Canada Law Journal.

VOL. XLV. TORONTO, AUGUST. Nos. 15 & 16

SHARP PRACTICE IN HIGH PLACES.

Some leading newspapers in the western section of the Province of Ontario have drawn attention to a matter which calls for notice in the columns of a legal journal.

It has been our duty to criticise various objectionable features of the legislation of that province in relation to a government emanation, known as the Hydro-Electric Power Commission of Ontario. Our criticism, however, has been tame in comparison with the language used by writers in England and elsewhere, who have denounced this legislation in a way that should bring a blush of shame to those responsible for it. It would seem from what now appears, that the mode of carrying out this legislation, which has been well criticised by others of high authority as "monstrous," "manifestly unjust," etc., is quite as objectionable as the legislation itself.

It will be remembered that by the Acts of 1906 and 1907 the Commission was given power to buy land for a line to transmit electricity at a very high voltage without the consent of the owners, but the provisions of the Public Works Act of Ontario were made applicable, thus giving machinery to settle values by arbitration, etc. It being found that to buy a fenced-in right of way, as is required of the existing transmission company, would largely add to the cost of power, the Act of 1909 gave the Commission the right to acquire easements for the location of their transmission towers and lines. But the Public Works Act was not made applicable to this right, so that it cannot be invoked either by the Commission or by the land owners.

It also appears that some of these owners along the line refused to accept the sums offered by the Commission and declined to permit a transmission line of such a dangerous character to go over their land, without proper protection in the shape of a fenced right of way and other safeguards. Just here a serious

difficulty presented itself which had to be surmounted by the Commission; for manifestly the line could not be built without some place to string the wires. It would never do to admit to the farmers that the legislation was defective; nor would it be good policy to tell them that the government had given itself the right to use their land without paying for it (though even this was, it is said, used by some of their agents as a threat to extort agreements). But the emergency had to be met, and it was met by the Commission serving on these owners a notice tendering a sum which was "deemed by the Commission to be reasonable value for an easement to enter upon and erect towers, etc.," and further notifying them that "if you refuse or fail to convey the said easement to the Commission, the question will be submitted to arbitration as provided in the Act respecting Public Works of Ontario. And three days after the tender of this notice the Commission will authorize possession to be taken of the said easement."

Here, of course, is a clear misrepresentation and suggestio falsi—for there can be no such arbitration. The Commission by this notice pretends it has a power which it knows it has not (for that has been admitted), and the only reason for such pretence can be the seeking to force a settlement which it had not been able to effect, and presumably could not effect except by means of some such device as this. Would it be too strong language to call this a false and fraudulent notice?

Whilst one might naturally be sorry for an ignorant farmer who is thus treated, all are much concerned that the government of the premier province of the Dominion should conduct its business with at least as much regard to fairness and honesty as would be expected of a private individual. Surely any citizen, be he high or low, intelligent or ignorant, has a right to suppose that a document emanating from a government office is trustworthy. Has it come to this, that recipents of such documents must submit them to legal scrutiny to escape pitfalls?

It is no excuse for the government to say we do not want to take your land for nothing, and are willing to arbitrate as

to price and terms. That would be fair and reasonable. But that is not what is said. The notice claims that a right exists, which the issuer knew did not exist. Surely it is not unfair to suggest that the reason for this claim is to mislead and deceive. In effect agreements thus obtained are obtained by fraud and duress, and probably therefore voidable.

RAILWAY TICKETS AND TRAVELLERS.

Is a railway ticket in its ordinary form, exclusive evidence, between the traveller and the conductor, of the traveller's right to be carried?

Upon no question, under the law of carriers, has there been a greater diversity of legal opinion than upon the question as to whether a railway ticket is, as between the passenger and train conductor, exclusive evidence of the passenger's right to passage, or, whether such right can be established outside of the ticket by extrinsic evidence. The frequency that the courts are called upon to consider this question makes it an important, as well as interesting one.

Ordinarily a railway ticker for passage is regarded as a mere token, voucher or receipt adopted by the carrier for its convenience, to shew that the passenger to whom it was issued or sold has paid the required fare for his right to be carried: 25 Am. & Eng. Ency. Law, 1074, 1075; Elliott, Railroads, s. 1593; Thompson, Carriers of Passengers, 65; Fetter, Carriers of Passengers, 711 and cases cited; *Petrie* v. *Penn. Ry. Co.*, 42 N.J.L. 449; Article on "Tickets" in 1 Har. Law Rev. p. 20. It is merely evidence of such right and cannot be said, in its ordinary form, as such a token or voucher, to constitute the sole contract for passage between the carrier and passenger. As one author puts it: "Tickets issued by a railway company to a passenger are prima facie evidence of a contract between the railway company and the passenger, to transport the latter and his personal baggage from the station named therein as the place of departure, to the station named therein as the place of destination": Wood on Railroads (2nd ed.), 1634.

But as the tickets now issued by the various railway companies are not uniform, and many now contain special stipulations and limitations, it is held that where there are stipulations and limitations on the ticket, known and assented to by the purchaser, that such tickets as to such stipulations, constitute binding contracts between the parties: 25 Am. & Eng. Ency. Law. 1074. It is well settled that a rule, requiring passengers who do not pay cash fare, to manifest their right to be carried by the production of tickets or other proper tokens, is a reasonable and valid one: *Downs* v. *New York, etc. Ry. Co.*, 36 Conn. 287, 4 Am. Rep. 77; *Shelton* v. *Lake Shore, etc. Ry. Co.*, 29 Ohio St. 214; *Pullman, etc. Co.* v. *Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Hibbard* v. *New York, etc. Ry. Co.*, 15 N.Y. 455. In speaking of this rule one court said: "Moreover, such rule is so general with carriers that it may be affirmed not only that those who deal with them take notice of it, but that every person of average intelligence does know of it: *Indianapolis St. Ry. Co.* v. *Wilson*, 161 Ind. p. 174 (dissenting opinion by Gillett, J.). So if a person enters the cars of a transportation company, and has no ticket, and refuses to pay his fare in cash, he may be expelled from the cars, no more force being used than is necessary for such purpose. This proposition is too firmly settled to necessitate the citation of authorities, but where through the mistake primarily of an agent of the company, a passenger is furnished with a wrong token or ticket, then the expelling of the passenger by the company's agent in charge of its train, over the explanation of the passenger, gives rise to the question as to whether such ticket, so given, is exclusive evidence of the passenger's right to passage or not, and whether expulsion under such circumstances is justifiable. The fact that the initial wrong was committed or made by the agent of the railway company in the majority of such cases, has, in the writer's opinion, been the basis and reason for the rule, now established in many states, that the ticket is not exclusive evidence in such a case, but is open to explanation by the passenger, which must be heeded by the company's servants, and that an expulsion in such a case is wrongful.

The reasons advanced by the courts so holding, can be best seen from a review of the leading cases. In a Tennessee case (*O'Rourke* v. *Street Ry. Co.*, 103 Tenn. 124, 52 S.W. 872, 76 Am. St. Rep. 639, 46 L.R.A. 614), where there was a mistake made by a street car conductor in giving a wrong transfer, which resulted in plaintiff's expulsion from the car, the Supreme Court in holding that the expulsion was wrongful and that plaintiff was entitled to damages, said: "The ticket whether for transfer, as in the present case, or for original passage, may well be called the carrier's written direction by one agent to another concerning the particular transportation in hand; and if the direction be contrary to the contract, and expulsion follow as a consequence, the carrier must be answerable for all proximate damages ensuing therefrom, just as any other principal is liable for the injurious result of misdirection to his agent. . . . The plaintiff had a right to believe the transfer ticket all it should be. With it he diligently sought and promptly entered the first transfer car, and upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, shewing that he had just left the other car, and that the first conductor must have wrongfully indicated the hour of issuance on the face of the ticket. On that statement the plaintiff should have been allowed to pursue his journey to its end. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of the contract, for which he became entitled to recover all proximately resulting damages, including those for humiliation and mortification, if such were in fact sustained."

