Canada Law Journal.

VOL. XLIII. JUNE 15. NO. 12.

SUNDAY REST AND RESTAURANTS.

Canada is attracting her population from many quarters of the Globe; the great twentieth century trek of immigration is moving across British America, and Canada is truly the smelting-pot of races. The Anglo-Saxon type of civilization is the most advanced type, and one of its bulwarks is not only a wise legislation regarding a rest day, but also a wise and reasonable interpretation and application of such legislation to the life of the nation and to the lives of the individuals making the nation, and in addition to that (which is a very important addition), a strong and clearly uttered public sentiment in support of such legislation. The basis of our Sabbath observance law is not a specially religious basis, not more so than the basis of any other of our laws, all of which should be based on the moral law, which is the law of the Bible and of regenerated humanity.

We put the Sabbath law, so far as Parliament can enact it, upon national, patriotic, economic and sanitary grounds; a day of rest—one day in seven—as a necessity for the health and growth of the nation, for suprema lex, salus populi. When Parliament has enacted a special day of rest it is then for the pulpit and the teachers and the journalists to convince the nation of the paramount advantage, nay more, the absolute necessity to make it also a day of worship. But the law of the Parliament cannot, should not and does not do that. The essential principle of Parliamentary Sabbath legislation is to abstain from all work except the work of necessity and charity. That principle is as old as the human race. The difficulty of its application to a complex condition of civilization is to define the exception—what are works of necessity or charity (as in the old U.C. Act. c. 104), or work of necessity or mercy (as in Dominion Lord's Day Act, 1906).

In a special case referred to the Court of Appeal regarding the constitutionality of the Ontario Lord's Day Act, certain questions of interpretation were also addressed to the Court and amongst these it was asked three questions as to the meaning of the words "work of necessity," the object being to establish some judicial land marks which would define more exactly the general character of the words. The late Chief Justice Armour gave some answer to these questions, but the Court of Appeal declined to do so, upon the grounds that they related to matters which ought to be left for decision when raised in actual litigation in the application and construction of legislative enactments with reference to an existing state of facts. Mr. Justice Osler remarked that "when they are represented as they here are represented in scena and not in foro—argued and decided academically and not judicially—the answers are likely to embarrass and perplex judges and parties who may afterwards have to deal with such questions or similar questions arising under varying facts and circumstances as they may be presented in actual litigation." The same questions came later before the Judicial Committee of the Privy Council and they also declined to answer them for the same general reasons.

This result was perhaps inevitable. The Dominion Lord's Day Act has enumerated certain specific exceptions as illustrative of the principle of necessity, but it carefully avoids exhausting the "works of necessity," and thus it is that each judge who tries a case affecting Sunday rest must to a large extent introduce into his judgment his own personal views as to what works or acts are necessary on Sunday, such being the result of his own education or environment or sympathy or antipathy—and we would add prejudice if we were referring to ordinary citizens. It is not, however, to be presumed that judges ever have prejudices. As Ovid puts it—"Judicis officium est, ut res, ita tempora rerum,"—"It is the duty of a judge to consider not only the facts but the circumstances of the case." Ovid was not technically a lawyer, but from this quotation it

would appear that he was gifted with the judicial instinct. And as illustrative of the value of such a statement it may be added that a distinguished Lord Chancellor of England quoted this line from the Latin poet. The opportunity for the exercise of what astronomers call the "personal equation" is boundless, and as a consequence the judges may be unconsciously lead to blur the distinction between their duty "jus dicere" (to interpret the law), and the admittedly human tendency "jus dare" (to make the law).

Shakespeare has put into the mouth of the Earl of Suffolk at that historic meeting in the Temple Garden, this honest confession,—

> "Faith, I have been a truant in the law,
> And never yet could frame my will to it,
> And therefore frame the law unto my will."

There is a danger of that very tendency overcoming our judgment even in this present year of grace.

The Sunday law as to restaurants has come before the Courts lately in the case of *Rex* v. *Devins*, when His Honour, Judge Morson, junior judge of the County Court of the County of York, Ontario, decided that a licensed restaurant-keeper could lawfully sell candies and oranges to a customer who carried them away from the premises.

It may here be observed as important that though the selling of an orange or a few candies is in itself a trivial matter, yet it touches a material principle, which should be settled by the highest possible judicial authority. Very often large results are pivoted upon small hinges. It was so in England, when John Hampden declined on principle to pay a few shillings of ship money, which offence was tried by a bench of twelve English judges of the highest authority, and the ultimate results were that England was drenched with blood, a King was brought to the scaffold, and great constitutional rights, involving the liberties of Englishmen, were established. We must not, therefore, turn with impatience from a case where important legal prin-

ciples affecting Sabbath observance are in the weigh-scales of judicial determination.

The restaurant question is not "res integra," for it has already been before our Courts more than once. The first was the case of *Queen* v. *Alberti* (1900), 3 Can. Cr. Cas. 356, where Macdougall, Co. J., the then senior judge of the County Court of York, held that a bona fide restaurant-keeper could, on Sunday, sell to a customer ice-cream to be eaten on the premises, on the ground that it was an article of food and could not be distinguished from other articles of food which might be more substantial. The judge notes the fact that candies were exhibited on the premises, but not offered for sale—evidently it was judicially suggested, if not actually held, that candies were not food. Then followed *Rex* v. *Sabine*, decided by his successor, Judge Winchester, who held that a licensed restaurant-keeper who did not strictly and exclusively supply meals and carry on the business of a victualler, but who obtained his license in order to give him a colour of right to sell ice-cream soda on Sunday, was rightly convicted of a breach of the Lord's Day Act.

Then comes a case decided at London by Mr. Francis Love, P. M., in December last. The defendant there had a restaurant license, and supplied only "short lunches," such as sandwiches, cakes, boiled eggs, etc., and did not serve regular meals on Sunday, but took orders for ice-cream and ice-cream soda alone. The London Police Magistrate followed *Rex* v. *Sabine*, and convicted, criticising *Queen* v. *Alberti* thus,—"I would have preferred to base this decision on the broad ground that an eating-house proprietor, in the fullest sense of the term, is not entitled to sell ice-cream on Sunday, unless it is supplied in conjunction with a regular meal or at a time when regular meals are usually and ordinarily supplied, or when the consumer is taking it for food purposes and as a necessary food and not a confection, but as this would directly contradict *Queen* v. *Alberti*, I do not feel at liberty to do so." These cases were duly prosecuted and seriously defended.

Another case of refreshment sales on Sunday, however, possesses a sort of "opera bouffe" character. An enterprising

and ingenious gentleman on Yonge street, Toronto, who was a druggist, opened his shop wide on Sunday for the ice-cream soda business, and put up a sign intimating to the thirsty public that he only sold ice-cream soda as medicine. His counters were lined with brawny specimens of lusty, rugged humanity, who, adopting the suggestion so obligingly offered by the druggist, silently offered him their dimes and sought to remedy their bodily anguish and to cure the ills that Sunday afternoon flesh is heir to by copious supplies of ice-cream soda. Two unsympathetic plain-clothes myrmidons of the law, as administered by Police Magistrate Denison, sauntered in one Sunday afternoon and received the medical treatment, and thereupon rudely disturbed the little pleasantry by laying an information, and the Police Magistrate quite good-naturedly gave the druggist the benefit, not of the doubt, for there was none, but of his views of the Lord's Day Act, and inflicted the expected fine, which at once stopped the Sunday afternoon ice-cream soda dispensary traffic. It was not observed as a result that the mortality of the city suffered any appreciable increase. There is no recorded appeal against this conviction—it was a one-act comedy. This incident presented a refreshing aspect in more than one sense.

In the case of *Rex* v. *Devins*, to which reference has been made, the test applied by the learned judge appears to have been whether or not candies were a food, and throughout the other cases which we have quoted that test seems to have been applied to a greater or less degree. It is difficult to understand how that can be the guiding or governing principle. In *Queen* v. *Alberti*, the earliest of the series, the learned judge discussed s. 3 of the old English Act of 29 Car. II, c. 7, which excepts from the prohibition of that Act, "the dressing of meat in families or dressing or selling of meat in inns, cook-shops or victualling-houses, for such as otherwise cannot be provided." This section was not inserted in the old Upper Canada Act, c. 104, nor in R.S.O. 1897, c. 246, which was the law when the Alberti judgment was delivered. The judge, however, seemed to desire the benefit of that last section, and thus arose the question what was "meat" or

"food," and what was not "meat" or "food"; in the last analysis, however, he gave the effort up and concluded—"it must probably be assumed that in adopting the provision of 29 Car. II. c. 7, our legislature intentionally omitted to re-enact the proviso. Our Act therefore has to be construed without it, and its omission compels the Court to place a meaning upon the words—'work of necessity'." It may be admitted that candies or confections are scientificially or chemically food, because they contain elements which, taken judiciously, may promote health and sustain life, and may come within the definition of victuals, "which is food, and what mixed with something else constitutes such food." See *Rex* v. *Hodgkinson*, 10 B. & C. 74.

