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CURRENT TOPICS AND CASES.

By 49-50 Vic., c. 34, s. 94, as reproduced in 3597 R. S. Q., it was expressly enacted by the Quebec Legislature that "advocates are entitled to fees and remuneration for their professional services. Amongst the professional services for which fees and remuneration may be charged are included: travelling, attendance, written and verbal consultations, and the examination of papers and documents." This was a positive declaration of the law which had previously been somewhat unsettled. In the recent case of *Christin & Lacoste*, decided by the Court of Appeal, at Montreal, Jan. 26, 1893, it was contended that for services specifically mentioned in the tariff the advocate is governed by its provisions, even in adjusting his account with his own client. The Court did not entertain this view, but held, in the words of Mr. Justice Hall who delivered the judgment, "that the tariff was never intended to regulate the adjustment of the attorney's claims against his own client, but only the successful litigant's claim, either in his own name or that of his attorney, against the losing party." The advocate, therefore, is now in a position to sue and recover judgment against the client who has employed him, for the proved value of his professional services, irrespective of the tariff. The Court concedes that in the absence of a special agreement between advocate and client there is a presumption

that the tariff shall govern, but holds that this presumption may be rebutted by evidence as to the unusual or unexpected importance or duration of the litigation.

Another important decision rendered by the Court of Appeal at Montreal, on the same day, was that pronounced in the case of *Reid & McFarlane*. This judgment is remarkable as it reverses the ruling of the same Court, three years ago, in the case of *Davie & Sylvestre*, M. L. R., 5 Q. B. 143; nay, more, it reverses the decision of the Court pronounced two years previously in *McFarlane & Fatt* (M. L. R., 6 Q. B. 251) on the same agreement which the Court was called upon to construe in *Reid & McFarlane*. An English judge, when a case of *Brown* v. *Robinson* was cited before him in argument, informed the counsel that he should not feel himself bound by that case unless a suit were before him in which the facts were precisely similar; indeed, added his lordship, "unless the plaintiff's name were Brown and the defendant's Robinson." Our Court of Appeal has hardly paid as much regard to precedent as the learned judge above referred to, for in a case turning upon the same agreement, the facts being exactly the same and one of the parties the same, it has declined to follow its own decision of two years ago. Of course, the composition of the Court is changed, the judges, with one exception (Mr. Justice Baby), being different, and he entered a dissent. The ground on which the Court overruled the precedents referred to was, that in the first case, *Davie & Sylvestre*, the Court had been misled by an incorrect appreciation of the decision of the Privy Council in *Singleton & Knight*, 11 L. N. 401, and that in the subsequent case of *McFarlane & Fatt* the Court had merely followed the precedent of *Davie & Sylvestre*, without any special examination of the facts of the case. In *Davie & Sylvestre* the Court laid down the broad rule that participation in profits makes the person participating liable as a partner to third parties, creditors of the person in whose name the

business is carried on. The facts in *Reid & McFarlane* were hardly so favorable to the person sought to be held liable as in the *Davie* case. McFarlane advanced moneys to one Nowell; each was to draw the same sum, monthly, from the business, and at the end of the year the profits were to be equally divided between them. McFarlane was to act as manager. The principal circumstance which negatived the existence of a partnership was that the business was not only carried on in the same name as before, but McFarlane's name appeared on the bill and letter-heads as manager. The Court of Appeal, in an elaborate judgment pronounced by the Chief Justice, holds that the first consideration is the intention of the parties, and that if they did not intend to form a partnership an arrangement for sharing profits will not make them liable to third persons, unless their acts have been such as to lead third persons to suppose that a partnership existed. "La participation dans les profits," observed the Chief Justice, "ne constitue donc pas à elle seule le contrat de société; il faut y trouver les autres éléments essentiels de la société, savoir l'apport pour le bénéfice commun et l'intention des parties de former une société, et ceci s'applique aux tiers créanciers tout aussi bien qu'aux parties entr'elles, car un contrat ne peut être un bail, un louage ou un prêt entre les parties et en même temps une société vis-a-vis des tiers. Ce qu'une cour a d'abord à déterminer c'est la nature du contrat des parties *inter se*. Si elle arrive à la conclusion que c'est une société, les créanciers auront un recours. Dans le cas contraire ils en seront privés. En cela il n'y a pas d'injustice, comme dit Alauzet, Société, No. 376. Si le nom du créancier est resté inconnu des tiers, si ceux-ci n'ont pas contracté avec le commerçant débiteur sous la foi de la responsabilité du préteur, si même ils ont eu connaissance du prêt qui a été fait, mais qu'ils n'aient jamais considéré le bailleur de fonds comme associé; qu'importe les conditions du contrat? La convention des parties doit déterminer leur position respective, et s'il n'y a pas société tout recours

sera refusé aux tiers contre le bailleur de fonds à moins que celui-ci ne se soit donné à eux comme associé. Sa responsabilité dans ce cas découle d'une autre source. Les tiers ne connaissent pas ce qui a été convenu entre les parties. Le contrat de société est consensuel et ne requiert pas d'écrit. Si donc une personne agit comme si elle était associée ou si elle contracte avec des tiers en cette qualité, si par sa conduite elle induit le public en erreur et encourage ainsi un crédit ou des avances qui n'auraient peut-être pas été fournis sans cela, il y aura quasi société ou société, vis-a-vis des tiers, indépendante du contrat réel, qui la liera vis-à-vis d'eux. C'est ainsi que les tiers seront protégés. Nous avons un exemple de cette responsabilité dans l'art. 1900 de notre Code."

The question as to the arrears of the Law Reports for 1892, referred to last month, has been settled by the cancellation of the contract, the printer having failed to proceed with the work for want of paper on which to print the pages standing in type. The work will therefore be taken up by the printers who have the contract for the current year. This difficulty has unfortunately caused much delay, and a good deal of work has had to be done over again. It is expected that the printers will now soon be in a position to resume the issue of the publication.

THE CANADIAN CRIMINAL CODE.

OTTAWA, 20th January, 1893.

DEAR SIR,—

Having been informed, on reliable authority, that amendments to the criminal code passed at the last session of Parliament are to be introduced at the next session, I take the liberty to send you a memorandum of the changes which should, in my humble opinion, be made thereto, before it is allowed to come into force.

It was a self evident proposition, one which no one will controvert, that the Chief Justice of England laid down, in re-

ference to an akin measure presented to the Imperial House of Commons in 1875, when he said :—" I think that any attempt " at codification which is either partial or incomplete can only " be productive of confusion and mischief," or, as he put it, in other words, in 1879, in reference to another one of the same import : " It is of the very essence of a perfect code, that it shall " contain and provide for whatever it is intended shall be the law " at the date of its formation, so that both those who have to ad- " minister the law, whether in its preliminary or after stages, " and those who have to obey it should have it before them as a " whole, without having to search for it in Acts of Parliament " scattered over the statute book, and which most persons, at " least so far as the laity are concerned, are ignorant of and know " not where to find. The main purpose of the codification of the " law is utterly defeated by leaving the code to be supplemented " by reference to statutes, and what is still worse, to parts of " statutes which are still to remain in force, but are not embodied " in it."

Now, sir, as you are aware, the draft code, upon which the Lord Chief Justice made these observations, was found to be so defective, as well for incompleteness, as for other reasons, that it had to be dropped in 1880 by the Attorney-General, and has never been adopted into law by the Imperial Parliament.