In *Hot Springs Ry. Co.* v. *Deloney*, 65 Ark. 117, 45 S.W. 351, 67 Am. St. Rep. 913, the passenger presented to the conductor of the defendant's train a ticket which he had purchased for passage to a certain point on the railroad. This ticket by mistake or fault of the ticket agent had not been properly made out so as to shew that the passenger was entitled to passage to the place to which he had paid his fare. On his refusal to pay the additional fare demanded he was ejected. In holding that such

ejectment was unlawful the higher court said: "There is this much to be said however, and that is that the tendency of more recent decisions is towards at least a conservative view of the principle contended for by appellee's counsel; and we adopt that in this case, to wit, that, notwithstanding the conductor has only carried out the company's rules and regulations, and these are reasonable, and he therefore may be exonerated from blame personally yet, as the company, through its ticket agent acting for it, was guilty of doing that which produced all the injury the plaintiff may have suffered from being put off the train, it is liable for such, and cannot shield itself behind the faithfulness of its servant, the conductor, for its negligence in not delivering a proper ticket to the plaintiff, has not only injured the plaintiff, if indeed he was injured, but placed the conductor in an attitude of participating in the wrong-doing, while yet performing his duty personally, while of course ignorant of the wrong done to the plaintiff, if any was done."

The Supreme Court of the State of Washington, uses the following language in holding a street car company liable in damages for expelling a passenger from one of its cars who had been given a rong transfer: "It seems tc us that in accordance with the general principles of law the appellant should recover. It is too plain for argument that only the right to sue for the recovery of the fare or a portion of the fare received by the company will be totally inadequate, and, through the plain, everyday law governing agency, the company is responsible for the acts of its agents and for their mistakes. This mistake it was the duty of the company to correct. It must necessarily correct it through its agents. It makes no difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was in effect the act of the second conductor, because the acts of both were the acts of the company, the company having for its own convenience intrusted its business to two agents instead of one. The contract was made when the passenger

paid the fare, and it was a contract not with any particular agent of the company, but with the company through its agent. The first conductor, who made the mistake, was not the agent of the passenger, but was the agent of the company, and his mistake was therefore the mistake of the company. If any other rule prevailed the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in nowise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked and for which he paid": *Lawshe* v. *Tacoma Ry. Co.* (Wash.), 70 Pac. 118.

A somewhat similar case was decided adversely to the railroad company by the Appellate Court of Indiana: *Evansville, etc., Ry. Co.* v. *Cates*, 14 Ind. App. 172. There the passenger was given a ticket to a city other than the one asked and paid for, and which was between the starting point of the passenger and the city to which he desired to go. When this city was reached the conductor demanded additional fare; the passenger explained the situation in regard to the ticket and also stated that he had no money with which to pay fare further. The conductor refused to heed or accept such explanation and upon the failure of the passenger to pay the fare demanded, ejected him from the train. It was held that in that case, under the circumstances, that the passenger was entitled to recover damages for the wrongful expulsion. In answering the contention of appellant that it is impracticable for a conductor to investigate the explanations or statements of a passenger in regard to his ticket for the reason that while so doing the passenger may reach his destination and depart from the train, and that the company could not pursue him without inconvenience and expense, the court said: "This is not much more impracticable than for a passenger to pay a second time who has no more money; nor is it, perhaps, much more inconvenient for the company to pursue the passenger for his fare than for the passenger to go to the expense and trouble of convincing the company that its

official has made a mistake and compelling the return of the money improperly exacted. As a rule, the amount involved and the expense and trouble required would be widely disproportionate."

In an Iowa case (*Ellsworth* v. *Chicago, etc., Ry. Co.*, 95 Iowa, 98, 63 N.W. 584, 29 L.R.A. 173), the ticket agent of the defendant sold the plaintiff a ticket which by mistake of the agent was antedated three days from the time of its purchase. The plaintiff presented it for passage on the day it was actually issued, but the conductor in charge of the train refused to accept it because on its face it disclosed that the time for using it had expired. The plaintiff refused to pay the fare and was ejected. The court, under the facts, held that the railroad company was liable for damages by reason of the unlawful expulsion of the plaintiff.

In the case of *Laird* v. *Pittsburg Traction Co.*, 166 Pa. St. 4, 31 Atl. 51, a conductor of the defendant's street car issued a transfer ticket to the plaintiff. This ticket contained two punch marks in respect to the time of its issue. One indicated 7:30 a.m. and the other 9 a.m. The conductor on the transfer car refused to accept it upon the ground that it was two hours old, and not within the time limit as provided by the rules of the company. The plaintiff explained to him that the ticket had been in fact issued at 9 a.m. just before he took passage on the transfer car. On his refusal to pay the fare demanded he was ejected from the car. The court in that appeal held that the company was liable for the wrongful expulsion of the plaintiff, for the reason that it was responsible for the defective or doubtful character of the transfer ticket.

In a Missouri case plaintiff was ejected from the train after presenting a ticket which the conductor claimed had expired, although the ticket shewed that it was good until a later date than the day on which he was using it. The ticket also contained a provision that in case of dispute between the passenger and the conductor as to the right to transportation under it, the passenger must pay his fare and apply to the company for redress. It was held that the expulsion was unlawful and the

condition in the ticket invalid. In regard to the validity of the condition the Supreme Court of Missouri said: "A multitude of cases could be cited bearing upon the question under consideration, but as there is an irreconcilable conflict between the adjudications, the foregoing is sufficient to shew that, whilst in England it is held that a railroad company may by special contract, either expressly or impliedly agreed to by the passenger, limit its liability, and prescribe rules of procedure in cases like the case at bar, still the American rule has been long settled that a railroad company cannot, even by an express contract signed by the passenger, limit its common law liability for negligence, and the rule is equally as well settled that no provision contained in the ticket will be binding upon the passenger whether expressly or impliedly accepted unless such provision is a just and reasonable one in the eye of the law. The reason underlying the rule is that, while ordinarily the courts will enforce contracts made by persons who are sui juris, still the public has an interest in contracts for carriage of passengers, and the law will require them to be just and reasonable, even if the passenger had not so required or had otherwise expressly agreed. . . . The provision is unreasonable, and was not binding upon the plaintiff. In fact, it is essentially unilateral in character: *Cherry* v. *C. & A. Ry. Co.*, 191 Mo. 489, 90 S.W. 381, 2 L.R.A. (N.S.) 695 and case note.

In a late case upon this subject (*Georgia Ry. & Electric Co.* v. *Baker* (Ga.), 54 S.E. 639. See also *Cincinnati, New Orleans & Texas Pac. Ry. Co.* v. *Harris*, 115 Tenn. 501, 91 S.W. 211, 5 L.R.A. (N.S.) 779 and case note), the Supreme Court of Georgia holds that, if a mistake is made by a conductor of the first car in issuing a transfer, and the passenger presents it to the conductor of the second car, and gives a reasonable explanation of the mistake, that the conductor of the second car, must determine at his peril whether the passenger is entitled to ride upon the transfer, notwithstanding that it does not upon its face shew such right.

In Wood on Railroads, that author says: "When the passenger asks and pays for a certain ticket, and the station agent by

mistake gives him a different one, which does not entitle him to the passage desired, the conductor has no right to expel him, and the company is liable in damages if he is expelled. The passenger has the right to rely on the agent to give him the right ticket. There are authorities which hold the other way, but it seems that their views are indefensible."

A leading Encyclopedia of Law, after stating that some of the authorities assert that a railroad conductor cannot be expected to listen to the passenger's explanation in regard to the ticket in dispute; that the passenger should either pay the fare demanded by the conductor or leave the train, and then sue the company for a breach of the contract, says: "Others hold that the conductor has no right to expel the passenger, and if he does so, the company is liable for damages therefor. The latter would seem to be the better doctrine—it certainly has the support of the more recent cases: 25 Am. & Eng. Ency. Law 1076. As cases denying the conclusive force of a railroad ticket, either directly or indirectly, see *Trice* v. *Chesapeake, etc., Ry. Co.*, 40 W. Va. 271, 21 S.E. 1022; *Northern Pac. Ry. Co.* v. *Pauson*, 70 Fed. 585, 30 L.R.A. 739; *Ray* v. *Courtland, etc., Trac. Co.*, 46 N.Y. Supp. 521; *N. Y., etc., Ry. Co.* v. *Winters*, 143 U.S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Burnham* v. *Grand Trunk Ry. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Philadelphia, etc., Ry. Co.* v. *Rice*, 64 Md. 63, 21 Atl. 97; *Pittsburg, etc Ry. Co.* v. *Hennigh*, 39 Ind. 509; *Cleveland, etc., Ry. Co.* v. *Kingsley*, 27 Ind. App. 135, 87 Am. St. 245; *Head* v. *Georgia P. R. Co.*, 79 Ga. 358; *Southern Kansas Ry. Co.* v. *Rice*, 38 Kan. 398; *Wilsey* v. *Louisville & N. R. Co.*, 83 Ky. 511; *L. & N. R. Co.* v. *Breckinridge*, 99 Ky. 1; *Forsee* v. *Alabama, G. S. R. Co.*, 63 Miss. 66, 56 Am. Rep. 801; *Cherry* v. *Kansas City, etc., Ry. Co.*, 52 Mo. App. 499; *Elliott* v. *N. Y., C. & H. R. Co.*, 53 Hun. 78; *Townsend* v. *New York, C. & H. R. R. Co.*, 6 Thomp. & C. 495; *Missouri P. R. Co.* v. *Martino*, 2 Tex. Civ. App. 634; *Gulf C. & S. F. R. Co.* v. *Ratha*, 3 Tex. Civ. App. 73; *Gulf C. & S. F. R. Co.* v. *Wright*, 2 Tex. Civ. App. 463; *Yorton* v. *M., L. S. & W. R. Co.*, 62 Wis. 367.