Is the test then to be whether these articles are food, or is the true principle to be found in the answer to the question, what is meant by "works of necessity or charity"? Let it be remembered also that there is no distinct exception as to food in the prohibition that it is not lawful for a "merchant to sell or publicly shew forth or expose or offer for sale, or to purchase any goods, chattels or other personal property," and the exception of "works of necessity or charity" is connected with the prohibition as to "work" and not as to "sales." There is no exception such as "sales of necessity" in the old Upper Canada Act nor in the new Dominion Lord's Day Act, which is the latest down-to-date elaboration on this subject and the best Lord's Day Act, in a civil sense, the world round and generations through. In that Act there is excepted "words of necessity or mercy" in general terms, and among illustrations of the general principle set forth as specific exceptions only three touch the question of food, and they are: —

(1) The caring for milk, cheese and live animals;

(2) The delivery of milk for domestic use and the work of domestic servants;

(3) The operations connected with the making of maple sugar and maple syrup in the maple grove."

None of these exceptions directly touch "sales of food."

The Dominion Lord's Day Act was the result of the combined

intelligence of our legislators after hearing all that could be possibly said upon the subject from all ranks and conditions of men, and we do not press the conclusion too far when we say that if it had been intended to give restaurants a free hand, the House of Commons would have done so. Let us not forget, moreover, that this Act was the composite result of all shades of Sabbath observance opinion throughout British America. We must, however, consider the spirit of the enactment, and if sales of certain goods are necessary, then we think the words "work of necessity" may be applied to such sales. Now it is perfectly manifest that preparing meals on Sunday is necessary, for health must be protected and life sustained, and the sale of the product of such necessary work must be permitted, or otherwise the preparation of food on Sunday would be useless. A restaurant-keeper is certainly a merchant, for a merchant is defined as "a person who buys and sells commodities as a business and for profit," and therefore a restaurant-keeper is forbidden to sell on Sunday unless his selling be connected with or grafted upon a "work of necessity." A restaurant-keeper may sell lawfully and may sell unlawfully; it is lawful to sell what is necessary, and unlawful to sell what is not necessary. A lawful business cannot protect an unlawful business, even if carried on in the same premises and by the same person. One hesitates to define the word "necessity," as eminent judges have, as above stated, declined so to do, but some principles may be safely laid down which may guide one to a clearer understanding. We would venture to suggest:—

(1) That "necessity" is not a physical or absolute necessity, but a moral fitness or propriety of the thing done under the circumstances of the particular case;

(2) That there is a clear distinction between "convenience" and "necessity";

(3) That necessity must be real, and not fancied;

(4) A necessity must not be voluntarily brought about by the person pleading the necessity.

We are not in the habit of taking the Sunday habits or laws of our American cousins as ideal, for we are rather inclined to

believe that we are in the van in that regard. We find, however, that selling cigars or tobacco is against their law, (see *Mueller* v. *State*, 40 Am. Reports 245), and that selling soda water, even by a restaurant-keeper is also forbidden: *Comm* v. *Hengler*, 15 Pa., Co. Ct., 222. And these are forbidden, not by any particular statute, but under reasoning on a line with what is set forth above.

We question the law laid down in the *Alberti case*, and prefer the view taken by the London magistrate. Candies or ice cream may chemically contain food elements, and may therefore scientifically be food, but the question is, are they food under the principle of "works of necessity" and all that such involves? Will any man seriously contend that it is necessary to sell such toothsome confections to satisfy hunger? for that is really what it comes to. We must on Sunday, without doubt, feed the hungry, but must we cater to the fanciful taste and delicate palate with what are but dainties? But it is answered—after all, it is only a dish of ice cream and a package of innocent candies. That is not an answer. If candies must be bought, and we may without prejudice admit that they are necessary articles of commerce, and pleasant to the eye and gratifying to the palate, whether they belong to the glucose group or the saccharose group, but let those who desire those carbohydrates hie to the emporium on Saturday and lay in a Sunday stock; this safe practice would not in the slightest degree acidulate the honeyed speeches that often accompany chocolates on Sunday afternoon.

Sunday rest must be enforced as a duty to the State. It is said there were 150,000 Sunday toilers in Canada before the Dominion Lord's Day Act came into force, and now as many as 50,000 have been emancipated. For the life of the individual and for the strength of the nation, we must reduce the number of these to a minimum. The position we therefore take is, that confections unconnected with a meal should not be sold at all on Sundays. It is not the question of candy-selling being lawful if eaten on the premises, and unlawful to take them off the premises; that is not the essential rock-bottom principle.

But even on this principle of differentiation much can be said. The word "restaurant" is thus defined in the Standard Dictionary, "A place where refreshments or meals are provided to order; the dining-room of a hotel conducted on the European plan." Webster defines it as an "eating-house"—"It is a place to which a person resorts to for the temporary purpose of obtaining a meal": 10 Fed. Rep. 6; *People* v. *Jones*, 54 Barb. 311, 317. The Imperial Dictionary defines "restaurant" as "an eating-house where provisions may be had ready cooked at all times." In *State* v. *Hogan*, 30 N.H. 268; a "restaurant" is defined as "an eating-house where something to eat, ready prepared, or which can be readily prepared, may be obtained."

From these definitions it would seem that under ordinary circumstances food is bought and consumed upon the premises but not taken away. On ordinary week days this distinction may be rejected, because such a place may partake of the character of an ordinary shop as well as of a restaurant, but on Sunday the shop character must disappear, and the restaurant phase is the only one that can be left.

A very celebrated man of Alexandria, who wrote a book on Geometry, which has caused many generations of school-boys many pangs and many thrashings, has a method of proof called "reductio ad absurdum." Let us now apply his justly celebrated logic, or a logic of a similar character. Let it be supposed that candies, because they are food, can be bought at a restaurant on Sunday and taken away for consumption; then any other food can also be bought and taken away. Therefore fruit, bread, cheese, butter, canned meats, canned vegetables, dried meats, maple syrup, sugar, et hoc genus omne, can be bought and taken away, and under the magic of the decision in *Rex* v. *Devins*,—presto change—the whole Sunday law and custom of the community that has held for a century past is completely altered—which is absurd. Therefore the major premise that candies can be bought and carried away on Sunday is false. For further illustrations see Archbishop Whateley's "Logic."

We have limited the above list to foods ready for consump-

tion. If we extend it to raw or unprepared foods, then the "reductio ad absurdum" becomes a "reductio ad absurdissimum." The only way in which the judgment can be protected is to apply the dictum of Lord Halsbury, in *Quinn* v. *Leathem* (1901), A.C. 506; where it was solemnly held that law was not logical. We observe that the learned judge agrees with what Lord Kenyon said in *Rex* v. *Younger*—"I am for the observation of the Sabbath, but not for the pharisaical observation of it." We all agree with that statement, but in the application we admit the infirmity of not seeing how it affects the point at issue. In *Fennell* v. *Ridler*, 5 B. & C. 406; Bayley J., says:—"The act cannot be construed according to its spirit, unless it is so construed as to check the career of worldly traffic." In *Phillips* v. *Innes*, 4 Clark & Finelly, 246, (the celebrated case involving Sunday shaving, which was held illegal), the Court said—"But the magistrates of Dundee and the Court of Session did make that distinction—rather making an Act of Parliament, than construing an Act." We submit that these quotations are pertinent.

The learned judge also speaks of the "absence of any statutory Lord's Day bill of fare fixing what kinds of food shall be eaten on the Lord's Day." There is a sentence in Bacon's Essay on "Judicature" which may be worth his referring to, and it is this—"Judges ought to be more learned than witty, more reverent than plausible, and more advised than confident."

For the reasons given we are compelled to dissent from the findings both in the *Alberti case* and in the *Devins case*. In our opinion they do not correctly set forth the law on the subject, and our conclusions may be summarized as follows:—(1) The sales of confectionary as a general rule do not on any sound principle come within the scope of the words "works of necessity or charity" or "mercy." (2) The use of Sunday restaurants may be a necessity, for the same reason that hotels are necessary, but there is no justification for them to be regarded as store-houses of food, where food or confectionery may be purchased and carried away for consumption elsewhere on Sunday. If this is per-

mitted the distinction between eating houses and shops not only approaches but reaches the vanishing point.

We understand that by the direction of the Attorney General of the province the question involved in this and other judgments will be tested in a new case and referred for adjudication to a Divisional Court of the High Court of Justice.

LEGAL ETHICS.

