Canada Law Journal.

VOL. XLIV. AUGUST. NOS. 15 AND 16.

LIABILITY FOR MISREPRESENTATION.

The principle established by the case of *Collen* v. *Wright* (1857) 8 E. & B. 647, seems to be one of those developments of our mercantile law due to the exigencies of business. That every person assuming to act as the agent of another, should be held to impliedly warrant that he has the authority which he holds himself out to have, is only reasonable. Much of the business of the world is done through agents, the exact scope of whose authority it is often difficult for those dealing with them to ascertain; and business transactions would often be paralyzed, if there was a possibility that in bargains made with persons assuming to be agents for others, neither they nor their alleged principals would be bound. A person assuming to act as an agent may be reasonably supposed to know the nature and extent of his authority, and it is not imposing any undue liability on him, to hold that when he assumes to act as agent he also impliedly assumes a liability in damages to those who enter into transactions with him, on the faith that he is what he represents himself to be, in case that representation turns out to be untrue.

The principle is stated, by Mr. Justice Story in his commentaries on the Law of Agency, to be "a plain principle of justice; for every person so acting for another, by a natural, if not by a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement." Ch. X., s. 364. And it was considered by their Lordships of the Judicial Committee of the Privy Council that *Collen* v. *Wright* had settled the law upon the subject in conformity with the view of Mr. Justice Story.

In *Collen* v. *Wright* a person representing himself to be agent of another person made a lease in the name of his alleged principal. It afterwards turned out that he had no authority to make

the lease, and the intended lessee sued the person who assumed to be agent for damages, and it was held by the Exchequer Chamber that there was a contract on the part of the pretended agent that he had authority, on which contract (he having since died) his representatives were liable.

As the later cases put it, such a transaction amounts to a warranty on the part of the agent that he has the authority of his alleged principal to do the act which he assumes to do, and if in fact he has not, then he is responsible in damages to the person whom he induces to act on the faith that he has the authority which he represents himself to have. *Collen* v. *Wright* was followed in *Pow* v. *Davis*, 30 L.J.Q.B. 257, and in *Spedding* v. *Nevell*, L.R. 4 C.P. 223, where the facts were similar; and the principle of the case was applied by the Judicial Committee of the Privy Council in *Cherry* v. *Colonial Bank of Australia*, L.R. 3 P.C. 24. In that case two directors of a company notified the company's bankers by letter that the manager of the company had authority to draw cheques on account of the company. These two directors did not form a majority of the directors so as to bind the company. On the faith of the letter the bank honoured the manager's cheques, and the company's account was thereby overdrawn; and it was held by the Judicial Committee of the Privy Council that although the directors had no power to give the manager authority to draw cheques on the company's account, yet they were personally liable in damages to the bank, on the ground that they had impliedly warranted the authority of the manager.

The principle was further applied in the case of *Richardson* v. *Williamson*, L.R. 6 Q.B. 276. There the plaintiff lent £70 to a building society and received a receipt signed by two directors certifying that the plaintiff had deposited £70 with the society for three months, certain to be repaid with interest after fourteen days' notice. The society had no power to borrow money; but the receipt was held by the court to be a representation on the part of the directors that the society had power to borrow money, and rendered them personally liable in damages for

breach of an implied warranty on their part, that the society had power to borrow.

Very similar in its facts to *Cherry* v. *Colonial Bank* was *Weeks* v. *Propert*, L.R. 8 C.P. 437. There the defendant, a director of a company, was party to the issuing of an advertisement stating that the company was prepared to receive proposals for loans on the security of debenture mortgages. The plaintiff in response to the advertisement offered to lend £500, which was accepted, and a debenture therefor was issued to the plaintiff, which was subsequently declared by a court of law to be invalid, as being beyond the borrowing powers of the company. The advertisement was held to be an implied warranty that the company had the necessary borrowing powers, and that the debenture to be issued would be valid and binding on the company, which the defendant was personally bound to make good; and *Chapleo* v. *Brunswick Building Society*, 6 Q.B.D. 706, and *Fairbanks* v. *Humphreys*, 18 Q.B.D. 54, are decisions to the same effect. But where a company had power and were bound to issue the debentures contracted for, but did not do so, in such a case the directors were held to incur no personal liability for breach of warranty because the default was the company's: *Elkington* v. *Hunter* (1892), 2 Ch. 452.

In *Rashdall* v. *Ford*, L.R. 2 Eq. 750, the plaintiff being desirous of investing money in railway bonds applied to the secretary of a railway company, who wrote offering him a bond of the company for £1.500, and stated that the company were not yet in a position to issue permanent debentures, but that they expected to be able to do so in four or five months' time. The plaintiff advanced his money on the security of the bond offered to him: with the bond, which was signed by the secretary, was sent a prospectus shewing that the company had been incorporated and that three persons named were directors. The bond proved to be invalid; and the action was brought against the directors, but the bill contained no obligations of fraud, misrepresentation of fact, or misapplication of the money, nor was there any allegation that the directors knew anything about the transaction, and the secre-

tary was not a defendant. In these circumstances a demurrer to the bill for want of equity was allowed. But in giving judgment, Wood, V.C., made this observation: "Now, if there had been any misrepresentation of a matter of fact in this case, the result would have been undoubted; as, for example, if the company having power to issue debentures to a certain amount, and having exhausted that power, the directors had stated that they still had power to issue debentures, they would then have stood in the position of being obliged to make good their representation."

The representation of the secretary as to the validity of the bond the learned Vice-Chancellor regarded as a representation of a matter of law, and as to that he said: "It seems to me impossible to extend the principle of relief arising out of misrepresentation, to a statement of law which turns out to be an incorrect statement."

The cases of *Cherry* v. *Colonial Bank of Australia, Richardson* v. *Williamson, Chapleo* v. *Brunswick Building Society, Fairbanks* v. *Humphrey*, it will be noticed, were not misrepresentations of authority to act as agent, but misrepresentations of the powers of the admitted principal. It will thus be seen that the doctrine of *Collen* v. *Wright* is not confined to cases of misrepresentations of authority to act as agent.

An unsuccessful attempt was made in *Dickson* v. *Reuters Telegram Co.*, 2 C.P.D. 62; 3 C.P.D. 5, to extend the principle of *Collen* v. *Wright* so as to make a telegraph company liable for misdelivering a message to the plaintiff which he acted on to his damage, supposing it to be intended for him. It was contended that the defendant, by delivering the message to the plaintiff, had impliedly warranted that they had been employed to deliver the message to him. Bramwell, L.J., said: "The general rule of law is clear, that no action is maintainable for a mere statement, although untrue, and though acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. . . . *Collen* v. *Wright* establishes a separate and independent rule, which, without

using language rigorously accurate, may be thus stated: If a person requests, and by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself, and a transaction with a person whose authority he represents he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into a transaction." The case was also distinguished from *Collen* v. *Wright* because there was no contract induced by the defendants by the alleged misrepresentation; but it is doubtful whether that is a real ground of distinction.

Where the representations of directors, though erroneous, are made good by the company they represent, and the person dealing with them is not put to any loss by reason of such misrepresentation, no liability attaches to the directors. This may seem an almost self-evident proposition, but it was the point nevertheless carried to the Court of Appeal in *Beattie* v. *Ebury*, L.R. 7 Ch. 777. There three directors of a railway company opened, on behalf of the company, an account with a bank and sent a letter signed by the three requesting the bank to honour cheques signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such cheques, the bank sued the company and recovered judgment against it for the amount of the overdraft, and being unable to collect the amount by execution, the bank then sued the directors on the letter, as being a representation that they had power to overdraw the account; but the Court of Appeal held that this was not a representation of fact, but of law, and even if it were such a false representation as the directors were bound to make good, yet, the bank had no claim against them, since it had been able to enforce the same remedies against the company as if the representation had been true.

It was decided by Kekewich, J., in *Halbot* v. *Lens* (1901) 1 Ch. 344, that a person who contracts as agent on behalf of an alleged principal without authority is not liable on an implied warranty if the other contracting party knows at the time of the transaction that the agent is acting without authority; thus, if

the person assuming to act as agent, at the time of so doing expressly disclaims having any present authority he incurs no liability. In that case the defendant had signed a creditor's composition agreement on behalf of his own wife, and one Clarke, as creditors, both of whom afterwards repudiated his authority. At the time he signed he thought he had power to sign for his wife, but as to Clarke it was known to the plaintiff that he had no authority to act, but it was hoped that Clarke would ratify the agreement. While, therefore, the defendant was held bound by *Collen* v. *Wright* to make good the representation as to his wife, he was held not to be liable in respect of his assuming to act for Clarke. In this case Kekewich, J., points out that the supposed necessity of some wrong, or omission of duty on the part of the person assuming to act as agent in order to make him liable which, in *Smout* v. *Iberry*, 10 M. & W. 1, the Court thought to be an essential ingredient, must be taken to have been negatived by the latter decision of *Collen* v. *Wright*.

The principle of *Collen* v. *Wright* has sometimes been supposed to be confined to cases of misrepresentations of agency: but it is obvious that the principle on which a person is held liable to make good such representations applies equally to any other representations of fact which one person makes to another as an inducement to that person to alter his position. The misrepresentation of agency is the misrepresentation of a fact, and other facts may also be misrepresented as an inducement to others to do or refrain from doing something to their damage, for which the person making the representation appears to be liable.

