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EDITORS:
HENRY O'BRIEN, Q.C.,
C. B. LABATT.
A. H. O'BRIEN, M.A.

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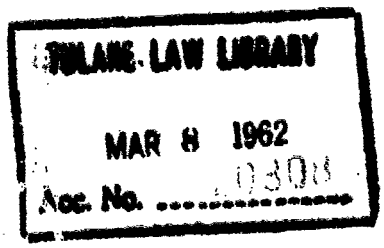

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Canada Law Journal.

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The Yukon Territory, as defined by the Act 61 Vict., c. 6, has been erected into an Admiralty District of the Exchequer Court of Canada, by order of His Excellency the Governor General in Council. The Local Judge, District Registrar, and other officers, have not yet been appointed. Mr. Chas. Morse, B.C.L., senior clerk in the Central Registry of the Exchequer Court, has been appointed Deputy-Registrar of the Court.

Mrs. Merrie H. Abbott was recently elected a prosecuting attorney in the State of Michigan. Her election was contested, and the Michigan Supreme Court decided that she was ineligible for the office, and her election was therefore declared void on the ground that according to the law of Michigan women cannot vote for public offices, such as prosecuting attorney ; and where the law is silent respecting qualifications for office, it must be understood that electors are eligible, but no others. We fear that the electors were making merry with Mrs. Abbott.

No one will question the enterprise of our American cousins. We are glad, moreover, that they know a good thing when they see it, though occasionally it takes them some time to do so. In our issue, for October 16th, we referred to a case on punctuation in the construction of statutes, giving our own summary thereof. We notice that the *Central Law Journal*, on December 1st, copies this summary word for word, leaving out, however, the place where the report of the case is to be found. We are glad to be able to help our brethren in the States editorially, and do not feel at all offended at their taking our work and giving it as their own. We look upon it as a compliment rather than otherwise.

We are indebted to our above contemporary (and are glad to acknowledge the same) for a note on the case of *Rowe* v. *Raper* in the Appellate Court of Indiana, in which it was held that the funeral expenses of a deceased minor are not a charge against his estate where he leaves surviving him a father able to pay them.

The Court says: "The deceased left surviving him a father. The claimant was his stepmother. It is insisted by appellant that the funeral expenses which are the foundation of the claim are not a charge against the estate. This position is supported by authorities." The Court after referring to these authorities cites Schouler on Dom. Rel. sec. 243, where it is stated that "A father is, in general, liable for the funeral expenses of his deceased minor child; citing *Blair* v. *Robinson*, 108 Pa. St. 249; *Sullivan* v. *Horner*, 41 N.J. Eq., 299, 7 Atl. Rep. 441. The foregoing is the general rule. When the parent has not property of his own to support his minor child, resort may be had to the property of the child for such purpose, but such condition must first be made to appear before such a resort can be had. With equal reason, a claim may be enforced against the estate of the minor for funeral expenses when the father is unable to pay them."

We may also observe that in a certain case in Ontario (*Wright* v. *McCabe*, 35 C.L.J. 233; 30 O.R. 396) the duty of a parent to support his infant child is declared not to be a legal liability, but only a moral one. Sec. 210 of the Criminal Code, however, seems to assume that in some parts of the Dominion it is a legal debt. We might also in connection with the above call attention to a case (*Re Gibbons*, noted post p. 23) wherein it was held, that where on the death of a married woman, whose husband was insolvent, and had left for parts unknown, a friend of the wife's assumed responsibility for the funeral expenses, the payment thereof was held to be a charge on the wife's estate and to be payable thereout.

In these days of accident insurance, a branch of business coming more and more into notice by reason of the various modern devices for shortening life, such as bicycles and other matters of ninteenth century enterprise, it may be of interest to note the following case, referred to by one of our American Exchanges. The deceased was insured against a "bodily injury sustained by external violence and accidental means." It was said that his death was caused by "hard pointed masses of food which perforated the intestines." A Judge of the United States Circuit Court of Vermont held that this was an accidental injury within the meaning of the policy. The food, he said, "was merely placed

where it accidentally caused the injury and that if an accident that persons of ordinary strength would stand, should kill a weak person, or a person of ordinary strength at a weak place, the accident, and not the weakness, should be said to have killed." If death were caused by the accidental swallowing of a bone or some other hard substance we could understand this decision but if, as seems to be indicated, the deceased were trying an experiment with substances more usually found in the stomach of an ostrich we should be inclined to think he was himself inviting his own funeral. Insurance companies can hardly be expected to contemplate the contingency of the assured eating "hard pointed masses of food which perforate the intestines."

A DOMINION OR ONTARIO CHARTER?

Company promotion has with the arrival of better times been increasing enormously in Canada, and during the past few months the wave has attained such proportions in Ontario, that it may be stated by way of illustration on the best authority that the fees received by the Provincial Secretary during the month of October alone amounted to more than the previous average for a whole year.

This increase, of course, is chiefly due to the outburst of commercial activity, but an explanation may also be found in the easy and efficient machinery provided by the Ontario Government, which affords all the advantages of the registration system, while control is still retained.

The question is frequently asked by company promoters as to the comparative advantages of incorporation under a Dominion or Ontario charter respectively, and while some of the main features and differences may occur at once to the mind it has seemed to the writer that at the present time it may be of some practical service to set out briefly what the respective advantages and disadvantages are in the main.

1. Time: If this is of importance to the promoters it should be noted that an advertisement of an intended application for a Dominion charter must be inserted in the *Canada Gazette* for six insertions or nearly six weeks previous to the application, while in Ontario no such advertisement is now necessary, As a general

rule it may be said that a Dominion charter can be obtained in about two months and an Ontario charter in three weeks.

2. Expense: The fee for a Dominion company with a capital of $1,000,000 or upwards is $500, for an Ontario company $385. There is, however, an additional expense required by the Dominion regulations for advertising, etc., which considerably increases the cost.

3. Value of the Charter: The constitutional question is sometimes discussed as to the respective rights of the Provinces and the Dominion to give charters under the B.N.A. Act, but this is not very seriously regarded. In many cases, however, it is not improbable that a Dominion charter would be regarded as of greater value in England or foreign countries than a charter with apparent Provincial limitations and this may, in some respects, be a factor of some importance.

4. Payment of Stock: Under the Dominion Act R.S.C., c. 119, before letters patent will issue not less than half of the total proposed capital stock must be actually subscribed and at least ten per cent. of the stock so taken must be actually paid in. All stock will also be deemed to have been issued and to be held subject to the payment of the whole amount in cash unless otherwise agreed upon by a written contract filed with the Secretary of State before the issue of the shares (sec. 27) a provision similar to that found in the English Act.

Under the Ontario regulations ten per cent. of the stock must be subscribed for (this is a departmental regulation and will not be found in the statute) but nothing need be paid in at the commencement, the only requirement being that ten per cent. of the allotted stock must be called during the first year. If the stock subscribed for is not paid for in cash but is paid for in kind such as good will, patents, plant, business, merchandise, etc., the agreement evidencing such arrangement need not be filed with the Government as under the Dominion Act. There is no section similar to sec. 27 of the Dominion Act.

5. Directors: The Dominion Act requires that the majority of the directors must be residents of Canada; there is no such limitation in the Ontario Act.

6. Annual Statements: Returns of a somewhat long and elaborate nature must be made by every Ontario company to the

Government before the 1st of February in every year—no such returns are required by the Dominion Government.

7. Name: It has been suggested, as pointed out, that an Ontario charter may possibly be confined to provincial objects and it is sometimes difficult to obtain the consent of the Provincial Government to the use of a general expression such as "Canadian" or "Dominion" in the name of the company. There is no statutory enactment as to this, but it is a departmental regulation. It may here be noted that the use of the word "Royal" is not allowed without a special license from the Home office.

8. Preference Stock: The Dominion Companies Act did not provide for a creation of preference stock but this has been remedied by 62 & 63 Vict., c. 40, in a section almost verbatim with the Ontario provision on this point, except that the Dominion Act requires that the meeting authorizing such preference stock must represent two-thirds of the stock of the company.

9. Increase of Capital: A Dominion company may increase its capital when the whole is subscribed and fifty per cent. paid up. An Ontario company may do so when nine-tenths has been subscribed and ten per cent. paid up.

10. Minor Points: (1) A Dominion charter will be forfeited if the business is not entered on within three years or for non-user for same period; in the case of an Ontario charter two years is the time limit.

(2) Both Acts require the use of the word "Limited," but Ontario companies must use the word unabbreviated.

(3) The Ontario Act excludes loan corporations from the operation of the Act while the Dominion Act requires that the capital of a loan company shall not be less than $100,000.

(4) The Dominion Act limits the amount which may be borrowed by a company to seventy-five per cent. of the paid up stock of the company; there is no such limitation in the Ontario Act.

(5) Directors of a Dominion company are liable for wages for six months, but in the case of an Ontario company for twelve months.

(6) Holders of proxies under the Dominion Act must be shareholders, whilst there is no similar restriction in the Ontario Act.

(7) The prospectus of a Dominion company must specify the

contracts entered into by or for the company. As to the prospectus of an Ontario company, see the Directors' Liability Act, R.S.O., c. 216.

The above sketch though not exhausting all the minor differences between the two Acts will perhaps be found to set out in a convenient form the chief points of contrast and those characteristics which may be important to bear in mind in weighing the comparative value of the two charters.

CHARLES MACINNES.

Toronto.

COLLATERAL NEGLIGENCE.