It seems absolutely impossible to eradicate the motion which lies unformulated at the basis of such comments that a guilty defendant in a criminal case is not entitled to counsel, and that the lawyer who undertakes his defence degrades himself, and to that extent lowers his profession. It is our boast that we live under "a government of laws, not of men," and the accused is entitled to demand an acquittal or a conviction according to law. According to law he is entitled to counsel, and it is the duty of that counsel to see that before he is pronounced guilty every real and every technical requirement of the law is complied with. If we are indeed living under a government of law, the accused is entitled to the benefit of even the technicalities that the law has created. It is surely a monstrous paradox to say that by insisting upon compliance with the law to the crossing of the last *t* or the dotting of the last *i* one is undermining the respect for law. If for a moment we could conceive of counsel failing to avail themselves of technical defences for their clients on the theory that substantial justice was being done, we should be but a little way from such substantial justice as was meted out in the attainder of Sir John Fenwick (whose case forms a stirring episode in Macaulay's History), because his friends had spirited away one of the two witnesses necessary for his conviction of treason. The locus classicus on the question of a lawyer's right to appear in a cause which he regards as bad is, as every one knows, contained in a conversation between Dr. Johnson and Boswell. The sturdy common sense of the "great moralist" solved the question in a way all the more impressive because he was not a lawyer.

And yet in a recent issue of a great newspaper the fact that Johnson was no lawyer was referred to as if it detracted from the weight of his opinion. Truly a curious idea. But if the opinions of lawyers are desired, that the late Lord Chancellor of England, Lord Halsbury, may perhaps have weight. He characterized as "ridiculous, impossible of performance, and calculated to lead to great injustice," the thesis "that an advocate is bound to convince himself by something like an original investigation that his client is in the right before he undertakes the duty of acting for him." To do so, he added, would be "usurping the office of the judge, by which I mean the judicial function, whether that function is performed by a single man or by the composite arrangement of judge and jury which finds favour with us." When the whole theory of our law, the conduct of trials, and the nature of an advocate's duties are remembered, all this seems too clear for any possible difference of opinion. The lawyer must, of course, stoop to no connivance at an unlawful or guilty method of defence, nor must he lie by stating or intimating to the jury his own individual opinion that the defendant is guiltless. Even though his client is guilty, it is his right and duty to present to the jury the evidence in the most favourable aspect for the prisoner, and to avail himself of all technical advantages. According to our system of administrating justice, truth is struck out between the opposing arguments of counsel each of whom presents his side of the case as strongly as he can. The ultimate decision rests not with the counsel, but with Court and jury. The system may admit of improvement, but as it is the advocate must act for his client with all the ability of which he is master. And by so doing he discharges his duty not only toward the client but to society at large.—*Law Notes.*

It is sometimes found to be a little awkward to be taken at your word. Christian Scientists say there is no such thing as matter and that pain and consequent suffering are quite unnecessary. One of the cult referred to recently sued the Fort Worth Railway Co., for damages to compensate her for physical

and mental suffering that she had been compelled to endure because she was expelled from one of the company's passenger cars. The defendant company set up the plea that the plaintiff should be consistent with her religious belief and contested her right to damages. The trial Judge ruled out the evidence tendered by the defendants as to the creed of a so-callel Christian Scientists, and the jury found against the company. On appeal the Court held that the defendants had a right to put in the evidence saying that "if she had such control of her feelings as she thought she had as to render her insensible to pain, when she willed to be, we see no reason why that circumstance should not have been considered by the jury in determining the extent of her suffering and the compensation to be made on account of it." It is sad to see the potency of the almighty dollar to cause people to fall from grace. As to the legal question involved it seems to be new as well as interesting.

The recent decision of Mr. Justice Riddell, in *Mills* v. *Small*, noted ante, p. 406, appears to be opposed to the decision of the English Court of Appeal in *Fitzroy* v. *Cave* (1905) 2 K.B. 364, (noted ante, vol. 41, p. 751). In that case there was an assignment of a debt and the assignee had covenanted to pay over the amount of the debt when recovered to the assignor less costs, and it was held that the assignment was absolute, and the assignor entitled to recover in his own name.

REVIEW OF CURRENT ENGLISH CASES.

ACTION IN REM—ACTION AGAINST PERSON—PUBLIC BODY—STATUTE OF LIMITATION.

The Burns (1907) P. 137 was an action in rem against a vessel to recover damages for a collision. The owners were a municipal body and set up a statute limiting the time for bringing actions for tort against them to within six months next after the act complained of, but Barnes, P.P.D., held that limitation did not apply to an action in rem, and his ruling was affirmed by the Court of Appeal (Collins, M.R., and Cozens-Hardy, and Moulton, L.JJ.)

WILL—CONSTRUCTION—"RESIDUARY LEGATEE"—RESIDUARY DEVISE—SPECIFIC DISPOSITION OF REAL ESTATE AT DATE OF WILL—SUBSEQUENT ACQUISITION OF REALTY—INTESTACY.

In re Gibbs, Martin v. *Harding* (1907) 1 Ch. 465. Joyce, J., was called on to construe a will whereby a testatrix specifically disposed of all the real estate she owned at the date of her will, and thereby named Emily Jane Harding her "residuary legatee." After the date of the will the testatrix acquired other lands, and the question was whether "the residuary legatee" was entitled thereto. The testatrix, had by the will given freehold cottages "free of legacy duty" and she had "bequeathed" other freehold property, but Joyce, J., was of the opinion that as at the date of the will the testatrix had no realty which was not specifically disposed of, the use of words did not indicate sufficiently an intention that "the residuary legatee" was to be also the residuary devisee; he therefore held that there was an intestacy as to the after acquired realty.

WILL—LEGACY PAYABLE BY INSTALMENTS ON LEGATEE ATTAINING SPECIFIED AGE—NO GIFT OVER—DEATH OF LEGATEE BEFORE ATTAINING SPECIFIED AGE—VESTING—INCOME.

In re Couturier, Couturier v. *Shea* (1907) 1 Ch. 470. In this case a testatrix bequeathed a sum of £200 to be set apart for her grandson James, £150 for her grandson John, and £150 for her grandson Fredrick, to be paid respectively as to £50 on

their attaining 21, and as to £50 on their attaining 25, and the balance of £100 to be paid James on his attaining 30 and the balance of £50 to John and Frederick on their attaining 30. James survived the testatrix and attained 21, and received the first installment. He died before attaining 25. The point submitted for Joyce, J. to decide was whether the legacies were vested or contingent. He held that they were vested, and, there being no gift over, the balance of the legacy to James with the interest which had accrued thereon was immediately payable to his personal representative.

WILL—CONSTRUCTION—POWER OF SALE—POWER GIVEN "TO MY TRUSTEES"—EXERCISE OF POWER BY SURVIVING TRUSTEE—MARRIED WOMAN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75) S. 5—(R.S.O. C. 163, S. 7)—REVERSIONARY INTEREST IN LAND.

In re Bacon, Toovey v. *Turner* (1907) 1 Ch. 475. Two points were involved, First, whether a power of sale given to two or more trustees to whom the legal estate in the trust property was devised before any of the Acts giving statutory powers of sale to trustees, could be exercised by surviving trustees, or a sole surviving trustee. Eady, J., held that it could, and that the contrary rule never applied except to a bare power. The second point was whether a married woman who before the passing of the Married Woman's Property Act, 1882, was entitled to a reversion in land, which after the passing of the Act, but before her estate fell into possession, was converted into money, was to be deemed to have acquired such property after the passing of the Act so as to make it her separate property under that Act, and this question the learned judge answered in the negative he holding that the conversion of the land into money gave her no new title.

PRACTICE—ADMINISTRATION—CONCURRENT ACTIONS—CONDUCT OF PROCEEDINGS.

In re Ross, Wingfield v. *Blair* (1907) 1 Ch. 482. There were several concurrent actions for the administration of a deceased person's estate, and the question was as to which of the plaintiffs should be given the conduct of the proceedings. Eady, J., decided that, although the general rule in such cases is, that the plaintiff who first commenced proceedings is the person entitled

to the carriage of the proceedings, yet that rule is subject to an exception where, as in the present case, such person is a creditor whose claim is bona fide disputed, and that in such a case a creditor whose claim is undisputed is to be preferred.

TRUSTEE—ASSIGNMENT BY CESTUI QUE TRUST—RIGHT OF TRUSTEE TO DEMAND DELIVERY UP OF ASSIGNMENT—PAYMENT TO ASSIGNOR OF CESTUI QUE TRUST.

In re Palmer, Lancashire & Yorkshire R. I. Co. v. *Burke* (1907) 1 Ch. 486. On the distribution of a trust fund by trustees, they claimed that on payment of a share to the assignees of one of the cestuis que trustent, they were entitled to call for the delivery up to them of the assignment, to which the assignees objected. Eady, J., held that this claim of the trustees was not well founded, and that the trustees could not properly make the delivery up of the assignment a condition of payment to the assignees.

TRADE NAME—USE OF APPROPRIATED NAME—INJUNCTION—LEGAL INJURY.

