Canada Law Journal.

VOL. XLVII. TORONTO, FEBRUARY 1. Nos. 2 & 3.

WIFE'S RIGHT TO INDEPENDENT ADVICE.

COX V. ADAMS—STUART V. BANK OF MONTREAL.

We have already called the attention of our readers more than once to the case of *Stuart* v. *Bank of Montreal* which, after same changes of fortune, has been finally decided in favour of the plaintiff by the court of last resort. It will be remembered that the majority of the judges of the Supreme Court reversed the finding of the trial judge in favour of the bank, on the ground that the case fell within the principle of the decision in *Cox* v. *Adams*, 35 S.C.R. 393, which they were bound to follow. The bank appealed to the Privy Council, and the appeal was argued in April last before the following members of the Judicial Committee: Lord Macnaghten, Lord Collins, Lord Shaw, and Sir Arthur Wilson. It was a battle of the giants, so far as the counsel appearing for the parties were concerned, the leader for the bank being Sir Robert Finlay, whose name will be long remembered by all loyal Canadians for his masterly presentation of their case in the Fisheries Arbitration, while the brunt of the contest on behalf of the respondent fell on the stalwart shoulders of Danckwerts, K.C., formerly of Cape Colony, but now one of the foremost gladiators in the wider arena of the English Bar.

The judgment was delivered by Lord Macnaghten, and when one has admired the crisp and clear-cut sentences in which that past-master, alike of the science of law and of the art of judicial exposition, has stated his reasons, what strikes one most forcibly is the cool, almost cavalier way in which their Lordships of the Privy Council brush aside the much canvassed decision of our Supreme Court in *Cox* v. *Adams*, the famous case which "added new terrors to the conduct of banking business." This case it

has been said was the fons et origo of the *Stuart* case, the difficulties of which seem to have resulted from a failure to distinguish between what was really *held* from what was merely *obiter*. The disturbing findings in *Cox* v. *Adams* have now happily been relegated by a tribunal from which there is no appeal—the vast and dreary limbo of overruled cases.

On this point we quote Lord Macnaghten, who says that *Cox* v. *Adams* "decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice," and proceeds to say that, "Their Lordships do not think that the doctrine supposed to be laid down in *Cox* v. *Adams* can be supported, and in fact no attempt to support it was made by the learned counsel at the Bar who appeared for Mrs. Stuart."

Another quotation from the judgment is worthy of consideration in this connection: "Their Lordships are of opinion that the order of the Supreme Court of Canada is right, though they are unable to concur in the reasons on which that order is founded."

It appears, then, that in the opinion of their Lordships of the Privy Council, the Judges of the Supreme Court of Canada while right in their judgment are wrong in their reasons. It becomes, therefore, a matter of some importance to the Canadian lawyer to know the grounds on which the final judgment is based, and to what extent they modify or illustrate the existing law. It seems to us that, so far as at present appears, the court of final resort has simply found, as a jury might do, that a certain state of facts existed, and applied to these facts principles of law which have for a long course of years been well known and fully recognized. If this view be correct it would seem that this cause célèbre turns out in the last resort to be one of the innumerable multitude of cases, feared of appellants but by reporters blessed, which turn upon questions of fact and should never have got into the reports at all. This statement may possibly surprise some of our readers, but it can we think be supported by another

quotation or two from the judgment. First of all, we may refer to a synopsis of the facts, as they appeared, to Lord Macnaghten: "The action which has given rise to this appeal was brought by Mrs. Stuart, a married lady living with her husband the respondent John Stuart, against the Bank of Montreal with the object of setting aside a series of transactions in connection with a pulp and paper company known as the Maritime Sulphite Fibre Company, Limited, in which the wife became involved at the instance of her husband for his accommodation and for the accommodation and benefit of his associates. The company and its shareholders, who were only five in number, were at the time under heavy liabilities to the bank. Mr. Stuart himself had no available means. Everything he had was embarked or sunk in the company. The transactions in question began by Mr. Stuart, who was impecunious and strangely sanguine, offering his wife as security to the bank for some further advances which his associates, more solvent and less hopeful, were unwilling to guarantee. They ended in the transfer to the bank of everything Mrs. Stuart possessed, so that in 1904 she was, as the bank was informed by its solicitor, 'absolutely cleaned out.'"

The judgment goes on to say that: "The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had designed to do so."

It is, however, stated in the judgment, and it is sufficiently plain from all the facts and circumstances of the case, that Mrs. Stuart ("a lady of intelligence and refinement," as described by Mr. Justice Mabee, the trial judge) repudiated in the most express terms any notion of undue influence, pressure or misrepresentation and said that she had acted of her own free will, to relieve her husband in his distress, and "would have scorned to consult any one" in such emergency. But, in their Lordships' view these decisions merely shew how deep-rooted and how lasting the influence of her husband was. They proceed to

say that, however difficult it may be to determine the point at which influence amounts to undue influence, in the case at their bar "there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational." They hold accordingly that "in this case there is enough, according to the recognized doctrine of courts of equity to entitle Mrs. Stuart to relief."

There is one feature in this case which seems to call for comment owing to the prominence given to it in the judgment. We refer to the strongly expressed view taken by the Judicial Committee as to the position of the gentleman who acted as solicitor for the bank throughout the whole course of the transactions which have been successfully impeached, and who was also Mr. Stuart's solicitor during the earlier part of the transactions. He is a man of unblemished honour and integrity and of the highest standing at the Bar and in the province, yet it is stated in the judgment that unfair advantage was taken of the plaintiff's confidence in her husband, not only by the husband, but also by the solicitor who acted for him to a certain extent as well as for the bank. The judgment of their Lordships states that they "do not attribute intentional unfairness" to the solicitor, but that being himself interested in the transaction and acting for the husband and the bank he "was in a position in which it would have been almost impossible for any man to act fairly."

When reading these and other severe comments of their Lordships on the conduct of Mr. Stuart and his legal adviser, it is well to remember that, as already suggested, these comments are practically the findings of four exceptionally able jurymen upon a series of complicated transactions extending over many years. They were undoubtedly entitled to make these findings, and it is a prerogative of which Courts of Appeal have of late availed themselves rather liberally. But it is surely still the case that the findings of the first and only original jury, or of the trial judge sitting as such jury, are entitled to much weight, and this position applies with peculiar force when the judge of first in-

stance was a gentleman of such robust intellect and hard-headed common sense as Mr. Justice Mabee. He had the great advantage of seeing and hearing the parties in the case and the solicitor for the bank when they gave their evidence, and his judgment (see 17 O.L.R., at p. 442) is that "there is no element of fraud of any kind in the case. There was the utmost good faith by Mr. Stuart both towards the bank and the plaintiff throughout a long course of dealings in connection with this sulphite company, and so far as the evidence and correspondence discloses, the same upright dealings and good faith extend into all the business transactions had between the guarantors to the bank." It did not seem to occur to him that any fault could be found with the conduct of the solicitor who was also one of the guarantors to the bank, and he says at the close of his judgment (p. 446) that "there certainly are facts that point most strongly to the conclusion that the matter was discussed" between Mrs. Stuart, her family and her son-in-law, a practising solicitor in Hamilton, before she gave the first guarantee, although in the view he took of the case, he did not regard it necessary to decide the point.

Then when the case reaches the Court of Appeal we find judges (or we might say, ad hoc jurors) of such keen intelligence and scrupulous conscientiousness as Mr. Justice Osler and the Chief Justice of Ontario affirming the verdict of the trial judge in the strongest terms. The former says in his judgment at p. 445 of the report cited: "I think the evidence rebuts any inference that the plaintiff was acting under pressure or any undue influence exerted by her husband. She seems to be a person capable of making up her own mind and of forming and acting upon her own uncontrolled opinion. No fraud or deceit was practised upon her, and she understood the nature and effect of the documents she signed and their object."

This is strong enough, but the verdict of the learned Chief Justice is possibly even stronger. He says (p. 451 of the report cited) that "as far as disclosed by an examination of cases decided in the English courts no case has yet arisen similar to

the present one; a case free of all the sinister elements of imposition, deception, misrepresentation, pressure by threats, intimidation or any other sort of duress or undue influence, and where there was knowledge of what was required of the wife and an intention on her part to do it of her own free will and presenting only the one point of absence of independent advice."

If, however, we look, at this case and its surrounding circumstances simply from the view point of strict professional ethics, the path of safety would seem to be indicated as well by the words of Lord Macnaghten in the case before us as by those of Lord Davey in *Willis* v. *Barron* (1902) A.C. 283, where he says: "It is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is primâ facie entitled to look to her husband's solicitor—the solicitor of her husband's family—for advice and assistance, until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman." Lord Macnaghten's view of the course which should have been taken by the legal adviser in the case referred to of *Stuart* v. *Bank of Montreal* was, as he says in the conclusion of his judgment, that "he ought to have endeavoured to advise the wife and to place her position and the consequences of what she was doing fully and plainly before her. Probably, if not certainly, she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and, if that was an impossibility, owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so."