That our code of 1892 is deficient, in respect of completeness, to a still greater degree than that one in reference to which the Lord Chief Justice so expressed his views on the essential requisites of a codification, must, it seems to me, be conceded, when it is taken into consideration that, whilst the latter superseded all the common law, the former leaves all of it in force, with, besides, a number of important enactments, scattered all over the statute book. So that, in future, any one desirous of ascertaining what is, on a given point, the criminal law of the country will have to refer first, to the common law, secondly, to our unrepealed statutory law, thirdly, to the case law, fourthly, to the Imperial special statutory enactments on the subject in force in Canada, not even alluded to in the code, and fifthly, to the code. I shall not attempt to here enter into details on what, to anyone at all conversant with the subject, appears *on the face of the record.* I have, however, called more particularly your attention in the annexed memorandum to a few of these *lacunæ*, which, in my opinion, must prove hereafter to detract so much from the usefulness of this legislation. They are those which more particu-

larly struck my mind in a preliminary survey I have made of its contents, in view of a third edition of my book on criminal law adapted to it, which, under pressing solicitations from Bench and Bar, from all parts of the Dominion, I have undertaken to prepare.

To cite here a few instances, under this head of omissions, I may more particularly allude to the following offences, which I have not been able to find treated of anywhere; negligent escape, compounding felonies, or offences generally, abortive inciting to commit any of the offences provided for by the code, one maiming himself, either to increase his chances at begging, or to avoid military service, champerty, malfeasance, or culpable nonfeasance of a public officer in relation to his office; extortion, and bribery, generally; various statutory indictable crimes, the number of which I have not ascertained; conspiracy to commit an unlawful, not indictable, act.

Then, as to accessories before the fact, I find that though sec. 63 defines what is an accessory after the fact, what is an accessory before the fact is nowhere to be found. The very name has disappeared from the law, even in the index.

Those who know the law on the subject can see that sec. 61 is given as a re-enactment of it in a different shape, but for those who, in their studies, finding the expression as one known at common law, in every book, desire to ascertain what it is in the code, it is putting obvious difficulties in their way, not to, at least, keep the name in the marginal note, or sub-title; the same may be said as to aiders and abettors. Then, not a word is to be found of the rule, "actus non facit reum nisi mens sit rea," nor of the cognate rule, as to intent, that the law of England judges not of the fact by the intent, but of the intent by the fact; nor of the law, in criminal cases, of principal and agent, or master and servant, nor of the rules on consent, waiver, or estoppel in such cases; neither of the law as to contributory negligence in manslaughter.

Another class of omissions is such as follows, and there are many of them. A man steals ten sheep at the same time. Can he be indicted ten times, one accusation for each? "Yes," says Lord Hale, "for thus it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time." —But then if a man steals, say ten sovereigns, can he be indicted ten times? or twice, if five of the sovereigns belong to A., and

five to B?—A. kills B. and C. by one shot. Has he committed two murders, or one murder of two men? Why not provide for such cases and say that one act constitutes only one crime, the quantity, etc., being only a matter of aggravation, or settle it, in some way or other? Persecution, in the guise of prosecution in the public interest, should not be tolerated. Such questions, it must be assumed, have been discussed by the special committee, but there is not a word of them in the code.

A third class of omissions to which I may here more especially allude is that of the Imperial Statutory enactments in force in Canada. I beg leave to refer you, for a few instances thereon, to my note under section 640 as to such of those that have come to my mind. Allow me, also, to call your attention to the fact that section 542 bears the construction that our Parliament has assumed jurisdiction on offences committed by a *foreigner* on the high seas, on board a *foreign* ship. That cannot have been intended and should be set right.

A few observations, now, on some of the amendments made to the existing law. I have not had time, as yet, to ascertain, to my own satisfaction, which of its 983 sections are new law, and which are old law, not a simple thing to do, by any means, you will admit, sir; but I have, however, seen enough of it to be in a position to assert that the changes and innovations are numerous and of a sweeping character, both in the substantive and in the adjective law.

A large, I may say, a very large number of these changes and innovations, including those in the law of murder, rape, perjury, bigamy, etc., etc., as well as those in the rules of procedure, were undoubtedly taken from the abortive bill or draft code presented to the Imperial House of Commons in 1880, that I have already alluded to. And it may be, if I am allowed to say so, that sufficient attention was not paid to the fact that these innovations, though suggested, had never been adopted in England, and that consequently, some of them have passed into this code without having been defined before Parliament in such a clear way that their consequences can have been foreseen. And, on this, rather than to speak for myself, I take the liberty to make the following quotation from the report of the committee of the Imperial House of Commons, to which had been referred, in 1875, a cognate measure, a bill on homicide drafted by Sir James Fitzjames Stephens: "Nothing could be more likely to impede, or, indeed, " utterly to frustrate the work of codification, than the suspicion

" or certainty that, under the pretext of simplification and re-
" arrangement, *great and important* changes were effected *which*
" *had never been brought out in a clear and simple way* to the atten-
" tion of the Houses of Parliament. For these reasons, your
" committee are of opinion that it is not desirable to proceed with
" the present bill, notwithstanding that this experience in codi-
" fication has been presented to them with every advantage that
" learning and skill could give it."

Without wishing here to enter into details, I call your attention to the following alterations and changes that I have noticed in the course of my cursory examination of the act.

The atrocious crime of infanticide by starvation, or neglect of natural duties, (so frequent in cases of illegitimacy) which has always here, as in England, and, in all the civilized world, been either murder or manslaughter, is to be nothing more in the future but a simple offence of the class now known as misdemeanours, and punishable with a mere fine, at the discretion of the Judge, or with imprisonment for not more than three years. If a husband, under a legal duty to provide necessaries for his wife, omits, without lawful excuse, to do so, and thereby causes her death, he has always been, up to the present, deemed guilty of murder or manslaughter. But that is, also, to be, in the future, but a simple offence punishable by a fine, or at the most, by an imprisonment for three years. Heretofore, a gaoler who caused the death of his prisoner, by not supplying him with the necessaries of life was guilty of manslaughter, but Parliament has decreed that that shall not be so in the future. I may be mistaken, but I am strongly inclined to think that such alterations in the law have not deliberately been made by Parliament. Yet, there they stand on the statute book, to be our law after the 1st of July. These last three changes, I need hardly say, were not proposed in the English bill of 1880.

Another instance:—It is decreed, by sec. 64, that the question, whether an act is too remote or not to constitute an attempt, shall be a question of law and not one for the jury. Has this important innovation been designedly made? See, in memo. what Chief Justice Cockburn says of a similar one, when proposed in England.

Another one again, (not proposed in the English bill):—In future, perjury, forgery, and manslaughter even, are to be triable at Quarter Sessions; counterfeiting Her Majesty's coin, treason

at common law, is also to be triable in the inferior Courts. Offences now falling under secs. 247 and 248, for injuries by explosives, heretofore not triable at Quarter Sessions, are also now to be so. I refer you for other instances of changes in the law to my memorandum.

I pass now to the intrinsic defects of the measure; they are numerous. It is replete of contradictory clauses, of redundant enactments, of clumsy, needlessly minute and irrational, or repugnant provisions, obviously leading, in many instances, to incongruities and anomalies, *rudis et indigesta moles*, cumbrous, yet not complete: the classification is unsystematic, and the whole without attempt at symmetry.