Society of Accountants v. *Goodway* (1907) 1 Ch. 489 was an action to restrain the use of a trade name by the defendants. The plaintiffs were an Association of Accountants, incorporated in 1885. They recommended that their members should adopt as a professional designation the use after their names the term "incorporated accountant," and by 1905, that resignation had come to be known to a section of the public as indicating a member of the plaintiff association which by its system of tests and examinations had conferred upon its members the valuable privilege of a recognized status for ability and integrity. In that year the defendant association was incorporated and shortly after its incorporation it recomended its members to adopt the designation of "incorporated accountant" with the addition of the abbreviation "Lon. Asson." The action was brought against Goodman one of the members of the defendant association and that association, claiming an injunction to restrain Goodman from using the addition "incorprated accountant," and also for an injunction against the defendant association from holding out by advertisements or otherwise that its members were entitled to use that designation. Warrington, J., who tried the action held that the words "incorporated accountant" was a fancy name, and not a descriptive term, and had come

to denote membership in the plaintiff association and that the unauthorized use of it by the defendants inflicted legal injury to the plaintiff society, in respect of which it was entitled to maintain an action, and had a pecuniary interest in preventing the defendant association from attempting to infringe the right of the plaintiffs and its members to use that designation as indicating membership in the plaintiff association; and an injunction was accordingly granted against both of the defendants.

COMPANY—RECEIVER AND MANAGER—AUTHORITY TO RECEIVER TO BORROW—BORROWING BY RECEIVER IN EXCESS OF AUTHORITY —INDEMNITY OUT OF ASSETS.

In re British Power & T. Co., Halifax Banking Co. v. *British Power & T. Co.* (1907) 1 Ch. 528. A receiver and manager had been appointed of the defendant company and he had been expressly authorized to borrow £3,000 for the purpose of carrying on the business. He had expended moneys in excess of the amount authorized to be borrowed, and he had also incurred an overdraft at his bankers of £1,500; part of the money had been expended (1) in completing goods ordered by customers before or after his appointment; (2) part in completing goods for the purpose of a show or exhibition; (3) part for rent of business premises, and (4) the £1,500 overdrawn. The receiver had died and his creditors claimed that he was entitled to indemnity for these expenditures out of the assets of the company, which claim was resisted on behalf of the debenture holders at whose instance the receiver had been appointed. Warrington, J., held that as regards the items (1) and (3), as the receiver had reasonable grounds for believing that these liabilities would be met out of the proceeds of the sales of the goods, and it would not have been practicable to apply to the Court for authority he ought to be indemnified as to them; but as to the item (2) that was in the nature of a speculation, and although the overdraft of £1,500 had all been spent on payments necessary to keep the business going, there was no reason why the receiver should not have applied to the Court for leave to make these payments, and having neglected to do so he was not entitled to indemnity in respect of either items (2) or (4).

DEED—MISREPRESENTATION AS TO CONTENTS OF DEED—PLEA OF NON EST FACTUM—MORTGAGE.

In *Howatson* v. *Webb* (1907) 1 Ch. 537 the action was

brought on a mortgage, and the defendant set up as a defence the plea of non est factum. The facts were briefly as follows: the defendant had been a solicitor's clerk and while in that employment several properties had been conveyed to him as the solicitor's nominee, but for the benefit of the solicitor. Having left this employment the solicitor presented to him for signature deeds in reference to the properties so conveyed, and on his asking the nature of the deeds he was informed that they were deeds conveying the properties to the solicitor, and, relying on that representation, he signed the deeds. One of them turned out to be the mortgage now sued on in favour of one Whitaker, to whom the solicitor was indebted, and contained a covenant by the defendant for the payment of the mortgage money. The plantiff was assignee of the mortgage. Warrington, J., held that the alleged misrepresentation being only as to the contents of the deed which, however, was known by the defendant to deal with the property in question, the defence of non est factum failed, and the defendant was liable on the covenant.

VENDOR AND PURCHASER—ERROR IN CONVEYANCE—COMMON MISTAKE—RECTIFICATION—LACHES.

Beale v. *Kyte* (1907) 1 Ch. 564 was an action by a vendor for rectification of the conveyance made to carry out the sale. The contract was made in 1900 and was for the sale to the defendant of three parcels numbered 101, 102 and 103 "on the plan annexed" to the contract. In 1905 the plaintiff sold to another person parcel No. 104, and the vendee of that lot proceeded to build, and in 1906 had nearly completed his building, when the defendant complained that he was encroaching on his land; and on examination of the deed to defendant the plaintiff found that the measurement of the land conveyed to the defendant did not agree with the measurement as shewn on the plan annexed to the contract, but encroached on parcel 104. The plaintiff on discovering the mistake immediately commenced this action. The defendant contended that the plaintiff had been guilty of laches and on that ground was not entitled to relief; but Neville, J., finding on the evidence that there had been in fact a common mistake, held that the plaintiff having commenced his action without delay after discovering the mistake, had not been guilty of any laches, and that the time to be considered is not the date of the instrument, but that at which the mistake was discovered by the plaintiff.

WILL—TRUST FOR ACCUMULATION—THELLUSSON ACT (39 & 40 *Geo.* III. c. 98), s. 1—(R.S.O. c. 332, s. 2(1) d.)—"MINORITY OF PERSON WHO IF OF FULL AGE WOULD BE ENTITLED TO THE RENTS AND PROFITS"—PERSONS BORN AFTER THE TESTATOR'S DEATH.

In re Cattell, Cattell v. *Cattell* (1907) 1 Ch. 567, turns upon the construction of a clause in the Thellusson Act (39 & 40 Geo. III. c. 98), s. 1 (R.S.O. c. 332, s. 2 (1) (*d*)). That clause validates accumulations during "the minority or respective minorities only of any person or persons who under the . . . trusts of . . . the will directing such accumulations would for the time being, if of full age, be entitled unto the rents . . . so directed to be accumulated," and the question was whether or not this provision is confined to the minority of persons born in the life time of the testator directing such accumulation, and Neville, J., came to the conclusion that it is not, notwithstanding the dicta to the contrary to be found in *Haley* v. *Bannister*. (1819) 4 Madd. 275; and *Jagger* v. *Jagger* (1883) 25 Ch. D. 729.

FIXTURES—HIRE-PURCHASE AGREEMENT—EQUITABLE MORTGAGE OF FIXTURES COVERED BY HIRE-PURCHASE AGREEMENT—PRIORITY.

In re Allen (1907) 1 Ch. 575, a company hired machinery under a hire-purchase agreement, under which the machinery, though to be affixed to the company's premises, was nevertheless to remain the property of the vendors, who in default of payment of the monthly payments of the purchase money were to be at liberty to enter and remove the machinery. After the machinery had been affixed the company made an equitable mortgage to a bank of the premises in which the machinery had been placed. The company failed to pay the purchase money, and the vendors claimed the right to remove the machinery which was contested by the mortgagees. Parker, J., held that the mortgagees, having a merely equitable mortgage, took subject to the rights of the vendors of the machinery.

COMPANY—SHARES—TRANSFER TO INFANT NOMINEE—WINDING-UP—CONTRIBUTORY.

In re National Bank (1907) 1 Ch. 582 was an application by a liquidator in a winding-up proceeding to place certain persons on the list of contributories in respect of certain shares of which

it was claimed they were the beneficial owners. The shares in question at the date of the commencement of the winding up had stood in the name of one Sparke, he contracted to sell them pending the winding-up proceedings to a firm of Massey & Griffin, and they nominated one Littlejohn, a clerk in their office and then an infant as transferee; and with the assent of the liquidator the transfer was made to him in April, 1894, and in May, 1894, Littlejohn, with the assent of the liquidator transferred the shares to one Davies, also an infant, and a clerk in the office of Massey & Griffin. In 1896 the liquidator became aware that Davies was an infant, and in March, 1906, calls upon the shares having been made and not paid, the present application to place Massey & Griffin on the list of contributories in respect of the shares so transferred to Davies was launched. Parker, J., held that there being no contractual relationship between Massey & Griffin and the company, they could not be placed on the list; and he also thought that if the liquidator had any equitable right against Littlejohn it had been lost by delay, and he doubted whether he had any right against Littlejohn, as he also was an infant. No application was made as against Sparke, and if it were, the learned judge would not say that it would be successful.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—JUDGMENT—REPUDIATION OF CONTRACT AFTER JUDGMENT—EVIDENCE OF TITLE—INTEREST—COSTS.