Our English contemporary, the *Law Times*, also discussess the same subject at some length in the following article:—

"More than a year ago, in an article entitled Status of a Married Woman (128 L.T. Jour. 3), we discussed in these columns the question whether the doctrine of *Huguenin* v. *Baseley*, 14 Ves. 273, Wh. & T., applies to the relation of husband

and wife. It had been definitely decided by the Supreme Court of Canada that this doctrine did so apply, though the balance of authority in the English courts was the other way. As the Canadian case of *Stuart* v. *Bank of Montreal* was the most recent case on the subject, and was likely to come before the Privy Council on appeal, it was then anticipated that the question, whether a transaction between husband and wife, by which the husband benefited, could be set aside on the sole ground that the wife had not had independent legal advice, would have to be decided by the Judicial Committee. Any such decision would have gone very far towards settling the law on this question. From the point of view of scientific jurisprudence this judgment may be said to be disappointing, inasmuch as the appeal was decided on the view of the facts taken by the Judicial Committee, and the rule of law governing transactions between husband and wife with respect to the necessity for independent advice received much less discussion than it had received in the court below."

After referring to the facts of the case and the course of the litigation, the writer continues:—

"The case was thus decided eventually on the footing that, as a matter of fact, unfair advantage had been taken of, and undue influence had been exerted over, the respondent by her husband. The existence of any such rule as was formulated in *Cox* v. *Adams* and the present case by the Supreme Court of Canada, to the effect that mere absence of independent advice in itself and without more entitles a married woman to set aside transactions with or for the benefit of her husband, formed no part of the ratio decidendi. The question, therefore, whether the doctrine of *Huguenin* v. *Baseley* applies to the relation of husband and wife has not, as had been hoped might be the case, been formally decided by the Judicial Committee in *Bank of Montreal* v. *Stuart*.

Nevertheless, in addition to the strong expression of opinion against the correctness of the doctrine "supposed to be laid down in *Cox* v. *Adams*" and adopted in the present case by the Supreme Court of Canada, the judgment delivered by Lord Macnaghten distinctly proceeds on the footing that there is no such

doctrine. For *Nedby* v. *Nedby*, the case cited as correctly laying down the law as to the burden of proof where undue influence by a husband is alleged, is the very case relied on by the present Master of the Rolls (when Mr. Justice Cozens-Hardy) in *Barron* v. *Willis*, 81 L.T. Rep. 321, (1899) 2 Ch., at p. 585, as a definite authority for these propositions: "The relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid." This statement of the law has since been approved both in the High Court and in the Court of Appeal: see *Bank of Africa* v. *Cohen*, 100 L.T. Rep. 916, (1909) 2 Ch., at p. 135; and *Howes* v. *Bishop*, 100 L.T. Rep. 826, (1909) 2 K.B. 390. In the latter case it was also pointed out that the statement to the contrary—that *Huguenin* v. *Baseley* does apply to husband and wife—made by Lord Penzance in *Parfitt* v. *Lawless*, 27 L.T. Rep. 215, 2 P. & D., at p. 468, is a mere dictum. The authority of *Parfitt* v. *Lawless* on this point (much relied on by text-writers) may therefore now be considered to be exploded. Another matter that calls for notice is that it was particularly pointed out by Mr. Justice Idington (the dissenting judge in *Stuart* v. *Bank of Montreal*, who declined to acquiesce in the supposed doctrine of *Cox* v. *Adams*) that the present-day Married Women's Property Acts are quite inconsistent with the theory that applies *Huguenin* v. *Baseley* to husband and wife. This point was also touched on by Lord Justice Farwell in the course of the argument in *Howes* v. *Bishop* (p. 394): "I do not see how, at any rate since the Married Women's Property Act, 1882, the rule in *Huguenin* v. *Baseley* can be said to cover the relation of husband and wife." These statements of the law made by Mr. Justice Idington in the Supreme Court of Canada in the present case and by Lord Justice Farwell in the Court of Appeal in *Howes* v. *Bishop* are in accord with the views of the Judicial Committee in *Bank of Montreal* v. *Stuart*. The authority for saying that a transaction by a married woman with her husband cannot now be impeached solely on the ground

that she had no independent advice is far stronger than in 1902, when the Judicial Committee in *Turnbull* v. *Duval*, 87 L.T. Rep. 154, (1902) A.C., at p. 434, expressed no decided opinion on the subject, but rather treated it as being an open question.

It may, therefore, now be taken as a matter hardly open to doubt that the doctrine of *Huguenin* v. *Baseley* does not apply to the relation of husband and wife. Actual proof of undue influence must therefore be given in order to avoid any specific transaction. What proof will be considered as sufficient under particular circumstances may be difficult to determine, but it may be that, in the words of Lord Macnaghten, "when there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete."

CHAMPERTY AND MAINTENANCE.

We notice that the Divisional Court (Falconbridge, C.J.K.B. and Britton and Riddell, JJ.) have affirmed the judgment of Mr. Justice Middleton in *Colville* v. *Small*, referred to ante, vol. 46, p. 713. The reasons given by the court do not indicate that their Lordships dealt with what appears to be the fundamental question, whether there can be, as a matter of law, champerty without maintenance. As we have already pointed out, the statutory definition of "a champertor" involves "maintenance" as a part of the definition, and if you cannot be a champertor without also being guilty of maintenance, how can a transaction be champertous when the party entering into it is not a champertor? That is a problem which does not appear to be solved.

THE LATE MR. JUSTICE MACMAHON.

The Hon. Hugh MacMahon was of Irish extraction and was the son of the late Hugh MacMahon, who came to Canada from the County Cavan, in Ireland, in 1819. The late judge was born in Guelph, March 6, 1836, and had consequently nearly reached the age of 75. His father was a man of parts, and under his fostering care he received his education. Like other distinguished lawyers, the law was not his first love—early in life he was employed as an engineer, under Lieutenant Col. Galwey on the survey of a proposed Ottawa ship canal.

In 1857 he began his life work and entered on the study of the law. In 1864 he was called to the Bar, and began the practice of his profession at Brantford, where he remained for five years, removing from thence to London, where he had a wider field. In 1876 he received silk from the Lieutenant-Governor of Ontario and in 1885 from the Governor-General.

The late judge was a Liberal in politics, and was employed in 1877 by the Dominion Government on the arbitration proceedings respecting the northern and western boundaries of Ontario. In 1883 he was appointed a puisne judge of the High Court, and has thus been 27 years on the Bench. By common consent of the profession he was regarded as a sound lawyer and one of the very best judges on the Bench in criminal cases.

To all classes of the profession he was most urbane and accessible, distinguished among his brethren as a man at all times of even and judicial temper, before whom it was a pleasure to practise. His memory will be always affectionately cherished by all who had the good fortune to know him; and his dignified and courteous presence on the Bench will be greatly missed.

The late judge had been ailing for some months past, but he was at Osgoode Hall only the week before he died. The end came suddenly on January 18th. The profession of Ontario have lost a judge and a friend whom they had learned to regard with the utmost esteem and respect.

THE SENTENCING OF PRISONERS.

The sentencing of prisoners has always been a subject of grave difficulty and much discussion. It is one of the difficult problems presented to judges from time to time and it is scarcely fair without a full knowledge of the facts and the surrounding circumstances to criticize any sentence which has been imposed even though it may seem either inadequate or too severe. His Honour Judge Morgan, one of the junior judges of the County of York, has recently come in for considerable criticism in this regard at the hands of the press and police authorities of the city of Toronto. It has been hinted that his leniency has ceased to be of that paternal preventive character which was apparently his desire and has become rather provocative of crime. One, however, cannot rely on newspaper reports for accuracy, and that which would sometimes seem to have been a very serious mistake on the part of a judge cannot always be so designated when the facts have been investigated. The learned judge referred to is reported to have let a woman go on suspended sentence who had pleaded guilty to theft from her employers and who, it was said, had previously been convicted for similar offences. It appears, however, that she had only been accused of several similar offences. There is, of course, a material difference. However that may be, the judge assumed a serious responsibility in taking the course he did.

Another phase of the subject is that the judge referred to and some others, who could be mentioned, deal with cases before them on the basis of what they call "merciful leniency," as being the best for persons charged with crime. It must be remembered, however, that justice is not administered in relation to the future of the criminal only, but mainly the protection of society and the prevention of crime. Whilst it is most desirable, so far as is consistent, that there should be endeavours made to reform criminals, judges should have in view the more important consideration of the safety of the community at large.

