Canada Law Journal.

VOL. XLIV. JUNE 15. NO 12.

FLOGGING.

Controversy has long existed as to whether the use of the lash as a punishment for, or deterrent from, crimes of a peculiarly brutal character, really answered the purpose for which it was intended. This mode of punishment was supported on the theory that the robber, for instance, who struck down his victim from behind, and beat him into insensibility that he might pick his pockets with impunity, or the brute who criminally assaulted a defenceless child were so thoroughly degraded that nothing but a sound flogging would appeal to their feelings. It is contended on the other hand that the degradation of the lash would only tend still further to degrade the criminal, and take from him whatever of human feeling he might still retain.

This view of the case was strongly and eloquently put by the present Premier of Great Britain, Mr. Asquith, also an eminent member of the English Bar, who speaking in the House of Commons in 1900 in opposition to Mr. Wharton's Corporal Punishment Bill said:—"I believe the majority of the English Bench, at present comprising some of the ablest and most experienced of our judges, have never in their lives awarded the sentence of the lash. As to reformation, has anyone ever yet been reformed by the punishment of the lash? I have never yet been able to discover any such evidence. Is it the wisest course for weaning men from brutality to commence the course of punishment by treatment which involves moral humiliation and physical torture? You may depend upon it with most of them there are latent but still present sparks of self-respect and an element of human dignity which, if carefully watched and tended, might in the course of time burn into a purifying glow, which would be in great danger of extinction by such measures as this Bill proposes. As to the deterrent effect of flogging, it is impossible to look upon a punishment as really deterrent if the question

whether it will be inflicted in any particular case is no more a certainty than a chance in a lottery. The majority of the judges never award this punishment at all."

In a debate in 1885, a similar view was held by such high authorities as Lord James, of Hereford, Sir Edward Clark, Lord Herschell, Lord Davey, and the Recorder of London and in 1900 the bill referred to was rejected by a majority of 123.

While our system of dealing with crime remains what it is it is idle to talk, as Mr. Asquith did, of possible reformation being prevented by the use of the lash. Self-respect and human dignity are not "carefully watched and tended" by the punishments commonly in use by our system of prison discipline any more than they would be by the punishment of the lash. A more reasonable view of the case would be to say that a nature of so low a type as that in question would not feel itself any further degraded by a flogging than it was before—the physical discomfort would be all that would be felt, and the pain of that would soon be over.

More important for us to consider is whether, as a deterrent from crime, the use of the lash has been effective. On this point it is strongly urged by the *Law Times* of April 12th, that such has not been the case—that robbery by violence has not been diminished in places where punishment by flogging has been freely resorted to. An instance is given at Liverpool where in 1882 there were fifty-six of such cases and in 1893 at the end of eleven years during which the judge had administered 1900 lashes the number of cases had risen to seventy-nine. Similar experience is recorded at Leeds.

In this connection the remarks of Lord Chancellor Herschell may be quoted:—"He strongly objected to the punishment of flogging for two reasons. The first was that it was perhaps above all other punishments an unequal punishment. They inflicted the same number of strokes upon two men, and the chances were that the man who deserved to feel the punishment most felt it by far the least. It was an extremely unequal punishment. And in the next place it was of all punishments the

most uncertain. They had to leave the punishment, as they must leave it, to the discretion of the judge. There were some judges who would always flog, there were some judges who would never flog. Whether the punishment was inflicted or not depended, not on the gravity of the offence, but upon the particular judge who might chance to go that particular circuit. He knew it was the prevailing opinion that the punishment acted as a great deterrent in cases of crimes of violence—that it put down garrotting. He invited anyone who entertained that belief to be good enough to peruse a return which was laid on the table of the House at his instance, because by that return it was shewn very clearly that garrotting had been put down before the Flogging Act was passed. If hon. members would read the return to which he alluded they would find that if a judge went assize and flogged a number of men for a particular offence the number of such offences at the next assize did not diminish."

We make these quotations, but it may be that there is evidence on the other side which has not come before us. The subject is an interesting and important one, as is everything connected with the administration of justice, and we should like to have some evidence as to the effect of the punishment where it has been applied in this country. We are far from having reached a method of dealing with criminals which commends itself to reason or humanity. How many criminals whom we punish have we made hardened criminals by our manner of dealing with first offenders? How many have we reformed, and how many have we given a chance of reforming themselves after the courts have done with them? These are questions which perhaps our legislators will deal with when they become weary of the interesting personal issues which now take up so much of their time and attention.

CRIMINAL APPEALS IN ENGLAND.

The Court of Criminal Appeal in England established under the Criminal Appeal Act, 1907, sat for the first time in the latter end of last month. As our readers will remember the

propriety of allowing appeals in criminal cases was fully discussed for some time before the Act was passed. It was strongly opposed by Lord Chief Justice Alverstone, whose views on the subject we published at length on a previous occasion (vol. 42, p. 582).

The first court was composed of the Lord Chief Justice, Mr. Justice Channell and Mr. Justice A. T. Lawrence. The *Law Times*, in referring to the matter in a recent issue, says: "From the way in which the cases that came before this court were dealt with, it is clear that, although the court intends to administer this new branch of our judicial procedure in the spirit which the legislature intended, at the same time it does not mean to open the door to those abuses which are so often to be found in some countries where criminal appeals exist."

It is well that the Chief Justice, holding the views he so forcibly expressed, was a member of the court at the beginning of its history, so that the dangers which he feared should as far as possible be minimized. The first list for disposal by the court consisted of seven applications, some of which were for leave to appeal and some were appeals. Of these seven cases, leave to appeal was given in one, and in two of them the convictions were quashed.

Our contemporary after referring to these cases and their treatment, concludes with the following pertinent observations: "To our mind, the first work of this tribunal amply justifies its existence, and it is undoubtedly better that cases of alleged miscarriage of justice should be investigated in open court rather than by the informal procedure of the Home Office, though, of course, the powers of the Crown exercised through the Home Secretary are in no way interfered with. We have very little doubt that there will be a considerable increase in the work of the Court of Criminal Appeal, and an increase in the number of judges of the King's Bench will become necessary; but, as we have stated, although the tribunal gives indication that it intends to administer loyally the new procedure, it does not intend to allow criminal appeal to become a by-word

in the country. Findings of juries on proper evidence are to be respected, and only when it is clearly shewn that there is a real miscarriage of justice will they be interfered with. Of course, time alone will shew whether the new court proves as successful as its supporters have stated it will be, but from the indications given by its first work we do not think that they will be disappointed."

JUVENILE DELINQUENTS ACT.

There is at present before the Dominion Senate a measure known as the Juvenile Delinquents Act, which provides machinery for the more complete separation of young persons under sixteen from the ordinary criminal procedure of the country. It aims at establishing detention homes apart from the jail, separate officials without uniform, and a separate court for children, so that anything that would tend to fasten the criminal stigma upon the child would be entirely removed. It is said that in the past many young people have been put into prison when more humane efforts would have resulted in their restoration to good society. Many boys receive their first lessons in crime in the jails and lock-ups, while awaiting trial, and are led by a certain spirit of bravado to regard a criminal career as heroic. The proposed measure desires to do away with such a tendency by bringing the lad under an educational system that would seek to touch his heart and influence him for a life of self-respecting citizenship.

