Canada Law Journal.

VOL. XLVI. TORONTO, FEBRUARY 15. No. 4.

IS CHRISTIANITY PART OF THE LAW?

It has sometimes been said that Christianity is part of the common law of England, and if of England, then also of Ontario; but by this expression we must not understand that Christianity is even from a legal standpoint in any way the product of the State. No one, of course, pretends that Christianity is a religion devised and invented by the English people in the way they have devised and invented that system of law which goes by the name of common law. Christianity is not the result of popular custom crystallized by judicial decisions. It is something which existed before the common law had any existence, and when it is said that "it is part of the common law," no more would seem to be meant than this, viz., that the common law recognized, as a fact generally accepted by the people, that the Christian religion is true, and that it is beneficial to the State, that it should be protected, and that actions contrary or derogatory to that religion should be suppressed as being an offence not only against God, but against the commonwealth. Furthermore, in order to foster that religion, endowments were granted both by the State and individuals in England for the support of ministers of that religion, and many of its chief ministers were called on to take a leading part in the government of the country. The prominence and influence which the English archbishops and bishops thus early attained in political affairs in England was due, no doubt, very largely to their superior learning in an age of ignorance. A religion which was thus protected and supported by the State, and which was professed by the great majority of the people was so much a part of the constitution of things, that it came to be regarded as part of the law of the land, and offences against the Christian religion became offences against the State and punishable as such; and the Christian religion thus acquired in England a status which was unknown to the primitive church.

Bracton declares that "God is the author of justice, for justice is in the Creator, and accordingly right and law have the same significance." Bract. B. I., c. 3. Moreover, this same author says: "Let the King then attribute to the law what the law attributes to him, namely, dominion and power, for there is no King where the will and not the law has dominion; and that he ought to be under the law, since he is the vicar of God, appears evidently after the likeness of Jesus Christ, whose place he fills on earth."

The administration of law in England was regarded by that writer as a sacred duty demanding the highest mental and moral qualifications. Thus he says: "Let not one who is unwise and unlearned ascend the judgment seat which is, as it were, the throne of God, lest he convert darkness into light and light into darkness, and lest, with a sword in his untaught hand, as it were, of a madman, he should slay the innocent and set free the guilty, and lest he tumble down from on high, as from the throne of God, in attempting to fly before he has acquired wings." Bract. B. I., c. 2, s. 7. Furthermore, he says: "Jurisprudence is the knowledge of divine and human things, the science of what is just and unjust." Ib. c. 4, s. 4.

This association of the law with the Christian religion is manifested not only in the works of the early writers, but in the actual practice of the courts of law from the earliest times. Lord Bacon declared religion to be one of the pillars of the law.

It finds public expression to this day in England in the judicial attendance at public worship for the purpose of invoking the Divine blessing and guidance on the proceedings of the law courts, whether it be at the assizes, or on the general resumption of legal business after the long vacation, a practice which, unfortunately, we in Ontario have not preserved.

The same recognition by the State of the Christian religion is evidenced by statutes against blasphemy, and for the proper observance of the Lord's Day.

Prior to the Norman conquest bishops sat with the sheriff in the County Courts, the bishop's duty being to inform the people

of the law of God, and though this mingling of temporal and ecclesiastical law was put an end to by the Conqueror, yet the confining of ecclesiastical causes to the courts Christian, which he accomplished, was in effect also a public recognition of the Christian religion, if not as part of the law of the land, nevertheless as having a status as part of the established order of society, which no other religion possessed in England.

Turning to the utterances of judges we find there are many to be found affirming directly or indirectly that Christianity is part of the law of England. For instance: "The laws of the realm do admit nothing against the law of God." Hobart, C.J., in *Colt* v. *Glover* (1614) Hol. 149.

"The second ground of the law of England is the law of God." Hyde, J., in *Manby* v. *Scott* (1663) 1 Mod. Rep. 126.

Lord Hale, C.J., in *Taylor's* Case (1675) 1 Vent. 293, said: "Christianity is part of the law" and Lord Raymond, C.J., in *Rex* v. *Woolston,* Fitz. 64, 2 Stra. 834, declared: "Christianity, in general, is part of the common law of England and therefore to be protected by it."

Lord Kenyon, C.J., said, in *Williams' Case* (1797) 26 How. St. Trials 704: "The Christian religion is part of the law of the land."

"I apprehend that it is the duty of every judge presiding in an English court of justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church or synagogue, to recollect that Christianity is part of the law of England." Lord Hardwicke, L.C., in *In re Masters, etc., of Bedford Charity* (1819) 2 Swan. 527.

"It is certain that the Christian religion is part of the law of the land." Patteson, J., in *Rex* v. *Hetherington* (1841) 5 Jur. O.S. 530.

Lord Chief Baron Kelly, in *Cowan* v. *Milbourn* (1867) 2 L.R. Ex. 234, declared: "There is abundant authority for saying that Christianity is a part and parcel of the law of the land."

In *Pringle* v. *Napanee* (1878) 43 U.C.Q.B. 285, Harrison, C.J., declared that "an examination of the English law will be

found to establish that Christianity in general, and not simply the tenets of particular sects, is a part of the common law of England, and that the cardinal doctrines of Christianity have been respected and guarded by the legislature and common law of the country," and he instances as legislative recognitions of Christianity the statutes for the proper observance of the Lord's Day (29 Car. II. c. 7), and the statute for the suppression of blasphemy (9 & 10 Wm. III. c. 32), both of which became part of the law of Ontario by virtue of the Constitutional Act, 49 Geo. III. c. 1 (U.C.).

When Christianity first appeared in the world it had no adventitious support from the temporal governments of the world. It was a purely voluntary society seeking to spread itself in the same way as any voluntary religious society to-day seeks to spread itself. No one could be compelled to join the society, and the only persuasions permitted were those addressed to the reason and the conscience. The reign of Constantine marks the era of the change of attitude of the State to the Christian religion. Thenceforward the Christian church was taken under the patronage of the temporal rulers of Europe, and though it acquired wealth and power, it was often at the expense of the sacrifice of spirituality.

In the heyday of the Church prosperity and patronage by the State, it is quite certain that methods were adopted by both Church and State for overcoming opposition to the tenets of the Christian faith of a far different kind from those employed by the primitive fathers, and the adoption of such methods, though attended with temporary success, has left a wound on the Church's reputation: because it is not unnaturally assumed by some that those who resorted to such methods were carrying out the principles of the Church whose ministers they were, though in truth and fact they were altogether misapprehending the spirit and true meaning of the religion they professed.

Who can now read of all the burnings and tortures of past ages done in the sacred name of the Christian religion without feeling how very far removed all such proceedings are from that

religion when properly understood? How much of this cruelty was due to a real, though mistaken, zeal for what was regarded as truth, and how much to a desire to enforce a system of spiritual tyranny and terrorism, who can tell?

Ever since the seventeenth century forces have been at work in England and among all English speaking people, which have materially modified the administration of the law in this respect. Toleration of all religious opinions which do not conflict with decency and public morality has also become a part of the law of the land; and this toleration, to be effective, must involve as a necessary consequence the right to advocate beliefs and doctrines contrary to the Christian religion. This changed condition of things has involved a change in the attitude of the courts to those who publicly advocate beliefs and doctrines contrary to Christianity. Provided they do so with some regard to morality and to a decent respect for the religious feelings of others, and has brought us back very far to the primitive condition of things.

Hence it has come to pass that greater latitude has of late years been allowed to the publication of books attacking the Christian faith, but although this may be done without fear of temporal punishment if the ordinary rules of decent argument are observed, it would be quite a mistake to assume that what may be done with impunity is nevertheless a lawful act in contemplation of law. As was said by Bramwell, B., in *Cowan* v. *Milbourn,* L.R. 2 Ex. 236: "A thing may be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it." And this distinction is not one of no importance, but may be found at times a sufficient ground for the avoidance of contracts. Thus, in *Cowan* v. *Milbourn,* the defendant contracted to let a room to the plaintiff for the purpose of delivering lectures which the defendant subsequently discovered were an attack on the Christian religion, and he then refused to allow the room to be used for that purpose by the plaintiff; and it was held that the purpose for which the room had been hired by the plaintiff was illegal, and the contract

was not enforceable; and to the same effect is *Pringle* v. *Napanee*, 43 U.C.Q.B. 285.