LANGUAGE v. LAW.

The demand made by the leaders of the French population in the Province of Quebec that all railway tickets, time tables, etc., should be printed in French as well as in English, makes very clear some important features in our political condition. How a railway ticket can be printed in two languages when the name of the place remains the same in either, it is hard to understand, but the absurdity of the demand only emphasizes its political importance. Two facts stand prominently forth which are worthy of the consideration of those who speak so fervently and eloquently of the unity of the two races, and the consolidation of the Dominion as its happy result. The demand above referred to having been properly rejected by the Parliament of the Dominion, and improperly and illegally, in our opinion, accepted by the Provincial Assembly, and having after some demur been agreed to by the railway authorities, is removed from present controversy, but remains to point the moral if not to adorn the tale.

The facts to which we would call attention are, first, the evidence given of the tenacity with which, even in so trivial a matter, the French Canadian holds to his policy of maintaining intact the use of his language, the independence of his race, and, secondly, the conclusion to be drawn from the easy yielding to so preposterous a demand by the railway companies, involving to them very considerable expense and inconvenience without any compensating advantage. When even a railway company has to take into account the loss it may sustain from the hostility of the population which it serves, based upon such trivial grounds as those above referred to, further comment is needless.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—BERTH NOTE—"DISPUTE ARISING AT LOADING PORTS" —ARBITRATION—STAY OF PROCEEDINGS.

The Dawlish (1910) P. 339. This was an appeal from the order of a judge of a County Court dismissing the action with costs. By a berth note it was agreed between the plaintiffs (shipowner) and defendants (grain merchants) that the plaintiffs' ship should go to the sea of Azov, and there load a cargo of grain, and in case of "any dispute at loading ports" under this berth note it is to be submitted to a specified court of arbitration whose decision was to be final. The vessel was loaded, and for stevedoring the defendants charged 40 roubles per 1,000 chelverts in accordance with the tariff on the margin of the berth note, and deducted the amount from the freight. On the accounts being received by the plaintiffs' London agent it was objected that the defendants had overcharged and the action was brought to recover the difference, but the Divisional Court (Evans, P.P.D., and Deane, J.) dismissed the appeal, holding that it was a dispute within the arbitration clause, it being a dispute as to the proper charges for stevedoring at the port of loading.

ADMIRALTY — SALVAGE — APPEAL COURT REDUCING AMOUNT OF SALVAGE.

The Port Hunter (1910) P. 343. This was an appeal against the amount awarded for salvage by Deane, J. The defendants' steamship with a cargo of wool bound for England broke down in the Red Sea owing to damage to her propeller. She was picked up by the plaintiffs' vessel and towed for six days, about 830 miles, to a safe anchorage in Suez Roads. The weather was fine except towards the end of the towage, when the usual northerly wind and some sea were encountered. The salving vessel lost three days and had been put to expense, amount not stated. The salving vessel cargo and freight were valued at £88,000 and the salved vessel cargo and freight at £269,700. Deane, J., had awarded £10,000, but the Court of Appeal (Williams and Buckley, L.JJ., and Evans, P.P.D.) reduced the amount to £6,000, being of the opinion that the court below had

not sufficiently taken into account the fact that there was no considerable danger incurred, and that it was merely a matter of towage and the consequent delay and expense.

COMPANY—RECEIVER AND MANAGER—SHIPMENT OF GOODS BY RECEIVER—BILL OF LADING—LIEN FOR PREVIOUSLY UNSATISFIED FREIGHT.

Whinney v. *Moss SS. Co.* (1910) 2 K.B. 813. The plaintiff in this case had been appointed the receiver and manager of a brewery company, and carried on the business in its name and as such receiver in the name of the company requested the defendant to carry a quantity of beer to be delivered in Malta. The bill of lading stipulated that the defendants were to have a lien on the goods for the freight and also for any other freight due from "the shippers or consignees" to them. The defendants refused to deliver the beer at Malta without payment of certain unsatisfied freight due to them by the brewery company on previous transactions. This demand was paid under protest and the present action was brought to recover it and the simple question was whether or not the defendants had had a valid lien therefor. Hamilton, J., who tried the action gave judgment for the defendants but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) came to the conclusion (1) that the bill of lading had not the effect of giving them a lien, and (2) that it was not competent for the plaintiff to give the defendants such a lien without the leave of the court. The defendants being aware that the plaintiff was carrying on the business of the company as receiver and manager and having really dealt with him on that footing the court considering it immaterial whether or not they knew he had been appointed by the court.

CONTRACT—CONSTRUCTION—RIGHT OF ENTRY FOR SPECIAL PURPOSE—RIGHT OF OWNER TO USE LAND FOR SIMILAR PURPOSE.

Reid-Newfoundland Co. v. *Anglo-American Telegraph Co.* (1910) A.C. 560. By agreement between the defendant railway company and the plaintiff telegraph company the latter were given the exclusive right to erect and work telegraph lines on the railway company's property, and were bound to furnish a special wire for the purposes of the railway as it existed at the date of the contract. The railway company having proceeded to erect wires on their property for their own purposes, this

action was brought to restrain them from so doing as being a violation of the agreement. The Supreme Court of Newfoundland held that the plaintiffs were entitled to an injunction, but the Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw and Sir A. Wilson) reversed that judgment, being of opinion that the grant of an exclusive right to the telegraph company to erect and work wires did not preclude the railway from also erecting wires for the purposes of its own business.

FIRE INSURANCE—POLICY—EXEMPTION FROM LIABILITY IN CASE GASOLINE IS STORED ON PREMISES—CONSTRUCTION—"STORED OR KEPT."

In *Thompson* v. *Equity Fire Insurance Co.* (1910) A.C. 592, the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey,) have reversed the decision of the Supreme Court of Canada. The case turns on the construction of a policy of fire insurance which exempted the insurers from liability in case gasoline should be "stored or kept" on the premises insured. It appeared that the fire was caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building. The judge at the trial considered that "stored or kept" connoted something in the nature of dealing in such articles or having a storehouse therefor. The Ontario Court of Appeal affirmed this judgment, but the Supreme Court by a majority reversed it. The Judicial Committee agreed with the judge at the trial and the Court of Appeal.

MARINE INSURANCE—INSURANCE AGAINST TOTAL LOSS OF CARGO "BY TOTAL LOSS OF VESSEL"—CONSTRUCTION.

Montreal Light, Heat and Power Co. v. *Sedgwick* (1910) ... 598. This was an action on a policy of insurance on a cargo of cement against total loss "by total loss of vessel." The cargo consisted of cement, the vessel was a barge and had been wrecked and practically, if not entirely, submerged, whereby both the vessel and cargo became a total loss and were abandoned as such. The defendants contended that the barge might have been restored to as good order and condition as she was in prior to the disaster for $1,046.48 and that a portion of the cargo could have been salved. The jury found in effect that the loss covered

by the policy had occurred, and the judge at the trial gave judgment for the plaintiff. The Supreme Court of Canada set aside this judgment and ordered a new trial on the question whether the barge was in fact a total loss; but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey and Sir E. Taschereau) reversed this judgment and restored the judgment given at the trial, holding that from the nature of the cargo, and the facts proved, there was ample evidence to support the finding of the jury that the loss insured against had occurred.

ACTION FOR DAMAGES FOR DEATH OF PLAINTIFF'S SON—NEGLIGENCE OF DEFENDANTS—MISDIRECTION AS TO CONTRIBUTORY NEGLIGENCE—JUDGE'S CHARGE NOT EXCEPTED TO AT TRIAL—NEW POINT TAKEN ON APPEAL.

White v. *Victoria Lumber Co.* (1910) A.C. 606. This was an action under a Fatal Accidents Act, or Employers' Liability Act to recover damages for the death of the plaintiff's son while acting as an engineer on the defendant's lumber train. The plaintiff claimed that the train was equipped with defective brakes, and that the brakeman employed was incompetent. The train got beyond control and was running down hill and the deceased jumped from the engine and was killed. It was also claimed that a siding or safety switch on the railway was unfit for the purpose for which it was provided. The defendants contended that there was no negligence on their part, but that the deceased was guilty of negligence in not keeping proper control of his engine and train and allowing it to travel at too great a speed on a down-grade. The jury found a verdict for the plaintiff and the judge at the trial gave judgment in his favour. On a motion against the verdict and judgment Hunter, C.J., thought the proper inference from the evidence was that the accident was caused by want of care of the deceased, and that judgment should be entered for the defendants, or, if not, that there should be a new trial. Irving, J., thought that the damages were excessive and that there should be a new trial on that ground. Morrison, J., thought the judgment at the trial should be affirmed. In these circumstances a new trial was ordered by the Supreme Court of British Columbia from which the plaintiff appealed to His Majesty in Council and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey and Sir E. Taschereau) reversed the order

of the Supreme Court of British Columbia and affirmed the judgment at the trial. On the appeal the defendants raised an objection on the ground of misdirection as to the question of contributory negligence which had not been taken at the trial nor in the court below, which their Lordships refused to entertain.

