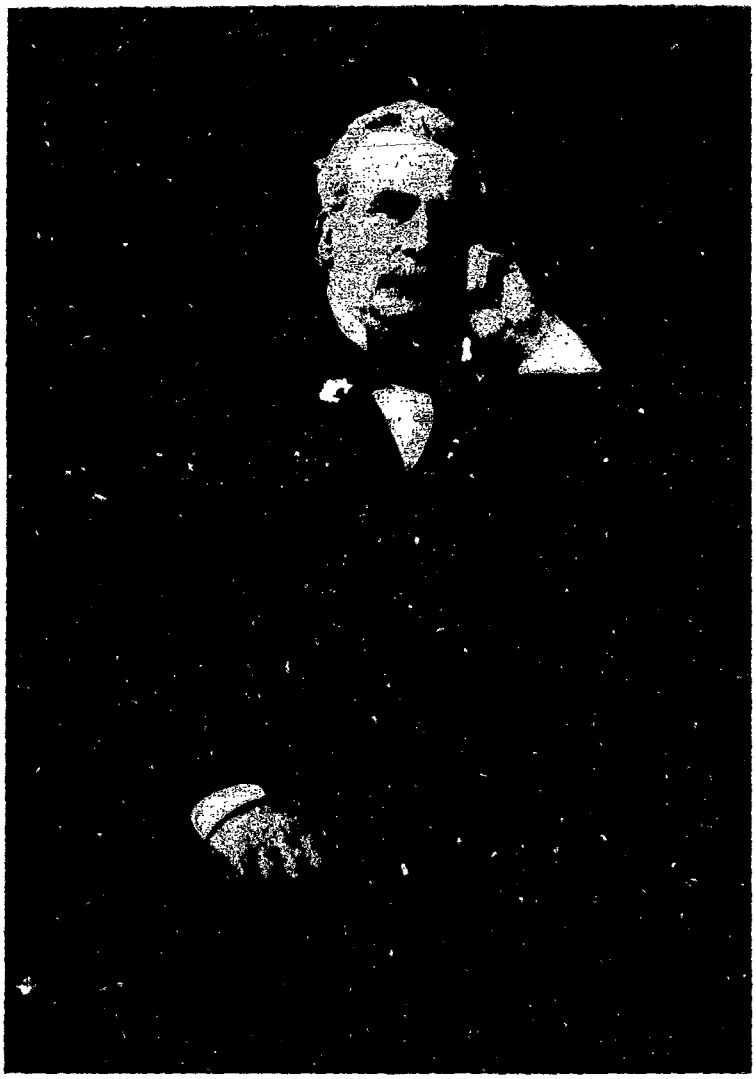

HON. DAVID MILLS, Q.C.,
MINISTER OF JUSTICE.

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HON. DAVID MILLS, Q.C.

MINISTER OF JUSTICE.

Hon. David Mills, Q.C., LL.B., Minister of Justice and Attorney General of the Dominion, is one of the best known of our Canadian public men. For almost a third of a century he has taken an active interest in the public affairs of this country, and to-day there is no man in Canadian public life whose opinions on a wide range of questions—legal as well as political and social—are more favourably received than are those of this statesman. A man of strong character, of positive individuality, of kindly disposition yet firm temperament, association with him at once leads to the conclusion that he is fitted by nature and by culture to take a high place in any country, and especially so in this young and growing section of the British Empire. With Puritan and United Empire Loyalists ancestors, he has exemplified in his own career many of the characteristics of the stock from which he sprung.

Mr. Mills is a native of Orford township, in county of Kent, Ontario. Here his father was a successful farmer, and in this section the subject of this sketch still, despite his multitudinous public duties, interests himself in the cultivation of the soil. Born in 1831 and educated at the public and district schools, he taught school for some time, and was subsequently appointed Superintendent of Education, which office he held until he entered public life. Meanwhile, he had attended the University of Michigan, the better to prepare himself for the high position he was destined to occupy. At an early age he won distinction in the national arena. He entered public life 33 years ago, being selected by his friends and neighbours in the electoral county of Bothwell as their representative in the first Parliament of confederated Canada. For thirty years uninterruptedly he represented the constituency, despite the fact that its boundaries were altered so as to take away the petty majority that was polled for him in the earlier contests. After the election of 1896, when he was defeated by a few votes, Mr. Mills was called to the Senate, and a year later, on

the retirement of Sir Oliver Mowat, to become Lieutenant Governor of Ontario, he assumed the portfolio of Minister of Justice and the position of Government leader in the Upper House. For both of these positions Mr. Mills was eminently qualified. Twenty-three years ago he entered the Ministry of Hon. Alex. Mackenzie as Minister of the Interior, and he held that important portfolio till the retirement of this administration from office in 1878. Under him the settlement of the North-West was greatly facilitated; treaties of a just character arrived at by many Indian tribes; and the nucleus of local self-government established. So that, when he was again requested to become a member of the Government of Canada, it was conceded on all hands that the Prime Minister had made an excellent choice, and Mr. Mills' subsequent career as Minister and Government leader in the Senate has amply sustained this view.

Our readers are probably more interested in the career of Mr. Mills as a jurist and as an authority on constitutional and international law. He is a Queen's Counsel of the Province of Ontario, and his name was included in the Dominion list presented to Lord Aberdeen by Sir Charles Tupper in 1896. For a number of years he successfully practised his profession in the city of London, and in 1872 he earned distinction for himself in connection with the definition of the north-west boundary of Ontario, pursuing his researches in support of the claims of the Province not only in Canada and in Great Britain, but at Washington. His professional services were retained in conducting the argument on the subject before the Imperial Privy Council in 1884, and his report was recognized on all hands as a most ably-reasoned and conclusive document. The claims therein made were entirely sustained by the British Privy Council. He was entrusted with other important business by the Ontario Administration—notably, the Indian title case, in which he appeared both before the Court of Appeal and the Supreme Court—and in each case earned praise for the manner in which he accomplished his important task. For a number of years he was editor of the *London Advertiser* and he is also a frequent contributor to the leading magazines. As Professor of Constitutional and International Law in the Provincial University, the Minister of Justice earned the highest respect from all with whom he came into contact, and he has had the satisfaction of seeing many of the students who have profited by

his study, his research and his wisdom, rise to positions of eminence and influence in this and other lands.

The distinguishing characteristic of the Minister of Justice is the care which he invariably takes to master every question that is brought before him. He is not a man who jumps at conclusions, who is easily prejudiced, or who lets preconceived notions guide him. When he takes up a subject he masters it. When he masters it and comes to deal with it, either as Minister of the Crown, before students at the University, in a public lecture, in a magazine article, on the platform or in the arena of parliament, he has the quality, which ought to be much coveted, of being able to explain his views in simple, easily understood language. A case in point was the dispute between Canada and the United States with regard to the Alaskan boundary. Countless speeches had been made on the subject, magazine and newspaper articles had been written by the thousand, all professing to elucidate the question. But how few there were that, amid the technical and involved treatment of the question, could clearly comprehend what it was all about. Then the Minister of Justice gave an interview on the subject; short, concise, plain as could be. It was the Canadian side in a way that could not be misunderstood. It was the putting of the United States at once on the defensive, for it stated the Canadian contention so clearly as to leave no room for quibbling. Leading United States newspapers which, prior to Mr. Mills' statement, had been sceptical about the rights of Canada, candidly confessed that the case as put by the Minister of Justice was apparently unassailable, and unless met, it was conceded that the United States would be placed in a humiliating position.

This is but an illustration of the thoroughness, simplicity and strength of Mr. Mills' style of reasoning and of writing. The same scholarly and statesmanlike methods characterize the whole of Mr. Mills' work, whether as legal adviser of the Crown, as Government leader in the Senate, as Professor of Law, or as student of questions relating first to his own country, secondly to the widely-spread countries forming a portion of the British Empire, and thirdly, to all questions of an international character in which Canada or any other section of the Empire may have a near or remote interest. Mr. Mills has always been a strong believer in British connection and in the benefits derivable from British institutions wherever they are introduced, and in this

connection we may refer to his work, "The English in Africa," giving an account of the circumstances under which British dominion over British territory held in that continent has been secured. This notice of the honourable gentleman may fittingly conclude by a quotation from the book referred to, giving in his own words a clear exposition of his well considered sentiments:

"I have sat for more than thirty years in the Parliament of this country, and I have been impressed with two truths, which I desire to emphasize here, the first is that the service of the Crown is entirely consistent with the service of the people; and the second is that the highest prosperity of every part of this great Empire can only be reached by the maintenance of its integrity; I trust then for ages to come, the character and features of the mother, will be found in each of her numerous progeny. The old courage, the old patience, the old constancy, the old faith in the right, the old determination to hold all that we have; and as a great family among the races of men to remain united, having in our international relations 'one life, one flag, one fleet, one throne,' to all of which we are devoted, and for which we are ready to make whatever sacrifices may be necessary to uphold them and make them now, and always the emblems of freedom and justice among men."

CHANGES IN THE ONTARIO BENCH.

Some important changes in the Judiciary of this Province have, as we go to press, been semi-officially announced, though we do not vouch for their accuracy.

Full of honours and ripe in age, Sir George Burton retires from the Court of Appeal followed by the kindest remembrances of all the members of the Bar who practice in that Court, and with the wishes of many friends that he may be long spared to enjoy the quiet comfort of retirement. For many years he was Judge of the Appellate Court, and on the retirement of the late Chief Justice Hagarty he naturally and properly succeeded to that position. Few men on the Bench to-day command as high a respect and regard as Chief Justice Burton.

