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CONSTITUTIONAL CHANGES.

Constitutional Government is of such recent growth in this country, and has passed through so many changes, that it is hard for us to realize how momentous and far-reaching is the action of the Imperial Government, which has resulted in the passage of what is known as the "Veto Bill."

By this measure, as our readers know, the power of the House of Lords, one of the three great estates of the realm, and of older foundation than the House of Commons, is absolutely extinguished so far as the Government of the country is concerned. It may retard or obstruct Legislation, but it can neither alter nor amend it. The functions of the Crown have become little more than ceremonial. In the face of a triumphant majority in the House of Commons which may or may not represent on any particular measure the majority of the electors, the Sovereign is powerless, and now by the veto bill the House of Peers is equally reduced to a position of impotence.

Avoiding any discussion of the merits of the various questions out of which the present crisis has arisen, we may properly call attention to the means by which the constitutional changes referred to have been effected. Carrying to an extreme point the doctrine of responsible government it is held, and the doctrine has been carried into action, that on the advice of ministers, supported by a majority in one House the Crown may be compelled to place the other House in such a position that it must either submit to political extinction, or allow itself to become subservient to the other branch of the Legislature by a process equally destructive to its usefulness and its influence. The practical result is that the Government of Great Britain and Ireland, and to some extent that of the Empire at large, is now in the hands of a minister supported by the majority of a single cham-

ber, a majority—the number of Liberals and Conservatives being equal—composed of Irish Nationalists with a few members of the labour party. The majority thus constituted is for the time being omnipotent. From their decisions there is no appeal. For the next two years the destinies of the Empire are in their hands. Public opinion has no terrors for them, for there is no voice by which it can be expressed. Education, experience in and knowledge of, public affairs, may be found in the possession of individual ministers, but can only be exercised at the will of the triumphant majority expressed through the medium of the dictator of the Irish Nationalists.

This may or may not be a desirable state of affairs, and best for the peace and good government of the country—we are not discussing that; we are simply calling attention to the facts as they exist, and to the changes which have so suddenly, without warning, and with but little time for consideration, been made in the constitution of the British Empire.

It may be said that such a revolution, the greatest in our history since the time of the Commonwealth, has no interest for us What matters it to us whether England is ruled by King, Lords and Commons, or by the House of Commons alone? At this moment it may not matter, but no student of history will fail to have misgivings for the future stability of the Empire.

One feature in the administration of public affairs in Great Britain, to be found in no other country, is the greatness of the service given to the public without fee or reward, or expectation of either. The unpaid magistracy comprise a body of men who, whatever their faults may be, are of great value to the State. In municipal affairs we find that the wealthiest and noblest in the land do not think it beneath their dignity to take an active part in whatever is going on to promote the interests of the people among whom they live. And in the higher spheres of public life, in the Houses of Parliament, we find the same spirit prevailing, and, alone among the Legislatures of the world, the members of that of Great Britain have never received any return in money for the time they spend, the work they do, or the expense they

incur. This proud distinction will exist no longer. Money payment for service, the mark of the professional in every walk of life, in sport as well as in business, will in future attach to the position of a member of Parliament. It may be right that it should be so. There is no doubt that there is something to be said in favour of it, but the change is a great one. It is in harmony with the constitutional changes we have been describing, and was therefore inevitable, but like the greater changes we simply record it as further evidence of the spirit in which those changes have been effected.

Interrupting, but scarcely retarding, the revolutionary proceedings now drawing to a close, came the great events of the Coronation and of the Colonial Conference. To the first of these we have already referred. The record of the second is fully before the public, but there is one question arising out of it, the importance of which may not be fully realized, and to which we would invite attention.

Our representative at that conference, who took a leading part in its proceedings, carried the doctrine of autonomy, of which he was the chief exponent, so far as to declare, on behalf of himself and his colleagues, and, of course, of the Dominion which he represented, that in the event of the British Government engaging in a war of which this country did not approve, we should be at liberty to declare our neutrality and take no part in the contest.

How this doctrine can be reconciled with that of Imperial unity we are at a loss to conceive. A simple declaration of neutrality would be of no avail unless accepted by the other party belligerent, and that could only be done by means of a treaty into which we should enter as an independent power, and not as a part of the British Empire. And suppose, what is most probable, that the other belligerent did not choose to recognize our neutrality, our ships would be liable to seizure, and our soil to invasion. True, in that case we might fight to defend our own property, but we could expect no help from the mother country.

