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The Hon. Henry George Carroll, Solicitor-General for the Dominion, has accepted the appointment of Judge of the Superior Court of the Province of Quebec for the District of Gaspé, in the place of Judge de Billy, retired. He filled the office of Solicitor-General with much acceptance, but, preferring law to politics, will doubtless be happier in his new position. He is succeeded by Mr. Rodolphe Lemieux, K.C.

We are glad to know that Mr. Benjamin Russell, K.C., D.C.L., is to be the new Chief Justice of the Province of Nova Scotia. No better appointment could be made. His high personal character as well as his legal acquirements would adorn the Bench. It is only by the appointment of such men as Dr. Russell that the high standing of the judiciary can be maintained. Congratulations may well be extended not only to the recipient of the honor but to the government for making so excellent a selection. Mr. D. C. Fraser, K.C., will become puisne judge in the place of Mr. Justice Henry resigned on account of ill health.

Henry William Newlands, of the City of Dawson, Yukon Territory, K.C., has been appointed puisne judge of the Supreme Court of the North-West Territories, in the room of Hon. Hugh Richardson, resigned. Although Mr. Newlands has not of late years been in active practice, he has had large experience in real property law in connection with his position under the Land Titles Act and has a judicial mind. His appointment meets with the general approval of the Bar over which he will now preside.

One of the provisions of the United States Immigration Law (passed in March, 1903,) is as follows: "No person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or officers generally, of the Government of the United States or any other organized government, because of his or their character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof." This enactment was placed upon the statute book a. the result of public indignation over the assassination of President McKinley by the anarchist Czolgocz. In view of the motly herd of lawless cranks and moral degenerates from the slums of Europe that the tide of immigration has been pouring upon the shores of the United States during the past decade or so, we think this an excellent law. Not so, however, thinks anarchist John Turner, who hails from England, and who, during his incarceration in the immigrant detention cells on Ellis Island, N.Y., several weeks ago, pending deportation to the place whence he came, wrote for one of the New York journals a doleful article in dispraise of reactionary legislation of this kind in the new world. He melodramatically says: "I am locked in a cage 9 x 6 feet, strong enough to hold an elephant, and am guarded night and day." "Such treatment," he adds, "is the beginning of a new political tyranny in which America, with its democratic institutions, can give points to monarchical Europe." If this experiment does anything to suppress the propagation of doctrines which moved the unbalanced mind of Czolgocz to murder William McKinley, then we rejoice in anarchist Turner's vicarious sufferings. Socialism of the dangerous European sort is already rearing its unlovely front in the western part of this Dominion. It attempted bodily harm to one of our best known public men some two or three months ago. Some such modification of the present easy access of the avowedly lawless brotherhoods to Canada may be necessary in the near future.

WHAT IS THE COMMON LAW?

Answering Professor Burdick's contention that for several centuries prior to the time of Lord Coke "there was a true body of law in England which was known as the Law Merchant,' (*a*) I pointed out (*b*) that he himself had stated that in Coke's time

> "The Law Merchant was proved, as foreign law now is. It was a question of *fact* (*c*). Merchants spoke to the existence of their customs, as foreign lawyers speak to the existence of laws abroad. When so proved a custom was part of the law of the land. This condition of things existed for about a century and a half, prior to the time of Mansfield."

And I asked if there was ever "a true body of law in England or elsewhere, the existence of which had to be *proved*; law which the *judges* had never heard of; law which "was part of the law" only *after evidence to that effect* had been adduced? In a short commenting note the professor said, "I do not see that it calls for a serious reply."

I pointed out, too, that during the 150 years between Coke and Mansfield (during which, as the professor contends, the term law merchant "loses much of the definiteness which characterized it" prior to that period) so little progress was made in the development of "a true body of (merchant) law" that Buller, J., (Mansfield's colleague) declared that

> "Before Lord Mansfield's time we find that in the courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury and they produced no established principle" (*d*),

and that Professor Burdick himself quoted Scrutton to the same effect:—

> As a result little was done towards building up any system of mercantile law in England."

The question presents itself, therefore, in this fashion: Prior to Coke "there was a true body of law in England which was known as the Law Merchant"; after a further century and a half

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(*a*) Prof. Burdick of Columbia University, New York, a lecturer and writer upon the law of Bills and Notes, challenged some sentences in the present writer's book upon Estoppel, wherein was questioned the existence of "a law of merchants in any other sense than there is a law of financiers or a law of tailors. . . . Judge-made law (not merchant-made), with Lord Mansfield as chief builder, is what we have here." The Professor's article was published in 2 Columbia Law Rev. 470.

(*b*) 3 Col. L.R, 135.

(*c*) All italics are those of the present writer.

(*d*) *Lickbarrow* v. *Mason* (1787) 2 T.R. 63.

it may truthfully be said that little had been "done towards building up *any* system of mercantile law in England," and that "*no* established principle" had been produced; *quære*, who had stolen that "true body" and where was it? To all this the professor said, "I do not see that it calls for a serious reply."

I also pointed out that at the end of the 150 years Lord Mansfield set to work to develop a body of rules for himself. Professor Burdick acknowledges this He says that Lord Mansfield

> "Reared a special body of jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided . . . When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it . . . The great study has been to find some general principle, not only to rule the particular case under consideration, but serve as a guide for the future. . . . It was from such sources, and from the current usages of merchants, that he undertook to develop a body of legal rules which should be free from the technicality of the common law, and whose principles shall be so broad, and sound, and just as to commend themselves to all courts in all countries."

And I ventured to ask: Why all this bother? That "true body of law" which had existed in England "for several centuries" prior to Coke's time must have been discoverable somewhere and somehow. Why did not Mansfield hunt it up? Why not issue a "general warrant," if need be, for its production? Thousands of people knew it by heart, and had been swearing to it, hoping for generations to get the judges enlightened upon the subject. Why not call another witness? History does not tell us that anybody had stolen all of them, too. Why did Mansfield undertake "to develop a body of legal rules"? Was it because theretofore "no established principle" had been "produced"? If so, how could there have been, prior to Mansfield, "a true body of law in England which was known as the Law Merchant"? And the only answer is, "I do not see that it calls for a serious reply."

Endeavoring to sink the Law Merchant notion, I linked it with the "Common Law"—"the most impudent pretender of all these phantom laws" (*e*)—but perhaps I did not sufficiently prove that

(*e*) The Law of Nature; the Law of Nations; the Law of God; the Law of Reason, the Law of the Universe, &c.

the appendage was a sinker. The professor would suggest that it was a float. Was there then a true body of law in England which was known as the Common Law?

Names are largely unimportant, so long as the things signified are rigidly determined. If, for example, you chose to call judges' decisions the "Common Law," I shall not quarrel with you. For my part, I should much prefer to denominate such law "judicial legislation" (*f*), or "judiciary law" (*g*). But if you say that the Common Law was, or is, a true body of law, with existence *separate* from the decisions, or if you use the words indiscriminately, meaning, now, the decisions and, now, something else, definable or otherwise, I venture to disagree and to protest.

Let us have some one meaning. Have we three sets of laws—(1) the Common Law, (2) the decisions, and (3) the statutes? Or have we four sets—these three plus Equity? Or really five—(1) the Common Law (in nubibus), (2) Equity (in nubibus), (3) Common Law decisions, (4) Equity decisions, and (5) Statutes? Or only two—decisions and statutes?

For example, have we Equity law apart from Equity decisions. We have, no doubt, as Dr. Bryce tells us, a

> "Regard for substantial as opposed to formal and technical justice, the kind of conduct which would approve itself to a man of honour and conscience" (*h*).

or, as we might more shortly say, a regard for justice (for formal and technical justice is usually not justice, but injustice); but was there, or is there, "a true body" of Equity law anywhere but in the decisions?

Of course nobody ever thought that there was (*i*). Very well, now, where did the Common Law decisions come from? The Equity judges developed their system empirically, applying notions of justice to cases as they arose. What did the common law judges do? The answer is simple: Apart from Roman law and other written aids, these judges went to precisely the same source

(*f*) See Pomeroy's Equity Jurisprudence, p. 66; and Mr. Justice McClain's paper read before the American Bar Association, 1902.

(*g*) Bentham's phrase: Principles of Moral and Legislation, p. 8.

(*h*) Studies in History and Jurisprdeunce, 581.

(*i*) Mr. Pomeroy tells us that the early Chancellors were guided by "their own individual consciences, by their moral sense apprehending what is right and wrong, by their own conception of bona fides": Equity Jurisprudence, 50.

as their Equity brethren; they went to their notions of justice—until they took to following their own precedents, and then the Equity men came along and helped them out of the ruts they had themselves cut and swore they were bound to run in.

Distinguish between local customs and notions of justice. Customs have to be proved. They are not law until shewn to conform to the requisites of the legal conception of the custom.

"Usage once recorded upon evidence immediately becomes written and fixed law" (*j*).

There can be no law without a judicial sanction, and until a custom has been adopted as law by courts of justice, it is always uncertain whether it will be sustained by that sanction or not" (*k*).