Sir George would, it is said, be succeeded by Chief Justice Armour of the Queen's Bench Division; a man of great mental and physical vigour, a strong reasoner and an able lawyer. The breeziness and rapidity of thought and action which distinguished him at Nisi Prius and in the Divisional Court would not perhaps be without its

helpfulness in the Court of Appeal, which court now enjoys the fullest confidence of the profession. These attributes would naturally be somewhat tempered by the serener atmosphere of an appellate court, where there is a necessity, not only for a careful consideration of the opinions of other judges, but also for that full research and critical scrutiny which were not always possible in the Court below. Chief Justice Armour is 70 years of age. He was called to the Bar in 1853 and appointed to the Bench in November, 1877, and made Chief Justice ten years later.

Mr. Justice Falconbridge, who would succeed Chief Justice Armour, is one of the most popular judges on the Bench, and his appointment would be received with great satisfaction. His exposition of the law is always clear, his judgments to the point, and his grasp of facts perhaps unequalled, certainly not excelled, by that of any of his brother justices. He has an exceptionally calm and even temper, and if he has any prejudices, from which few men are free, they are under strong control. Wise and discreet, he always has been looked upon as a very reliable and satisfactory Judge; and in jury cases particularly, he has no superior. He is 54 years of age, and was appointed a Justice of the Queen's Bench in November, 1887.

As to the vacancy thus created, it is difficult even to speculate how it would be filled. There are several well-known aspirants, but there are others who are much better qualified, if they would but accept a position which unfortunately does not command the highest talent at the Bar.

The writer of the article Caveat Venditor, which appears in another place, refers to a matter of great importance, namely, the wisdom of the legislatures of the various Provinces in the Dominion having similar legislation on all matters which touch upon important branches of law which are of general application to trade and commerce, but as to which, under our constitution the various Provinces have the right to legislate, without reference to one another. This was one of the things wherein it was hoped that the Canadian Bar Association might have been of use. The sooner some steps are taken of a practical character in the direction above indicated the better. Possibly the present Minister of Justice may be one to make a move in the matter and succeed in getting the legislative heads of the Provinces together for consultation to agree upon some concerted action in the premises.

A NOTABLE RE-PRINT.

Of all the enterprises which have been undertaken of late years for the purpose of facilitating access to the appalling accumulation of case-law which weighs down the shelves of our libraries, the re-publication of the English Reports, which has just been announced, will, if we are not mistaken, prove the most useful. As every lawyer knows to his cost, the decisions rendered during the period which elapsed between the discontinuance of the Year Book and the inauguration in 1866 of the present semi-official reports brought out under the management of the Incorporated Council of Law Reporting, are scattered through an immense number of volumes, amounting in all to over 1,000. The merely mechanical part of the labour of research, the most wearisome and unprofitable of all its incidents, has been increased to an almost intolerable degree by the necessity of handling and examining such a portentous mass of printed matter. Other unpleasant aspects of the present condition of things are the inconveniently large amount of shelf-room needed for a complete collection of these reports, and the ruinous price which is demanded for such a collection—about $9,000—whenever, which is not very frequently, there is one to be had.

To supply in a reduced bulk the contents of this huge pile of books and to bring the whole of them within the reach of men of moderate means, are the aims of the publishers who have projected the new re-print. By taking advantage of all the space-saving expedients of large pages, a type small but remarkably clear, and a specially prepared thin paper they find that the matter in the original 1,000 volumes can be reproduced in 150, which will cost only about one-tenth of the price of the original collection, and require only about one-tenth of the shelf-room for their accomodation. The original paging will be clearly indicated, so that the investigator will have no difficulty in utilizing the present system of citations. This general outline of the scheme is sufficient to show that the project is one which merits, in an eminent degree, the support of the profession. For its details our readers are referred to the prospectus, copies of which can be had upon application to the sole Canadian agents, The Canada Law Book Company, 32 Toronto Street, Toronto, who are one of the promoters of the scheme.

CAVEAT VENDITOR.

Three hundred years ago, when the well-known case of *Chandelor* v. *Lopus* (1603), 2 Croke Jac., p. 4, was decided, the sale of property, both real and personal, accentuated in a marked manner the difference between the civil law and the common law of England. In the case of the former the cautionary "beware" applied to the vendor; while in the latter the purchaser was thrown upon his guard by the monitory caveat emptor. In Coke upon Littleton, the following distinction was drawn:—"By the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty either indeed or in law; for caveat emptor." Many important exceptions, favouring the civil law rule, have gradually tended to modify the common law maxim. Chancellor Kent is reported to have said with reference to the rule of caveat emptor:—"If the question was res integra in our law, I confess I should be overcome by the reasoning of the civilians."

An eminent English Judge has said of the common law rule: "It is, so far as the sale of chattels is concerned, pretty well eaten up by exceptions." A review of the cases shows by what gradual steps the common law of England has, in a marked degree, reverted to the civil law rule. So far as the sale of real estate, however, is concerned, the change has been comparatively slight.

By the civil law, warranty of title was implied on the part of a vendor on the sale of land, so that, in case of eviction, an action would lay for damages against him at the suit of the vendee. By the common law of England, to use the quaint language of Coke, "If a man buys lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him."

When land is leased, there is no implied covenant by the lessor that it is reasonably fit for cultivation or occupation, nor that there is not anything in its state or condition detrimental to health. So, too, when an unfurnished house is let, there is no implied undertaking that it is in a habitable condition. The landlord is also under no implied obligation to do any repairs upon the house, even if it should become uninhabitable during the term for the want of them. If a house is in an unsafe condition, there is no implied duty cast upon the owner to inform the proposed

tenant that it is unfit for habitation. If, however, a house is unfinished, and the landlord undertake to finish it, there is an implied contract on his part to deliver it in a state of repair that renders it tenantable.

On the letting of a furnished house, there is an implied condition that the premises are in a state fit for habitation; and if it prove to be unfit, the tenant is at liberty to throw it up when he makes the discovery that it is so: *Smith* v. *Marrable* (1843), 11 M. & W., p. 5. Doubt was subsequently cast upon this decision; but finally the rule was settled, in 1877, by the decision in *Wilson* v. *Finch-Hatton*, L.R. 2 Ex. D., p. 336. Chief Baron Kelly, in his judgment, at page 343, is thus reported: "Now, I am prepared to hold that the law as laid down in that case (*Smith* v. *Marrable*) is good and sound law; and I may add that although some discussion may have taken place about that case, and although some doubts may have been thrown on the law as there propounded by judges of learning and eminence, still I have no hesitation in holding that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation. I am, therefore, of opinion that, both on the authority of *Smith* v. *Marrable* and on the general principles of law, there is an implied condition that a furnished house shall be in a good and tenantable condition, and reasonably fit for human occupation, from the very day on which the tenancy is dated to begin, and that where such a house is in such a condition that there is either great discomfort or danger to health in entering and dwelling in it, then the intending tenant is entitled to repudiate the contract altogether."

In the absence of agreement, there is no implied condition on the part of the landlord, in the case of an unfurnished house, that he will do any repairs during the tenancy, nor even that the house will endure during the term.

If the landlord has agreed to keep the premises in repair during the tenancy, there is no implied condition that, should he fail in the performance of the contract, the tenant may throw up the tenancy. In such a case, the tenant will have his remedy over against the landlord.

From a careful examination of the authorities, it would seem the only instance in which the common law rule has relaxed in

favour of the civil law maxim, in the case of realty or that which savours of realty, is that of the lease of furnished apartments.

Passing to the sale of chattels, we find that virtually the exceptions have become the rule, and the old rule has dwindled into the exception. The cause of this return to the civil law rule of caveat venditor arises from the demand for quicker and more confidential intercourse consequent upon the ever-growing increase of trade. In the rush and hurry of business transactions, we are compelled to rely more and more upon the honesty and good faith of the seller. The policy of the law in the furtherance of commercial transactions has created the necessity of uberrimæ fidei on the part of the seller The rule of caveat emptor arose from the practice of sales in market overt, when the transactions were comparatively few and simple, and the buyer was left to rely upon his own judgment after examination of the article of intended purchase.

We start, then, with the oft-repeated maxim of caveat emptor as laid down in *Chandelor* v. *Lopus*, three hundred years ago, that the buyer must be beware, and he purchases at his own risk, unless the seller has given an express warranty. The first exception to this general rule was enunciated by Lord Chief Justice Holt two hundred years ago, namely, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended. See judgment of Buller, J., in *Pasley* v. *Freeman*, 3 T. R., p. 51. The case of *Wood* v. *Smith* (1829), 4 C. & P., p. 45, affords a good illustration of a qualified warranty. The defendant, on the sale of a mare, having been asked, Is she sound? replied, "Yes, to the best of my knowledge." Then said the plaintiff, "Will you warrant her?" "No," said the defendant, "I never warrant; I would not even warrant myself." It was proved, on the trial, the mare was unsound, and the defendant knew it. Verdict passed for the plaintiff. Bayley, J., on delivering his judgment dismissing the rule for a new trial, said. "The general rule is, that whatever a person represents at the time of a sale is a warranty. But the party may give either a general warranty or he may qualify that warranty. By a general warranty, the person warrants at all events; but here the defendant gives a qualified warranty, as he only warrants the mare sound for all he knows."

A mere representation of that which the seller bona fide believed to be a fact would not amount to a warranty An

affirmation, however, made absolutely and not as a mere expression of opinion, and intended to form part of the contract, is a warranty.