PRINCIPAL AND AGENT—COMMISSION ON SALE OF MINING PROPERTY —SALE ON TERMS DISAPPROVED BY AGENT—AGENT, EFFICIENT CAUSE OF SALE.

Burchell v. *Gourie and Blockhouse Collieries* (1910) A.C. 614. This was an action by an agent to recover a commission on a sale of mining property. The agent was employed to procure a purchaser and had introduced to the vendors a company which ultimately became the purchasers, but on terms disapproved of by the agent. The official referee to whom the action was referred had found in favour of the plaintiff, but the Supreme Court of Nova Scotia reversed his finding and gave judgment dismissing the action and the Supreme Court of Canada dismissed an appeal therefrom. On appeal, however, the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey), came to the conclusion that the referee was right and reversed the decision of the Supreme Court of Canada and restored the judgment of the referee.

COMMON SCHOOL LANDS FUND—ONTARIO AND QUEBEC—ARBITRATION—JURISDICTION OF ARBITRATORS.

Attorney-General (Quebec) v. *Attorney-General (Ontario)* (1910) A.C. 627. This was an appeal from the Supreme Court of Canada. In pursuance of statutory authority the three governments of Canada, Ontario, and Quebec, entered into a submission to arbitration as to matters arising out of the settlement of accounts under an award relating to the Common School Fund—and on behalf of Quebec it was claimed that certain moneys not actually received by Ontario should be regarded as constructively received by Ontario for the purpose of the division, the sums in question being the amount of certain deductions which Ontario was only entitled to make at its own expense. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey) held that the Supreme Court of Canada was right in holding that the arbitrators had no

jurisdiction to deal with anything except moneys actually received, and that the terms of the submission could not be extended to cover constructive receipts.

TREATY EXTINGUISHING INDIAN RIGHTS IN ONTARIO LANDS — PAYMENTS MADE UNDER INDIAN TREATY—RIGHT OF DOMINION TO INDEMNITY FROM PROVINCE BENEFITED.

Canada v. *Ontario* (1910) A.C. 637. This was a contest between the governments of Canada and Ontario as to whether or not the Dominion government was entitled to be indemnified by the province for payments made to Indians under the Indian Treaty of October 3, 1873, whereby Indian rights were relinquished in a large tract of land part of which was within the province of Ontario. Burbidge, J., who tried the case, gave judgment in favour of the Dominion, but his judgment was reversed by the Supreme Court of Canada and on appeal to His Majesty in Council, the Judicial Committee of the Privy Council (Lords Loreburn, L.C., and Lords Macnaghten, Atkinson, Shaw and Mersey) were of the opinion that having regard to the jurisdiction conferred on the Exchequer Court, the action was properly dismissed as not being sustainable on any principle of law; that the treaty in question had not been made by the Dominion government as trustee or agent for the Province, or with its consent, or for the benefit of the lands in question, but with a view to great national interests—that is, for distinct and important interests of the Dominion, in pursuance of the powers derived from the British North America Act. Some of the judges in the courts below relied on a dictum of Lord Watson in *St. Catharines Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 60: "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving payment of money, which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government." But their Lordships hold that this was obiter; which serves to shew how dangerous it is for even profound lawyers to express an opinion even on points which seem, but may not in fact be, obvious.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Alta.] FINSETH *v.* RYLEY HOTEL CO. [Nov. 2, 1910.

Appeal—Jurisdiction—Special leave—Judicial proceeding—Discretionary order—Matter of public interest—Alberta Liquor License Ordinance, s. 57—Originating summons.

An originating summons issued by a judge of the Supreme Court of Alberta on an application for cancellation of a license under s. 57 of the Liquor License Ordinance, is a judicial proceeding within the meaning of s. 37 of the Supreme Court Act, R.S.C. 1906, c. 139, and, consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon.

Where the decisions of the provincial courts shew that the judges of that court are equally divided in opinion as to the proper construction of a statute in force in the province and it appears to be desirable in the public interest that the question should be finally settled, it is proper for the Supreme Court of Canada to exercise the discretion vested in it for the granting of special leave to appeal under the provisions of s. 37 of the Supreme Court Act. GIROUARD, J., dissented on the ground that the proceedings in question were intended to be summary and that in these circumstances, the case was not one in which special leave to appeal should be granted.

Motion granted.

Chrysler, K.C., for the application. *Ewart*, K.C., contra.

Que.] [Nov. 2, 1910.

TOWN OF OUTREMONT *v.* JOYCE.

Appeal—Jurisdiction—Matter in controversy—Instalment of municipal tax—Collateral effect of judgment.

In an action instituted in the Province of Quebec to recover the sum of $1,133.53 claimed as an instalment of an amount exceeding $2,000, imposed on the defendant's lands for special

taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal, although the judgment complained of may be conclusive in regard to further claims arising under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the court. *Dominion Salvage and Wrecking Co.* v. *Brown*, 20 Can. S.C.R. 203, followed. Appeal quashed with costs.

Davidson, K.C., for the motion. *Beaubien*, K.C., contra.

Man.] LONGMORE *v.* MCARTHUR. [Nov. 2, 1910.

Negligence — Dangerous works — Joint tortfeasors — Judgment against one of several persons responsible for damages—Bar to action.

Held, 1. A proprietor or principal contractor undertaking works in the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected.

2. Failure to discharge such duty makes the proprietor and his contractor, or the contractor and his sub-contractor, as the case may be, equally liable as joint tortfeasors for resultant injury.

3. A judgment for damages sustained in consequence of any such injury against one of such joint tortfeasors is a bar to a subsequent action therefor against another.

Judgment appealed from (19 Man. R. 641) affirmed.

A. C. Galt, K.C., for appellant. *Ewart*, K.C., for respondents.

Man.] [Nov. 2, 1910.

DOMINION FISH CO. *v.* ISBESTER.

Appeal—Concurrent findings of fact—Negligence—Shipping—Action for damages—Personal injury—Evidence—Res ipsa loquitur—Limitation of liability.

Concurrent findings on questions of fact in the courts below ought not to be disturbed on appeal unless a mistake is clearly shewn.

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers in time to permit them to escape in safety, and, in an action to recover damages for injuries sustained in consequence by a

passenger, the owners adduced no evidence to explain the origin of the fire.

Held, affirming the judgment appealed from (19 Man. R. 430), that the only inference to be drawn was that the owners were grossly negligent.

In such an action the owners of the ship cannot invoke the limitation provided by s. 921 of the Canada Shipping Act, R.S.C. 1906, c. 113. *The Orwell*, 13 P.D. 80, and *Roche* v. *London and South Western Ry. Co.* (1889) 2 Q.B. 502, referred to.

Appeal dismissed with costs.

Affleck, for appellants. *Blackwood*, for respondent.

Alta.] [Nov. 2, 1910.

GRAND TRUNK PACIFIC RY. CO. *v.* WHITE.

Construction of statute—Public Works Health Act—Regulations —Breach of statutory duty.

Sec. 3 of the Public Works Health Act, R.S.C. 1906, c. 153, provides that "for the preservation of health and the mitigation of disease amongst persons employed in the construction of public works, the Governor-General in Council may from time to time make regulations . . . (*d*) for the provision of hospitals on the works and as to the number, location and character of such hospitals; . . ."

Held, that the above works "for the preservation of health and mitigation of disease" govern the construction of the whole section and a company directed to provide a hospital for such purpose is not obliged to furnish it with applications for treating employees personally injured on its works. Appeal allowed with costs.

Chrysler, K.C., for the appellants. *Ewart*, K.C., for the respondents.

Que.] [Nov. 21, 1910.

SHAWINIGAN HYDRO-ELECTRIC CO. *v.* SHAWINIGAN WATER & POWER CO.

Appeal—Jurisdiction—Matter in controversy—Stare decisis—Municipal by-law—Injunction—Contract—Collateral effect of judgment—Construction of statute—Supreme Court Act, R.S.C. 1906, c. 139, *ss.* 36, 39(*e*), 46.