Why, for one or two instances, as to defective classification, put the offence of unlawfully digging up a dead body, under the title of nuisances? Or, why separate by eighty sections the offence of defiling a girl under 14 with the offence of defiling a girl above 14? As to repugnancy, redundance, irrational legislation, let me refer to a few enactments as illustrations.

It is an indictable offence to conspire to induce a woman to commit adultery, but to commit adultery itself, is not, except in New Brunswick. Now, a conspiracy to commit or procure the commission of an unlawful act is, at common law, indictable, even where that unlawful act itself is not. But there is no reason, that I can see, for a special enactment as to this one, when the unlawful act itself is not made indictable. It has the effect to reduce the punishment, and that cannot have been the reason why it was enacted. Such an enactment was proposed in the English draft. It was a necessary one there, because all the common law was superseded. It has been lost sight of, in this special provision on conspiracy to cause adultery to be committed, that the common law of conspiracy remains untouched by this code.

Any one who offers for sale a putrid carcass of mutton, or an obscene photograph, or a car conductor's fault of being drunk on duty, must be prosecuted by indictment, whilst any one who entices one of Her Majesty's soldiers to desert from the service, or any one who personates a candidate at an examination in a college or university, may be punished on summary conviction. *Adultery* is to be an indictable offence in New Brunswick, *but is not to be so in the other Provinces.* A number of offences are purged by lapse of time, whilst there is no limitation for the prosecution of the attempt or conspiracy to commit the same of

fences; treason, and the offences under the trade marks act are put alone on the three year's limitation list. Why? The seducer of a girl under sixteen is protected by one years' limitation, whilst one who once offers for sale one obscene photograph, or a pound of tainted meat, has no such protection, and can be prosecuted at any time. One year relieves from all liability to punishment the nefarious crime of *a mother*, who, for a few dollars, is a party to *the ruin of her* 14 *year old daughter*; but the prosecution for the same offence when committed *by any other person*, on that girl, is barred by no limitation whatever. There are to be found five sections on injuries by explosives; three different enactments to say that a peace officer may arrest without warrant a person committing certain offences; two to say that a false oath, not in a judicial proceeding, amounts to perjury; two or three to provide for offences against railways; two sections to decree, in different terms, that if any one leaves a hole made by him through the ice, unguarded, he will be guilty of manslaughter, if any person loses his life by falling therein. One section enacting that an attempt to commit sodomy, will be punishable by ten years, and another one, that an assault, with attempt to commit sodomy, will be punishable by seven years. Could even a Philadelphia lawyer tell the difference between the two, between an attempt to commit sodomy and an assault with attempt to commit sodomy? With, to make confusion worse confounded, a different punishment attached to each. It is decreed that a nuisance which occasions injury to one individual is indictable. Is that a *common* nuisance?

On many of these subjects, the law, it is true, was not previously in a better state; and the errors and anomalies that I have called attention to, often are mere reproductions from the statute book. But you will bear me out, sir, when I say that this is obviously an aggravation, not an excuse of the fault committed of not taking advantage of the codification to remedy the law. The pruning knife was evidently wanting in the hands of the drafter: the "lopping off the dead branches without hurting the root," if you allow me, sir, to use the felicitous expression, was not performed, the weeding has been left undone.

A most favorable occasion has been lost to improve, to ameliorate, to make needed reforms, to reduce the bulk of the law and simplify its mechanism. I have given you illustrations of it; allow me to add a few others. A complete revision of the punishments is clearly wanted—that is admitted on all hands in

England, and our statutes on the subject do not stand on a better footing. A reference to the compilation, under the heading "Punishments," that I have attached to my memorandum, so as to afford an easy though incomplete comparison thereon, will amply demonstrate it, were demonstration necessary. But to particularize here for one moment, should not a codification have purged our statute book from the following anomalies instead of re-enacting them ?—An accessory before the fact to the offence of carnally knowing a girl under fourteen, *when a perfect stranger to her*, is punishable with *imprisonment for life.* But, *if he is a guardian* who is such accessory to the like offence *on his ward,* he is punishable *by fourteen years only.* That extraordinary legislation is a reproduction from the statute of 1890. But that is not all; if it is himself, *the guardian*, who seduces his ward, he is liable only to a fine, or at the most, *to two years' imprisonment*! And another one almost as startling : a train conductor for merely being *drunk* on duty, is liable to *seven years' penitentiary.* And, for another one again, any one who, *unsuccessfully* incites another to commit an indecent assault is liable to *seven years'* penitentiary, but, if the other does, in fact, *commit* the assault, then the inciter escapes with two years' prison.

Again, to simply *obstruct* a "*public*" officer in the execution of his duty, is punishable by *ten* years' penitentiary, but to *assault* a public officer whilst performing his duty, only by *two* years' *prison* ; and to *obstruct* a "*peace*" officer in the execution of his duty, *two years.*

Then, in many instances, it has evidently been forgotten that a codifier must not rashly cast down without also building up; that, to quote Austin's words (*Principles of Jurisprudence*)—"he should have constantly before his mind, a map of the law as a whole, enabling him to subordinate the less general under the more general, to perceive the relations of the parts to one another and thus to travel from general to particular, and from particular to general, and from a part to its relations to other parts, with readiness and ease, to subsume the particulars under the general, and to analyze and translate the general into the particulars that it contains."

Some of the instances where most beneficial enactments have been repealed and not re-enacted have been referred to in my memorandum.

As to the enactments relating to the code itself, I call your attention specially to section 981, which enacts that, after July 1st,

next, two sets of rules of procedure will be in force, one, for the offences committed before that date, and one for the offences committed after that date. That seems to me very objectionable for obvious reasons. Please refer to my note under that article for my suggestions on the subject.

Another class of errors may be mentioned. Here again I shall not enter into details. They are of a less important nature, and, evidently, the result of inadvertence. Some of the class of those I here allude to are the errors made in the repeal of the statutes. One, for instance, is the repeal of a section that had already been repealed. Another one, is the unrepeal of an enactment which clashes with an enactment on the same subject. One, *and a singular one it is*, is in enacting that the code itself shall come into force on the 1*st of July*, whilst the repeal of the previous Statutes takes effect only *on the 2nd.* So that on the 1st of July itself, for twenty-four hours, the two *sets of laws will be in force.* Another one, a clear oversight also, has for serious consequence to strike out of the law the provision for punishing a *master*, *foreman* or *superintendent* of a factory, mill, workshop, *for the seduction of any girl under twenty-one years of age who is under his control and in his employment.* All of these, and there are not a few of them, are palpable errors ; I leave it to you, sir, to say whether they do not disfigure the measure, to make use, for once, of an euphemism.

I REST HERE.—My object is simply to bring to your attention what I consider to be serious defects in this legislation, without entering into more details than necessary to *prima facie* support my remarks. In fact, the short time at my disposal, at this season of the year, would not have allowed me to do more. I have not been able to go over the whole of these 983 sections more than once, and in such a cursory way, that it is possible that some of them, not many, are not open to the objections I have taken.