When a principal employs an independent contractor to perform a work and a third party is injured in its performance, through the negligence of the contractor or his servants, such negligence is said to be collateral to the work which the contractor was engaged to do, and the principal is not liable, if he parted with control over the work in course of its being carried out and interfered in no way at any stage of the process. The reason of the rule is that the damage arises from a collateral or casual omission not ordinarily incident to the work.

Like all general rules, however, the rule above stated is subject, to several exceptions Chief among them is the following :—Where the work interferes with the rights of others and thus casts upon the principal the duty of seeing it properly executed, he cannot escape responsibility by delegating the performance of that duty to another. This branch of the doctrine of respondeat superior is thus clearly expressed by Wills, J., in the recent case of *Holliday* v. *National Telephone Company* (1899) 1 Q. B. 227. "There are many cases in which a person who employs another to do the work for him is not exempted from liability for accidents arising out of such work, because he has employed an independent person and has not retained any control over processes or details, nor even interfered in any way with the work at any stage. If a person orders a thing to be done which when done, or as done, is an interference with the safety or rights of another who at the time he is injured is in the exercise of his lawful rights, it is no answer to say, that the person for whom the offending thing has been done has procured it to be done by

virtue of a contract with some one independent of his interference or control. * * * The man who disturbs, or who fails to create, a state of things which other people have a legal right to expect at his hands, is liable for such disturbance or failure. The man who maintains an insecure weight hanging over the heads of passers-by and fails in taking care that it shall not expose them to danger; the man who contracts a right of way, vertically or laterally, which the public have a right to enjoy in all its old height or width, and the man who digs a hole in a place where others have a right to expect no hole, disturbs a state of things to which they have a legal right, and does it at his peril, if an accident happens by reason of what has been done. In the same way, if the hole deprives a neighbouring house of support to which it is entitled, the disturbance of the status quo is at the risk of him who brings it about."

The above case affords a striking illustration of the fact, that while judges may give a clear exposition of the law, they often egregiously err in applying it to the facts of a particular case. The facts were briefly these:—The defendents were lawfully engaged in laying down telephone wires under the pavement of a street. The soldering of the joints connecting the tubes which held the wires was let to an independent contractor. The plaintiff was injured by the explosion of a safety lamp used in soldering, through the negligence of a servant of the contractor. The Deputy Judge of the City of London Court, who tried the case without a jury, gave judgment for the plaintiff for an agreed sum of £25. On appeal, it was held, that the defendants were not liable, on the ground that the negligence of the contractor's servant was collateral to the execution of the work which the contractor was employed by them to do. Wills, J., in delivering the judgment of the court, designates the negligence that wrought the mischief as "about as typical an instance of negligence merely casual, collateral, or incidental, as can well be conceived."

This judgment of the Divisional Court was reversed in the Court of Appeal (1899) 2 Q. B. 392. Lord Chancellor Halsbury at page 399 remarking: "It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that

persons passing along the highway were not injured by the negligent performance of the work."

Lord Justice Smith, at page 400, gave his opinion that :—"Since the decision of the House of Lords in *Hughes* v. *Percival*, 8 A. C. 443, and that of the Privy Council in *Black* v. *Christchurch Finance Co.* (1894) A. C. 48, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any danger to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Higmore was engaged to perform."

In considering the cases on this branch of the law, the following general rules should be borne constantly in mind :—First—When a contractor is employed by a principal to do a work, lawful in itself, not necessarily involving injurious consequences to others, and damages result to another, from the negligence of the contractor or his servants, the contractor and not the employer is liable. Second—On the other hand, if the work to be done is of such a description as requires the consent of constituted authority for its performance, or of such a nature as injurious consequences must be expected to arise, unless means are adopted to prevent them, the employer is bound to see to the doing of that which is necessary to prevent the mischief, and cannot escape liability, if injury is sustained by a third party, by a transference of that duty.

Collateral negligence as a distinct branch of law did not take shape and become definitely settled until 1840, in the leading case of *Quarman* v. *Burnett* 6 M. & W. 499. Lord Blackburn in reviewing the cases in *Dalton* v. *Angus* thus refers to it :—"Ever since *Quarman* v. *Burnett*, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant exists between them." A consideration of the leading cases, during the past hundred years, shows how gradually its underlying principles have been evolved, until now they are firmly bedded in our legal system. In *Bush* v. *Steinman*, (1799) 1 B. & P. 404, the owner of a house employed a surveyor to do some work upon it ; the surveyor in

turn contracted with another to do the job, who again contracted with still another to furnish the materials. The servant of the last sub-contractor brought a quantity of lime to the house and left it on the road, by which the plaintiff's carriage was overturned and plaintiff injured. Under this state of facts, the court unanimously held, that he who had work going on for his benefit, and on his premises, was civilly answerable for the acts of those engaged in this work. The reason of the decision was, that it should be intended by the court, that he had control over all persons who worked on his premises, and he should not be allowed to discharge himself from that intendment of law by any contract of his own. Eyre, C.J., had misgivings as to the decision, feeling a difficulty in stating the precise principle on which the judgment was founded, yet he was satisfied with the opinion of his brothers. The ratio decidendi, in this case, proceeded rather upon the argumentum ab inconvenienti, than sound legal principle —that the remedy should be obvious, and the person injured compelled only to look to the owner of the house and not to enter into the concerns between that owner and other persons.

In 1826, the question was again carefully considered in *Laugher* v. *Pointer* 5 B. & C. p. 547, all of the authorities having been exhaustively reviewed. In this case, the owner of a carriage hired a stable keeper a pair of horses to draw it for a day, the owner of the horses providing the driver, through whose negligent driving injury was done to a horse belonging to a third party. The court was equally divided, Abbott, C.J., and Littledale, J., holding that the owner of the carriage was not liable, Bayley and Holroyd, JJ., contra. Thus the law stood until 1840, when *Bush* v. *Steinman* was over-ruled by *Quarman* v. *Burnett*, 6 M. & W. 499. The facts in the last named case were similar to those in *Laugher* v. *Pointer*. Parke, B., in delivering judgment, said :— "Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant ; * * * and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist ; and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and

his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has consented to do for his benefit."

In *Reedie* v. *The London and North-Western Railway Company* (1849) 4 Ex. 243, the defendants were held not to be liable where the workman of a contractor under the company had, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him, although the company by their terms of agreement had reserved to themselves the power of dismissing any of the contractor's workmen for incompetency.

In *Murray* v. *Currie*, L.R. 6 C.P.D. 24, decided in 1870, Willis, J. said :-"I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong doer, that you must look to the wrong doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable."

In *Bower* v. *Peate* (1876) L.R. 1 Q B.D. 321, the plaintiff and defendant were respective owners of two adjoining houses, plaintiff being entitled for support of his house to defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the same. The contractor undertook the risk of supporting plaintiff's house, as far as might be necessary during the work, and to make good any damage arising therefrom. Plaintiff's house was injured during the progress of the work owing to the means taken by the contractor to support it being insufficient. The court held defendant liable, on the ground, he was bound to see to the doing of that which was necessary to prevent the mischief, and he could not relieve himself of his responsibility by employing some one else to do what was necessary to prevent the act he had ordered to be done from becoming wrongful.

In *Hughes* v. *Percival* (1883) 8 Ap. Cas. 443, the defendant pulled down his house and had it rebuilt on a plan which involved in it the tying together of the new building and the party wall

which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The plaintiff's house was destroyed by the negligent performance of the work which had been let to a contractor. It was held, that the defendant could not shift the liability the law cast upon him of seeing that reasonable care and skill were exercised in the operation. Lord Fitzgerald, in his judgment, asks:—"What is the law applicable?" "What was the defendant's duty?" And then proceeds to answer these questions in manner following: "The law has been varying somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another."

Pickard v. *Smith* 10 C.B.N.S. 470, was decided upon a like principle, as was also *Black* v. *The Christchurch Finance Co., Limited* (1894) L.R. App. Cas. 48. This last named action was brought to recover damages for the act of a contractor of the defendant company in negligently and improperly lighting a fire on its lands and permitting it to spread to the plaintiff's lands, causing injury. Lord Shand, in delivering the judgment of the House of Lords, said:—"The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (sic utere tuo ut alienum non lædas). And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that those are observed, otherwise he will be responsible for the consequences."

In *Hardaker* v. *Idle District Council* (1896) 1 Q.B. 335, the defendant council employed a contractor to construct a sewer for it. Through the neglect of the contractor in its performance the plaintiff was injured. The court held that the council owed a duty to the public (including the plaintiff) so to construct it

as not to injure anyone, and must respond in damages for the injury done.

A like principle was adopted in *Penny* v. *Wimbledon Council* (1898) 2 Q.B. 212 : 34 C.L.J. 686. The contractor employed by the defendant to lay down a sewer in a street, left a heap of excavated soil on the highway unprotected and unlighted, over which the plaintiff in the dark stumbled and was hurt. Judgment passed for the plaintiff. At page 217 Bruce, J., is reported as saying :—"The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken cause damage to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." The judgment of Bruce, J., was affirmed on appeal (1899) 2 Q.B. 72 ; 34 C.L.J. 671.

