Co.* v. *Kenora* (1908), 11 O.L.R. 266.

The plaintiff claimed, as part of lot 5, a bar or deposit of gravel and sand below the bank of the river. This sandbar as to vegetation retained the characteristics of a bed of the stream. For the greater part of the year it was covered with water, and during the remainder was frequently under water, while at times of freshets the water covered it to a depth of 25 or 30 feet, and sometimes overflowed the bank, which was of at least that height.

Held, that the bar had not become land formed by alluvium, but still formed part of the bed of the river. *Hindson* v. *Ashby* (1896), 1 Ch. 78 (1896), 2 Ch. 1, followed.

Judgment of CLUTE, J., reversed.

Matthew Wilson, K.C., for defendants, appellants. *A. H. Clarke*, K.C., and *D. H. Smith*, for plaintiff.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [March 5.

ROBINSON *v.* MORRIS.

Security for costs—Action against constable for arrest of plaintiff—Defence on merits—Affidavit—Insufficiency—Grounds—Belief—Rule 518—*Agent—Solicitor.*

The provisions of R.S.O. 1897, c. 89, requiring plaintiffs in actions against justices of the peace and other officers fulfilling public duties, to give security for costs, in certain circumstances, must be followed with some approach to strictness, the right given being a variation from the usual course of litigation. The affidavit filed on behalf of the defendant, a constable, in an action brought against him for the arrest of the plaintiff, in support of a motion for an order for security for costs under the Act referred to, did not, in the part indicating the nature of

the defence, shew the grounds for the belief of the deponent in the truth of the statement made, as required by Con. Rule 518, where facts are stated not within the knowledge of the deponent; and did not in terms state that the defendant had a good defence on the merits, nor set out the facts justifying the conclusion that the defendant had such defence or that the grounds of action were trivial or frivolous.

Held, 1. The affidavit was insufficient, and the motion should be dismissed, but, as it appeared that the defendant acted as an officer of the law, the dismissal should not preclude an application upon better material, on payment of costs.

2. The solicitor for the defendant was an "agent" within the meaning of the statute, and might make the affidavit.

Decisions of CLUTE, J., and the Master in Chambers reversed.

J. B. Mackenzie, for plaintiff. *Monahan*, for defendant.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [March 9.

STANDARD BANK *v.* STEPHENS.

Promissory note—Subscription for share in company—Fraud—Note of subscriber transferred to bank—Holders in due course—Hypothecation of securities—Powers of company—By-law—Resolution—Indorsement by secretary—Negotiation of note.

The defendant was induced to subscribe for one share of the stock of an incorporated manufacturing company, and to give a promissory note for the amount of the par value thereof, by a false and fraudulent representation made by an agent of the company. The note shewed on its face that it was given for a share in the company, and it was indorsed to the order of the plaintiffs, a chartered bank, by an indorsement in the name of the company, with the name of the secretary thereof signed thereto. A by-law was passed by the directors of the company, and confirmed by the shareholders at an annual meeting, authorizing the borrowing of money, following the words of section 49 of R.S.O. (1897) c. 191. It was also resolved by the directors, and confirmed by the shareholders, that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the company and usually deposited in the ordinary course of banking, be deposited in said bank account; that the same might be withdrawn therefrom by cheque,

bill, or acceptance in the name of the company, over the names of any two of four specified officers (one being the secretary); and that for all purposes connected with the making of deposits in the bank account, the signature of any one of the four should be sufficient. By a memorandum over the seal of the company and the hands of three of the officers, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness; and it appeared that the note above referred to, upon which this action was brought, with a large number of others, was delivered to the plaintiffs as a collateral security, accordingly. The secretary was also a director of the company, and indorsed notes, as he indorsed that in question, almost daily, with the knowledge of his co-directors, for a year and a half.

Held, that the by-law was sufficient to authorize the hypothecation of the company's securities to secure the present and future indebtedness of the company to the plaintiffs; that the indorsement over the signature of the secretary was sufficient to pass the property in the note to the plaintiffs; that the plaintiffs were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company for such share, and that the company had the right to negotiate it; and (upon the evidence) that the plaintiffs were holders in due course, for value, without notice of the fraud, and were entitled to recover.