There is an observation that I think proper to make, sir, before closing, one hardly necessary, yet, which it is perhaps, better for me not to omit, so that no room be left anywhere for misrepresentation or misinterpretation. Whilst addressing this letter to you as head of the administration of justice in the Dominion, in your capacity of Attorney-General, I wish it to be clearly understood that I have not committed the mistake to think that you are the author of this code of 1892. It cannot be expected, in any quarter, that an Attorney-General's duties, here not more than in England, and, perhaps here still less than in England,

would at all permit him to undertake such a task. And when Lord Chief Justice Cockburn, in 18 9, addressed his criticisms on a similar measure that I have alluded to, to the Attorney-General of England, he was, likewise, perfectly aware that though he had introduced it in the House of Commons, the Attorney-General had not drafted it.

Moreover, let me assure you, that, had it at all been possible for me to think, for one moment, that you were the author of this one, I would certainly not have taken the liberty to address you these comments. The mistakes have been made somewhere, and there lie, perhaps, the principal causes of the ill-success, first, to place too much reliance on Sir James Stephen's draft; and secondly, to form too light an estimate of the difficulties that lie in the drafting of a code, a mistake that has, in England, put such powerful arms in the hands of the opponents of codification, as to enable them, by itself almost alone, to resist successfully, so far, all endeavors in that direction. I myself, though, at one time, of opinion that a code of criminal law would be of great advantage to Canada, and might be prepared without very serious difficulties, am free to admit that I, now, have, to say the least, grave doubts on the subject. A revision and consolidation, not a mere compilation, of the statutory law, would, perhaps, be all that is necessary in that direction to supply the present needs of the administration of justice in Canada.

Should Parliament, however, not determine to withdraw the present one, temporarily at least, I suggest that the ends of justice might perhaps require that the date of its coming into force should be postponed.

I have the honour to be, Sir,

With highest consideration,

Your obedient servant,

H. E. TASCHEREAU,

Judge, Supreme Court.

THE HON. SIR JOHN THOMPSON, K.C.M.G.

Minister of Justice and Attorney-General.

P.S.—Following the course adopted by Lord Chief Justice Cockburn, in England, when addressing the Attorney-General on an analogous subject, I give to this communication the form of an open letter. I trust, sir, that you will see no impropriety in my doing so.

SUPREME COURT OF CANADA.

OTTAWA, Dec. 13, 1892.

Quebec.]

McGREGOR v. CANADA INVESTMENT & AGENCY CO.

Will—Construction—Usufruct—Sheriff's sale—Effect of—Art. 711, C. C. P.

The will of the late J. McG. contained the following provisions:—

"Fifthly. I give, devise and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife, the usufruct, use and enjoyment during all her natural lifetime of the rest and residue of my property movable or immovable..... in which I may have any right, interest or share at the time of my death, without any exception or reserve.

"To have and to hold, use and enjoy the said usufruct, use and enjoyment of the said property unto my said wife the said Helen Mahers, as and for her own property from and after my decease, and during all her natural lifetime.

"Sixthly. I give, devise and bequeath in full property unto my son James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind movable, real, or personal, or of which the usufruct, use and enjoyment during her natural lifetime is hereinbefore left to my said wife the said Helen Mahers, but subject to the said usufruct, use and enjoyment of his mother the said Helen Mahers during all her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever; should however my said son the said James McGregor die before his said mother, my said wife the said Helen Mahers, then and in that case I give, devise and bequeath the said property so hereby bequeathed to him to the said Helen Mahers in full property, to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever.

"To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property for ever. and in the event of his predeceasing his said

mother, unto the said Helen Mahers her heirs and assigns, as and for her and their own property for ever."

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), 1 B. R. Q. (1892) 197, that the will of J. McG. did not create a substitution, but a simple bequest of usufruct to his wife and of ownership to his son.

Held, also, that a sheriff's sale (*décret*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will. Art. 711 C. C. P. *Patton* v. *Morin*, 16 L. C. R. 267, followed.

Appeal dismissed with costs.

Honan and *E. Lafleur* for appellant.
Laflamme, Q.C., and *H. Abbott, Q.C.*, for respondent.

OTTAWA, Dec. 13, 1892.

Quebec.]

AUBERT-GALLION v. ROY.

44-45 Vic., Ch. 90 (P. Q.)—Toll-bridge—Franchise of—Free bridge —Interference by—Injunction.

By 44-45 Vic. (P. Q.), Ch. 90, sec. 3, granting to respondent a statutory privilege to construct a toll-bridge across the Chaudière River in the parish of St. George, it is enacted that "So soon as the bridge shall be open to the use of the public as aforesaid, during thirty years no person shall erect or cause to be erected, any bridge or bridges or works, or use or cause to be used, any means of passage for the conveyance of any persons, vehicles or cattle for lucre or gain across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll-bridge or toll-bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river, for the conveyance of persons, vehicles or cattle, within such limits, shall pay to the said David Roy, three times the amount of the tolls imposed by the present Act, for the persons, cattle or vehicles, which shall thus pass over such bridge or bridges; and if any person or persons shall, at any

time, for lucre or gain, convey across the river any person or persons, cattle or vehicles within the above mentioned limits, such offender shall incur a penalty not exceeding $10 for each person, animal or vehicle which shall have thus passed the said river; provided always that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles or loads from crossing such river within the said limits by a ford, or in a canoe or other vessel without charge."

After the bridge had been used for several years the appellant municipality passed a by-law to erect a free bridge across the Chaudière in close proximity to the toll-bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge.

Held, affirming the judgments of the Courts below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll bridge, and the injunction should be granted.

Appeal dismissed with costs.

Lemieux, Q.C., & Taschereau, Q.C., for appellant.
Fitzpatrick, Q.C., for respondent.

OTTAWA, Dec. 3, 1892.

Quebec.]

VALLÉE v. PREFONTAINE.

DUFRESNE v. PREFONTAINE.

Builder's privilege—Arts. 1695, 2013, 2103, *C. C.—Expert—Duties of—Procès verbal—Arts.* 333 *et seq., C. C. P.*

Appeal from judgment of the Court of Queen's Bench, P. Q., *Vide* 1 B. R. Q. (1892), 330.

Held, 1. That it is not necessary for an expert, when appointed under Art. 2013, C. C. to secure a builder's privilege on an immovable, to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by arts. 322 *et seq.* C. C. P.

2. That there was evidence to support the finding of fact of the Courts below that the second *procès-verbal*, or official statement required to be made by the expert under art. 2013, had been made within six months of the completion of the builder's works.

3. That it was sufficient for the expert to state in his second *procès-verbal* made within the six months, that the works described had been executed and that such works had given to the immovable the additional value fixed by him. The words completed "suivant les règles de l'art," are not *strictissimi juris.*

4. That if an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity but will only entitle the interested parties to ask for a reduction of the expert's valuation.

Appeals dismissed with costs.

Geoffrion, Q.C., Béique, Q.C., & Beaudin, Q.C., for appellants.
Girouard, Q.C., & Madore for respondent.

OTTAWA, Dec. 13, 1892.

British Columbia.]

Re COUNTY COURT JUDGES OF BRITISH COLUMBIA.

(Referred by Governor General in Council.)

Constitutional law—Administration of justice—Constitution of Provincial Courts—Powers of Federal Government—Appointment and payment of judges—B. N. A. Act, s. 92, *s.s.* 14.

The power given to the provincial governments by the B. N. A. Act, s. 92, s.s. 14, to legislate regarding the constitution, maintenance and organization of provincial courts, includes the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts.