Halkett v. *Dudley* (1907) 1 Ch. 590 was an action for specific performance by a vendor in which judgment had been pronounced on 14th January, 1905, directing the usual reference as to title. While the title was being investigated before the Master the defendant applied to be allowed to be discharged from the purchase on the ground that at the date of the contract and at the date of the judgment the plaintiff had not a good title. The Master found that a good title had been made, and that it was first shewn in his office on the 8th December, 1905, when a contract for the release of certain restrictive covenants affecting the property was obtained. The defendant also claimed that the vendor was bound to produce, or procure a covenant to produce, a document of title which was of record in Scotland. With regard to the latter point Parker, J., held that it was not necessary to produce or procure a covenant for the production of the document in question, but that the vendor was bound to give secondary evidence of its contents; and as regarded the right to repudiate

the contract, he held that after a judgment for specific performance that could only be done with the leave of the Court. That although a purchaser on finding out that his vendor is unable to make a good title may promptly repudiate the purchase, yet that after judgment for specific performance (though the title is not made good until after judgment), the fact that the vendor had not a good title at the time of the contract or at the date of the judgment, does not entitle the defendant to repudiate without leave of the Court, and that such leave in the exercise of its discretion ought not to be granted by the Court after a good tile has been in fact shewn. He also held that interest did not begin to run on the purchase money until the date the good title was shewn. The defendant having been an unwilling purchaser, and the action having been thereby occasioned, he was ordered to pay the costs of the action up to judgment, and the plaintiff was ordered to pay the subsequent costs down to the time the title was shewn, and thereafter no costs were given to either party.

EXTRADITION—JURISDICTION—FUGITIVE OFFENDER—EVIDENCE OF CRIME PUNISHABLE BY IMPRISONMENT WITH HARD LABOUR FOR TWELVE MONTHS OR MORE—FUGITIVE OFFENDERS ACT, 1881 (44-45 VICT. C. 69), S. 9—(R.S.O. C. 155, S. 3.)

The King v. *Governor of Brixton Prison* (1907) 1 K.B. 696 was an application by a prisoner for a habeas corpus. He had been committed by a magistrate under the Fugitive Offenders Act, 1881, and the question raised was whether there was proper and sufficient evidence before the committing magistrate that the offence of which the applicant was accused was punishable in the Court of the Colony to which he was to be extradited, by imprisonment with hard labour for twelve months or more: (see R.S.C. c. 155, s. 3). The offence charged was larceny, in the Colony of Victoria, in the year 1898, and the only evidence of the law of Victoria, was a statement by a senior police constable, that larceny was punishable by the Crimes Act, 1890, of Victoria, with hard labour for a term not exceeding five years.

The Divisional Court, (Lord Alverstone, C.J., and Darling, J.,) held that Colonial law can only be proved like foreign law by the evidence of experts, and that the evidence of the constable was not sufficient; and that though it was competent for the Court to remit the case to the magistrate to receive further evidence, yet having regard to the fact that the offence had been committed so long ago, and that the applicant had endeavoured

to make reparation, and had since been leading an honest life, they thought the interests of justice would be best served by discharging the prisoner which was accordingly done.

VOLUNTEER CORPS—COMMANDING OFFICER ORDERING GOODS FOR CORPS—LIABILITY.

Samuel v. *Whetherly* (1907) 1 K.B. 709. In this case the defendant's testator was the commander of a volunteer corps and had personally ordered a supply of goods from the plaintiff for the use of his corps, and the question was whether he had thereby made himself personally liable for payment thereof. Walton, J., held that he was personally liable and judgment was accordingly given against the defendant for the amount claimed which was over $11.000.

GAMING AND WAGERING—GAMBLING IN FOREIGN COUNTRY—LOAN FOR GAMBLING—CHEQUE GIVEN FOR GAMBLING—GAMING ACT, 1710. (9 ANNE C. 14) S. 1—GAMING ACT, 1835 (5-6 WM. IV. C. 41) S. 1—(R.S.O. C. 339, S. 1).

In *Moulis* v. *Owen* (1907) 1 K.B. 746 the plaintiff sought to recover a cheque given by the defendant in Algiers, drawn on an English bank, partly in payment of money lent by the plaintiff to the defendant to enable the defendant to gamble at cards in Algiers, and the balance in payment of money won at cards by the plaintiff at Algiers. According to the law of France the consideration for the cheque was legal. Darling, J., who tried the action gave judgment for the plaintiff, but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.,) held that the case was governed by English law, the cheque being drawn on an English bank and payable in England; and that according to the Gaming Act, 9 Anne c. 14, s. 1, as amended by 5-6 Wm. IV. c. 41, s. 1, (R.S.O. c. 339, s. 1), the cheque must be deemed to have been given for an illegal consideration, and therefore the plaintiff could not recover, Moulton, L.J., however, dissented, on the ground that the Statute of Anne applies, in his opinion, only to gaming in England and did not apply to gaming in other countries where it was not unlawful.

SHIP—CONTRACT OF CARRIAGE—CONSTRUCTION—DAMAGE CAPABLE OF BEING INSURED.

In *Nelson* v. *Nelson* (1907) 1 K.B. 769 the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.J.J.) have

affirmed the judgment of Bray, J., (1906) 2 K.B. 804 noted ante, p. 246.

SHIP—CHARTER—PARTY—DEMURRAGE—LAY DAYS, SUNDAYS AND HOLIDAYS EXCEPTED—WORK DONE ON SUNDAYS AND HOLIDAYS.

Whittall v. *Rahtken's Shipping Co.* (1907) 1 K.B. 783 was an action by the plaintiffs' the charterers of the defendants' vessel to recover money paid under protest for demurrage. The charter-party provided that thirteen running days, Sundays and holidays excepted, should be allowed the plaintiffs for loading the cargo. By direction of the plaintiffs, however, work was done in loading the ship on a Sunday after the lay days had begun to run and before they had expired. Bray, J., held that the proper inference was that by agreement of the parties that day was to be included in the lay days and that, in the absence of any evidence to the contrary, the same inference should be drawn when the work is done on the Sunday and holiday whether by the direction or at the request of the charterer or not. The charter-party also provided that the time in shifting port was to count as a lay day, and it was held that where the vessel at the charterers' request shifted port on Sunday, that day was to be included in the lay days. The plaintiffs' action therefore failed.

SHIP—SEAMAN—CONTRACT OF SERVICE—CARGO, CONTRABAND OF WAR—REFUSAL OF SEAMAN TO PROCEED—ORDER OF NAVAL COURT—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. c. 60), s. 225, SUB-s. 1 (c), s. 243.

Hutton v. *Ras SS. Co.* (1907) 1 K.B. 834. Action by a seaman to recover wages. It appeared that he shipped on board a vessel on a voyage for Port Arthur, on arriving at Yokohama the plaintiff refused to proceed on the ground that the cargo included contraband of war. A Naval Court was assembled at Yokohama at the instance of the master by the British Consul, and the plaintiff was tried and found guilty of refusing to obey lawful orders, and the Court found the plaintiff was guilty, and his plea that the carriage of contraband vitiated his contract was held to be without force, and the Court ordered the plaintiff to be discharged. Lord Alverstone, C.J., who tried the action held that the order of the Naval Court concluded the plaintiff, and he dismissed his action: and his decision was affirmed by the Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L. JJ.).

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] OWEN *v.* MERCIER. [April 22.

Vendor and purchaser—Contract for sale of land—Delivery of registerable conveyance—Immoral purposes of purchaser—Rescission of sale.

Appeal from judgment of Boyd C., reported 12 O.L.R. 529. Appeal allowed and action dismissed with costs throughout.

As between the plaintiff and the vendee the transaction had been completed when the deed was sent back to him for correction. Whatever difficulty the omission in the description may have given rise to as regards its registration, the conveyance was operative to pass the property, the fault in the description merely rendering it equivocal, and causing latent ambiguity which might be rebutted and removed by extrinsic evidence. The plaintiff could derive no right under the condition inserted even if in form valid, because made without consent after the execution and delivery of the deed.

Per MEREDITH, J. A.:—If the condition inserted be a common law condition, as it seems to be, it might be contended to be void as infringing upon the rule against perpetuities.

Middleton, for defendant, appellant. *C. A. Moss*, for respondent.

HIGH COURT OF JUSTICE.

Anglin, J.] RE TAYLOR *v.* MARTYN. [March 8.

Vendor and purchaser—Making title—Discharge of mortgage by executor—Registering probate—Local improvement rates—Covenant in agreement to convey free from incumbrances—Executions and general registrations.

On an application under the Vendors and Purchasers Act, R.S.O. 1897, c. 134, on making title.

Held, 1. As the vendor was entitled to a registered title the vendor was bound to register the probate of the will of a deceased mortgagee whose executor had given a discharge in 1888.

2. Under an agreement that the vendor "would convey the lands freed and discharged from all incumbrances" local improvement rates were not apportionable as "taxes rates and assessments" and must be removed; but

3. The purchaser must satisfy himself by the usual searches as to entries in the general register and executions affecting the lands in the hands of the sheriff.

Luscombe, for purchaser. *Buchner*, for vendor.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [March 27.

GENTLES *v.* CANADIAN PACIFIC RY. CO.

Estoppel by conduct—Unpaid accounts receipted at request of agent—Action against principal.