The altered attitude of the courts towards those who advocate doctrines inimical to Christianity appears from the following observations of the late Lord Chief Justice Coleridge. He says: "It is no longer true in the sense in which it was true when these dicta were uttered that 'Christianity is part of the law of the land.' Non-Conformists and Jews were then under penal laws, and were hardly allowed civil rights. But now, so far as I know the law, a Jew might be Lord Chancellor. Certainly he might be Master of the Rolls, and the great judge whose loss we have all had to deplore (Jessel, M.R.) might have had to try such a case, and if the view of the law supposed, be correct, he would have had to tell the jury, perhaps partly composed of Jews, that it was blasphemy to deny that Jesus Christ was the Messiah, which he himself did deny, and which Parliament has allowed him to deny, and which it was part of 'the law of the land' that he might deny." *Reg.* v. *Ramsay* (1883) 15 Cox C.C. 235; and in another case he said: "I for one would never be a party, unless the law were clear, to saying to every man who put forward his views on those most sacred things, that he should be branded as apparently criminal because he differed from the majority of mankind in his religious views or convictions on the subject of religion. If that were so, we should get into ages and times which, thank God, we do not live in, when people were put to death for opinions and beliefs which now almost all of us believe to be true": *Reg.* v. *Bradlaugh* (1883) 15 Cox C.C. 230.

It is well known that many learned men of the present day deny the Mosaic account of the creation of man, and prefer to think that they are merely improved monkeys, and others delight themselves in discovering what they believe to be flaws in those Scriptures on which the credibility of the Christian religion is based; and these men from time to time publish to the world the result of their investigations which are by some thought to be, and are certainly intended to be, destructive of faith in the truth of Christianity; nevertheless such writings,

so long as they refrain from abuse and vituperation, and keep within the ordinary bounds of morality, are allowed to pass unnoticed by the law; but this freedom from penal consequences can hardly be rightly construed as indicating any real alteration in the fundamental rule witnessed to by so many legal sages of the past, to the effect that Christianity is a part of our law, and is still a veritable and effective part of it; but it rather indicates that the law deems it to be a saner method of maintaining the Christian faith, to reason with, rather than punish, those who have the misfortune to be unconvinced of its truth, or inclined to controvert it.

No harm happens to society from a few men thinking themselves improved monkeys rather than the subjects of a special creation, so long as they do not think fit to adopt the morals of monkeys, which might indeed prove very detrimental to society. Neither is society much harmed because a few men delight to think that they have discovered that the writings ascribed to certain persons in the Scriptures were not in fact written by them, or that the generally received date of certain writings is not the true date. From a Christian standpoint, however, those who for any reason are led to deny the Christian faith, ought to be objects of pity and commiseration rather than subjects for punishment as criminals.

G. S. H.

HIS HONOUR THOMAS HODGINS, LL.D.

There has passed from amongst us one of the most learned as well as one of the most respected members of the profession in this country—His Honour Thomas Hodgins, M.A., LL.D., judge of the Admiralty Division of the Exchequer Court and Master in Ordinary of the Supreme Court of Ontario. He died suddenly at his residence in the city of Toronto on the 14th ult. He was in the act of telephoning to his stenographer in reference to some alterations he desired to make in some manuscript when the call came that waits for no answer, and death ensued from heart failure during the conversation. We can well believe that his desire was to die in harness, and so he did.

Dominion of Canada was concerned and many of his articles on this subject have appeared in this journal as well as in some of the leading English reviews.

As a member of the Canadian Volunteer Force he saw service as a member of the University Rifles in the Fenian Raid in 1866, and as a member of the Church Militant for many years took an active interest in the proceedings of the Synod of the Diocese of Toronto.

His was a full, active and useful life. Both at the Bar and on the Bench he was deservedly popular, and was held in respect for his impartiality, patience and courtesy. In private life a large circle of friends will mourn his loss. Tributes to his memory were paid by several of the judges of the Ontario Bench, on the meeting of their courts the day after his death, which we gladly reproduce.

Sir Charles Moss, President of the Supreme Court of Judicature said: "I believe that everybody who knew him or came in contact with him in these important duties will agree that in the exercise of them he always performed his duty as he saw it. Gifted with an infinite capacity for taking pains, he possessed large stores of legal knowledge. But he went further and branched out into broader and more comprehensive fields.

"As a man he was kindly and genial in manner. Courteous and considerate he always was.

"For myself and my colleagues I can but deeply voice regret for the event which has removed one who earned our highest respect and esteem. He died as I believe he would have wished, with his mental faculties unimpaired."

Sir John Alexander Boyd, President of the High Court of Justice, said: "Since the court was last in session, suddenly has come the inevitable call to one whom we know rather as Master in Ordinary than as local judge of the Admiralty Court. Mr. Justice Hodgins lived to a good old age and filled his judicial offices with competent and efficient service. It is as a judge that his industry and patience and integrity are to be commended in this place. He was an erudite and painstaking judge who always

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sought to do what he believed to be right. No greater encomium can be paid upon any judicial officer than that which is applicable to him; his constant endeavour was to arrive at the truth in order to give effect to what appealed to him as the very right and justice of the case. His passing is a distinct loss to the public service of the country. All his large and ripe experience cannot be replaced."

Sir Glenholme Falconbridge, President and Chief Justice of the King's Bench, said: "Mr. Hodgins' manners were characterized by that polished urbanity which we always find pleasing, even though we know or suspect that it is a mere artificial veneer. But in his case it was the outward manifestation of true benevolence of disposition, and kindness of heart.

"As to his intellectual achievements, he was not alone distinguished in the general domain of law, but he had made himself known as a high authority in international questions, in constitutional law, diplomacy and parliamentary practice. He loved his country as he loved his alma mater, with a pure and lofty fervour; and he gave of his best to the service of both—his time, his talents, his tongue and pen. He was a fine example of altruism in an age which is generally characterized by selfishness and egoism. May God rest his soul in peace."

The family has become well known in this country. His elder brother, John George Hodgins, LL.D., has rendered splendid service for the province in connection with its educational system, having occupied prominent positions in connection therewith. As historiographer of the Educational Department of Ontario he was at the time of his death engaged in preparing a work in four volumes on "The Documentary History of Education in Upper Canada." One of the sons of the deceased is in the Royal Artillery. His nephew, Frank E. Hodgins, K.C., a son of Dr. Hodgins, occupies a prominent place at the Bar of Ontario. His brother, Col. Hodgins, is one of the most enthusiastic of our staff commanding officers and is D.O.C. at London, Ontario.

REVIEW OF CURRENT ENGLISH CASES.

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SETTLEMENT — REAL PROPERTY—APPOINTMENT—REMOTENESS — RULE AGAINST DOUBLE POSSIBILITIES—SUCCESSIVE LIMITATIONS TO UNBORN CHILDREN—ELECTION.

In re Nash, Cook v. *Frederick* (1910) 1 Ch. 1. This was an appeal from the decision of Eve, J., 1909) 2 Ch 450 (noted ante, vol. 45, p. 746). Two points were involved in the case. First, whether the rule against double possibilities applied to the limitation of equitable estates, and second, whether, where an assumed exercise of a power by will fails on the ground of its offending against the rule against double possibilities, those who benefit by such failure are put to an election whether they will confirm the will, or accept the benefits given them by the will. Eve, J., held that the rule against double possibilities does apply to the limitation of equitable estates, but where an appointment by will fails because it offends against the rule no case of election arises, and his decision is now affirmed on both points by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.).

RAILWAY—GRANT OF LAND TO RAILWAY COMPANY—AGREEMENT TO PERMIT GRANTOR TO MAKE A TUNNEL—TIME AND PLACE NOT SPECIFIED—UNCERTAINTY—PERPETUITY—ULTRA VIRES — ASSIGNABILITY OF AGREEMENT.

South Eastern Ry. v. *Associated Portland Cement Manufacturers* (1910) 1 Ch. 12. In 1847 one Calcraft entered into an agreement with the plaintiffs to sell to them certain lands for the purposes of their railway, subject to a stipulation that Calcraft and his assigns might at any time construct a tunnel under the land to be conveyed. A conveyance was subsequently made by Calcraft to the plaintiffs which excepted and reserved to Calcraft and his assigns the right to construct a tunnel under the lands conveyed. Calcraft died and his universal successor made a lease of part of the land severed by the railway, and also assigned to the lessee during the continuance of the demise the benefit of the agreement of 1847, and the defendants having become the assignee of the lease were about to construct a tunnel,

and this action was brought to restrain them from so doing. The plaintiffs contended that the agreement, and the reservation and exception in the deed, were void for uncertainty for not specifying a time when or a specific place where the tunnel was to be made, and that they were also void as offending against the law of perpetuities, and also that the defendants were not entitled to the benefit of the agreement. Eady, J., who tried the action, held that as against the original covenantors, the railway company, the provision in the agreement as to the tunnel was a personal contract and was not obnoxious to the rule against perpetuities, and that the benefit of the contract could be assigned and had been validly assigned to the defendants, during the continuance of their term; and on both these points he was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.). Eady, J., also held that the reservation in the deed amounted to a regrant of an easement by the plaintiff, and was not void for uncertainty and was not ultra vires of the railway company, but on these points the Court of Appeal expressed no opinion.