Behn v. *Burness*, 3 B. & S., p. 751, is authority for the rule that a representation was of no effect unless it was either fraudulent or a term in the contract. If a term in the contract, it would amount to a warranty. Bramwell, B., in *Stucley* v. *Baily* (1862), 1 H. & C., at p. 417, is thus reported: "A representation to constitute a warranty must form part of the contract. No doubt there may be a warranty without the word 'warrant' or even 'undertake' being used; if it can be collected from the documents between the parties, or if a reasonable person would understand from what was said by them that they intended that there should be a warranty, there would be one."

In *Irvine* v. *Godard*, 3 N.B.R., p. 364, the plaintiff bought a quantity of timber, and at the time of the sale the defendant stated "that he knew the timber to be good, and he would make it good; that there had been an opportunity of examining it as it lay on the brow." The timber turned out mostly rotten and worthless. The jury having found for the plaintiff, on motion for a new trial the Court held it was a question for the jury whether the representation amounted to a warranty, and they might infer that a sale took place at the time of such representation

Tisdale v. *Connell*, 3 N.B.R., p. 401, was to the like effect. The vendor represented, on the sale of some pine timber, "that the timber was of good quality and uncommon long lengths." The timber having turned out to be of an inferior quality, it was held by the Court, on application to set aside the verdict for plaintiff, that it was a proper question for the jury whether, under all the circumstances, the representation amounted to a warranty.

Great difficulty frequently arises as to whether a representation, statement or assertion made by a vendor at or before the sale is a condition precedent, a breach of which will justify repudiation by the vendee, or an independent agreement which can only form the subject of an action for compensation in damages on failure thereof. It, however, has been considered a safe rule that if the representation is essential, and is so regarded by both parties, it is a condition precedent; if not essential, it is a warranty.

Under the Imperial "Sale of Goods Act, 1893," this question

in each case, is made to depend upon the construction of the contract. Sec. 11, sub-sec. (*b*) of that Act provides:

"Whether a stipulation in a contract of a sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

(*c*) "When a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or when the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground of rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

The judgment of Williams, J., in *Behn* v. *Burness* (supra) is the most complete analysis of a condition precedent and an independent agreement extant. Blackburn, J., in delivering the judgment of the court in *Bettini* v. *Gye* (1876), 1 Q.B.D., p. 183, is thus reported: "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one, or they may think that the performance of some matter apparently of essential importance and prima facie a condition precedent is not really vital, and may be compensated for in damages, and, if they sufficiently expressed such an intention, it will not be a condition precedent."

Courts of law find few subjects more difficult than exactly to define and to give the just weight and significance to the various terms of contracts of sale, such as representation, condition precedent, warranty, independent agreement, implied warranty, warranty in the nature of a condition; also, when a warranty ceases to be a condition precedent, and when a descriptive statement becomes a substantive part of the contract.

Another exception to the general maxim of caveat emptor is where goods are sold by a trader for a particular purpose of which he is aware they must be reasonably fit for the purpose, especially if the buyer necessarily trusts to the judgment or skill of the seller. This principle was very clearly laid down by Lord Ellenborough

in *Gardner* v. *Gray*, 4 Camp. 144. The defendant sold some bags of waste silk, which on its arrival was found to be of a quality not saleable under the denomination of waste silk. His Lordship, in delivering judgment, said: "The purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them."

The following broad principle was laid down by Best, C.J., in *Jones* v. *Bright*, 5 Bing., p. 533: "If a man sells an article, he thereby warrants that it is merchantable—that it is fit for some purpose. This was established in *Laing* v. *Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose. . . . The law then resolves itself into this—that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

Still another exception to the general rule is: If an article is ordered of a manufacturer for a particular purpose, there is an implied warranty that it shall not only be fit for that purpose, but the implied warranty extends to latent as well as to open defects. This was clearly laid down in the case of *Randall* v. *Newson* (1877), L.R. 2 Q.B.D. 102.

To render the seller liable in such a case, the particular use intended must be made known to him, so as to put upon him the responsibility of furnishing an article reasonably fit for the purpose to which it is to be applied.

From the authorities, the following distinction seems to be drawn: Where a party orders an ascertained article, there is no implied warranty that it is fit for the purpose for which he ordered it: see *Chanter* v. *Hopkins*, 4 M. & W. 399. If the order, however, is for an undescribed and unascertained thing, stated for a particular purpose, which a manufacturer supplies, there is an implied warranty that it is fit for that purpose.

A sale by sample is still another exception to the general maxim. Such a sale is a silent, symbolical warranty that the

quality of the bulk is equal to the sample. In the case of a sale by sample by a manufacturer, if a latent defect exist in the sample, the manufacturer is liable upon his implied warranty: see *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438.

The general rule is subject to the still further exception that, where the buyer has no opportunity of examining the goods, there is an implied warranty that they are of a merchantable quality: see *Laing* v. *Fidgeon*, 6 Taunton 108. See also *Gardner* v. *Gray*, *supra*.

Further, an implied warranty may be raised on the sale of an article by the custom of a particular trade: *Jones* v. *Bowden*, 4 Taunton 847.

On the sale of goods for food, there is also an implied warranty that they are fit to be used and consumed.

It will thus be seen that the exceptions, in the case of implied warranties, are so many, as regards quality in the sale of goods and chattels, as to justify the remark of the Judge referred to, that the exceptions have eaten up the rule; and the maxim should be, Let the seller, and not the buyer, beware.

As to title, the general rule is, the purchaser of a chattel takes it, subject to what may turn out to be informalities in the same: *Cundy* v. *Lindsay* (1878), 3 Appeal Cases 459. This rule is subject to the following exception: In the case of goods sold in an open shop or a warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods; and if it turns out otherwise, as when the goods are claimed by the true owner, from whom they have been stolen, the buyer may recover back the price as money paid upon a consideration which has failed: *Eicholz* v. *Bannister*, 17 C.B.N.S. 708.

In the sale of a specific chattel, there is no implied warranty of title. The seller, however, is liable in such a case, if he has practised fraud by declaration or conduct: *Morley* v. *Attenborough*, 3 Ex. 500.

By the provisions of the Sale of Goods Act, 1893, already referred to, these various exceptions have been crystallized into statutory enactment. Sec. 14 of that Act provides:

(1) "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the

course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or trade name, there is no implied condition as to its fitness for a particular purpose :

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade."

Sec. 15, sub-sec. (2) " In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality :

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

The Imperial Act has been founded on the line of the decided cases on contracts of sale for the last two hundred years. It would be the part of wisdom for the Legislatures of the several Provinces to enact similar legislation, thereby securing greater uniformity in the decisions of our Courts, and a fixed standard of reference in this important branch of contractual relations.

SILAS ALWARD.

St. John, N.B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MISTAKE—MONEY CREDITED BY MISTAKE—RECEIPT IN FULL GIVEN.

In *Ward* v. *Wallis* (1900) 1 Q B. 675, the plaintiffs sought to recover a sum of money under the following circumstances. In a prior action the plaintiffs had sued the defendant for work and labour done by them as sub-contractors with the defendant, but, by mistake, had given him credit in their claim for a sum of money received from another person of the same name as the defendant. The defendant paid the balance claimed, and took a receipt in full from the plaintiffs. On the mistake being subsequently discovered by the plaintiffs they brought the present action to recover the amount for which they had erroneously given credit, and in the alternative for money had and received by the defendant to their use. Kennedy, J., although of opinion that prima facie the settlement of the claim in the former action would be a bar to re-opening it in any subsequent action where the parties had acted in good faith, was nevertheless of opinion that the settlement was not conclusive when there was a lack of bona fides, and he was of opinion that the defendant had not acted in good faith in taking advantage of the mistake of fact made by the plaintiff, and that the allowance in account was equivalent to payment, and that the plaintiffs, notwithstanding the settlement of the former action, were entitled to recover the amount claimed as money had and received to the plaintiffs' use. He, therefore, gave judgment in favour of the plaintiffs with costs.

CONTRACT—CHARTER PARTY—CONTRACT TO LOAD "A CARGO OF SAY ABOUT 2800 TONS."

Miller v. *Borner* (1900) 1 Q.B. 691 is an action which turns on the construction of a charter party whereby the charterer undertook to load "a cargo of ore, say about 2800 tons." The actual capacity of the ship was 2880 tons and the charterer loaded 2840 tons. Channell and Bucknill, JJ., held that the contract differed

from that in question in *Morris* v. *Levison*, 1 C.P.D 155, where the charterer bound himself to load "*a full and complete cargo*, say about 1100 tons," and that the charterer had in this case fulfilled his contract, and that the question of what was meant by "about" ought not to be left to the jury.

VENDOR AND PURCHASER—DEPOSIT, RECOVERY OF, BY PURCHASER—CONDITION TO BE PERFORMED BY VENDOR—TIME FOR PERFORMANCE OF CONDITION—DATE OF COMPLETION—CONSENT OF THIRD PARTY.

Smith v. *Butler* (1900) 1 Q.B. 694 was an action by a purchaser to recover his deposit on the ground of the failure of the vendor to perform a condition subject to which the contract of sale had been made. The sale was of a parcel of land on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount remaining outstanding on the mortgage as was then due. A date was fixed for completion, and a deposit paid, which was to be forfeited if the sale went off through the default of the plaintiff. Before the day fixed for completion, at an interview between the plaintiff, the defendant, and the mortgagee, the latter would only consent to a lesser sum remaining on mortgage. The plaintiff, therefore, treated the contract as at an end. Subsequently, and before the day fixed for completion, the defendant procured the mortgagee's consent to the full amount remaining on mortgage, but the plaintiff refused to proceed with the purchase, and brought the present action to recover his deposit. The action was tried by Bucknill, J., who gave judgment for the plaintiff. The Court of Appeal (Smith, Collins and Romer, L.JJ.), however, unanimously reversed his decision, holding that the plaintiff was not justified in treating the contract as off, on the mortgagee's refusal to consent, inasmuch as the time for completion had not then arrived, and the vendor had until the day fixed for completion in which to get him to consent to the proposed arrangement, and having done so, the plaintiff was bound to have carried out the contract, and not having done so it had fallen through by his default, and, therefore, his deposit was forfeited.