The contrary doctrine to the one as above stated, and which is upheld by many respectable authorities is based upon the fact that the passenger has a complete remedy in contract for the breach in failing to deliver to him a proper ticket, and if he insists upon remaining upon the train, not having a proper ticket, then he brings the ejectment upon himself, and the railroad should not be held liable for the same. One of the clearest decisions so holding, is *Bradshaw* v. *South Boston Ry. Co.*, 135 Mass. 407, 46 Am. Rep. 481. The action was in tort in expelling a person from a street car who insisted upon travelling upon a wrong transfer that had been given him by mistake. In disposing of the case, the court said: "The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid fare to the conductor of another car; or even to receive and decide upon the verbal statement of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favourable for a correct decision in a doubtful case. A wrong decision in favour of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger,

on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. . . . It is a reasonable practice to require a passenger to pay his fare, or to shew a ticket, check, or pass; and in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that in a moment of irritation and excitement it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the laws hold him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded, and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket."

The rule, that a passenger cannot invite the application of force to remove him from a train, when he is riding upon a ticket not good as a result of a mistake of an agent, and then recover damages for such ejectment, is thus clearly stated by the Supreme Court of New York: *Townsend* v. *New York, etc., Ry. Co.* 56 N.Y. 295, 15 Am. Rep. 419. The court said: "If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to

effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has the right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such cases. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servants without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations."

That the court will not sanction a rule which would tend to promote breaches of the peace, is brought out in an Illinois case (*Penn. Ry. Co.* v. *Connell*, 112 Ill. 295, 304, 306, 54 Am. Rep. 238), where the court said: "Had appellee paid the fare demanded he might have sued the company and recovered for a breach of the contract. Had he left the train when the conductor refused to receive the ticket and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train. . . . A train crowded with passengers—often women and children—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise, and dangerous to the travelling public, to adopt any rule which might encourage a resort to violence on a train of cars."

A Michigan case (*Frederick* v. *Marquette, etc., Ry. Co.*, 37 Mich. 342, 26 Am. Rep. 531. See also *Hufford* v. *Grand Rapids, etc., Ry. Co.*, 53 Mich. 118, 18 N.W. 580; *Mahoney* v. *Detroit S. R. Co.*, 93 Mich. 612, 18 L.R.A. 335, 32 Am. St. Rep. 528; *Keen* v. *Detroit Electric Ry.*, 123 Mich. 247, 81 N.W. 1084), which is often cited as a leading case, comes out squarely on the question as to a railroad ticket being exclusive evidence of the passenger's right to be carried. In the opinion of the court, written by Marston, J., it is said: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and pre-

sented to him? Practically there are but two ways,—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safe-guards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the travelling public generally. There is but one rule that can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company through the mistake of its agent has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare the second time in order to retain it, he would have a remedy against the company for a breach of the contract."

In a federal case (*Poulin* v. *Canadian Pac. Ry. Co.*, 52 Fed. 197), the court said: "The law settled by the great weight of authority, and but recently declared in a case in this court (*New York, etc., R. R. Co.* v. *Bennett*, 50 Fed. 496, 1 C.C.A. 544), is, that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossi-

bility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the travelling public, or the proper security of the company in collecting its fares. The conductor cannot decide from the statements of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud, and subsequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent. There is some conflict among the authorities, but the great weight of them is in favour of the result here stated."

In a late Virginia case (*Virginia & Southwestern Ry. Co.* v. *Hall*, 105 Va. 729, 54 S.E. 872, 6 L.R.A. (N.S.) 899), a passenger was by mistake given a ticket to an intermediate point to his real place of destination. After passing this point he refused to pay additional fare and was ejected by the conductor. In holding such ejection justifiable the Court of Appeals of that state, following the reasoning of the Michigan court, as set out in the "Frederick case," said: "Unquestionably there is great conflict in the authorities as to what should be the controlling rule in such cases, and we have been cited to a number of them by plaintiff's counsel which take the opposite view; but we do not deem it necessary to review them at length, as in our opinion the more satisfactory and safe rule is that adhered to in the line of cases beginning with *Frederick* v. *Marquette H. & Q. R. Co.* Under this rule the defendant's conductor in this case had the right to eject the plaintiff, and the ejection itself was not wrongful or tortious, and no suit for tort can be maintained unless undue force or violence accompanied the ejection."

One of the latest cases upon this subject which holds that a railroad ticket is exclusive evidence of the passenger's right to be carried, is the case of *Shelton* v. *Erie R. R. Co.*, (N.J.) 66 Atl.

403, 9 L.R.A. (N.S.) 727. In that case plaintiff was wrongfully given a limited ticket and attempted to use it after it had expired. This resulted in his ejectment from the train, on a refusal to pay further fare. The New Jersey Court of Appeals in holding that a passenger does not pay fare until his ticket is accepted by the conductor, said: "By far the greater number of the cases thus referred to (as supporting the plaintiff's right to damages for ejection) proceed upon the idea that the delivery of a wrong ticket by the ticket agent, or the giving or misleading information, establishes a contractural right between the injured passenger and the railroad company, for the breach of which the train conductor must afford redress upon a summary investigation. The fundamental fallacy of this position is that it assumes the authority of ticket agents to make contracts for railroad companies. The authority of such agents is notoriously limited to the sale of tickets and to the doing of acts that are ancillary thereto. . . . The other proposition that has been characterized as unsound is that the purchase of a ticket by a passenger is the payment of his fare. Such was the precise claim of the plaintiff in the present case. The fallacy of this proposition must be apparent. It is one of fact. Payment of fares is made to the conductor alone. This is true whether such fare be by cash or by ticket. Ticket agents do not collect or receive fares. They issue tickets. A fare is a payment that is made when the right of carriage is claimed. The very word 'fare' originally meant 'journey.' When a ticket is accepted by the conductor, it becomes a fare, but not before. . . . The failure to observe this distinction has resulted in a line of decisions which, while recognizing the right of the conductor to expel a passenger for nonpayment of fare, hold that the company is liable for such expulsion if in point of fact, to use the language of these cases, 'the passenger has paid his fare to the ticket agent.'"

In a note to a Massachusetts case (*Com.* v. *Power* (Mass.), 41 Am. Dec. 475), Mr. Freeman states that the rule is that the passenger "should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as a part

of his damages, reasonable compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected, being reasonable, is a complete protection to the company and its servants against the recovery of any damages, directly or indirectly, for an assault made necessary by his own obstinancy, if no more violence than is required for his ejectment is used."

In Judge Baldwin's treatise on American Railroad Law, that author says: "But, as between the passenger and the conductor of the car in which he is, the terms of the ticket or check are conclusive, and the right to ride upon it on that train is, for the time being, to be determined accordingly. . . . In any of these cases where the ticket varies from the true contract if the passenger is ejected, the conductor commits no trespass, but the company is liable to an action for breach of contract. The damages for this breach will not be aggravated by the expulsion from the car. The plaintiff should have left it voluntarily."

It would seem to be agreed by all the authorities that where unnecessary force is used in expelling a passenger, that the railroad company is liable for such assault. Whether the force used was unnecessary or not would usually be a question for the jury under proper instructions from the court.

From a somewhat thorough review of the authorities pro and con on this mooted subject, admitting the conflict of authority upon the same, yet the writer is disposed to make the following legal conclusions, deducted from the holdings, as being the most logical, reasonable and as supported by the most recent decisions.

1. A railroad ticket is, as between the passenger and conductor, the exclusive evidence of the passenger's right to be carried.