EXPROPRIATION — COMPULSORY PURCHASE — WIDENING STREET — NOTICE TO TREAT—LANDOWNER REJECTING OFFER—WITHDRAWAL OF NOTICE—DAMAGES.

In *Wild* v. *Woolwich* (1910) 1 Ch. 35, a notice had been given by a municipal corporation to treat for the purchase of land for the widening of a street. The landowner rejected the proposed offer on the ground that more land was proposed to be taken than was necessary, the corporation then withdrew the notice, and the plaintiffs then brought the present action to recover damages occasioned by service of the notice. Eve, J., held that they were not entitled to succeed and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Buckley, L.JJ.) affirmed his decision, holding that where a notice to treat is served the landowner must either treat the notice as good, or repudiate it as a whole, but cannot accept it in part, and reject it in part; and where he has not accepted it as a whole, the notice may be withdrawn, without imposing on the corporation giving the notice any liability for damages.

VENDOR AND PURCHASER—DOUBTFUL TITLE—DIFFICULT QUESTION OF CONSTRUCTION—VENDORS' AND PURCHASERS' ACT—ORIGINATING SUMMONS—COSTS.

In re Nichols & Von Joel (1910) 1 Ch. 43. In this case an application was made under the Vendors' and Purchasers' Act to determine a question of title, Neville, J., before whom the application was heard, finding that the question turned on the construction of a will, thought the title ought not to be forced on the purchaser, but offered before disposing of the matter to give the vendor an opportunity of applying on an originating summons for a construction of the will, which offer was declined and the application was accordingly dismissed. On appeal to the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) that court made the same offer which the vendor then accepted, and an application was then made on an originating summons to determine the question of construction which the court found in favour of the vendor. In these circumstances the Court of Appeal on the new evidence allowed the appeal and declared in favour of the title, but ordered the vendor to pay the costs of the appeal and of the motion before Neville, J.

INJUNCTION—NUISANCE—POLLUTION OF STREAM — SUBSEQUENT REMEDY OF OBJECTION—REVOCATION OF INJUNCTION.

Attorney-General v. *Birmingham* (1910) 1 Ch. 48. In this case a perpetual injunction had been granted by Kekewich, J., restraining the defendants, a municipal corporation, from polluting a stream by discharging sewage into it. An appeal was taken from his judgment, and pending the appeal the defendants had, by the expenditure of £500,000, removed all ground of complaint, and it was now contended that although the injunction was rightly granted, yet in the altered state of circumstances it should now be discharged. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) having directed an examination by an expert and being satisfied by his report that all ground of complaint had been removed, discharged the injunction.

WILL—LEGACY TO FOUND BED IN HOSPITAL.

Attorney-General v. *Belgrave Hospital* (1910) 1 Ch. 73. A testatrix by her will having given a legacy of £1,000 to found a bed in a hospital, Eady, J., was asked to decide in what manner

the fund ought to be applied, and he held that the capital must be invested, and the income to be derived therefrom must be applied in maintaining the bed. The hospital had treated the legacy as applicable to the general purposes of the hospital, and as merely giving the testatrix the right to have a particular bed named after her. But Eady, J., considered this was not an admissible method of dealing with the fund. It will be well for solicitors of charitable institutions to take notice of this case as dealing with a point which is constantly arising.

SETTLEMENT—APPORTIONMENT OF SPECIFIC SUMS OF STOCK—SURRENDER OF APPOINTOR'S LIFE INTEREST—DEATH OF APPOINTOR—HOTCHPOT—DATE AT WHICH VALUE OF APPOINTED STOCKS SHOULD BE ASCERTAINED.

In re Kelly, Gustard v. *Berkeley* (1910) 1 Ch. 78. In this case a donee of a power of appointment over a trust fund invested in stock in which the donee had a life interest appointed part of the stock, and released her life interest to the appointee, the appointment providing that in case the appointee should become entitled to any part of the unappointed fund she should bring the part appointed to her into hotchpot. The tenant for life having died, and the appointee having become entitled to a share of the unappointed fund, it became necessary to determine at what period of time the value of the stock appointed was to be ascertained, and Warrington, J., held, that the value must be ascertained at the date of the death of the tenant for life, and not at the date of the appointment, because so long as the tenant for life was alive, the appointee was in possession in the place of the tenant for life.

RESTRICTIVE COVENANTS—BUILDING SCHEME—SUBSEQUENT PURCHASERS—RIGHT OF SUB-PURCHASERS TO ENFORCE COVENANTS MADE TO A PRIOR VENDOR—NOTICE OF RESTRICTIVE COVENANTS.

Willé v. *St. John* (1910) 1 Ch. 84 was an action to enforce a restrictive covenant in the following circumstances. Du Cane, being owner of a tract of land, sold 14 acres of it to Holmes, and took from him a covenant not to erect any buildings except dwelling houses upon the fourteen acres. Holmes sold part of the land to the plaintiff and part to the defendants. Neither the plaintiffs nor the defendants entered into any restrictive covenants, but they had noticé of the covenant made by Holmes with Du Cane. The defendants erected a church on part of the land

bought by them, which the plaintiffs claimed was a detriment to them, and a breach of the restrictive covenant which Holmes had given to Du Cane, and which they claimed to be entitled to enforce. Warrington, J., who tried the action, however, held that they had no such right, because there was no evidence of the covenant being given in pursuance of, or to carry out, any building scheme, that the mere registration of the covenant did not have the affect of annexing it to the land, that there was no imposition of the covenant by the common vendor of the plaintiff and defendants in furtherance of any building scheme, and neither party purchased their lots on the footing that the covenant in question was to enure for the benefit of the other lots. He held that the covenant in question was one intended merely for the benefit of Du Cane as owner of the rest of the estate of which the fourteen acres had formed part, which was not enforceable by any one but Du Cane or his representatives.

SOLICITOR—SOLICITOR AND AGENT—AGENT'S BILL OF COSTS—TAXATION—ORDER OF COURSE—SOLICITORS' ACT, 1843 (6-7 VICT. c. 73), s. 37—ATTORNEYS' & SOLICITORS' ACT, 1870—(33-34 VICT. c. 28), ss. 3, 17—(R.S.O. c. 174, s. 35).

In re Wilde (1910) 1 Ch. 100. A country solicitor having employed his London agent to transact certain business for which the latter was entitled to costs, obtained an order of course for the delivery by the agent of his bill of costs. This order the agent contended was irregular because the relation of solicitor and client did not exist between a solicitor and his London agent, and he having refused to deliver his bill pursuant to the order, a motion for an attachment was made against him for contempt, whereupon the agent also moved to discharge the order. Both motions were heard together, and Neville, J., who heard them, decided that although prior to the Solicitors' Act of 1843, there did not appear to have been any power at common law to order taxation of an agent's bill, and it was only ordered in Chancery on the terms of bringing the amount of the bill into court, yet that since the Act a different rule prevailed and that under s. 37 (R.S.O. c. 174, s. 35) the country solicitor was entitled as a "party chargeable" to have a taxation of his agent's bill without any terms being imposed, and the order of course was therefore regular, and the agent was ordered to deliver his bill within 21 days and pay the costs of both motions.

MOTOR CAR—DRIVER EXCEEDING SPEED LIMIT—POLICE—WARNING GIVEN BY THIRD PERSON—WILFUL OBSTRUCTION OF CONSTABLE IN EXECUTION OF HIS DUTY—PREVENTION OF CRIMES AMENDMENT ACT, 1885 (48-49 VICT. c. 75) s. 2—(CR. CODE, SS. 168, 169).

Betts v. *Stevens* (1910) 1 K.B. 1 was a prosecution for obstructing a constable in the execution of his duty. The facts were that with a view to preventing motors from travelling at an excessive speed, certain police officers had measured a mile of a travelled road, and set a watch for observing the speed of motor cars driven along the road. The defendant with the object of preventing drivers from being caught, had, as they approached the measured mile at an illegal speed, signalled the drivers whereby they were informed that they were being watched, and thereupon they lowered their speed to a legal rate. The magistrates convicted the defendant, but stated a case for the opinion of a Divisional Court (Lord Alverstone, C.J., and Darling and Bucknill, JJ.), who affirmed the conviction. It is pointed out that a great deal depends on the apparent intention of giving such a warning. If it were given solely with the object of preventing the commission of an illegal act, it would not be unlawful; if, however, the apparent object of the warning is merely to induce the offender to suspend his illegal act only so long as there is danger of detection by the police, then the warning becomes an unlawful obstruction of the police in the execution of their duty.