The Lark (1899) Q.D. 74 followed *Hardaker* v. *Idle District Council* and *Penny* v. *Wimbledon Council.*

The main proposition, that one is not liable for the negligence of a contractor employed by him is subject to the further exception, that where a statute confers a power and imposes a duty as to the manner of its execution, and by neglect injury is caused, the party aggrieved has his remedy against the employer. This branch of the law was very clearly laid down by Wilde, B., in *Hole* v. *The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488. In this case Parliament empowered the defendant company to construct a railway bridge across a navigable river. To do this work, the defendant employed a contractor. From some defect in its construction, it could not be opened, and the plaintiff's vessel was prevented from navigating the river. It was held the defendants were liable for the damage caused to the plaintiff. The learned Baron in his judgment said :—"The distinction appears to me to be that, when work is being done under a contract, if any accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be

done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it. The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was under their authority. In the course of executing their orders, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a land owner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form." In 1864, the like doctrine was held in *Gray* v. *Hubble* 5 B. & S. 970. The defendant was authorized by constituted authority to cut a trench across a highway, for the purpose of making a sewer from his premises. The plaintiff fell into the trench and was injured. It was held the defendant was liable, notwithstanding he had employed an independent contractor to do the work, on the ground that a statutory obligation was imposed upon him and the duty rested with him to see it properly executed.

A further exception to the general rule arises where the act is wrongful or unlawful, and mischief arises from the negligence or misconduct of the contractor. In such a case the employer is liable for the injury done. Lord Campbell, C.J., in delivering judgment in *Ellis* v. *The Sheffield Gas Consumers Company* 2 E. & B. 767, 1853, said :—"But in the present case the defendants had no right to break up the street at all; they employed Watson Brothers to break up the streets and in so doing to heap up the earth and stones so as to be a public nuisance; and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done."

The following rules may be fairly drawn from the decided cases on this branch of the law :—

1. That an employer, who engages an independent contractor to do work for him, is not, as a general proposition, liable for the contractor's negligence in its execution, if a third person sustains

injury by the negligent conduct of the work. To this general rule, however, there are several exceptions.

2. The employer, on the contrary, is liable, if he actively interferes or assumes direct and personal control over the contractor or his servants, in the execution of the work, on the principle of the well recognized rule of respondeat superior. A mere right to superintend or stop the work if ill-done, or the power to reject it if not rightly done, or the power to discharge the contractor's workmen for incompetency, will not render the employer answerable for the contractor's fault or negligence.

3. The employer is also liable, in case injury is done to a third party by the negligence of the contractor, if the work is of such a character as casts upon the employer the duty of seeing it properly executed.

4. The like responsibility rests upon the employer, as stated in last paragraph, if the work is such as likely to cause damage to others unless effectual means are taken to guard against it.

5. The employer is also liable for injury to a third party by the negligence of the contractor, if the work is unlawful in itself, or is done in contravention of statutory or municipal authority, where leave is required first to be had of such authority.

6. Where a statute or municipal authority empowers the execution of a work and imposes a duty as to the manner of its execution, an obligation rests upon the employer to see it properly done and he cannot escape responsibility, if a third party is injured by the negligent act of a contractor who is entrusted with its performance.

7. If the work necessarily results in the creation of a nuisance or makes a place dangerous which before was safe, then, regardless of the relation which exists between them, the employer is liable for the breach of duty on the part of the independent contractor.

8. Some judges, by virtue of the decision in *Reedie* v. *The London and North Western Railway Co.* 4 Exch. 244, have held, that even in a case where a duty is cast upon an employer to see the work properly done, he is not liable for an act of negligence, causing injury to a third party, carelessly done by an independent contractor or his servants, which was a mere incident in the course of carrying on the operation and left no tangible result upon the work when completed. This question, however,

has been settled beyond doubt by the judgment of the court of last resort in *Holliday* v. *National Telephone Company* above referred to.

SILAS ALWARD.

St. John, N.B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

INSURANCE OF GOODS IN TRANSIT—POLICY—DURATION—CLAUSE ALLOWING DURATION.

In *Hyderabad Co.* v. *Willoughby* (1899) 2 Q.B. 530, the plaintiffs sought to recover on a policy insuring goods during their transit from India to London. The goods in question consisted of a box containing bars of bullion, and the insurance was "at and from Boodinni to London," including "all risks of every description from the mines by escort to the railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay, thence to London." The policy contained a clause covering the assured in the event of deviation or change of voyage, at a premium to be hereafter arranged." When the box arrived at Raichur in charge of the plaintiff's servant, the railway company improperly refused to accept it except at the owner's risk. The plaintiff's servant was on his way to a place called Secunderabad 170 miles from Raichur, and off the route from that place to Bombay, and took the box there where it was kept for a month in the plaintiff's safe, pending negotiations with the railway company. The company having ultimately agreed to accept the risk of carriage, the box was taken to Raichur, and from thence was forwarded by the prescribed route to London. On its arrival there it was discovered that one of the bars of gold had been abstracted, and Bigham, J., who tried the case found that it had been in fact stolen while the box was in the plaintiff's office at Secunderabad; and the question therefore was whether this was a loss covered by the policy. Bigham, J., held that the deviation was a necessary one under the circumstances, and that the box must be considered still to have been in transit while at Secunderabad, but that an additional premium was payable in respect of such deviation.

COUNTY—LIABILITY FOR EXPENSES OF TROOPS SUMMONED TO PRESERVE PEACE.

In *The Queen* v. *Glamorgan* (1899) 2 Q.B. 536, the Court of Appeal (Smith, Williams and Rigby, L.JJ.) have affirmed the judgment of the Divisional Court (1899) 2 Q.B. 26 (noted vol. 35, 670) to the effect that a county is not liable to defray the expenses of troops, whose aid is obtained by the municipal authorities for the purpose of preserving the peace.

LOST WILL—PROBATE—PRACTICE—PROOF OF LOST WILL ON MOTION—NEXT OF KIN, CONSENT OF, DISPENSED WITH.

In the goods of Apted (1899) P. 272, was an application to prove a lost will on motion, and without notifying or procuring the consent of all of the next of kin. The applicant was the universal legatee and sole executrix named in the alleged will. The estate was of small value, in all £196 5s. Some of the next of kin (a brother and three sisters) had been notified, and made no objection. Barnes, J. entertained the motion, and dispensed with notice to the other next of kin, and granted administration with the will, as contained in the copy annexed, until the original shall be found.

DESERTION—HUSBAND AND WIFE—HUSBAND'S REFUSAL TO LEAD A CHASTE LIFE.

Sickert v. *Sickert* (1899) P. 278, was a suit for divorce on the ground of desertion. The husband had been guilty of continuous acts of adultery, and refused to give up that course of life, in consequence of which the plaintiff refused to live with him, and it was held by Barnes, J. that such conduct on the part of the husband amounted in law to desertion by the husband.

COMPANY—PROMOTERS OF COMPANY BEING ALSO VENDORS—CONTRACT SALE BY DIRECTORS OF ONE COMPANY TO THEMSELVES AS DIRECTORS OF ANOTHER COMPANY—RESCISSION.

Lagunas Nitrate Co. v. *Lagunas Syndicate* (1899) 2 Ch. 392, is a case which gave rise to a difference of opinion in the Court of Appeal. The action was brought by the plaintiff company to rescind a contract of sale under the following circumstances. The plaintiff company was promoted and formed by the directors of the defendant syndicate, for the purpose of purchasing and working nitrate works of the syndicate. The articles of association were prepared by the directors of the syndicate, and stated specifically that the

directors of the plaintiff company nominated in the articles were also directors of the syndicate. The directors of the syndicate also prepared the purchase contract now sought to be rescinded, and affixed the seal of the syndicate and company thereto. Two years after the completion of ıe contract, certain of the shareholders of the plaintiff company, being of opinion that the property had been purchased at an over value, appointed an independent board of directors, who, after an investigation, authorized the present action, claiming rescission of the contract, or damages for misrepresentation, but not alleging fraud. From the date of the contract, and up to the trial of the action, the plaintiff company had carried on business and worked the property the subject of the contract. Romer, J. who tried the action, directed, as against the defendant syndicate, an inquiry as to damages sustained by the plaintiffs by reason of certain of the property purchased not being in complete working order at the date of the contract as represented, but he was of opinion that on the facts the plaintiffs were not entitled to a rescission of the contract and he dismissed the action as against the directors of the defendant syndicate. On appeal from this judgment the majority of the Court of Appeal (Lindley, M.R. and Collins, L.J.) held that at the time of the contract the plaintiff company had notice, by its memorandum and articles of association, that its directors were also vendors or agents of the vendor syndicate, and the mere fact that its directors did not constitute an independent board of directors was not a sufficient ground for setting aside the sale. Also that there had been no misrepresentation or concealment of any material fact at the date of the contract, and they also considered that although the contract and prospectus were misleading in certain particulars which would have entitled the company to repudiate the contract, yet owing to the alteration of the property by its being subsequently worked by the company, the position of the parties had been so changed that they could not be restored to their original position. They also held that the directors of the syndicate had not been guilty of such negligence or breach of trust as to render them liable in damages to the company for the loss sustained. Rigby, L.J., on the other hand, dissented from the other members of the court, and was of opinion that the directors of the syndicate in promoting the plaintiff company and the purchase in question occupied a fiduciary position in regard to the plaintiff, and that the

company was entitled to rescission on the ground that the directors could not validly bind the company by a contract for the sale of their own property, without the company having independent advice, and that the notice in the memorandum and articles of association of the dual character in which the directors were acting, was ineffectual to make valid a contract entered into under such circumstances, and that the company had not lost its rights to rescission by reason of delay, because the time did not run against the plaintiff company whilst it was dominated by the directors of the syndicate, nor yet by the alteration of the property by its working, which he held to be the act of the vendor syndicate by its directors.