A mere misrepresentation, innocently made, does not involve the person making it in liability for deceit to a person who acts upon it to his damage, as was determined by the House of Lords in *Peak* v. *Derry* (1889) 14 App. Cas. 337; but when the representation of any fact is made by a person to another in a matter of business, on the faith of which it is known and intended the person to whom it is made, shall or will act, and he thereby incurs a loss or liability, which but for such misrepresentation he would not have incurred, there seems no good reason why the

person making the representation should not be personally liable for the damage so occasioned. It was said by the Court of Appeal in *Oliver* v. *The Bank of England* (1902) 1 Ch. 610, that the rule established by *Collen* v. *Wright* is unaffected by *Peak* v. *Derry*; and it was there held that *Collen* v. *Wright* applies to any case when a person professing to have authority as agent, induces another to act in a matter of business on the faith of his having that authority, but it is questionable if it does not go farther, as has been already pointed out. Some of the cases already referred to shew that the case has been held to apply to misrepresentations of other facts, than that of authority to act as agent. Neither does it seem necessary in order to found liability, that the person to whom the misrepresentation is made should thereby be induced to enter into any contract, as seems to have been assumed in *Dickson* v. *Reuters Telegram Co.*, supra; on the contrary it seems enough that the person to whom the misrepresentation is made is thereby induced to alter his position, or give up some right, or give, or do, something amounting to a valuable consideration, as the known and intended result of such misrepresentation. See the observations of Williams, L.J., in *Oliver* v. *Bank of England,* supra; (1901) 1 Ch. 682; (1902) 1 Ch. 611. S. C., sub nom *Sharkey* v. *Bank of England* (1903) A.C. 114. In that case Sharkey & Co., stockbrokers, presented to the Bank of England a power of attorney authorizing them to transfer consols. The brokers believed at the time that the power was genuine, but it turned out to be a forgery, and it was held by the House of Lords that the brokers must be taken to have warranted the genuineness of the power under which they claimed to act, and were liable to make good to the bank the loss it had sustained by improperly permitting a transfer pursuant to the power.

In *Bank of England* v. *Cutler,* 98 L.T. 336; (1908) 2 K.B. 108, a woman was introduced to a stockbroker as the holder of India stock, which she desired to transfer, and the stockbroker attended with the woman at the transfer department of the Bank of England where she made a transfer in the books of the stock

standing in the name of a person whom she was in fact personating. The stockbroker identified her to the bank authority as being the holder of the stock. Here it will be seen it was not a misrepresentation as to agency, but a misrepresentation of another fact, namely, the identity of the person claiming to make the transfer with the true owner, and it was held by the Court of Appeal that the broker was liable to make good to the bank the value of the stock so transferred, on it subsequently being discovered that the person identified was not really the owner. In this case an attempt to escape liability on the ground that the defendant had merely acted as a witness failed. The decision in this case is based on *Barclay* v. *Sheffield* (1905) A.C. 392; 93 L.T. 83, which again was based on *Sharkey* v. *Bank of England*, supra, which was based on *Collen* v. *Wright*; here, too, it may be remarked, no contract was made by the bank acting on the representation; but it did something whereby it suffered loss on the faith of it, which the person making the representation was held bound to make good.

In *Collen* v. *Wright* Willes, J., said: "The fact of entering into the transaction with the professed agent as such, is good consideration for the promise," a remark which was afterwards cited with approval by Lord Davy in *Sheffield* v. *Barclay*, supra; so in the *Cutler* case the bank's acting on the representation of the broker that the person identified was the true owner, would seem to be a good consideration for the implied warranty that the representation was true.

In view of *Cherry* v. *The Colonial Bank of Australia*, supra, and the *Bank of England* v. *Cutler*, supra, it may perhaps be reasonably doubted whether *White* v. *Sage*, 19 Ont. App. 135, was correctly decided. In that case the defendant introduced to the plaintiff a stranger having a cheque purported to be signed by one George Rice, the stranger desired to get the cheque cashed, and the defendant assured the plaintiff that it was "all right," and on the faith of that representation the plaintiff cashed the cheque, which proved to be a forgery. The jury found, as a fact, that the defendant had not fraudulently represented the cheque

to be all right, but he made the representation without knowing it to be true or false. On this state of facts the Court of Appeal considered, and so held, that the defendant was not liable, conceiving the case to be one of innocent misrepresentation covered by *Peak* v. *Derry*. But it may be noticed that the representation was made for the express purpose of inducing the plaintiff to cash the cheque, and his doing so, it would seem, was a valuable consideration for an implied warranty on the part of the defendant that his representation was true.

There are no doubt passages in the reasons given for the decision in *Peak* v. *Derry* which conflict with this view, but it is questionable whether they have not been modified by the later cases above referred to. While it would undoubtedly be hard to make a man responsible in damages to persons acting on representations innocently made, which turn out to be false, where they are made without any express object of inducing the course of action which results in damage, still the case is very different where the representation is made for the express purpose of inducing the course of action which results in damage to the person relying on it. At the same time it must be confessed the line would in many cases be hard to draw between cases where liability should attach and where it should not. For instance, if a man tells another he may safely walk over a bridge which he knows to be unsafe, and the person acts on his representation and is injured, the person making the representation would seem to be liable, but if not knowing whether it is safe or not, he says it is safe and it proves to be unsafe, then that might be said to be a mere expression of opinion for the correctness of which he would not be held liable. But can a man who positively affirms that a cheque is "all right," for the purpose of inducing another to cash it, be considered as merely expressing an opinion? He is positively affirming a fact to be true, as an inducement to a course of action, and in such a case it seems not unreasonable to hold that he warrants the truth of the statement.

In *Le Lievre* v. *Gould* (1893) 1 Q.B. 491, Lindley, L.J., refers to this conflict of opinion and considers that it has been

finally and definitely settled by *Peak* v. *Derry* that an action for misrepresentation will not lie except where it is made fraudulently; but it may well be doubted whether in view of *Cherry* v. *The Colonial Bank of Australia*, *Sharkey* v. *Bank of England*, *Barclay* v. *Sheffield*, and *Bank of England* v. *Cutler*, supra, and *Bank of Ottawa* v. *Harty*, hereafter referred to, that point can now be said to be so conclusively settled as he assumed.

The question of the measure of damages for which an assumed agent in such circumstances is liable on a breach of his implied warranty was discussed in the case of *In re National Coffee Palace Co.*, 24 Ch. D. 367. There a broker had by mistake subscribed for shares on behalf of a customer in one company instead of another, which had been named by the customer. The shares were allotted to the customer, who repudiated them, and they had in fact no marketable value. The broker was, nevertheless, held liable for the par value of the shares subscribed, it being held that the measure of damage was what the company would have gained had the contract been carried out.

This was followed in *Meek* v. *Wendt*, 21 Q.B.D. 126. In that case the plaintiff had a claim against an insurance company, and the defendants, the agents of the company in England, believing in good faith that they had the power, entered into an agreement with the plaintiff whereby on behalf of the company they agreed to pay £300 in settlement of his claim. The company having repudiated the settlement, it was held by Charles, J., that the measure of damages was the £300, and not merely the expenses to which the plaintiff had been put by entering into the negotiation.

In *Hughes* v. *Graeme*, 33 L.J.Q.B. 336, the defendant, who was agent of the plaintiffs, also assumed as agent of certain other persons to sell certain goods to the plaintiffs. The defendant's authority to sell was repudiated, and it was held that he was liable to the plaintiffs for all the damages which they had sustained by breach of the contract. This included the costs of an unsuccessful action to enforce the contract, and the difference between the price contracted to be paid and the value of the

goods, taking into account all mercantile circumstances affecting the value, e.g., in this case, the fact that the goods might have been exported free of duty to America.

In the recent case of *Salvesen* v. *Oscar*, 92 L.T. 575, (1905) A.C. 302, however, it was held that the plaintiff is not entitled to recover prospective profits, but merely the loss actually sustained. Where a person assuming to be agent for another orders work to be done, and says that he will see the person doing the work paid, that does not amount to a representation of authority to act as agent, but is a mere contract to answer for the debt of another, and is void if not in writing, as is exemplified by the case of *Mountstephen* v. *Lakeman*, L.R. 7 Q.B. 196.

On the grounds of public policy the principle laid down in *Collen* v. *Wright* is held not to be applicable to public functionaries acting for the Crown. Therefore, where the plaintiff alleged that the defendant, a public functionary, had misrepresented that he had power to engage the plaintiff as a servant of the Crown for three years, and the plaintiff after entering the employment, had been dismissed before the three years were up, it was held that the doctrine of implied warranty of authority is not applicable to a public servant. *Dunn* v. *Macdonald* (1896) 1 Q.B. 401.