2. It is a passenger's duty to examine his ticket or transfer, when the same is given to him, and if there is any mistake in the same, to call the agent's attention to it, so that it may be corrected.

3. It would tend to promote breaches of the peace to require a conductor to take the oral statement of a passenger, where he

has no valid ticket, and to allow him to ride on the strength of such statements. Such a method is, taking into consideration the nature of the railroad business, impracticable.

4. A passenger having been given a wrong ticket and required to pay additional fare, or to leave the train, has full redress against the company for breach of the contract to deliver a valid ticket, and is not justified in remaining until ejected.

5. A rule of a railroad company that a passenger must either pay his fare in cash or show a valid ticket or check, is a reasonable one, and one necessary to the successful operation of a railroad.

6. A passenger does not "pay fare" until his ticket is accepted by the conductor, and if not accepted he may be lawfully ejected.

7. Only such force as is necessary to remove a passenger from a train can be used, where the passenger has no proper ticket and refuses to pay the fare demanded.—*Central Law Journal.*

The House of Commons before adjournment the other day, appointed a strong Parliamentary Committee, selected from both Houses, to consider the congestion of business in the law courts and the need of more judges. Practising barristers declare that at least two new King's Bench judges are needed—for preference, three. Common law business is in a deplorable state of arrear. The Chancery courts are well up to their work, and the Appeal Court can at any time be temporarily strengthened by the summoning of puisne judges. Only, if there are not enough puisne judges to do their own work, their transference to the courts above would make the congestion of business even worse than it is.—*Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

RAILWAY COMPANY—EXTENSION OF POWERS—CONSTRUCTION OF EXTENSION LINE—SEPARATE UNDERTAKING—APPLICATION OF ASSETS—CREDITORS.

In *Pearson* v. *Dublin & South Eastern Ry.* (1909) A.C. 217, the House of Lords reversed the judgment of the Irish Courts of King's Bench and Appeal. The question at issue turned on the following facts, the defendant company, incorporated by statute, was empowered by a later Act to make extension railways, the land and works and property acquired for such extension were to form a separate undertaking, with separate capital, and as between the general and special undertaking the expenses of maintaining and working the extension line were to be paid out of the revenue thereof. The plaintiffs were creditors for work done in the construction of the extension line, which the company had covenanted to pay, and the point in controversy was, whether they were entitled to be paid out of the general assets of the company or whether they were limited to recovering out of the assets of the separate undertaking. The Irish courts decided that the plaintiffs could only have recourse to the assets of the separate undertaking for payment of their claim, but the majority of the House of Lords (Lord Loreburn, L.C., and Lord Macnaghten) held that the assets of the general undertaking were also liable. Lord Ashbourne dissented and agreed with the courts below.

RAILWAY COMPANY — DEFECTIVE FENCE — NEGLIGENCE — TURNTABLE LEFT UNGUARDED—INFANT TRESPASSER—INVITATION TO DANGER.

Cooke v. *Midland Great Western Ry.* (1909) A.C. 229 is a case of some importance on the question of negligence. The defendants kept a turntable unlocked (and therefore dangerous for children) on their land, close to a public road. The defendants' servants knew that children were in the habit of trespassing and playing with the turntable, to which they obtained easy access through a well-worn gap in a fence which the defendants were bound by statute to maintain. The plaintiff, a child between four and five years old, playing with other children on the turntable, was seriously injured. A judgment in favour of the plaintiff had been reversed by the Irish Court of Appeal,

but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins) reversed the judgment of the Court of Appeal and restored that of the trial court—their lordships holding that there was evidence of negligence on the part of the defendants sufficient to support a verdict in favour of the plaintiff. Their lordships appear to think that the fact that the defendants had omitted to keep their fence in proper order was not very material, and their omission to maintain it could not be regarded as the effective cause of the accident, but they hold their omission to lock the turntable, having knowledge that children were accustomed to play with it, which they took no steps to prevent, constituted negligence. It may be useful to compare this case with that of *Smith* v. *Hayes*, 29 Ont. 283.

INSURANCE, LIFE—VOIDABLE POLICY—BENEFIT OBTAINED BY FRAUD OF AGENT—RECOVERY OF PREMIUMS PAID UPON MISREPRESENTATION OF AGENT.

Refuge Assurance Co. v. *Kettlewell* (1909) A.C. 243 is the case known in the courts below as *Kettlewell* v. *Refuge Assurance Co.* The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Ashbourne, Macnaghten and James) have affirmed the decision of the Court of Appeal (1908) 1 K.B. 115 (noted ante, vol. 44, p. 275). The facts were that the plaintiff had taken out a policy with the defendant company, and after it had been in force for a year, the defendants' agent represented to the plaintiff, who proposed to let it lapse, that if she paid four more premiums the policy would remain in force, and she would have no more premiums to pay. She accordingly paid the premiums for the four more years, relying on this representation, and, the defendants then refusing to give her a paid up policy, she brought this action to recover the four premiums. All the courts below held she was entitled to succeed, and their decisions have now been unanimously affirmed by the House of Lords, without calling on the respondents, and apparently deeming the case so plain as not to call for any reasons. Lord Loreburn, L.C., putting the significant question to counsel for the appellant: "Do you really contend that the principal can keep the money obtained by the fraud of the agent?" To which the learned editor adds the note "May one be pardon'd and retain the offence?"—Hamlet. This at first sight may not seem very apposite, but when we remember that Shakespeare uses the word "offence" here as equivalent to "the fruit of iniquity," it is seen that it is singularly apt.

WILL — CONSTRUCTION — EXECUTORY LIMITATION PERPETUITY — CONTINGENCY—REMOTENESS.

Edwards v. *Edwards* (1909) A.C. 275. In this case the construction of a will was in question whereby the testator devised realty to his two sons as tenants in common in fee simple, with a direction in a codicil to his two sons and their heirs to make to each of his daughters for life "and afterwards to and amongst the children of each and their heirs," certain payments out of the royalties or out of the dead rent payable in respect of the coal under a specified farm, and any other coal under any other land of the testator when worked or let. By this codicil the House of Lords (Lord Loreburn, L.C., and Lord Macnaghten) held (affirming the Court of Appeal) that the testator intended to create executory limitations in land to arise at some future and indefinite period, on a contingency which might or might not happen, and that the direction offended against the rule against perpetuities, and was therefore void for remoteness so far as it related to the testator's grandchildren.

WILL—PARTY PREPARING WILL TAKING BENEFIT THEREUNDER.

Low v. *Guthrie* (1909) A.C. 278 was an appeal from the Scotch Court of Session. A will was attacked on the ground that the person who prepared it took a benefit thereunder. The appellants contended unsuccessfully that the rule which requires in such a case satisfactory evidence that the instrument contains the real intention of the testator, also justified the court in assuming that the party preparing it was guilty of some fraud or dishonesty for which no foundation was laid, but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Dunedin and Shaw) dismissed the appeal, being unanimously of the contrary opinion.

PATENT—GOLF BALL—INTERPRETATION OF SPECIFICATION—INFRINGEMENT—DAMAGES.

In *Roger* v. *Cochrane* (1909) A.C. 285 the action was for infringement of a patent golf ball—known as the "Mingay," the infringement being called the "Ace." In the plaintiff's specification the patentee claimed as his invention the substitution for the core hitherto used, an incompressible fluid such as water, or other liquid, or semi-liquid, contained in a suitable receptacle of elastic material; the defendants were the exclusive licensees

from the patentee to manufacture for six years the "Mingay" balls. While they were such licensees they manufactured the "Ace," constructed mechanically in the same way as the "Mingay" balls, but with a core consisting of 85 per cent. water and 15 per cent. of gelatine. The House of Lords (Lords Loreburn, L.C., and Lords James, Gorrell and Shaw) held that the "Ace" was an infringement, the plaintiff's specifications including not merely liquids like water, but also sticky substances like gelatine.

CONTRACT — CONSTRUCTION — COAL — "REASONABLY FREE FROM STONE AND SHALE"—BREACH OF CONTRACT—UNSUITABILITY OF COAL FOR PURPOSES REQUIRED—DAMAGES—SPECIFIC PERFORMANCE.