COSTS - APPEAL AS TO COSTS—DISCRETION PRACTICE—JUDICATURE ACT 1873, (36 & 37 VICT., C. 66) S. 49 -RULE 976 -(ONT. JUD. ACT, S. 72)—(ONT. RULE 1130.)

Bew v. *Bew* (1899) 2 Ch. 467, was an action br ught by a husband against his wife to obtain a declaration that in respect of certain moneys invested on mortgage in the wife's name, she was trustee thereof for the plaintiff. The wife denied the trust, and died pending the action, and the suit was revived against her executors. Kekewich, J. who tried the action, made the declaration asked by the plaintiff, but ordered that the defendant's costs (including the costs, charges and expenses of the deceased wife) as between solicitor and client, should be paid out of the trust fund which had been paid into court. The plaintiff appealed from so much of the judgment as gave the defendants as trustees, costs charges and expenses of the action as between solicitor and client, on the ground that the wife had denied the trust, and that the judge at the trial had assumed that the costs were not in his discretion. The Court of Appeal (Lindley, M.R. and Jeune, P.P.D. and Romer, L.J.) held, that under the rule laid down in *The City of Manchester*, 5 P.D. 221, the appeal would lie without leave, on the ground that although the costs were in the discretion of the judge at the trial, yet he had disposed of them on the supposition that his discretion was excluded, and on this point they refused to follow *Charles* v. *Jones*, 33 Ch. D. 80, but the Court of Appeal thought that where an order is made for payment of "costs, charges and expenses" no appeal can be had as to the costs, if the order as to charges and expenses is not appealable. In the result the judgment of Kekewich, J. was varied as to costs, by directing

the defendants to pay the plaintiff's costs of the action, and limiting "the costs and charges and expenses" to be paid out of the fund to those incurred by the deceased wife as trustee of the fund.

MORTGAGE—COLLATERAL ADVANTAGE—CLOG ON REDEMPTION.

Santley v. *Wilde* (1899) 2 Ch. 474, is another decision bearing on the question of the right of a mortgagee to stipulate for collateral advantages over and above the repayment of his principal and interest. In this case the Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) have seen fit to reverse the decision of Byrne, J. (1899) 1 Ch. 747, (noted ante vol. 35, p. 486). The stipulation objected to as being a clog on the equity of redemption was one for the payment of one-third of the profits of the mortgaged property (a theatre), in addition to the repayment of the principal advanced and interest thereon at 6 per cent. in twenty equal quarterly payments Byrne, J. held that the stipulation for the payment of the profits was invalid, but the Court of Appeal considered the case covered by *Biggs* v. *Hoddinott* (1898) 2 Ch. 307 (noted ante vol. 34, p. 773), and upheld the stipulation. It may be observed that the mortgage security was a leasehold, and was of a somewhat risky character, a fact which is commented upon by Lindley, M.R. and Jeune, P.P.D. as justifying the mortgagee's bargain, but, in the absence of any unfair dealing or over-reaching by a mortgagee, the question of the character of the security may be found to have very little to do with the legal validity of such contracts.

COMPANY—SHARES ISSUED AS FULLY PAID—SUFFICIENCY OF CONTRACT FOR PAYMENT FOR SHARES OTHERWISE THAN IN CASH—COMPANIES ACT, 1867 (30 & 31 VICT., C. 131) S. 25—(R.S.C. C. 119, S. 27.)

In re African Gold Co. (1899) 2 Ch. 480, involved a question as to the sufficiency of an implied contract for the issue of shares as fully paid up, for a consideration other than cash. Wright, J. held that the filed contract need not disclose the agreement in all its details, but that the statute (30 & 31 Vict. c. 131) s. 25, (see R.S.C. c. 119 s. 27) is sufficiently complied with if the contract shows the nature of the consideration other than cash, which is to be given. This decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.)

In re Robert Watson (1899) 2 Ch. 509, Kekewich, J. holds that

the nature of the consideration must appear in the contract filed, and not merely by reference therein to some other document which is not filed, e.g. a statement that the consideration is the sale to the company of property the general nature of which did not appear on the face of the contract was declared to be insufficient.

VENDOR AND PURCHASER—TITLE—PRACTICE—VENDORS' AND PURCHASERS' ACT, 1894 (37 & 38 VICT., c. 78), s. 9 (R.S.O. c. 134, s. 4)—FORM OF CONVEYANCE—COVENANTS.

In re Wallis & Barnard's Contract (1899) 2 Ch. 515, was an application under the Vendors' and Purchasers' Act, 1873 (see R.S.O. c. 134, s. 4), in which Kekewich, J., discusses the proper practice to be pursued under the Act. In his opinion, it is not proper to ask the court to decide generally whether a title is good or bad, but merely to present some particular question arising on the title for the decision of the court, and it is quite obvious that if it were otherwise, the court would practically be turned into a Master's office, and he holds that applications asking a declaration that a vendor has shewn a good title, or has not shewn a good title, are unwarranted by the Act. Such declarations, he considers, can only be properly made in specific performance actions. The present application, he held, was properly framed in that it simply asked the court to decide whether or not the purchaser was entitled to a particular covenant. The contract expressly stated that the land was sold subject to a certain restrictive covenant, but it did not refer to another restrictive covenant to which the land was also subject, and which the vendor now claimed that the purchaser had notice that the land was subject to; but Kekewich, J., held that even if he had, he was entitled to a conveyance in accordance with the terms of his contract, and subject only to the restrictive covenant therein mentioned.

COMPANY—ACTION AGAINST DIRECTOR—DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT., c. 64), s. 3—(R.S.O. c. 216, s. 4.)

In *Thomson* v. *Clanmorris* (1899) 2 Ch. 523, it became necessary to determine whether an action against a director to recover compensation for loss occasioned by misrepresentation in a prospectus, brought under the Directors' Liability Act, 1890 (53 & 54 Vict., c. 64), s. 3, (R.S.O. c. 216, s. 4), was "an action for penalties or

damages given to the party aggrieved by a statute" within the meaning 3 & 4 Wm. IV., c. 42, s. 3. Kekewich, J., held that it was not, and that the statute in question applied only to actions for damages in the nature of penalties, and not to actions, such as the present, to recover compensation for loss sustained by parties who have subscribed on the faith of untrue statements in a prospectus.

MORTGAGE—"ALL MY REAL AND PERSONAL ESTATE"—UNCERTAINTY.—PUBLIC POLICY—VALIDITY.

In re Kelcey, Tyson v. *Kelcey* (1899) 2 Ch. 530, was an action for administration by a creditor of a deceased person in which the validity of a mortgage executed by the testator on "all my real and personal estate" was disputed, and it was contended that the mortgage was void for uncertainty, and as being against public policy, but Kekewich, J., upheld the validity of the mortgage.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

Que.] LAFRANCE *v.* LAFONTAINE. [Oct. 3.

Estoppel—Acquiescement—Flotable waters—Waterpower—River improvements—Joint user—Easement—Arts. 400, 549, 550, 551 and 1213 Civil Code of Quebec.

In a petitory action by the plaintiffs for declaration of title to a parcel of land on the bank of a flotable river, with certain water powers appurtenant, and the dams, mill-race and privileges thereto belonging, free and clear from any servitude or right of co-ownership, it appeared that the proprietor of the land adjoining plaintiff's, on the lower side, had acquired it for manufacturing purposes, and for a number of years had taken his waterpower through a flume constructed on the river bank in continuation of the plaintiffs' mill-race which brought the water from the dam to the plaintiffs' mills and that, in several deeds and written agreements, there had been acknowledgments of the right of owners of the lower lands to use this water subject to the charge of defraying an equal share of the expense of keeping up the constructions incidental to the utilization of the

waterpower and that both proprietors had, for a number of years, contributed equally towards such expenses.

Held, affirming the judgment appealed from, that, whether the rights so recognized constituted a servitude or a right of co-ownership in the lands upon which the constructions had been erected the plaintiffs had no exclusive right to the enjoyment thereof as against the owner of the lands although they were absolute owners of the strip of land on which the constructions had been made. Appeal dismissed with costs.

Lafleur, Q. C., and *Guillett* for appellant. *Belcourt*, Q. C., and *R. S. Cooke* for respondent.

Quebec.] HONAN *v.* BAR OF MONTREAL. [Oct. 24.

Bar of Province of Quebec—Discipline—Advocates—Want or excess of jurisdiction—Irregular procedure—Domestic tribunal—Powers—Arts. 3504 et seq. R.S.Q. 58 Vict., c. 36 (Q.).

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witness had been examined upon oath during the inquiry, and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec.

Held, affirming the judgment appealed from (Q. R. 8 Q. B. 26) that the local Council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession, notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the council of the bar had complete jurisdiction; further a writ of prohibition does not lie to prevent the execution of a sentence of suspension pronounced by the council of a local section of the Bar of the Province of Quebec against a member of that section where the corporation in the exercise of its disciplinary powers had acted within the jurisdiction given to it by statute; and that the omission to preserve a complete record of the proceedings upon the inquiry of the council in the matter or to take written notes of the evidence of witnesses adduced constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition. Appeal dismissed without costs.

McDougall, Q.C., for appellant. *Globensky* for respondent.

Province of Ontario.

COURT OF APPEAL.

HILLIKER *v.* KNIGHTS OF THE MACCABEES.