An important feature of the bill is known as probation. Heretofore, a boy was either discharged, convicted and allowed out on suspended sentence, or sent to a reformatory. Under the proposed system he is placed under the oversight or guardianship of a probation officer, who, while attached to the court in an official capacity, is not a police officer, but is often a lady intimately associated with the city charities or missions. This probation officer immediately takes charge of the case without removing the child from its home; visits the parents, the school

or place of employment, and ascertains all about his companionships, and endeavours to influence for good all his friends and relatives, so that his energies may be directed along right and worthy lines, rather than in antagonism to law and order. This system has been tried in other countries, and in our own province of Ontario, for fifteen years past with great success. It claims to be the simplest and most effectual means of permanently ber..:ting the child, the family and the community.

We publish in another place a summary of the Act introduced last week in the British House of Commons by Mr. Gladstone, with the same aim in view as that now before our Dominion legislature, viz., the prevention of crime. These two bills mark a step, we trust in advance, in this most important subject.

PREVENTION OF CRIME.

The measure introduced last week into the House of Commons by Mr. Gladstone, which is described as a Bill to make better provision for the prevention of crime, and for that purpose to provide for the reformation of young offenders and the prolonged detention of habitual criminals, is a great advance in the rational treatment of crime, and is undoubtedly based upon sound principles.

Part I. of the Bill relates to the reformation of young offenders, and power is given to the court, where a person not less than sixteen nor more than twenty-one years of age is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal institution for a term of not less than one year nor more than three years. The court has to be satisfied also that by reason of his antecedents or mode of life it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime.

Where a court passes such a sentence, it is also to pass, as an alternative, such sentence of penal servitude or imprison-

ment as the court would otherwise have passed, and, if it appears to the Secretary of State, on the report of the Prison Commissioners, that, owing to the character, state of health, or mental condition of the offender, it is not advisable to send the offender to a Borstal institution, the Secretary of State may order that the offender undergo such alternative sentence, but, apart from such order, the sentence of detention in the institution shall take effect. All these provisions may be extended by the order of the Secretary of State to persons apparently under such age as may be specified in the order, and to persons summarily convicted of an indictable offence; but we do not quite see why this large extension of the provisions of the Bill should be left to the discretion of a Government department, and it is to be hoped that all offenders, whether convicted on indictment or summarily, who are apparently between the years of sixteen and twenty-one will be brought within its provisions. Power is to be given to the Secretary of State to transfer a person from prison to a Borstal institution, and, as a necessary corollary of the Bill, clause 3 provides for the establishment of Borstal institutions and for making regulations for their rule and management. Clause 4 gives power to the Prison Commissioners, subject to regulations by the Secretary of State, at any time after the expiration of six months from the commencement of the term of detention, if satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, by license to permit him to be discharged from the Borstal institution on condition that he be placed under the supervision or authority of any society or person named in the license who may be willing to take charge of the case. Where a person detained in a Borstal institution proves to be incorrigible, or to be exercising a bad influence on the other inmates, the Secretary of State may transfer such person to prison, and power is given to remove a person sentenced to detention from one part of the United Kingdom to another.

These are the chief provisions of the Bill with regard to the reformation of young offenders, and it will be seen that a strong

effort is made to separate them from the contaminating influence of prison, while, at the same time, the fullest opportunity will be afforded them, owing to the "license" provisions, of starting life afresh in a respectable way.

The detention of habitual criminals is the subject-matter of Part II. of the Bill, and power is given, where a person is convicted on indictment of a crime and subsequently the offender admits or is found by the jury to be an habitual criminal and the court passes a sentence of penal servitude, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, the court may pass a further sentence ordering that on the determination of the sentence of penal servitude the offender be detained during His Majesty's pleasure, such detention being called "preventive detention."

In order that a person be found an habitual criminal, the jury must be satisfied that he has been three times previously convicted of a crime, and that at the time when he committed the crime for which he is to be sentenced he was leading persistently a dishonest or criminal life. The word "crime," with reference to this subject-matter, is to mean any felony, coining offence, obtaining goods or money by false pretences, conspiracy to defraud, and any misdemeanour under section 58 of the Larceny Act, 1861. The accused person is only to be put on his trial as an habitual criminal after pleading guilty to, or conviction for, the crime with which he is charged, and a charge of being an habitual criminal is not to be inserted in an indictment without the consent of the Director of Public Prosecutions, and unless seven days' notice has been given that it is intended to insert such charge. It is also provided that a person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal.

Perhaps one of the most important clauses of this measure, and one that will require very careful consideration, is clause

11, which deals with the power to discharge on license persons sentenced to preventive detention, for naturally it is hoped that the changes brought about by the Bill may be reformatory as well as preventive, and, therefore, it will be necessary that ample scope should be afforded of considering the conduct, and progress of reformation if such occurs, of habitual criminals undergoing sentences of preventive detention. The Secretary of State, once at least in every three years, is to consider whether the person detained shall be released on license, and the directors of convict prisons are to report periodically to him on the conduct and industry of the persons detained, and for this purpose are to be assisted by a committee at each prison consisting of the governor and members of the board of visitors, such committee to hold meetings at least every six months. If the Secretary of State is satisfied that there is a reasonable probability that the person detained will abstain from crime and lead a useful and industrious life, or that he is no longer capable of engaging in crime, he may by license permit the person detained to be discharged from prison on probation and on condition that he be placed under the supervision or authority of any society or person named in the license. Clause 12 embodies the provisions as to persons so placed out on license, and, if this measure passes into law, it is clear that any relapse of an habitual criminal into a life of crime will result in a more or less permanent detention.

Everybody who has had any experience of crime and criminals will, we feel sure, cordially approve the principles of this measure. It aims to stop the criminal at his earliest stages, and to try to bring him back to an honest mode of living so that he may become a respectable citizen, while, at the same time, it is hoped to free society of those persons who are apparently beyond reclamation, although opportunity is to be given to them to hew that they desire to leave that course of life which they have mainly followed throughout their existence.—*Law Times.*

In reference to the recent legislation providing for the election of Benchers in Ontario it should be noted that the suggestion which emanated from this journal in 1901 was followed in 1906 by a motion introduced in Convocation by a Bencher of the Law Society of Upper Canada (Mr. H. H. Strathy, K.C.) to have the suggested change in the mode of election discussed by a Committee of the Bench. In consequence of the action of that Committee, subsequently endorsed by the unanimous vote of Convocation, the matter was brought by the Society to the notice of the Attorney-General. The Benchers are therefore entitled to the credit of bringing the matter to a practical issue, resulting in the much needed change being effected.