CRIMINAL LAW—SERVANT'S CHARACTER—FALSE CHARACTER—VERBAL REPRESENTATION—CONSPIRACY—SERVANTS' CHARACTERS ACT, 1792 (32 GEO. III. c. 56), SS. 2, 3.

The King v. *Costello* (1910) 1 K.B. 28. This case was a prosecution under the Servants' Characters Act, 1792 (32 Geo. III. c. 56), for giving a servant a false character; and the principal question was, whether in order to come within the Act the character must be given in writing. The words of the Act are, "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing," etc. The Divisional Court (Lord Alverstone, C.J., and Darling and Bucknill, JJ.) held that the words "in writing" only qualify the word "assert," and do not apply to the words "knowingly and wilfully pretend," and therefore that a false verbal representation as to a servant's character is within the Act. We may note that this Act seems

to be one which became part of the law of Upper Canada and would seem to be still in force in Ontario, although we do not recollect to have come across any case in which it was in question.

CONTRACT—HUSBAND AND WIFE—CONTRACT BY HUSBAND WITH WIFE TO PAY HER A SUM IN CASE HE SHOULD BE GUILTY OF CONDUCT ENTITLING HER TO A SEPARATION—VALIDITY OF AGREEMENT—PUBLIC POLICY.

Harrison v. *Harrison* (1910) 1 K.B. 35. This was an action by a wife against her husband to enforce an agreement for the payment of a sum of money. The defendant had been convicted of cruelty to the plaintiff, and a separation order had been made by justices. In order to induce the plaintiff to return to cohabitation with the defendant he agreed that, in the event of the defendant thereafter being guilty of conduct entitling the plaintiff to a separation, he would pay her the sum of £150, and on such payment she agreed not to demand or receive any weekly sum under any further separation order. The plaintiff returned to live with the defendant, who again assaulted her, whereupon she obtained a further separation order and brought the present action to recover the sum of £150. The defendant contended that the agreement was void as being made in contemplation of a future separation and was therefore contrary to public policy. Walton, J., who tried the action, held that that objection was not tenable, and gave judgment for the plaintiff for the full amount claimed.

WRIT OF SUMMONS—SPECIAL INDORSEMENT—SPEEDY JUDGMENT—AFFIDAVIT IN SUPPORT OF MOTION—FOREIGN PLAINTIFF—AFFIDAVIT OF SOLICITOR—INFORMATION AND BELIEF—RULES 16, 115—(ONT. RULES, 138, 603).

Lagos v. *Grunwaldt* (1910) 1 K.B. 41. In this case a motion for speedy judgment was made upon a specially indorsed writ. The plaintiff was a foreigner resident out of the jurisdiction, and the affidavit in support of the motion was made by his solicitor on "information and belief." The claim was for professional charges rendered by the plaintiff as a foreign solicitor, and the balance claimed was £1,469 4s. 1d. The Master gave the defendant leave to defend on certain terms, including the payment into court of £400 within fourteen days. Sutton, J., affirmed this order, and from it the defendant appealed, claiming to be entitled

to unconditional leave to defend. The defendant objected that the claim was not "a debt or liquidated demand," and therefore not the subject of "special indorsement," but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.) overruled this objection. But on the point of the sufficiency of the affidavit filed in support of the motion, the Court of Appeal were in defendant's favour, and held that under Rule 115 (Ont. Rule 603) an affidavit founded on information is not sufficient to give the court jurisdiction, it not being an affidavit by "a person who can swear positively to the debt or cause of action."

SUNDAY OBSERVANCE—CONSENT TO PROSECUTION—SUNDAY OBSERVANCE PROSECUTION ACT, 1871 (34-35 VICT. C. 87), SS. 1, 2 AND SCHEDULE—(R.S.C. C. 153, S. 17).

The King v. *Halkett* (1910) 1 K.B. 50. In order to prevent oppressive prosecutions for non-observance of the Lord's Day Act (29 Car. II. c. 7), it is provided by the Sunday Observance Prosecution Act, 1871 (34-35 Vict. c. 87) that no prosecution is to be brought under 29 Car. II. c. 7, without the consent of the chief constable or other officer by whatever name called, having the chief command of the police in the police district. In this case the chief constable was away on his holidays, and a superintendent of police was discharging his duties during his absence, but the Divisional Court (Lord Alverstone, C.J., and Darling and Bucknill, JJ.) were of the opinion that his consent was not sufficient under the statute to warrant a prosecution, and the conviction was quashed. A similar provision is to be found in R.S.C. c. 153, s. 17, and from this case it would appear that no one but the Provincial Attorney-General in person is competent to give a consent under that section.

MONEY PAID UNDER MISTAKE OF FACT—MUTUAL MISTAKE—ACTION TO RECOVER MONEY PAID UNDER MISTAKE—STATUTE OF LIMITATIONS—WHETHER NOTICE TO OPPOSITE PARTY OF MISTAKE IS NECESSARY TO COMPLETE CAUSE OF ACTION—9 GEO. IV. C. 14, S. 4—(R.S.O. C. 146, S. 5).

Baker v. *Courage* (1910) 1 K.B. 56. In this case the plaintiff was a licensed victualler and the defendants a brewery company. In February, 1869, the plaintiff being a lessee for a long term of a public house subject to a mortgage to the defendants, acquired the reversion; £1,000, part of the purchase money, being secured

by mortgage of the freehold to the vendor. In March, 1896, the plaintiff agreed to sell his leasehold and freehold interests together with his stock in trade to the defendants. In order to facilitate the transaction the defendants lent the plaintiff £1,000 to pay off the mortgage on the freehold. The same solicitors acted both for the plaintiff and defendants, and in the final adjustment of accounts to ascertain the balance payable to the plaintiff the £1,000 thus lent was omitted to be debited to the plaintiff; and on March 31, 1896, the balance, according to this erroneous account, amounting to £9,000, was paid to the plaintiff. On the day following the plaintiff deposited the £9,000 with the defendant at interest, and from time to time drew out portions, until in January, 1909, there being only a balance of £1,000 remaining, the plaintiff gave notice of his intention to withdraw it. Just before the receipt of that notice the defendants instituted inquiries to find out what amount the house purchased from the plaintiff had cost them, and the mistake as to the £1,000 was then discovered; they, therefore, refused to pay the $1,000, and this action was brought to recover it, and the defendants set up the payment by mistake by way of set-off and counterclaim, to which the plaintiff pleaded the Statute of Limitations. The defendants contended that the cause of action for the recovery of the money paid by mistake did not arise until the mistake was discovered and notice given to the plaintiff; but Hamilton, J., who tried the action, came to the conclusion that the defendant's cause of action arose when the money was paid, and that from that time the statute began to run, and that consequently the defendant's claim was barred, and the plaintiff was entitled to judgment for the amount claimed: see R.S.O. c. 146, s. 5, which is taken from Imp. St. 9 Geo. IV. c. 14, s. 4. Having regard to the result in this case it may well be doubted whether this section is in furtherance of justice. There might be some reason in allowing the statute to be pleaded as to any sum claimed by a defendant by way of set-off over and above the plaintiff's demand; but the same reason obviously does not apply to so much of the set-off as equals the plaintiff's claim.

Correspondence.

THE POWER COMMISSION AND THE ATTORNEY-GENERAL'S FIAT FROM THE STANDPOINT OF THE COMMON LAW.

To the Editor, CANADA LAW JOURNAL:

SIR,—It is my intention to discuss, from the point of view of English common law and practice, s. 23 of the Power Commission Act, 1907, and the use made of his powers thereunder by the Attorney-General for Ontario, in order to discover what, if any, support can be supplied from that source to the action of the legislature and the Attorney-General.

That section provides that "without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office," and it seems clear that if the provision had not been inserted in the Act or if the Attorney-General had not interpreted and applied it as he has, the lieges of Ontario would have been able to appeal to their own courts for the ascertainment and the establishment of their rights, and the subsequent troubles, accompanied—one cannot say cured—by the subsequent legislation, would have been avoided.

In England, there are only four classes of civil suits in which the subject has to obtain the fiat or allowance of the Crown or of the Attorney-General before he can commence proceedings, namely, (1) actions by the Attorney-General with a relator; (2) petitions of right; (3) scire facias on lunacy bonds, where the bond is put in suit for a private solicitor; and (4) petitions with request to charities under the Charities Procedure Act, 1812 (52 Geo. III. c. 101). The latter two cases need not be further considered—they have nothing to do with the matter which I am now discussing; but a short examination of the former two cases will shew how widely different they are from the case of actions against the Hydro-Electric Power Commission and its members. In neither case is the necessity for a fiat the creation of statute (the Petition of Rights Act, 1860, 23 & 24 Vict. c. 34), merely regulates procedure and does not affect the prerogative.[1] In

1. *Tobin* v. *R.* (1863) 22 L.T.C.P. 216, at p. 221, per Erle, C.J. The report of the passage in 14 C.B.N.S. 505, at p, 521, is not so complete.

the case of an action (formerly called an information) by the Attorney-General with a relator, a member of the public wishing to enforce a public right or to prevent a public injury merely as a member of the public and where his own private rights are not affected and he has suffered no special damage, has to request the Attorney-General to allow him to use the name of the Attorney-General as plaintiff, with or without himself as co-plaintiff. This form of action seems to have been derived from the early form of proceedings in which a Crown grantee, or a person claiming under the Crown, sued in the Crown's name in order to obtain the advantage of the prerogative.[2] It is clear that the necessity of obtaining the Attorney-General's permission in this form of action forms no precedent at all for the provisions of s. 2[?] of the Power Commission Act, 1907.