Dominion Coal v. *Dominion Iron & Steel Co.* (1909) A.C. 293. This was an appeal from the Supreme Court of Nova Scotia. The action was brought by the Steel Company for breach of contract by the Coal Co. to deliver coal for a period of 90 years. The coal contracted for was, as the court found, to be suitable for the plaintiffs' manufacturing purposes and was to be "reasonably free from shale and stone," and was to be taken from a seam to be designated by the plaintiffs. The defendants had tendered coal which the plaintiffs claimed was unfit for the purpose required, and not reasonably free from stone and shale, and with an excess of sulphur, and which they accordingly rejected. The defendants having refused to deliver any other coal the action was brought, and judgment given in the plaintiffs' favour for specific performance of the contract for the unexpired period of 86 years. From this judgment the defendants appealed. The Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins and Sir A. Wilson) held that the words "reasonably free from stone and shale" did not, as the defendants contended, mean that the coal was to be as reasonably free from stone and shale as it could be made by picking out stone and shale; but that it meant that the coal was to be reasonably free from stone and shale irrespective of the method by which it might be made so, and that coal carrying in laminæ permeating the lumps, stone and shale, which could not be picked out, was not reasonably free from stone and shale within the meaning of the contract; further, their lordships held that as the effect of the contract was that the defendants were bound to deliver coal suitable for the plaintiffs' purposes as manufacturers of steel, etc., the defendants had committed a breach of

the contract, so far agreeing with the courts below—but their lordships held that the courts below had erred in decreeing specific performance, and that the only remedy the plaintiffs were entitled to was damages, and the judgment appealed from was varied accordingly.

SUMMARY PROCEEDINGS—RIGHT OF ACCUSED TO SHEW CAUSE—AUDI ALTERAM PARTEM.

Chang Hang Kin v. *Piggott* (1909) A.C. 312 is an instance of the fundamental nature of the rule of British law audi alteram partem. According to an ordinance of Hong Kong, the court is empowered in case it finds that a witness has committed perjury to summarily commit him for contempt of court. An action was tried before the Chief Justice of the colony, and he came to the conclusion that eight witnesses had committed wilful and corrupt perjury in the evidence which they gave, and without calling on them to shew cause why they should not be committed, he summarily committed the whole of them to prison for contempt. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) held that the neglect to call on the witnesses to shew cause which would have given the accused an opportunity for explanation and possibly the correction of misapprehension as to what had in fact been said or meant by them, was a fatal defect, and the committal order was accordingly rescinded.

RAILWAY—THIRD-CLASS CARRIAGES—16 VICT. C. 37, S. 3 (CAN.)—DOMINION RAILWAY ACT, 1906.

Grand Trunk Railway v. *Robertson* (1909) A.C. 325. In this case the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson, Collins and Gorrell) affirmed the decision of the Canadian Board of Railway Commissioners, holding that under the Provincial Act, 16 Vict. c. 37, s. 3, the Grand Trunk Railway is bound to provide a train every day between Toronto and Montreal on which they provide for the carriage of passengers at the rate of a penny a mile; and that such provision is not superseded by any provision in the Dominion Railway Act, 1906.

REPORTS AND NOTES OF CASES.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] DEAN v. MCLEAN. [July 12.

Promissory note — Illegal transaction — Compromise and forbearance.

The defence to an action on a promissory note was that the money represented by the note was loaned by plaintiff to defendant with knowledge that defendant was about to use it for an illegal purpose, such purpose being the acquiring of shares in a company with intent to make gain by the rise and fall of the shares contrary to the provision of s. 231 of the Criminal Code, there being no real transaction in shares or contemplation of the receipt of shares at the time.

The evidence shewed that plaintiff was aware of the purpose to which the money was to be applied.

Held, that plaintiff could not recover.

2. A person knowing that his claim is illegal cannot by compromising or giving time for payment supply a valid consideration.

3. Defendant setting up his own criminal conduct was not entitled to costs.

R. G. MacKay, for plaintiff. *Rowlings*, for defendant.

Longley, J.] PRATT v. BALCOM. [July 20.

Deed—Conditions as to retention of possession during grantors lifetime and the payment of money charges subsequently—Held a deed and not testamentary in its character.

W. D. B. and wife made and recorded a deed of lands to their two sons E. and C. containing a limitation that the grantor and his wife should retain possession and control of the lands during their lifetime or the life of either of them and charging the land with the payment of certain sums of money to plaintiff and four other persons named after the death of the grantors. W. D. B. survived the making of the deed for a period of twenty

years, his wife having died some years previously. After his death plaintiff brought an action against the defendant C. who had obtained a deed of their interest from the heirs of E. subject to the carrying out of the conditions, to enforce payment of the amount charged upon the land in her favour.

Held, 1. Following *Majoribanks* v. *Hovenden*, Durry's Reps. 29, that the document in question having all the characteristics of a deed and there being no words having a direct bearing upon the supposed intention that it should operate as a will must be regarded as a deed and not as testamentary in its character.

2. When the deed was delivered and recorded the grantees acquired immediate interests which the grantors were powerless to revoke.

3. The plaintiff though first named did not thereby obtain any final advantage in case the property was not of sufficient value to pay the charges in full, and that as the claims of all the beneficiaries had matured the other beneficiaries should be joined as parties plaintiff or defendant in order that the interests of all could be considered.

J. J. Ritchie, K.C., for plaintiff. *Roscoe*, K.C. and *Miller*, for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] COOPER v. MCDONALD. [June 14.

Promissory note—Indorsement of note payable to order of an unincorporated non-trading association.

The indorsement of a promissory note payable to the order of an unincorporated non-trading association, such as a trade union, with the name of the association and the signatures of two or more of its officers will not enable the person to whom it is delivered so indorsed to sue the maker upon it. There is no valid method of indorsement of such a note, so as to pass a title to it under the Law Merchant, except by the signatures of all the members of the association.

Knott, for plaintiff. *Blackwood*, for defendant.

Full Court.] REX v. GUERTIN. [June 14.

Criminal law—Information—Amendment of, after lapse of time limited by statute—Liquor License Act—Certiorari.

An information under s. 168 of the Liquor License Act, R.S.M. 1902, c. 101, for furnishing liquor to an interdict discloses no offence unless it alleges that the defendant had knowledge of the interdiction, and it becomes a new information if amended by introducing such allegation.

If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed on amended information, and a conviction based upon it will be quashed on certiorari.

Whitla, for defendant. *Patterson*, D.A.-G., for the magistrate.

Full Court.] DECOCK v. BARRAGER. [June 14.

Contract—Construction—Permit to cut hay—Cancellation of permit if land sold or leased—Subsequent lease of part of land.

The defendant paid for a permit to cut hay in 1908 on a parcel of land across which was printed the following: "This permit becomes cancelled by the sale or lease of the land." Subsequently the plaintiff obtained a lease of half the same parcel.

Held, that the defendant's permit gave him an actual interest in the land, that the provisions for cancellation should be most strictly construed and that, as the land had not been leased but only a part of it, the permit was not cancelled, and the defendant had a right to the hay cut in that year on the whole of the land including some that had been cut by the plaintiff under his lease.

Symington, for plaintiff. *A. B. Hudson*, for defendant.

Full Court.] [June 14.

SCOTT v. CANADIAN PACIFIC RAILWAY COMPANY.

Negligence—Railway company—Brakeman injured whilst going between ends of moving cars to uncouple—Defective apparatus—Costs—Evidence.

The plaintiff, a brakeman on duty in the defendant's employ, was injured in an attempt to uncouple a number of cars from an engine, the train being in motion. There was evidence that the lever on the engine tender failed to work properly, that there

was no lever on the end of the car next the tender, and that the plaintiff, in order to uncouple, had to reach in between the ends of the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down and had an arm cut off by the wheels of the tender.

Held, that, in view of the requirement in sub-s. (*c*) of s. 264 of the Railway Act, R.S.C. 1906, c. 37, that all cars should be equipped with apparatus which shall prevent the necessity of brakemen going in between the ends of the cars to uncouple the plaintiff had made out a prima facie case of negligence, and that the nonsuit entered at the trial should be set aside, and a new trial granted. Costs of the former trial and of the appeal to be costs to the plaintiff in any event of the cause.

The trial judge had made an order that, if a new trial should be granted by the Court of Appeal, then in the event of either of the plaintiff's witnesses being out of the country, he should have the right to read the evidence such witness had given at the trial on the case coming up for trial again, and the court ordered this provision to be embodied in the judgment.

MacNeil, for plaintiff. *Curle*, for defendant.

Full Court.] McGREGOR *v.* CAMPBELL. [June 14.