It would appear, to use a slang expression, appropriate to the wild and woolly west, that "there are not enough judges to go round" in the province of British Columbia. A protest was made at the opening of the Supreme Court in that province this month against the delays caused by the want of a sufficient number of judges. It is said that as a result many of the cases had to go over as a number of the appeals were from the decisions of judges then on the Bench; the other judges being absent on duty elsewhere. We scarcely appreciate, perhaps, that Canada is a country of magnificent distances, and that much time is lost, especially in our Pacific province, by the necessities of travel.

It is not quite clear from the report given in the daily press exactly the view held by the Minister of Justice as to the right of or discretion as to disallowance of Provincial Acts given to the Dominion Government by the British North America Act. The mere fact of a matter being within the purview of the provincial legislature is not surely a sufficient reason for not exercising the right should the case seem to require intervention. The subject is one of great importance and worthy of discussion.

REVIEW OF CURRENT ENGLISH CASES.

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PRACTICE—COSTS—SOLICITOR—TAXATION OF COSTS AFTER PAYMENT—THIRD PARTY LIABLE TO PAY—SPECIAL CIRCUMSTANCES.

In re Hirst (1908) 1 K.B. 982. A third party liable to pay a solicitor's bill of costs made application for taxation thereof after payment. The circumstances were as follows. A Miss Elsworth had begun an action against the executors of one Fox to recover moneys alleged to be due from his estate under a deed The action was compromised, the executors agreeing to pay the plaintiff's costs both of and prior to the action, out of the estate and the action was to be stayed. The plaintiff paid her solicitors their costs and claimed payment thereof out of the estate as agreed. The executors thereupon applied for taxation under the Solicitors Act as being third parties liable to pay. The Master refused the order, and his order was affirmed by Ridley; but the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) reversed his decision, and held that the order should be granted, and held that the "special circumstances" justifying taxation after payment, are not confined to pressure, overcharge or fraud, but include any circumstances of an exceptional nature which a judge in the exercise of a judicial discretion may consider will justify such taxation. In the present case before payment of the bill the solicitors for the executors had expressly required to have the costs taxed, but the plaintiff, without acceding to that request, had paid her solicitors' bill without taxation. The fact that it would be necessary for the taxing officer to construe the agreement for payment of the costs in order to determine what particular costs were payable thereunder was also held to be no obstacle to the granting of the order.

PRACTICE—ORDER—INTERLOCUTORY—FINAL.

In re Marchant (1908) 1 K.B. 998 may be briefly noted for the fact that the Court of Appeal (Williams and Farwell, L.JJ.) decided that an order made on a summary application to enforce a solicitor's undertaking, and whereby the solicitor was ordered to pay a sum of money, was a final and not a merely interlocutory order.

MAINTENANCE OF ACTION—COMMON INTEREST—TRADE RIVALS—PROTECTION OF CUSTOMERS—INDEMNITY.

In *British Cash & P.C.* v. *Lamson Store Co.* (1908) 1 K.B. 1006 the defendants were rivals of the plaintiffs in trade and had obtained contracts of hire for their goods from three of the plaintiffs' customers, and they agreed to indemnify these customers against any claims of the plaintiffs against them for breach of contract. Two of these customers were originally customers of the defendants and the third had given an order to the plaintiffs in the belief that he was dealing with the defendants. The plaintiffs sued each of the customers for breach of contract, and in two instances recovered damages and costs, which the defendants paid under their contract of indemnity. The plaintiffs then sued the defendants, claiming damages on the ground that they had been guilty of maintenance. Ridley, J., who tried the action, gave judgment in favour of the plaintiffs for nominal damages and awarded an injunction restraining the defendants "from unlawfully upholding or maintaining actions, suits or other legal proceedings between the plaintiffs and any other person or persons"; but on appeal to the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) the judgment of Ridley, J., was reversed and the action dismissed on the ground that the acts complained of did not amount to maintenance, and that on the contrary the defendants had a common interest with the customers in question. Cozens-Hardy, M.R., adopts the language of Lord Abinger in *Findon* v. *Parker*, 11 M. & W. 675: "The law of maintenance, as I understand it, upon the modern constructions is confined to cases where a man improperly, and for the purposes of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make." but that does not in his opinion preclude the making of contracts of indemnity in proper cases, even though it may involve and, indeed, contemplate the institution of an action against the person indemnified.

PRACTICE—DISCOVERY—SHIP'S PAPERS—FIRE INSURANCE.

In *Tannebaum* v. *Heath* (1908) 1 K.B. 1032 the plaintiffs sued on a policy of fire insurance to recover the value of goods. The policy covered loss in transitu by sea, but the loss had in fact taken place in a store on land. Bigham, J., assuming that the action was an ordinary policy of marine insurance made an order

for discovery of ship's papers, but this, on appeal, was set aside, the court holding that the discovery of ship's papers was peculiar to actions for losses at sea, and not to be extended to actions where, as in this case, the loss had taken place on land.

PRACTICE—SERVICE OF DEFENDANT OUT OF JURISDICTION—RULE 64 —(ONT. RULE 162 (a)).

The Hagen (1908) P. 189 deserves a passing notice. The action was in the Admiralty Division to recover damages against a German shipowner for a collision which took place in the Elbe. The plaintiffs' ship, which was British, when coming down the Elbe came into collision with another British ship, which in turn came into collision with a German ship. The agents of the plaintiffs' and the German ship exchanged letters of guarantee, but the owners of the German ship did not commence any action in Germany against the two British ships. The plaintiffs commenced the present action in personam against the owners of the other British ship and the owners of the German vessel and obtained leave to serve the latter out of the jurisdiction. The owners of the German vessel applied to discharge the order. Deane, J., refused the application, but the Court of Appeal (Lord Alverstone, C.J., and Farwell and Kennedy, L.JJ.) reversed his decision. The Court of Appeal admitted that the German owners were necessary or proper parties to the action and therefore primâ facie within the rule; but it appearing that an action by the German owners was pending when this application was made in a German court in respect of the collision, that it was not a proper exercise of discretion to allow them to be served as defendants in the present action.

COMPANY—DEBENTURE—FLOATING SECURITY—SUBSEQUENT ISSUE OF DEBENTURES—SPECIFIC CHARGE—PRIORITY—DEBENTURES RANKING PARI PASSU—ORDINARY COURSE OF BUSINESS.