Let us now turn to the case of Petitions of Right. It is a very ancient principle of the common law that the King is not liable to be sued by a subject—some writers say this was because "the King by his writ cannot command himself,"[3] but more probably it was because the King cannot be sued in his own court. But from very early times it was the practice of the Crown to abate its prerogative to such an extent as to permit a subject (then called the suppliant) to proceed against the Crown by a petition of right or a monstrans de droit in a proper case, that is to say, where there was a reasonable cause of action, and a cause of action which was of such a nature that it was compatible with the prerogative.[4] At the present day the practice is regulated by the statute referred to above, but the principles on which the fiat is granted and refused remain as they always were at common law. It may be stated generally that petition of right is the process by which recovery is made from the Crown of property of any kind, including money, to which the subject is legally or equitably entitled, except in cases where the process is noted by some statutory mode of recovery.[5] It is necessary to use this process not only against the Crown itself, but also against government departments exercising prerogative powers, except in certain cases where there is statutory provision for suing the department

2. See Robertson, Civil Proceedings by and against the Crown, pp. 464, 465.

3. *Sadlers Company's* case (1588) 4 Co. Rep. 54*b*, at p. 55*a*; Comyns, Dig. Action, c. 1; Prerogative, D. 78, and see Robertson, op. cit., p. 2.

4. Claims based on fact, for instance, will not lie against the Crown. A complete list of the cases in which petitions of right will or will not lie will be found in Robertson, op. cit., pp. 330-363.

5. See Robertson, op. cit. 331.

or its head by ordinary writ.[6] The tendency of modern English legislation, unlike that of Ontario, is to lessen the number of cases in which it is necessary to obtain a fiat and employ the prerogative remedy, and to widen the subject's right to bring an ordinary action.[7] But I know of no English instance, in modern or ancient times, in which a statute has purported to prevent a subject from proceeding against a body of commissioners engaged in commercial and competitive operations, and who, in no real sense of the phrase, represent the Crown, unless he first obtains the fiat of the Attorney-General—indeed, as I have already said, the necessity for obtaining the fiat of the Crown or of the Attorney-General has never been imposed in England by statute, except in the one very special, and now irrelevant, case of the Charities Procedure Act, 1812.

I will now examine the manner in which the Attorney-General for Ontario has exercised his powers of granting or refusing the fiat under the Power Commission Acts of 1906 and 1907. Here the departure from English law and practice is even more noteworthy.

In actions of the Attorney-General with a relator the fiat is never refused if any possible cause of action, of a nature suitable to proceedings of this description, is shewn by the statement of claim. There have been rare cases where the defendants have presented a memorial against the granting of authority by the Attorney-General, and the latter has heard the relator and the defendant before granting it,[8] but this has never been done in the case of a petition of right.

In the case of a petition of right, it is the Attorney-General's constitutional duty to advise the King to grant his fiat where there is any sort of substance in the claim, and if it is not such a claim as cannot possibly succeed against the King. It is not "competent to the King, or rather to his responsible advisers, to

6. These cases are enumerated in Robertson, op. cit., pp. 21-108.

7. Compare *Graham v. His Majesty's Commissioners of Public Works & Buildings* [1901] 2 K.B. 781, per Phillimore, J. The actual decision in this case is open to grave criticism, but this fact does not affect the observations to which I refer.

8. E.g., *Attorney-General* v. *Halifax Corporation* (1871) L.R. 12 Eq. 262. Here the defendants raised the question whether or not there was a public nuisance. If there was not, a relator action was not the proper form of proceeding. The Attorney-General did not try the merits of the case in any sense of the word, and granted his fiat. Where the defendants subsequently applied again to him, and in his opinion were endeavouring to get him to release the case, he refused to listen to him.

refuse applications to put into a due course of investigation any proper question raised on a petition of right."[9] "Everybody knows that the fiat is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown wherever there is a shadow of claim; nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous. Therefore, in this particular instance, where there is a bonâ fide case to be tried, there was not a shadow of reason for pretending from the first that there was the least danger tnat the fiat would not be granted."[10] These opinions put the matter rather strongly, and from long personal experience of the matter, I can say from my own knowledge, that the fiat is never refused except in the case of claims which are clearly absurd, and that, even where the Attorney-General is convinced that the claim will fail, the fiat is not seldom granted in order that the suppliant may have the opportunity of satisfying himself by obtaining a judgment of the court.[11]

The practice of the Attorney-General for Ontario has been very different. If he had followed the English rule, and this, it is submitted, is obviously the reasonable one, he would have perused the statements of claim in the actions for which his fiat was sought, and if he had found any reasonable cause of action, whatever his opinion might have been as to its ultimate success, he would have granted his fiat without more; if he had found none, he would have refused it. This would have been the rational and constitutional course, and if he or his government were anxious to avoid difficulties and the possibility of injustice, as it must be assumed that they were, they would have thus avoided them. But, instead of pursuing this course, in the four cases which are before me, namely, the cases of *Murray*, *Felker*, *Smith* and *Beardmore*, the Attorney-General (in one case the acting Attorney-General), purported to erect himself into a sort

9. *Ryoes* v. *Duke of Wellington* (1846) 9 Beav. 579, at p. 600, per Lord Langdale, M.R.

10. *R.* v. *Commissioners of Inland Revenue, In re Nattan* (1884) 12 Q.B.D. 461, at p. 479, per Bowen, L.J. The remarks of Lord Justice Bowen, afterwards Lord Bowen, on this subject are of special value, as he was junior counsel to the Treasury, before he was raised to the Bench, and as such had, in accordance with the ordinary practice, to report to the Attorney-General whether he should advise the Crown to grant or refuse the fiat to such petitions of right as were presented.

11. Instances of this will be found in Robertson, op. cit., p. 379. See also *Harris's* case, a claim on the borderline between contract and tort, where the fiat was granted, discussed. Ibid., p. 341.

of little court for the preliminary trial of the actions, and, after hearing counsel on both sides, decided, in his wisdom, that the plaintiffs would not succeed in their claims if he allowed them to go on, and in each case issued, in the form of a report, which I can only describe as a farcical document, his reasons for refusing his fiat. In England the Attorney-General exercises certain semi-judicial functions in connection with patents for inventions, but even there he is not to be regarded as holding a court. "At common law, the Attorney-General is, when he is exercising his functions as an officer of the Crown, in no case that I know of, a court in the ordinary sense."[12] The Attorney-General for Ontario, however, has constituted himself not only a court, but a court which arrogates to itself the right to hear and determine questions of law and fact, and to supersede the ordinary courts. In his report on the cases of *Smith* and *Beardmore*, moreover, the acting Attorney-General goes so far as to decide the matter on his personal knowledge of what the legislature meant and not on what it said; a quite novel and unprecedented method of interpreting a statute;[13] in another (*Murray's* case) the Attorney-General cheerfully disposes of the very difficult question as to the nature and limits of the Ontario Power Co.'s powers; in the fourth (*Felker's* case) he delivers a regular judgment of a sort on the Power Commission's alleged right to take easements. If there is any common law precedent for this kind of performance on the part of the Attorney-General, I shall be glad to know of it. In my opinion, it is quite impossible to find any justification for such proceedings in the law of England.

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12. *In re Van Gelder's Patent* (1888) 6 Rep. Pat. Cas. 22; sub. nom. *R.* v. *Attorney-General*, 4 Times L.R. 488, per Bowen, L.J. See also *R.* v. *Comptroller-General of Patents, Designs and Trade Marks* [1899] 1 Q.B. 909, per A. L. Smith, L.J. Lord Justice A. L. Smith, afterwards M.R., also occupied at one time the position of junior counsel to the Treasury, and, therefore, like Lord Bowen, had special knowledge of the matters now under discussion.