The case of *Collen* v. *Wright* was recently considered in Ontario in *The Bank of Ottawa* v. *Harty*, 12 O.L.R. 218, the facts of which were somewhat peculiar. One McEwan being in possession of a cheque drawn by the Lake Superior Corporation on the Morton Trust Co., of New York, handed it to Harty to collect. Harty delivered it to the Bank of Ottawa, having McEwan's indorsement. He signed his name on the back but "without recourse." The cheque was sent to New York for collection and was paid on presentation, and the amount remitted to the Bank of Ottawa, who paid it over to Harty, who in turn paid it to McEwan, less a small sum which McEwan owed him. The New York company subsequently discovered that the indorsement made by McEwan was made without authority, and they called on the Bank of Ottawa to refund, which they did.

The bank then claimed to recover the amount from Harty on an implied warranty that the indorsement was genuine. It was not proved at the trial that the indorsement was a forgery, or that McEwan had in fact no authority to indorse it, but it did appear that McEwan had been indicted for forging the indorsement, and had been acquitted. Boyd, C., in these circumstances thought the plaintiffs could not recover, but the Divisional Court ordered a new trial on the question of forgery, holding that in case the indorsement were in fact forged the defendant would be liable. This case seems to be opposed to *White* v. *Sage*, supra.

GEO. S. HOLMESTED.

NOTE.—The subject of the foregoing article has been recently before the Supreme Court of Canada: see supra, pp. 491-2.—Ed. C.L.J.

The Government Service of Canada has recently sustained a distinct loss in the death of Mr. F. A. McCord, Law Clerk of the House of Commons and Parliamentary Counsel to the Government. Mr. McCord was an LL.B. of Laval University, and a member of the Quebec Bar: he did not, however, practice, but immediately entered the public service, in which he continued for twenty-four years, until his death. He was recognized as a man of extensive general knowledge, with a special aptitude for the important and technical work required of a parliamentary draftsman. He was particularly well informed upon the constitutional history of Canada, being also a writer to some extent upon this subject. It is but a short time since we had occasion to give unstinted praise to his index to the Revised Statutes, a subject requiring special qualifications, and but rarely found. Cut off suddenly, in the midst of a useful life, he has left an enviable record.

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—SUBSTITUTIONARY GIFT—WORDS OF FUTURITY—CHILD DEAD AT DATE OF WILL.

In re Cope, Cross v. *Cross* (1908) 2 Ch. 1. In this case a testator gave his residuary estate in trust for all his children who attained 21 in equal shares "provided always that if any child of mine *shall die* in my lifetime having a child or children who shall survive and being a son or sons shall attain 21 years, or being a daughter, or daughters, shall attain that age, or marry under that age, then, and in every such case, the last mentioned child or children shall take, (and if more than one, equally between them), the share which his, her or their parent *would have taken* . . . if such parent had survived me (subject, nevertheless, to the proviso hereinafter contained) provided always that if any child of mine shall die in the lifetime of my wife, having a husband or wife who shall survive her or him, then I declare that on the decease of my said wife, the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine." At the date of the will two of the testator's children were dead leaving a wife and children, and husband and child respectively surviving them, and the question was whether these children and the surviving wife and husband were entitled to the benefit of the above provisos. Eady, J., thought that they were; but the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) differed from him, and held that the will must be construed according to its grammatical meaning, and that according to that meaning it was plain that the words "shall die" were referrable to a death after the date of the will, and could not be extended to include those who had died previously to its date; neither the children nor the husband and wife of the testator's children who were dead at the date of the will therefore took any benefit under the provisos. See *In re Lambert*, infra.

MORTGAGE—POWER OF SALE—NOTICE REQUIRING PAYMENT—DEFAULT FOR THREE MONTHS—CONVEYANCING AND LAW OF PROPERTY ACT 1881 (44-45 VICT. C. 41) SS. 19, 20—(R.S.O. C. 121, SS. 20, 22.)

In *Barker* v. *Illingworth* (1908) 2 Ch. 20, after a mortgage

was in default a notice of exercising the power of sale was served under the provisions of 44-45 Vict. c. 41, ss. 19, 20, (see R.S.O. c. 121, ss. 20, 22), and it was contended on behalf of the plaintiff, the mortgagor, that the power could not be exercised until three months had elapsed from the time fixed for payment by the notice, but Eady, J., held that it was exercisable at any time after default in payment according to the notice, and the plaintiff's motion to restrain the sale was accordingly dismissed.

PRACTICE—FLOATING SECURITY—DEBENTURE HOLDER—SECURITY NOT IN DEFAULT WHEN ACTION COMMENCED — DEFAULT AFTER ACTION—RECEIVER.

In re Carshalton Park (1908) 2 Ch. 62. In this case one Turnell, being a debenture holder of a company, and as such having a floating security over all the company's assets, before his debenture was in default, commenced his action against the company, and moved for the appointment of a receiver and manager, his debenture not being in default at the time of the motion, the application was refused. A month afterwards the time for payment arrived and the plaintiff's debenture was not paid and he gave notice of another motion for the appointment of a receiver and manager, and on the same day Graham, another debenture holder whose debenture was overdue and unpaid, commenced a similar action and also gave notice of motion for the appointment of a receiver. The motions came on to be heard together, and Graham contended that the order should be made on his application because at the time Turnell issued his writ his debenture was not in default, and he had no cause of action; but Warrington, J., held that although the court might not be able to grant a receiver in favour of a plaintiff whose security was not in default, still a plaintiff having a floating security had for the purpose of "crystallising his security" a right of action, even before default, and that on a default taking place, even pendente lite, a receiver might properly be appointed, and he accordingly made the appointment on Turnell's application.

ADMINISTRATION—WILL—GIFT OF SHARE OF RESIDUE TO DEBTOR OF TESTATOR WHOSE DEBT IS NOT DUE—RIGHT OF EXECUTOR TO RETAIN LEGACY TO ANSWER FUTURE ACCRUING DEBT.

In re Abrahams, Abrahams v. *Abrahams* (1908) 2 Ch. 69 deals with a point of some interest. A testator gave a share of

his residue to a person who was his debtor, but the debt was payable by instalments, some of which were not due, and the question Warrington, J., was called on to decide was, whether the executor could properly retain out of the legatee's share of the residue a sum sufficient to answer the future accruing instalments of the debt due by the legatee to the testator. This question the learned judge answers in the negative.

TENANT FOR LIFE—REMAINDERMAN—TRUST FOR SALE OF REALTY —POSTPONEMENT OF SALE—RENTS AND PROFITS.

In re Oliver, Wilson v. *Oliver* (1908) 2 Ch. 74, Warrington, J., holds that when real and personal estate is given on trust for sale and the proceeds are to be held in trust for a person for life and then for others, and the sale without any impropriety is postponed, the tenant for life is, until the sale, entitled to the rents and profits of the realty.

WILL—SPECIFIC LEGACY—SHARES IN BANK—MISDESCRIPTION OF SUBJECT OF LEGACY—EXTRINSIC EVIDENCE.

In re Jameson, King v. *Winn* (1908) 2 Ch. 111. In this case a testatrix by her will, made in 1902, bequeathed to two legatees "all my shares in the Wensleydale and Swaledale Bank." At the date of the will and at the date of her death she had no such shares. In 1899 she held 25 such shares, but the Wensleydale and Swaledale Bank was then taken over and amalgamated with Barclay & Co., Limited, and the testatrix received in exchange for her shares in the Wensleydale and Swaledale Bank 25 shares in Barclay & Co., Limited, which she held at the date of her will and at the time of her death, and had no other bank shares. In these circumstances, Eve, J., held that the 25 shares of Barclay & Co. passed to the legatees of the Wensleydale and Swaledale bank shares.

WILL—CONSTRUCTION—WORDS OF FUTURITY—SUBSTITUTIONAL GIFT—GIFT TO CHILDREN OF NEPHEW "IN CASE NEPHEW SHALL DIE IN MY LIFETIME"—NEPHEW DEAD AT DATE OF WILL.

In re Lambert, Corns v. *Harrison* (1908) 2 Ch. 117. This case involves a very similar point to that discussed *In re Cope, Cross* v. *Cross*, supra. Here a testatrix gave the residue of her estate in trust for all my nephews and nieces who shall be living at my death, to be equally divided between them. Provided

always that if any nephew or niece of mine shall die in my lifetime having a child or children who shall survive me . . . such child or children shall take the share which his or her parent would have taken . . . if such persons had survived me." Eve, J., came to the same conclusion as did Eady, J., *In re Cope*, that the child of a nephew who survived the testatrix but whose parent was dead at the date of the will, was entitled to share in the residue. This decision appears to have been given on 2nd April last, but before the decision of the Court of Appeal, *In re Cope*, and it would therefore seem that the conclusion of Eve, J., was erroneous.

PATENT—SALE OF PATENT—PART OF PURCHASE MONEY TO BE PAID IN ROYALTIES—ASSIGNMENT BY PURCHASER—VENDOR'S LIEN —COSTS, AS AGAINST DEFENDING AND NON-DEFENDING DEFENDANTS.