Cox Moore v. *Peruvian Corporation* (1908) 1 Ch. 604. This was an action by a debenture holder of a company to restrain the company from issuing a further series of debentures in such a way as to give them priority over that held by the plaintiff. The company had very extensive powers, and was not, as Warrington, J., found, a strictly trading corporation. It had power to issue debentures to the amount of £6,000,000. It did issue debentures to the amount of £3,700,000. These debentures were

headed "first mortgage debenture," and by them the company purported to create a floating charge on all its property, but this was not to interfere (until default in payment of principal and interest and steps taken to enforce payment) with the company dealing with its property. By condition on the debenture it was stated to be "one of an issue of like debentures for the aggregate sum of £———, part of the said authorized issue of £6,000,000—the whole of which debentures of such authorized issue are intended to rank pari passu as a first charge on all the company's property," and the company reserved the right to issue the balance. There was also a condition providing for meetings of debenture holders and enabling them to consent to the issue of other securities to rank prior to, or pari passu with, the £6,000,000 of debentures. The company proposed to issue £2,000,000 more debentures, part of the £6,000,000, to be secured by a fixed and specific charge upon specific assets of the company without any floating charge. The proposal had not been submitted to any meeting of debenture holders. The plaintiff, who was a debenture holder of the £3,700,000 series, moved for an interim injunction to restrain the issue of the proposed debentures upon the security proposed as being an undue interference with his rights. Warrington, J., refused the motion, holding that the creation of a floating charge in favour of the first issue of debentures did not prevent the company from giving a specific charge on specific assets in favour of the debentures now sought to be issued. He [illegible] that the condition as to the meeting of debenture holders, etc., did not apply to issues of any part of the £6,000,000, but was a provision to enable the company with the consent of the debenture holders to increase the debenture debt over the £6,000,000.

FIXTURES—RIGHT OF REMOVAL—TAPESTRIES—GENERAL SCHEME OF DECORATION—DEVISE OF HOUSE—REQUEST OF CHATTELS.

In *Re Whaley, Whaley* v. *Roehrich* (1908) 1 Ch. 615 the question is again raised whether tapestries and a picture affixed to a wall of a dwelling house as part of the decoration of a room are to be regarded as chattels or as part of the freehold. The question, it may be remembered, was the subject of much litigation in the case of *Leigh* v. *Taylor* (1902) A.C. 157, where the House of Lords determined that in the circumstances of that case tapestries must be regarded as chattels. In the present instance a different conclusion has been reached. The circum-

stances of this case were that the tapestries and picture in question had been originally purchased by a testator as part of the house—they were kept in place by oak mouldings, and the picture (a portrait of Queen Elizabeth) painted on wood, was fixed to the wall over the mantel piece by the moulding of an over mantel. The testator devised the house to one person and his chattels to another, and each claimed the tapestries and picture. Neville, J., held that they were affixed to the freehold and passed with the house.

EASEMENT—PARTY WALL—DAMAGE BY SMOKE.

Jones v. *Pritchard* (1908) 1 Ch. 630. In this case the plaintiff and defendant each owned one-half of a party wall between their respective dwellings; on either side of this wall were fire places and chimney flues for their respective houses. By reason of the subsidence of the defendant's house, but for which it was not shewn that he was in any way responsible, the wall became defective and the smoke from the defendant's chimney found its way into the plaintiff's house and created damage, and thereupon the plaintiff brought the present action, claiming an injunction. Parker, J., who tried the action held that the plaintiff was not entitled to the relief claimed, and that the defendant was not liable for any nuisance occasioned by his using the party wall for the purposes intended and without negligence.

LANDLORD AND TENANT—FIXTURES—COVENANT TO DELIVER UP DEMISED PREMISES WITH FIXTURES—SURRENDER—CREATION OF NEW TENANCY.

In *Leschellas* v. *Woolf* (1908) 1 Ch. 641 several questions relating to the law of landlord and tenant are determined. In 1851 a lease of houses was made for the term of 70 years, it contained a covenant by the lessee at the expiration or determination of the term to deliver up the demised premises "with all and singular the fixtures and articles belonging thereto." In 1907 Abrahams was the lessee for the unexpired term, but the premises were then sub-let to Woolf, who used them as a lodging house. In June, 1907, Abrahams was notified to repair, and he then made an offer to surrender the premises at once and pay £100 towards the repairs, which offer was accepted by the lessor. Woolf, who had certain tenant's fixtures on the premises, was not a party to this agreement, but was aware of what was going

on, but the lessors did not know of his sub-tenancy until July, 1907. The lessors and Abrahams wished to get rid of the sub-tenancy, and early in August Abrahams gave Woolf notice to quit on August 19, and subsequently the lessors on the 7 August made an agreement in writing with Woolf whereby he became the weekly tenant of the lessors as from August 12, but there was no agreement as to Woolf's fixtures. On August 19 Abrahams executed a deed of surrender, but dated August 6 (so as to make the surrender precede the date of the agreement between the lessors and Woolf). On September 12, 1907, the lessors gave Woolf notice to quit on September 23. Woolf on quitting removed some of his trade fixtures and claimed to remove others, and the present action was brought by the lessors, claiming an injunction and damages. Parker, J., who tried the action, came to the conclusion that the defendant was precluded by what had taken place from removing the fixtures, that if not bound by Abrahams' agreement to surrender, yet his agreement of August 7 had the effect of surrendering his tenancy under Abrahams, and by accepting a new tenancy under the plaintiffs without making any stipulations for the removal of the fixtures he had lost his right to remove them.

LANDLORD AND TENANT—QUIET ENJOYMENT—DEROGATION FROM GRANT—IMPLIED CONTRACT—AGREEMENT "TO LET"—DISTURBANCE INDUCED BY LANDLORD.

Markham v. *Paget* (1908) 1 Ch. 697 was an action by a tenant against his landlord for breach of an implied covenant for quiet enjoyment. The demised premises consisted of a residence and grounds beneath which was a bed of coal, which was excepted and reserved. The landlord was equitable tenant for life of the premises and was also one of several trustees of the fee, including the minerals, which had been also leased to demising trustees, who had leased them to a company. This company covenanted to indemnify the lessors against damage caused by their working and to indemnify the lessors against actions in respect of damage arising from the exercise of their powers. The mining lease empowered the lessees to let down the surface, but there was a provision that in case serious damage by subsidence was reasonably anticipated, the company might, without paying for the same, leave sufficient coal, as might be agreed upon by the lessors, for support. Serious damage being anticipated to the residence leased to the plaintiff by working of the coal, the

defendant induced the "demising trustees" to refuse to agree to any coal being left for support. The coal was therefore worked, subsidence took place and the plaintiff's residence was damaged. The plaintiff claimed damages on the ground that the defendant by inducing the trustees to refuse their consent to leaving proper support had derogated from her grant, and also committed a breach of her covenant for quiet enjoyment which was implied by the word "let," and Eady, J., held that the plaintiff was entitled to succeed on both grounds. The defendant claimed relief over against the company by third party notice on their agreement to indemnify, but the court held that that agreement did not extend to liabilities created by the act of the defendant herself.

CHARITY—BEQUEST TO CHARITY ORGANIZATION—SOCIETY IN TRUST FOR "SUCH OTHER SOCIETY OF SOCIETIES AS SHALL IN THE OPINION OF THE GOVERNING BODY BE MOST IN NEED OF HELP"—EJUSDEM GENERIS.