Commenting upon which Mr. Lightwood says (*l*):—

"We have thus arrived at the result that all law is, in the last resort, the creature of the sovereign, and that it is made immediately either by the sovereign or by a subordinate; but that in the latter case it exists as law by the sovereign's assent, either express or tacit, and it is made either by way of statute or *obliquely by way of judicial decision*. These are decided to be the only modes in which law can be made, and hence it does not exist by virtue of being customary, or of being in accordance with legal opinion, or with natural law. *These facts may be reasons for its adoption as positive law*, but it does not become such until the sovereign has adopted it in the manner above described, either individually or mediately, either directly or obliquely."

Customs, then, we understand, and the best way to contrast them with our notions of justice is to say that it is by notions of justice that customs are accepted or rejected—are declared to be fit or unfit to become law. It is exactly at this point that Professor Burdick (if I may so say) goes wrong. He sees merchants plying their business according to fairly well understood but very general customs of very uncertain definition, and he imagines these customs or methods to have been laws—to have formed, indeed, "a true body of law," not observing that upon any difference of opinion arising between two of the merchants the courts had to determine which of the contentions was the more in accordance with their notions of justice, which was to be declared to be the law, and that in this way the courts

(*j*) Maine's Village Communities, 72.

(*k*) Austin's Lectures on Jurisprudence II, 565

(*l*) The Nature of Positive Law, 359.

"have incorporated it (usage) in what is called the law merchant, and have made it part of the common law of the country" (*m*).

Is it not true that

"The proper idea of a rule of law (*n*) is that it is an attempt to sum up current opinion upon a class of cases?" (*o*).

an attempt (oftimes a poor effort) to sum up current opinion as to what is justice in relation to the class of case in hand.

"Law is declared, it is not made; it is a discovery, a statement of the conditions under which, as wise men have shewn, life can be lived" (*p*).

Customs, usages, notions there are, no doubt, in abundance prior to the decisions, but was there any law except "in crudest condition and regulative of simplest transactions" (*q*)—was there "a true body of law in England known as the Common Law," a body of law which not merely furnished enlightenment for the courts, but which, being a *true* body of law, was binding upon the courts? And was that "true body of law" something which the judges had never officially heard of, something which they had to ascertain as best they could from the mouths of contradictory witnesses?

There is a very short way of settling such questions. If any one says that there was or is "a true body of law known as Common Law" (apart from the decisions) let him quote for us, or otherwise authoritatively refer us to, a single item of it. The Leges Barbarorum we know; the laws of Justinian we know; the laws of the Twelve Tables (B.C. 500) we know; even the laws of Hammurabi of Babylon (B.C., say, 2250) we know, and can quote from. Will somebody please furnish us with an extract from the Common Law of England?

Surely this can easily be done. Go to the law reports and read to us. The judges, if they were deciding according to this "true body of law" will undoubtedly so indicate. No, these modern judges seem to know nothing of it. Open, then, these musty old Year Books; thumb them all. No? Try the Rolls—

(*m*) *Edelstein* v. *Schuler*, 1902, 2 K.B., 144.

(*n*) A judicial rule of law.

(*o*) Lightwood: The Nature of Positive Law, 226. And see the whole chapter Ch. X.

(*p*) Jenks: Law and Politics in the Middle Ages, 301-2.

(*q*) 3 Col. L.R. 144; Note.

back as far as John's reign. Nothing there? Well, don't despair; in the works of Bracton (Chief Justiciar of England 1265-1267) or in those of Glanvil (the oldest writer on English jurisprudence, and Chief Justiciar of England in the reign of Henry II.) there must be some trace of this "true body." Not a word?

Well, where did these judges and writers get the law that they tell us of? Mr. Justice McClain would answer:—

"By ascertaining what it was customary for English judges to decide in like cases. The reading of Bracton, himself, beyond the introductory pages, proves conclusively the fact . . . He refers to decisions of the courts, although he is compelled to do so from current or personal knowledge, as reported decisions were as yet apparently unknown, and instead of announcing general principles, borrowed from any code, or pandects, or digests, he tells what was decided in an assize of mort d'ancestor, &c., . . . His successors were the digesters and abridgement-makers—Fitzherbert and Brooke and Rolle and Viner—and these men concerned themselves with the decisions of the English judges and prepared the way for Coke and Hale and Blackstone, the great expounders of the distinctively English system of law" (*r*).

If I am to be told that nobody says that anybody can give extracts from the common law, and that what is meant is that the Common Law consisted of certain well known principles upon which the decisions were based, then I ask profert of one of these principles. And if it be alleged that production is impossible, for that the said principles were in the mind or heart, or consciousness, or liver, or legs, of the people, and not otherwise or elsewhere, I still require at least a hint as to what they looked like before believing in their corporeality.

Perhaps they were mere ethical conceptions—conceptions supposed to be very clear and easily definable until somebody attempted to analyse and apply them. To you who have what you assume to be very certain and even rigid notions as to the compelling requirements of veracity, of justice, of purity, of benevolence, of the duty to act rationally, to govern the lower parts of your nature by the higher, and so on—to you, I say, read Professor Sidgwick's "Methods of Ethics," and perhaps you will arrive at his conclusion:—

(*r*) Address before the American Bar Association, 1902. The learned judge does not permit the Civil Law the influence which the present writer would attribute to it; but there can be little doubt that Bracton and Glanvil, whether they made much or little appeal to Roman Law, made none whatever to any "true body of law" known as the Common Law.

"We have examined the moral notions that present themselves with a prima facie claim to furnish independent self-evident rules of morality: and we have in each case found that from such regulation of conduct as the common sense of mankind really supports, no proposition can be elicited which, when fairly contemplated, even appears to have the characteristic of a scientific axiom"—although no doubt there may be "a rough general agreement, at least among educated persons of the same age and country" (*s*).

Yes, prior to the decisions there was "a rough general agreement" as to the principles which ought to regulate the relations and transactions of people "of the same age and country," but (with deference to Professor Burdick) I object to that "rough, general agreement" being called "a true body of law." I take the liberty of agreeing with one of the best of the American authors (Mr. Pomeroy) when (speaking of the appointment by William I. of a Chief Justiciar—"a permanent judicial officer . . . having supreme jurisdiction throughout England") he tells us that, prior to that period, law was administered by the Saxon local folk—courts having for officials no professional judges, and for laws a "mass of arbitrary rules and usages (*t*). The new professional judges, with supreme jurisdiction throughout England, at once commenced the work of "reducing the tangle of customs to order" (*u*); commenced the construction of that

"Science which has for its ultimate aim the ascertainment of rules which shall regulate human regulations in accordance with the common sense of right" (*v*).

Let Mr. Pomeroy himself continue:

This "initial activity in creating the common law of England was done, not by parliamentary legislation nor by royal decrees, but by the justices in their decisions of civil and criminal causes" (*w*). "In this work of constructing a jurisprudence, the early common law judges, as well as the Chancellor at a later day, drew largely from their own knowledge of the Roman law. The evidence, both internal and historical, is conclusive that the common law of England, in its earliest formative period, was much indebted to that Roman jurisprudence which enters so largely into the judicial systems of all the western nations of the European Continent" (*x*).

(*s*) P. 360

(*t*) Equity Jurisprudence, 13.

(*u*) Bryce: Studies in History and Jurisprudence, 763.

(*v*) Lightwood: The Nature of Positive Law, 36.

(*w*) Equity Jurisprudence, § 13.

(*x*) § 14.

Pause here for a moment—"the Common Law of England in its earliest formative period was much indebted to the Roman jurisprudence." In what sense are we using the words "the common law of England"? Do we mean "the arbitrary rules and usages" of the folk courts—the only things that look like laws before William's Chief Justiciar got to work? Or do we mean the "rough, general agreement" of the people? Or do we not mean that the judges got some light from the civil law? That the *decisions* were colored by Roman jurisprudence? The Common Law was much indebted to the Roman jurisprudence. If we mean by this the decisions, would it not be better to say so?

When Mr. Pomeroy speaks of "building upon the Common Law with materials taken from the never-failing quarries of the Roman legislation" (*y*), or declares that "the ancient Common Law rigidly exacted all penalties" (*z*), or indicates that "the ancient Common Law paid great deference to matters of pure form" (*a*), everybody understands him, and every lawyer (or nearly every lawyer) would use the words "Common Law" in the same sense. Turn back to the Year Books of the 14th century and the meaning is the same:—

"Audita Querela is given rather by Equity than by Common Law"(*b*).

"And this suit is ordained by Parliament because I cannot have a recovery at Common Law" (*c*).

Let us look at the matter concretely. The courts have been examining lately some very modern developments in social relations, and adding "Boycott" and "Strikes" to the digests as additional headings. Now, from what source are the judges getting the law upon these subjects? Is it out of that gaseous Common Law which, if one may surmise, has existed from all eternity (for no one has ever heard of its creation, or other genesis)? Or are we to believe in special divine inflations for the birth of each new opinion—veritable modern themistes instead of the apocryphal inspirations of ancient days? Before trusts and combinations commenced to affright us, the English courts had little difficulty in asserting that

(*y*) § 15.

(*z*) § 72; and see 381.

(*a*) § 379.

(*b*) 17 Ed. III, 370.

(*c*) Ib. 386.

"It is in vain to say that a thing might have been done by an individual but cannot be done by a combination of persons" (*d*).

Now-a-days, however, they go much more warily, if very much less logically and lucidly, with the result that Mr. Haldane (in the front rank of English Counsel), undertaking to explain the two latest judgments of the House of Lords (*e*), is forced to acknowledge that he does not understand them himself (*f*) and must perforce await further revelations (of the Common Law?) at the hands of the judicial mediums.