Set-off—Counterclaim—Assignments Act—Right of action for damages—Solicitor's lien for costs—King's Bench Act, s. 39(*e*), rule 293.

Plaintiff sued for damages for deceit upon the sale by defendant to him of a business fraudulently represented to be of much greater value than it was. Defendant counterclaimed for the balance of the purchase money.

After the trial, but before judgment, plaintiff made an assignment for the benefit of his creditors under R.S.M. 1902, c. 8, and the assignee was added as a co-plaintiff.

In giving judgment the trial judge awarded $750 damages to the plaintiff with the costs of the action, but he found also that the defendant was entitled to recover a much larger sum on his counterclaim, which was not disputed. The judge also ordered a set-off and that judgment be entered for defendant for the balance and refused to allow the plaintiff's solicitor any lien for costs.

Held, on appeal, HOWELL, C.J.A., dissenting, that the plaintiff's claim against the defendant did not pass to the assignee by virtue

of the Assignment Act, not being covered by any of the expressions, "real and personal estate, rights, property, credits and effects," used in s. 6 of the Act, and being something which could not be reached by creditors under ordinary legal proceedings.

2. Such a right of action is not assignable under sub-s. (*e*) of s. 39 of the King's Bench Act. *Blair* v. *Asselstine*, 15 P.R. 211, and *McCormack* v. *Toronto Railway Co.*, 13 O.L.R. 656, followed.

3. Even if the plaintiff's claim had been validly transferred to the assignee, the defendant would be entitled to maintain his counterclaim and to have the plaintiff's damages paid by deducting them from it, as both claim and counterclaim arose out of the same transaction, and rule 293 of the King's Bench Act expressly provides that the trial judge may order such set-off to be made. *Shrapnel* v. *Laing*, 20 Q.B.D. 334; *Lowe* v. *Holme*, 10 Q.B.D. 286, and *Newfoundland* v. *Newfoundland Ry. Co.*, 13 A.C. 199, followed.

4. The discretion of the judge in making such order should not be interfered with, although the effect was to deprive the plaintiff's solicitor of any lien for costs on the amount awarded to his client whether for damages or costs. *Westacott* v. *Bevan*, [1891] 1 Q.B. 774; *Pringle* v. *Gloag*, 10 Ch.D. 680, and *McPherson* v. *Allsop*, L.J. 8 Ex. 262, followed.

Hudson, for plaintiff. *Affleck*, for defendant.

Full Court.] [June 14.

CITY OF WINNIPEG v. WINNIPEG ELECTRIC RY. CO.

Pleading—Amendment—Defences arising after delivery of statement of defence—King's Bench Act, rule 339—Estoppel.

Appeals by both parties from judgment of MATHERS, J., noted ante, p. 371, dismissed. Costs of both appeals to be costs in the cause.

Held, also, that the permission to amend setting up facts alleged to create an estoppel does not imply a decision that such facts would actually work an estoppel.

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

Full Court.] AMERICAN ABELL CO. *v.* MCMILLAN. [June 14.

Dominion Lands Act—Charge on land created by homesteader before recommendation for patent—Declaration of Minister of Interior as to effect of such charge—Estoppel.

Appeal from decision of MATHERS, J., noted ante, p. 248, dismissed with costs, HOWELL, C.J.A., dissenting.

A. B. Hudson, for plaintiff. *Johnston* and *Berguron*, for defendant.

Full Court.] ANDREWS *v.* BROWN. [June 14.

Fixtures—Conditional sale of chattels—Lien note—Purchaser without notice.

If a purchaser of a chattel such as a furnace annexes it to land in such a manner that it would ordinarily become a part of the realty, it cannot be deemed to remain a chattel because of an agreement between the purchaser and the vendor that, until paid for, the property in it should remain in the vendor and that, in case of default of payment, the vendor might detach it and take it away.

Such an agreement merely confers a license to enter on the land and sever what is no longer a chattel so as to make it again a chattel and to remove it, and a purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor of the chattel recover possession of it or damages for its conversion from him. *Hobson* v. *Gorringe* (1897) 1 Ch. 182, and *Reynolds* v. *Ashby* (1904) A.C. 466, followed; *Waterous* v. *Henry*, 2 M.R. 169, and *Vuncan Iron* v. *Rapid City*, 9 M.R. 577, overruled.

Coyne, for plaintiffs. *Wilson*, K.C., for defendants.

Full Court.] [June 14.

REX EX REL. TUTTLE *v.* QUESNEL.

Practice—Quo warranto—Civil or criminal proceeding—King's Bench Act, R.S.M. 1902, *c.* 40, *s.* 92, *rule* 1.

Quo warranto proceedings to test the right of a person to hold a seat as school trustee are purely civil proceedings and an application for leave to file an information by way of quo warranto for such a purpose is properly made by notice of motion and not by rule nisi.

The Crown side of the Court of King's Bench referred to in rule 1 and s. 92 of the King's Bench Act is only that part of the business of the court which it gets by virtue of the Dominion Legislation in the Criminal Code.

Curran, for relator. *F. M. Burbidge,* for defendant.

Full Court.] JOHANSSON v. GUDMUNDSON. [June 14.

Infant—Purchase of land by—Specific performance—Damages in lieu of—Ratification.

Appeal from judgment of MATHERS, J., noted ante, p. 250, allowed with costs.

Held, 1. The appointment by an infant of an agent to act for him is not void but only voidable, if it is to his advantage, and an infant may elect to ratify and take advantage of a contract entered into by an agent for him and the court will, in the exercise of its equitable jurisdiction, assist the infant in enforcing his rights.

2. An infant can purchase land and enforce the contract against the vendor, at least to the extent of recovering damages against the vendor for breach of the contract. *Warwick* v. *Bruce,* 2 M. & Sel. 205, and Simpson on Infants, 3rd ed. 37, followed.

3. The fact that the statement of claim asks for specific performance of a contract sale when specific performance cannot be granted, does not bar the plaintiffs from recovering damages for breach of the contract, when these are also claimed in the alternative. *Hipgrave* v. *Case,* 28 Ch.D. 356, distinguished.

Hudson, for plaintiffs. *Bergman,* for defendant.

Full Court.] RE HARRIS. [July 13.

Military law—Enlistment in active militia—Service continued after expiration of term of enlistment—Habeas corpus.

The applicant was a member of a permanent corps in the Active Militia of Canada. His term of enlistment expired on 18th June, 1908, but he continued in the service. Being arrested and imprisoned by order of the Colonel commanding on a charge of conduct to the prejudice of good order and military discipline and held to await trial by court martial, he applied for his re-

lease on habeas corpus. He had not applied for his discharge or been legally discharged or dismissed from the force.

Held, that, under ss. 23 and 71 of the Militia Act, R.S.C. 1906, c. 41, the applicant was still subject to military law, and should be handed back to the custody of the military authorities.

Phillips, for applicant. *Hudson*, for Militia Department.

Full Court.] KING *v.* GLYNN. [June 25.

Money-Lenders Act—Criminal Code, s. 69—Liability of salaried employee of person whose money is lent—Usury.

A person in the employment of another person not a resident of Canada, whose money is lent, acting as the manager of his business although paid by salary and having no share in the excessive interest charged, may be convicted as a money-lender under R.S.C. 1906, c. 122, and s. 69 of Criminal Code.

Ferguson, K.C., for the prisoner. *Patterson*, K.C., for the Crown.

Full Court.] EGAN *v.* SIMON. [June 25.

Principal and agent—Commission on sale of land—Introduction of terms not authorized by vendor.

To entitle himself to a commission for finding a purchaser of land for his principal, the agent must shew that the purchaser found was not only willing, ready and able to carry out the purchase, but was also willing to carry it out on the terms authorized by the principal, so that, if the purchaser stipulates for an additional term giving him the privilege of paying off at any time the part of the purchase money to be secured by mortgage and the vendor has not authorized, or does not agree to, such additional term, the agent is not entitled to any commission.

Manahan, for plaintiff. *Affleck*, for defendant.

Full Court.] COUTURE *v.* DOMINION FISH CO. [July 2.

Lord Campbell's Act—Action against resident of province for death happening out of the jurisdiction—Necessity for administration granted by authorities of place where cause of action arose—General Ordinances, N. W. T. 1905, p. 195—7 & 8 Edw. VII., c. 49, s. 2(D.).

The plaintiff sued as administrator of the estate of his deceased wife appointed by the proper court of the Province of

Manitoba, of which they were residents, for damages for the death of his wife in the North-West Territories alleged to have been caused by the negligence of the defendants whose domicile was also in Manitoba.