In re Freeman, Shilton v. *Freeman* (1908) 1 Ch. 720. A testator had bequeathed the residue of his estate to the Charity Organization Society in trust to invest, and out of the annual income retain one-tenth for the purposes of that society, and divide and pay the residue "to such other society or societies as shall in the opinion of the governing body of the Charity Organization Society be most in need of help, besides fulfiling the standard of good management, efficiency and economy of such Charity Organization Society." The question for decision was whether the disposition of the nine-tenths of the income was a valid bequest to charity. The "ejusdem generis" rule was invoked in support of the bequest and it was contended that it was in effect a bequest to similar organizations to that of the Charity Organization Society itself, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) agreed with Joyce, J., that in the circumstances of this case the ejusdem generis rule was inapplicable and would not carry out the real intention of the testator, and that the bequest as to the nine-tenths was therefore void for uncertainty and passed to the next of kin.

INFANT — NECESSARIES — ACTUAL REQUIREMENTS — EVIDENCE — ONUS OF PROOF—SALE OF GOODS ACT, 1893—(56 & 57 VICT. C. 71), S. 2.

Nash v. *Inman* (1908) 2 K.B. 1 was an action brought by a tailor against an infant to recover £122 19s. 6d. for clothes fur-

nished to the defendant. The garments supplied included eleven fancy waistcoats at two guineas a piece. The father of the defendant proved that he was under age, that he was a student at Cambridge and had been supplied with a sufficient wardrobe. There was no evidence given to the contrary, and Ridley, J., who tried the action, held that there was no evidence to go to the jury and dismissed the action. The plaintiff moved for a new trial on the ground that the judge himself had decided the issues of fact himself and that he should have left them to the jury; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) affirmed the decision holding that under the Sale of Goods Act, s. 2, it is not only necessary to shew in such a case that the goods sold were necessaries, but that the infant actually required them. That section defines "necessaries" to mean goods suitable to the condition of life of the infant and to his actual requirements at the time of the sale and delivery, and this, as Moulton, L.J., points out, was the effect of the decisions prior to the Act of 1893, and the case would therefore appear to be good law in Ontario.

NUISANCE—CREOSOTE USED IN PAVING ROAD—INJURY TO VEGETATION FROM FUMES OF CREOSOTE—STATUTORY AUTHORITY.

West v. *Bristol Tramways Co.* (1908) 2 K.B. 14 was an action brought to recover damages for nuisance occasioned by the defendants using blocks coated with creosote for paving a roadway. The defendants were empowered by statute to pave the roadway with wooden blocks, but there was no express authority to use creosote. The blocks used by the defendants were steeped in creosote and the fumes therefrom injured the plaintiff's plants growing in his garden near the highway. Phillimore, J., who tried the action, gave judgment for the plaintiff, and the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Farwell, L.J.) affirmed his decision, holding that the case was within the principle laid down in *Fletcher* v. *Rylands* (1868) L.R. 3 H.L. 330, and that the statutory power to pave the road with wood gave the defendants no power to create a nuisance.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Exch.] THE KING v. ARMSTRONG. [May 5.

Negligence of fellow-servant—Operation of railway—Defective switch—Public work—Tort—Liability of Crown—Right of action—Exchequer Court Act, s. 16 (*c*)—*Lord Campbell's Act—Art.* 1056 *C.C.*

In consequence of a broken switch, at a siding on the Intercolonial Railway (a public work of Canada), failing to work properly although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. In an action to recover damages from the Crown, under article 1056 of the Civil Code of Lower Canada,

Held, affirming the judgment appealed from that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort; that the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (*c*), imposed liability upon the Crown in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages, and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards the Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller* v. *Grand Trunk Ry. Co.* (1906) A.C. 187, followed. Appeal dismissed with costs.

Newcombe, K.C., for appellant. *R. C. Smith*, K.C. and *W. G. Mitchell*, for respondent.

B.C.] MARKS v. MARKS. [May 5.

Will—Construction—Description of legatee—Devise "to my wife"—Bigamous marriage—Evidence—Burden of proof.

A devise made in a will "to my wife" was claimed by two women, with both of whom the testator had lived in the relationship of husband and wife.

Held, per IDINGTON, J.—That even if the first marriage was assumed to have been validly performed, all the surrounding circumstances shewed that, by the words "to my wife," the testator intended to indicate the woman with whom he was living, in that relationship, at the time of the execution of the will and thereafter up to the time of his death.

Held, per DUFF, J.—That the woman who claimed to have been first married to the testator had not sufficiently proved that fact, and that the other woman, who was living with the testator as his wife at the time of the execution of the will and up to the time of his death, was entitled to the devise.

Held, per DAVIES and MACLENNAN, JJ., dissenting.—That the first marriage was sufficiently proved and, consequently, that the devise went to the only person who was the legal wife of the testator.

FITZPATRICK, C.J., was of opinion that the appeal should be dismissed.

Judgment appealed from (13 B.C. 161) affirmed, DAVIES and MACLENNAN, JJ., dissenting. Appeal dismissed with costs.

Cassidy, K.C,. for appellant. *Travers Lewis*, K.C., for respondent.

Ont.] WABASH RY. CO. *v.* MCKAY. [May 5.

Railway—Collision—Stop at crossing—Statutory rule—Company's rule—Contributory negligence.

A train of the Wabash Railroad Co. and one of the Canadian Pacific Ry. Co. approaching a level crossing at obtuse angles. At each track was a distance semaphore between 800 and 900 feet from the crossing and on the C.P.R. track a "stop post" half way between said semaphore and the crossing, where a rule of the company required trains to stop. The Wabash train did not come to a "full stop" before reaching the crossing and the other did at the distance semaphore, but made no further stop at the "stop post." The trains collided at the crossing and the C.P.R. engineer was killed. In an action by his widow,

Held, that the failure of the engineer of the C.P.R. to stop the second time was not contributory negligence, and the Wabash Co. being admittedly guilty of negligence in not complying with the statutory rule (R.S. (1906) c. 37, s. 278), the widow was entitled to recover. Appeal dismissed with costs.

Rose, for appellants. *Robinette*, K.C. and *Godfrey*, for respondent.

N.S.] AINSLIE MINING CO. *v.* MCDOUGALL. [May 14.

Appeal—Alternative relief—Appeal for larger relief than granted.

The unsuccessful party at the trial of an action moved the court of last resort for the province for judgment or, in the alternative, a new trial, and obtained the latter relief.

Held, that he could not appeal to the Supreme Court of Canada from the order for a new trial with a view to obtaining a judgment in his favour. Appeal quashed without costs.

Mellish, K.C., for appellants. *Daniel McNeill,* for respondent.

N.S.] EAD *v.* THE KING. [May 18.

Appeal—Criminal law—Reserved case—Application "during trial."

By s. 1014 (3) of the Criminal Code, either party may "during the trial" of a prisoner on indictment apply to the court to have a question which has arisen reserved for the consideration of the Court of Appeal.

Held, that for the purposes of this provision the trial ends with the verdict after which no such application can be made. Appeal dismissed.