Judgment of MACBETH, Co.J., affirmed.

T. G. Meredith, K.C., for defendant. *G. S. Gibbons,* for plaintiffs.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] GORDON *v.* LEARY. [Feb. 11.

Principal and agent—Undisclosed principal.

Appeal from judgment of DUBUC, C.J., noted vol. 43, p. 586, allowed with costs and action dismissed with costs on the ground that the learned judge erred in drawing the inference from the undisputed facts that the defendant had undertaken

to carry on the business formerly carried in his son's name. The defendant was the principal creditor of J. G. Leary & Co., and although Schofield was put in charge of the business with the consent of father and son and apparently for the defendant's protection, there was no evidence warranting the holding that the business was in fact transferred to the defendant as his business, and the account with the plaintiffs was continued in the name of J. G. Leary & Co., the defendant not having been asked by the plaintiff whether he was the proprietor or not.

Fullerton, for plaintiff. *Elliott* and *McNeil*, for defendants.

Full Court.] REX v. CHONEY. [Feb. 17.

Criminal law—Confession obtained by trick—Conversation with person who represents himself as having been sent by prisoner's counsel, admissibility of—Evidence of detectives who overhear such conversation—Evidence.

The prisoner was in jail awaiting his trial for murder. While there another prisoner, L., who spoke his language, was employed several times by prisoner's counsel as interpreter at conferences between them. Afterwards a constable arranged an interview between L. and the prisoner in a cell outside of which two detectives were concealed in such a manner that they could overhear the conversation. The trial judge found, as a fact, that L. falsely stated to the prisoner that his counsel had requested him to get all the facts from the prisoner to enable counsel to properly conduct the defence. The prisoner then made certain statements to L. in the Ruthenian language. These were overheard by the detectives who also understood that language. The trial judge refused to admit evidence of such statements. On a reserved case stated for the opinion of the Court,

Held, that the prisoner's conversation with L., whom he reasonably supposed to be his counsel's agent, was privileged; and, as the whole matter was the carrying out of one fraudulent design, the conversation should be treated as if it was with all the three witnesses, and so the evidence of the two detectives should also be excluded.

It having been admitted by counsel for the Crown that, under the facts as found by the trial judge, the conversation with L. was privileged, the interview should be treated as one with several persons who had fraudulently adopted the character of

the counsel's representatives, and the cloak of privilege should be applied to what was heard by the witnesses without, as well as within, the cell.

J. Hillyard Leech, for the Crown. *Blackwood*, for the prisoner.

Full Court.] RE DUPUIS. [Feb. 17.

Municipality—By-law—Retroactive legislation.

The Town of St. Boniface passed a by-law providing that no stable should be built and maintained at less than twenty feet from any house without the permission of the owner, and all stables built and in use at the date of the passing of the by-law, which did not conform to that standard, were declared to be a nuisance, and, as such, subject to abatement. Dupuis was was convicted, under the by-law, for maintaining a stable which had been erected and used before the passing of the by-law.

Held, that the municipality had no power to pass a by-law having a retroactive effect, and that the conviction must be quashed.

A. Dubuc, for applicant. *Knott*, for Town of St. Boniface.

Full Court.] SMYTHE *v.* MILLS. [Feb. 25.

Pleading—Demurrer—Action of deceit—Misrepresentation as to something that would take place in the future not sufficient to found action.

Action to recover damages for deceit. The statement of claim alleged that, during negotiations with the defendant for a lease of a store owned by the latter, he represented that the store would be vacant on October 31, 1905, that on the faith of such representation the plaintiff agreed to rent the store from November 1, 1905, purchased a stock of goods and expended other moneys in preparation for the intended business, and that it subsequently transpired that defendant had granted a lease of the store to another person for a year, which would not expire until June 1, 1906, and that plaintiff was, consequently, unable to occupy the store as agreed. On appeal from the judgment of HOWELL, C.J., on a demurrer to the statement of claim,

Held, that it should have specifically alleged the concealment of the lease as the ground of action, the representation as

to what would take place in the future not being a ground for an action of deceit. Leave to amend given on payment of the costs of the appeal and costs up to the hearing to be costs to defendant in any event in case plaintiff amended.