Held, HOWELL, C.J.A., dissenting, 1. If the alleged wrongful act or negligence was not actionable where it took place it would not be actionable in Manitoba, even though the defendants were domiciled there. *Phillips* v. *Eyre*, L.R. 6 Q.B. 1; *The Moxham*, 1 P.D. 107, and *Machado* v. *Fontes*, [1897] 2 Q.B. 233, followed.

2. The rule actio personalis moritur cum persona would apply and no action could be brought in the Territories for such wrongful act or negligence unless Lord Campbell's Act or some statute equivalent thereto were in force there.

3. Such equivalent stature, viz: "An Ordinance respecting Compensation to the Families of Persons killed by Accidents," printed at page 195 of the General Ordinances of the North-West Territories of Canada, 1905, requiring that such action shall be brought by and in the name of the executor or administrator of the person deceased, it must be assumed that the Legislature meant the executor or administrator appointed as such under the laws in force in the North-West Territories, and the plaintiff, not having received such appointment, could not maintain the action. *Doidge* v. *Mimms*, 13 M.R. 48, followed; *Dennick* v. *R. R. Co.*, 103 U.S. 11, distinguished.

Sec. 2 of c. 49 of 7 & 8 Edw. VII., (*D.*), giving jurisdiction to the Superior Courts of Manitoba and other provinces to try civil cases with respect to persons and property in a certain portion of the Territories does not authorize the court here to apply the laws of Manitoba in determining rights arising in the Territories, but the court must, while applying its own practice and procedure, decide such cases in accordance with the laws in force in such Territories.

Blackwood, for plaintiff. *Heap* and *Stratton*, for defendants.

KING'S BENCH.

Mathers, J.] SANDERSON v. HEAP. [June 24.

Indians—Indian Act—B. N. A. Act, s. 91, *s.-s.* 24—*Estoppel Act, R.S.M.* 1902, *c.* 56—*Vendor's lien—Dismissal of petition following caveat under the Real Property Act.*

Indians in Canada are British subjects and are entitled to all the rights and privileges of such, except in so far as these rights

are restricted by statute, and, notwithstanding sub-s. (24) of s. 91 of the British North America Act, 1867, they are subject to all provincial laws which the province has power to enact: *Reg. ex rel. Gibb* v. *White*, 5 P.R. 315, and *Rex* v. *Hill*, 15 O.L.R. at p. 410.

An Indian has the same right to sell or dispose of land which has been allotted to him by the Dominion Government as his own individual property as any other British subject has and neither s. 102 of the Indian Act, R.S.C. 1906, c. 61, which prevents any person acquiring any lien or charge on real property of an Indian not subject to taxes under the last three preceding sections, nor any other provisions of the Act imposes, any restriction on the right of selling outright any of his individual property. *Totten* v. *Watson*, 15 U.C.R. 392, followed.

The Estoppel Act, R.S.M. 1902, c. 56, applies to conveyances made by Indians as well as others and, where an Indian has given a deed of his land with the covenants mentioned in that Act, the subsequent issue of the Crown patent to him vests the title in the grantee in fee simple.

Dismissal of petition following caveat under the Real Property Act delayed to enable petitioner to take proceedings to establish a vendor's lien for unpaid purchase money under prayer for general relief.

Knott, for petitioner. *Dennistoun*, K.C., and *Stratton*, for caveatee.

Macdonald, J.] MACDONALD *v.* FAIRCHILD. [June 17.

Practice—Final judgment—Action against several defendants, one only defending—Discontinuance.

Held, 1. Final judgment cannot be signed against a defendant for want of a defence, if there is an untried issue pending between the plaintiff and another defendant in the same action who has entered a defence.

2. A notice of discontinuance of an action as against defendant B. served more than a year after the irregular entry of final judgment against defendant A., is a nullity, and A. may, within a reasonable time after the service of such notice, move to set aside the judgment against him.

3. Such a discontinuance cannot be effected under rule 538 of the King's Bench Act except under sub-s. (*c*), and then only by leave of the court or a judge.

Heap, for plaintiff. *Elliott*, for defendant.

Macdonald, J.] ROYCE *v.* MACDONALD. [June 29.

Limitation of actions—Sale of land for taxes—Right of municipality to sell after ten years.

Sec. 24 of the Real Property Limitation Act, R.S.M. 1902, c. 100, refers only to actions, suits or proceedings in the courts to recover money secured by any lien or otherwise charged upon or payable out of any land, and is therefore no bar to the proceedings provided by the Assessment Act for the realization by a municipality of its lien for unpaid taxes by a sale of the land, although such proceedings be not commenced within ten years.

Sec. 17 of the Act does not apply to the rights of a municipality in such case or to such proceedings taken by it, so as to distinguish the debt or the lien therefor created by the Assessment Act.

Andrews, K.C., for plaintiff. *Haggart*, K.C., for defendants.

Mathers, J.] STREIMER *v.* NAGEL. [July 10.

Contract—Reformation of—Consensus ad idem—Evidence to vary written contract.

The defendants signed an agreement to purchase a flour mill from the plaintiff for $13,000, payable $1,000 cash and the balance in quarterly instalments. The agreement contained a clause providing that, upon any default being made in payment, the whole purchase money should become due and payable at once. This clause was not asked for by any of the parties, but found its way into the agreement simply because it happened to be in the printed form used by the solicitor who prepared it and acted for both sides. The defendants were foreigners who understood English very imperfectly and the trial judge found as facts that they were entirely ignorant of the existence in the agreement of the clause referred to, that it was not explained to them either by the solicitor or by any other person in a manner that they could understand and that the plaintiff, who spoke the defendants' language, had undertaken to explain the agreement to them and that they had depended on him to do so.

Held, that the defendants were not bound by the clause in question and the plaintiff could only recover the amount of the overdue instalment.

MacNeil, for plaintiff. *Stacpoole* and *T. J. Elliott*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] [June 29.

EAST KOOTENAY POWER AND LIGHT CO. *v.* CRANBROOK POWER AND LIGHT CO.

Water and water rights—Water Clauses Consolidation Act, 1897—Appeal—Hearing de novo—Scope of—Point of diversion of water—Effect of on other records.

The Water Clauses Consolidation Act, 1897, R.S. c. 190, s. 36 provides that any person affected by the decision of a Commissioner or Gold Commissioner under the Act may appeal therefrom to the Supreme Court or County Court in a summary manner by filing a petition pursuant to the procedure prescribed in the section.

Held, 1. A hearing so had is a trial de novo and the judge is bound to go into the merits of the application, as he must make such order in relation to the matters dealt with in the decision appealed from, and respecting the rights of all parties in interest and affected by the decision appealed from, whether named in the petition or not, as he deems just.

2. As the change in the point of diversion of the water sought here meant a serious interference with a prior record, the learned judge below rightly refused to allow such change.

Woodworth, for appellants. *S. S. Taylor*, K.C., for respondents.

Full Court.] [June 29.

COUGHLAN *v.* NATIONAL CONSTRUCTION COMPANY.
McLEAN *v.* LOO GEE WING.

Mechanics' liens—Filing of claim for lien—Time of completion of work—Notes discounted by bank—Notice to owner. Mechanics' Lien Act, Amendment Act, 1907, *c.* 7, *s.* 2.

By agreement dated the 23rd of December, 1907, the defendant, National Construction Company, Ltd., agreed with the defendant Jsong Mong Lin to construct a building upon the property of the last named defendant for the sum of $80,000. The plaintiffs furnished material from time to time during the course

of construction. The construction company got into financial difficulties and was unable to complete its contract. On the 24th of October, 1908, a deed of the property from Jsong Mong Lin to her husband, Loo Gee Wing, was executed and deposited in the Land Registry Office with the application to register same. On the 28th of October, 1908, the plaintiffs' solicitors sent to the defendant Jsong Mong Lin, by registered mail, a notice addressed to her, c/o Loo Gee Wing, Victoria, B.C., which notice was in the following terms: "We beg to notify you that J. Coughlan & Sons intend to file a mechanics' lien against your property in the city of Vancouver, being lots 1 and 2. Westerly 10 feet of lot 3, in block 29, district lot 541, for the balance due, amounting to $5,180.92, for goods and materials supplied and work done by the National Construction Company on the building on the above mentioned lots, if not paid to us at once."