Heaven apart, whence are the judges getting this new law? It is not in the statutes, nor is it in the decisions. Whence then? From the Common Law enwrapped in the palpitating tissues of the heart of the people, or its diaphram? The soul, as everybody knows, locates itself in the—well, perhaps we have trouble enough on hand for the present. But this Common Law—do somebody tell us where it is, and what it is, and is it like anything that we know something about? Is it regulating the trusts at present, do you think? And if so, is it making much of a job of it? Judges applying their notions of justice to new conditions, we can all understand; and to certain people that is what they seem to be doing, in this business of manufacturing trust and strike law. But the idea of judges labouriously delving into nothing, nowhere, and pretending that they are unearthing primeval aphorisms, axioms and principles placed there by omnipotence or by nature (by behemoths, just as likely) for use in these later stages—well, for one, I don't believe it. And is the Common Law only one law, since the noun is in the singular? Or is it one compressed epitome of all law, some primeval protoplasmic germ with wonder-

(*d*) *Mogul Steamship Co.* v. *McGregor*, (1892) A.C. 25.

(*e*) *Allen* v. *Flood* (1898) A.C. 1; *Quinn* v. *Leathem* (1901) A.C. 495.

(*f*) "These decisions (he says) disclose divergencies of view amongst distinguished men which make it hopeless for anyone to try to say with accuracy or certainty what the law is. Speaking for myself, I should be very sorry to be called on to tell a Trade Union Secretary how he could conduct a strike lawfully. The only safe answer I could give would be that having regard to the diverging opinions of the judges, I did not know." (Contemporary Review, March 1903, p. 368.) But why not take a look, Mr. Haldane, at the Common Law? Why, upon the theory that judges merely expound and interpret the Common Law, not read and expound a little yourself? Why? Because each judge is consulting, not any body of law, "true," "common," or otherwise, but is declaring what to him with all his personal idiosyncracies, his dreads, his antipathies, his sympathies, his forecasts, his whole mental characteristics and climate—what to his particular, brain, appears to be best.

ful evolutionary potentiality, from which everything else shall in good time proceed? Radium, we learn, is untiring and unremitting in its emanation of X rays, electrons, and particles of matter (exploded atoms, they say), and never is it a whit the poorer or the weaker—is the Common Law anything like radium?

Consider also our laws of estoppel and waiver; think you that we shall ever dig them up, either in London or Washington? Or for them too must we go to "judicial legislation" alone?

Or take our maritime law. Where did it come from? Out of the Common Law or from Lord Stowell principally? For example, the master of a ship can, under certain circumstances, bind a cargo by respondentia bond; was that law derived from the eternal verities? or was it "from the general policy of the law"—the general policy of Lord Stowell, we may say? Seamen's lien for wages, salvage, etc.; are these laws founded upon imperishable memories of some Edenic or, at least, Noachean code? Shall we say that they were discovered in the Pleistocene? or shall we confess that their creator was the modern Lord Stowell?

Turn to the law of bills and notes, and you change the founder merely, not the foundation or the methods of building. Here Lord Mansfield is at work, Lord Stowell there. And we find no more law merchant in the one case than law ship-owner in the other. Days of grace are given by law because of the previous *custom* of merchants, just as thirteen shrimps go to the dozen; that is because in the bill case ten days really meant thirteen, and in the shrimp case twelve meant thirteen. This is neither law-merchant nor law-shrimp, but a well-known bit of the law of contracts.

Getting away from this feature (the contractual feature) of the law of bills and notes, and examining the slow evolution of the general law relating to the subject itself, one cannot do better than quote from Professor Thayer's excellent treatise upon "Evidence at the Common Law." At the inception of some question there is usually, not a fixed common law to go to, but, on the contrary, a very wide difference of opinion, and this is followed "by fixing *in particular cases* an outside limit of what is rationally permissible," and then step by step growing more precise:—

"In this way the legal rule as to what is reasonable notice of the dishonour of a bill of exchange was established: juries were resisted by the court, when they sought to require notice within an hour, and on the other

band when they tried to support it if given within fourteen days, or even within three days when 'all were within twenty minutes' walk of each other' (*Tindal* v. *Brown*, 1 T.R. 168, 9); and so the modern rule was fixed that ordinarily notice is sufficient if given on the following day" (*g*). "The process is now going on as regards the question of timely notice to the indorser of a demand note" (*h*).

What a pity, after all, that there was not a "Law Merchant," or a Common Law, wherewith to settle long ago all these age-long controversies; or if indeed there was one, that it has been so irretrievably lost. But may we not yet hope? In London the other day a pachyderm which had lain lost for some 150,000 years was accidentally dug up.

JOHN S. EWART.

Winnipeg, Manitoba.

(*g*) P. 214, 215, 226.

(*h*) P. 215. Citing *Paine* v. *R. R. Co.*, 118 U.S. 152, 160.

Correspondence.

JUDICIAL FRILLS.

To the Editor of the CANADA LAW JOURNAL.

SIR,—No one may hereafter be heard to say that *noblesse* doesn't *oblige* the editors of legal publications in the United States. In the last number of the *American Law Review* I find the following editorial reference (p. 733) to one of the Federal judges: "Mr. United States Circuit Judge LeBaron B. Colt, of Rhode Island." Surely the "Genius of Democracy" will clamour for "the wig and the ermine, the buckles and sword," of the effete English Bench after this!

QUIDNUNC.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—DEBENTURES – FLOATING CHARGE—EQUITABLE INCUMBRANCES—NOTICE—PRIORITY.

In re Valletort, Ward v. *Valletort* (1903) 2 Ch. 654, was a contest for priority between the creditors of a joint stock company. Debentures were issued under which one set of creditors claimed, which constituted a floating charge on the assets of the company and the terms of which precluded the company from creating any prior charge, but the manager of the company, in forgetfulness of this provision, deposited the title deeds of the company with a bank to secure the present and future overdraft of the company's current account. The bank knew that debentures had been issued and held some of them as security for another customer's account, but made no inquiry in the matter. It was contended by the debenture holders that the possession of the debentures as security affected the bank with notice of their contents so as to preclude them claiming priority in respect of their equitable mortgage by deposit. But Eady, J., held that the possession of the debentures as security for another customer's account did not affect the bank with notice of the contents of the debentures in their dealings with the company; and that the fact of the company's managing director making the deposit of the title deeds was an implied representation that the company could give a valid first charge, and though the bank was aware of the debentures it was not put on inquiry as to their terms. Subsequent to the deposit of the deeds the company issued a debenture as further security to the bank which was expressly made subject to the first issue of debentures, but it was held that this fact did not put the bank on inquiry as to the terms of the first issue, so as to postpone their equitable mortgage in respect of advances subsequently made.

EQUITABLE WASTE — ORNAMENTAL TIMBER — "PLANTED OR LEFT FOR ORNAMENT OR SHADE"—EVIDENCE—PRESUMPTION—INJUNCTION.

Weld-Blundell v. *Wolseley* (1903) 2 Ch. 664, was an action to restrain equitable waste by the committee of a lunatic's estate. The plaintiff was tenant in remainder and claimed that certain timber trees which the committee proposed to sell had been planted or left for ornament or shade. A case was stated by a referee as to whether the plaintiff had made a prima facie case, and Eady, J., ruled that he had, and that in such cases the question is not whether the trees in question were ornamental, or useful for shelter, but whether they were in fact planted or left for those or either of those objects.

CO-SURETIES—INSURANCE OF MORTGAGE DEBT—COVENANT TO PAY WITH LIMIT OF LIABILITY—CONTRIBUTION.

In re Denton, License Insurance Corporation v. *Denton* (1903) 2 Ch. 670. The plaintiffs in this case had insured a mortgage debt secured by a mortgage made by one Hannay for £4,000 in which one Denton had joined as surety; by the mortgage Hannay and Denton jointly covenanted to pay the whole mortgage debt, but subject to a proviso that Denton's liability should be limited to £1,000. The mortgage also contained a covenant by Hannay alone to insure and keep insured the mortgage debt with the plaintiff company, and the plaintiffs had issued a document purporting to be a policy insuring the payment of the whole amount of the mortgage debt, and agreed that if the mortgagor made default the plaintiffs would pay, and that thereupon the mortgagees should assign the mortgage debt and all securities to the plaintiffs, and do all things necessary for the purpose of enforcing any rights or remedies or of obtaining relief or indemnity from other parties, to which the plaintiffs should be subrogated on payment under the policy. The mortgagor made default and the plaintiffs had paid the debt, which with interest, etc., amounted to £5,000. The mortgaged property had been realized and had produced £4,000, leaving a deficiency of £1,000, the whole of which the plaintiffs claimed to recover from Denton's estate, he having died. It was contended by the plaintiffs that they were insurers and not sureties, and at all events not co-sureties with Denton because their contract was subsequent and independent of the mortgage. Eady, J., was inclined to think the plaintiffs were merely sureties notwithstand-

ing the form of the contract, but whether sureties or insurers was immaterial, because, though the mortgage and policy were separate instruments they were nevertheless parts of the same transaction, the procuring of the policy being expressly provided for in the mortgage, that therefore notwithstanding the form of the documents they were in effect co-sureties with Denton in unequal amounts, and were bound to contribute in the like proportions to the payment of the deficiency, and as the plaintiffs were liable for the whole debt, which had been ascertained to be £5,000, and Denton for only £1,000, the proportions of their respective liabilities were 5/6 and 1/6.