The action was brought by the respondents and other ratepayers of the town of Shawinigan, against the town and Hydro-

Electric Company, to set aside a by-law of the town corporation authorizing the purchase of certain lands with an electric power-house and plant from the Hydro-electric Company for $40,750, and for an injunction prohibiting the carrying into effect of the contract of sale. The final judgment in the Superior Court dissolved the injunction and dismissed the action, but on appeal by the plaintiffs the Court of King's Bench maintained the action and made the injunction permanent. On a motion to quash an appeal by the Hydro-Electric Company to the Supreme Court of Canada,

Held, per FITZPATRICK, C.J., and GIROUARD, J., that the Supreme Court was competent to entertain the appeal under the provisions of s. 39(*c*) of the Supreme Court Act. *Bell Telephone Co.* v. *City of Quebec*, 20 S.C.R. 230, disapproved.

Per DUFF and ANGLIN, JJ. Semble, that the decision in that case is binding on the Supreme Court of Canada.

Per IDINGTON, DUFF and ANGLIN, JJ (DAVIES, J., contra), that as the appeal was from the final judgment of the highest court of final resort in the Province of Quebec in an action instituted in a court of superior jurisdiction for the purpose of preventing the consummation of a contract for a consideration exceeding $2,000, the Supreme Court of Canada was competent to entertain the appeal under ss. 36 and 46 of the Supreme Court Act.

Per DAVIES, J., dissenting, that the controversy related merely to the validity of the by-law and did not involve the sum or value of $2,000, that the collateral or incidental effects of the judgment were not in question on the appeal, and that, therefore, the Supreme Court of Canada was not competent to entertain the appeal. *Bell Telephone Co.* v. *City of Quebec*, 20 S.C.R. 230, followed.

Motion dismissed with costs.

Holden, for the motion. *Aimé Geoffrion*, K.C., contra.

Ont.] SOVEREIGN BANK v. MCINTYRE. [Dec. 23, 1910.

Evidence—Burden of proof—Banks and banking—Sale of bank stock—Offer to shareholders—Shares refused or relinquished—Sale to public—Authority.

A bank sued M. on a promissory note alleged to have been given in payment for part of a new issue of its stock. M. pleaded want of consideration and non-receipt of the shares. On the

trial a resolution by the bank's directors was proved authorizing the offer of the new issue to the then shareholders (of whom M. was not one) and counsel for the bank admitted that there was none allotting it to anybody else.

Held, 1. IDINGTON and DUFF, JJ., dissenting, that the onus was on M. to prove that the shares had been sold to the public without authority and he had failed to satisfy it.

2. Per IDINGTON and DUFF, JJ., that the onus was originally on M., but the evidence and admission of counsel had shifted it to the bank, which did not furnish the requisite proof.

Appeal allowed with costs.

C. Macdonell, K.C., for appellants. *McEvoy*, K.C., for respondent.

Ont.] RODD *v.* COUNTY OF ESSEX. [Dec. 23, 1910.

Municipal corporation—Statutory duty—County officers—Office accommodation—Discretion—Mandamus.

The selection of the place in an Ontario county at which an office shall be provided for the County Crown Attorney and clerk of the peace rests with the County Council and the courts should not interfere with the reasonable exercise of the council in making such selection.

Judgment of the Court of Appeal, 19 Ont. L.R. 659, affirmed. Appeal dismissed with costs.

Wigle, K.C., for appellant. *A. H. Clarke*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] BEARDMORE *v.* CITY OF TORONTO. [Dec. 30, 1910.

Appeal to Privy Council—Application for leave.

This was an application on behalf of the plaintiff for the allowance by the court of the security required to be given on an appeal to the Judicial Committee of the Privy Council as provided by 10 Edw. VII. c. 24. The decision to be appealed from is reported in 21 O.L.R. 505.

Held, 1. That whilst the nature of the case and the question raised undoubtedly bring it within a class of cases in which not infrequently the Judicial Committee have considered it proper to grant leave to appeal the granting or refusing of which rests entirely with the Judicial Committee.

2. The Act under which the application is made, only confers on the Court of Appeal the power to deal with this application where the case comes within s. 2 and it has been decided that it does not: see *City of Toronto* v. *Toronto Electric Light Co.*, 11 O.L.R. 310; *Canadian Pacific Ry. Co.* v. *City of Toronto* (1909) 19 O.L.R. 661.

Johnston, K.C., and *Lundy*, for application. *Drayton*, K.C., contra.

HIGH COURT OF JUSTICE.

Divisional Court—C.P.] [Dec. 12, 1910.

FOSTER v. RENO.

Distress for taxes—Seizure of stranger's property on premises—Tax collector—Validity of appointment—De facto officer of municipality.

Appeal by plaintiff from the judgment of the County Court of Kent dismissing an action against a tax collector for wrongful distress. The person assessed as owner of the land in question and of the horse that was seized made a chattel mortgage to one Shaw. As further security a collateral note was taken by the mortgagee endorsed by three persons interested in the racing of the horse. After demand for the taxes an arrangement was made, evidenced by a document recorded under the Bills of Sale Act, by which the horse was transferred to the plaintiff to hold as security for the protection of the endorsers. The owner agreed to care for the horse, and was at liberty to enter it at the races. It was then removed from his premises and boarded at an hotel stable. When out for exercise the owner of the premises took it for a temporary purpose to his place where it was seized by the defendant and sold for taxes.

Held, 1. Under 4 Edw. VII. c. 23, s. 103, the right to distrain for taxes is placed upon the same plane as a landlord's right to distrain for rent, and the horse being on the land, and the plaintiff claiming title thereto under the person taxed, there

was no reason why full effect should not be given to the words of the statute. The distress was therefore valid.

It was contended that the defendant was not a duly appointed tax collector. In 1908 he was admittedly duly appointed; but in 1909 his appointment was by resolution and not by by-law.

Held, that although s. 325 of the Municipal Act enacts that the powers of the council shall be exercised by by-law; yet the council is also an administrative body, whose duties can be discharged without the formality of a by-law, and s. 325 refers to the exercise of a municipal legislative power and not to the performance of a statutory duty. See *Croft* v. *Peterboro*, 5 C.P. 541; *Pratt* v. *City of Stratford*, 14 O.R. 260, 16 A.R. 5.

Held, also, that the duty of the council to appoint assessors or collectors may be discharged in any way indicating corporate action, e.g., by resolution.

Appeal dismissed with costs.

Gundy, for plaintiff. *Wilson*, K.C., for defendant.

Master in Chambers.] [Dec. 12, 1910.

VACHON v. CROWN RESERVE MINING CO.

Parties—Joinder of defendants—Separate causes of action—Tort—Breach of contract.

Motion by defendants to strike out so much of the statement of claim as dealt with the claim against the defendants, the Maryland Casualty Co. The statement of claim set out that the plaintiff on Nov. 28, 1909, was seriously injured while in the service of the defendants, the Crown Reserve Mining Co., and that, upon his making a claim for damages against those defendants, the defendants, the Maryland Casualty Co., began negotiations with the plaintiff on behalf of themselves and the mining company, looking to a settlement, and that finally, on May 14, 1910, an agreement was made between the plaintiff and defendants, under which the defendants were to pay $3,500 in full settlement to the plaintiff; but that on May 28, the defendants refused to carry this out. The plaintiff claimed from both defendants payment of this $3,500, with interest from May 14, 1910, or, in the alternative, $1,500 damages from the mining company.

Held, that the plaintiff was seeking to join two entirely separate and distinct causes of action—first, an action of tort against the mining company, and, second, an action for breach of

an alleged agreement of settlement—and these could not be joined, being inconsistent and mutually destructive, and not both against the same defendants: *Andrews* v. *Forsyth*, 7 O.L.R. 188; *Quigley* v. *Waterloo Manufacturing Co.*, 1 O.L.R. 606; *Evans* v. *Jaffray*, ib. 614, 621. However numerous the defendants, there must be only one claim for relief, based on one injuria in which all are alleged to be implicated. Motion granted with costs.

G. M. Clark, for defendants. *J. A. Macintosh*, for plaintiff.

Clute, J.] HOUGHTON v. MAY. [Dec. 15, 1910.

Execution — Seizure of ship under fi. fa. — Ship wrongfully brought by execution creditor from foreign waters into sheriff's bailiwick—Public policy—International law—Ashburton Treaty, art. 7.

This was an issue in which the plaintiff affirmed and the defendant denied that the ship "Houghton," seized by the sheriff of Essex, under an execution issued in *May* v. *Houghton*, was improperly brought by the defendant, or with his connivance by others, into the bailiwick of the sheriff of Esesx, or came within his bailiwick under such circumstances that the ship was not exigible in execution, and that the seizure was an abuse of the process of the court, and the ship should be released.

The trial judge found that the vessel was cut loose either by the orders of the defendant or with his connivance.

Held, 1. It would be against public policy and might create international trouble to permit a seizure under such circumstances.