Benevolent society—Non-payment of dues—Forfeiture of benefits—Life insurance.

Upon the construction of the special rules of a benevolent society, BURTON, C.J.O., and MACLENNAN, J.A., held that a member had, in consequence of non-payment of dues by him, ceased to be a member and had forfeited his right to benefits, while OSLER and MOSS, JJ.A., took the contrary view. In the result, therefore, the judgment of BOYD, C., in the plaintiff's favour, was affirmed. But see 29 S.C.R. 397.

J. A. Paterson for appellants. *Ball*, Q.C., and *R. N. Ball* for respondent.

HIGH COURT OF JUSTICE.

Trial of Actions.

Meredith, C.J.] EWING *v.* HEWITT. [June 19, 1899.

Negligence—Trap-door in sidewalk.

The plaintiff, while walking on the sidewalk in front of the defendant's premises, tripped over a hinge projecting an inch above the sidewalk and broke his leg. The hinge was placed upon the sidewalk by the predecessor in title of the defendant, and formed a portion of two iron doors covering an area under the sidewalk, and used by the defendant for the purpose of getting access to her cellar. A former action brought against the City of Toronto, in which indemnity was claimed over by the city against the present defendant, having failed, in consequence of the plaintiff having failed to establish notice to the city of the alleged obstruction, and the jury having found in the present case that the hinge constituted an obstruction,

Held, that the plaintiff was entitled to succeed, and that the failure in the former action was no bar to his right to recover in the present action.

John MacGregor and *R. G. Smyth* for plaintiff. *A. H. Marsh* and *A. Cameron* for defendant.

Rose, J.] RE GIBBONS. [Sept. 30, 1899.

Funeral expenses—Payable by friend—Charge on estate.

Where on the death of a married women, whose husband was insolvent, and had left for parts unknown, a friend of the wife's assumed responsibility for the funeral expenses, the payment thereof was held to be a charge on the wife's estate and to be payable thereout.

John Hoskin, Q.C., for administrator and infant. *C. J. Holman*, Q.C., for creditors.

Boyd, C.] FAYNE *v.* LANGLEY. [Oct. 28, 1899.

Company—Assignment for the benefit of creditors—President and vice-president—Wages—Priority.

Claims for arrears of salary made by persons occupying the position of president and vice-president of a company, such salary being made payable under resolutions duly passed therefore, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors.

Shepley, Q.C., and *F. C. Cooke* for plaintiffs. *W. H. Blake* for defendants.

Ferguson, J.] LILLIE *v.* WILLIS. [Nov. 10, 1899.

Will—Devise over in case devisee dies previous to the death of two parties—Death of one—Estate in fee to devisee.

A testator devised all her real and personal estate to her son in fee, and provided, in case (the son) should die without issue, previous to the death of "my brother and sister" that they should take certain interests. The sister died in the lifetime of the son.

Held, that as the event, the death of the son previous to the death of both brother and sister could not happen the son took an estate in fee simple.

Geo. Wilkie, for the plaintiffs. No one for the other parties.

Divisional Court.] REGINA *v.* THE T. EATON CO. [Nov. 14, 1899.

Trade description—False application of—Quadruple plate—Evidence.

The defendants by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the regular price thereof was $12.00 a set but would be sold for $6.00. The purchaser of one of the sets, before making his purchase, inquired, and was informed, that it was one of the tea-sets advertised, and that the advertisement could be relied upon.

Held (ROSE, J., dissenting), that the use of the words "quadruple plate" in the advertisement was an application of false trade description, in that such goods could not properly be described as such, and that there was evidence to shew that the advertisement applied to these goods.

J. R. Cartwright, Q.C., for Crown. *J. J. Maclaren*, Q.C., for defendants.

Boyd, C.] [Nov. 30, 1899.

WARD *v.* TOWNSHIP OF WELLAND.

Municipal corporations—Money by-laws—Recital of existing debt—Invalidity—R.S.O., c. 223, ss. 384, 685 (2).

The Municipal Act, R.S.O., c. 223, by s. 685 (2), after declaring that debentures issued under local improvement by-laws of a municipality, on

the security of special assessments therefor, form no part of the general debt of such municipality, provides that it shall not be necessary to recite the amount of such local improvement debt in any by-law for borrowing money on the credit of the municipality, but that "it shall be sufficient to state in any such by-law, that the amount of the general debt of the municipality as therein set forth" (pursuant to sec. 384 (10)) "is exclusive of local improvement debts secured by special Acts, rates or assessments."

Held, that this concluding clause is directory only, and the omission to observe it will not alone invalidate the by-law.

Bicknell, for the plaintiff. *German*, Q.C., for the defendants.

Boyd, C.] ONTARIO MINING CO. *v.* SEYBOLD. [Dec. 2, 1899.

Indians and land reserved for Indians—Surrender of Indian lands—Constitutional law—Crown title—Precious metals—B.N.A. Act, s. 109.

By the North-West Angle Treaty, No. 3, whereby certain Indian territory was surrendered to the Dominion Government in 1873, certain lesser reserves in the surrendered lands were to be defined and set aside, and thereafter to be administered and dealt with by the Dominion for the benefit of the Indians making the surrender. It was also provided that lesser reserves might be sold, leased or otherwise disposed of by the Dominion for the use of the Indians, their consent being first obtained. One of such lesser reserves so set apart was known as 38 B., and in 1886, some 600 acres of it were surrendered to the Queen under the Dominion Indian Act of 1880, in trust to sell the same upon such terms as the Dominion Government might deem most conducive to the welfare of the Indians, and to hold the proceeds in trust for the Indians. Part of this 600 acres, being the lands in question, the Dominion Government patented to the plaintiff. But the defendants asserted title in fee simple to the same land by virtue of a provincial patent granted in 1899. Moreover, in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be there after delimited.

Held, that the effect of the surrender in 1886 was to leave the sole proprietary and present ownership in the Crown as represented by the Ontario Government, and from it alone could an estate in fee simple be obtained; and although the title of the Crown to the precious metals is distinct from its title to the land, and rests on the royal prerogative, still the beneficial interest therein being vested in the province of Canada at confederation, by virtue of 9 Vict., c. 114 (C.), passed by s. 106 of the B.N.A. Act to Ontario. With these royal mines the Indians had no concern; nor could the Dominion Government make any valid stipulation with them in 1873, which could affect the rights of Ontario.

Plaintiffs' action dismissed with costs, and the Dominion patent held invalid.

Christopher Robinson, Q.C., and *J. Bicknell*, for the plaintiffs. *J. M. Clark*, and *R. U. Macpherson*, for defendants other than Seybold. *L. G. McCarthy* and *Stewart*, for defendant Seybold.

Boyd, C., Ferguson, J.] QUEEN *v.* LANGLEY. [Dec. 2, 1899.

Municipal corporations -- By-laws — Transient traders — Sale · Trading stamps—Conviction -R.S.O., c. 223, s. 583, sub-s. 30, 31.

The defendant entered into an arrangement with various retail merchants by which each of them was to receive from him a quantity of "trading stamps" (the property in which, however, was to remain in him), and to pay him fifty cents per 100 of such stamps received, and to give one of these stamps to each customer who purchased for cash ten cents worth of goods, while he, on his part, was to advertise them in certain directories to be distributed by him and also in newspapers. A blank space was left in these directories for pasting in such stamps, and every customer of any of the merchants who brought to the defendant one of the directories with 999 stamps pasted in it was entitled to receive in exchange any one he might select of an assortment of goods kept in stock by the defendant. Apart from this these goods were not for sale.

Held, that these transactions did not constitute a selling or offering for sale by the defendant within the meaning of a municipal by-law, passed under R.S.O., c. 223, s. 583, sub-s. 30, 31, the stamps delivered to the defendant in exchange for his goods being of no value to him. The essence of sale is transfer of property from one person to another for money or money's worth.

J. B. Clarke, Q.C., for defendant. *Aylesworth*, Q.C., for the prosecutor.

Meredith, C.J., Rose, J.] STIRTON *v.* GUMMER. [Dec. 5, 1899.

Libel - Evidence—Admissibility—Previous writings — Provocation - Mitigation of damages—Meaning of words.

In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff;

Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages. *Percy* v. *Glasgow*, 22 C.P. 521, followed.

Held, also, per ROSE, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were admissible too, as furnishing provocation for the second of the alleged libels; MEREDITH, C.J., contra.

In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump.

Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up."

Riddell, Q.C., and *H. Guthrie* for plaintiff. *King*, Q.C., for defendant.

Divisional Court.] REGINA *v.* IRELAND. [Dec. 5, 1899.

Intoxicating liquors—Unlicensed premises—Search for liquor—Right of inspector to take stranger with him—Necessity for warrant—Proof of liquor being sold—Liquor License Act, R.S.O., c. 245, ss. 130, 131.

The right of entry under s. 130 of the Liquor License Act, R.S O., c. 245, into any inn, tavern, etc., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable, or inspector;" and it is only under s. 131, on the procuring a warrant as therein provided, that the officer, etc., can take with him a person not being one of those named. Where therefore a license inspector, in proceeding to search the defendant's premises for liquor, took with him a person not being one of those so named, and without having procured a warrant, his act was illegal, and the defendant justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed.

The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold or reputed to be sold therein was the statement of the inspector that the defendant's bar-room remained the same as before, *i.e.*, the expiry of his license.

Per MEREDITH, C. J. This was not sufficient to satisfy the requirements of the section; and under the circumstances of this case an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place, or was about to take place, was not tenable.