Dansk Rekylriffel, etc. v. *Snell* (1908) 2 Ch. 127 was an action by the vendor of a patent against the purchaser and his assignees to recover part of the consideration. The defendant, Snell, purchased the patent from the plaintiff for £5,000 cash and the payment of certain royalties, it being agreed that the minimum royalties should be a specific sum per annum, the royalties being payable half yearly. The patents were assigned to Snell absolutely, and Snell subsequently sold his interest in them to the defendants with notice of the arrangement with the plaintiffs. The defendant company paid to the plaintiffs part of the minimum royalties agreed to be paid, and thereafter Snell wrote to the plaintiffs repudiating the agreement, whereupon the plaintiffs commenced the action against the defendant company and Snell claiming as against Snell the full amount of minimum royalties as damages for breach of the agreement, and as against the defendant company a lien on the patents for the unpaid minimum royalties. The defendant company contended that the effect of the plaintiffs' action was to put an end to the contract, and therefore they were not entitled to a vendor's lien, but Neville, J., declined to accede to that argument and held that the plaintiff was entitled as against the defendant company to a lien on the patents for the unpaid royalties, and as against the defendant Snell to damages for breach of the agreement. Snell did not defend, and judgment was obtained against him on motion, the company defended and the action was carried to

trial as against it; and in disposing of the costs, Neville, J., directed that the taxing officer should distinguish between the costs attributable to the defendants jointly and those attributable to each separately, and that the defendants should respectively pay the costs as so certified. This is a departure from the ordinary rule. Usually it is considered that where the wrongful act of the defendants occasioned the action they should all pay the plaintiffs' costs of obtaining redress.

WEIGHTS AND MEASURES—VEHICLE CARRYING COAL—PERSON IN CHARGE OF VEHICLE—LIABILITY OF CARTER FOR SHORT WEIGHT.

Paul v. *Hargreaves* (1908) 2 K.B. 289. By the Weights and Measures Act, 1889, it is provided that "If it appears to a court of summary jurisdiction that any load, sack, or less quantity (of coal) so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding £5." The defendant was in charge of a vehicle from which coal of less weight than that represented by his employer was being delivered to the purchaser, but he was merely a carter and there was no evidence that he had any knowledge that the weight was less than that represented. On a case stated the Divisional Court (Lord Alverstone, C.J. and Ridley, and Darling, JJ.) held that the defendant was not liable and that in order to constitute an offence on his part that it was essential that it should be established that he had a guilty knowledge.

SHIPPING—GENERAL AVERAGE—DAMAGE TO CARGO FROM UNLOADING IN ORDER TO REPAIR SHIP.

In *Hamel* v. *Peninsular & Oriental Navigation Co.* (1908) 2 K.B. 298 the plaintiff's cargo which was being carried on the defendants' vessel was unloaded for the purpose of enabling damage to the vessel, arising from the ordinary perils of navigation, to be repaired. In the process of unloading the cargo which had never been in peril, suffered damage, and the question in the action was whether the plaintiff was entitled to general average contribution from the ship owners and Lord Alverstone, C.J., who tried the action held that he was not and dismissed the action.

DEFAMATION—LIBEL—DEFENCE OF FAIR COMMENT—MISDIRECTION—NEW TRIAL.

Hunt v. *Star Newspaper Co.* (1908) 2 K.B. 309 was an action for libel in which the defendants set up a defence of justification and fair comment. The alleged libel imputed to the plaintiff misconduct in the discharge of his duties as a deputy returning officer at a municipal election. Lawrence, J., tried the action, and the jury found a verdict for the plaintiff for £800. The defendants moved for a new trial in the ground that the learned judge misdirected the jury by telling them that it was for the jury to decide whether it was a bonâ fide and fair comment, or whether it was comment which tended to charge the plaintiff with improper conduct: and also by telling them that if they came to the conclusion that the words complained of were libels and were such as would have a tendency to prejudice the plaintiff in his position, they must return a verdict for him. The Court of Appeal (Cozens-Hardy, M.R. and Moulton, and Buckley, L.JJ.) considered the objections to the charge well founded and granted a new trial as it was apparent that the defence of fair comment as a separate issue had not been properly left to the jury.

SUBPOENA DUCES TECUM—SEALED PACKET—DEPOSIT IN BANK—OBLIGATION OF BANKER TO PRODUCE SEALED PACKET DEPOSITED WITH HIM.

The King v. *Daye* (1908) 2.K.B. 333. In this case, for the purpose of extradition proceedings, a subpœna duces tecum was issued and served on a bank with which a certain sealed packet alleged to contain a chemical formula for the manufacture of diamonds had been deposited by the alleged criminal, upon the terms that it was not to be delivered up without the consent of the depositor and a third person. The bank's representative objected in these circumstances to producing the packet under the subpœna duces tecum and raised the question whether a sealed packet such as that in question could be said to be "a document." On a motion to commit the bank's representative for disobedience to the subpœna it was held by the Divisional Court [(Lord Alverstone, C.J., and Ridley and Darling, JJ.)] that the packet was a document, and as such producible under the subpœna, and that the circumstances of the deposit did not afford any excuse for its non-production, and the attachment was granted, but ordered to lie in the office for a month.

PROHIBITION—INFERIOR COURT—ALTERNATIVE MODES OF PROOF—UNDERTAKING TO RELY ONLY ON PROOF OF CAUSE ARISING WITHIN JURISDICTION.

Josolyne v. *Roberts* (1908) 2 K.B. 349 was an application for a prohibition to the Mayor's Court. The action was brought on a promissory note which was payable at an address within the city of London. Neither plaintiff nor defendant resided in the city, nor did any part of the cause of action arise there, except that the presentment at the address named was, unless waived, necessary to render the defendant liable. On the plaintiff undertaking not to rely on a waiver of presentment, the motion was refused by Channell and Sutton, JJ.

SAVAGE DOG—KEEPING A KNOWN VICIOUS ANIMAL—SERVANT CAUSING DOG TO BITE—LIABILITY OF MASTER—REMOTENESS OF DAMAGE.

Baker v. *Snell* (1908) 2 K.B. 352 was an action brought to recover damages for injury sustained through the bite of the defendant's dog. The dog was known to be vicious and was entrusted to the custody of the defendant's man servant, whose duty it was to let the dog out early in the morning and then chain it up again before the defendant and his maid servants came downstairs. On the occasion in question the man servant brought the dog into the kitchen where the plaintiff, a maid servant, was, and said: "I will bet the dog will not bite any one in the room." He then let the dog loose and said: "Go it Bob," and the dog flew at the plaintiff and bit her. It had previously bitten the plaintiff and other persons to the defendant's knowledge. The County Court judge who tried the action held that the act of the man servant was an assault, for which the defendant, his master, was not liable, and dismissed the action; but the Divisional Court (Channell and Sutton, JJ.) came to the conclusion that the act of the man servant was not intentionally malicious, in which case the master would not have been liable, but was a foolish and wanton act done in neglect of his duty to keep the dog safe, for which the defendant, his master, was responsible; but that this was a question of fact which ought to be left to a jury, and a new trial was therefore ordered.

SHIP—BILL OF LADING—CONSTRUCTION—"PORT INACCESSIBLE BY ICE"—EJUSDEM GENERIS—"ERROR IN JUDGMENT" OF MASTER.

In *Tillmann's* v. *Knutsford* (1908) 2 K.B. 385 the Court of

Appeal (Williams, Farwell and Kennedy, L.JJ.) has affirmed the judgment of Channell, J. (1908) 1 K.B. 185, noted ante, p. 226. An additional point to those noted there seems to have been raised on the appeal, viz., as to whether the owners were liable on bills of lading signed by the time charterers "for captain and owners." Farwell and Kennedy, L.JJ., held that they were, but Williams, L.J. was doubtful.

SOLICITOR—BILL OF COSTS—FORM OF BILL OF COSTS—SOLICITORS' ACT 1843 (6-7 VICT. C. 73) S. 37—(R.S.O. C. 174, S. 34.)

In *Cobbett* v. *Wood* (1908) 2 K.B. 419 the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) has reversed the decision of Pickford, J. (1908) 1 K.B. 590 (noted ante, p. 277) on the ground that the bill of costs should have included not only the extra costs claimed but also the items of the bill taxed and allowed between party and party, and that consequently there had been no proper delivery of a bill on which the action could be brought.

LIFE INSURANCE—STATEMENT AGREED TO BE BASIS OF CONTRACT—NON-DISCLOSURE OF MATERIAL FACTS—ABSENCE OF FRAUDULENT INTENT—AVOIDANCE OF POLICY.

Joel v. *Law Union, etc., Ins. Co.* (1908) 2 K.B. 431. This was an action on a policy of insurance on the life of one Robina Morrison. On the application for the insurance the insured signed a declaration that the statements made in her application were true and were to form the basis of the contract. Subsequently, but before execution of the policy, she was interrogated on behalf of the company (1) as to whether she had ever suffered from mental derangement, and (2) as to the names of any doctors she had consulted. She answered the first question in the negative, as the jury found, without fraud, and in answering the second she omitted to disclose the name of a doctor whom she had consulted for nervous depression, but as the jury found she not fraudulently but foolishly concealed the fact. At the same time she signed a further declaration that her answers were true, but this declaration did not state that her answers were to form part of the basis of the contract. The policy did not refer to the proposal or the second declaration. The assured subsequently committed suicide. She had, prior to the application for insurance, suffered from acute mania, but the jury found she was ignorant of the fact, and they also found

that the name of the doctor she had consulted was material for the defendants to know, but that the insured was not aware that it was material. In these circumstances Lord Alverstone, C.J., held that the plaintiff could not recover, and that although the defendants were not entitled to rely on the answers made to the question on the second occasion, by the insured, as forming part of the basis of the contract, yet that the defendants were entitled to revoke the policy on the ground that as to the question of mental derangement the insured had innocently misrepresented a material fact, and in not disclosing the name of the doctor consulted by her, she had innocently concealed a material fact, and that the defendants were entitled to revoke the policy even after the death of the insured, because the knowledge of the misrepresentation and concealment of material facts did not reach them till after the death, and the defendants submitting to repay the premiums received, he ordered the policy to be delivered up to be cancelled.