The C. S. B. C., c. 25, s. 14, enacted that "Any county court judge appointed under this Act may act as county court judge in any other district, upon the death, illness or unavoidable absence of, or at the request of the judge of that district, and while so acting the said first mentioned judge shall possess all the powers and authorities of a county court judge in the said district; provided, however, the said judge so acting out of his district shall immediately thereafter report in writing to the provincial secretary the fact of his so doing and the cause thereof;" and by 53 Vict., c. 8, s. 9 (B. C.), it is enacted that "Until a county court judge of Kootenay is appointed, the judge of the county court of Yale shall act as and perform the duties of the county court judge of Kootenay, and shall, while so acting,

whether sitting in the county court district of Kootenay or not, have, in respect of all actions, suits, matters or proceedings being carried on in the county court of Kootenay, all the powers and authorities that the judge of the county court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by sections 5 and 7 of the County Courts Act, over which the county court of Yale and the county court of Kootenay, respectively, have jurisdiction shall be united."

Held, that these statutes are *intra vires* of the Government of British Columbia under the said section of the B. N. A. Act.

By the Dominion statute, 51 V., c. 47, "The Speedy Trials Act," jurisdiction is given to "any judge of a county court" among others, to try certain criminal offences.

Held, that this expression "any judge of a county court" in such Act, means any judge having, by force of the Provincial law regulating the constitution and organisation of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorise a county court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial legislature so to do.

Held also, that the Speedy Trials Act is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure.

Æmilius Irving, Q.C., for Atty. Gen. of B. C.

Sedgewick, Q.C., for Atty. Gen. of Canada.

OTTAWA, Dec. 13, 1892.

Ontario.]

ARCHIBALD v. MCLAREN.

Action for malicious prosecution—Reasonable and probable cause—Inference from facts proved—Functions of judge and jury.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause is to be decided by the judge and not the jury.

A., staff inspector of the Toronto police force, laid an information before the police magistrate charging M., a married woman, with the offence of keeping a house of ill-fame. In laying the

information A. acted on a statement made to him by a woman who alleged that she had been a frequenter of the house occupied by M. and stated facts sufficient, if true, to prove the charge. A warrant was issued against M. who was arrested and brought before the magistrate, who, after hearing the evidence, dismissed the charge. M. and her husband then brought an action against A. for malicious prosecution.

The action was tried three times, each trial resulting in a judgment of non-suit which was set aside by a divisional Court and a new trial ordered. From the judgment ordering the third new trial A. appealed and the judges in the Court of Appeal being equally divided the order for new trial stood. A. then appealed to the Supreme Court of Canada.

At the last trial of the action it was shown that A. had requested the police inspector for the division in which M.'s house was situate, to make inquiries about it, and that after the information was laid the inspector informed A. that there were frequent rows in the house owing to the intemperance of M., and that he thought there was nothing in the charge. The trial judge did not submit the case to the jury but held that want of reasonable and probable cause was not shown; but the Divisional Court held that he should have asked the jury to find on the fact of A's belief in the statement furnished to him on which he acted in bringing the charge.

Held, Taschereau, J., dissenting, that A. was justified in acting on the statement, and the facts not being in dispute there was nothing to leave to the jury; that the trial judge rightly held that no want of reasonable and probable cause had been shown, and his judgment should not have been set aside and must be restored.

Appeal allowed with costs.

Maclaren, Q.C., for the appellant.
Tytler for the respondents.

OTTAWA, Dec. 13, 1892.

North West Territories.]

FAIRCHILD v. FERGUSON.

Promissory note—Form of—"Sixty days after date we promise to pay," and signed by manager of company—Liability of company on.

R., manager of an unincorporated lumbering Co., gave a promissory note for logs purchased by him as such manager, com-

mencing "sixty days after date we promise to pay," etc., and signed it: "R., manager O. L. Co." An action on this note against the individual members of the company, was defended on the ground that it was the personal note of R.; that the words "manager," etc., were merely descriptive of R.'s occupation; and that the defendants were not liable.

Held, affirming the judgment of the Supreme Court of the North West Territories (1 N. W. T. Rep. part 3, p. 41), that as the evidence showed that when the note was given both R. and the creditor intended it to be the note of the company, and as R. as manager was competent to make a note on which the members of the company would be liable, and as the form of the note was sufficient for that purpose, the defence set up could not prevail and the plaintiffs in the action were entitled to recover.

Appeal dismissed with costs.

Ewart, Q.C., for appellants.

Ferguson, Q.C., for respondents.

COURT OF APPEAL ABSTRACT.

Privilege—Hypothec—Non-registration—Effect of.

Appellant, holder of a *bailleur de fonds* claim on an immovable in the possession of M. (being the unpaid balance of the price of sale from L. to M.) brought the property to judicial sale. Respondents were collocated by privilege on the proceeds, for the amount of an obligation with hypothec executed by L. before the sale, and transferred to respondents. The title of L. was not registered until after the sale to M.

Held, maintaining the collocation, that appellant, transferee of the rights of L., held the relation of debtor as regards the respondents; that L. could not, by selling and reserving to himself a *bailleur de fonds* claim, create in his own favor a preferential claim over that of his hypothecary creditor. Notwithstanding absence of registration of title, a hypothecary creditor has a valid hypothec as regards his debtor, and is entitled to be collocated by preference to him on the proceeds of the immovable hypothecated.—*Dolan & Baker*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall, Wurtele, JJ., June 8, 1892.

Engineer—Workman and laborer—R.S.Q., 5931.—*Art.* 628, *par.* 5, *C.C.P.*

Held, that an engineer engaged on a steamer, and having the

supervision and direction of the motive power, is not, within the meaning of Art. 628, par. 5, C.C.P., a workman or laborer (*operarius*), and therefore his wages are not exempt from seizure to the extent of three-fourths thereof.—*Cie. de Navigation R. & O. & Triganne*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet and Hall, JJ., Sept. 26, 1892.

College of physicians and surgeons—R.S.Q., 3977—Construction of——Discretion of medical board.

Held, that Art. 3977, R.S.Q., which provides that the Provincial Medical Board "has power to grant the same privilege (*i.e.*, a license to practise without examination) to holders of degrees or diplomas of medicine and surgery from other British, Colonial or French universities or colleges," does not make it imperative on the Provincial Medical Board to grant such license, but merely vests the Board with discretionary power to grant or refuse a license as they see fit.—*College de Medecins et Chirurgiens & Pavlides*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet and Hall, JJ., Sept. 26, 1892.

Hypothec—Payment of hypothecary claim by purchaser.

M. acquired an immovable against which a judgment had previously been registered. M. paid this hypothecary claim out of the purchase price payable by him only after the extinction of an usufruct on the property. When he did so, the time for renewing the registration of the hypothec had not expired, and he did not renew the registration of the judgment within the delay of the *cadastre*.

Held, that the payment by M. of the hypothec on the property was made *en temps utile*, and had the effect of extinguishing the hypothec, and that M. was entitled to retain the amount so paid out of the price payable to his vendor.—*Kay & Gibeault*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchot and Wurtele, JJ., Dec. 23, 1892.

Master and servant—Dismissal of employee—Damages.

Held, where an employee who is engaged for a definite term, is dismissed without sufficient grounds before the expiration of his engagement, and it is shown that he was unable to procure work at his trade elsewhere, he is entitled by way of damages to

his wages from the date of dismissal until the end of the period for which he was hired.—*Montreal Watch Case Co. & Bonneau*, Montreal, Lacoste, C.J., Baby, Blanchet, Hall and Wurtele, J J., Nov. 26, 1892.