2. There was a trespass committed, if not a crime, and as the defendant seeks to take advantage of the wrongful act, he ought not to be permitted to do so. See *Edgerton* v. *Barlow*, 4 H.L.C. 1, 196, and Ashburton Treaty, 1842, art. 7.

3. It is not clearly apparent that this article of the treaty applies to the channel between Detroit and Windsor; but, if it did apply, it would not help the plaintiff, if his property was properly within the bailiwick of the sheriff.

A. H. Clarke, K.C., for plaintiff. *E. S. Wigle*, K.C., for defendant.

Meredith, C.J., Sutherland, J., Middleton, J.] [Dec. 23, 1910.

APPLEBY *v.* ERIE TOBACCO CO.

Nuisance—Tobacco factory—Injunction.

Appeal by plaintiff from judgment of Boyd, C., dismissing an action to restrain defendants from continuing a nuisance.

The nuisance complained of arose from the manufacture of tobacco, the important objection was the odour arising from the steaming and stewing of the tobacco leaves, other articles being mixed with it, such as sugar and liquorice. These odours could not be prevented. The evidence was conflicting, but it was clear that there was a strong odour that to most neighbours was extremely disagreeable.

Held, 1. That in view of all the surrounding circumstances (which must always be taken into consideration) the defendants' manufactory constituted a nuisance.

2. As to whether an injunction should be granted, MIDDLETON, J., who delivered the judgment, said:—

Nuisances fall into two classes—those which interfere with the comfort and enjoyment of the property, and those which interfere with the value of the property. The occupant may sue in respect of the former. In such suit an injunction may well be awarded, as damages cannot be an adequate remedy: *Jones* v. *Chappell*, L.R. 20 Eq. 539. The working rule stated by A. L. Smith, L.J., in *Sheefer* v. *City of London Electric Co.*, [1894] 1 Ch., at p. 332, as defining the cases in which damages may be given in lieu of an injunction, shews that here an injunction is the proper remedy. No one should be called upon to submit to the inconvenience and annoyance arising from a noxious and sickening odour for a 'small money payment,' and the inconvenience and annoyance cannot be adequately 'estimated in money.' The cases in which damages can be substituted for an injunction sought to abate a nuisance of the first class must be exceedingly rare. The injunction should, therefore, go, restraining the defendants from so operating their works as to cause a nuisance to the plaintiff by reason of the offensive odours arising from the manufacture of tobacco; the operation of the injunction to be stayed for six months to allow the defendants to abate the nuisance, if they can do so, or to make arrangements for the removal of that part of the business causing the odour.

Rodd, for plaintiff. *Clarke*, K.C., for defendant.

Meredith, C.J., Teetzel, J., Clute, J.] [Dec. 24, 1910.

FOWELL *v.* GRAFTON.

Negligence—Sale of air-gun to minor—Injury to person—Liability—Crim. Code, s. 119.

Appeal by defendants from the judgment of Britton, J., 20 O.L.R. 539, in favour of the plaintiff, upon the findings of a jury, holding the defendants, who sold an air-gun to a boy of thirteen, liable to the plaintiff, who was injured by a shot fired from the gun in the hands of the boy, for their negligence in selling it to a minor under sixteen.

MEREDITH, C.J., said: It appears from the considered judgment of the learned judge, 20 O.L.R. 639, that he was of opinion that, apart altogether from the question of negligence, as the air-gun was sold to the boy in contravention of the provisions of the Code, sec. 119, the defendants were liable to answer in damages to the plaintiff for the injury which he sustained, the unlawful act being, in his opinion, the proximate cause of the injury. The object of the provision of s. 119 of the Code was the prevention of such accidents as that which happened to the plaintiff, and, that being the case, the view of the learned judge is supported by a statement in Pollock on Torts, 8th ed., pp. 26, 27. But, however that may be, I am of opinion that there was evidence for the jury that the plaintiff's injuries were caused by the defendants' negligence, and that there was no misdirection.

I think, also, that the learned judge was right in telling the jury that the fact that the danger to the public of an air-gun or ammunition being in the hands of a minor under the age of sixteen was deemed by the legislature of so serious a character as to render it proper that it should be made a criminal offence to sell or give either the air-gun or ammunition for it, was a factor they might take into account in determining whether the defendants were guilty of the negligence with which they were charged.

Appeal dismissed with costs.

Counsell, for plaintiff. *Lynch-Staunton*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 3, 1910.

ROBINSON *v.* IMPERIAL LIFE ASSURANCE CO.

Life insurance—Security for advances—Words "as interests may appear"—Debt barred by statute.

A policy of life insurance issued by the defendant company upon the life of R. S. was made payable to B. "as his interests may appear." Subsequently the insured directed the company in writing to make the amount payable to plaintiff "as his interests may appear" explaining that B. was to have made him an advance of a sum of money, but had been unable to do so and that this was his "reason for changing the beneficiary in the contract."

Held, that plaintiff's claim must be restricted to the amount of his advance made at the time and that he could not recover or retain by virtue of the words "as his interests may appear" a large sum claimed by him for services alleged to have been rendered to the deceased in his lifetime and which had been barred by the Statute of Limitations.

O'Connor, K.C., in support of appeal. *W. B. A. Ritchie*, K.C., contra.

Full Court.] MOORHEAD *v.* KAULBACH. [Dec. 15, 1910.

Probate court—Proof of claim against estate—Necessity for corroboration—Material fact—Amendment—Power of judge to allow.

On the contestation of a claim made by M. against the estate of K., deceased, where plaintiff's claim as rendered in the first instance, was for the sum of $700, for the publication for one year, from December, 1903, to December, 1904, of a newspaper for the deceased, the judge allowed the substitution of a claim under an agreement in writing whereby the claimant was to publish the paper in question, using the plant belonging to deceased, and upon delivery up to the deceased at his request the subscription list was to receive the sum of $500.

Held, 1. The delivery of the subscription list was a material fact which must be substantiated by corroborative evidence to entitle the claimant to recover.

2. The fact that the paper suspended publication about the time that the list was said to have been surrendered had no bearing as furnishing the element of corroboration required.

Quære, whether the judge had power to permit the amendment allowed by him to be made.

Mellish, K.C., and *Kaulbach*, for appellant. *O'Connor*, K.C., and *Matheson*, K.C., for respondent.

Full Court.] CARR *v.* FERGUSON. [Dec. 15, 1910.

Crown lands—Temporary acts of occupation—Municipal council—Laying out new road—Irregularities—Waiver—Commissioner—Jurisdiction—Obstructions—Right to remove.

To give title or possessory rights as against the Crown the proof should be clear and unequivocal.

The occupation and use of land on the seashore where the acts of occupation (apart from the erection of small structures not of a permanent character) are shewn to have been of a casual, temporary and irregular character, in the absence of enclosure or anything to indicate the extent of possession, are not sufficient to give title as against the Crown.

The occasional use of a strip of beach and land adjacent thereto, the property of the Crown, for the purpose of drying nets, etc., will be regarded as having occurred in the exercise of public right and will not confer any special right or interest in the locus. Such acts are not sufficient to enable the persons exercising them to maintain trespass against a person in possession claiming under colour of title.

Where a municipal council is seized with jurisdiction to deal with the subject of opening up a new road mere irregularities in the procedure cannot be relied on by way of collateral attack. The task of locating the new road belongs in the first place exclusively to the commissioner.

Objections to the project as a whole, or as to the location or payment of damages, etc., may be urged when the council is asked to confirm or adopt the proceedings and where such objections are not then urged they cannot be afterwards raised as ground for invalidating the prior proceedings. The municipal authorities having entered, or being entitled to enter, have the right, especially after notice, to remove obstructions from the way.

Rowlings, for appeal. *Gregory*, K.C., contra.

Graham, E.J.] LORRAINE *v.* NORRIE. [Jan. 7.

Watercourses — Riparian rights — Obstructions — Abatement of nuisance—Assault in course of—Costs.

Where one of two riparian proprietors on opposite sides of a river, for the protection of his land against the current, erected structures known as "wing dams," extending for some distance into the bed of the river, the effect being to raise the height of the water at the outer ends, and to increase the velocity of the current, and to deflect it against the land of the opposite proprietor.

Held, that the latter was entitled to recover damages for the injury to his land, and to an injunction for the removal of the structures causing the injury.

Quære, whether a party lawfully entering upon the land of another for the purpose of abating a nuisance but committing acts of excess in overcoming the resistance of the owner does not thereby become a trespasser ab initio.

W. B. A. Ritchie, K.C., and *H. McKenzie*, K.C., for plaintiff. *J. J. Ritchie*, K.C., and *S. D. McLell[illegible]*, K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] SCHRAGGE *v.* WEIDMAN. [Nov. 28, 1910.