SHIP—CHARTER PARTY—DISCHARGE OF CARGO—DEMURRAGE.

In *Hutllien* v. *Stewart* (1903) A.C. 389, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey, Robertson and Lindley) have decided that where a clause in a charter party provides that the cargo is to be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, subject to a special exception in case of a strike, or lockout, or epidemics, demurrage is not payable if the discharge is effected with the utmost despatch possible, consistent with the custom of the port, and having regard to the facilities of delivery and all other circumstances not brought about by or within the control of the person whose duty it is to take delivery.

TESTAMENTARY POWER—POWER OF APPOINTMENT—COVENANT TO EXERCISE TESTAMENTARY POWER FOR BENEFIT OF CREDITOR—PRIORITIES—APPOINTED FUND—(R.S.O. c. 337, s. 20).

In *Beyfus* v. *Lawley* (1903) A.C. 411, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) have affirmed the decision of the Court of Appeal *In re Lawley, Zaiser* v. *Lawley* (1902) 2 Ch. 799 (noted ante, vol. 39, p. 102) where it was held that a borrower having a general testamentary power of appointment over a fund could not, by exercising it in favour of the lender as security for a loan, give the lender any priority over other creditors in regard to the fund, because by the exercise of the power the fund, ipso facto, becomes general assets of the estate of the appointor, (see R.S.O. c. 337, s. 20).

CONTRACT—ASSIGNMENT OF CONTRACT—RIGHT OF ASSIGNEE OF CONTRACT TO SUE ALONE WITHOUT JOINING ASSIGNOR—COMPANY PARTIES.

In *Tolhurst* v. *Associated Portland Cement Manufacturers* (1903) A.C. 414 the House of Lords (not without some difference of opinion) have affirmed the decision of the Court of Appeal (1902) 2 K.B. 660 (noted ante, vol. 39, p. 155). Two points were involved in the appeal, one as to the effect of the contract in question and the other as to the right of an assignee of it to sue alone without joining their assignors. The contract was to supply at least 750 tons of chalk a week, and so much more as the contractees might require for the purpose of their business, the manufacture of cement. The contractees went into liquidation and the contract was assigned to the plaintiffs, a new company which carried on the same business but on a larger scale. The Court of Appeal held that there was a personal element in the contract, which prevented its assignment, so as to enable it to be enforced by the assignees without joining the assignor; but that the contract was subsisting and might be enforced by the assignor for the benefit of their assignee. The majority of their lordships (Macnaghten, Shand and Lindley) held that upon the true construction of the contract it must be read as if made with the original contractees, their successors and assigns, and the assignees could enforce it without joining their assignors, but Lord Halsbury, L.C., doubted, and Lord Robertson dissented from this conclusion.

MINES—EXPROPRIATION—NOTICE TO TREAT—SUBSEQUENT RISE IN VALUE OF MINERALS—EVIDENCE.

The Brecon and Merthyr Dare N.S. Collieries v. *The Pontypridd Water Works Co.* (1903) A.C. 426, is a case in which there has been some fluctuation of opinion. The question was where the working of mining lands is sought to be stopped, subject to compensation being made, whether in fixing the compensation to be paid a rise in value of the minerals, after the notice to treat was served, can be taken into account. The Divisional Court held that it could (1901) 2 K.B. 798 (noted ante vol. 38, p. 16); the Court of Appeal (1902) 2 K.B. 135 (noted ante vol. 38, p. 646) held that it could not; and now the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Robertson and Lindley) have unanimously held that it could, thereby affirming the original decision. Their lordships held that the notice to treat did not operate as a sale of

the minerals, the property remained in the mine owners, who were only prevented from working them. They consider therefore that the analogy of a sale does not hold good.

MUNICIPAL CORPORATION—CONTRACT—VALIDITY—MEMBERS OF CORPORATION DIRECTLY OR INDIRECTLY INTERESTED OR CONCERNED IN—ASSIGNMENT OF CONTRACT.

London Electric Lighting Co. v. *London* (1903) A.C. 434, deals with a question of municipal law which it may be well to note. By an English statute no member of a municipal corporation can be directly or indirectly interested in any contract made or entered into by the corporation for the execution of any works authorized by the Act, inter alia, lighting contracts, on pain of the contract being null and void. At the time a contract for lighting was made with a syndicate no members of the corporation were interested in the syndicate. Afterwards with the consent of the municipal authorities the contract was assigned by the syndicate to a company in which several members of the corporation were shareholders. The Court of Appeal held that this did not invalidate the contract, which was valid at the time it was made, and the House of Lords (Lord Halsbury, L.C., and Lords Davey and Robertson) affirmed that decision; but contracts made with companies in which members of the corporation were shareholders were held to be within the statute and invalid.

CANADIAN CUSTOMS ACT, 1897, S. 4—DUTY ON IMPORTED GOODS—FOREIGN-BUILT SHIP.

In *Algoma Central Ry. Co.* v. *The King* (1903) A.C. 478, the Judicial Committee of the Privy Council (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Davey, Robertson and Lindley, and Sir Arthur Wilson) have affirmed the decision of the Supreme Court on a question of constitutional law. The Court of Exchequer held, and the Supreme Court affirmed the decision, that the Canadian Customs Act (1897) imposing a duty on foreign-built ships imported into Canada was not in any way repugnant to the Imperial Merchants' Shipping Act (1894), and that the duty (as specified, s. 4, sched. A., item 409), was payable in respect of a ship built in the United States and brought to Canada.

STREET RAILWAY—REMOVAL OF SNOW FROM TRACKS—ELECTRIC SWEEPER.

In *Montreal* v. *Montreal Street Railway Co.* (1903) A.C. 482, the plaintiffs had entered into a contract with the defendant company, whereby, inter alia, the defendants bound themselves to keep their track free from ice and snow. In order to carry out this part of their agreement they used an electric sweeper which brushed the snow off the track on to the other part of the roadway of the street on either side, causing a trench which was inconvenient for other traffic. The action was brought to test their right to do this, and the Supreme Court of Quebec found that the company was bound to keep its tracks clear from ice and snow, but were not bound to remove from the streets or convey elsewhere the snow so removed, and that they were entitled without the consent of the city to use an electric sweeper for the purpose of so cleaning their tracks; and with this decision the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley, and Sir A. Wilson) agreed. It was argued that the railway's action amounted to a nuisance and the case was within the principle of *Ogaton* v. *Aberdeen* (1897) A.C. 111, where the spreading of a briny mixture on the streets by the defendants, was held to be illegal and a nuisance, but their lordships held that that case did not apply because here the defendants were authorized by the municipality to do the act complained of.

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In *Graves* v. *Gorrie* (1903) A.C. 496, the Judicial Committee of the Privy Council (Lords Macnaghten, Shand, Robertson and Lindley, and Sir A. Wilson) have affirmed the judgment of the Court of Appeal for Ontario, 3 O.L.R. 697, holding that the provisions of the Imperial Fine Arts Copyright Act, 1862 (25 & 26 Vict., c. 68), do not extend to Canada, on the ground that there is nothing in the Act to indicate an intention on the part of the Legislature to extend the limits within which copyright might be enjoyed thereunder to any part of the British Dominions outside the United Kingdom. *Tuck* v. *Priester*, 16 Q.B.D. 629, was approved.

SHIP—SALVAGE—SHIP SALVED THE PROPERTY OF THE CROWN.

Young v. *S S. Scotia* (1903) A.C. 501, was an appeal from the Supreme Court of Newfoundland in an action to recover for salvage services rendered the Steamship Scotia. The court found that the ship at the time the services were rendered was and is still the property of the Dominion of Canada, and therefor the public property of His Majesty, and therefore not liable to claims, for salvage. The Judicial Committee (The Lord Chancellor and Lords Macnaghten, Shand, Davey, Robertson and Lindley, and Sir A. Wilson) held that the judgment was right, but at the same time expressed a strong opinion that the claim was a meritorious one and should be paid.

PATENT—INFRINGEMENT—COUPLER—NEW DEVICE FOR EFFECTING OBJECT COVERED BY PRIOR PATENT.

Consolidated Car Heating Co. v. *Came* (1903) A.C. 509, was an action to restrain the alleged infringement of a patent. The patent of the plaintiffs was for a coupler for hose attached to railway cars so as to secure a steam-tight fastening which would permit an automatic separation of the hose when the car was uncoupled. The defendant's coupler was in all respects the same as the plaintiffs' but produced the required result without one particular feature of the plaintiff's coupler called a rib or hinge joint, which was proved to have been a very material part of the plaintiffs' coupler and their specification shewed they never contemplated its omission. The Quebec Court of King's Bench held that there had been no infringement, because the defendant's coupler was a new way of accomplishing the end aimed at by the plaintiffs' coupler, and with this conclusion the Judicial Committee of the Privy Council (Lords Davey, James and Robertson, and Sir A. Wilson) agreed.

PRACTICE—LEAVE TO APPEAL TO PRIVY COUNCIL FROM SUPREME COURT—R.S.C. c. 135, s. 71.