BILL OF LADING—DESCRIPTION OF GOODS—"MARKED AND NUMBERED AS IN THE MARGIN"—MISTAKE—BILLS OF LADING ACT, 1855 (18 & 19 VICT., C. 11), S. 3—(R.S.O. C. 145, S. 5 (3)).

Parsons v. *New Zealand Shipping Co.* (1900) 1 Q.B. 714, was an action by consignees of certain goods covered by a bill of lading

to recover damages against the shipowners for short delivery. The goods referred to in the bill of lading were described as "marked and numbered as in the margin," and the question of law in the case was whether the shipowners were entitled to show, notwithstanding the Bills of Lading Act, 1855 (18 & 19 Vict. c. 11) s. 3, (R.S.O. c. 145, s. 5 (3)), that some of the goods intended to be covered by the bill of lading were by mistake incorrectly described in the margin of the bills of lading, and were shipped as part of the total quantities shipped under such bills of lading, and that the defendants were entitled to offer, and the plaintiff was bound to accept, such goods as part of the plaintiff's consignment, notwithstanding the erroneous description. The plaintiff contended that under the Act the bills of lading were conclusive as to the description of the goods, and that the defendants were not entitled to set up an alleged mistake in the marginal description. Kennedy, J., however, held that the Act is not conclusive as to the marks where the marks do not affect or denote substance, quality, and commercial value, and the marks in the present case not having that effect, he held that the defendants were, therefore, entitled to show the mistake, and to require the plaintiff's acceptance of the goods thus erroneously described.

EXPROPRIATION—COMPENSATION—INJURIOUS AFFECTION—INTENTION TO USE LAND FOR SPECIAL PURPOSE.

Bailey v. *Isle of Thanet Ry. Co.* (1900) 1 Q.B. 722, was a case stated by an arbitrator appointed under the Land Clauses Act for the purpose of fixing the compensation for land expropriated by the defendants for the purposes of their railway. The land in question was part of a parcel which had been acquired by the plaintiff for the purpose of erecting thereon a school, for which purpose it was specially adapted. No steps had been taken up to the time of the expropriation towards erecting the school. In consequence of the construction of the railway the part of the land not taken was rendered less suitable for a school, and there was no other site in the neighbourhood equally suitable for the purpose. The question on which the opinion of the Court was desired was whether these facts ought to be taken into consideration in fixing the compensation. Channell and Bucknill, JJ, were of opinion that the intention of the owner to use the land for a particular purpose ought properly to be taken into account.

LORD'S DAY ACT—(29 CAR. 2, C. 7, S. 1)—EXERCISING "WORLDLY LABOUR, BUSINESS OR WORK" ON SUNDAY.

In *Palmer* v. *Snow* (1900) 1 Q.B. 725, Channell and Bucknill, JJ., on a case stated by a magistrate as to whether a barber was within the provisions of the Lord's Day Act (29 Car. 2, c. 7 s. 1), which forbids work on Sundays by any "tradesman, artificer, workman, labourer, *or other person whatsoever*," came to the conclusion that the general words of the section must be confined to persons ejusdem generis as those specifically enumerated, and that a barber did not, therefore, come within them.

DISTRESS—EXEMPTION—"BEDDING."

In *Davis* v. *Harris* (1900) 1 Q.B. 729, under a statute exempting from distress certain property of the tenant, inter alia, "bedding," it was held by Channell and Bucknill, JJ., that the word "bedding" included "bedstead." The Ontario Acts relating to exemptions from execution and distress expressly include "bedsteads": see R.S.O. c. 77, s. 2; c. 170, s. 30.

APPORTIONMENT—RENT PAYABLE IN ADVANCE—APPORTIONMENT ON EVICTION—APPORTIONMENT ACT, 1870 (33 & 34 VICT., C. 35) S. 2—(R.S.O. C. 170, S. 4.)

In *Ellis* v. *Rowbotham* (1900) 1 Q.B. 740, the defendant, a tenant whose rent was payable in advance, was sued for an instalment of rent; he had been evicted for non-payment of such instalment under the terms of the lease, and claimed that under the Apportionment Act, 1870, (33 & 34 Vict., c. 35) s.2.—(R.S.O. c. 170, s. 4) notwithstanding that the rent was payable in advance, that he was only liable for a proportionate part which would fall due de die in diem up to the day of his eviction. The Court of Appeal (Smith, Collins, and Romer, L.JJ.,) affirmed the judgment of Kennedy, J., in favour of the landlord, holding that in such a case, the rent being payable in advance, there is no right of apportionment, although Collins, L.J., confessed to having some doubt.

HIGHWAY—TRESPASS TO LAND—USE OF HIGHWAY FOR PURPOSE OTHER THAN TRAVEL.

Hickenson v. *Maisey* (1900) 1 Q.B. 752, was an action of trespass in which the facts were as follows: The plaintiff was possessed of land traversed by a highway. A trainer of horses had agreed with the plaintiff for the use of some of his land for the training and

trial of race horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant was one of the proprietors of a paper which published accounts of the doings of race horses, and for the purpose of getting information as to the performances of horses being trained on the plaintiff's land the defendant walked backwards and forwards on the highway on the plaintiff's land about fifteen yards in length for about an hour and a half, watching and taking notes of the trials of race horses on the plaintiff's land. The plaintiff brought an action against the defendant for trespass in thus using the highway, and the jury found a verdict for the plaintiff, and Day, J., who tried the action, gave judgment for the plaintiff and granted an injunction to restrain further trespass by the defendant. On appeal from that judgment the Court of Appeal (Smith, Collins, and Romer, L.JJ.,) following *Harrison* v. *Rutland* (1893) 1 Q.B. 142, (noted ante vol. 29, p. 178), affirmed the decision. Owing to the difference of the law in Ontario respecting the ownership of the freehold of highways, (see R.S.O. c. 223, ss. 599,601), it would seem that this case would have but a limited application in Ontario.

PARTNERSHIP—DISSOLUTION—FIRM NAME OF DISSOLVED PARTNERSHIP, RIGHT TO USE—SOLICITORS' BUSINESS.

In *Burchell* v. *Wilde* (1900) 1 Ch. 551, the right of the partners of a dissolved firm to use the name of the firm is discussed. In this case the business carried on by the firm was that of solicitors. It was formed in 1882 and was composed of Wm. Burchell, senior, and Wm. Burchell, junior, W. G. Wilde, the defendant, and J. W. Burchell and C. T. D. Burchell, the plaintiffs, and the business was carried on under the name of "Burchells." In June, 1893, William Burchell, senior, died and Wm. Burchell, junior, retired, and the other members of the firm agreed to carry on the business under the style of "Burchell & Co." In 1899 the partnership was dissolved by consent, there being no sale of the good will or assets, and no provision as to the use of the firm name. The plaintiffs then proceeded to carry on business in the office of the old firm as "Burchell & Co.," and the defendant, W. G. Wilde, and his son, whom he had taken into partnership, carried on business at a new office as "Burchell & Co." The plaintiffs brought the action to restrain the Wildes from using the name of "Burchell" or "Burchells" in anyway as part of their firm name. On a motion for

an interim injunction, Byrne, J., held that the plaintiffs were not entitled to an injunction unless they could show that there was, or was likely to be, some substantial risk of a liability being cast on them by reason of the defendant's use of the former firm name, and as this was not shown, he refused to make any order, and his judgment was affirmed by the Court of Appeal (Lindley, M.R., and Rigby, and Williams, L.JJ.,) although the latter court expressed the opinion that it would be more satisfactory if the defendants would continue to use (as they had done since the hearing before Byrne, J.,) the name of "Burchell, Wilde & Co.," but this was presumably by way of advice only, and not in any way a decision that they were bound so to do, or to abstain from using the name of "Burchell & Co."

PATENT—INFRINGEMENT—INFRINGING ARTICLES SENT ABROAD.

British Motor Syndicate v. *Taylor* (1900) 1 Ch. 577, was an action brought to restrain the infringement of the plaintiff's patent. The plaintiff obtained judgment with a reference to assess damages. On the reference it appeared that the defendants had purchased articles in England infringing the patent, and had transmitted them for sale to the defendant's branch business house in Paris. The Master assessed the damages on the basis that such articles constituted an infringement, and on appeal Stirling, J., affirmed his ruling holding that the transport of the articles within the United Kingdom under the circumstances was "making use" of the invention within the meaning of the patent, and constituted an infringement thereof. The Master assessed the damages at £8 for each infringing article, but Stirling, J., on a review of the evidence, was of opinion that the damages allowed were too high, and reduced the amount to £5 per article.

LUNATIC—CONTRACT TO PURCHASE LAND—VOIDABLE CONTRACT—COMPLETION OF PURCHASE BY COMMITTEE—CONVERSION.