This doctrine of neutrality simply means that in time of peace we should enjoy all the advantages of union with the Empire, and then, if trouble arose, we should find some excuse for escaping from our share of possible danger and loss, and in so doing take a position which could only lead to severance from the Empire.

The position is an unthinkable one. It is as illogical as it is humiliating, and it is one which the people of this country will never accept. There are only two courses open to us, and one or other we must be manly enough to choose. Either declare our independence, or say, what indeed goes without saying, that "if England is at war Canada is at war."

But our Imperialist friends need not be apprehensive. The British Government is not given to engaging in aggressive or unjust warfare. For centuries it has never done so. It neither suits the temper, the policy, nor the interest of the British people to do so. They may make mistakes, as perhaps they did in the case of the Crimean war, but even then the motive which led to war was not one of aggression. We may trust the Imperial authorities, especially now that our own rulers have been taken into their confidence, and consign this childish and contemptible theory of neutrality to oblivion. It is true, that sprung upon the Conference as it was at the close of the proceedings, it seemed to be accepted as a foregone conclusion, but it has since been emphatically repudiated, both in Africa, Australia and New Zealand, and so we are sure will be repudiated by Canada if ever the question is brought before us.

TRANSFER OF WAREHOUSE RECEIPTS TO BANKS.

A recently reported decision of the Court of King's Bench at Montreal, in the case of *La Banque Nationale* v. *Royer*, 20 Quebec King's Bench Reports 341, is of much interest to the wholesale traders as affecting their dealings with Canadian banks and the special securities authorized by the Bank Act, Revised Statutes of Canada (1906), chapter 29.

The Bank Act declares (sec. 2), that a "warehouse receipt,"

as that term is used in the Act, shall mean, "any receipt given by any person for any goods, wares or merchandize in his actual, visible and continued possession as bailee thereof, in good faith and not as of his own property." As pointed out by the Honourable Mr. Justice Cross, who delivered the majority judgment in the King's Bench, a warehouse receipt, in the common use of language, is understood to be a receipt issued by a warehouseman. Does the statutory definition enlarge or restrict the ordinary significance of the term "warehouse receipt" as regards banking transactions? The majority of the court in *La Banque Nationale* v. *Royer* considered that the statute gave it a wider meaning and that a clerk in the employ of wholesale grocers, to whom the possession of a part of the stock in trade was committed, was a bailee in actual, visible and continued possession within the statutory definition, although such part of the stock in trade was merely set apart in portions of a building leased by the firm to their clerk at a nominal rental. A warehouse receipt had been issued by the clerk as warehouseman for goods received from his employers, the grocery firm, actually placed in the rented portion of the building. The portion of the premises so used as a warehouse was boarded off from the other part of the building and was kept locked and the clerk kept the key. The warehouse receipt signed by the clerk, acknowledged that he had received in store at his warehouse from the grocery firm goods, as per lists certified by the subscriber, to be delivered to the order of the bank. The bank made an advance in good faith to the grocery firm on the security of this warehouse receipt. When any part of the warehoused goods were sold by the grocery firm, the clerk, as warehouseman, by arrangement with the bank, released such part on being paid the proceeds and accounted for such proceeds on the same day to the bank.

Many years ago, the Canadian Parliament in the interests of banking, passed a statute permitting certain classes of traders to issue warehouse receipts to banks, affecting goods of which such traders continued to be in possession.

Nominally this authorization to traders to become warehousemen of their own goods, was abolished by the Bank Act of 1890.

Under the operation of sec. 7 of the Act of 1880, reproduced as sec. 54 of chapter 120 of the Revised Statutes of 1886, the title of a bank, to goods for which it was holder of a warehouse receipt issued by persons of certain specified callings, who were actually owners of the goods for which they issued the receipts, was "as valid and effectual as if such owner, and the persons making such warehouse receipt or bill of lading, were different persons." These callings or classes of persons, were warehousemen, wharfingers, saw-millers, maltsters and some others. *Milloy* v. *Kerr*, 3 Ont. App. R. 360, 8 Can. S.C.R. 474.