SETTLEMENT—ESTATE TAIL—DISENTAILING DEED—PROTECTOR—THREE PROTECTORS APPOINTED BY SETTLOR—RIGHT OF SURVIVING PROTECTOR TO ACT—FINES AND RECOVERIES ACT 1833 (3-4 WM. IV. c. 74) ss. 22, 32—(R.S.O. c. 122, s. 20).

Cohen v. *Bailey-Worthington* (1908) A.C. 97 was known in the court below as *Re Bailey-Worthington & Cohen*. The question involved in it was whether the assent of a sole survivor of three protectors of a settlement was sufficient to give effect to a disentailing deed. The Court of Appeal (1908) 1 Ch. 25 (noted ante, p. 144) held that it was, and the House of Lords (Lord Loreburn, L.C. and Lords Macnaghten, Robertson, Atkinson and Collins) have affirmed that decision.

SHIP—CHARTER-PARTY—LAY DAYS—EXCEPTION OF SUNDAYS AND HOLIDAYS—LOADING DONE ON HOLIDAYS—IMPLIED AGREEMENT—DESPATCH MONEY—DAYS SAVED.

In *Nelson* v. *Nelson* (1908) A.C. 108 the House of Lords (Lord Loreburn, L.C. and Lords Halsbury, Macnaghten and Atkinson) have been unable to agree with the Court of Appeal (1907) 2 K.B. 705 (noted ante, vol. 43, p. 774). The action was to recover despatch money for time saved in loading a ship. The charter-party provided that "seven weather working days (Sundays and holidays excepted)" should be allowed by the

ship owners to the charterers for loading and for each clear day saved in loading the charterers were to be paid or allowed £20. The loading was continued during two holidays and the question was whether these two days were to be accounted as "days saved." The Court below held that they were not (Moulton, L.J., dissenting), but the House of Lords held that in the absence of any evidence of any agreement to the contrary, under the charter-party the holidays on which work was done must be considered as "days saved" for which despatch money was payable.

SHIP—CHARTER BY DEMISE—"OWNER"—LIMITATION OF LIABILITY—MERCHANT SHIPPING ACT 1894 (57-58 VICT. C. 60) SS. 503, 504.

Jackson v. *SS. "Blanche"* (1908) A.C. 126 may be briefly noticed. The question was whether charterers to whom a ship is demised are owners and as such entitled to the benefit of the limitation of liability prescribed by s. 503 of the Merchants Shipping Act 1894. Deane, J., held that they were not; but the House of Lords reversed his decision.

CHEQUE—FORGED INDORSEMENT—PAYEE—FICTITIOUS PAYEE—BELIEF OF DRAWER—BILLS OF EXCHANGE ACT 1882 (45-46 VICT. C. 61) S. 7(3)—(R.S.C. C. 119, S. 21(5).)

In *North & South Wales Bank* v. *Macbeth* (1908) A.C. 137 the House of Lords (Lord Loreburn, L.C., and Lords Robertson and Collins) have affirmed the judgment of the Court of Appeal (1908) 1 K.B. 13 (noted ante, p. 195). This it may be remembered was the case where the plaintiff was induced by one White to give him a cheque payable to one Kerr for the alleged purchase of shares. Kerr was an existing individual, but the proposed purchase of shares was really a fraudulent representation of White, who forged Kerr's indorsement of the cheque and succeeded in stealing the money. The defendant bank endeavoured to get over the difficulty by setting up that Kerr was in the circumstances a fictitious payee, and the cheque was, therefore, under the Bills of Exchange Act, payable to bearer, but the defence failed below and had no better success in the House of Lords.

MARINE INSURANCE—CONSTRUCTIVE TOTAL LOSS—POLICY ON SHIP —VALUE OF WRECK—COST OF REPAIR.

Macbeth v. *Maritime Insurance Co.* (1908) A.C. 141 is an important decision on the question what is the proper test for ascertaining whether a loss under a policy of marine insurance is to be deemed a constructive total loss; because the House of Lords (Lord Loreburn, L.C. and Lords Robertson and Collins) have overruled the decision of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Co.* (1903) 1 K.B. 811. In this case the policy provided that the insured value £12,000 was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel was driven on to rocks, and notice of abandonment given, and the insured claimed to recover as for a constructive total loss. It was found by Walton, J., who tried the action that the cost of repair would be £11,000 and that the value of the wreck was £3,000. The insured claimed to add the value of the wreck to the estimated cost of repairs for the purpose of ascertaining whether the loss was a constructive total loss and the House of Lords held that he was entitled to do this. Lord Loreburn, however, says the real test is whether a prudent uninsured owner would repair having regard to all the circumstances. We presume the reason why the value of the wreck should be added to the cost of repair, is this, though it is not very clearly stated in the report, viz., that in order to ascertain the cost of the repaired vessel, you must take into account what the value of the vessel is before the repairs are made, and then adding that to the cost of repairs you find that for £14,000, you have obtained a vessel which is only worth £12,000 and therefore from the prudent man's standpoint to repair a vessel in such circumstances would not be expedient or reasonable.

PRACTICE—SPECIAL LEAVE TO APPEAL TO KING IN COUNCIL—LEGISLATION REMOVING GROUND OF APPEAL AS TO FUTURE CASES.

In *Commissioners of Taxation* v. *Baxter* (1908) A.C. 214 an application was made for special leave to appeal from a decision of the High Court of Australia on the ground that that court had refused to follow a previous decision of His Majesty in Council to the effect that the Australian States had no power to impose income tax on salaries paid to federal officials. Before the application was heard a statute had been

passed expressly giving such power to the States and the point in controversy could not arise again, and, as the amount in question was trifling, leave was refused.

TWO CONTEMPORANEOUS WILLS—ELECTION—TESTATOR'S WIDOW ELECTING TO TAKE AGAINST ONE WILL, CANNOT CLAIM UNDER THE OTHER.

Douglas-Menzies v. *Umphelby* (1908) A.C. 224 was an appeal from the Supreme Court of New South Wales. A summary application was made to that court to determine the rights of parties under two separate wills made by a testator concerning respectively his estates in Scotland and Australia and which wills together formed one scheme for the distribution of his estate. The widow elected to take against the will dealing with the Scotch estates, but claimed the benefit of the provisions made for her benefit by the will dealing with the testator's Australian property. The New South Wales court decided she could do this, but the Judicial Committee of the Privy Council (Lord Macnaghten, Robertson, Atkinson and Collins and Sir A. Wilson) held that the two instruments formed one will, and that the widow having elected to defeat the will in part could claim no interest under the Australian will. Their Lordships also held that the appellant, who was a beneficiary under the Scottish will only, had a good locus standi to maintain the appeal, being interested in protecting the Australian estate in order to compensate those who had been deprived of benefits under the will by the widow's election.

REGISTRATION OF TITLE—WRONGFUL REGISTRATION—REMAINDERMAN—MEASURE OF DAMAGES.

Spencer v. *Registrar of Titles* (1908) A.C. 235 was an action to recover compensation against the Assurance Fund under the West Australian Torrens Act for damages sustained by the plaintiff through the wrongful registration of the title to certain land in 1875 at which time the plaintiff was entitled thereto in remainder. The plaintiff's estate fell into possession in 1903 and the question was whether the measure of damages was the value of the land and building as they existed in 1875 or in 1903. The Australian Court held that the measure of damages was the value of the land exclusive of any buildings erected thereon after 1875, but the Judicial Committee (Lords Macnaghten, Robertson, Atkinson and Collins, and Sir A. Wilson)

considered this erroneous, and held that the plaintiff was entitled to the value of the land plus the value of any buildings existing thereon in 1903 when the plaintiff's right of action accrued.

SPECIAL LEAVE TO APPEAL IN CRIMINAL CASE.

In *Tshingumuzi* v. *Attorney-General of Natal* (1908) A.C. 248 special leave to appeal to His Majesty in Council in a criminal case in which there was a conflict of evidence, and as to the effect of which there was a difference of opinion in the court below, was refused. The Judicial Committee of the Privy Council being of the opinion that there had been no violation of any principle of natural justice, and that no grave or substantial injustice had been done.

TRIAL BY JURY—EVIDENCE FAIRLY SUBMITTED—SETTING ASIDE VERDICT—NEW TRIAL—SPECIAL LEAVE TO CROSS APPEAL NUNC PRO TUNC.