Where a debt or obligation has been contracted through an agent and the principal is induced by the conduct of the creditor to reasonably believe that the agent has paid the debt or discharged the obligation and in consequence of such belief pays or settles or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny as between himself and the principal that the debt has been paid or the obligation discharged; and in a case where a railway engineer who was supplied with money by the railway company to pay for supplies and the board of his men, being credited with the amounts of the receipted accounts as they came in, and who had induced a firm of hotel keepers who had furnished both, to receipt the accounts in advance on the representation that the company as part of their system required receipts before they would pay the accounts.

Held, that the company were justified in relying on these representations, that the accounts were paid; and as they had altered their position (the engineer having left their employment without accounting) on the faith of them, the hotel keepers were estopped from setting up to the prejudice of the company that the accounts were not in fact paid.

Judgment of MAGEE, J., reversed.

Angus MacMurchy and *John D. Spence*, for the appeal. *Robert McKay*, contra.

Divisional Court, Ex.D.] [April 19.

DUNN *v.* MCCALLUM.

Mechanics' liens—Lien of material man—Registration of one lien against three separate owners—Validity of.

Where the owners of three separate parcels of land made three separate contracts with a contractor for the erection of houses on their respective parcels, and materials were furnished by a material man to the contractor which were used by him in the erection of the three houses, such material man is not empowered, under the Mechanics' Lien Act, to register a lien against all the lands jointly.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

Bicknell, K.C., for plaintiff, appellant. *Middleton* and *Forster*, for the other parties.

Divisional Court, Ex.D.] [April 19.

REX *v.* HOLMES.

Police magistrate—Appointment for town—Ex officio justice of the peace for county—Jurisdiction over offences in another town.

A police magistrate appointed for a town, notwithstanding he has jurisdiction as a justice of the peace for the whole country, has no jurisdiction to act at the trial of an offence committed in another town for which there is a police magistrate, except at the general sessions, or in case of illness or absence, or at the request of such other police magistrate.

MAGEE, J., dissented.

Frank McCarthy, for defendant. *Cartwright*, K.C., for the Crown.

Divisional Court.] FAULKNER *v.* GREER. [April 22.

Trespass—Wrongful removal of timber from lands—Subsequent sale—Measure of damages.

The husband of the plaintiff in an interpleader issue conveyed certain lots in June, 1905, to his wife for valuable consideration. Prior to this deed but without his knowledge or that of the plain-

tiff, certain timber was cut and removed from the lots without any colour of right. The parties who had committed this trespass sold some of the timber to the defendants to this issue, who purchased bona fide, and subsequently sold the same to another bona fide purchaser. The plaintiff thereupon brought an action against these two purchasers for damages for cutting and taking the timber and for a declaration that as against them she was entitled to the proceeds of the timber. The second purchaser obtained leave to pay the purchase money into Court, and this issue was directed to determine the rights to it as between the plaintiff and the first of the above purchasers.

Held, that the plaintiff was entitled to recover only so much of the said purchase money as represented the value of the timber taken to the plaintiff as standing on the land, and she was not entitled "to fasten upon any increment of value which from exceptional circumstances might be found to attach" to the timber, as for example, by reason of the transportation of the timber to the place where it was ultimately sold. The balance of the said purchase money must be paid out to the defendants in the issue.

W. Blake, K.C., for defendants, appellants. *C. A. Moss*, for plaintiff.

Divisional Court.] [May 6.

MORRIS *v.* CAIRNCROSS.

Landlord and tenant—Tenant for years—Liability for permissive waste—Covenants in lease—Construction.

Held, after detailed review of the cases, that *Yellowly* v. *Gower* (1855) 11 Exch. 274, which decided that a tenant for years is liable for permissive waste, was rightly decided, and that this authority has not been impugned or affected by any subsequent case or displaced by the provisions of the Judicature Act.

Held, also, that the provisions in the lease in question in this case, whereby the covenants to repair and to repair according to notice were qualified by the exceptions in the covenant to leave the premises in good repair, namely: "reasonable wear and tear and damage by fire or tempest"—did not have the effect of relieving the tenant from any liability which but for this he would have been subject to for permissive waste.

Raney and *A. Mills*, for plaintiff. *C. A. Moss*, for defendant.

Divisional Court.] [May 20.

SIMPSON *v.* TORONTO & YORK RADIAL CO.

Negligence—Tram car—Passenger projecting head—Accident.

Action for damages. On September 4th, 1905, the plaintiff boarded a car of the defendants at Long Branch for Toronto, and as the car was crowded and he wished to smoke he stood on the rear platform of the car. He leaned back over the wire gate of the car, which was quite low, in order to expectorate, and in so doing was struck by a post belonging to the defendants and used by them for their trolley-wire.

Held, upon the whole case that there was ample evidence upon which the jury could as they did find the cause of the accident to be the negligence of the defendants, and a nonsuit was properly refused. The extent to which the head of the plaintiff was projected was not such as to make his act negligence per se and it was rightly left to the jury to say whether his act under the circumstances was negligence at all.

The Massachusetts rule that if one riding on a car with his elbow or arm projecting out of the window sustains an injury he is guilty of want of due care which will prevent him from maintaining his action, dissented from.

Robinette, K.C., and *C. A. Moss*, for defendants, appellants. *Loftus*, for respondent.

ASSESSMENT CASES.

IN RE VOKES ASSESSMENT.

Assessment—Removal from one municipality to another after assessment fixed—Change of investment.

V. residing in Toronto was assessed in 1902 for $10,000 on personal property and $1,990 on realty, for the year 1903. In 1903 he paid taxes on the $1,990, but objected to pay on the whole of the $10,000, as he was not residing in Toronto in 1903 and had invested part of that sum in real property in another municipality.

Held, that, nevertheless, he was liable to pay taxes on the whole assessment.

[TORONTO, Nov. 2, 1906.—Winchester, Co.J.

This was an appeal from the Board of Assessment of the City of Toronto, to the County Judge of the County of York.

In 1902 Mr. Vokes, the appellant, while residing on Will-

cocks St., Toronto, was assessed $10,000 on personal property and $1,990 on real estate, making together $11,990.00. There was no appeal from the assessment, the amount of same having been arranged by Mr. Vokes and the Assessment Department on July 10, 1902. The tax on this assessment was payable in 1903, The tax on the real estate was duly paid. In November, 1902, Vokes invested $7,600 of the monies of his personal property assessed as above in a house in the Township of York, and in February, 1903, he invested a further sum of $2,100 in a house on Palmerston Avenue. In December, 1902, he removed to the Township of York, where he has lived since then and where he paid taxes, in 1903, on the houses purchased by him as above.

Gideon Grant, for appellant, contended that by reason of not residing in Toronto during the year 1903, he was not liable to pay taxes assessed on his personal property in Toronto in the year 1902, for the tax year 1903, and that as he had already paid taxes on a part of the personal property so assessed in 1902 by paying same on the property in which he invested his monies in the Township of York he should not be called to pay a double taxation on the same property.

W. C. Chisholm, contra.

WINCHESTER Co., J.—The Assessment Act in force in the years 1902 and 1903 being R.S.O. c. 224, ss. 58 and 59, provided for the taking the assessment of all property in Toronto prior to the 30th September, and by sub-s. 5 of s. 59 it was provided that "The assessment so made and completed may be adopted by the council of the following year as the assessment on which the rate of taxation for such year following shall be fixed and the taxes for such following year shall in such case be levied upon the said assessment." Accordingly the assessment made in Toronto during the year 1902, and confirmed as required by the statute, was adopted by the council of the following year as the assessment on which the rate of taxation for 1903 should be fixed and the taxes for 1903 were levied upon the assessment for 1902.

There is no dispute as to the legality of the assessment of 1902 for 1903, and it must therefore be held that the personal property for which Mr. Vokes was assessed was properly assessed to him in 1902 for 1903. Neither is there any dispute that the tax rate of 1903 was made or fixed on the assessment of 1902 pursuant to the statute and the city by-law and the same was entered on the rolls placed in the collector's hands for collection by levy, etc., as provided by the statute.

In my opinion the liability of a party to pay his tax is fixed by the provisions of the Assessment Act from the time he receives the notice of his assessment notwithstanding the tax is not payable thereon until the following year, provided of course that the assessment becomes confirmed and the party assessed is not entitled to any exemption.