Section 54 of ch. 120, R.S.C. 1886, was not reproduced in the Bank Act of 1890, nor in the Bank Act, R.S.C. 1906, ch. 29, but while that part of the Act was dropped, a new form of security was authorized by sec. 74 of the Act of 1890 (now sec. 88 of the Bank Act, R.S.C. 1906, ch. 29).

As to the effect of the change, it is pointed out by Mr. Falconbridge (On Banking, p. 166) that, while the fiction whereby the owner of goods would use a form of warehouse receipt for the purpose of obtaining advances on goods in his own possession, was abolished, and, instead, the thing was openly legalized: "the privilege of pledging the pledgor's own goods for advances was no longer limited to certain named classes of traders, but any person engaged in business, as a wholesale manufacturer of goods, wares and merchandise, and any wholesale purchaser or shipper of products of agriculture, the forest and mine, or the sea, lakes and rivers and any wholesale purchaser or shipper of live stock or dead stock and the products thereof, was authorized to give to the bank security, as mentioned in the Act."

Judge Cross says it is clear that the number of persons thus authorized to pledge goods, while still continuing to be in possession of them, is very large and that the Act still requires that the warehouse receipt to the bank shall have been given by

a person for goods "in his actual, visible and continued possession, as bailee thereof, in good faith, and not as of his own property."

The learned judge quotes with approval the opinion expressed by Mr. Falconbridge, that, "if the bank seeks to obtain a priority over other creditors by virtue of the Act, and the general law confers no priority, it is necessary for the bank, as against the creditors of the transferor, to shew that the transaction was in precise accordance with the provisions of the Act."

At the same time, and as evidence of a well-marked legislative intent, it is held in *La Banque Nationale* v. *Royer*, that regard is to be had to section 88, which not only clearly authorizes the taking of security from wholesale purchasers, or dealers, in a very large number of classes of commodities, in fact in most of the commodities which make up the wholesale trade, upon the security of goods belonging to them, but also expressly declares that the bank's rights, in virtue of the "security paper," are the same as if acquired by virtue of a warehouse receipt.

This being so, the element of exclusive physical possession has come to be of less significance, though it would, no doubt, continue to be an important element to be considered in cases where fraud was an issue, or where, for example, the expedient had been resorted to, to enable the bank to receive payment of a past-due debt. Per Cross, J., in *La Banque Nationale* v. *Royer*, 20 Que. K.B. 341.

The court held in that case, that, although the "warehouseman" was in the service of the insolvents and although the lease by them to him of two floors of their storehouse was made solely for the purpose of constituting him a warehouseman and of bringing the transaction with the bank into literal compliance with the Bank Act, it could not be said that the clerk was not in "actual, visible and continued possession," as bailee "in good faith." He, in fact, did exercise the control of a possessor. All consideration of fraud being eliminated, it was

for the court to give effect to the transaction in the form in which the parties chose to have it expressed, if that form be one which the law authorizes. *Yorkshire & Co.* v. *Maclure*, 21 C.D. 309.

As pointed out by Mr. Falconbridge, "It is not strictly necessary that the premises must be kept by him for the purpose of warehousing goods in general, or the goods mentioned in the receipt in particular": Falconbridge on Banking, page 170; *Re Monteith* (1885), 10 Ont. R. 529.

Judge Cross in delivering the majority judgment says:—

> "When it is considered that the classes of persons, entitled to obtain advances upon the security of goods retained in their own possession, first provided for in the year 1861, were gradually enlarged by enactments in 1865, 1871, 1872, 1880 and 1888 and that the words "or dealer in" were added in 1900 (representing a very notable enlargement) with the result that these classes of persons now include wholesale purchasers of and dealers in "products of agriculture, the forest, quarry and mine, or the sea, lakes and river, and live stock or dead stock and the products thereof," there is manifested a clear legislative intent to greatly widen, in the interests of trade, the right of wholesale traders to give security upon their stock of goods."

In the same case the bank's claim for a lien or "privilege" in respect of a second advance by the bank made after its manager had seen a statement of the firm's affairs shewing a considerable deficit was disallowed, on the ground that the borrowers were insolvent to the knowledge of the bank, when the second advance was made.

FOREIGN JUDGMENTS.