In *Clergue* v. *Murray* (1903) A.C. 521, an application was made to the Privy Council for leave to appeal from a judgment of the Supreme Court of Canada. Under R.S.C., c. 135, s. 71, no appeal lies from such a judgment except by special leave of His Majesty in Council. The Judicial Committee (Lords Davey, James and Robertson, and Sir A. Wilson) refused leave following

Prince v. *Gagnon* (1882) 8 App. Cas. 103, on the ground that where a suitor has a choice of appealing either to the Supreme Court or to His Majesty in Council, and elects to appeal to the Supreme Court, special leave to appeal therefrom should not be given except in a very strong case. The reporter notes two cases in which the committee granted leave, one where there had been an equal division in the Supreme Court, and the other involving a question of law affecting the rights of the Crown.

LORD'S DAY ACT—(R.S.O. 1897, 346)—POWERS OF LOCAL LEGISLATURE—POWERS OF DOMINION PARLIAMENT—CRIMINAL LAW—B.N.A. ACT, S. 91 (27)—PRACTICE AS TO QUESTIONS REFERRED.

Attorney-General of Ontario v. *Hamilton Street Ry.* (1903) A.C. 524. This was an appeal from the Ontario Court of Appeal on the question of the validity of the Ontario Lord's Day Act, R.S.O. 1897, c. 246. In the case stated for the opinion of the court besides the general question as to the constitutionality of the Act, there were a number of other questions in which the opinion of the Court was asked as to the powers of the Legislature to prohibit the doing of certain acts, and as to the meaning of certain sections. The Judicial Committee of the Privy Council (The Lord Chancellor and Lords Macnaghten, Shand, Davey, Robertson and Lindley) confined themselves to answering the principal question, and declared the Act to be an invasion of the exclusive legislative authority of the Dominion Parliament under the B.N.A. Act, s. 91 (27) in relation to criminal law, and held that the other questions propounded could only be properly raised in concrete cases, and were not the proper subject for judicial decision as being mere hypothetical or speculative questions, upon which it would be impossible to pronounce any conclusive opinion. The effect of the decision, as we formerly pointed out, appears to be to leave the old C.S.U.C., c. 104, as being still in force. See volume of Acts of Provinces of Canada not repealed, p. 243.

TRADE UNION—LIABILITY OF TRADE UNION FOR WRONGFUL ACTS OF AGENTS—CONSPIRACY—ILLEGALLY PREVENTING WORKMAN FROM OBTAINING EMPLOYMENT.

Giblan v. *National Amalgamated Labourers' Union* (1903) 2 K.B. 600, was an action brought by a member of a trades union against the union and its general and local secretaries, claiming

damages for loss of wages occasioned by the defendants having illegally prevented the plaintiff from getting employment, and also an injunction to restrain the continuance of the acts complained of. The plaintiff had been treasurer of a local branch of the defendant union, and a sum of £38 was claimed to be due by the plaintiff as such treasurer, which he had failed to pay, and for which judgment had been recovered against him. In February, 1900, the defendant the general secretary of the union went to the foreman of the firm where the plaintiff was employed and notified him that, unless the plaintiff was dismissed, the rest of the union men would strike. Whereupon the plaintiff was dismissed, and was out of employment for three weeks. He then got work elsewhere; being still in default to the union, he was at a general meeting expelled, and his expulsion was notified to all the local branches, and thereafter several union men were fined for working with the plaintiff. The local secretary subsequently went to the plaintiff's employer and notified him unless the plaintiff was discharged the union men in his employ would be called out, and similar notices were given to three other employers with whom the plaintiff had got work, resulting in each case in his dismissal; another ground for the defendant's action being that the plaintiff, a non-unionist, was obtaining employment when union men were out of work. The action was tried before Walton, J., and on the answers of the jury to certain questions submitted to them, the learned judge, in a considered judgment, held that the general secretary alone was liable to the plaintiff for the acts complained of, and dismissed the action as to the other defendants: but the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) came to a different conclusion, and held that the union was responsible for the acts of their general secretary, and that the evidence shewed that there had been a conspiracy on the part of the officers of the union to prevent the plaintiff getting or retaining work, in order to compel him to pay the debt he owed the union, which was in effect an attempt on their part to effect a legal object by illegal means, and that on the principle laid down in *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, at page 265, the union was liable for the acts of its officers.

PRINCIPAL AND AGENT—SECRET PROFIT—RIGHT OF AGENT MISCONDUCTING HIMSELF TO COMMISSION.

Andrews v. *Ramsay* (1903) 2 K.B. 635 lays down a very wholesome rule, which ought to tend to fair and honest dealing by agents. The strange mental obliquity whereby an agent employed by his principal for a certain purpose, conceives himself also entitled to make a profit out of the transaction unknown to his principal, is an insidious evil that needs to be rooted out; henceforth, an agent who enters on that slippery path should know that his principal may not only recover from him the secret profit he has treacherously endeavoured to secure, but also any compensation he may have retained with the assent of his principal and which he would have been legitimately entitled to, had he acted honestly. In short, according to the judgment of the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ) an agent who makes a secret profit renders himself liable to an action by his principal to recover not only his illegitimate gains, but also the legitimate reward he might otherwise have been entitled to.

INSURANCE—BREACH OF WARRANTY BY SHIPOWNER—WARRANTY OF SEAWORTHINESS—NEGLIGENCE OF MASTER—PROXIMATE CAUSE OF LOSS.

In *Greenock Steamship Co.* v. *Maritime Ins. Co.* (1903) 2 K.B. 657, the Court of Appeal have affirmed the decision of Bigham, J. (1903) 1 K.B. 367 (noted ante vol. 39, p. 357.)

BILL OF LADING—HARTER ACT (ACT OF CONGRESS OF U.S.A. 1893)—"FAULTS OR ERRORS IN MANAGEMENT OF VESSEL."

In *Rowson* v. *Atlantic Transport Co.* (1903) 2 K.B. 666, the Court of Appeal have also affirmed the judgment of Kennedy, J. (1903) 1 K.B. 114 (noted ante vol. 39, p. 192). In this case it may be remembered the action was brought to recover damages to a cargo occasioned by the mismanagement of the refrigerating apparatus, which Kennedy, J. held to be "an error in the management of the vessel," for which, under the bill of lading, the owners were responsible.

CONTRACT—SPECIFIC PERFORMANCE—FAILURE OF CONSIDERATION—OBJECT OF ENTERING INTO CONTRACT FRUSTRATED—DEMISE OF SHIP—REPUDIATION OF CONTRACT BEFORE TIME FOR PERFORMANCE.

Herne Bay Steamboat Co. v. *Hutton* (1903) 2 K.B. 683. This, and the two following cases, arise out of the postponement of the coronation festivities. In this case the defendants entered into an agreement in writing with the plaintiff, whereby it was agreed that

the plaintiffs' steamer Cynthia should be "at the disposal" of the defendant on June 28, to take passengers to Herne Bay "for the purpose of seeing the naval review," announced to take place on that day, "and for a day's cruise round the fleet, and also on June 29 for similar purposes: price £250, payable £50 down and balance when ship leaves Herne Bay." The £50 was paid when the agreement was signed. On June 25 the review was cancelled, whereupon the plaintiff telegraphed to the defendant for instructions, stating that the ship was ready, and requesting payment of the balance. Receiving no reply the plaintiffs used the ship on 28th and 29th June for their own purposes, and made a profit. On June 29 the defendant repudiated the contract in toto. The fleet remained anchored at Spithead for the two days. The action was brought to recover £200 less the profits realized from the use of the vessel on June 28 and 29. Grantham, J., who tried the action dismissed it; but the Court of Appeal (Williams, Romer and Stirling, L.JJ.) reversed his decision, because it appeared by the contract that the defendant had two objects in view. (1) to take people to see the review and (2) to take them round the fleet: that though the first object was frustrated, the second could have been carried out, and, therefore, the review not being the sole basis of the contract there was not a total factor of consideration, and the case did not come within *Taylor* v. *Caldwell*, 3 B. & S. 826. The defendant set up that the vessel had not been placed at his disposal on the days named, but the Court of Appeal held that before the time came for performance the defendant had repudiated his obligations under the contract and therefore the plaintiffs properly employed the vessel in her usual daily services.

CONTRACT—HAPPENING OF EXPECTED EVENT—BASIS OF CONTRACT—IMPLIED CONDITION.

In *Krell* v. *Henry* (1903), 2 K.B. 740, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would pass along that street. The contract contained no express reference to the processions or to any purpose for which the flat was hired, but the Court found that from necessary inferences drawn from the surrounding circumstances it was regarded by both contracting parties that the taking place of the procession on the days named was the foundation of the contract. A deposit

was paid at the time of the contract, but the procession having been abandoned the defendant refused to pay the balance of the agreed rent, and to recover the same the action was brought. In this case the Court of Appeal (Williams, Romer and Stirling, L.JJ.) held that the doctrine of *Taylor* v. *Caldwell* did apply, and that the plaintiff was therefore not entitled to succeed. The distinction between this and the preceding case is somewhat finely drawn: and it might be said that the purpose for which the defendant required the flat was a matter with which the plaintiff had nothing to do, and that the defendant took the risk of the object failing. The fact that in the preceding case besides seeing the contemplated review the defendant also intended to cruise around the fleet, turned the scale; would the intention of reserving the flat for some subsidiary purpose, such as giving a "luncheon party," as well as seeing the processions, have turned the scale in the present case?