Haverson for applicants. *Langton*, Q.C., contra.

Meredith, C.J., Rose, J.] REGINA *v.* SMITH. [Dec. 5, 1899.

Municipal corporations—By-law—Regulation of hawkers—R.S.O., c. 223, s. 583, s.-s. 14—Proviso—Negativing exception—Conviction—Quashing—Costs.

A by-law of a County Council recited the provisions of sub-s. 14 of s. 583 of the Municipal Act, R.S.O., c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in the county without a license obtained as in this by-law provided"; but the by-law contained no such exception as is mentioned in the proviso to sub-s. 14, in favor of the manufacturer or producer and his servants.

Held, that the by-law was ultra vires of the council, and a conviction under it was bad.

Held, also, following *Regina* v. *McFarlane* (1897) 33 C.L.J. 119, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not show whether or not the defendant's act came within it. The conviction was therefore quashed, but costs were not given against the informant.

Trial of actions—Meredith, C.J.] [Dec. 13, 1899.

MONTGOMERY *v.* RUPPENBURG.

Specific performance—Lands abroad—Foreign plaintiff—Jurisdiction.

The plaintiff, a resident of Buffalo, agreed in writing with the defendant to exchange certain lands situate in Buffalo for land of defendant situate in Ontario, and now brought this action for a specific performance of this contract.

Held, that the plaintiff having brought his action in this Court and thereby submitting to its jurisdiction, the Court had jurisdiction to decree specific performance.

Collier and *Morwood* for the plaintiff. *L. C. Raymond* for the defendant.

Meredith, C.J.] [Dec 13, 1899.

IN RE MEDLAND AND CITY OF TORONTO.

Municipal corporations—Local improvements—Block pavement—Liability to repair—Reconstruction—R.S.O., c. 223, s. 666—62 Vict., sess. 2, c. 26, s. 41.

A city corporation having, by law passed in 1888, adopted the local improvement system, a pavement was constructed as a local improvement in 1891, composed of cedar blocks, circular in form and seven inches in length, laid upon a bed of clean gravel, the roadway having been first graded to the proper level, with wooden kerbing on each side of it. The by-law for levying the assessments stated that ten years was the "lifetime" of the pavement. Secs. 664 and 665 of the Municipal Act, R.S.O., c. 223, authorize the passing of by-laws providing for the construction of local improvements and the making of assessments therefor. Sec. 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repair or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the city generally."

Held, that what the Legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be

responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of construction.

Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public.

Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever it is in such a condition that practical men would say of it that it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 Vict., sess. 2., c. 26.

Semble, that if the dilapidated condition of the payment were due to the municipality having in the past neglected the duty to repair the result would be different, the amending Act of 1899 being applicable to cases where the breach took place before it was passed.

F. A. Hilton and *S. B. Woods*, for applicant. *Fullerton*, Q.C., for the City of Toronto.

Trial of Actions—Meredith, C.J.] [Dec. 13, 1899.

HORSMAN *v.* CITY OF TORONTO.

Taxes and assessment—Arrears of taxes—Goods on premises "purchased" from owner—R.S.O., c. 224, s. 135, sub.-s. 4 (b).

Held, that the goods purchased from a mortgagee of the owner or person assessed were not goods title whereof is claimed by purchase, gift, transfer or assignment from the owner or person assessed" within the meaning of s. 135, sub-s. 4 (b) of the Assessment Act (R.S.O., c. 224) and could not be levied on for taxes in arrear in respect of the premises owned by the mortgagor of the goods.

Brewster, for the plaintiff. *Fullerton*, Q.C., and *Chisholm*, for the defendants.

Rose, J.] [Dec. 14, 1899.

HARRIS *v.* BANK OF BRITISH NORTH AMERICA.

Interpleader—Summary application—Rule 1103 (a)—Money in bank—Adverse claims—Foreign claimants—Foreign action—Jurisdiction.

An appeal by the defendants from an order of the Master in Chambers dismissing a motion, under Rule 1103 (a), for an interpleader order in respect of moneys in the hands of the defendants, which were claimed by the plaintiff, and also by the Pioneer Trading Corporation of the Klondike, Limited, a corporation having their head office in London, England. This

company had not sued and did not intend to sue the defendants in Ontario, but had brought an action in London, England. They objected to any order being made for the purpose of compelling them to litigate their rights in Ontario. A deposit of deeds with the defendants was made at Dawson City, with a direction as to the disposition of them; the money in question was deposited in London, England, and none of the parties had any dealings with each other in the Province; the defendants, however, were sued here by the plaintiff.

Held, that it was not convenient or proper to make an interpleader order; and *semble*, there was no jurisdiction to make one.

In re Confederation Life Association and Cordingly, 19 P.R. 16, *Credits Gerundeuse* v. *VanWeede*, 12 Q.B.D. 171, and *Re Benfield and Stevens*, 17 P.R. 339, referred to. Appeal dismissed with costs.

J. Greer, for defendants. *D. O. Cameron*, for plaintiff. *W. H. Blake*, for other claimants.

Rose, J.] McCUAIG *v.* CONMEE. [Dec. 16, 1899.

Injunction—Motion to dissolve—Practice.

When an injunction is granted to a day certain and requires a motion to continue in order to extend it beyond such a day, a motion to dissolve is improper, except where it is desired to get rid of the interim order before the day named.

J. H. Moss, for plaintiff. *Rowell*, for defendant. *Corley*, for Rat Portage Lumber Co.

MUNICIPAL LAW.

REG. *v.* ST. JOHN.

Liquor License Act—Meaning of the word "liquor".

The words "any description of liquor whatever," in s. 78 of the Liquor License Act, R.S.O., c. 245, do not include non intoxicating liquor.

Hamilton, Nov 15, 1899.—Snider, Co. J.

One Bowman, a person apparently under the age of twenty-one years, was supplied with ginger ale by Wellington St. John, on his licensed premises in Hamilton, for which he was convicted by Police Magistrate Jelps, under s. 78 of the Liquor License Act, which forbids a licensee supplying such a person with "any description of liquor whatever."

There was an appeal from this conviction to the judge of the County Court of Wentworth.

Haverson, for appellant. *Crerar*, Q.C., contra.

SNIDER, Co. J.—This appeal is not against the finding of facts, but against the learned Magistrate's construction of the words "any description

of liquor whatever," in s. 78 of c. 245, R.S.O. According to the learned Magistrate's finding on the evidence, the defendant in his licensed bar-room sold to a minor ginger ale. For this action he found him guilty of an offence, under s. 78, and fined him $10.00, holding that the word "liquor" as there used is synonymous with fluid, and is not restricted to intoxicating liquor.

The main object of the Act is to deal with the sale of intoxicating liquors, and in the interpretation clause, s. 2, sub-s. 1, the Legislature defines clearly what is to be understood wherever in the Act the word "liquor" is used. Sub-section 1 is as follows: "Liquors" or "liquor" "shall include all spirituous and malt liquor, and all combinations of "liquors and drinks, and drinkable liquids which are intoxicating," but does not expressly say that it shall not include anything else. It is admitted that ginger ale does not come within these words. The burden is on the Crown to show that in s. 78 the Legislature intended to enlarge this meaning, which they have said in the interpretation clause, the words shall be given. In ordinary acceptation I do not think the word "liquor" is understood to include non-intoxicating liquid. It conveys to the general public, I think, the idea of fluid with intoxicating properties in some degree. See the definition of "liquor" given in the Imperial Dictionary and other dictionaries.

The Legislature sometimes uses the words "intoxicating liquor," and the word "liquor" as interchangeable terms having the same meaning, as for example is s. 22 of this Act, the words "intoxicating liquors" are used, and in the form of conviction for an offence against this and other sections, the word "liquor" alone is used. With all deference, it does not appear to me that the words "intoxicating liquor" are used in s. 25, cited by the learned Magistrate as necessary in order to exclude non-intoxicating liquids from its operation. The word "liquor" alone according to the meaning given it in the interpretation clause would have been equally effective. The same may be said of all the clauses referred to, the word "intoxicating" appearing to be surplusage. On the other hand, it seems to me that in order to extend the meaning given in sub-s. 1 of s. 2, to the word "liquor" so as to include fluids of all kinds, it would be necessary to say so in the most explicit terms.

In s. 125, referred to in the judgment appealed from, the words "intoxicating liquor" are used in the first sub-section thereof, while in sub-s. 2 of this same section, the words "any liquor" are used as meaning exactly the same thing. It would be impossible to give the words used in sub-s. 2 any wider meaning than those used in the 1st sub-section. Sub-s. 1 provides that under certain circumstances there mentioned, a wife, parent, &c., may give notice to any licensed hotel or saloon keeper not to deliver "intoxicating liquor" to the person having the habit of drinking "intoxicating liquor" to excess. Then sub-s. 2 of this s., 125, provides that any person who, with the knowledge of this notice, gives, sells, purchases for or

on behalf of the person, with regard to whom the notice has been served, or for his or her use "any liquor" shall for every such act incur a penalty of not less than $25.00, nor more than $50.00. It seems impossible to contend that the words "any liquor" used in this part of the section, providing the punishment, can be given a wider meaning than the words "intoxicating liquor" used in the part of the section providing for the notice. The words "any liquor" are quite as comprehensive, it appears to me, as the words "any description of liquor whatever," used in s. 78. In both sections it comes back to the meaning to be given the word "liquor" alone in this Act, and I do not find, to my mind, any greater evidence of a "contrary intention" on the part of the Legislature to the interpretation given in sub-s. 1 of s. 2, in using the words in s. 78, than I do in their using the words "any liquor" in sub-s. 2, of s. 125, where undoubtedly intoxicating liquor is alone intended.