In *Baldwyn* v. *Smith* (1900) 1 Ch. 588, the point to be settled was whether or not there had been a conversion of a lunatic's estate from personalty to realty. The facts being that the lunatic while of unsound mind had entered into a contract to purchase a parcel of land. He was subsequently declared a lunatic, and a committee appointed who was authorized by the court to complete the purchase, which was accordingly done, and the purchase money was

paid out of the lunatic's personal estate. The lunatic having died intestate, his next of kin claimed that the land passed as personal estate, but Byrne, J., was of opinion that the contract in the first place having been voidable, nevertheless when affirmed and adopted by the court on the lunatic's behalf, related back to the time it was made, with the necessary legal consequences ensuing from it, and that therefore there had been a conversion, and the claim of the next of kin failed and the action was dismissed with costs.

EASEMENT—USER OF EASEMENT FOR 40 YEARS—WAY—PAYMENT OF MONEY ANNUALLY FOR USE OF EASEMENT—PAROL AGREEMENT—PRESCRIPTION ACT (2 & 3 W. 4, c. 71,) s. 2—(R.S.O. c. 133, s. 35)—"CLAIMING RIGHT THERETO."

In *Gardner* v. *Hodgson's Kingston Breweries Co.* (1900) 1 Ch. 592, the plaintiff claimed a declaration that he was entitled to a right of way over certain premises of the defendant and a right to use a pump thereon, and also an injunction to restrain the defendants from obstructing the plaintiff's use and enjoyment thereof. It appeared by the evidence that the plaintiff and his predecessor in title had for upwards of sixty years enjoyed the easement claimed without interruption, and that they had at least from 1853 paid a yearly sum of 15s. to the owner of the defendant's premises for the use of the way, but there was no evidence of any consent or agreement in writing to allow the use of the way. Cosens-Hardy, J., under these circumstances was of opinion that the plaintiff had established an actual user by a person "claiming right thereto without interruption" of the way in question within the meaning of the Prescription Act, s. 2—(R.S.O. c. 133, s. 35), and that the payment of the annual sum of 15s. - was no "interruption" so as to prevent the acquisition of a right by actual enjoyment, and as no agreement or consent in writing was found, the plaintiff's right to the way had become under the section indefeasible, and he granted the plaintiff the relief claimed with costs.

RECEIVER—DEBENTURE HOLDERS—CHARGE ON PROPERTY IN FOREIGN COUNTRY—FRENCH DEBT—DEBT, LOCALITY OF—CONTEMPT.

In re Maudslay, Maudslay v. *Maudslay* (1900) 1 Ch. 602. The plaintiffs were debenture holders of a limited company, having a charge upon all its assets, among which was a debt due to the company by a French firm. The plaintiffs, for the purpose of

enforcing payment of their debentures, had procured the appointment of a receiver of all the company's assets, and the question raised in the present application was, whether certain English creditors of the defendant company who had taken proceedings in France to attach the debt due by the French firm, were thereby guilty of contempt of court, on the ground of such proceedings being an interference with the receiver. Cosens-Hardy, J., was of opinion that the English creditors were not guilty of any interference with the receiver, on the ground that, although the plaintiff's charge on the French debt was valid according to English law, yet the appointment of a receiver by an English court for enforcing such charge required, so far as the French debt was concerned (which must be treated as situate in France and subject to French law), to be supplemented by proceedings in a French court in order to put the receiver in possession, and until that was done, and the receiver had acquired a right to the debt under French law, it was open to any creditor of the company, not a party to the suit in which the receiver is appointed, to take any proceedings allowed by French law to attach such debt, and he therefore held that the attachment of the debt in the French court, which alone was recognized by the law of France as giving a legal title to such debt, must prevail over the title of the debenture holders.

LEASE, AGREEMENT FOR—LESSEE NOT NAMED—STATUTE OF FRAUDS—MEMORIAL IN WRITING, SUFFICIENCY OF.

Carr v. *Lynch* (1900) 1 Ch. 613, was an action for specific performance of an agreement for a lease, in which the sole question was whether the intended lessee was sufficiently defined in the agreement. One Jayne was the assignee of a subsisting lease of the premises, and on 30th December 1898, he paid the defendant, the lessor, £50, and took from him a memorandum dated on that day, which so far as is material to the case was as follows: "Dear Sir,—In consideration of you having this day paid me the sum of £50 I hereby agree . . . to grant you . . . a further lease of 24 years . . . of the Warden Arms . . . to run immediately after the expiration of . . . the now existing lease . . ." The name of the intended lessee not being stated in the memorandum. Farwell, J., held that the proposed lessee was sufficiently identified as being the person who had paid the £50—and thatthe memorandum satisfied the statute, and he gave judgment for the plaintiff, the assignee of Jayne, with costs.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] JOHNSON *v.* KIRK. [June 12.

Registry law—Registration of tax deeds—Certificate of title—Priority over earlier certificate.

Sec. 13 of the British Columbia Land Registry Act (R.S.B.C. c. 111) provides that a person claiming ownership in fee of land may apply for registration thereof, and the Registrar, on being satisfied after examination of the title deeds, that a prima facie case is established, shall register the title in the "Register of Absolute Fees." Sec. 19, which authorizes the Registrar to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as prima facie evidence in all courts of justice in the Province, of the particulars therein set forth." And by sec. 23: "The registered owner of an absolute fee shall be deemed to be the prima facie owner of the land described or referred to in the register for such an estate of freehold as he may possess." . . .

Held, affirming the judgment of the Supreme Court of British Columbia (7 B.C. Rep. 12, sub nom *Kirk* v. *Firkland*) that a certificate of title issued on registration of a deed from the assessor of taxes to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with. Appeal dismissed with costs.

Gormully, Q.C., and *Orde*, for appellant. *J. Travers Lewis*, for respondent.

Yukon Ter.] O'BRIEN *v.* ALLEN. [June 12.

Constitutional law — Government of Yukon—Franchise over Dominion lands—Exaction of tolls.

In 1898 the Executive Government of the Yukon Territory granted to appellants the privilege of building a toll tramway or waggon road, or partly both, between certain points in the territory, which road, when constructed, passed largely through Dominion lands. The respondents, who were in the express and carrying trade, being obliged to take freight over said tramway, had to pay a toll of one-half cent per pound thereon and

brought an action against appellants for repayment of the amount so exacted, claiming that they had a right to the free use of these public lands. The action was tried before Mr. Justice Dugas, who held that as the franchise of appellants had not been confirmed by the Interior Department which had control over and management of Dominion lands, the appellants had no right to exact the tolls. On appeal from this judgment—

Held, reversing the judgment appealed from, that the Commissioners in Council of the Yukon had the same powers to make laws for the Government of the Territory as were possessed by the Lieutenant-Governor and Legislature of the North-West Territories, and substantially the same as the Executive in the other Provinces; that the building and operating of tramways is wholly a matter of provincial jurisdiction; and that the ownership of the soil could only be brought in question in this case by the Crown. Appeal dismissed with costs.

Aylesworth, Q.C., and *McGiverin*, for appellants. The appeal was prosecuted ex parte.

Ont.] THOMPSON *v.* MATHESON. [June 12.

Contract—Sale of lumber—Inspection.

A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final."

Held, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on both parties. Appeal allowed with costs.

Riddell, Q.C., for appellant. *Aylesworth*, Q.C., and *Smith*, for respondent.

Ont.] LAKE ERIE & DETROIT RIVER RAILWAY *v.* BARCLAY. [June 12.

Negligence — Railway accident — Shunting cars — Warning — Proof of negligence.

B., in driving towards his home on a night in September, had to cross a railway track between 9 and 10 o'clock on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction and also to pick up a passenger car on a siding. After some switching the train was made up and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross when he was struck by the latter and killed. There was no warning of the approach

of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the Railway Co. was guilty of negligence and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, GWYNNE, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the Co. to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. Appeal dismissed with costs.

Riddell, Q.C., and *Coburn*, for appellants. *Wilson*, Q.C., and *Gundy*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Armour, J.] UFFNER *v.* LEWIS. [May 7.
BOYS' HOME *v.* LEWIS.

Executors and administrators—Trustees—Distribution of estate—Unpaid legatee—Contribution by other legatees—Limitation of actions.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, and of which they have received no notice. The judgment in such an action however enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

Per MACLENNAN, J.A.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, they are not protected if they, even under the order and direction of the court, distribute the residue among the other persons entitled.

Per CUR.—Persons who have received a share of the residue under such circumstances must refund for the benefit of the persons whose claims have been ignored the amount received in excess of the sum payable if the division had been properly made. Judgment of ARMOUR, C.J., affirmed.

Armour, Q.C., and *W. Bell*, for Lewis and Morgan. *Teetzel*, Q.C., for the Boys' Home. *D'Arcy Tate*, for respondents.

From Off. Arb.] [May 15.

IN RE MCLELLAN AND TOWNSHIP OF CHINGUACOUSY.

Ditches and Watercourses Act—Municipal corporations—Compensation.

A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act, of highways under its jurisdiction and as such may initiate proceedings under that Act.

Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owners' land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor on the ground that his land has been injuriously affected by the drain. Judgment of the Official Arbitrator reversed.

Shepley, Q.C., and *A. McKechnie*, for appellants. *T. J. Blain* and *D. O. Cameron*, for respondent.

From Meredith, C.J.] [May 15.

ONTARIO LANTERN COMPANY *v.* HAMLTON BRASS COMPANY.

Contract—Manufacture and sale of chattels—Breach—Damages.

Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract.

Held, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.

The court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed by MEREDITH, C.J.

Lynch-Staunton, Q.C., for the appellants. *D'Arcy Tate*, for the respondents.

From Street, J.] CLIFTON *v.* CRAWFORD. [May 15.

Will—Construction—Legacy—Survivorship—Accruer.