W. F. O'Connor, for appellant. *A. C. Morrison,* K.C., for respondent.

Province of Ontario.

SURROGATE COURT OF THE COUNTY OF YORK.

IN RE SHAMBROOK ESTATE.

Succession Duties Act—Insurance money—Aggregate value.

The deceased had an insurance on his life, the policy being made payable in his lifetime to his wife and the amount was after his death paid to her.

Held, that the amount so paid formed part of the aggregate value of the estate for the purpose affixing the amount of succession duty, although itself exempt from duty.

[TORONTO, June 2—Winchester, Surr. J.]

This was a matter of enquiry directed by the Provincial Treasurer under s. 8 of the Succession Duties Act, with reference to the value of the estate of the deceased.

Geary, K.C., for the solicitor for the Treasury. *Ballantyne*, for the widow. *Cavell*, for the brothers and sisters of deceased.

WINCHESTER, SURR. J.:—The real question in dispute is as to an insurance on the life of the deceased for $2,000, the policy being made payable in the deceased's lifetime to his wife, and the amount of which has since been paid to the widow.

It is claimed by the solicitor for the treasury that this sum should be added to the value of the estate in ascertaining the aggregate value of the estate, although exempt from duty under the statute, the sum being less than $5,000, as provided by s. 5, s.-s. 4, of the Act.

For the widow and the others interested in the estate it is claimed that it should not be so taken into account, that it never formed part of the estate, was not property of the deceased, and did not pass on the death of the deceased under the statute.

The sections of the statute involved in the contention of the parties are s. 3, s.-s. (a), (b), (g), (h); s. 4; s. 5, s.-s. 4; s. 6 (f) and s.-s. 2 (b).

Sec. 3 (b) interprets the word "property" as including the real and personal property of every description, and every estate and interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives. Sec. 3 (a), explains the meaning of the words "passing on the death." Sec. 6 (f) refers to the property that shall be subject to succession duty as being inter alia money received under a policy of insurance effected by any person on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or the part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit. And s.-s. 2 (b) of the same section provides as follows: "Any property within the meaning of clauses (b) to (h) inclusive shall for all purposes of this Act be deemed to pass on the death of deceased."

We have it therefore declared by these sections that money received under a policy of insurance (effected as in the present case) is to be deemed as passing on the death of the deceased, and liable to succession duty unless otherwise exempted.

Sec. 3 (g) provides that the words "aggregate value" mean the value of the property after the debts, encumbrances and other allowances authorized by s. 4 of this Act are deducted therefrom, and for the purpose of determining the aggregate value and the rate of duty payable, the value of property situ-

ated out of Ontario shall be included. No allowance as to insurance money is referred to in s. 4 of the Act so that the exemption provided by s. 5 is not to be deducted as directed by s. 3 (g).

Sec. 5, s.-s. 4, provides that no duty shall be leviable on any moneys received under a contract for insurance effected by any person on his life payable to any of the persons mentioned in s.-s. 3 of this section when the aggregate of such insurance or insurances does not exceed $5,000; but, as stated above, this is not to be considered as a deduction under s. 3 (g).

It was held by Falconbridge, C.J.K.B., and affirmed in appeal by the Court of Appeal, *Attorney-General* v. *Lee*, 9 O.L.R. 9, and 10 O.L.R. 79, that in ascertaining the aggregate value of property the amount of a mortgage against real estate could not be taken from the value of the property under the law as then existing, which provided that the aggregate value meant the value of the property before any debts or other allowances or exemptions were deducted therefrom. That Act has since been amended, and therefore that case is not at present applicable to the present state of the law: but it shews that although certain property would be exempt from the duty, yet it should be considered in ascertaining the aggregate value of the estate for the purpose of the Succession Duties Act. I refer to s. 3, s.-s. 2, and s. 3 of 1 Edw. VII. c. 8.

I am therefore of opinion that in ascertaining the aggregate value of the estate it is proper to include the moneys received under the insurance policy effected by the intestate as in this case, notwithstanding that the sum subsequently becomes exempt from duty.

It is, however, contended that insurance money is not "property" as defined by s. 3 (b) and that it cannot be considered as "passing on the death of the owner" under that section as the deceased could not be the owner of the insurance money under the provisions of the policy. If s. 3 (b) were the only enactment respecting insurance moneys I am inclined to think that this contention would be correct, but s. 6, s.-s. 2 (b) expressly provides that such moneys shall for all purposes of the Act be deemed to pass on the death of the deceased.

In *Attorney-General* v. *Robinson* (1901) Ir. Rep. 2 K.B. 67, it was held that moneys payable under policies of insurance were liable to estate duty under the English Finance Act of 1894, s. 2, s.-s. 1 (c), as property (deemed to pass) within the meaning of the section. The sections of the Finance Act of 1894 are somewhat similar to s. 6 (f), and s. 6, s.-s. 2 (b), of the Ontario Act.

Palles, C.B., in his judgment at p. 90, said: "Upon the whole,

then, I am of opinion that the true effect of clauses (c)—which is similar to the latter clause of s. 6 (f) of our Act—and (d)—which is similar to the first clause of s. 6 (f) of our Act—taken together in relation to money received under policies of insurance effected by the deceased on his own life, is that the policy moneys, although not vested in the deceased at his death, are liable under clause (c) to duty, if the policies have been wholly kept up by him for the benefit of another; and that part of such policy moneys if so liable where the policies are partially kept up by him for such benefit. This liability arises from the fact of the policies having been kept up by the deceased, and is independent of the existence of any obligation upon him to do so, or any arrangement between him and any other person."

I therefore hold that the "aggregate value" of the estate of the late George H. Shambrook is to include the $2,000 of insurance money paid to his widow. This will make the aggregate value of the estate after deducting the debts, encumbrances and other allowances authorized by s. 4 of the Act, exceed the sum of $10,000, and the estate will therefore be liable to succession duty subject to the provisions of s. 5 of the Act.

Since writing the above my attention has been called to the Insurance Act, R.S.O. 1897, c. 203, where it is provided by s. 159, inter alia, that insurance monies, such as those in question in this matter, do not form part of the estate of the assured. I hold, however, that the Insurance Act is governed by the provisions of the later—the Succession Duties Act.

COUNTY COURT OF THE COUNTY OF YORK.

Rex v. Ayer.

Liquor License Act—Defective information—Amendment.

At the trial before a police magistrate on Jan. 8, 1908, on an information for selling liquor on Dec. 3, 1907, to a person under the age of 21 years, it was objected that the information disclosed no offence. This was admitted and on application an amendment was allowed under s. 104 of the Liquor License Act,

Held, on appeal that s. 104 must be read with s. 95 and that no amendment could be made after 30 days from the commission of the offence.

[Toronto, June 8—Morgan, Jr. Co. J.]