To enlarge their own definition, the Legislature would, I think, in fairness to the license holder, use unmistakable language. Again in sub-s. 7 of s. 52, the Legislature has used the words "any liquor, or soda water, apollinaris, ginger ale, &c., clearly indicating that the words "any liquor" do not include, and are not intended to include, ginger ale, nor any non-intoxicating fluid. Many other sections of the Act are to the same effect.

In *Northcot* v. *Brunker*, 14 O. A.R., p. 364, Patterson, J., in discussing the meaning to be given to the word "liquor" says "the word 'liquor' popularly means intoxicating liquor," and further on he says: "As I read the interpretation clause of the statute, the word 'liquor' when used in the Act (the Liquor License Act in force in 1886) not only comprehends intoxicating liquor, but is restricted to that meaning."

The Legislature by the interpretation clause directs expressly what is to be understood by the word "liquor" wherever used in this Act, and with all deference to the learned Magistrate's opinion, and appreciating fully his desire to protect minors from the temptation which naturally attends their being allowed to purchase even non-intoxicating drinks in licensed places, I do not think the Legislature has indicated by the words used in s. 78, an intention to include non-intoxicating drinks. The appeal will, therefore, be allowed with costs.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] BRENCHLEY *v.* MCLEOD. [Nov. 20, 1899.

Appeal from County Court—County Courts Act, R.S.M., c. 33, ss. 330, 315 —Amendment—Final order or judgment.

In a suit on a promissory note in a County Court, the date of the note

was given in the particulars of claim as March 19, 1892, but the note produced at the trial bore date November 19, 1892, when defendant asked for a nonsuit. Upon plaintiff's application the County Court Judge made an order under s. 330 of the "County Courts' Act" R.S.M., c. 33, giving plaintiff leave to amend, and providing that defendant should have fifteen days to amend his dispute note so as to set up any defence he might have to the amended claim, and that in default thereof, judgment might be signed by plaintiff for the full amount of his claim with costs of court only. Defendant appealed to the Full Court against the order, and when the appeal came on to be heard, counsel for plaintiff took the objection that under s. 315 of the Act, so amended by 59 Vict., c. 3, s. 2, no appeal lies from such an order.

Held, that the order was appealable, as it was not a mere direction in the course of the trial allowing an amendment and trial subsequently proceeded with.

There was to be no further trial, if no new dispute note was filed, and, if one should be filed, there would be another trial altogether.

The order provided for a final disposition of the case in a certain event, and if that event happened, the signing of the final judgment would be the act of the Clerk of the Court, from which there could be no appeal.

The appeal was subsequently heard and dismissed.

Phippen, for plaintiff. *Bonnar*, for defendant.

Full Court.] THE QUEEN *v.* WINSLOW. [Dec. 13, 1899.

Criminal law—Evidence—Withdrawing case from jury—Criminal Code, s. 744.

The prisoner was tried before a judge without a jury, and convicted of having stolen a pocket-book, containing $3.50 in money from the person of Mrs. D., whilst attending the exhibition at Winnipeg, on July 12th, 1899.

The evidence shewed that Mrs. D. entered the grounds with a number of others, having in her pocket the pocket-book containing the money; that she stopped in a crowd to watch something that attracted attention; that there was a commotion in the crowd, during which the prisoner pushed her or was pushed against her; that just as this occurred a constable saw the prisoner putting his hand into a fold of her dress which he took to be the situation of her pocket; that the pocket-book was missed within a few minutes afterwards, and that the prisoner, being arrested after an interval, had upon him money in bills and silver, some of which were of the denominations in Mrs. D.'s pocket-book, but none of which could be identified as having been hers.

Counsel for the prisoner requested the trial judge to reserve a case for the opinion of the Full Court upon the question whether there was sufficient evidence to have warranted the leaving of the case to a jury, if a jury had been sitting. This being refused, the prisoner with the consent of the

Attorney-General applied for, and obtained leave to appeal under s. 744 o the Criminal Code.

Held, that the evidence did not raise more than a mere suspicion against the prisoner, and was not sufficient in law to warrant a conviction; and that the prisoner should be discharged.

Patterson, for the Crown. *Bonnar*, for the prisoner.

Full Court.] IN RE DUPAS. [Dec. 13, 1899.

Practice—Certiorari—Full Court—Master and Servant's Act, R.S.M., c. 96—Criminal matter—Procedure.

This was a motion to the Full Court, upon notice to a Justice of the Peace for a writ of certiorari to remove a conviction of the applicant under the Master and Servant's Act, R.S.M., c. 96, for non-payment of wages, and the applicant contended that, under *Regina* v. *Beale*, 11 M.R. 448, such a motion could only be brought before the Full Court. Counsel for the justice contended that the Queen's Bench Act, 1895, and its rules, apply to such a case, as it was in no sense a criminal or quasi-criminal matter or proceeding, and that the application might be heard by a single judge.

The Court, without deciding this point, ordered that the motion should be adjourned into chambers, to be heard by a single judge if the parties consented, otherwise that it should be dismissed without prejudice to a motion in chambers.

Haney, for applicant. *Patterson*, for the Justice.

Full Court.] KENNEDY *v.* PORTAGE LA PRAIRIE. [Dec. 22, 1899.

Municipality—Highway—Liability for non-repair—Negligence—Pitch-holes in winter roads—Objections not raised at trial—Municipal Act, R.S.M., c. 100, s. 618.

Appeal from a judgment of the County Court of Portage la Prairie, against the rural municipality of Portage la Prairie, giving damages to the plaintiff for injury to a horse caused by non-repair of a highway by reason of the continued existence of a series of deep pitch-holes produced by traffic in the snow covered surface of a travelled road. There were ten or twelve of these pitch-holes in almost uninterrupted succession at intervals of only a few feet, varying in depth from one to three and a-half or four feet below the level of the travelled snow road, and the descent into them was very steep. The evidence also shewed that the depth of the snow outside the one beaten trail was so great that it was impossible for a loaded sleigh such as the plaintiff was driving to turn out so as to avoid the pitch-holes, and that the defects in the road had existed for a considerable time and could have been remedied by a small expenditure of money.

Held, that, under s. 618 of the "Municipal Act," R.S.M., c. 100, the

defendants were liable for the damages sustained by the plaintiff. *Caswell* v. *St. Mary's Road Co.*, 28 U.C.R., 247 and *Walker* v. *City of Halifax*, 16 N.S.R. 371, Cas. Dig. 175, followed.

The liability of the municipality for non-repair being limited to that portion of a road on which work has been performed or public improvements made by the municipality or which has been in some way assumed by it. Objection was taken on the hearing of the appeal that there was no direct evidence that such had been done, but the County Court Judge stated that it was not disputed before him that the municipality was bound to keep the road in repair, and he found that it was a road of very considerable importance leading into the town of Portage la Prairie, and at all times much used. The evidence also showed that from seventy-five to eighty teams passed over the portion of the road in question each way daily about the time of the injury to the plaintiff's horse.

Held, following *Proctor* v. *Parker*, 12 M.R. 529, that, by not raising the objection at the trial, the defence had waived strict proof of the circumstances rendering the municipality liable to keep the road in repair.

Appeal dismissed with costs, Bain, J., dissenting.

Anderson, for plaintiff. *James* and *Perdue*, for defendants.

Full Court.] RE ROCKWOOD AGRICULTURAL SOCIETY. [Dec. 22, 1899.

Corporation—Power to mortgage real estate of corporation—Power to borrow—Ultra vires—Construction of statutes.

This was an appeal from the refusal of the District Registrar to register a mortgage given by the Agricultural Society on land subject to The Real Property Act.

Held, that, having regard to the purposes and objects of the society as set forth in section 6 of The Agricultural Societies Act, 55 Vict., c. 2 (M. 1892), under which it had been incorporated, there was no implied power to borrow money or to mortgage real estate belonging to the corporation as the exercise of such power would not be necessary to enable it to carry out its purposes, and it was not in any sense a trading corporation; and, there being no express power given by the statute, the District Registrar was right in refusing to register the mortgage, notwithstanding the provisions of section 9 of the Act prohibiting a sale, mortgage, lease or other disposition of any real property of the society unless authorized at a general meeting of the society. Brice on Ultra Vires, p. 222; Fisher on Mortgages, p. 136; *The Queen* v. *Sir Chas. Reed*, 5 Q.B.D. 483, and *Blackburn Building Society* v. *Cunliffe*, 22 Ch.D. 1, followed; *Bickford* v. *The Grand Junction Railway Co.*, 1 S.C.R. 7, distinguished.

Held, further, that a subsequent statute empowering a certain municipality to guarantee a loan to the society, "to be effected or procured for the purpose of erecting buildings and the improvement of the grounds of the said society," could not be construed as giving the society any power which it had not before, for a misapprehension of the law by the legislature

has not the effect of making that the law which the legislature had erroneously assumed it to be: *North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33.

Crawford, Q.C., for society. *Wilson*, for District Registrar.

Province of British Columbia.

SUPREME COURT.

Walkem, J.] WILSON *v.* DONALD. [July 31.

Practice—Writ of summons—Service out of jurisdiction—Shares in ship—Receiver—Order XI.