CONTRACT—CONSTRUCTION—RIGHTS OF PARTIES WHEN PERFORMANCE OF CONTRACT HAS BECOME IMPOSSIBLE COSTS.

Civil Service Co-operative Society v. *The General Steam Navigation Co.* (1903) 2 K.B. 756, is the third case above referred to. In this case also the plaintiffs in March, 1902, hired from defendants a vessel for three days to be at their sole disposal for the purpose of taking passengers to see the naval review on the occasion of the King's coronation in June or July, 1902. £250 was paid down, and the balance of the hire, £1,250, was to be paid "ten days before the date of the review." On the 18th June the balance was paid, the review having been fixed to take place June 28th. The review was postponed on June 25th, and the plaintiffs then gave notice to the defendants that they would not require the steamer. The defendants before the postponement of the review had incurred expenses to the amount of £500 in fitting out the vessel for the trip and other things in part performance of the contract. The plaintiffs sought to recover £1,500 as having been paid on a consideration which had failed. Bigham, J., who tried the action, dismissed it, but without costs. The Court of Appeal (Lord Halsbury, L.C., Lord Alverstone, C.J., and Cozens-Hardy, L.J.) held that the action was rightly dismissed, and approve the decision of the Divisional Court in *Blakeley* v. *Muller*, and *Hobson* v. *Pattenden*, which are reported in the note on p. 760, and which were County Court actions

brought under similar circumstances to recover moneys paid for seats to view the coronation procession. On the question of costs, however, the Court of Appeal reversed Bigham, J.'s order, holding that there was no ground for depriving the defendants of their costs, the fact that it was "a hard case" not being deemed a sufficient reason.

WILL—PROBATE—FRAUD AND UNDUE INFLUENCE UNSUCCESSFULLY SET UP—COSTS.

Wilson v. *Bassil* (1903) P. 239, was a probate action in which the defendant set up that the will was obtained by fraud and undue influence. The facts surrounding the making of the will brought the case within the principles laid down in *Brown* v. *Fisher* (1890) 63 L.T. 465; *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448; and *Tyrrell* v. *Painton* (1894), P. 151, and imposed upon the plaintiff propounding the will the onus not only of proving its valid execution, but that it was not obtained by fraud and undue influence, and that it did truly express the last will of the testator. Under these circumstances, although the defendant failed, Walton, J., held that the defendant was entitled to payment of his party and party costs out of the estate next after payment of the plaintiff's costs as between solicitor and client.

PROBATE—NUNCUPATIVE WILL—SOLDIER ON ACTIVE SERVICE—TESTAMENTARY DISPOSITION—"EFFECTS TO BE CREDITED"—WILLS ACT (1 VICT., C. 26), S. 11—(R.S.O., c. 128, s. 14).

In the goods of Scott (1903) P. 243, was an application for administration with the contents of a nuncupative will annexed. The testator was a soldier in active service at the time of his death. The declaration was made by the deceased to his commanding officer as follows: "In the event of my death in South Africa I desire all my effects to be credited to my sister, Miss N. Scott, 39 Hanley Road, London, N." This, Jeune, P.P.D., held to be a sufficient will and administration was granted as prayed.

HIGHWAY LAND BETWEEN FENCES SEPARATING ROADWAY FROM ADJOINING LAND—DEDICATION—PRESUMPTION.

In *Harvey* v. *Truro* (1903) 2 Ch. 638, Joyce, J., decided that in the case of an ordinary roadway running between fences, although the space between them be of a varying and unequal width, the right of passage or way primâ facie, in the absence of evidence to

the contrary, extends to the whole of the ground between the fences and not merely to the metalled portion, and that the whole space is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption—moreover he reaffirms the rule that mere disuse of a highway for any length of time cannot avail to deprive the public of their rights in respect of it.

MORTGAGOR AND MORTGAGEE—SALE UNDER POWER—AUCTION—PURCHASE BY OFFICER OF MORTGAGEE SOCIETY—INVALIDITY OF SALE.

Hodson v. *Deans* (1903) 2 Ch. 647, was a redemption action. The plaintiff had mortgaged the land to the trustees of a friendly society to secure an advance. Under a power of sale the trustees had offered the property for sale by auction, and an officer of the society who knew the reserved bid, and took part in instructing the auctioneer who conducted the sale, attended the sale and bought the property for himself, the plaintiff attended the sale and bid against him. The sale was at a small undervalue. Notwithstanding this sale Joyce, J., held that the property was redeemable and gave the plaintiff the relief claimed, because the society could not have sold privately to one of their officers, and it made no difference that the sale was by auction.

TIME COMPUTATION OF TIME—"THREE YEARS FROM THE PASSING OF THIS ACT—STATUTE—CONSTRUCTION.

The Goldsmiths Co. v. *The West Metropolitan Ry. Co.* (1904) 1 K.B. 1, deserves a brief notice, because the Court of Appeal (Collins, M.R., and Mathew, L.J.) were called on to reverse a well-settled rule in the construction of statutes. By the statute in question a company was empowered to expropriate lands within "three years from the passing of this Act." The Act received the Royal assent on August 9, 1899, and on August 9, 1902, the company gave the plaintiffs notice to treat. It was contended by the plaintiff that the notice was too late because the day of passing the Act was to be included in the computation of the three years, but the Court of Appeal agreed with Walton, J., that it was to be excluded.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Drainage Referee.] WIGLE *v.* TOWNSHIP OF GOSFIELD SOUTH. [Jan. 5.

Drainage—Township drain—Division of township—Damages for construction—Joint claim—Amendment of statute—Limitation clause—Recurrence of damages.

Pursuant to the judgment of the Court of Appeal of March 2, 1901 (1 O.L.R. 519), the Drainage Referee July 25, 1901, added the township of Gosfield North as defendants, and they filed a statement of defence on Sept. 10, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On April 15, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of the complaint arose.

Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on Sept. 10, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence. Judgment of the Drainage Referee reversed.

Langton, K.C., and *A. H. Clarke*, K.C., for appellants, the defendants. *Mabee*, K.C., for plaintiffs.

Full Court.] DOMINION BANK *v.* EWING. [Jan. 25.

Promissory note — Forgery — Notice — Repudiation — Ratification — Estoppel—Severance of liability.

The plaintiffs were endorsees of a promissory note for $2,000 dated August 14, 1900, purporting to be made by the defendants to the order of the Thomas Phosphate Company. The manager of the company had as a matter of fact forged the maker's name, but got the Bank to discount the note and place the proceeds to the credit of the company on August 15. Cheques were thereupon issued by the company against the proceeds, which

left a balance to their credit at the close of business on the 15th of $1,611.55, on the 16th of $1,355, and on the 17th of $84. On the 15th the Bank notified the defendants, who resided in Montreal, that the note, describing it, would fall due on December 19, 1900, which notification the defendant received on the following day. Instead of replying to the Bank, however, the defendants kept up a correspondence with the forger urging him to settle the matter. On December 4th the plaintiffs again wrote to the defendants about the note and when it would fall due. It was not until December 10th that the defendants wrote to the plaintiffs stating that the note was not their note.

Held, that the defendants should have answered a business communication like that of the bank's of August 15th according to the dictates of common sense and fair dealing, and that their silence being coupled with resulting damage created an estoppel againt them.

Held, also, that the plaintiffs' recovery should not be restricted to $1,355, or any lesser sum which was actually paid out after the time when the plaintiffs should have had notice from the defendants of the forgery, but they were entitled to recover the full amount of the note. The estoppel went to the extent that the defendants must be taken to be the makers of the note which the plaintiffs had bought and paid full value for, and there was no reason for saying that their liability was to be severed.

H. S. Osler, K.C., and *Britton Osler*, for defendants (appellants). *Shepley*, K.C., and *Keilcher*, for plaintiffs (respondents).

HIGH COURT OF JUSTICE.

Osler, J.A.] IN RE WAY [Dec. 5, 1903

Will—Construction—Residuary bequest—Personal effects—Mortgage—Debts and expenses of administration—Ratable charge in real and personal estate.

A will was in part as follows; "My will is first that all my just and awful debts, and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows: I give devise and bequeath absolutely to my loved wife . . all my furniture, books, plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children. The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate.

Held, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." "These words occurring in a residuary gift were not to be read as restricted to things ejusdem generis with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate.

Held, also, following *Re Thomas*, 2 O.L.R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values: Devolution of Estates Act, R.S.O. 1897 c. 127, s. 7.

D'Arcy Tate, for executors and S. J. Way. *J. Dickson*, for other parties.

MacMahon, J.] MAGER *v.* CANADIAN TIN PLATE CO. [Dec. 15, 1903.

Prohibition—Money demanded—Final judgment—Entry of a for want of dispute notice—R.S.O., c. 60, s. 113.

An action in a Division Court in which the particulars described the plaintiff's claim as for "money received by the defendants for the use of the plaintiff being money obtained from the plaintiff by the defendants by false representations" in an action for a "money demanded" within s. 113 of the Division Courts Act, R.S.O., c. 60, and a motion for prohibition to restrain proceedings upon a judgment entered in default of a dispute notice was refused.

Middleton, for motion. *W. Davidson*, contra.