On the same day that this notice was posted the plaintiffs filed a mechanic's lien in respect of their claim in the County Court Office at Vancouver, and on the 27th of November, 1908, commenced to enforce same. Other lien claimants had meanwhile commenced their actions in which Loo Gee Wing was made party defendant as owner, and on the 7th of December, 1908, an order was made by Grant, C.J., upon the application of Loo Gee Wing, consolidating this and the other actions pending. On the trial the claim of the present plaintiffs came on first for hearing and upon the conclusion of the evidence the learned judge dismissed the plaintiffs' action on the grounds that Loo Gee Wing, the owner of the property, was not before the Court, that there was no notice given to the owner of the property in the terms of s. 3 of the Mechanics' Lien Act, Amendment Act, c. 27, of the Statutes of 1907, and that such notice as was given was not given within 15 days before the completion of the work.

Held, that the notice required to be given fifteen days before the completion of the work means fifteen days before the completion of the work of the building as a whole and not fifteen days before the completion of the delivery of the material by the vendor.

Sec. 24 of the Mechanics' Lien Act, Amendment Act, 1900, enacts that where in any action for a lien the amount claimed to be owing is adjudged to be less than $250, the judgment shall be final and without appeal.

Held, that this applies only where a sum of money has been awarded, and that the existence of a valid lien is presupposed.

Reid, K.C., and *R. M. Macdonald*, for plaintiffs. *A. D. Taylor*, K.C., *Woodworth, Griffin* and *Brydone Jack*, for various defendants.

Clement, J.] [June 29.

DISOURDI *v.* SULLIVAN GROUP MINING CO.
DISOURDI *v.* MARYLAND CASUALTY CO.

Workmen's Compensation Act, 1902, *s.* 6—*Workmen's compensation — Ultra vires — Insolvency of employer — Procedure by applicant to establish liability of insurer.*

The applicant was injured in the employment of the defendant mining company, which, during the proceedings to establish his claim against them, went into liquidation. He was awarded compensation in $1,500. The insurance company disputed the award, and the applicant applied under s. 6 of the Act for an order that the mining company and the insurers proceed to the treat of an issue with him.

Held, 1. Any right which the applicant might have against the insurers under said s. 6 must be decided in an action commenced in the ordinary way.

2. The rules made under s. 6 are ultra vires.

S. S. Taylor, K.C., for the applicant. *L. G. McPhillips*, K.C., for the insurers.

Book Reviews.

A Commentary on the Bills of Exchange Act (R.S.C. 1906, c. 119). With references to English, Canadian and American cases, and to the opinions of eminent jurists. By HON. BENJAMIN RUSSELL, M.A., D.C.L., one of the justices of the Supreme Court of Nova Scotia. Halifax: McAlpine Publishing Company, Ltd. 1909.

Some twenty years ago the learned author wrote a series of letters to the Toronto *Mail* on the subject of Bills and Notes, desiring thereby to call attention to the necessity for a statute which should provide a general law in relation to negotiable instruments, applicable to the whole Dominion. These letters, and the attention they called to the subject, largely contributed to the passing of the legislation of 1890 which produced the

Dominion Act relating to Bills of Exchange and Promissory Notes. The preface gives a very interesting statement of the reasons for the Bills of Exchange Act and suggestions as to the form the legislation should take. This is of historical interest and of value in that regard.

For many years Mr. Russell has been the Lecturer on Bills and Notes and cognate subjects, in the Law Faculty of Dalhousie University; he has, therefore, more than most men in the profession, had a constant familiarity and kept in close touch with the subjects he discusses in the volume before us, which is a very valuable addition to the learning on this subject.

The plan pursued by the learned author is to give the sections of the Act and append thereto appropriate notes. These notes are by no means a mere collection of cases, but contain in addition a most intelligent and valuable discussion of the legal principles involved and the result of the authorities. We would suggest that in a new edition (and we can safely prophesy that a new edition will soon be required), that the author should give something in the nature of a table of contents which would be of convenience to the reader.

The Law Relating to Executors and Administrators. By ARTHUR ROBERT INGPEN, K.C.; with notes of Canadian cases by WILLIAM BERNARD WALLACE, LL.B., Author of Mechanics' Lien Laws in Canada. London: Stevens & Sons, 119-120 Chancery Lane. Toronto: Canada Law Book Co., Ltd., Law Publishers. 1909.

More concise than the great work of Sir Edward Vaughan Williams on the above subject, Mr. Ingpen's book will find its own place, and be found most useful both to practitioners and to students.

To lawyers in this country its value is much enhanced by the very careful collection of Canadian cases, which are collected at the end of the various chapters of the work; following in this respect the plan adopted by Mr. Armour, K.C., in his Canadian notes to the last edition of Theobald on Wills. These cases are selected from the volumes of reports published in the various Provinces of Canada, and are conveniently referred to in a separate index at the end of the volume. Not the least part of the value of this book lies in the fact that this collection of cases has been made by one so eminently qualified for the task as his Honour, Judge Wallace of Halifax, N.S.

The arrangement of the book follows largely that of Williams on Executors, but whenever the authorities on any particular subject have been reviewed in recent years and a principle restated by the Court, the principle so stated has been embodied in this treatise with a reference to the case, but omitting earlier authorities.

It is well to have such a book as Williams on Executors, but the book before us is a necessity to every lawyer in this Dominion. Coming from such a well-known publishing house the typographical execution is, of course, of the very best quality.

A Supplement to Lord Lindley's Treatise on the Law of Partnership. Containing the Limited Partnership Act of 1907; with notes, rules and forms. By T. J. C. TOMLIN, M.A., Barrister-at-law and A. ANDREWS UTHWATT, B.C.L., Barrister-at-law. London: Sweet & Maxwell, 3 Chancery Lane, 1909.

This book of 92 pages is a useful addition to Lindley on Partnership, and completes the subject so ably treated by him. Mr. Tomlin, it will be remembered, is joint editor of the 7th edition of the latter work, and of course, therefore, the right man to prepare and give the information contained in this supplementary volume.

Lawyers' Reports Annotated. New Series. BURDELL A. RICH and HENRY P. FARNHAM, Editors. Rochester, N.Y.: The Lawyers' Co-operative Publishing Company. 1909.

Book 19 of this excellent series of reports has been received. It is unnecessary for us to enlarge upon the many excellent qualities of these volumes; a perfect mine of legal lore, and always up-to-date—a most intelligent selection of cases with learned notes thereto appended.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Frederick Arthur Gore Ouseley of Humboldt, Saskatchewan, Barrister-at-law; to be judge of the District Court of the Judicial District of Moosejaw in the said Province of Saskatchewan. (July 6.)

His Honour Joseph Camillien Noel, judge of the District Court of Wetaskiwin, Alberta, to be judge of the District Court of Athabasca, Alberta. (July 10.)

William A. D. Lees of Fort Saskatchewan, Alberta, Barrister-at-law, to be judge of the District Court of Wetaskiwin, Alberta, vice His Honour J. C. Noel. (July 10.)

Edward Cornelius Stanbury Huycke of the town of Cobourg, Ontario, K.C., to be judge of the County Court of the county of Peterborough, vice His Honour Charles A. Weller, deceased.

Flotsam and Jetsam.

Celestials, like Anglo-Saxons, are ceasing to trust what they read in the papers. Mr. Hop Kee, a Chinese laundryman, was recently charged with conducting a laundry without a license. He rested his defence upon a copy of a Toronto paper, wherein it was announced, in the "chaste and flowing language" of the reporter, that "as nobody raised a kick about Hop Kee getting a license, the license was granted." The Chinaman was much astonished that this misplaced confidence should cost him $5 or gaol for 15 days.

We are glad to see that a determined stand is being made in the House of Commons against the objectionable clauses in the Finance Bill, by which it is sought to oust the jurisdiction of the courts of law and to substitute therefor a tribunal nominated and paid by the department whose administrative acts and decisions may be called in question. The Solicitor-General stated that he agreed with the Attorney-General that the judges of the law courts were by no means the best tribunal to decide questions of fact arising out of the valuation of land. With this we emphatically differ, and we believe that the public will prefer to leave disputed questions of this kind—upon which there must be wide differences—to the arbitrament of the fair and impartial determination of a court of law rather than have the matter finally determined by the department exacting the tax, or by the nominee of such department. Past experience has shewn what may be expected in these departmental inquiries. No doubt the rules to be made will deprive persons of their right to have professional assistance, for, in the past, the services of counsel have been denied, and perhaps this will be extended to all legal and other assistance.—*Law Times.*