If the party assessed move from the city after the confirmation of such assessment into another municipality taking the assessed property with him he is not thereby relieved from the liability to pay his tax on such property when it becomes due and payable even should he be compelled to pay a tax on such property by the municipality into which he moves. I can find no decided case in our courts on the point, but in the American reports there are some cases similar to the present one in principle. I refer to *DeArman* v. *Williams*, 93 Mo. 158. In that case the plaintiff resided in Johnson County, Missouri, on the 1st June, 1882, and had on hand money of his own amounting to $2,135.00 which the assessor of that county duly assessed for estate and county purposes between that date and 1st December, 1882. In January, 1883, the plaintiff moved to Bales County taking the money with him where he invested the same in a stock of goods and took out a merchant's license and paid the license tax for 1883. The defendant, collector of Johnson County, issued a tax bill to the sheriff of Bales County to levy on plaintiff's goods. Black, J., in his judgment after reciting the above facts says—"The assessor is required to make the assessment between the 1st of June and January (this includes all property owned on the 1st June)—plaintiff being a resident of Johnson County from June 1st to December, 1882, his personal property was liable to taxation in the county for the year known as the tax year of 1883. His subsequent removal to Bales County did not prevent the officer of Johnson County from extending and collecting the tax nor does the fact that he in 1883 invested the money in a stock of goods and paid a merchant's license in Bales County for 1883, relieve him from the payment of the Johnson County tax."

In the case of *The City of Kansas* v. *Johnson*, 78 Mo. 661, the law requires every person owning property on the 1st of January to pay a tax thereon for the fiscal year beginning on the 3rd Monday of April thereafter. Johnson had a merchant's license tax for the year ending April 15th, 1878, and another on an entirely different stock of goods for the year ending in 1879. He sold the first stock of goods in March, 1878, and the

goods were then removed from the State. Still it was held that he must pay the tax for that stock also for the fiscal year of 1878 because he owned the goods on and after the 1st of January, 1878.

In *Warner* v. *Weneer Treasurer, etc.*, 14 Wis. 396, after setting out the sections of the Code relating to the duties of assessors and mode of assessing as also the facts of the case, Cole, J., says: "From these various provisions of the law we think it clear that the liability of a party to pay his tax is fixed from the time he receives the notice, and if he afterwards changes his residence it cannot affect this liability for that year. It is certainly very desirable and important that some definite and specific rule be adopted as to the place where a party should pay his taxes."

It was argued that Mr. Vokes, if required to pay the tax in question, would thus be made to pay double taxes on the same property. Even if this were so there is no means by which he can escape paying these taxes that I am aware of; but, as a matter of fact, he does not pay a double tax. During the year in which he was assessed in Toronto he did not pay any taxes on such assessment; it is no doubt true he may have been subject to a tax, but that was on the assessment for the preceding year so that during the year in which he was first assessed he paid no tax.

I am therefore of opinion that Mr. Vokes is liable to pay the taxes for 1903 as fixed on the assessment of his personal property in the year 1902.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] WINSLOW *v.* RICHARDS CO. [May 21.

Agreement—Option—Assignment—Renewal and modification of option—Rights of assignee.

An option was held by R. upon property of defendant company for the sum of $562,586. By agreement dated August 7, 1903, reciting the option and that the company had arranged through R. to execute an option to P. and C. for $640,000, it was witnessed that if the property was purchased in accordance with such option, "or mutual modification of the same," the

company would pay to R. or his assigns, any excess realized above the option price of $562,586. R. immediately afterwards assigned a one-half interest in the agreement to the plaintiff. By agreement of the same date, the company gave an option on the property to P. and C. for $700,000, who in case of a sale by them under that option or any mutual modification thereof were to be allowed $60,000. This option expired March 1, 1904. On October 27, 1904, a new option was given by the company to P. and C., and this by subsequent agreements was extended to June 15, 1905. On June 10 P. and C. agreed to sell the property to I. P. Co. for $725,000. This agreement fell through. On October 2, 1905, a sale was made to I. P. Co. for $675,000. By agreement of the same date the defendant company agreed to pay P. and C. $100,000 for their services in connection with the sale, leaving $575,000 as the net amount to the company from the sale. Prior to the sale the company having no notice of the assignment by R. to the plaintiff had agreed with R. that his option should be for $580,000. The plaintiff claimed one half of the difference between the sum realized by the company from the sale and $562,586.

Held, that under the circumstances the option given after the expiry of the first option to P. and C. was a modification of it within the meaning of the agreement with R., but that the company having no notice of plaintiff's assignment were free to deal with R., and that consequently the change made by R. in his agreement with the company was binding on the plaintiff.

A. O. Earle, K.C., for plaintiff. *Currey*, K.C., and *McLellan*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [April 19.

COUCH *v.* MUNICIPALITY OF LOUISE.

Municipality—Accident—Non-repair of highway—Work done on portion of road distant from point of accident—Notice of non-repair.

By sub-s. (a) of s. 667 of the Municipal Act, R.S.M.

1902, c. 116, the liability of a municipality for damages sustained by any person, by reason of default in keeping a public road in repair, is "limited to that portion of the road on which work has been performed or public improvements made by the municipality."

The defendants made public improvements on the road allowance in question to the east of a deep ravine which crossed it, and the owner of the land at that point permitted travellers to go on his land around the ravine to or from that portion of the road allowance to the west of the ravine from which access was had to an intersecting highway farther west.

The obstruction which caused to the plaintiff the damages sued for was a barbed wire fence which had been placed by a private individual on the road allowance at a point a considerable distance west of the ravine, and the municipality had performed no work nor made any improvements upon that portion of the road. The work done on the east of the ravine, however, together with the detour around the ravine, enabled the public to make use of the whole road, and so to travel between that part of the country east of the ravine and a market town situated to the west of the point where the accident took place, and it was for that purpose that the improvements to the east of the ravine had been made.

Held, HOWELL, C.J.A., dissenting, that the road allowance at the point where the accident occurred was, within the meaning of the statute, a portion of the public highway on which work had been performed by the municipality and therefore it was liable, as the obstruction had been allowed to remain on the road for more than three months, and notice of its existence there should be imputed to the defendants notwithstanding the absence of direct evidence of knowledge of it. The result would be different in the case of a partially completed work looking to the ultimate opening up of an extension of the road, the accident happening beyond where the work had been done.

Appeal from verdict of County Court judge in favor of the plaintiff, dismissed with costs.

McLeod, for plaintiff. *Hough*, K.C., for defendants.

KING'S BENCH.

Mathers, J.] ROSS *v.* MOON. [May 1.

Contract—Sale of several articles together, some only supplied—New contract subject to terms of old one—Sale of goods—Implied warranty—Interest.

Action for the price of an engine, and other articles of machinery supplied by plaintiffs to defendants in pursuance of a written contract. This contract called for the furnishing at the same time of a number of articles in addition to those actually supplied.

The statement of claim was founded upon the original contract, but the evidence shewed that the defendants had made a new bargain under which they accepted the machinery actually delivered on the plaintiffs promising to pay the freight and to allow for the articles not delivered.

Held, that the plaintiffs should be allowed to amend the statement of claim and should then have judgment for the contract price less the freight and the cost of the articles not delivered.

Defendants contended that the written agreement was superseded by the new arrangement and the plaintiffs could only rely upon an implied agreement to pay what the good were worth, subject to the implied condition, under sub-s. (a) of s. 16 of R. S.M. 1902, c. 152, and they were reasonably fit for the purposes for which they were sold.

The original agreement, however, contained a proviso that "in the event of changes being made in machinery or terms mentioned in this contract; or any changes whatever, such changes are in no way to supersede or invalidate this contract but it is to remain valid, binding and in full force in all its clauses except in so far as relates to the specific changes.

Held, that full effect must be given to this proviso and that all the provisions of the original contract, except those modified by the new bargain, remained in full force.

The contract contained the usual printed warranty followed by the clause: "All warranties are to be inoperative and void in case the machinery is not settled for when delivered." It was not "settled for," and therefore any warranty covered by the expression "all warranties" in that clause became inoperative and void; but it should be held that that expression only referred to the printed warranty immediately preceding, and any im-

plied warranty under the 16th section of the Sale of Goods Act, would still remain unless, as provided in sub-s. (d), the express warranty was inconsistent with the implied warranty under sub-s. (a). The learned judge, having found on the evidence that the machinery was reasonably fit for the purposes for which it was sold,

Held, that it was not necessary to decide whether such warranties were consistent or not.

Held, also, that the plaintiffs were only entitled to interest at the statutory rate of 5 per cent. per annum, although it was stipulated that, if notes were given, they would carry interest at a higher rate. The notes were not given, and the plaintiffs' right to recover depended on the further provision in the agreement making the whole purchase price in that event due and payable forthwith. In this latter event there was no provision for the payment of interest.

Fullerton and *Blackwood*, for plaintiffs. *Burbidge*, for defendants.

Mathers, J.] [May 2.

RAT PORTAGE LUMBER CO. *v.* EQUITY FIRE INSURANCE CO.

Practice—Particulars—Order for, when and for what purpose made.

Appeal from an order of the referee requiring plaintiffs to furnish particulars of their reply to the statement of defence. The only material filed in support of the motion was an affidavit identifying the pleadings.

Held, that, the pleadings being closed, particulars could not be required with a view to have the prior pleading made distinct enough to enable the applicant to frame his answer thereto properly: *Smith* v. *Boyd*, 17 P.R. 467.