The defendant was charged that on Dec. 3, 1907, he did unlawfully sell, give, procure or did unlawfully allow or permit

liquor to be given to or furnished to one Clark Graham, an infant under the age of 21 years, without the said Clark Graham producing a requisition from a medical practitioner that such liquor was required for medicinal purposes. The trial took place at Newmarket, before the police magistrate and an associate justice on Jan. 8, 1908. It was objected on behalf of the defendant that the information disclosed no offence, as the sale was under s. 78 of the Liquor License Act, must be to a person apparently or to the knowledge of the person selling or otherwise supplying the liquor under the age of 21 years. The prosecution then applied for an amendment of the information under s. 104 of the License Act, which provides that at any time before judgment the police magistrate may amend any information. An amendment was thereupon made, and after hearing evidence a conviction was made, and a fine of $10 and costs imposed. A similar case was tried in a similar manner against the same defendant for a sale to Thomas Hodgins with a similar result. From these convictions the defendant appealed to the judge of the County Court of the County of York.

Haverson, K.C., for the appellant, contended that the information as originally laid contained no offence, as the section did not forbid the sale to a person under the age of 21 years, but to a person apparently or to the knowledge of the person selling under that age: *Rex* v. *Boomer*, 15 O.L.R. 321; and that under s. 95 of the License Act all informations must be laid within 30 days after the commission of the offence and not afterwards. It was therefore too late on Jan. 8 to amend an information which did not disclose any offence.

Choppin, for the respondent submitted that the amendment could be made under s. 104.

MORGAN, JUNIOR CO. J.:—These are appeals to me against convictions under the Liquor License Act. The facts in each case are identical, and one judgment will suffice for both cases.

The defendant charged in each case, for that he did on the third day of December, 1907, at his licensed premises give, sell, or furnish liquor to Graham and Hodgins respectively, who at such time were alleged to be minors under the age of 21 years, and who did not furnish the defendant with a requisition in writing signed by a medical practitioner or justice of the peace that the liquor was required for medical purposes.

The trial under the respective informations did not come on until the 8th day of January, 1908, and at the trial objection was taken that the information did not disclose any offence under the provisions of the Liquor License Act.

The prosecution, conceding the soundness of the objection, asked leave to amend, and did amend the information by charging that the defendant on the third day of December did sell, give, furnish or allow or permit liquor to be furnished or given to the said Graham and Hodgins respectively—persons "apparently to the knowledge of defendant under the age of 21 years" —without furnishing the proper requisition of a medical practitioner.

It was objected that such amendment could not then be made, because it was practically charging a new offence, and that the time limit within which an information for the new offence so charged had expired. The amendment, however, was allowed by the justices, and defendant was convicted on both charges.

It is quite clear that at the time the information was amended the time limit had expired within which an information could have been laid for the offence charged was alleged to have taken place.

While it is quite clear that under the provisions of the Liquor License Act the information can be amended not only as to matter of form, but as to matter of substance, charging an absolutely new offence, as sought to be charged by the amendment, such amendment must be made within the time limited by the statute when an original information might have been laid charging the offence as sought to be charged by the amendment. If the time for laying such new information had not expired when the amendment was made, then the amendment might properly have been made, and defendant, if the facts were warranted, might have been convicted; and even when the amendment was made, if the scope of the amendment went only as to matter of form and detail in the information charging the same offence, but dealing with only matters of detail, then the amendment might have been made; but as the amendment charges an entirely new offence I am of opinion it could not at the time it was made be properly permitted, and no conviction could follow upon the amended information.

When the objection to the information was taken, if no amendment had been sought the prosecution should have been dismissed by the magistrates on the ground that no offence under the statute was charged. If at that time a new information

could have been laid because the date at which the offence charged in the amendment was within the time limit as provided by the statute, then the amendment might have been made. But because the effect of the amendment was in substance a new information alleging a new offence, and because the time limit had expired in which an information for such new offence could have been laid, then the amendment was improperly made, and the conviction under such amendment must fail.

The Legislature provided a time limit within which all prosecutions such as this under the Liquor License Act had to be commenced by the laying of informations, and it never could have contemplated, in the section of the Act giving leave for amendment by charging the new offence, that such new offence should be charged in an amendment after the time had expired when the substantive information could have been laid, and by such amendment destroy the protection which was given to the defendant by the clause in the statute putting the time limit upon the initiation of the prosecution.

The result of giving force to the amendment made at the time when it was made, namely, after the time limit for laying the original information had expired would be absolutely to nullify the protecting clause of the Liquor License Act and to take away from the accused that protection which the statute had deliberately thrown about him.

For these reasons I think that both convictions must be set aside with costs, which I fix at $10 in each case. In support of the view I have taken see *Rex* v. *Boomer*, 15 O.L.R. 321; *Rex* v. *Hawthorne*, 2 Can. Cr. Cas. 468.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] McINTYRE *v.* GIBSON. [May 6.

Garnishment—Garnishing order before judgment in action of tort.

The plaintiff's claim against the defendant was to recover damages suffered by reason of the defendants removing part of a fence enclosing the plaintiff's crops and thereby allowing cattle to enter and damage the crops. He claimed $600 damages.

This was an appeal from the order of DUBUC, C.J., setting aside an order of the referee, made on the application of the plaintiff before judgment, attaching money due to the defendant by a third party to answer the judgment of the plaintiff to be recovered. That order had been made under Rule 759 of the King's Bench Act, R.S.M. 1902, c. 40, upon an affidavit of plaintiff drawn up in accordance with that rule.

Held, that the words "claim or demand" used in that rule, being limited by the words "due and owing" do not extend to a claim in tort for unascertained damages, that the plaintiff must shew that he is a creditor, that a person whose claim is merely one for damages arising out of tort cannot be said to be a creditor and cannot, therefore, obtain a garnishing order before judgment. *Grant* v. *West*, 23 A.R. 533, followed. Appeal dismissed with costs.

Mackenzie, for plaintiff. *Burbidge*, for defendant.

Full Court.] HANNAH *v.* GRAHAM. [May 6.

Specific performance—Misrepresentation as to quality of land purchased—Caveat emptor—Fraud—Rescission of contract —Appeal from trial judge's findings of fact.

Appeal from judgment of MATHERS, J., noted ante, p. 287, dismissed with costs on the ground that, as the trial judge's findings both as to the alleged representations and as to their falsity were adverse to the defendant, the court could not properly interfere with them.

The majority of the court, however, expressed doubts as to whether they would have decided in the same way upon the evidence. On the legal point involved, the majority expressed no opinion, but PERDUE, J.A., expressly dissented from the trial judge's view and cited *Redgrave* v. *Hurd*, 20 Ch.D. 1, and *Smith* v. *Land, etc., Corporation*, 27 Ch.D. 7.

McLaws, for plaintiff. *O'Connor* and *Locke*, for defendant.

Full Court.] TRADERS BANK *v.* WRIGHT. [May 15.

Fraudulent conveyance—Injunction—Pleading—Evidence of fraud.