Knott, for plaintiff. *Burbidge*, for defendant.

Full Court.] [Feb. 29.

CANADIAN NORTHERN RY. CO. *v.* ROBINSON.

Compulsory taking of land—Appeal from award of arbitrators —Interest on amount awarded.

Held, 1. Upon an appeal under section 209 of the Railway Act, R.S.C. 1906, c. 37, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the decision or verdict of a judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion.

2. Interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award.

3. It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale.

4. The arbitrators are not bound to allow ten per cent. extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage.

Munson, K.C., and *Clark*, K.C., for the company. *Pitblado*, and *A. B. Hudson*, for Robinson.

Full Court.] SIMON *v.* SINCLAIR. [Feb. 29.

Estoppel—Forgery—Failure to defend action on prior note forged by same person.

Held, on appeal from PERDUE, J., that a person whose indorsement on a promissory note has been forged is not estopped from denying his signature by the fact that he had allowed judgment to go against him by default in a previous action by

the same plaintiff on an indorsement of his name on a prior note forged by the same person, although the forger negotiated the second note after such judgment. *Morris* v. *Bethell*, L.R. 5 C.P., followed. *Mackenzie* v. *British Linen Co.*, 6 A.C. 82, distinguished.

If there were any estoppel in this case, it would be only one arising from negligence in not anticipating that there might be subsequent similar forgeries, and warning the plaintiff by telling him of the first forgery. But mere negligence, to amount to an estoppel, must occur in the transaction in question: *Arnold* v. *The Cheque Bank*, 1 C.P.D. 578; Everett and Strode on Estoppel, 2nd ed. 343.

Wilson and *Affleck*, for plaintiff. *Fullerton*, for defendant.

KING'S BENCH.

Mathers, J.] MONTGOMERY *v.* MITCHELL. [Feb. 3.

Company—Lien on shares for debt due to company—Power to make by-law providing for lien—Estoppel—Waiver of lien.

This was an interpleader application in which the contest was as to the right of a company incorporated under the Manitoba Joint Stock Companies Act, to assert a lien upon the shares of one of its stockholders for an amount due to the company for unpaid calls on the shares as against an execution creditor, under whose execution the sheriff had seized the shares.

Held, 1. The company was entitled to such lien under the terms of its by-laws which provided for such a lien in sufficiently clear terms.

2. The company had power to pass such by-laws under section 31 of the Manitoba Joint Stock Companies Act, by virtue of the expression, "the conduct in all other particulars of the affairs of the company."

Child v. *Hudson Bay Co.*, 2 P. Wms. 207, and *Société Canadienne Française, etc.* v. *Daveluy*, 20 S.C.R. 499, followed.

As, however, the public are not charged with notice of the company's by-laws in this Province, such a by-law would not protect the company against a bona fide purchaser of shares without notice.

The shares in question stood in the name of the defendant's wife, but the plaintiff on the first day of May, 1907, recovered

a judgment against the defendant, his wife and the company declaring that the said shares were the absolute property of the defendant Mitchell, and available under execution in satisfaction of the plaintiff's judgment. At that time a note given to the company for the balance due on the shares was held by the bank in which it had been discounted; but, before the time of the seizure of the shares by the sheriff, that note had fallen due and had been taken up by the company.

Held, 1. At the time of the recovery of the last mentioned judgment, there was no debt due from Mitchell or his wife to the company for which the company could then have set up a lien, and it was not estopped by the judgment from setting up the lien as soon as it had taken up the note.

2. The right to the lien had not been waived or lost by the taking and discounting of a promissory note for the debt for which the lien was claimed.

Whilst such would be the result in the case of a mechanic's lien, the analogy is not complete. In the one case the lien is a statutory right for the protection of a particular debt and, if this is once discharged, the lien is gone. In the other case the lien is a continuing one for every debt that may arise and, the moment there is a debt or liability due by the shareholder, the lien at once attaches.

Burbidge, for plaintiff. *Baker,* for claimant.

Macdonald, J.] [Feb. 10.