Substitution—Institutes—Community—Arts. 947, 949, *C.C.*

Held, that institutes are entitled to sue for the recovery of a debt due to them as institutes, without the curator to the substitution being a party to the cause.

2. Husband and wife *communs en biens*, and sued as such, may be condemned jointly and severally for the amount of an obligation contracted by the wife, for her personal affairs, and for which her husband became personally liable, even where it is not expressly stated that he binds himself jointly and severally with her.—*Ouimet & Benoit*, Montreal, Baby, Bossé, Blanchet, Hall and Wurtele, JJ., Sept. 26, 1892.

Contract—Sale—Error—Nullity.

The defendant purchased an immovable property at auction for $5,000. In the conditions of sale were the following words, "lease to be respected, rental £90." This was an unintentional error, the lease, which had one more year to run, being for £85. The rent was not mentioned in the public advertisements of the sale; the seller acted in good faith, and had offered to make up the deficiency in rental.

Held, that the error was not sufficiently serious to justify the buyer in treating the sale as a nullity, and in refusing to complete the purchase.—*McBean & Marler*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., May 21, 1892.

Costs—Discretion of court.

Held, where appellant had agreed to discharge a hypothec in his favor, registered against an immovable, and it appeared that he had instructed his notary to prepare the discharge, but through inadvertence no discharge was executed or registered until after the institution of an action against him *en radiation d'hypothèque*, the Court of Appeal will not interfere with the discretion exercised by the Court below in condemning the appellant to pay the costs of such action,—more especially as the hypothec in question was not in fact included in the registered trans-

fer of his rights pleaded by appellant.—*McLaren & Laperrière*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall, Wurtele, JJ., May 21, 1892.

Simulation—Seizure against party not registered owner—Procedure.

Held, where opposant's title to immovable property, acquired by her from a disinterested third party, was duly registered before the existence of the claim of a judgment creditor of opposant's husband, and no action to annul the wife's deed had ever been instituted, such creditor is not entitled to seize the property, and a contestation by him of the wife's opposition on the ground that the deed to the wife was simulated, and that the husband was the real owner, cannot be maintained.—*Lefebvre & Marsan dit Lapierre*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., May 21, 1892.

Pledge—Bank—Commercial matter—Knowledge of insolvency—Arts. 1036, 1488, 1966*a*, *C.C.*

Held, 1. The pledge of goods to a bank by a trader, as collateral security, the goods in question being held at the time by the trader under commercial documents of title duly endorsed and transferred to him, and the pledge being in the course of the bank's regular business, is a commercial matter; and the bank receiving such pledge in good faith thereby acquires a valid title to the goods, and the right to dispose of the same for its benefit.

2. A transfer of promissory notes made by a trader to a bank as collateral security for a debt due by him to the bank, the manager of the bank, at the time of the transfer, having reason to know that the transferor is insolvent, is void under art. 1036, C. C.—*Canadian Bank of Commerce & Stevenson*, Montreal, Baby, Bossé, Blanchet, Hall and Wurtele, JJ., May 21, 1892.

Jurisdiction—Cause of action—Intervention—Arts. 114, 157, *C. C. P.*

Held, 1. Where the intervening party, within three days after allowance of the intervention, fails to have it served upon the parties in the case, and to file a certificate of such service, it is held not to have been filed, and a motion to dismiss a second intervention by the same party on the ground that the first is still in the record, will not be granted. (Art. 157, C. C. P.)

2. Where the plaintiff, domiciled in the district of M., revendicates as his property goods in the possession of a defendant domi-

ciled in another district, and alleged to be illegally detained by him therein, the action, being based on defendant's possession of the goods, should be brought in the district of his domicile.

3. Where an action is manifestly beyond the jurisdiction of the Court, it will be dismissed even though no declinatory exception has been filed.

4. A person who intervenes in an action of revendication (the defendant making default), in order to contest the seizure, may raise the question of jurisdiction by his intervention, without having filed a declinatory exception within four days from the allowance of his intervention.

5. The intervening party in such case, is not bound by a consent to the jurisdiction, proved to have been given by defendant, before the institution of the action.—*Goldie & Rasconi*, Montreal, Lacoste, C.J., Blanchet, Hall, JJ., and Doherty, A.J., June 8, 1892.

SUPERIOR COURT ABSTRACT.

Gaming contract—Pledge—Money deposited with broker as margin on speculative stock transactions—Action to recover balance of deposit—Interest.

Held: 1. An action lies for the recovery of money deposited by the plaintiff in the hands of a broker, as "margin" for speculative stock transactions which were admittedly mere *jeux de bourse*; the money in question being the balance remaining in the broker's hands, as shown by the account rendered by him, after payment of all losses incurred in the transactions. The illicit nature of the debt to secure which a pledge is given, is not a ground which the pledgee can invoke as entitling him to retain the pledge,—more especially where the pledge is given, as in the present case, to secure merely an eventual indebtedness, which, whether licit or illicit, has never existed, the event on which it was to come into existence not having occurred.

2. Interest is due on such balance only from the date of service of action.—*Perodeau* v. *Jackson*, S. C., Doherty, J., Montreal, December 10, 1892.

Circuit Court—Jurisdiction—Contract—Fraud.

Held, 1. On the contestation of the declaration of a garnishee, in the Circuit Court, that that Court has jurisdiction to pronounce upon the validity of a deed invoked by the garnishee to

prove title to goods in his hands, though the price or consider ation mentioned in the deed exceed $200.

2. An onerous contract made by an insolvent debtor with a person who does not know him to be insolvent, and whose acts throughout show good faith, will not be set aside as simulated and fraudulent.—*Adams et al.* v. *Boucher, & Boucher*, T. S., Montreal, in Review, Johnson, C. J., Tait and Davidson, JJ., Nov. 30, 1892.

Sale à reméré—Simulation.

The sale *à reméré* by a debtor to enable him to pay part of his liabilities cannot be attacked as simulated, fraudulent and preferential by a creditor who was cognizant of the sale, and himself received the proceeds of it. Under such circumstances the remedy of the creditor is, not to deprive the advancer of his security, but rather to disinterest him by repaying him, and thus bring the security back into the debtor's estate.—*Ratté* v. *Noel et al.*, and *Matte*, oppt., S. C., Quebec, Andrews, J., March 23, 1892.

Officier public—Taxe imposée par l'article 1213, *S. R. P. Q.*

Jugé, Que la taxe de vingt pour cent sur l'excédant de la recette nette des officiers publics au-dessus de mille piastres, imposée par le statut 45 Vic., ch. 17, sec. 2, codifié maintenant dans l'article 1213 des statuts refondus de la province de Québec, peut être exigé des officiers publics qui étaient en fonctions lors de la passation du dit statut.—*Turcotte es qual.* v. *J. C. Auger*, Pagnuelo, J., Montréal, 9 jan. 1892.

Droit maritime—Saisie-conservatoire d'un vaisseau—Dernier voyage—Privilége du dernier équipeur—Art. 2383, § 5, *C. C.*

Dans les premiers jours de novembre 1891, les demandeurs ont approvisionné le steamer Haytor qui fit voile le 5 novembre pour Rotterdam. De là il alla successivement à Cardiff, Wales, à Baltimore, à Falmouth, à Newport en Virginie, à Livourne, à Eliza qui est une île sur la côte d'Espagne, à St. Jean de Terreneuve, à Pictou dans la Nouvelle Ecosse. De Pictou il fit voile pour Montréal, où il arriva le 11 mai 1892. Le lendemain les demandeurs le fit saisir pour assurer leur privilége.