Conspiracy in restraint of trade—Criminal combination—Illegal contract—Crim. Code, s. 498, s.-ss. (b) and (d).

Appeal from judgment of MATHERS, C.J., noted, vol. 46, p. 510, allowed with costs.

Held, RICHARDS, J.A., dissenting, that, although the agreement in question was one which, to a certain extent, tended to prevent or lessen competition, it was one which, at common law, would be enforcible between the parties, because its provisions were not unreasonable in their restraint of competition, and therefore such restraint should not be held to be "undue" within the meaning of sub-s. (*d*) of s. 498, of the Criminal Code.

Rex v. *Clarke*, 14 Can. Cr. Cas. 46; *Wampole* v. *Karn*, 11 O.L.R. 619, and *Rex* v. *Elliott*, 9 O.L.R. 648, distinguished. *Nor-*

denfeldt v. *Maxim Nordenfeldt & Co.* (1894) A.C. 535; *Mogul Steamship Co.* v. *McGregor* (1892) A. C. 25; *Collins* v. *Locke*, 4 A.C. 674, and *Elliman* v. *Carington* (1901) 2 Ch. 275, followed.

Macneill, for plaintiff. *F. M. Burbidge*, for defendants.

Full Court.] MILLER *v.* SUTTON. [Nov. 28, 1910.

Vendor and purchaser—Cancellation of agreement.

Appeal from judgment of PRENDERGAST, J., noted, vol. 46, p. 744, dismissed with costs.

Full Court.] [Dec. 14, 1910.

IN RE RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.

Local option—Liquor License Act—Appointment of scrutineers.

Appeal from judgment of MATHERS, C.J., noted, vol. 46, p. 464, allowed with costs, the court holding that the omission from the by-law of any provision for the appointment of scrutineers to attend at the polls and at the summing up of the notes as required by s. 377 of the Municipal Act, was a fatal defect in it, notwithstanding that scrutineers had actually been appointed and acted as such; also that the defect was not covered by the curative provisions in s. 200 of the Act.

Re Bell and Corporation of Elma, 13 O.L.R. 80, followed.

Burbidge, for applicant. *Fullerton* and *McWilliams*, for the municipality.

Full Court.] [Dec. 14, 1910.

KING *v.* QUONG TONG SHING.

Criminal law—Summary trial—Common gaming house—Police magistrate—Jurisdiction—Excessive fine—Amendment.

A police magistrate, though he belongs to the class of officials designated in s. 777 of Crim. Code who may try summarily, with the consent of the accused, a great number of serious indictable offences, can only try summarily without his consent a person charged with the indictable offence of keeping a common gaming house under the powers conferred by ss. 773 and 774 as re-enacted by c. 9 of 8 & 9 Edw. VII. and s. 781 limits

the amount of the fine upon conviction in such a case to $100 including costs.

A conviction imposing a fine exceeding $100 in such a case cannot be amended under s. 1124 of the Code and should be quashed on certiorari, as that section only applies to summary convictions under Part XV. of the Code, notwithstanding that that section was, in the revision of 1906, taken out of the summary convictions part of the Code, where it formerly stood as s. 889, and placed in the part headed "Extraordinary remedies."

Reg. v. *Randolph*, 4 Can. Cr. Cas. 165, followed.

Monkman and *Parker*, for accused. *Whitla*, for the Crown.

Full Court.] IN RE TOWN OF CARMAN. [Dec. 14, 1910.

Liquor License Act—Local option by-law must be complete in itself.

A local option by-law intended to be submitted to the vote of the ratepayers under ss. 61 to 72 inclusive of the Liquor License Act, R.S.M. 1902, c. 101, must, by force of s. 68, referring to proceedings under the Municipal Act, be complete in itself and contain provisions fixing the time and place of the polling and providing for the other matters specified in ss. 376 and 377 of the Municipal Act, including the appointment of agents or scrutineers. Where, therefore, the council passed two by-laws, one simply forbidding the receiving of any money for a license under the Liquor License Act, which by-law was submitted to the vote of the ratepayers before its third reading, and another making the usual and necessary provisions for the taking of the vote on the first as required by the Municipal Act, which by-law was passed through its third reading at one session, the proceedings were held to be fatally defective and incapable of being cured by s. 200 of the Act.

Burbidge, for applicant. *Fullerton*, for town of Carman.

Full Court.] SMITH v. THIESEN. [Dec. 14, 1910.

Partnership—Execution against goods of one partner—Interpleader between execution creditor and other partners—Priority as between vendor of land sold on crop payments and execution creditor of purchaser—Growing crops—Bills of Sale Act.

When several persons are tenants in common of a farm and jointly raise crops on it, they are partners in such farming oper-

ations and the crops when harvested are the property of the partnership. Such crops cannot be sold by the sheriff under an execution against one partner. All the sheriff can sell is the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a fi. fa., and all the purchaser gets is the right to have the accounts of the partnership taken to ascertain what that share or interest is and then to realize it in proceedings to wind up the partnership. *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S.C.R. 692, and *Helmore* v. *Smith*, 35 Ch. D., at p. 447, followed.

Christie, one of the claimants in these interpleader proceedings had sold the farm in question, on deferred payments, to the defendant and two other persons who had agreed that all the wheat grown upon it should, when threshed, be delivered at an elevator or in cars in the joint names of vendor and purchasers and that half of the proceeds should be applied, first, in paying the interest due, second, in paying taxes and other charges against the crop and the balance towards the purchase price of the farm, the remaining half to be paid to the purchasers.

Held, that the plaintiff as execution creditor of one of the purchasers, could reap no advantage against Christie from s. 39 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, which makes void a security taken upon growing crops and crops to be grown, even if that section would apply in such a case as to which no opinion was expressed. The plaintiff, claiming the proceeds of the crops which were partnership funds, must fail in the issue as against another partner claiming the fund and also as against Christie, as that partner conceded Christie's right to it.

Hoskin, K.C., and *Bowen*, for plaintiff. *A. B. Hudson* and *Locke*, for claimants.

KING'S BENCH.

Prendergast, J.] [Nov. 9, 1910.

THE KING *v.* WONG ROOD.

Criminal law — Summary trial — Police magistrate — Gaming house—Excessive punishment—Amendment of conviction—Habeas corpus.

Held, 1. Since the amendment of ss. 773(*f*) and 774 of Crim. Code by 8 & 9 Edw. VII. c. 9, the case of *King* v. *Lee Guey*, 13

Can. Cr. Cas. 80, is no longer applicable, and a police magistrate has absolute jurisdiction to try summarily a charge of keeping a disorderly house, to wit, a common gaming house, without the consent of the accused.

2. The amount of any fine imposed upon a conviction by a police magistrate in such a case is limited by s. 781 to $100 including costs, and nothing on s. 777 will enable any magistrate to impose a greater fine.

3. When the magistrate, assuming to exercise the powers conferred by s. 777, imposed a fine of $200 in such a case, a judge should not, upon an application for a habeas corpus, exercise the power conferred by s. 1120 of the Code of making an order for the further detention of the accused and directing the magistrate to amend the conviction nor could he amend the conviction himself under s. 1124, which is not applicable to summary trials by police magistrates under Part XVI. of the Code.

Queen v. *Randolph*, 4 Can. Cr. Cas. 168, followed.

Graham, for the Crown. *Hagel*, for prisoner.

Robson, J.] CHODERKER v. HARRISON. [Dec. 7, 1910.

Landlord and tenant—Action by sub-tenant for wrongful distress —2 W. & M. Sess. 1, c. 5, s. 5—Acceleration of rent—Abandonment of premises—Payment to landlord's clerk—Bailiff's liability.

Defendants demised the premises in question to one Lesk under a lease in which he covenanted that he would not assign or sublet without leave, also that, if any of the goods and chattels of the lessee should be at any time seized or taken in execution, or in attachment by any creditor of the said lessee, or if the lessee should attempt to abandon said premises or to sell or dispose of his goods and chattels so that there would not in that event be, in the opinion of the lessors, a sufficient distress on the premises for the then accruing rent, then the current month's rent, together with the rent for the succeeding three months next accruing should immediately become due and payable, etc. The lease also provided that the word "lessee" should include the heirs, executors and administrators of the lessee, also his assigns, if he should assign with the consent of the lessors. The plaintiff bought the stock in trade on the premises from Lesk and took possession, thereafter paying the rent to the defendants, but there was no consent to an assignment by Lesk.

Held, 1. The plaintiff was not the "lessee" within the meaning of the covenant in the lease and the defendants could not justify a distress for three months' accelerated rent under the covenant above set forth by reason of any seizure of the goods and chattels of the plaintiff on the premises or any dealing by the plaintiff with such goods.