A testator gave a legacy of $500 to each of three grandchildren, William, Thomas and Zilla, and directed "the said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority, and the said legacy to my said granddaughter Zilla to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, which ever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this

my will contained shall be divided among and go to the survivor or survivors of them share and share alike." William died under age and unmarried, and then Zilla died under age and unmarried.

Held, that the legacies to William and Zilla became divested by their death before the time for payment and became vested in Thomas, and that Zilla's representatives were not entitled to one-half of William's legacy which v in her contingently upon his predeceasing her. Judgment of STREET, J., reversed.

B. F. Justin, for appellants. *B. N. Davis* and *J. E. Cook*, for respondents.

From Robertson, J.] [May 15.

CONFEDERATION LIFE ASSOCIATION *v.* LABATT.

Sale of goods—Want of title—Damages.

The purchaser of a chattel is entitled to recover from the vendor upon failure of title the value of the chattel, and not merely the amount paid by him to the vendor. Judgment of ROBERTSON, J., reversed in part.

Shepley, Q.C., and *W. H. Irving*, for appellants. *Aylesworth*, Q.C., and *Rowell*, for respondent Labatt. *Russell Snow*, for plaintiffs.

From McMahon, J.] UNION BANK *v.* CODE. [May 15.

UNION BANK *v.* MORRIS.

Company—Shares—Issue at a discount—Payment for services—Transfer—Certificate—R.S.C. c. 119, ss. 27, 48, 55.

Where shares in a company incorporated under the Dominion Joint Stock Companies Act, R.S.C. ch. 119, were issued as paid up shares, but part of the alleged payment consisted of an amount allowed by the company to the shareholders for services which by a contemporaneous agreement they agreed to render to the company, it was held, in a judgment creditor's action, that the shares, to the extent of the amount so allowed, must be treated as unpaid shares. Judgment of MACMAHON, J., affirmed.

Where without any transfer being executed certificates were, on the application of the transferor, issued by the company to the alleged transferee, it was held, having regard to the Act and the by-laws of the company, that the alleged transfer was ineffectual and that the transferor remained liable to the company's creditors. Judgment of MACMAHON, J., reversed.

D. W. Saunders and *E. C. Cattanach*, for plaintiffs. *Watson*, Q.C., and *J. B. Noble*, for defendants.

From Falconbridge, J.] [May 15.

INCE *v.* CITY OF TORONTO.

Municipal corporations—Highways—Damages—Ice—Negligence—"Gross negligence."

"Gross negligence" in s. 606 (2) of the Municipal Act, R.S.O. c. 223.

means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk it must be shown that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time.

If the sidewalk has been contructed in accordance with the plans of competent engineers and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence.

Where there was a sudden change in temperature about six in the morning and ice then formed on the sidewalk in question it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning. Judgment of FALCONBRIDGE, J., reversed.

Fullerton, Q.C., and *W. G. Chisholm*, for appellants. *Aylesworth*, Q.C., and *C. A. Moss*, for respondent.

From Divl. Court.] [May 15.

BOLLANDER *v.* CITY OF OTTAWA.

Municipal corporations—Market—Auctioneer—"Regulating and governing"—R.S.O. c. 223, ss. 580, 583 (2).

Neither under section 580, nor under section 583 (2), of the Municipal Act, R.S.O. ch. 223, can a municipal corporation prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. Judgment of a Divisional Court, 35 C.L.J. 27, 30 O.R. 7, affirmed.

Leighton McCarthy, for appellants. *G. F. Henderson*, for respondent.

From Robertson, J.] SNIDER *v.* MCKELVEY. [May 15.

Contract — Breach — Agreement not to practice medicine — Damages — Injunction.

By an agreement under seal the defendant sold to the plaintiff a house and the good will of his medical practice for $2,100, and the defendant "(bound) himself in the sum of $400, to be paid to the (plaintiff), in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village."

Held, that the sum of $400 was payable as liquidated damages, and that the plaintiff, on the breach of the agreement, was entitled to that sum or to an injunction, but not to both. Judgment of ROBERTSON, J., 35 C.L.J. 610, 31 O.R. 91, varied.

Garrow, Q.C., for appellant. *W. M. Sinclair*, for respondent.

From Falconbridge, J.] [May 15.

WILSON *v.* OWEN SOUND PORTLAND CEMENT CO.

Master and servant—Workmen's compensation for injuries Act—Defect in machinery—Want of notice of accident.

A machine, perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of s. 3 (1) of the Workmen's compensation for injuries Act, R.S.O. c. 160

To state in the defence that notice of the acc[illegible] has not been given and that the defendants intend to rely on that defence is not sufficient. Formal notice must be given in accordance with the provisions of section 14. *Cavanagh* v. *Park* (1896), 23 A.R. 715, applied. Judgment of FALCONBRIDGE, J., affirmed.

J. M. Kilbourn, for appellants. *A. G. Mackay*, for respondent.

From McDougall, Co. J.] [May 15.

GEARING *v.* ROBINSON.

Mechanics' lien—"Owner"—R.S.O. c. 153, s. 2, sub.-s. 3.

A person is not an "owner," within the meaning of above sub-section, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances, to give rise to the lien. Judgment of MCDOUGALL, Co. J., reversed.

Shepley, Q.C., for appellants. *E. F. A. DuVernet* and *D. C. Ross*, for the respondent the plaintiff. *R. C. LeVesc[illegible]te*, for the respondents, the Robinsons.

From Meredith, C.J.] [May 15.

ECKARDT *v.* LANCASHIRE INSURANCE CO.

Fire insurance—Co-insurance condition—R.S.O. c. 203, s. 171.

Per OSLER, MACLENNAN and LISTER, JJ. A. The condition commonly known as the "co-insurance condition" cannot be held to be "not just and reasonable" within the meaning of above section when the premium is reduced in consideration of its insertion.

Per BURTON, C.J. O. and MOSS, J. A. In the absence of evidence that the insured, in consideration of the reduced premium, elected to take a policy with this condition it must be held to be prima facie "not just and reasonable," and not binding upon him. In the result the judgment of MEREDITH, C.J., 29 O.R. 695, was affirmed.

Lash, Q.C., and *A. W. Anglin*, for appellants. *Osler*, Q.C., and *Creelman*, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Rose, J.] IN RE VERNON. [June 7.

Lunatic—Maintenance—Moneys on deposit—Attachment by creditor—Payment into Court.

A motion by the committee of a lunatic for an order directing the Canadian Bank of Commerce to pay into Court, for the purpose of application for the lunatic's benefit, certain moneys deposited to the credit of the lunatic. The moneys had been attached by a creditor of the lunatic, to whom notice of this application was given.

J. W. McCullough, for the committee.

J. D. Montgomery, for the creditor, opposed the application.

J. F. Edgar, for the Inspector of Prisons and Public Charities.

ROSE, J.—In *Wood* v. *Joselin*, 18 A.R. at p. 60, Mr. Justice Osler said: "It is clear that the service of the garnishee summons does not create, as between garnishor and garnishee, any debt, either at law or in equity, and does not operate to any extent as an assignment or transfer of the debt to the garnishor: *Chatterton* v. *Watney*, 17 Ch. D. 259; *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99." See also Wade on Attachment, vol. 2, s. 325. The claim of the creditor to have his debt paid out of the money in the hands of the Canadian Bank of Commerce fails. These moneys must be paid into Court for the maintenance of the lunatic, without prejudice to such priority as this creditor may have obtained over any other creditors as to any surplus which may remain if the lunatic should die or recover before the fund is exhausted.

The creditor must pay the costs of the inspector and of the committee.

Boyd, C., Ferguson J., Meredith, J.] [June 12.

HOLMES *v.* TOWN OF GODERICH.

Contract—Delivery of goods—Place—"At," meaning of.

The plaintiff, tendering for a supply of coal for the defendant's waterworks, wrote, "I will deliver in bond into the coal shed at pumping station or grounds adjacent thereto where directed by you, one thousand tons," etc. The plaintiff's tender being accepted, a contract was drawn up by which he agreed "to deliver at the coal shed," etc.

The defendants refused to accept or pay for the greater part of the coal furnished by the plaintiff, because it was not delivered to them at the place mentioned in the contract, i.e., it was not put into the shed by the plaintiff, but left at the dock near the pumping station.

ARMOUR, C. J., who tried the action, found that all the coal was delivered "at the coal shed" within the true intent and meaning of

the contract, and held, that the word "at," as used in the contract, signified "near to," and that was the primary idea conveyed by this word, citing Webster's Dictionary, tit. "at;" *Mohawk Co.* v. *Utica and Schenectady Co.*, 6 Paige 554; *Dunkham* v. *Smith*, 5 T. B. Monroe 372; *State* v. *Cox*, 9 Vroom 302; *Homer* v. *Homer*, 8 Ch. D. 758; *Price* v. *Bala Co.*, 50 L. T. N. S. 787.

Held, by a Divisional Court, upon the evidence, reversing the finding of ARMOUR, C. J., that the portion of the coal in question was not delivered at the place designated by the contract.

Per BOYD, C.—"At" means rather within a place than without; "at" the coal shed means "in" or "in close proximity to" the shed. The cases referred to as to the meaning of the word "at" merely show its meaning under the circumstances of each case. Such words take their colouring from their circumstances and situation.

E. L. Dickinson, for plaintiff. *Garrow*, Q.C., for defendants.

Rose, J.] PRITCHARD *v.* PATTISON. [June 14.

Evidence—Motion—Security for costs—Nominal plaintiff—Insolvency.