Jugé, Que toutes ces courses ne constituent, en égard au privilége accordé par l'article 2383, § 5, C. C., qu'un seul et même voyage; que l'expression "dernier voyage" dont se sert cette

article, s'entend du voyage complet d'aller et retour, et que ce voyage n'est achevé que lorsque le navire revient au port de départ. Que c'est le droit français, et non le droit anglais, qui fait autorité sur cette matière.—*McLea* v. *Holman*, C. S., Montréal, Pagnuelo, J., 3 décembre 1892.

Preuve—Copie de document—Action en nullité de procès-verbal—Compétence de la Cour Supérieure—Pouvoirs des conseils municipaux—Procès-verbal—Surintendant spécial et répartition.

Jugé:—1. La copie d'une copie d'un procès-verbal contenant une attestation du secrétaire-trésorier qu'il n'existe que sous cette forme dans les archives dont il est dépositaire, ne constate pas l'existence du procès-verbal, et n'en constitue pas la preuve légale dans une action intentée pour le faire annuler.

2. La Cour Supérieure est compétente à connaître d'une action par un intéressé en nullité d'un procès-verbal homologué, même après l'expiration des trente jours dans lesquels la demande en cassation doit être portée devant la Cour de Circuit.

3. Mais l'action ne peut être prise avant l'homologation du procès-verbal, qui n'est jusque-là qu'une information au corps municipal auquel il est adressé.

4. Un conseil municipal peut, par résolution, nommer un surintendant spécial pour faire une répartition de travaux en vertu d'un procès-verbal qui n'en contient pas, et le rapport exigé par l'article 809*a*, C. M., n'est pas requis en ce cas. Ce surintendant peut être choisi en dehors de la municipalité. Art. 204, C. M. —*Lacoursière* v. *Corporation du Comte de Maskinongé*, Québec, en révision, Casault, Caron, Andrews, JJ., 31 mars 1892.

Sale without reserve—Mining rights—R. S. Q. 1421—*Non-apparent servitude—C. C.* 1519—*C. C. P.* 126.

Held: An unreserved sale of an immovable conveys all mining rights on the same, subject to the provisions of the Quebec mining laws; and an action will lie to resiliate such sale, or for an indemnity, by the purchaser who subsequently discovers that a reserve of such mining rights exists in favor of his vendor's *auteurs.*—*Neill* v. *Proulx*, Quebec, in Review, Casault, Routhier, Andrews, JJ., April 30, 1892.

Assignation—Exception à la forme—Temps moyen et vrai—"Standard time."

Jugé: Le temps moyen à l'endroit où une assignation est donnée

est celui qui doit déterminer si elle l'a été avant sept heures du matin, ou après sept heures du soir.

2. D'après le temps moyen à Ste. Luce, le 31 octobre dernier, la défenderesse a été assignée avant sept heures du soir (Casault, J., diss.).—*Leclaire* v. *Gagné*, Québec, en révision, Casault, Routhier, Andrews, JJ., 30 avril 1892.

QUEEN'S BENCH DIVISION.

TORONTO, Dec. 29, 1892.

Coram ROSE, J.

NIXON v. GRAND TRUNK R. Co.

Railway—Damage to animals—53 Vict. (D.), ch. 28, s. 2.

Plaintiff's horses escaped from his farm, passed down a concession road to an allowance for road which was intersected by defendants' railway, then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train.

HELD:—*That the horses not being in charge of any person, were not properly within half a mile of the point of intersection, and so did not get upon the railway from an adjoining place where, under the circumstances, they might properly be; and notwithstanding the absence of cattle-guards the plaintiff was not entitled to recover.*

ROSE, J.—This demurrer raises the question of the proper construction of 53 Vic., ch. 28, s. 2 (D.), repealing s-s. 3 of s. 194 of "The Railway Act," 51 Vict., ch. 29, and substituting a new section therefor. The 51st Vict. repealed Cap. 109, R. S. C. (1886) S. 13, which provided for the construction and maintenance of fences and cattle guards.

Under s-s 2 of S. 13 the liability of a railway company for damages to animals on the railway where fences or cattle guards were not constructed or maintained was absolute and unconditional.

Hurst v. *B. & L. H. R. Co.*, 16 U. C. R. 299; *Daniels* v. *G. T. R. Co.*, 11 A. R., p. 474.

By the 51st Vict. the liability was limited to damages done to animals "not wrongfully on the railway and having got there "in consequence of the omission to make complete and maintain "such fences and cattle guards as aforesaid."

The 53 Vict. introduced the following provision: "3. If the "company omits to erect and complete as aforesaid any fence or "cattle guard, or if after it is completed the company neglects "to maintain the same as aforesaid, and if in consequence of "such omission or neglect any animal gets upon the railway "from an adjoining place where under the circumstances, it "might properly be, then the company shall be liable to the "owner of every such animal for all damages in respect of it "caused by any of the company's trains or engines; and no "animal allowed by law to run at large shall be held to be im-"properly on a place adjoining the railway merely for the reason "that the owner or occupant of such place has not permitted it "to be there."

A perusal of the cases above referred to as well as of *Ferrie* v. *G. T. R.*, 16 U. C. R. 474; *McKennan* v. *G. T. R.*, 8 C. P. 411; *Simpson* v. *G. W. R.*, 17 U. C. R. 57; *Corley* v. *G. T. R.*, 18 U. C. R. 96; *Conway* v. *G. T. R.*, 12 A. R. 708; and *Duncan* v. *C. P. R.*, 21 O. R. 355, will show the history of the legislation, the construction put upon it by the Courts and the object and effect of the clause above set out.

The facts appearing upon the record show that the horses in question "escaped" from the plaintiff's farm, passed down a concession road to an allowance for road which was intersected by the railway, then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. No negligence is charged in the management of the train, the only negligence charged is in not constructing and maintaining cattle guards or fences. I do not see why anything is said about fences, as no fence could have prevented the horses going from the highway on the railway. A cattle guard would no doubt have kept the horses from travelling along the track of the railway, and it may properly be said that it was in consequence of the omission or neglect to construct and maintain a cattle guard that the animals got upon the railway from the highway.

Then, was the highway a place where, under the circumstances, the animals at the time when they went on the track "might properly be?" If they were animals "allowed by law to run at large," the fact that they were on the highway without the permission of the owners of the road, would not, of itself, be sufficient to warrant a holding that the animals were improperly on the highway.

Sec. 271 prohibits the permitting of horses, etc., to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, "unless such cattle are "in charge of some person or persons to prevent their loitering "or stopping on such highway at such intersection." See *Simpson* v. *G. W. R.*, *supra*.

From the pleadings we learn that the line of the railway crosses the road allowance "on the level." It does not appear that the horses were in charge of any person; if not, they were not properly within half a mile of the point of intersection, and so did not get upon the railway from an adjoining place, where, under the circumstances, they might properly be. The case of *Daniels* v. *G. T. R.*, above referred to, is much in point. See also *Corley* v. *G. T. R.*, *supra*.

In my opinion the defendant is entitled to judgment on the demurrer with costs.

H. S. Osler for demurrer.

Watson, Q.C., contra.