Motion to set aside the service of a writ of summons out of the jurisdiction and to discharge the order allowing the service. The plaintiffs sue on behalf of themselves and all the other execution creditors of one James Morton, and on behalf of the sheriff of Victoria. Morton being the owner of the steamship "Horsa" (registered at Victoria) mortgaged her on the 27th of August, 1898, to the defendant John A. Donald, to secure payment to him of $15,000.00. After the mortgage was executed, and before it became due, the plaintiffs severally recovered judgments at Victoria against Morton for various sums due to them, principally for supplies to the ship, and placed writs of fieri facias in the sheriff's hands with instructions to seize Morton's equity of redemption in the shares of the ship. Morton having failed to pay off the mortgage, Donald under a power of sale in it, sold the ship on the 31st of December, 1898, to H. P. Saunders of New York, for $20,000.00, that is to say for about $5,000.00 over what was due to him. The bill of sale to Saunders was registered at the Custom House, Victoria, on the 16th of January last and the ship left that port,

Notwithstanding the sale to Saunders, it was contended on behalf of the plaintiffs that the equity of redemption in the shares had been seized, and is now held by the sheriff, and that the shares are thus, in effect, now within the jurisdiction of this Court.

Held, (1) That the creditors not having got a receiver appointed of the shares they had passed to the purchaser; (2) that an order for service out of the jurisdiction on the mortgage, could not be made.

Langley for the motion. *G. A. S. Potts* contra.

Full Court.] [Nov. 28, 1899.

SHORT *v.* FEDERATION BRAND SALMON CANNING CO.

Practice—Time for appealing—Supreme Court Act, s. 76, and amendment of 1899—Meaning of "refusal of a motion or application."

Appeal to the Full Court from the judgment of DRAKE, J., dismissing the action. The judgment was pronounced on the 26th of April, 1899, and

notice of appeal was served on the 2nd of September. On the appeal coming on before McColl, C.J., Walkem and Irving, JJ., *Wilson*, Q.C., for the respondents took the preliminary objection that the appeal was out of time, as the notice was given more than three months after the pronouncing of the judgment, contending that the dismissal of an action is the refusal of an application, and the time for appealing does not therefore run from the time of signing, entry, or otherwise perfecting of the order, but from the time of refusal.

A. D. Taylor for appellants.

Held (Irving, J., dissenting), that the time for bringing an appeal from a trial judgment runs from the date of signing, entry, or perfection thereof, as the case may be, and not from the date of pronouncement. *The International Financial Society* v. *City of Moscow Gas Company* (1877) 7 Ch. D. 241, discussed.

Full Court.] Johnson *v.* Miller. [Nov. 29, 1899.

Bennett-Atlin Commission Act, 1899—Appeal by consent from Commissioner purporting to sit as a County Court Judge—Whether competent.

Appeal to the Full Court from a decision of Irving, J., pronounced at Atlin City in a dispute brought by petition before him as "Special Commissioner" under the Bennett-Atlin Commission Act, 1899, to assess the damages suffered from the destruction by the defendants of a natural dyke that protected the mining claims of the plaintiffs. At the trial both parties expressed a wish to have a right of appeal, and as the statute provided that the Commissioner's decision should be final, he decided to sit as a County Court Judge, and so give the parties an opportunity of appealing.

Held, that the Special Commissioner could not confer the right of appeal to the parties to a dispute tried before him by purporting to sit as a County Court Judge. No order made.

Wilson, Q.C., for appellants.

Irving, J.] Hand *v.* Warren. [Dec. 16, 1899.

Mining law—Action to set aside certificate of improvements instead of adverse action.

Action by the recorded owner of two mineral claims to set aside the certificate of improvements issued to the defendants in respect of the same claims previously recorded by them under different names. On behalf of the plaintiff it was alleged that the certificate of improvements was obtained by fraud. The evidence shewed that the defendants had employed a man to do the assessment work, who fraudulently represented to the Mining Recorder that the necessary work had been done, and in this way obtained a certificate of work. The action was tried on 6th December, 1899, at Rossland before Irving, J. The plaintiff failed to bring his adverse

action in time, but on the 5th of March, 1898, brought this action to set aside the certificate of improvements issued on the 10th of February, 1898, on the ground that the same was obtained by fraud.

Held, that an adverse claimant who neglects to take the remedy provided by s. 37 of the Mineral Act cannot sue to set aside a certificate of improvements on the ground of fraud. *Semble*, that under such circumstances the Crown alone is entitled to sue.

Martin, Q.C., and *W. S. Deacon* for plaintiff. *J. A. Macdonald* for defendants.

Martin, J.] [Dec. 19, 1899.

McDONALD *v.* CANADIAN PACIFIC EXPLORATION CO.

Inspection of Metalliferous Mines Act, R.S.B.C. (1897) c. 134, s. 25—Accident by falling rock—Duty of mine owner under Act.

Action tried at Nelson before MARTIN, J., without a jury, for damages received by a miner in a mine. On behalf of the plaintiff it was contended that the air course in which he was set to work was not securely timbered, in consequence of which alleged negligence a mass of rock fell from the hanging wall upon his left foot and severely crushed it, causing injuries which resulted in the amputation of the greater part of the wounded member. Sec. 25, rule (20) of the Inspection of Metalliferous Mines Act provides that "Each shaft, incline, stope, tunnel, level or drift, and any working place in the mine to which this Act applies, shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material;" and the operative words of sec. 25 are: "The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies."

Held, that the accident was caused by plaintiff's own carelessness, and further, that sec. 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner, and therefore he is only required to use reasonable precaution against accidents to the miners. Action dismissed.

Macdonald, Q.C., and *Johnson* for plaintiff. *MacNeill*, Q.C., for defendant.

Martin, J.] TRAVES *v.* CITY OF NELSON. [Dec. 21, 1899.

Municipal law—Revising by-law—Printed roll not attested by mayor and city clerk at time of passage of by-law—Proceedings by municipality under a by-law not quashed—Municipal Clauses Act, R.S.B.C. (1897), c. 144, ss. 91, 92—Certiorari—Validity of by-law may be determined by.

Action for an injunction to prevent the defendant corporation from pulling down and removing a building within the fire limits as defined by by-law No. 7 of the revised by-laws of the City of Nelson, and for damages.

Held, Where a revising by-law purports to bring into effect a number of by-laws contained in a printed roll alleged to be attested by the mayor

and city clerk, but such roll was not, in fact, so attested until after the final passage of the revising by-law, such by-law has failed to bring into force any by-law contained in such roll.

Held, further, on a motion for a writ of certiorari to remove the conviction of the plaintiff by the Police Magistrate of the City of Nelson for an alleged infraction of the said by-law, that the validity of such a by-law may be determined in certiorari proceedings.

S. S. Taylor, Q.C., and *R. W. Hannington* for plaintiff. *Sir C. H. Tupper*, Q.C., and *Galliher* for defendants.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

MOLSONS BANK *v.* COOPER.

Collateral security—Crediting proceeds—Suspense account—Banks.

A bank gave a customer "a line of credit to $150,000, to be secured by collections deposited":—

Held, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.

Judgment of the Supreme Court of Canada, 26 S.C.R. 611 affirmed, and see 32 C.L.J. 119.

Book Reviews.

An Analytical Synopsis of the Criminal Code and of The Canada Evidence Act, by James Crankshaw, B.C.L., Barrister, Montreal; author of An Annotated Edition of the Criminal Code, and of A Practical Guide to Police Magistrates, and Justices of the Peace, Montreal: C. Theoret, Law Book Publisher, Nos. 11 and 13 St. James Street.

The title page expresses sufficiently what the author claims to have done. It has been prepared at the request of the publisher for use by the students, as well as the magistrates and practitioners, as an auxiliary to larger works on the subject. It brings the amendments to the Code down to date.

A treatise on the Canadian Law of Conditional Sales of Chattels, and of Chattel Liens. By W. J. TREMEEAR, of the Toronto Bar. Toronto, 1899: The Canada Law Book Company, Law Publishers, 32 Toronto Street.

The wide spread use within recent years of contracts of conditional sale has given rise to many statutes and reported decisions dealing with that class of contracts, and this excellent treatise on the subject makes a timely appearance. The annotation of the statutory law on the subject is made with references to the statutes of the Provinces of Ontario, Nova Scotia, British Columbia, Manitoba, New Brunswick and Prince Edward Island and the North-West Territories. The statutes and decided cases of the various provinces are collected and discussed, while reference is made to the more important English and American decisions. Among the subjects treated of are Rights of Vendor and Vendee under contracts of Conditional Sale, Rights of Third Parties, Chattel Liens, Lien of unpaid Vendor, Stoppage in Transitu, Factors' Liens, Warehousemen's Liens, Carriers' Liens, Woodmen's Liens, Innkeepers' Liens, Landlord's Liens. Mortgagee's Liens by distress are also dealt with. An appendix contains the statutes of the several provinces. The index is unusually full and accurate. The printing and binding of the book are of the best style. The profession will find the book to be a practical and reliable reference work on this branch of the law.

The Statutes Serial with Decided Cases. Taxes and the Assessment Law, by H. E. F. Caston, Barrister. Toronto: Carswell Co., Law Publishers, 1899.

It is not easy to gather what is the object aimed at by the compiler. He gives copies of certain statutes and portions of statutes, some referring to the subject of assessment and taxes, and others which have no relation to such matters, and the reader is not assisted by a list of them.