The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action.

Held, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a prima facie case had been made out that he was only the nominal, and not the real and substantial, plaintiff; and the evidence given upon the motion before the examination of the plaintiff showed that he had a substantial interest.

F. J. Roche, for plaintiff. *P. H. Drayton*, for defendant.

Boyd, C., Ferguson, J., Robertson, J.] [June 19.

BEAM *v.* BEATTY.

Arrest—Application for discharge—Onus—Intent to defraud—Former absconding.

Upon an application by the defendant for his discharge from arrest under a ca. re., he did not dispute the existence of a debt alleged by the plaintiff, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the province with intent to defraud. The debt sued for was contracted in 1893, and arose out of an irrigation scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this

was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shown that he ever had any property in this province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not show that he was at the time of the arrest about to leave the province hurriedly, but that he intended to stay until he had finished the business which brought him to the province, and then return to his own country as of course.

Held, FERGUSON, J. dissenting, that the Court could not, upon this application, try the question whether defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed the arrest could not be maintained.

Kersterman v. *McLennan*, 10 P.R. 122, distinguished.

Per FERGUSON, J.—Upon this application the burden was upon the applicant of showing that, upon the facts as they actually existed, the arrest should not have been ordered or made. Before, and at the time of his arrest, the defendant was not in a like position as to residence as was the defendant in *Clement* v. *Kerby*, 7 P.R. 103, or at all in the position of a mere traveller or visitor found in this country, but was living here and transacting important business here. His former conduct in respect of the same debt was also to be considered on the question of intent to defraud; and, having regard to that and all the facts appearing, the defendant was about to leave this country with intent never to pay this debt, or presumably any of the debts that he owed in this country, which was the same as an intent to defraud.

A. C. McMaster, for plaintiff. *Masten*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] THE QUEEN *v.* FOWCETT. [May, 1900.

Real Property Act—60 & 61 Vict. (D.), c. 29, s. 18—Dominion lands—Charge on land for indebtedness to Crown on seed grain mortgage of other land—Costs against the Crown.

The caveatee applied for a certificate of title for the N.E. quarter 10-11-8 W., under the Real Property Act, and the Minister of the Interior filed a caveat to establish his claim that the Crown was entitled to a lien or charge

thereon for the amount of the debt owing by the caveatee on a seed grain mortgage given by him in 1876 on the N.W. quarter of the same section, basing the claim on the provisions of sec 18 of 60 & 61 Vict. (D.), c. 29, which is as follows: "In any case in which any settler or purchaser is entitled to the issue of letters-patent for any land to which the said Act (the Dominion Lands Act) relates, but the issue of such patent is delayed because of the liability of such settler or purchaser . . . as mortgagor on a mortgage in favour of the Crown for the repayment of an advance of seed grain, . . . the Minister may cause such letters-patent to issue, . . . and may transmit them to the registrar in whose district the land is situated, with a certificate signed by him or his deputy, . . . setting forth the particulars of such liability or indebtedness . . . the names of the persons liable or indebted therefor, and the land to be charged thereby, and the registrar, when registering the patent for such land, shall make the necessary entries respecting such indebtedness in the proper register or other record book in his office, and thereafter the said indebtedness shall be and remain a charge upon the land until satisfied and extinguished according to law." The provisions of this section were fully complied with except that the registrar failed, through an oversight, to make any entries respecting the indebtedness in the "Abstract Book," or other official record book in his office, but only in a docket or note book in which he kept a record of all applications under the Real Property Act received and examined by him, and which was only a book that he kept for his own convenience as Examiner of Titles, but not one required to be kept under either system of registration.

Held, that the indebtedness had not been constituted a charge upon the land in question, and that the petition of the caveator must be dismissed: Maxwell on Statutes, p. 453.

Held, also, that under Rule 277 of the Queen's Bench Act, 1895, the caveatee was entitled to his costs to be set off pro tant against his indebtedness to the Crown.

Howell, Q.C., and *Mathers*, for the Crown. *Aikins*, Q.C., and *Pitblado*, for the caveatee.

Full Court]. LAKE OF THE WOODS MILLING CO. *v.* COLLIN. [June 2.

Garnishment—Claim under fire insurance policy before proofs of loss furnished—Option to replace destroyed property—Queen's Bench Act, 1895, Rule 741 as amended by 60 Vict. (M.) c. 4 and Rule 742.

Application by defendant to set aside a garnishing order made in Chambers.

Rules 741 and 742 of the Queen's Bench Act, 1895, as amended by 60 Vict., c. 4, authorized the attachment by garnishing order of "all debts, obligations and liabilities owing, payable, or accruing due," not including such as do not arise out of any trust or contract, unless judgment has been

recovered thereon, but including all claims and demands which could be made available under equitable execution.

Held, that the claim of the assured under a policy of insurance against loss by fire, which provided that the loss should not be payable until thirty days after the completion of the proofs of loss usually required, could not be attached by garnishing order before such completion, although the property insured had been burnt.

Howell v. *Metropolitan District Ry. Co.*, 19 Ch.D. 508, and *Central Bank* v. *Ellis*, 20 A.R. 364, followed. *Canada Cotton Co.* v. *Parmalee*, 13 P.R. 26, not followed.

The only kind of liability which may be attached under our statutes is a purely pecuniary one, and it must be absolute and not dependent upon a condition which may or may not be fulfilled.

Held, also, that the liability of the insurance company was not attachable because the policy contained a condition giving an option to the company to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, which had not expired; so that it was not certain that any pecuniary liability would ever arise. Attaching order set aside.

Ewart, Q.C., and *Wilson*, for plaintiffs. *Howell*, Q.C., and *Mathers*, for defendant.

Full Court.] IN RE ST. BONIFACE ELECTION. [June 2.

Election petition—Preliminary objections—Proof of deposit of security—Evidence that notes deposited were current money of Canada—Notice of presentation of petition—Manitoba Controverted Elections Act, R.S.M. c. 29, s. 22.

Decision of BAIN, J., noted ante p. 245, affirmed with costs.

Andrews and *Bernier*, for petitioner. *Wilson*, for respondent.

Full Court.] IN RE ROSENFELDT ELECTION. [June 2.

Election petition—Preliminary objections—Manitoba Controverted Elections Act, R.S.M. c. 29, s. 18—Manitoba Election Act, R.S.M. c. 49, s. 196—Return to clerk of executive council and gazetting same before result of recount—Time for filing petition.

The Returning Officer having made his return to the Clerk of the Executive Council pursuant to section 196 of The Manitoba Election Act, R.S.M. c. 49, but without waiting for the result of a recount of which he had received notice, the Clerk, as required by s. 200, published the election of the respondent in the next number of the Manitoba Gazette. The petition was filed on the last of the thirty days thereafter in accordance with section 18 of the Controverted Elections Act, R.S.M. c. 29. After the result of the recount was made known confirming the election of the

respondent, the Returning Officer sent another return to the Clerk of the Executive Council which he duly gazetted, but this was more than six weeks after the filing of the petition. It was contended on behalf of the respondent that the first return and gazetting of the election were void, and that the petition not having been filed after the second return must be dismissed.

Held, that the petitioner could not have done otherwise than file his petition at the time he did. The respondent was then relying on the return that had been made and on the certificate of the Clerk of the Council issued to him in pursuance of it as entitling him to his seat in the Legislative Assembly, and should be estopped from now claiming that the return and publication thereof were nullities and that the petitioner was not entitled to file his petition at the time he did. To hold otherwise might cause serious public inconvenience; and in this particular case the effect would be that by the neglect or default of the Returning Officer the petitioner would be deprived of his right to complain of the election. Preliminary objections overruled with costs.

Ewart, Q.C., and *Wilson*, for petitioner. *Aikins*, Q.C., and *Crawford*, Q.C., for respondent.

Province of British Columbia.

SUPREME COURT.

Martin, J.] TATE *v.* HENNESSEY. [March. 14.

Practice—Ex juris writ—Affidavit leading to order for—Jurisdiction of Local Judge—Order XI—Rule 1075.

Motion to set aside an order made by Spinks, Lo. J.S C., allowing plaintiffs to issue a writ for service out of the jurisdiction. The action was for a declaration that defendants held certain interests in mineral claims in trust for plaintiffs. The cause of action was fraudulent misrepresentation.

Held, a Local Judge of the Supreme Court has jurisdiction to make an order for an ex juris writ.

The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance the order should not be made.

A Supreme Court Judge has power on motion to set aside an ultra vires order made by a Judge of limited jurisdiction.

Order set aside.

Duff, for the motion. *J. K. Macrae*, for plaintiffs.

Drake, J.] CRANSTON *v.* ENGLISH CANADIAN CO. [May 24.

Mining law—Unoccupied ground—Overlapping—Abandonment—Proof of.

Adverse claim tried before DRAKE, J., at Rossland, 23rd May, 1900.

Held, in adverse proceedings the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work.

Semble, a locator cannot after abandonment by a prior locator rest on a location made before such abandonment, but must re-locate.

W. J. Whiteside, for plaintiffs. *J. A. Macdonald*, for defendants.

Drake, J.] REGINA *v.* NICOL. [June 20.

Venue—Change of—Grounds for—Criminal libel—Political bias.

Motion for change of venue from the County of Victoria. The defendant was charged with criminal libel in respect of an article in the Province newspaper published in Victoria on 11th December, 1897, and reflecting on the conduct of Messrs. Turner and Pooley, then members of the Provincial Executive. The motion was made under section 651 of the Criminal Code, 1892. The cause had been tried at Victoria in February, 1899, and in April, 1900, and in each of the trials the jury failed to agree. The affidavit of W. H. Langley, solicitor for the defendant, used in support of the motion set out that the prosecutors were, at the time of the alleged libel, and still are, interested in politics, and that in his belief it would be impossible to obtain a fair and impartial trial in the City or County of Victoria.