13. See *Salamon* v. *Salamon*, [1897] A.C. 22, at p. 38, per Lord Watson.

DIVORCE IN QUEBEC.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—Ten or twelve days ago I cut the following extract from the Montreal *Daily Witness*, of 7th instant:—

"Mr. Justice Bruneau has just rendered judgment annulling the marriage of George Normandin with Emma F. Williams. The action was taken by Normandin on the ground that the marriage ceremony not having taken place before a competent official and with the required conditions, it was null and void, and should be declared so by the court. He alleged that being a Roman Catholic and Emma F. Williams belonging to another faith, the Protestant minister, the Rev. T. Walker Malcolm, who married them at Detroit, was not a competent officer to perform the ceremony, and, moreover, there was no publication of the banns, although no dispensation was obtained, and consequently the marriage was not public. A decree of Archbishop Bruchesi, dated October 21 last, annulling the marriage, for the reasons above mentioned, was also produced.

"Emma Williams did not plead to the action, and the court granted the civil annulment of the marriage as asked by Normandin."

If I understand the language of the paragraph, a Quebec judge has undertaken to declare null and void a marriage celebrated in the United States on grounds that would not be recognized under the law of any State in the Union, and that would not be recognized in any province of Canada, outside of Quebec.

The whole performance, if correctly reported, seems to me a travesty on marriage and divorce, and less defensible than the loosest divorce proceedings in the divorce courts of the neighbouring republic.

Yours truly,

S. A. CHESLEY.

LUNENBURG, N.S., Jan. 22. 1910.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Board of Railway Commissioners.] [Dec. 13, 1909.

IN RE ORDER NO. 7473 OF THE BOARD OF RAILWAY COMMISSIONERS OF CANADA RESPECTING FENCING AND CATTLE-GUARDS.

Railways—Fencing—Uninclosed lands—Jurisdiction of Board of Railway Commissioners—Construction of statute—The Railway Act, R.S.C. 1906, *c.* 37, *ss.* 30, 254.

Under the provisions of the Railway Act the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect to some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of each case.

The order appealed from was varied, DUFF, J., dissenting.

Appeal allowed in part.

Present:—Sir Charles Fitzpatrick, C.J., and Girouard, Davies, Idington, Duff and Anglin, JJ.

Chrysler, K.C., for the Canadian Northern Railway Co. *Ford*, K.C., supported the order.

Quebec.] LARIN *v.* LAPOINTE. [Dec. 24, 1909.

Appeal—Quo warranto—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure—Matter of form—Montreal City Charter, ss. 42, 334, 338—3 *Edw. VII.* c. 62, ss. 6, 27.

An action by a ratepayer of the city of Montreal to compel the members of the finance committee of the city council to reim-

burse the city for moneys which it was alleged they authorized to be illegally expended and asking for their disqualification under s. 338 of the City Charter is not a proceeding in quo warranto under the provisions of articles 987 et seq. of the Code of Civil Procedure.

By s. 334 of the charter (3 Edw. VII. c. 62, s. 27), the city council of Montreal must at the end of each year appropriate the sums at its disposal from the revenues of the city for the services during the coming year, including a reserve of 5%, 2% of which is to provide for unforeseen expenses. By s. 42, as amended by 3 Edw. VII. c. 62, s. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted. An item of unforeseen expenditure, namely, the payment of expenses of a delegation to France, came before the council and was passed and sent to the finance committee which directed the city treasurer to pay the amount.

Held, the CHIEF JUSTICE and GIROUARD, J., contra, that the reserve of the two per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid.

Held, also, the CHIEF JUSTICE and GIROUARD, J., dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money where there has been no appropriation for the payment must receive the consideration of the finance committee and its sanction or refusal to sanction such payment before final action thereon by the council. That such a payment without this formality, even though bonâ fide, and though, in fact, sanctioned by the finance committee after being finally dealt with by the council, and though the city was not prejudiced thereby, is an illegal expenditure and involves the consequences provided by s. 338 of the City Charter.

Appeal allowed with costs.

Lafleur, K.C., and *C. Rodier*, for appellant. *Atwater*, K.C., and *Ethier*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] GORDON *v.* GOODWIN. [Jan. 19.

Landlord and tenant—Unsanitary condition of dwelling-house—Right of tenant to repudiate tenancy—Remedying defects—Findings of fact of trial judge—Reversal on appeal.

Appeal by the defendant from the judgment of CLUTE, J., in favour of the plaintiff in an action for rent or damages for breach of covenant in lease.

The plaintiff was the owner of a house in Ottawa, which by an indenture of lease, dated the 1st February, 1909, she let furnished to the defendant for 6 months at a rental of $125 per month in advance. The defendant covenanted to leave the premises in good repair; and the plaintiff, that the premises and property were "now in good and substantial repair."

In the negotiation for the letting the plaintiff told the defendant that the sewerage and plumbing in the house were in perfect order.

The defendant took possession, and about two weeks thereafter became ill; a bad smell had been noticed; and a plumber who was sent for reported that there were defects in the plumbing. The defendant left the house, deeming it in an unsanitary condition.

The plaintiff sued for $1,000, and obtained a verdict for $640.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

Travers Lewis, K.C., and *J. W. Bain*, K.C., for the defendant. *G. F. Henderson*, K.C., for the plaintiff.

RIDDELL, J.:—There is no doubt as to the law. Upon the letting of a furnished house there is an implied undertaking that the house is reasonably fit for habitation, and if from any cause this is not the case, the tenant is justified in repudiating the tenancy: *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, etc., he is not relieved from the effect of such representation by the

fact that he honestly believed in the truth of his representation: *Chaisely* v. *Jones,* 53 J.P. 280. And the house must be so reasonably fit for habitation at the time of the beginning of the term, and the lessor has no right to be allowed after that time to put the house in the condition it should have been in. Of course, there is no need for the tenement answering every whim of a finical tenant; but common sense should be applied in determining whether it does fulfil the required conditions. This state of the law was present to the mind of the learned trial judge, and the whole question is one of fact.

My brother Clute at the trial found against the defendant; and it becomes now a matter for consideration whether his findings of fact can be supported.

In *Beal* v. *Michigan Central R.R. Co.,* 19 O.L.R. 502, and *Ryan* v. *McIntosh,* 20 O.L.R. 31, we recently considered the principles to be adopted upon an appeal from the findings of fact made by a trial judge.

Here it seems to me that my learned brother has failed to give what I consider due weight to the evidence of the condition of the house in general, and confined his attention to three physical defects—two of which he considers slight and trifling and remediable in a short time. The evidence is, to my mind, clear that the house was in an unsanitary condition; it probably, from the evidence, would have been unsanitary even if the two defects found by the learned trial judge had been remedied; while the third defect, viz., that in the cellar, which seems to be proved by satisfactory evidence, can, I venture to think, not fairly be described as "a very slight defect." Supposing, however, all the defects to be slight, the case for the plaintiff is not bettered; for, in the first place, it is not the extent of the defect which is material, but the result of such defect in producing an unsanitary condition; and, second, the plaintiff has not the right either herself to correct these defects now, after the beginning of the term, or to call upon the defendant himself to repair.

Much was made of the fact that it was not proved that the sickness resulted from the condition of the house. It is quite likely, in accordance with *Beal* v. *Michigan Central R.R. Co.,* and the cases there cited, that the defendant would have filed had he claimed damages from the plaintiff for causing the sickness; but it is not necessary to go that far—it is not necessary to prove that the condition of the house was such that it did cause sickness; it is abundantly sufficient to prove, as was done in this

case, that it might have such effect—that is (to repeat) that the house was unsanitary.

Appeal allowed with costs and action dismissed with costs.

Divisional Court.] [Jan. 20.

FARMERS BANK *v.* BIG CITIES REALTY AND AGENCY CO.

Summary judgment—Motion for—Affidavit in reply—Refusal to allow cross-examination on appeal—Case remitted to court below—County Courts Act, s. 54.

On a motion for summary judgment, affidavits were filed by the defendants which, unanswered, would entitle them to a dismissal of the motion. But an affidavit was filed in reply by the solicitor for the plaintiffs, which counsel for the defendants asked leave to cross-examine on, but leave was refused.

Held, on appeal to the Divisional Court, the defendants should have had an opportunity of disproving, if they could, the statements in the last affidavit by cross-examination thereon. Rule 603 should be applied only with caution and in a perfectly plain case. Appeal allowed with costs in the cause to the defendants, and case remitted to the court below under s. 54 of the County Courts Act.

T. Hislop, for the defendants. *W. H. Hunter*, for the plaintiffs.

Clute, J., in Chambers.] [Jan. 21.

REX *v.* TEASDALE.

Liquor License Act—Conviction for second offence—Amendment of s. 72 after first conviction—Change in penalty for first offence—Effect of—Interpretation of statutes.

Application by the defendant, on the return of a habeas corpus for his discharge from custody under a warrant of commitment pursuant to a conviction for a second offence against the Liquor License Act.