Appeal from decision of MACDONALD, J., granting an injunction restraining defendant Archibald Wright from making further transfers of his property and his co-defendant, his wife,

from transferring certain shares held by her under assignment from her husband, allowed with costs on the following grounds:

1. The statement of claim did not contain a distinct allegation that Archibald Wright was indebted to the plaintiffs, or any allegation that there was any indebtedness at the time of the transfer of any of the stock, except the Tuxedo Park Co. stock.

2. The only evidence that there was any fraud, or attempt at fraud, or conspiracy to get rid of his property, was the bare statement of Archibald Wright to the plaintiffs' Winnipeg manager, that he had no security to give when he was asked to give security for his liabilities to the plaintiffs, although at the time he first incurred the liability he had represented his financial strength at $316,000, consisting principally of shares in several joint stock companies, the subject matters of the alleged fraudulent conveyances, and such statement could be no evidence of fraud, or indeed evidence of any nature to bind his co-defendant.

3. The statement of claim did not allege that Archibald Wright, after parting with the assets in question, had not still enough other property to meet his liabilities.

4. Although the action purported, in the style of cause, to be brought on behalf of the plaintiffs and all other creditors of Wright, there was in the body of the statement of claim no allegation of the existence of other creditors. Injunction dissolved with costs of the motion and of the appeal.

Leave to amend within fourteen days.

Mulock, K.C., and *Loftus*, for plaintiffs. *Minty*, for defendants.

KING'S BENCH.

Macdonald, J.] [May 4.

BENNETTO *v.* CANADIAN PACIFIC RY. CO.

Railway company—Expropriation of land—Acceptance of amount offered by company.

Defendants, in exercise of their right to expropriate the plaintiff's land, served upon him in November, 1904, a notice offering $6,500 for it and naming an arbitrator in case of refusal. In June following, the plaintiff accepted the offer, no proceedings having been taken by the company in the meantime. This action, brought to recover the $6,500, was defended on the ground that, under s. 159 of the Railway Act, 1903, the plain-

tiff's acceptance of their offer should have been made within ten days, and that, in default, the only remedy he had was by arbitration as provided for by the Act.

Held, that such is not the effect of section 159, but only that, if the offer is not accepted within ten days, the company may proceed by way of arbitration, and that, as the company had taken no such proceedings before the acceptance, the plaintiff was entitled to recover.

O'Connor, and *Blackwood,* for plaintiff. *Curle,* for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] IN RE NARAIN SINGH. [April 29.

Constitutional law—B. N. A. Act, sec. 95—Immigration Act—Dominion and Provincial legislations—Conflict of jurisdiction.

This case was noted in respect of another matter, ante, p. 287. By s. 30 of the Dominion Immigration Act, Parliament has delegated to the Governor in Council the whole question of immigration, and that Act furnishes a complete code as to what classes of immigrants shall be admitted or excluded. The Provincial Act is inoperative in view of the Dominion legislation.

A. D. Taylor, K.C., for the Crown. *Brydone-Jack,* for the applicants.

Full Court.] FOSS *v.* HILL. [April 29.

Practice—Summons for directions—Order for directions also fixing place of trial—Subsequent application for change of venue—Order XXX, rr, 1, 2—Discretion.

On a summons for directions, the usual order was made, inter alia fixing the place of trial at New Westminister. There was nothing said as to venue, and no objection raised on this application. Subsequently, defendant applied to have the venue changed to Fernie on the grounds of convenience of witnesses, and the necessity for a view of the locus in quo. This application was refused.

Held, on appeal, CLEMENT, J., dissenting, that the omission of the solicitor's agent to keep open the question of venue until he was properly instructed should not in the circumstances be permitted to work an undue hardship on the defendant.

Davis, K.C., for plaintiffs, appellants. *Joseph Martin*, K.C., for defendant, respondent.

Full Court.] [April 29.

BRYCE *v.* CANADIAN PACIFIC RY. CO.

Shipping—Collision—Overtaking vessel, duty of—"Inevitable accident"—"Narrow channel."

Held, on appeal, reversing the finding of MARTIN, J., at the trial (IRVING, J., dissenting) (see ante, vol. 43, p. 589), that in this case the overtaking vessel was at fault.

Joseph Martin, K.C., and *Bowser*, K.C., for plaintiff, appellant. *Bodwell*, K.C., for defendants, respondents.

Full Court.] COURT OF CROWN CASES RESERVED. [April 29.

Criminal law—Charge to jury—Duty of judge to explain their legal powers—Inability to withdraw right to acquit—Jury may find lesser instead of graver offence.

In his charge to the jury in a criminal trial, it is not competent for the judge to withdraw from their consideration a verdict of any lesser offence which may be included in the indictment.

Maclean, K.C. (D. A.-G.) for the Crown. *Joseph Martin*, K.C., for the prisoner.

Martin, J.] McINNES *v.* B.C. ELECTRIC RY. CO. [May 21.

Practice—Discovery, examination for—Nature of under Rules.

The omission, in the new Rules of 1906, of the amendment of June, 1900, to the old Rule 703, has not changed the practice, and an examination for discovery is still in the nature of a cross-examination.

Bloomfield, for plaintiff. *Joseph Martin*, K.C., for defendant company.

Full Court.] [June 3.

GREEN *v.* WORLD PUBLISHING COMPANY.

Libel—Verdict of jury opposed to judge's charge—New trial—Separate allegations—One not justified.

Two substantive allegations of wrongdoing on the part of plaintiff as a minister of the Crown having been alleged, and there being no proof of the truth, and no justification for one, of such allegations, the jury, on direction in favour of the plaintiff, brought in a verdict for the defendant.

Held, on appeal (IRVING, J., dissenting), that there should be a new trial.

Charles Wilson, K.C., and *Burns,* for plaintiff, appellant. *Macdonell* and *Wintemute,* for defendant, respondent.

Flotsam and Jetsam.

In the case of *Spier* v. *Corll,* 33 Ohio St. 236, the statement of facts concludes as follows: "The plaintiff, by petition in error in the District Court, sought to reverse this judgment, on the ground of error in excluding the several exemplifications of record offered in evidence by him on the trial. And the three judges of the District Court, being equally divided in opinion, as it is certified, on the question of error or no error in said judgments, ordered the cause to be reserved for decision by the Supreme Court." We have been sitting up nights of late trying to figure out how those three judges could have been equally divided in opinion, but have not yet arrived at any satisfactory results.—*Law Notes.*

THE LIVING AGE, Boston, Mass.—Lovers of rare and dainty ware will find a peculiar charm in Mr. J. H. Yoxall's article "On a Platter at Montreuil," reprinted in *The Living Age* for June 13 from the *Cornhill.* No contemporary writer discourses more delightfully upon such topics than Mr. Yoxall. A striking feature for June 6 is a tribute to the late Henry Campbell-Bannerman by John Redmond, the leader of the Irish parliamentary party. The many lovers of Dickens will enjoy "Old Fleet's" study of Dickens's women characters, which is promised for June 20.