RE JONES & MOORE ELECTRICAL COMPANY.

Company—Contributories—Agreement with company after subscription for shares.

This was an application to add, as contributories in the winding-up of the company, John Wesley Jones and Frank L. Moore in respect of their written agreement to take and pay for, each, two hundred shares of the capital stock of the company of one hundred dollars each. Jones and Moore resisted the application on the ground that the company had afterwards entered into an agreement in writing with them, whereby the company were to issue to them fully paid-up and non-assessable shares, being the shares for which they had already subscribed, in consideration of their assigning to the company all their rights, title and interest in a business acquired by the company from another company controlled by them, and certain patent rights

and good will, and of their covenants to furnish to the company certain chattel property to the value of $6,500, and to secure to the company all the business formerly carried on in the west by said other company, together with other benefits and advantages. The agreement under which Jones and Moore subscribed for the shares was separate and distinct from the other agreement, and was not in any way conditional upon the terms of the latter.

Held, that Jones and Moore must pay in cash for the shares subscribed for by them.

In re Hr 'ford Company, Pells' case, L.R. 8 Eq. 222, distinguished because Pells' application for the shares in that case was contemporaneous with and founded upon an agreement of the company to take certain good will and stock-in-trade in payment for the shares.

Held, also, that Jones and Moore were not entitled to any credit for the goods supplied by them to the company under the special agreement referred to because that agreement was ultra vires of the company, and if payments on subscribed shares are not made in cash, they must be made in kind by the transfer in præsenti of property or the rendering in præsenti of services. *Drummond's case*, 4 Ch. 722, followed.

Minty, for creditors. *Wilson* and *Cameron*, for liquidator. *Anderson* and *Fullerton*, for Jones and Moore.

Bench and Bar.

THE LATE HON. A. C. KILLAM.

The profession of the Province of Manitoba have worthily referred to the death of the Chief Commissioner of the Board of Railway Commissioners.

The Benchers of the Law Society, in special meeting assembled, passed a resolution placing on record their sense of the loss sustained by the country in his death, and desiring to join with his many friends and associates in expressing their sorrow and regret at the unexpected and sudden close of such a distinguished and useful career.

A resolution was also passed by the judges of the Courts of Appeal and King's Bench for Manitoba to the same effect. Amongst other expressions of appreciation of his high character, intellectual capacity and learning said:—"Upon the bench

he proved himself to be an erudite and painstaking judge, whose decisions commended themselves to his brother judges and to the members of the legal profession as models of clear and learned judicial reasoning. His work upon the Board of Railway Commissioners may be characterized as one of national importance. His work in his latest capacity was one of the utmost utility to the public. It will remain a monument to his memory and a model for the future."

Chief Justice Howell at the opening of the spring assizes also took occasion to refer in most appreciative terms to the deceased, and concluded as follows:—"What an example for young men just commencing a professional career. Killam, the friend, the lawyer, the citizen, the judge, the chief justice, the railway commissioner, is gone. Let us hope that the night of death has been followed by a glorious morning."

United States Decisions.

DEATH—Compensation.—Where there was evidence that plaintiff was in normal health at the time of an accident, it is not error to charge that the jury should not consider any previous illness from which she had recovered in determining her compensation. *Jacksonville Electric Co.* v. *Batchis*, Fla., 44 So. Rep. 933.

FORGERY—What constitutes.—To constitute forgery, the false instrument must be one which if genuine would have legal validity; hence, if an instrument be such that, though falsely made, it shews on the face of it that it has no legal validity, it is not the subject of forgery. *Ex parte Farrell*, Mont., 92 Pac. Rep. 785.

HIGHWAYS—Dedication.—Where one who moves his fence back intends to dedicate the space set free to the public, the fact that his motive was to oblige a friend is immaterial. *Tise* v. *Whitaker-Harvey Co.*, N.C. 59 S.E. Rep. 1012.

HOMICIDE—Self-Defence.—The aggressor not reasonably free from fault cannot excuse the killing of his antagonist on the ground of self-defence, unless he in good faith declined the combat and his adversary became the aggressor. *King* v. *State*, Fla., 44 So. Rep. 941.