Cartwright, Master.] KIRK *v.* CITY OF TORONTO. [Dec. 22, 1903.

Jury notice—Injury by steam roller—Non-repair of street—O. J. Act, 104.

Injuries caused by the negligent use of a steam roller belonging to a Municipal Corporation and operated by a contracting company on a street of the latter are not caused through non-repair of the street and a motion to strike out a jury notice under s. 104 of the Judicature Act was refused.

Nasmith, for plaintiff. *Chisholm*, for city. *J. E. Jones*, for the contractors.

Divisional Court.] GARNER *v.* TOWNSHIP OF STAMFORD. [Dec. 28, 1903.

Evidence—Negligence—Statements of persons injured—Res gestæ.

In an action brought by the father and mother of a young girl to recover damages in respect of her death which resulted as was alleged from a fall on a stone in a highway under the control of the defendants. It was proved that the stone in question had been allowed to remain for a long

time in a part of the highway used by foot passengers; that several persons had tripped over it; that the deceased had left her house on a certain evening to go to another house the direct route to which would be by the highway in question; that she came to the other house apparently suffering great pain, and stated that she had tripped on the stone and hurt herself; that about the time she would in the ordinary course have been passing the place in question a witness saw a young girl whose description answered to that of the deceased lying beside the stone, who stated to him that she had fallen on the stone and hurt herself; and that the girl died from peritonitis, resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall upon a stone;

Held, affirming the judgment of MACMAHON, J., that the statement of the deceased to her friends at the house to which she came, and, assuming that the indentity had been proven, her statement while lying near the stone, were not admissible in evidence as part of the res gestæ, these being at most statements made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection which alone are properly admissible as part of the res gestæ. *Regina* v. *McMahon* (1889), 18 O.R. 502, applied.

Held, however, reversing the judgment of MACMAHON, J., that the identity of the deceased with the person seen by the witness lying near the stone was established; that, excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone; and that as the highway was by reason of the presence of the stone in a dangerous condition and out of repair the defendants were liable.

Masten and *McBurney*, for appellant. *Hill*, for the Town of Niagara Falls. *Griffiths*, for the Township of Stamford.

Trial—Boyd, C.] [Dec. 28, 1903.

ELGIN LOAN AND SAVINGS CO. *v.* NATIONAL TRUST CO.

Company—Shares—Deposit of certificates—Bailment—Trust—Detention—Excuse—Trustee Act—Winding-up direction of Master—Jurisdiction—Detinue—Measure of damages—Price of shares.

The plaintiffs became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, and deposited the certificates for the shares with the defendant trust company for safe keeping. The defendant trust company executed and delivered to the plaintiff loan company a document under seal by which they acknowledged the receipt of the certificates, and agreed to hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept

safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put in the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound-up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Company, and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations the plaintiff trust company as liquidators demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention.

Held, 1. The defendant trust company were merely bailees and not trustees; but, if they were to be regarded as trustees, the failure to hand over the certificates was not a breach of trust for which they ought fairly to be excused under 62 Vict. (2), c. 15, s. 1 (O.); owing to their dual character, they did not act with singleness of purpose, and therefore not honestly and reasonably; and the direction of the Master in Ordinary to whom was referred the winding-up of the Atlas Loan Company, that the whole 575 shares should be retained by the defendant trust company as liquidators, was made without jurisdiction, and did not protect them as trustees.

2. The plaintiffs were entitled to damages for the detention (delivery having ben made pending the action) based on estimates of what had been lost by the detention; and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery.

Gibbons, K.C., *Shirley Denison* and *W. K. Cameron*, for plaintiffs. *S. H. Blake*, K.C., and *W. H. Blake*, K.C., for defendants.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Dec. 29, 1903.

GRAHAM *v.* BOURQUE.

Chose in action—Assignment of money payable "in respect of the contract" —Damages for interference with the work—Attachment of debts.

Held, affirming the decision of STREET, J., 6 O.L.R. 428, that the assignment to the claimants of moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded to the contractor by the judgment in *Bourque* v. *City of Ottawa*, 6 O.L.R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor.

Aylesworth, K.C., for judgment creditor. *Middleton*, for claimants.

Meredith, C.J.C.P.] [Dec. 29, 1903.

HAYCOCK *v.* SAPPHIRE CORUNDUM CO.

Mechanics' lien — Action — Parties — Execution creditor — Incumbrance arising pendente lite—Notice of trial—Judgment—Vacating.

Under s. 36 of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, c. 153, it is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served; service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in.

After service of notice of trial in an action to enforce a mechanic's lien against the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a fi. fa. against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge, or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens.

Held, that the name of the petitioners and all reference to their claim should be stricken out of the judgment.

F. E. Hodgins, K.C., for petitioners. *W. H. Blake*, K.C., for plaintiffs.

Meredith, C.J.C.P.] RE WALSH & FITCH. [Jan. 2.

Solicitor and client—Taxation—Delivery of bill of costs—Delivery of amended bill after order.

Some solicitors having delivered an unsigned bill of costs, the client applied for and obtained an order that they do deliver a bill and for taxation of same when delivered. Under this order the solicitor delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, and some new items were charged.

Objection was taken on the part of the client that nothing more should be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed.

Held, that by applying for an order for delivery of a bill the client must be considered to have consented to the old bill being withdrawn, and the objection could not prevail.

Hislop, for client. *Middleton*, for solicitors.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Jan. 4.

BILLING *v.* SEMMENS.

Master and servant—Injury to servant—Death—Absence of direct evidence as to cause of injury—Case for jury—Dangerous machinery—Factories Act.

The plaintiff sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of the defendants, which, as she alleged, resulted in his death, and were caused by a defect in the condition or arrangement of a "jointer" at which the deceased was working, the revolving knives of which it was, as she contended, the duty of the defendants under the Factories Act to guard, and which were not so guarded. The plaintiff shewed that the knives of the jointer were a dangerous part of the defendant's machinery; that it was practicable securely to guard them; that they were not securely guarded; that the deceased's injuries were caused by his fingers coming in contact with the knives while they were in motion; and that he was then engaged in trimming, by means of the knives, the edges of a board eight feet long, two inches thick, and from twelve to fourteen inches wide; but it was not shewn by direct evidence exactly how the deceased's fingers came into contact with the knives, It was shewn, however, that almost immediately after the accident the board was found lying on the table of the machine, with "up the centre a split running about half way through it;" that the board "had been run half way over the machine;" and that there was a shaving hanging to it "as if the knives had struck the wood and never cleaned it out—curled up." There was also evidence that the action of the operator in pushing a board over the machine was likely to stop the machine if the bolts were not tight, and that, in the opinion of an expert who had seen the machine in operation, the position of matters immediately after the accident indicated that the machine had stopped owing to the belt not having been tight enough, and that, if this had happened, the board would be likely to "jump" and to cause the operator's fingers to drop from it and to be brought into contact with the knives. There was also evidence that what was spoken of in the evidence as a "fence" was in proper position.

Held, that these circumstances afforded evidence which, if believed, warranted the inference being drawn that the injuries to the deceased happened while he was in the act of putting the board through the jointer, and that, owing to the knives being unguarded, his fingers, without fault of his, came into contact with the revolving knives by which the ends of them were taken off.

Montreal Rolling Mills Co. v. *Corcoran*, 26 S.C.R. 595, *Canadian Cotoured Cotton Co.* v. *Kervin*, 29 S.C.R. 479, and *Wakelin* v. *London and South Western R. Co.*, 12 App. Cas. 41, (1896) 1 Q.B. 196 n., distinguished.

Held, also, following *Groves* v. *Wimborne*, (1898) 2 Q.B. 402, and *Sault Ste. Marie Pulp Co*, v. *Myers*, 33 S.C.R. 23, that failure to obey the direction of the Factories Act as to guarding dangerous machinery, which results in injury being caused to an employee, gives a right of action.

Nesbitt, K.C., for plaintiff. *Riddell* K.C., for defendants.

Divisional Court.] IN RE BAILEY. [Jan. 5.

Will—Construction—Legacies—Payment out of real estate.

A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters and proceeded as follows: "I give to my wife all the moneys that remains after paying my former bequeaths, debts and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living;"

Held, that there has not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville* v. *Browne* (1859), 7 H.L.C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate. Judgment of TEETZEL, J., affirmed.

Watson, K.C., for appellants. *George Wilkie*, for respondents.

Teetzel, J.] STANDARD TRADING CO. *v.* SEYBOLD. [Jan. 9.

Discovery—Examination for—Amended pleadings—Second examination order for—Limitation of.

Where pleadings have been amended raising matters not before suggested, after examination for discovery has been had, an order may be made in a proper case for a further examination which may be limited to the matters raised by the amendment. Judgment of the Master in Chambers affirmed.

D. L. McCarthy, for the appeal. *W. H. Blake*, K.C., contra.

Teetzel, J.] CLEMENS *v.* TOWN OF BERLIN. [Jan. 21.

Jury notice—Striking out—Steam roller on highway—Misfeasance by defendants—Non-repair—O.J.A. s. 104.

An action for damages caused by runaway horses which were frightened by a steam roller, left standing on highway, is an action based on an act of misfeasance by the defendants, and not of the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury. Judgment of the Master in Chambers reversed.

Du Vernet, for plaintiff. *C. A. Moss*, for defendants.