Toronto Railway Co. v. *King* (1908) A.C. 260 was an appeal from the Ontario Court of Appeal. The action was brought under Lord Campbell's Act for the recovery of damages for the death of a driver of a wagon killed while endeavouring to cross the track of the Toronto Street Railway, by collision with a motor car of the defendants. The evidence was fairly submitted to the jury and a verdict rendered for the plaintiffs for $3,000 and $1,500 respectively. The case was carried to the Court of Appeal and all the members of that Court came to the conclusion that the evidence did not warrant a verdict for the plaintiff, two of the learned judges thought the verdict should be set aside and the action dismissed, but the other three held that there should be a new trial. From this order the defendants appealed claiming that the action should have been dismissed. Pending the appeal the respondents obtained leave to a cross appeal nunc pro tunc also from the order and to restore the judgment at the trial. The Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) were of the opinion that there was no conflict in the evidence which had been fairly submitted to the jury, and that the dissent of the judges of the Court of Appeal from the inferences apparently drawn by the jury from the evidence was not a proper groun for setting aside the verdict, the order of the Court of Appeal was therefore rescinded and the judgment at the trial restored.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Man.] FRASER *v.* DOUGLAS. [June 9.

Married woman—Separate property—Debts of husband—Execution—Registration under "Real Property Act"—Married Women's Act—Conveyance during coverture.

Where land was transferred, as a gift, to a married woman by her husband, during the time that the "Married Women's Property Act," R.S.M. (1891) c. 95, was in force, the husband being then solvent, and a certificate of title therefor issued in her name under the provisions of the Manitoba "Real Property Act" the beneficial as well as the legal interest in the land vested in her for her separate use, and neither the land nor its proceeds can be taken in execution for the debts of the husband subsequently incurred, notwithstanding the provisions of the second section of the "Married Women's Property Act" respecting property received by a married woman from her husband during coverture.

Appeal dismissed with costs.

T. Mayne Daly, K.C., and *J. Travers Lewis*, K.C., for appellant. *Pitblado*, for respondent.

Man.] DOMINION BANK *v.* UNION BANK. [June 9.

Banks and banking — Forged cheques — Negligence — Responsibility of drawee—Payment by mistake—Principal and agent —Change of position—Laches.

A cheque for $6, drawn on the Union Bank was fraudulently altered by changing the date and the name of the payee, and by raising the amount to $1,000. The drawee refused payment for want of identification of the person presenting it. The defendant bank, without requiring identification, advanced $25 in

cash to the forger on the cheque, placed the balance to his credit in a deposit account, indorsed it and received the full amount of $1,000 from the drawee. After receipt of this amount the Dominion Bank paid the further sum of $800 to the forger out of the amount so placed to his credit. The fraud was discovered a few days later and, on its refusal to refund the money, an action was brought to recover it back from the Dominion Bank as indorser or as having received money paid under mistake of fact.

Held, that the drawee of the cheque, although obliged to know the signature of its customer, was not under a similar obligation as to the writing in the body of the cheque; that, as the receiving bank had dealt with the drawee as a principal and not merely as the agent for the collection of the cheque and had obtained payment thereof as indorser and holder in due course it was liable to the drawee which had, through the negligence of the receiving bank, been deceived in respect to the genuineness of the body of the cheque, and that the drawee was entitled to recover back the money which it had thus paid under mistake of fact notwithstanding that, after such payment, the position of the defendant had been changed by paying over part of the money to the forger.

Judgment appealed from (17 Man. R. 68) affirmed, IDINGTON, J., dissenting.

Appeal dismissed with costs.

Shepley, K.C., and *D. H. Laird*, for appellant. *Ewart*, K.C., for respondent.

Que.] HÉBERT *v.* LA BANQUE NATIONALE. [June 16.

Bills and notes — Material alteration — Forgery — Partnership mandate—Assent of parties—Liability of indorser—Construction of statute—Bills of Exchange Act.

R. induced H. to become a party to and indorser of a demand note for the purpose of raising funds and agreed to give warehouse receipts as security to the bank on discounting the note. It was arranged that the goods covered by the warehouse receipts were to be held and sold on joint account, each sharing equally in the profits or losses of the transaction. Subsequently, R. altered the note, without the knowledge or consent of H., by adding thereto the words "avec interet a sept par cent. par an," and falsely represented to the bank that H. held the warehouse receipts as collateral security for his indorsement. A couple of months later

H., for the first time, became aware that the goods had never been purchased or placed in warehouse, that no warehouse receipt had been assigned to the bank and did not until some months later know that the alteration had been made in the note. There was some evidence that H. had asked for time to make a settlement of the amount due to the bank upon the note after he had become aware of the fraud and the alteration so made.

Held, by IDINGTON, MACLENNAN and DUFF, JJ., that the instrument was a forgery and could not be ratified by an ex post facto assent. *The Merchants Bank* v. *Lucas*, 18 Can. S.C.R. 704; Cam. Cas. 275, and *Brook* v. *Hook*, L.R. 6 Ex. 89, followed.

Per IDINGTON, J.:—The circumstances of the case did not shew that there had been any assent to the alteration within the meaning of s. 145 of the "Bills of Exchange Act."

Per MACLENNAN, J.:—The assent required to bring an altered bill within the exception provided by section 145 of the "Bills of Exchange Act," R.S.C. (1905), c. 119, must be given by the party sought to be bound at the time of or before the making of the alteration.

Held, also, the Chief Justice and DAVIES, J., contra, that, in the special circumstances of the case, there was no partnership relation between the parties to the note for the purposes of the transaction in question and there could be no implied authorization for the making of the alteration in the note.

Per FITZPATRICK, C.J.:—The transaction in question was a joint venture or particular partnership for the enterprise in contemplation of the parties and, consequently, R. had a mandate to make whatever agreement was necessary with the bank to obtain the funds and to provide for the payment of interest on the advances required to carry out the business.

Appeal allowed with costs.

Bisaillon, K.C., and *A. Geoffrion*, K.C., for appellant. *Laurendeau*, K.C., for respondent.

Ex. C.] [June 16.

BOW MCLACHLAN & CO. *v.* THE "CAMOSUN."

Admiralty law—Jurisdiction of the Exchequer Court of Canada—Claim under mortgage on ship—Action in rem—Pleading—Abatement of contract price—Defects in construction—Damages.

In an action in rem by the builders of a ship to enforce a mortgage thereon given to them on account of the contract price

for its construction, the owners, for whom the ship was built, may plead as a defence pro tanto that the ship was not constructed according to specifications and claim an abatement of the price, in consequence of such default, and that the loss in value of the ship, at the time of delivery, attributable to such default, should be deducted from the claim under the mortgage.

Appeal dismissed with costs.

R. Cassidy, K.C., for appellants. *Chrysler*, K.C., for respondents.

Ex. C.] THE KING *v.* LEFRANCOIS. [June 16.

Government railway—Operation over other lines—Agreement for running rights—Extensions and branches—"Public work"—Construction of statute—54 & 55 Vict. c. 50, s. 67(D.)—Exchequer Court Act, 50 & 51 *Vict. c.* 16, *s.* 16(*c*); *R.S.C.* 1906, *c.* 140, *s.* 20(*c*).

The agreement between the Government of Canada and The Grand Trunk Railway Company, made under the provisions of the Dominion statute, 43 Vict. c. 8, giving the Government running rights and power over a portion of the Grand Trunk Railway, from Levis to Chaudière, between two sections of the Intercolonial Railway, constitutes that portion of the Grand Trunk Railway a part of the International Railway, under the provisions of the 67th section of the Act, 54 & 55 Vict. c. 50(D.), and, consequently, a public work within the meaning of the "Exchequer Court Act," 50 & 51 Vict. c. 16, s. 16(*c*), now R.S.C., 1906, c. 140, s. 20(*c*).

Appeal dismissed with costs.

Newcombe, K.C., for appellant. *Lane*, K.C., for respondent.

Ont.] GREER *v.* FAULKNER. [June 16.

Damages—Trespass—Cutting timber—Sale to bonâ fide purchaser—Action by owner of land—Amendment.

F. conveyed land to his wife not knowing that timber thereon had been wrongfully cut and sold to G. It was afterwards found that G., who bought it in good faith, had sold the timber to another bonâ fide purchaser and an action was brought by F.'s wife against the latter and G. The purchase money having been paid into court an interpleader issue was granted to decide whether the plaintiff or G. was entitled to it.

Held, affirming the decision of the Court of Appeal (16 Ont. L.R. 123), which reversed the judgment of the Divisional Court (14 Ont. L.R. 360), DUFF, J., expressing no opinion, that the plaintiff was entitled to the whole of the purchase money without deduction for expense of cutting and transportation.

Held, also, IDINGTON, J., hesitante, and DUFF, J., dissenting, that if necessary the writ and interpleader order could be amended by adding F. as a co-plaintiff with his wife.

Appeal dismissed with costs.

W. H. Blake, K.C., and *Anglin*, K.C., for appellants. *Shepley*, K.C., and *C. A. Moss*, for respondents.

Oct.] THOMPSON *v.* ONTARIO SEWER PIPE CO. [June 16.

Negligence—Proximate cause—Finding of jury—Evidence.