Held, in criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecution is interested in politics in the place where the libel is alleged to have been committed and that, therefore, the defendant cannot obtain a fair trial. The fact that two abortive trials have taken place is not per se a reason for change of venue.

Langley, for the motion *Cassidy*, contra.

North-West Territories.

SUPREME COURT.

Rouleau, J.] THE QUEEN *v.* WHIFFIN. [May 14.

Summary conviction under Liquor License ordinance, N. W. T.—Two offences charged in one information—Ss. 102 and 106—Both offences tried together—Minute of adjudication—Hard labour—Costs.

This was an application to quash a conviction against one Alfred E. Whiffin who was convicted on the 5th July, 1899, of having unlawfully sold intoxicating liquor without a license, and of having kept intoxicating liquor

for the purpose of sale without a license, on the following grounds: 1. That the conviction was bad in law inasmuch as it was for two offences, 2. That the said conviction was bad in law inasmuch as it imposed hard labour in default of payment of the fine imposed or of sufficient distress; 3. That the conviction was bad in law inasmuch as it varies from the minute of adjudication; 4. That the minute of adjudication did not disclose the commission of any offence in law.

The minute of adjudication was in these words: "It is this day adjudged by the Court that the accused Alfred E. Whiffin be convicted of the charge of selling intoxicating liquor and of keeping the same for sale, and that the accused Alfred E. Whiffin be fined the sum of fifty dollars for each offence and the costs of the Court five dollars and thirty-five cents and in default of payment to two months' hard labour in the guard room at Maple Creek, N.W.M. Police."

The original conviction provided for distress and sale of defendant's goods, and in default of sufficient distress two months' imprisonment at hard labour. In the amended conviction the distress clause and hard labour were omitted. The other facts sufficiently appear in the judgment.

James Muir, Q.C., for the Attorney General. *R. B. Bennett*, for the defendant.

ROULEAU, J.—Under s. 102 of c. 89 of the Consolidated Ordinances several charges of contravention of this Ordinance may be included in one and the same information or complaint, and under s. 106 convictions for several offences may be made although committed on the same day. The amended conviction returned into Court adjudged "the said Alfred E. Whiffin for each of his said offences to forfeit and pay the sum of fifty dollars," which the J.P. was authorized to do under said s. 106. Unless the statute would prohibit such conviction, I do not think that a Court of Justice would quash it on that ground: *King* v. *Swallow*, 8 Term Rep. 284.

The second ground of objection has been remedied by the amended conviction.

The third ground of objection is that the conviction is bad in law because it varies from the minute of adjudication inasmuch as the minute of adjudication imposed imprisonment at hard labour, which is not authorized by the Ordinance, and the amended conviction imposes only imprisonment.

I am of the opinion that in view of Art. 889 of the Crim. Code and the late decisions given in cases similar to this the judge would have power to amend a conviction if it followed the adjudication in which the magistrate would impose imprisonment at hard labour when he was only authorized to award imprisonment without hard labour. At all events, according to numerous decisions, the magistrate has certainly the right to omit such an error in his formal conviction. This is what he did in this case. Amongst other cases, I may cite the following cases which are very much in point:

Reg. v. *Hartley*, 20 Ont. R., 481; *Reg.* v. *Richardson*, 20 Ont. R., 514; *Reg.* v. *McCay*, 23 Ont. R., 442.

If any other grounds of objection could have been sustained I think the fourth ground might have been argued with success, but I am of the opinion that this ground is not tenable now in view of s. 889 of the Criminal Code which says that "No conviction or order made by any Justice of the Peace shall, on being removed by certiorari be held invalid for any irregularity, informality or insufficiency therein, provided the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction," etc., etc. This no doubt gives me the right to adjudicate de novo on the evidence given before the magistrate. But I may add that I am of the same opinion as that expressed in *Ex p. Nugent*, 1 Can. Crim. Cases, 126, that the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate; also that where the only penalty authorized has been imposed, but with an unauthorized addition the latter may be struck out on amendment after its return under certiorari.

For these reasons this application is refused without costs. Amended conviction affirmed.

My reason for not granting costs is that costs of certiorari proceedings are not usually given where the conviction is amended and affirmed in the amended form: *R.* v. *Higham*, 7 El. & Bl., 557.

WHERE TO SPEND VACATION DAYS.

The average member of the legal profession, wearied with the ceaseless grind of office work, needs absolute change of surroundings and climate for the full enjoyment of his vacation. These can be found in a cruise on the great Upper Lakes, in the incomparable mountains of British Columbia, in the picturesque region of the Temiskaming or in the wild Laurentians, north of Montreal, and on the Atlantic coast. If the invigorating salt laden breezes of the ocean are sought, there is no more delightful spot where they can be enjoyed than St. Andrews-by-the-Sea in New Brunswick —a charming retreat on Passamaquoddy Bay, which offers those attractions to recreation and health seekers that are possessed by few other places. There is a wealth of scenic beauty about St. Andrews-by-the-Sea, a perfect summer climate that is cool and temperate, excellent sea bathing, capital fishing, and roads in the locality unsurpassed in their smoothness and freedom from dust or mud, leading in many directions to interesting places. The water trips are also numerous, and on the placid Bay, sheltered from the Atlantic's storms and fogs by a long barrier of islands, and up the St. Croix river, boating may be indulged in even by the inexperienced in perfect safety, for here there are no sudden squalls nor heavy seas. Deep sea

fishing for cod, haddock and pollock is within a few miles of the town, and in the near-by Chamcock Lakes are land-locked salmon, and the numerous brooks and streams of the locality are filled with trout. There are clambakes and dulse parties at St. Andrews-by-the-Sea, and the operation of seining sardines after the fish are impounded in the weirs is an interesting operation to the stranger. Golf is a favorite amusement, and the Algonquin Club, with a membership of 125, distributed over Canada and the United States, has an unequalled, natural nine hole golf links.

One of the great charms of St. Andrews-by-the-Sea is in the restfulness of the surroundings. The town boasts of an excellent modern summer hotel and several smaller ones, and there are numerous boarding houses for those with limited purses. Cottages, both furnished and unfurnished, are also procurable.

St. Andrews-by-the-Sea is reached by the Canadian Pacific Railway, which runs through sleepers from Montreal every Tuesday and Friday nights during the summer, and very low fares are in effect for this delightful outing.

On the Upper Lakes, what is practically an ocean voyage may be enjoyed by taking one of the C. P. R's. magnificent lake steamers from Owen Sound, and crossing Lake Huron, running up the Sault Ste. Marie river and through the locks to Lake Superior and across that greatest of all bodies of fresh water to Port Arthur and Fort William. There are three sailings a week from Owen Sound and the round trip can be made in less than a week.

Beyond the Great Lakes, lie the gold fields of New Ontario, to reach which is involved a pleasant trip on Lake of the Woods, and further west are the great prairies and ranching grounds of Western Canada, and beyond again are the mountain regions of British Columbia, in which the Canadian Pacific has materially aided Nature in creating delightful resorts—at Banff, in the Canadian National Park, the famed Lakes in the Clouds, Field at the base of Mount Stephen, the Great Glacier, the largest of all Ice-fields, Revelstoke, on the Columbia, Sicamons, at the galencey to the Okanagan Valley, and at North Bend, in the wonderful canons of the Fraser. Vancouver and Victoria will present to the eastern traveller an idea of the growth and progress of Canadian cities on the Pacific Coast, and in returning home, the gold fields of the Kootenay and boundary countries can be visited and the great plains of the North-West revealed again by the Crow's Nest Pass Railway—thus affording views of the mountain region from different degrees of latitude.

Correspondence.

To the Editor CANADA LAW JOURNAL:

I enclose a clipping from a country paper which, after giving name and address, reads as follows: "Member of Law Society of Ontario, will execute Mortgages, Deeds, Wills, Leases, etc. Moderate charges. Satisfaction guaranteed. Office and Residence ——." There are two features which are somewhat new in the advertisement; one is that the advertiser is "a member of the Law Society of Ontario." Possibly this may be somewhat different from the "Law Society of Upper Canada," but the names are sufficiently alike to provoke enquiry. Then again, most of the advertisements I have seen of this kind stated that the advertiser was prepared to *draw* documents of all kinds, for moderate charges, and to guarantee satisfaction. This gentleman goes a little further and says that he is prepared to "execute" them on the same reasonable terms.

Yours,

READER.

Book Reviews.

Law and Practice in Accident Cases, by CHAS. C. BLACK, author of New Jersey Law of Taxation. Newark, N.J.: Soney & Sage. 1900.

This is an enlargement of a previous book known as Proofs and Pleadings in Accident Cases. The writer states his object to be to produce a practice book in distinction from standard works on the law of negligence, a book that would render assistance in bringing, maintaining, and defending accident cases in the Courts, and which would be useful for ready reference at the trial. It includes a statement of general principles, with short treatises on actions and parties thereto; pleadings and forms; evidence and proof; damages for personal injuries and for causing death; questions of law and fact; contributory negligence; fellow servants, etc. In these days when accident cases form so large a portion of litigation in all our Courts, every assistance that can be had will we welcomed by the profession, and the volume before us, which contains over 700 pages, will be helpful in this country, though a comparatively large portion is devoted to forms of pleadings and practice inappropriate to our precedure.