2. It could not be said that Lesk, the lessee, had, by selling out and turning over possession to the plaintiff, attempted to abandon the premises. *Monson* v. *Boehm*, 26 Ch. D., at p. 405, and 1 A. & E. Ency. L. & P. 4, followed.

3. Sec. 5, of 2 W. & M. Sess. 1, c. 5, authorizes the recovery of double the value of goods and chattels illegally distrained and sold in an action by the owner of the goods, although he may not be the tenant. Bell on Landlord and Tenant, p. 345, followed.

4. The defendant Willis, who acted as the bailiff of . . . defendant Harrison in making the illegal distress and sale was equally liable with them under the statute quoted. *Hope* v. *White*, 17 U.C.C.P. 52, followed.

Finklestein and *Morrisey*, for plaintiff. *Wright* and *Tench*, for defendants.

Macdonald, J.] [Dec. 14, 1910.

SKULAK *v.* CANADIAN NORTHERN RY. CO.

Railway—Engine moving backwards in yard without man in front to warn pedestrians—Negligence—Contributory negligence—Use of bell and whistle—Trespasser, right of action for injury to.

Under s. 276 of the Railway Act, R.S.C. 1906, c. 37, as amended by 9 & 10 Edw. VII. c. 50, s. 7, it is only when a train is passing or about to pass over or along a highway that the railway company is required, in case the train is not headed by an engine moving forward in the ordinary manner, to station a man on that part of the train, or of the tender if that is in front, which is then foremost, to warn persons standing on or crossing or about to cross the track; and s. 274 of the Act, requiring the use of the bell and whistle, should be interpreted as limited in the same way.

The plaintiff's husband, an employee of the defendant company, while proceeding through the railway yards on business of his own, stepped off the track on which he was walking to avoid an approaching express train, and stepped on to another track when he was struck and killed, at a point which was not near any

highway crossing, by a yard engine moving reversely without any person stationed on the part of the tender which was foremost. There was a path between the two tracks on which the deceased might have walked safely.

Held (without a finding on the evidence as to whether or not the bell of the yard engine had been rung), that the defendants were not liable, as they had not been guilty of any negligence and the deceased was guilty of contributory negligence in going upon the other track.

Semble, the deceased had no right to be where he was at the time of the accident and was therefore a trespasser: *Dean* v. *Clayton*, 7 Taunt. 489, and *Jordin* v. *Crump*, 8 M. & W. 782; and no action was maintainable without evidence of intention to injure.

Howell and *H. V. Hudson*, for plaintiff. *Clark*, K.C., for defendants.

Robson, J.] NOBLE *v.* CAMPBELL. [Dec. 14, 1910.

Mortgage—Purchaser of land subject to mortgage on implied covenant to indemnify vendor—Foreclosure, effect on liability of mortgagor under covenant—Parties to action.

The plaintiff sold certain land to the defendant subject to two mortgages under the Real Property Act, so that defendant was under an implied covenant to indemnify the plaintiff against the mortgages. The mortgagees subsequently recovered judgment against the plaintiff for the amount due on the mortgages, and afterwards foreclosed them and obtained certificate of title to the property. In this action by plaintiff to enforce the defendant's implied covenant of indemnity defendant raised the contention that the plaintiff was released from his covenant by this action of the mortgagees in obtaining the foreclosure.

Held, that this question could not be decided in the absence of the mortgagees, and that unless plaintiff would amend, pursuant to leave, adding the mortgagees as parties defendant, the action should be dismissed with costs.

Haggart, K.C., and *Sullivan*, for plaintiff. *Hoskin*, K.C., and *Huggard*, for defendant.

Macdonald, J.] [Dec. 14, 1910.

TOWN OF SELKIRK *v.* SELKIRK ELECTRIC LIGHT CO.

Municipality—Use of streets by electric light company after expiration of time limited—Injunction—Order to remove poles and wires—Estoppel.

The defendant company had acquired the rights and business of a company which had in 1891 secured the right to erect poles and wires in the streets of the town of Selkirk and to carry on the business of supplying electric light and power in the town for a period of ten years. After the expiration of that period, and until the year 1909, the defendant company and its predecessors in title continued the business and erected from time to time new poles and wires in the streets without procuring any extension of the franchise, but also without any action being taken by the town to prevent the carrying on of the business.

Held, 1. The town was not estopped from passing a by-law in 1909 revoking and terminating the rights and privileges previously granted and then exercised by the defendant company and requiring the immediate removal of all their poles and wires from the streets, and was entitled to a declaration that the defendant company had no right any longer to maintain its system, an injunction to restrain it from maintaining the same or erecting poles or wires or transmitting electricity within the town, and an order requiring the company to remove their poles and equipment from the streets of the town.

2. The Attorney-General was not a necessary party to the action.

Saugeen v. *Church Society*, 6 Gr. 538, and *Fenelon* v. *Victoria Ry. Co.*, 29 Gr. 4, followed.

Heap and *Stratton*, for plaintiffs. *Wilson*, K.C., and *Hamilton*, for defendants.

Mathers, C.J.] [Dec. 23, 1910.

CLARK *v.* WATERLOO MANUFACTURING CO.

Sale of goods—Sale of Goods Act—Warranty—Implied condition.

Action for breach of warranty of threshing machinery consisting of an engine, separator and several other articles sold by defendants under an agreement in writing containing the following among other clauses:—

"The said machinery is warranted to be made of good material, to be durable, and, with good care, to do good work if properly

operated by competent persons. This warranty does not apply to second-hand machinery. There are no other warranties, guarantees or agreements other than those contained herein."

Held, 1. As there was no complaint respecting anything but the separator, which was admitted to be "second-hand," there was no warranty under the agreement.

2. The agreement and the plaintiff's course in suing only for a breach of warranty excluded the operation of s. 16 of the Sale of Goods Act, R.S.M. 1902, c. 152, which would otherwise import "an implied condition that the goods shall be reasonably fit" for the particular purpose for which they are required.

3. *Quære*, whether the agreement did not in any case exclude the statutory implied condition.

Sawyer-Massey v. *Ritchie*, 13 W.L.R. 89, reversed in the Supreme Court, not yet reported, referred to.

Curran, K.C., for plaintiff. *G. F. Taylor*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] GOODACRE & SONS v. SIMPSON. [Dec. 21, 1910.

Statute of Limitations—Payment on account—Appropriation of fund—Promise sufficient to take debt out of statute.

A debt collector having accounts placed in his hands by both plaintiffs and defendant for collection, applied to the defendant for payment of his account, which was statute-barred. Defendant stated that plaintiffs would never press him for payment, but on the collector insisting, defendant instructed him to hand over to plaintiffs some of the money collected for defendant. The collector accordingly paid in $11.65.

Held, affirming the judgment of LAMPMAN, Co. J., at the trial, that from the instructions of defendant to the collector to pay to plaintiffs some of the moneys collected for him (defendant) could be inferred a promise to pay sufficient to take the debt out of the statute, and was not an appropriation of a particular fund.

H. E. B. Robertson, for defendant, appellant. *Aikman*, for plaintiffs, respondents.

Book Reviews.

Lawyers' Reports Annotated. New Series. Lawyers' Co-operative Society, Rochester, N.Y., U.S.A. 1910.

The 28th volume has been received, together with an index-digest bringing all the cases up to date. The excellence of this series is recognized both in United States and in Canada. We cannot do without United States reports and the selection of cases by the Editors of this series saves the profession the enormous, and one might say the impossible, labour of picking out authorities from the multitudinous reports in the various States of the Union. We cannot too highly recommend these volumes.

Flotsam and Jetsam.

The *British Medical Journal* had a good story last month of jurors and medical evidence. A leading citizen was had up for assault and battery. One of the witnesses was a local doctor, whom the prosecuting attorney proceeded to worry, suggesting that he was prejudiced in favour of the defendant, and had, therefore, wilfully distorted his evidence in his favour. The doctor denied this, and went on to say that the defendant was suffering from "phalacrosis." The word caused a sensation in the Court. Asked to define the disease, the doctor described it as "a sort of chronic disease of an inflammatory nature which affects certain cranial tissues." Asked if it affected the mind, the doctor said he was not posing as an expert, but he had known some persons who were suffering from the disease become raving maniacs, others merely foolish, some shewed destructive and pugilistic tendencies, while many others had suffered for years and had never shewn any mental abnormalities. He refused to say anything further, and the jury promptly acquitted the "leading citizen," because as the foreman explained, "the doctor said there was something the matter with his head." When the case was over the prosecutor sought enlightenment as to the mysterious disease, and found that "phalacrosis" meant "baldness"!—*Law Notes.*