T., an engineer, was scalded by steam escaping when the front of a valve was blown out by pressure. In an action for damages against his employers the jury found that the defendants were negligent in running the engine on an improper bed; that they not furnished proper appliances and kept them in proper condition for the work T. was to do, the engine, bed and room all being in bad condition; and that the valve was not defective.

Held, that in the absence of a finding that the negligence imputed to the defendants was the proximate cause of the injury to T. and of evidence to support such a finding the action must fail.

Appeal dismissed with costs.

Robert McKay, for appellant. *Hellmuth*, K.C., and *Greer*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [June 19.

PETERBOROUGH HYDRAULIC POWER CO. *v.* MCALLISTER.

Banks and banking—Right of bank to carry on business—Assignment of lease—Obligation to pay rent.

In 1905, the defendants, a firm carrying on a milling busi-

ness, being heavily indebted to a bank, and unable to make payment, a settlement was effected, an agreement being entered into between them and the bank, which was executed by them, and by the local manager of the bank on its behalf, whereby, after reciting the indebtedness, and that the bank held, as part security therefor, a lien, under the Bank Act, on the firm's goods and merchandise; and that it had an assignment of the book debts, as well as of a policy of insurance on the life of one of the partners—the firm paid $10,000 to the bank, and surrendered to it all its assets, the bank, in consideration thereof, assuming the payment of the firm's liabilities, as set out in a memorandum attached, which, however, did not specifically refer to the lease; and were to forthwith release the firm, as well as the individual partners from all liability. At the same time another agreement was entered into, similarly executed, for, as was stated, the more convenient liquidation of the assets, and disposal of the business as a going concern, whereby M., one of the partners, was to act as manager and continue the business in the firm's name, the bank indemnifying him against all liability therefor. This release agreed on was duly executed by the bank under the corporate seal. Subsequently a power of attorney was executed by the bank, appointing the said local manager its attorney, with the view of carrying out an anticipated sale of the business, but which was not consummated. The mill property was held by the firm under a lease, which contained a covenant against assigning without the lessor's consent. The lessors were apparently unaware of the assignment to the bank, and had never given any consent, but they had, on being applied to by M., signified their willingness to consent to any assignment that might be required.

Held, that the agreement was, under the circumstances, valid and binding on the bank, and the bank became the lawful assignees of the lease, and that the carrying on of the business, in view of the powers conferred by s. 81 and other sections of the Bank Act, R.S.C. 1906, c. 29, was not ultra vires under s. 76 (2a) of the said Act; and that the defendants were entitled to claim indemnity from the bank for a claim made by the lessors for rent due under the lease.

Judgment of the Divisional Court reversed, and that of the trial judge affirmed.

Wallace Nesbitt, K.C., for appellants. *James Bicknell,* K.C., for respondents.

HIGH COURT OF JUSTICE.

Riddell, J.] IN RE AARON ERB (No. 1). [May 11.

Assignment for benefit of creditors—Collateral securities held by bank—Refusal to value—Appeal to judge in Chambers—Jurisdiction—"Judge of the Court of Appeal"—Transfer of motion under C.R. 784—Costs—63 Vict. c. 17, s. 14(O.).

A., having made an assignment for the benefit of creditors, the M. bank filed a claim for over $25,000, for which they held as collateral security certain notes made by the B. company to A. and endorsed by him, to an amount over $17,500. The bank declined to value these securities, in which position they were supported upon an application being made to a county judge. The assignee thereupon served notice of motion before the presiding judge in Chambers, "by way of appeal from the order" of the county judge, and to reverse the same and for an order that the M. bank should value the securities held by them against the B. company, "or for such other order as may be just." The matter having come before Britton, J., he permitted an amendment to be made in the notice of motion, changing it into a notice for special leave to appeal under 63 Vict. c. 17, s. 14(O.).

Held, 1. There was no jurisdiction to entertain the motion, as under the statute the leave is to be granted "by a judge of the Court of Appeal," which means that division of the Supreme Court of Judicature which is called in the Judicature Act, s. 3(2), "the Court of Appeal for Ontario," and in most other parts of the legislation, simply "the Court of Appeal."

2. Under the general prayer "for such other order as may seem just," the application for leave to appeal might, on payment of costs be transferred to a judge of the Court of Appeal under Con. Rule 784, which provides that "where any motion or appeal is set down to be heard before a court which is not the proper court for hearing the motion or appeal, the same may, upon such terms as may seem just, be transferred to, and shall be heard by, the proper court for hearing the same."

3. Under Con. Rule 1130(1), costs may be awarded against the applicant in cases in which the tribunal applied to has no jurisdiction.

Middleton, K.C., for applicant. *J. E. Jones*, for the Merchants Bank of Canada.

Riddell, J.] IN RE AARON ERB (No. 2). [May 12.

Assignment—Collateral securities—Refusal to value—Order of County Court judge—Certiorari—Power of court to grant —Right of appeal—Judicial discretion—Costs.

After notice of the application referred to in the preceding note was given, the assignee served another notice of motion "for an order in the nature of certiorari" to bring up and review the proceedings before the County Court judge, and for an order directing the valuation of the securities held by the bank, etc.

Held, that in respect of the application for certiorari, the County Court judge, acting as he was, is an inferior court to which such an order might be addressed, and that the fact that there is a right of appeal apparently given by leave obtained from a judge of the Court of Appeal does not oust the power of this court to grant such an order.

After judgment, however, the order for certiorari is no longer ex debito justitiæ, but is a matter of judicial discretion, and in general no order should be made unless and until all other remedies which would afford adequate relief have failed. In the present case, therefore, no order should issue until after an application has been made to a judge of the Court of Appeal for leave to appeal from the order of the county judge, and the application should be dismissed with costs, as the motion should not have been made before applying to the proper forum for leave to appeal.

Middleton, K.C., for applicant. *J. E. Jones*, for Merchants Bank of Canada.

Divisional Court, Q.B.D.] [June 18.

BARRINGTON *v.* MARTIN.

Mechanics lien—Description of claimant and of goods supplied —Date of lien.

In a claim for a lien against certain land, under R.S.O. 1897, c. 153, the claimant was described merely as "of Toronto," while the claim was stated to be against the estate of M. for "material supplied" before a named date. M. was not the owner of the land, though believed so to be by the claimant,

Held, reversing the order of the Master in Chambers that the claim was sufficient.

R. Mackay, for claimants. *Jennings*, for plaintiff. *Payne*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J., Chambers.] [July 18.

HALL *v.* THE QUEEN INSURANCE CO.

Collection Act—Assignment and re-assignment—Effect of—Rights of subsequent assignees.

The plaintiff H. made assignments under the Collection Act to the Canadian Bank of Commerce and other creditors of which notice was given to the defendant company, in the order in which the different assignments were made.

Subsequently the bank re-assigned its claim to the plaintiff subject to an undertaking on the part of plaintiff and his solicitor that the bank's claim amounting to $792.00 would be paid in the first place out of the moneys to be recovered in the action.

Held, 1. That the assignment to the bank in the first place and the notice to defendant vested in the bank the exclusive right to sue for and recover the loss and that the parties to whom the subsequent assignments were made merely stood in the shoes of the plaintiff and possessed no greater right than he did to compel an accounting by the bank.

2. That the re-assignment to plaintiff by the bank merely vested in him the title and rights that the bank then held. And that the rights acquired by them against the fund in the hands of the bank before the re-assignment could not be affected by any subsequent act or transfer by the plaintiff and could not be extinguished or prejudiced by any subsequent legal proceeding.

3. That the re-assignment by the bank to the insured gave him no power or control over the fund that would enable him to give priority to anyone else over those who obtained assignments

subsequent to the assignment to the bank, but prior to the re-assignment to the insured.

4. That the effect of the re-assignment by the bank was to displace its lien upon the balance of moneys recovered under the judgment and that the other creditors to whom assignments were made subsequent to the assignment to the bank, thereupon became entitled to such balance in order of priority.

Paton, K.C., and *Robertson*, for claimants.

Graham, E.J., Chambers.] [July 24.

THE DOMINION COAL CO. *v.* BURCHELL.

Striking out pleas—Practice as to.

On application to strike out a portion of the defence as false part having already been struck out on another ground, the court will look altogether to the defendant's affidavits answering the plaintiff's to see if he has any defence.

The evidence cannot be weighed.

Covert, for applicant. *Ritchie*, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Perdue, J.A.] TRADERS BANK *v.* WRIGHT. [June 29.

Costs—7 & 8 Edw. VII., c. 12, ss. 1, 2—Injunction—Interlocutory motion or application.

In this action, which was commenced after 7 & 8 Edw. VII., c. 12 came into force, the plaintiffs obtained an interim injunction against the defendants which was afterwards dissolved by the Court of Appeal, ante, p. 468, and the plaintiffs had to pay the costs of the motion and the appeal. Sec. 1 of that Act provides that the amount of costs, exclusive of disbursements, but inclusive of all interlocutory motions and applications and

any appeal or appeals therefrom to the Court of Appeal, which may be taxed and allowed to the successful party in any action or proceeding, as against any other party thereto, up to and inclusive of the trial or final disposition of any such action or proceeding in the Court of King's Bench, shall, subject to the proviso at the end of the section (giving the trial judge a discretion to increase the amount), be limited to the sum of three hundred dollars.