ENGLISH TESTAMENTARY LAW.

It may be worth while to draw attention to what appears to be a serious defect in English testamentary law. No curb is placed by the law of England on the arbitrary power of testators. If a person is proved to have been of sound mind, and not under undue influence at the time of making his (or her) will, and if the will is correct in form, English law will not venture to set it aside, no matter how cruel, how unjust, or unnatural may be its provisions. Suppose, for instance, a man has conceived some unfounded antipathy against his wife and children—a thing that sometimes happens—there is nothing to prevent him, according to English jurisprudence, from leaving them penniless, although he happens to die a millionaire. He may give all his property to an utter stranger—to a mistress, for instance—and the law will not interfere with his will. As a text-book on Probate Law puts it, 'However ridiculous or extravagant the dispositions of a will may be, still if the testator was, at the time, of sound mind, and not acting under undue influence, the will must be established.' Many examples have been given of absurd and capricious wills, which were upheld by the English Probate Court. The will of an Englishman, who had at different times, while residing in India, professed the Hindoo and Mohammedan faith, and who,

to the exclusion of all his relatives, left the bulk of his property for the benefit of the poor of Constantinople was held to be perfectly valid (*Austen* v. *Graham*, 8 Moo. P. C. C. 493). In 1838, a man named Boys, a clerk and book-keeper, by his will left all his property to a stranger, and directed his executors to cause some of his bowels to be converted into fiddle strings, others to be sublimed into smelling salts, and the remainder of his body to be vitrified into lenses for optical purposes. This extraordinary will was upheld (*vide Monthly Law Magazine* for 1838, p. 117). But surely the sanity of this testator was, at least, open to suspicion.

Some restraint should certainly be placed on the arbitrary power of disinheriting those who have a natural claim on the testator. It is easy to conceive a case where a father might reasonably punish a worthless son by leaving him merely the means of subsistence; but the law should be at liberty to set aside wills which are inofficious, or, to use a less technical word, unnatural.

Nearly every code of laws, except the English, has limited the powers of testators in this respect. In the laws of ancient Rome there was a form of procedure known as the *querela inofficiosi testamenti*, whereby children or other persons who had without cause been excluded from the testator's will, could seek to set it aside even though it was formally perfect. Even brothers and sisters of the half-blood were allowed to bring this suit by the laws of Justinian. It should, however, be mentioned that, if anything was left to a person by the will, he could not attack it as *inofficiosum*, but he had the right to bring the action *in supplementum legitimæ*, to have that which was left to him made up, so as to equal the fourth part of what he would have taken *ab intestato*.

The testator's power of disposition is greatly restricted in France and Spain. In France, if a man at the time of his death has only one legitimate child, he cannot dispose of more than a moiety of his goods; if he leaves two children, he can only dispose of a third, and if he leaves three or four he can only dispose of a fourth. In Spain, he who has a child, grandchild, or other descendant, can only will one-fifth to strangers. If he has no legitimate offspring he may give all to his illegitimate children; and a woman may, in the absence of legitimate offspring, leave all she dies possessed of to illegitimate children, provided they are not the fruit of adultery. The Italian law has some-

what similar provisions. In Turkey there is no power of making a will, and the law disposes of a man's property. Of course, there is an exception in the case of non-Turkish subjects residing in the Ottoman Empire.

Nature, and the elementary principles of justice, demand that no man should have the power, through mere caprice or malice, of beggaring his wife and children. English law has failed to recognise this principle, and, therefore, it is desirable that, either by statute or otherwise, the powers of testators should be curtailed within reasonable limits.—*Irish Law Times.*

GENERAL NOTES.

TRESPASS BY SUBTERRANEAN SQUEEZING.—A recent New Jersey case (*Costigan* v. *Pennsylvania Railway Company*, 23 Atl. R. 810) presents a rather novel instance of trespass. The declaration charged that the defendants wrongfully and injuriously made, on their own land, an embankment so heavy that the downward pressure (two hundred thousand tons), causing an equal lateral pressure, forced earth and gravel, lying below the surface in the defendant's land, into the plaintiff's land, thereby disturbing the surface of the plaintiff's lot, moving his house on to land not his, and cracking its foundation. The defendants justify under their charter, the embankment being properly and carefully built. The Court holds that while the charter justifies any public damage from reasonable working of the road, as injury arising from noise, smoke, cinders, vibration, any damage which in its nature is distinctly private is not within their privilege. This decision, that such an embankment is not within the legislative sanction, which on the facts stated seems open to doubt, leaves the question as though the act had been done by a private individual, and the result of the case is that no man shall squeeze his neighbour's land, even below the surface. To say that a man cannot put buildings of the size he chooses on his own land is at first a startling doctrine; but if the plaintiff can prove actual transfer of particles of earth from his neighbour's lot to his, however far below the surface, it seems to follow necessarily that there is a trespass. Of course, as every downward pressure produces lateral pressure, and pressure is displacement, a man trespasses with every step he takes on his own land. It also follows that, since the right to support extends only to the land itself, a man is absolutely responsible for all damages to his

neighbour's land resulting from building on his own, however firm his land and however loose that of his neighbour. It is needless to add that the unmetaphysical sympathies of juries, as well as the infrequency of violent subterreanean displacements, will keep this scientific principle within due limits.—*Harvard Law Review.*

PERSONAL STATISTICS.—The oldest Cabinet Minister is the Right Hon. William Ewart Gladstone, M.P., First Lord of the Treasury and Lord Privy Seal, aged eighty-three years; the youngest is the Right Hon. Herbert Henry Asquith, Q.C., M.P., Secretary of State for the Home Department, aged forty-one. The oldest member of Her Majesty's Privy Council is the Right Hon. Sir James Bacon, aged ninety-four; the youngest, the Right Hon. Lord Walter Gordon-Lennox, M.P., aged twenty-seven. The oldest member of the House of Commons is the Right Hon. Charles Pelham Villiers, M.P. for the Southern Division of the Borough of Wolverhampton, aged ninety-one; the youngest, Mr. William Shepherd Allen, M.P. for the Borough of Newcastle-under-Lyme, aged twenty-two. The oldest judge in England is the Right Hon. Lord Esher. Master of the Rolls, aged seventy-six; the youngest, the Hon. Sir John Gorell Barnes, of the Probate, Divorce and Admiralty Division of the High Court, aged forty-four. The oldest judge in Ireland is the Hon. John Fitz-Henry Townsend, LL.D., of the Court of Admiralty, aged eighty-two; the youngest, the Right Hon. John George Gibson, of the Queen's Bench Division, aged forty-six. The oldest of the Scotch Lords of Session is the Right Hon. George, Lord Young, aged seventy-three; the youngest, the Right Hon. Lord Robertson, Lord Justice-General, aged forty-seven.—*Who's Who in* 1893.

MESMERISM.—The following curious and interesting question is asked by *Law Notes*: "If A. mesmerizes B. and induces him to disclose his most private affairs, can B. have a summons for assault against A.? A metropolitan magistrate the other day declined to grant one. What is the remedy, a civil action for damages?" It has struck us on several occasions of late that before very long the difficulties of the magistrate and of the law may be very appreciably increased by the constant recurrence of questions connected with the conduct of hypnotizers, mesmerizers and others of the kind toward patients, particularly females. The existence of a mysterious power for evil, in the nature of hypnotization, cannot be denied or ignored.—*Indian Jurist.*