The prisoner was first convicted on the 28th July, 1908.

On the 13th April, 1909, s. 72 of the Act was amended by increasing the penalty for a first offence from not less than $50 besides costs and not more than $100 besides costs, to a sum of not less than $100 besides costs and not more than $200 besides costs. The punishment for a second offence (imprisonment for 4

months) was not changed by the amendment. The Act was not repealed, but the figures indicating the amount of the penalty were changed.

CLUTE, J.:—It cannot be supposed that the legislature intended by increasing the penalty to give a clear slate in all cases where a first conviction has been made. The second offence, which calls for imprisonment, is the offence of selling liquor without a license after a previous conviction. There was a previous conviction for an offence against the Act.

Having regard to the nature of the amendment and to the intendment of the statute, as enacted by s. 101, sub-s. 6, I am of opinion that the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment. I am unable to give effect to the objection. See the Interpretation Act, 1907, s. 7, sub-s. 46(*d*).

J. B. Mackenzie, for the defendant. *E. Bayly*, K.C., for the Crown.

Divisional Court.] FINDLAY *v.* STEVENS. [Jan. 21.

Building contract—Penalty for non-completion of work by certain day—Contractor delayed by default of other workmen—Work not commenced until after time for completion—New contract—Necessity for proof of damage by delay.

A contractor agreed to pay by way of liquidated damages $1 a day after a certain date until the completion of the work.

Held, if the contractor is so delayed by the default of the proprietor or his workmen that he is unable to begin his work till a date after the termination of the time fixed by the contract . . . his delay in the after-prosecution of the work is not to be visited by the imposition of the penalty of so much a day. There is, in effect, a new contract for the performance of the work at the contract price, but without any revival of the penalty clause. On delay in this after-prosecution of the work the contractor may be liable, but only on proof of damage sustained thereby. *Moore* v. *Hamilton*, 33 U.C.R. 279, 520; *Holme* v. *Guppy*, 3 M. & W. 387; *Dodd* v. *Charles* (1897), 1 K.B.

H. E. Rose, K.C., for the plaintiff. *S. F. Washington*, K.C., for the defendant.

DIVISION COURT—ELGIN.

Ermatinger, J.J., Elgin Co.] [Jan. 18.

TRADERS BANK *v.* CRAIG.

Bill and notes—Collateral notes—Lien.

The plaintiffs on the strength of his note dated 30th March last for $675 and a number of collateral notes amounting to $900, advanced to Robert Craig the sum of $650.65. Among the collaterals was the note sued upon, made by Wilfred Craig in favour of the defendant, Louis Craig, and by him endorsed and also assigned to the plaintiffs by a special endorsement consenting to extension of time, waiving protest, etc. All the other collaterals have been paid except $5 unpaid on one. The advance of $650.65 has thus been more than repaid. The plaintiffs however claim a lien on this note sued on for other moneys due them to more than the amount of this note in respect of over-drafts and advances made by them both prior and subsequent to the advance of $650.65. I think upon the evidence the plaintiffs have undoubtedly a lien for the amount still due them upon Robert Craig's general account, and that, as I understand it, is more than the amount of this note. See *In re European Bank*, L.R. 8 Chy. 41.

It was contended that this lien was subject to any defence that defendant Louis Craig might have as against Robert Craig, and that as a matter of fact Robert Craig was, and his estate is, indebted to the defendant Louis Craig. By s. 54, sub-s. 2, of the Bills of Exchange Act (R.S.C., c. 119), the lienholder is "a holder for value to extent of the sum for which he has a lien." The plaintiffs are also holders in due course as defined by s. 56, having no knowledge of the state of accounts between defendant Louis and Robert Craig and having acquired the note while current. The note is a negotiable instrument within the ordinary law merchant and plaintiffs being holders in due course and for value, no defence as between defendant and Robert Craig merely can effect their claim, on which they are entitled to judgment for the full amount claimed (with costs) against Louis Craig, and for $75.65 against the garnishees.

I have not considered the possible rights of said defendant as between him and Brown, the endorser of prior note of Robert Craig, in the event of the amount so covered herein and in the suit against Brown being more than sufficient to satisfy all liens

or claims of the plaintiffs, that is, as to who would be entitled to such surplus or whether any rights of contribution as between Louis Craig and Brown may or may not arise.

A. E. Haines, for plaintiffs. *W. Harold Barnum*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] BALCOM *v.* HISELER. [Feb. 1.

Mines and minerals—Partnership in operation of gold mining areas—Accounting—Evidence—Entry in book—Suspicious circumstances—Estoppel.

In an action for an accounting in connection with the acquisition, management and proceeds of certain gold mining areas, and the sale of mining machinery an entry made by defendant's bookkeeper in defendant's ledger, shewed that the price charged to plaintiff for his share of the property was $4,000. This entry, plaintiff swore, was made by the bookkeeper at the time by defendant's directions and the evidence was supported by the bookkeeper and by an independent witness, the latter of whom gave evidence of an admission made to him by defendant. Defendant relied upon the instrument of transfer in which the amount was stated as $10,000, and upon an entry made by defendant in his day book to the same effect. Plaintiff swore that the amount mentioned in the transfer was inserted at the instance of defendant for the reason that it would "look better" in the event of a sale, and there was a suspicious circumstance connected with the entry in the day book inasmuch as the entry was made in defendant's handwriting at the foot of a page and the next entry, at the top of the following page was of an earlier date.

Held, that the entry in the day book was not from any point of view evidence in defendant's favour, and could only be made use of, if at all, by way of qualifying the entry in the ledger, and must be disregarded inasmuch as under the evidence it seemed to have been made after the event for the purpose of bolstering up defendant's claim.

There was a verbal agreement for the transfer of a half

interest in another property, to be worked on the same terms. When plaintiff demanded a transfer defendant tendered one that was not considered satisfactory, and plaintiff had a form of transfer prepared which defendant refused to sign. Plaintiff left the province and subsequently his agent placed the original transfer on file in the Mines Office.

Held, that this was an acceptance of the transfer tendered by defendant, and plaintiff could not after that acceptance claim that he had no interest in the areas referred to, but must be regarded as an owner and entitled to an accounting with regard to the property from the time that work commenced.

After plaintiff's departure from the province defendant inquired of his agent whether plaintiff had left any money for the purpose of working the property and was informed that he had not and that any work that had to be done would be a matter for consideration.

Held, that defendant could not after this go on indefinitely making expenditures and charging them up to plaintiff and that the accounting must close with expenditures made up to the date of the interview.

Power, K.C., for plaintiff. *Harris,* K.C., and *Kenny,* for defendant.

Trial.—Drysdale, J.] [Feb. 1.

BLACK *v.* TYRER ET AL.

Sales—Contract for cargo of lumber—Failure to deliver according to specifications—Refusal to accept—Shipment on vessel subsequently lost—Receipt by master—Held not a waiver—Intermediary—Advances and commissions.

Plaintiff contracted through the defendant T. with the defendants G. & W. for the supply to the latter of a cargo of lumber in specified quantities, of specified dimensions and in specified proportions. The contract called, among other things, for the supply of a quantity of spruce boards, of which not less than fifty per cent. were to be of certain size. The defendants G. & W., on receiving notice that not more than twenty-five per cent. of the spruce boards were of the required size, refused to accept delivery.

There were some negotiations with a view to inducing them to accept the cargo on new terms, and, while these were pending, the vessel chartered by defendants, upon which the cargo had

been loaded, proceeded to sea and was wrecked before reaching her destination.

Held, that the shipment made by plaintiff not being according to contract defendants were not bound to accept delivery.

Also, that the receipt of the goods by the master of the vessel, who was merely defendants' agent to receive the goods for the purpose of carriage, was not an acceptance as delivery under the terms of the contract.

Also, that plaintiff's claim could not be sustained as against the defendant T., he being shewn to be a mere intermediary.

Plaintiff claimed, in addition, for money supplied the master of the vessel, at defendant's request and for commission thereon.

Held, as to this, that he was entitled to recover.

Harris, Henry & Co. for plaintiff. *Murray & McKinnon,* for the defendant Tyrer. *McInnes, Mellish & Co.*, for the defendants G. & W.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] SHAW *v.* CITY OF WINNIPEG. [Jan. 17.

Negligence—Liability of municipal corporation for negligence of employee of waterworks department—Agency of servant of corporation.

A municipal corporation authorized by the legislature to establish and manage a system of waterworks, but not bound by law to do so, will, if it does so, be liable for injuries caused by the negligence of the servants employed by it therein while in the performance of their duties.

Hesketh v. *Toronto,* 25 A.R. 449, and *Garbutt* v. *Winnipeg,* 18 M.R. 345, followed.