Held, that a motion for an interim injunction is an interlocutory motion or application, and the defendants' costs could not be taxed against the plaintiffs at more than $300, exclusive of disbursements.

Sec. 2 of the same Act, subject to a proviso giving a discretion to the Court of Appeal to increase the amount, provides that no greater sum than one hundred dollars, exclusive of disbursements, shall be taxed and allowed for costs of appeal from the final disposition of an action or proceeding in the Court of King's Bench, to the successful party in any appeal to the Court of Appeal as against any other party thereto.

Held, that the defendants appeal came within s. 1 and not within s. 2 and they could not be allowed the $100 provided for by s. 2 in addition to the $300 limited by s. 1.

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

KING'S BENCH.

Mathers, J.] [June 29.

RE CROWN MUTUAL HAIL INSURANCE CO.

Company—Costs of procuring Act of incorporation—Liability of company for—Appropriation of payments—Marshalling of assets.

Application by the Attorney-General, at whose instance the company was being wound up pursuant to ss. 42-44 of the Act incorporating the company, 3-4 Edw. VII. c. 69, for a direction to the receivers to disallow, as a claim against the company, a solicitor's bill of costs for fees, charges and disbursements. The bill covered charges for drawing the Act and promoting its passage through the legislature, for procuring the passage

of an amending Act and for services rendered to the company after organization. The solicitors had already been paid $250 on account, leaving a balance claimed of $838. There was no provision in the Act for payment by the company of the costs and expenses of obtaining the Act and preparatory thereto.

Held, that, without such a provision in the Act or charter incorporating a company, it is not liable for the expenses of procuring its incorporation unless after incorporation it agrees to pay them. *Hamilton*, 69; *Lindley*, 196, and *Healey*, 557.

The opinion expressed in Brice on Ultra Vires, at p. 770, that the solicitors would have an equitable claim against the company on the ground that it had taken the benefit of the solicitor's services, is expressly dissented from in *In re English and Colonial Produce Company, Ltd.* (1903), 2 Ch. 435.

Held, however, that, as the company might have paid the solicitor's pre-incoropration costs, Gore-Brown on Companies, 119, they should now be permitted to appropriate the $250 already paid to such costs as was done in that case.

The company was a mutual hail insurance company and the Act permitted the directors to make assessments annually to cover only losses by hail during the crop season, and the expenses for the year, so that no assessment could be made to pay any part of the solicitor's bill. There was, however, a reserve fund accumulated under the Act which might "be applied by the directors to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year."

Held, that those creditors for the payment of whose claims an assessment could be made should be compelled, in the first place, to have recourse to that method of payment, so as to leave the reserve fund available as far as possible to pay the solicitor's bill. The assessment already made to stand and the proceeds to be applied first in payment of the claims against the company other than the costs in question; any remaining debts, including the amount found due on taxation to the solicitors for services subsequent to the incorporation, to rank pro rata on the reserve fund, after payment of the receiver's costs.

Patterson, D.A.G., for Attorney-General: *Mulock*, K.C., for receiver. *Minty*, for solicitors.

Mathers, J.] BENT *v.* ARROWHEAD LUMBER CO. [June 29.

Principal and agent—Commission on sale of land.

The defendant's president made an agreement with the plaintiff that, if he would procure a prospective purchaser for the timber limits owned by the defendants in British Columbia, the company would offer the property at $550,000, and, in the event of a sale, would pay the plaintiff a commission of $50,000, but any abatement of the named price down to $500,000 was to come out of the plaintiff. The defendant's president had authority to make that bargain with the plaintiff.

The plaintiff found a purchaser to whom the property was subsequently sold without the plaintiff's knowledge or concurrence at the net price of $500,000, and this sale was the result of the introduction of the property by the plaintiff to the purchaser. The trial judge also found that the defendant's president knew, when negotiating with the purchaser, that he was the plaintiff's purchaser.

Held, that the plaintiff was entitled to be remunerated for his services quantum meruit. *Lacotors* v. *Clough*, ante p. 503; *Pardee* v. *Ferguson*, 5 O.W.R. 698, 6 O.W.R. 810, and *Bridgman* v. *Hepburn*, 8 W.L.R. 28, distinguished.

Verdict for plaintiff for $25,000 and costs.

Galt, for plaintiff. *Wilson* and *Robson*, for defendants.

Mathers, J.] FREDKIN *v.* GLINES. [June 29.

Growing wild hay, whether goods or lands—When purchaser is to cut and remove it—Sale of Goods Act.

The defendants sold to the plaintiff the wild hay growing on certain lands to be cut and removed by the plaintiff. He paid the price and proceeded to cut and remove the hay when he was stopped by a person rightfully entitled to it. The defendants then admitted they had made a mistake as to their right to sell the hay and offered to return the money to the plaintiff. He refused it and sued for damages for breach of an implied warranty of title. At the trial the defendants contended that the thing sold was an interest in land as to which there could be no implied warranty of title.

Held, that, under paragraph (h) of s. 2 of R.S.M. 1902, c. 152, the hay was "goods," as it was a "thing attached to or forming part of the land which was agreed to be secured . . . under the contract of sale," and that the defendants were liable in damages as claimed. The statute has extended the common law: Benjamin on Sales, p. 190.

Hudson and *Laurence,* for plaintiff. *Wilson* and *Jameson,* for defendants.

Cameron, J.] ALLOWAY *v.* MUNICIPALITY OF MORRIS. [July 4.

Sale of land—Warranty of title—Representation that land patented—Recovery of money paid under mistake of fact—Assessment Act—Caveat emptor—Limitation of actions.

The defendant municipality on 12th April, 1902, offered to sell by public auction the lands in question, for arrears of taxes, and the plaintiff offered $166.16 for them. This being the highest bid, the defendants sold and conveyed the lands to the plaintiff for that sum which he paid. The lands had been previously advertised for sale in the *Manitoba Gazette.* That advertisement, signed "H. R. Whitworth, Secretary-Treasurer, Rural Municipality of Morris," under the heading "patented or unpatented," had the lands listed as "pat'd." The plaintiff paid the defendants subsequent taxes for 1902 and 1903, amounting to $248.23. It was admitted that, at the time of the sale, the lands were unpatented, also that the defendants had, under s. 159 of the Assessment Act, R.S.M. 1902, c. 117, authorised the treasurer to sell the lands.

Held, that the defendants had expressly warranted that the lands were patented and were liable to the plaintiff for the damages suffered by him in consequence of having paid his money on the strength of that warranty and that such damages should be fixed at an amount equal to the sum of all the moneys he had paid them together with simple interest at five per cent. per annum. Blackwell, on Tax Titles, s. 1007; *Chapman* v. *Brooklyn,* 40 N.Y. 379; *Pearson* v. *Dublin* (1907) A.C. 351 followed; *Austin* v. *Simcoe,* 28 U.C.R. 73, distinguished.

It was argued at the trial that the treasurer was a statutory officer, independent of the municipality, and performing duties imposed on him by statute and that, therefore, the municipality was relieved from any liability for his actions, and *Seymour* v. *Maidstone,* 24 O.R. 370; *Forsyth* v. *Toronto,* 20 O.R. 478, and *McLellan* v. *Assiniboia,* 5 M.R. 265, were relied on.

Held, distinguishing those cases, and following *Hesketh* v. *Toronto*, 25 A.R. 449, and *McSorley* v. *St. John*, 6 S.C.R. 531, that the municipality, having appointed the treasurer and having control over him in the discharge of his duties, with power to retain or dismiss him, was responsible for his acts in discharging such duties in matters that were of benefit to it.

Held, also, that the doctrine caveat emptor, does not apply when the vendor takes upon himself to inform the purchaser and the purchaser agrees to trust to him with regard to particulars which he could ascertain himself by inspection. Kerr, on Frauds, p. 69; *Barr* v. *Doan*, 45 U.C.R. 491.

Held, also, that the plaintiff had a right to recover the amounts subsequently paid by him for taxes as damages resulting from the breach of warranty established, notwithstanding the six months limited by s. 229 of the Assessment Act, for the commencement of any action against a municipality "for the return of any moneys paid to it on account of a claim, whether valid or invalid, made by the municipality for taxes, whether under protest or otherwise," had elapsed.

Ferguson, for plaintiff. *Hudson* and *McLaws*, for defendants.

United States Decisions.

FIDELITY BOND.—The failure of the obligee in a fidelity bond to communicate to the sureties, at the time of its execution, the fact that the principal was indebted to the obligee for money embezzled, is held, in *Hebert* v. *Lee* (Tenn.) 12 L.R.A. (N.S.) 247, to relieve the sureties from liability on the bond, although they made no inquiry upon that subject, and no communication took place between obligee and sureties about the bond, the execution of which was secured by the principal, and the bond purported to cover past, as well as future, obligations.

ULTRA VIRES.—After an elaborate and theoretical discussion of the doctrine of ultra vires, it is held, in *Bell* v. *Kirkland*, 102 Minn. 213, 113 N.W. 271, 13 L.R.A. (N.S.) 793, that a contractor's bondsmen will not be permitted to set up the fact that the contract between the municipality and the contractor was irregular, as a defense to an action brought upon the bond by materialmen for material furnished to the contractor.