After the pleadings are closed, particulars may, in a proper case, be ordered for the purpose of saving expense, or for the purpose of presenting surprise at the trial. But it must be shewn by affidavit or otherwise, independently of the pleadings, that particulars are needed for either of those purposes.

Gourond v. *Fitzgerald*, 37 W.R. 55, 265; *Thompson* v. *Berkley*, 31 W.R. 230; *Bank of Toronto* v. *Insurance Co. of North American*, 18 P.R. 27, followed.

Appeal allowed and order for particulars, discharged with costs.

Anderson, for plaintiffs. *Clarke*, for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] WHEELDON *v.* CRANSTON. [May 7.

Mining law—Placer claim—Location under obsolete Act—Re-location under existent Act of discovery or error—Formal abandonment, whether necessary in such circumstances—Representation—Work done on adjoining claim—Placer Mining Act, R.S.B.C. 1897, *c.* 136—*B.C. Stat.* 1901, *c.* 38.

Where a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to relocate it in accordance with the existent statute, and no formal abandonment is necessary.

Adopting the principle laid down in *Woodbury* v. *Hudnut* (1884) 1 B.C. (Pt. 2) 39, the work done by a miner making a cut through an adjoining claim with the consent of the owners for the better working of his own claim must be held to be a representation of his own claim.

Where one post was made to do joint duty on the common boundary line of two claims, the names of the two claims being written on the side of the post facing the respective claims.

Held, that the object of the statute requiring due marking had been accomplished.

S. S. Taylor, K.C., for plaintiff. *A. M. Johnson*, for defendant.

Irving, J.] [May 17.

COTTON *v.* CITY OF VANCOUVER.

Municipal law—Streets, property of corporation in—"Vest," meaning of.

Sec. 218 of the Vancouver Incorporation Act, 1900, provides in part that every public street . . . in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved). In an action for an injunction to restrain the corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted

that the construction of the word "vest" as used in s. 218, did not authorize the corporation to dig to an excessive depth.

Held, adopting the ruling in *Roche* v. *Ryan* (1891) 22 Ont. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well, but

Held, on the evidence, that it had not been shewn by plaintiffs that substantial or irreparable injury would be sustained by them through the construction of the drain.

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

Hunter, C.J.] A. *v.* B. [May 17.

Divorce—Alimony, whether grantable to wife obtaining a divorce on account of impotence.

The wife obtained a decree of divorce on the ground of impotence on the part of the husband, and on an application for permanent alimony objection was taken that there was no jurisdiction, as there was never a valid marriage.

Held, on the principle that a marriage annulled on the ground of impotency is not void ab initio, but voidable only at the instance of the aggrieved spouse ,that the wife was entitled to permanent alimony.

Macdonell, for the applicant. *Davis*, K.C., contra.

Book Reviews.

Tristram and Cootes' Probate Practice, by A. C. Forster Boulton. Fourteenth edition, London: Butterworth & Co., Bell Yard. Canada, The Canada Law Book Company, Limited, Toronto, 1907.

Whilst it is of course unnecessary to do more than state that this is a new edition of the great English work on Probate and Administration Practice, it is nevertheless desirable to call attention to the fact that this is an edition prepared by Mr. Forster Boulton, with a special reference to the use of this work in Canada. We have in Mr. Weir's book on Probate, Administration and Guardianship a useful summary, but we have in the book before us a more exhaustive treatise, in fact a mine of in-

formation on this important branch of law. The editor claims to refer to all cases that have been decided by the Canadian Courts, besides all rules and statutes which appear upon the text; as he says, this will be helpful in aiding in the assimilation of English and Canadian law, and "forging another link in the chain of common jurisprudence in the two countries." A glance at the preface to the first edition published in 1858 shews the development which has taken place since the time when the Proctors at Doctors Commons "made this part of their art a mysterious property, in the knowledge of which neither the public nor the general profession should participate."

An Epitome of Constitutional Law and Cases, by W. H. HASTINGS KELKE, M.A., Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1907.

This little book of one hundred and ninety pages, is founded on Broom's Constitutional Law, and is in fact an elementary treatise giving a connected sketch of constitntional law as a whole, with occasional full abstracts of the leading cases. It may be looked upon as an introduction to the larger works of Dicey and Anson; compact and very readable.

Trades' Union Law, by HERMAN COHEN, Barrister-at-law. Second edition, London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1907.

Trade unions have come to stay, and trade union law, as the author remarks, "is now mainly a code for the regulation or non-regulation of the internal affairs of the societies, and the Taff Vale controversy is becoming a thing of the past." The historical parts have therefore been eliminated from the present edition. The contents are the various acts affecting the subject matter with annotations and references to decided cases.

United States Decisions.

OPTION.—A broker who finds a person who takes an option upon the purchase of a certain mining property, which is never carried out, is held, in *Crowe* v. *Trickey*, Advance Sheets, U. S. (1906) 275, to have no right, where the owner dies before the

option expires, to recover his agreed commission from the administrator, when the latter, after the expiration of the option, sells the property to the same person and at the same price.

DEED.—A ditch constructed by the landowner to relieve a portion of his land of surface water and convey it to another portion, where it is valuable for irrigation purposes, which is plainly visible upon the ground at the time he sells the latter portion, is held, in *Fayter* v. *North* (Utah) 6 L.R.A. (N. S.) 410, to pass, together with the water flowing thereon, under the words "privileges and appurtenances," in the deed.

NEGLIGENCE.— A volunteer who, having been warned of the danger of approaching a broken electric wire which he knows to be uninsulated and to carry a current for lighting purposes, and to have shocked another into insensibility, approaches the wire for the purpose of determining whether or not it is still alive, is held, in *Carroll* v. *Grande Ronde Electric Co.* (Or.) 6 L.R.A. (N.S.) 290, to be guilty of such negligence that no recovery can be had for his death, in case he places his hand within the danger zone, and a shock from the wire kills him.

A report made to the claim agent of a street railway company by the conductor and motorman of an electric car, of an accident in which a passenger was injured, which was made pursuant to a standing rule of the company for the information of the claim agent, as a basis for settlement or for use of counsel in case of suit against the company, is held, in *Re Schoeph* (Ohio) 6 L.R.A. (N.S.) 325, to be a privileged communication, the production of which cannot be enforced in the taking of depositions before the trial in a suit against the company for injury received in such accident.

STREET RAILWAY.—The title to the rails, poles, and other appliances for operating a branch of a street-railway system remaining in the streets at the expiration of its franchise is held, in *Cleveland Electric R. Co.* v. *Cleveland,* Advance Sheets, U.S. (1906) 202, to be in the railway company which has been operating the road; and the power of the municipality to confer upon another street railway company the right to take possession of such property is denied.

WATERCOURSE.—The owner of the servient estate is held, in *Pohlman* v. *Chicago, M. & St. P. R. Co.* (Iowa), 6 L.R.A. (N.S.)

146, not to be liable for hastening the flow of surface water therefrom, although it results in the wearing of ditches in the dominant estate.

Where water runs in a well-defined channel, with bed and banks, made by the force of the water, and has a permanent source of supply, it is held, in *Rait* v. *Furrow* (Kan.), 6 L.R.A. (N.S.) 157, that it is to be regarded as a natural water course, although the stream may be small, its course short, and it may have existed for only a short time.

An owner of land bounded by a navigable stream is held, in *Fowler* v. *Wood* (Kan.), 6 L.R.A. (N.S.) 162, to have the right to protect his soil against the inroads of the water, to secure accretions which form against his bank, and to erect and maintain improvements necessary to promote commerce, navigation, fishing, and other uses of the river as navigable water, but to have no right by obstruction placed across the main current, to deflect the stream itself into a new channel.

One erecting fences and culverts across a stream is held, in *American Locomotive Co.* v. *Hoffman* (Va.), 6 L.R.A. (N.S.) 252, not to be liable for injuries to an upper riparian proprietor because they are not sufficient to pass an extraordinary flood due to the giving way of a dam, or to an unprecedented rainfall.

That the water of a navigable lake cannot be withdrawn below the original low-water mark for irrigation purposes, to the injury of a riparian owner who acquired his rights prior to the adoption of the constitutional provision vesting title to the navigable waters in the State, is declared in *Madson* v. *Spokane Valley L. & W. Co.* (Wash.), 6 L.R.A. (N.S.) 257.

Flotsam and Jetsam.

PRESUMPTIONS AS TO POSSIBILITY OF ISSUE:—The *Law Times* (p. 405) gives a collection of the authorities in the English reports which would be useful to the practitioner desiring to know the trend of the cases on this subject.

A writer in the *Central Law Journal* (U.S.A.) p. 428) collects the authorities in the United States on the power of a Court to compel a plaintiff in a suit to submit to a physical examination. As the number of accidents is ever increasing and actions of negligence are multiplying in these days, the subject is one of interest.