It is actionable negligence if an employee of the waterworks department of a city, having opened the trap door in the floor of a kitchen for the purpose of reading the water meter in the basement, leaves the trap door open on going away, whereby an occupant of the house is injured by falling through the open trap door.

Dennistoun, K.C., and *Young,* for plaintiff. *Hunt,* for defendants.

KING'S BENCH.

Macdonald, J.] IN RE BEDSON ESTATE. [Jan. 18.

Statute of Limitations—Administration of estates—King's Bench Act—Manitoba Trustee Act.

Application by the administrator of the estate for the advice and direction of a judge under s. 42 of the Manitoba Trustee Act, R.S.M. 1902, c. 10.

The intestate died in 1893 and the administrator in 1896 distributed amongst the creditors whose claims were proved and allowed by him the proceeds of all the assets of the estate of which he had any knowledge, such proceeds being only sufficient to pay the creditors a dividend of about 3.41 per cent.

In 1909 the administrator realized a further sum for the estate upon an asset then recently discovered.

There had been no payment on account or written acknowledgment of indebtedness made by the administrator to any creditor since 1896.

Held, notwithstanding sub-s. (*a*) of s. 39 of the King's Bench Act, R.S.M. 1902, c. 40, that the claims of the creditors were barred by the Statute of Limitations, that it would be the duty of the administrator to plead the statute in any action by a creditor and that the administrator should forthwith distribute the remaining funds of the estate amongst the next of kin. Costs to all parties out of the estate.

Hough, K.C., for the creditors. *Young*, for the next of kin.

Mathers, J.] [Jan. 27.

CITY OF WINNIPEG *v.* WINNIPEG ELECTRIC RAILWAY CO.

Injunction—Forfeiture—Waiver—Estoppel—Meaning of words "operation, conduct and management."

1. An agreement by the defendant railway company to place and keep within the city limits all their engines, machinery, power houses, etc., is not a term or condition relating to the "operation, conduct and management" of the street railway lines in the city; and, although the city may sue for and recover damages in consequence of the establishment and use of a hydro-electric power plant outside the city for operating its cars in the city, the company does not thereby forfeit its privileges and rights as to street

cars under a provision that, "insofar as the terms and conditions of the agreement relate to the operation, conduct and management of said railway lines or system or any part thereof, the same and the fulfilment of same shall be conditions precedent to the continued enjoyment" of such privileges and rights.

2. If the agreement had fully provided for such forfeiture, the city had waived it by passing by-laws fixing schedules for the running of the cars, by calling on the company to proceed at once with the construction and operation of new lines, which were accordingly built and subsequently operated at great expense to the company, and by accepting five per cent. of the gross earnings of the company payable under the agreement and aggregating about $100,000, all these things having been done after the city had full knowledge of the alleged breach of the agreement.

3. The alternating current brought into the city from the power plant at Lac du Bonnet is used to drive electric generators at the Mill Street Station in the city and these develop the direct current used in propelling the cars. This direct current is power produced in the city and the company has the right to use it to operate its street cars without the consent of the city and to erect poles and wires for that purpose, but not for any other purpose.

4. The defendants had acquired the right to develop electric energy outside the city and to distribute it in the city through poles and wires, but only with the consent of the city; and, as that consent had never been given or applied for, an injunction should be issued to prevent the defendants from erecting poles or wires on the streets, lanes or highways of the city for the transmission of electric current developed outside the city limits for the purposes of electric lighting or commercial power, and requiring the removal of any poles and wires so erected.

5. The issue by the city engineer of a permit for the erection of the poles and wires objected to was not intended to authorize the use of them for electric power, and the engineer had no authority to give any permit that would obviate the necessity of the consent of the city being obtained.

6. The city was not estopped from applying for the injunction by having taken and paid for power transmitted over such poles and wires from the plant outside the city without its consent and against its protest.

Wilson, K.C., and *Robson*, K.C., for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

Book Reviews.

The Canadian Annual Digest, 1909. Toronto: Canada Law Book Company, Limited.

This useful work, which is already in the hands of the profession, is a digest of all the cases reported in the official reports of the various courts of the Dominion including the Supreme and Exchequer Courts of Canada and the Canadian cases decided by the Privy Council during the year. It contains also a digest of cases selected from the Canadian Criminal Cases, the Canadian Railway Cases, and the Canada Law Journal.

The volume just issued maintains the high level of the series, logical in its divisions and arrangement, and accurate in its references. It is sure to find a place on the desk of every lawyer who pretends to be up to date.

A Treatise on Crimes and Misdemeanours. By Sir William O. Russell, late Chief Justice of Bengal. Seventh English editirn. By W. Feilden Cr.' 'es and Leonard W. Kershaw, both of the Inner Temple, Barristers-at-law. 3 vols. London: Stevens & Sons, Limited, and Sweet & Maxwell, Limited. Canadian Notes by the Hon. A. B. Morine, K.C. Toronto: Canada Law Book Company, Limited.

Am ng all the admirable books for lawyers which have been given to us by London publishers, "Russell on Crimes" deservedly holds a high place, and this new edition will establish its reputation more firmly than ever as the leading work on criminal law and practice. One of the defects of earlier editions has been its faulty arrangement. Thus, criminal libel and bigamy, as well as conspiracy and perjury, were treated with numerous other miscellaneous subjects under "Offences affecting the Government."

The outstanding feature of this new edition of "Russell on Crimes" is the rearrangement of the material of the old work in harmony with modern ideas. The new arrangement, which is logical and scientific, follows the main line of Stephens' Draft Code, and in the result we have now practically a new "Russell on Crimes," which is a distinct advance on all former editions.

The Canadian notes, which have been compiled in a painstaking and thorough manner by the Hon. A. B. Morine, K.C., have been added at the end of each chapter, and in its appropri-

ate place will be found the relevant statutory enactments and decisions of the Canadian courts in all the provinces. Each note is given a heading which indicates the special subject-matter with which it deals. It is not too much to say that this edition will supersede all earlier ones, and will be found indispensable to every practitioner in the criminal courts.

Canadian Patent Office Practice. Definitions for guidance in preparing and prosecuting applications and other proceedings relating to patents. By W. J. LYNCH, Chief Clerk of the Canadian Patent Office, Ottawa. 1909.

This very useful little handbook has been prepared by one to whom long years of experience have given an intimate knowledge and insight into the peculiarities arising from applications for patents and of the stumbling-blocks met with in obtaining a patent. The work has been compiled more particularly for the use of the profession, but is useful for all having business with the Patent Office. The text of the Act is given in full, with annotations, in order to make clear those points on which it has been found in practice that misconceptions and consequent errors have arisen, causing trouble and sometimes failure. Under one cover are found the law, rules, forms and practice. The author, who is his own publisher, may be congratulated on the book being neatly got up, while the printing and typography are all that could be desired.

Leading Cases in Equity. By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-law. London: Butterworth & Co. 1909.

This little book is intended to introduce students to the study of the law reports, by shewing them, as simply as possible, how the principles they are learning have been applied by distinguished lawyers to actual facts. The editor seems to have made an excellent selection of cases.

The Principles of the General Law of Mortgages. By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-law. London: Butterworth & Co.

This little work aims at shewing that the law of mortgages is based on sensible general principles which the very common law judges, who denounce it, apply without scruple to ordinary contracts which involve penalties. It is a very interesting and helpful book for students.

Bench and Bar.

HAMILTON LAW ASSOCIATION.

The Annual Meeting of the Hamilton Law Association was held January 11th, 1910, in the Law Library.

The trustees presented their Thirtieth Annual Report. The membership of the Association is 70. There are 4,674 volumes in the library, 103 having been added during the year.

The trustees expressed their regret at the deaths of two former members, H. H. Bicknell and James Dickson.

In response to a letter from the Secretary of the Statutes Revision Commission, the proposed revision of the Devolution of Estates Act was referred to the Legislation Committee, whose suggestions were forwarded to the Secretary.

At the meeting it was unanimously resolved, that in the opinion of the members of this Association, there should be an increase of fees provided for in cases when what were formerly High Court cases are now tried in the County Courts, and also that there should be an increase in the Surrogate Court fees, and fees for succession duty papers provided for.

The following officers were elected for 1910:—

President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell, K.C.; Treasurer, Mr. Chas. Lemon; Secretary, Mr. W. T. Evans; Trustees, Messrs. Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, W. A. Logie.

JUDICIAL APPOINTMENTS.

John Donald Swanson, of Kamloops, Province of British Columbia, Barrister-at-law, to be judge of the County Court of Yale, in the said province, vice His Honour Judge Spinks, resigned. (Jan. 24.)

His Honour Judge Donald Swanson, judge of the County Court of Yale, Province of British Columbia, to be a local judge of the Supreme Court of British Columbia.