Boyd, C., Ferguson, J.] [Jan. 25.

PALMER *v.* MICHIGAN CENTRAL R. R. Co.

Railway—Farm Crossing—Approaches—Repair.

Judgment of Street, J., reported 6 O.L.R. 90, affirmed.

The accident arose on the plaintiff's own property and from his own default in not remedying the defect in the approach, and in not giving notice to the company that any such defect existed.

Semble, a distinction exists between the approach to an over-head bridge on a public highway, and the approach on private lands to a farm crossing over the line of rail. While the presumption will be, in the case of the former, that the approach is part of the bridge to be kept in repair by the Railway Company, in the case of the latter, in the absence of original compensation as to the crossing, and of express agreement, while it is for the company to maintain the crossing over its limits, it is for the owner to maintain the approach within his limits.

Tremeear, for plaintiffs. *Hellmuth* K.C., for defendants.

North-West Territories.

SUPREME COURT.—NORTHERN ALBERTA.

Scott, J.] KING *v.* LATIMER. [Dec. 30, 1903.

Practice—Judgment by default—Debt—Interest—Setting aside—Rule 90.

In an action for $108.07 for goods sold and delivered, the plaintiff claimed $4.66 as interest, but did not shew upon what the claim for interest was founded.

Held, on an application to set aside a judgment, signed in default of appearance under Rule 90, that, in the absence of an allegation in the statement of claim of some contract, expressed or implied, to pay interest, it is an unliquidated demand, and cannot be included in such judgment.

Judgment set aside accordingly.

J. D. Hyndman, for plaintiff. *F. C. Jamieson*, for defendant.

Scott, J.] KING *v.* PLANTE. [Dec. 30, 1903.

Liquor License Ordinance — Imprisonment — Hard labour — Conviction quashed—No power to amend—Magistrates' Ordinance—Interpretation.

The defendant was convicted under section 122 of the Liquor License Ordinance (C.O. 1898, c. 89) for supplying intoxicating liquor to an interdicted person, knowing the said person to be interdicted, and sentenced to pay a fine of $50 and costs, and in default of payment to imprisonment for a term of two months with hard labour. Section 122 of the Ordinance provides that a person convicted of such an offence shall be liable to a penalty of not less than fifty dollars and not more than two hundred dollars, and in default of payment to not less than two months nor not more than twelve months imprisonment, no provision being made for imposing imprisonment with hard labour.

Held, on an application to quash, that imprisonment does not include imprisonment with hard labour, and in the absence of special provision imprisonment with hard labour cannot be imposed.

Held, also, that, upon application to quash, the Court has no power to amend convictions under a Territorial Ordinance, that the powers of amendment given by sections 883, &c., of the Criminal Code do not apply, the provisions of Part LVIII. being made applicable by the Magistrates' Ordinance (C.O. c. 32, s. 8 and c. 8 of 1900) to proceedings before justices of the peace and to proceedings upon appeal only. Conviction quashed.

C. F. Newell, for prosecutor. *Wilfrid Gariepy*, for defendant.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] HICKEY *v.* SCIUTTO. [April 8, 1903.

Landlord and tenant—Lease of premises for hotel—Premises not fulfilling requirements of by-law—Illegal lease.

Action by lessor on covenants for rent and repair. Premises in Vancouver leased for use as an hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was stopped by the authorities from using the premises as an hotel:—

Held, in an action by the lessor on covenants for rent and repair, that the lease was void ab initio and the maxim, In pari delicto potior est conditio defendentis, applied.

Even if the lease were not void ab initio it became void by the action of the authorities in stopping the further use of the premises as an hotel. Judgment for defendant.

L. Bond, for plaintiff. *G. H. Cowan* and *A. J. Kappele*, for defendant.

Hunter, C. J.] WOODBURY MINES *v.* POYNTZ. [Oct. 13, 1903.

Mining Law—Expiration of certificate—Special certificate—R.S.B.C., 1897, c. 135, s. 9 and B.C. Stat., 1901, c. 35, s. 2.

Action of adverse claim in which the plaintiffs adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiffs claimed the ground in dispute under two locations known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to May 31, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located on July 8, 1901. On Oct. 25, 1901, the plaintiffs, by paying a fee of $300 obtained a special free miner's certificate in accordance with the provisions of s. 2, c. 35, of stat. of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant.

Held, that on the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner, becomes open to location, and the obtaining of a special certificate under s. 2, of the Mineral Act Amendment Act, 1901, does not revive the title if in the meantime the ground has been located as a mineral claim. Judgment for defendant.

A.H. MacNeil K.C. for plaintiffs. *McAnn* K.C. and *P.E. Wilson*, for defendant.

Full Court.] JOWETT *v.* WATTS. [Nov. 5, 1903.

County Court Act, ss. 103, 104, 106.—Garnishee summons based on default summons.

Appeal from a judgment of Forin, Co. J., setting aside a garnishee summons which had been issued based on a default summons, holding that it was irregular because the only provision for issuing a garnishee summons was to make it returnable at the same Court as the ordinary summons was returnable and a default summons is not returnable at any fixed Court.

Held, a garnishee summons may be issued based on a default summons as well as on an ordinary summons; the settling of the time of the holding of the Court is only a question of procedure, and if a plaintiff summons a garnishee too soon it will be at the peril of costs. Appeal allowed.

S.S. Taylor, K.C. for appellant. *C.B. Macneill*, for respondent.

Drake, J.] DAVIES, SAYWARD MILL CO. *v.* BUCHANAN. [Nov. 26, 1903.

Production of documents—Place of—Rules 4 and 5 of Rules of April, 7, 1899.

Summons to produce for inspection certain documents refered to in defendants' affidavits of documents. The plaintiffs and their solicitors lived in Victoria and the writ was issued out of the Victoria Registry. The defendant, Buchanan and his solicitor lived in Kaslo. Notice was given to plaintiffs' solicitors, that the documents might be inspected at Kaslo. Plaintiffs contended that the documents should be produced for inspection in Victoria where the defendants' solicitor had a registered agent.

Held, that all defendants' documents other than the books of account (the production of which in Victoria would be prejudicial to defendant's business operations) should be produced for inspection in Victoria: and that the books of account be produced in Kaslo.

Fell, for plaintiffs. *Barnard*, for defendant.

Full Court.] MILLER *v.* AVERILL. [Jan. 8.

Specific performance—Contract to accept part payment for services in stock—Failure to deliver stock—Damages.

Appeal from judgment of Leamy, Co. J. Plaintiff contracted with defendant to do certain work at the rate of $7 per day whereof $1.50 should be paid in cash and the balance of $5.50 in stock in a mining company at fifteen cents a share, and after the lapse of over a year plaintiff sued for the cash balance due him for his services, or in the alternative for damages for breach of contract. At the trial, without any evidence as to the present value of the stock, the defendant was ordered to deliver stock at fifteen cents a share in satisfaction of plaintiff's claim.

Held, allowing the appeal, that on defendant's failure to deliver the stock plaintiff was entitled to damages for breach of contract and could not be compelled to accept stock.

W. H. P. Clement, for appellant. *J. H. Lawson, Jr.*, for respondent.

Full Court.] [Jan. 27.

ESQUIMALT WATER WORKS CO. *v.* CITY OF VICTORIA.

By-law—Illegality—Insensible—Rules of construction.

Appeal from judgment of Drake, J., quashing a by-law on the ground that it was insensible and meaningless.

A by-law having for its object the closing of the Craigflower Road read thus: "That portion of the Craigflower Road by-law No. 327, being the 'Craigflower Road Re-opening by-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic." The word

"by" was omitted inadvertently from between "Road" and "By-law," and by the strict grammatical construction a former by-law dealing with the same road was declared closed instead of the road itself.

Held, that the words "By-law No. 327, being the Craigflower re-opening by-law" in the enacting clause should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended.

The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable.

Appeal allowed, Irving, J., dissenting.

W. J. Taylor, K.C., and *Bradburn* for appellants. *A. P. Luxton* and *R. H. Pooley* for respondents.

Book Reviews.

An Epitome of Real Property law for the use of Students. By W. H. HASTINGS KELKE, M.A., Barrister-at-Law. 3rd edition. Sweet & Maxwell, Limited, 3 Chancery Lane, London, 1903. 190 pp.

That this manual has been found to meet the needs of students is evident from its having attained to its third edition in a comparatively few years. As the author says, "It is not intended to supplant any of the larger manuals but to be read along with them." As he also correctly says, "a student who attacks a big law book is apt to be appalled by the multiplicity of detail and the enormous number of cases and statutes." We thus readily see its raison d'etre.

Rating Forms of grounds of notices of objection and appeal. By W.L.L. BELL, Barrister-at-Law. Sweet & Maxwell, Limited, 3 Chancery Lane, London, 1903. 138 pp.

We, in this country, are surprised to be told that in England, "few things are more difficult to the legal draftsman than the drawing of a notice of objection or appeal against a valuation list or rate." In this portion of the empire nothing is much simpler. It might perhaps be well for the solicitor of the Ontario Municipal Association to look into this matter. Appeals should not be too easy! And besides a change in our practice in this respect might help to supplement waning professional incomes, which are now mercifully aided by the bountiful grist of municipal amendments which pass through the legislative mill of this Province, still further confusing things already worse confounded.