X, when riding in Paris, comes into collision with *A*, and thereby causes grave injury to *A*. *X* is proceeded against by French authorities for criminal negligence. *A* intervenes in these proceedings, as he is intitled to do by French law (see Code d'Instruction Criminelle, ss. 1, 2, and 3) as a civil party and claims compensation from *X* for the damage done him. *X*, before the trial comes on, leaves for England. In *X*'s absence he is found guilty and judgment goes against him. In the judgment a penalty is inflicted upon *X* of £4 and a month's imprisonment. The same judgment which inflicts the penalty contains an award to *A* of provisional damages amounting to about £400 and directs an inquiry by an eminent doctor as to the actual damages to which *A* is entitled. He finds that *A* has suffered damage to the amount of £600, and judgment is entered for that amount. Proceedings are taken in England for enforcing the French judgment in favour of *A*. The defence raised is that the foreign judgment proceeded upon is a penal judgment and cannot be given effect to in an English Court (see *Huntington* v. *Attrill* [1893] A.C. 150, and see *Wisconsin* v. *Pelican Insurance Co.* (1887), 127 U.S. 265). The case comes for trial before Hamilton, J., without a jury. These are in substance the fact of *Raulin* v. *Fischer* [1911], 2 K.B. 93, 80 L.J. K.B. 811. It is held by Hamilton, J., that in the circumstances of the case the French judgment is severable, and that the portion of it awarding damages to *A* is not within the rule of international law which prohibits courts of justice from executing the penal judgments of a foreign court. The case is one which we believe has never before called for decision by an English Court. It may possibly therefore lead to an appeal, but we may venture to anticipate that the judgment of Hamilton, J., will be upheld. The French judgment in favour of *A* was not a penal judgment. It can easily be separated from the condemnation of *X* to a payment of a penalty and to imprisonment. There is in the nature of things no more reason why the French

judgment, or rather *A*'s right to compensation under the French judgment, should not be enforced in England than for not enforcing a judgment for damages payable to *A* by *X* and obtained in a purely civil action brought in France by *A* against *X*. Sir Francis Piggott has ingeniously anticipated the case with which Mr. Justice Hamilton had to deal, and has arrived at the same conclusion as his lordship (Piggott, Foreign Judgments, Part I, pp. 90, 91).—*Law Quarterly Review.*

DAWN JUDICIALLY DETERMINED.

There are numerous cases in the reports, most of them admiralty cases arising out of collisions on the water, where courts have found it necessary to estimate the degree of light existing before sunrise or after sunset. In *Cohen* v. *The Brig Mary T. Wilder*, Taney (U.S.) 567, 6 Fed. Cas. No. 2,965, Chief Justice Taney said that in the interval between the going down of the moon at an hour and a half before sunrise, and broad daylight, it may be very dark; "certainly the mere dawn of the day would not immediately dissipate the darkness which followed the going down of the moon." In *Train* v. *The North America*, 23 Fed. Cas. No. 13,853, a case of a collision off the Battery, at New York, at four o'clock in the morning of March 30, Judge Betts held it to be culpable negligence for a vessel to be lying at anchor without a light. In the *City of Troy*, Ben. (U.S.) 466, 5 Fed. Cas. No. 2,769, Judge Benedict held that on a clear July morning, when the dawn was already breaking, it could not have been so dark that a barge with a light at her bow and in tow of a tug would not be plainly visible to a vessel which observed the tug and succeeded in clearing her by an ample margin, if the vessel's lookout had been alert. In *Fletcher* v. *The Cubana*, 9 Fed. Cas. No. 4,863, where a collision occurred at about four or half past four a.m. on June 19th, in latitude 25° 48′ N., longitude 62° 18′ W., the pivotal question was whether or not it was dark at the time. The witnesses on one vessel insisted that it was not, while those on the other asserted the contrary. Two wit-

nesses from New York were called, who testified that they were acquainted with the navigation of the ocean in the vicinity of the place of collision, and they stated that at that time of the year it must have been broad daylight when the vessels collided. "The court has had some hesitation in accepting this statement," said Judge Shipman, "as it is in conflict with the commonly received opinion of geographers and navigators touching the length of time which dawn precedes the morning and twilight follows the setting sun. But as the testimony is positive, and the witnesses say they have personally witnessed the state of the atmosphere in that region and at that season of the year and time of day, the court must accept their testimony as confirming that of those on board the schooner," who affirmed the same fact.—*Law Notes.*

IMPERIAL COURT OF APPEAL.

During the past week the *Times* has published two highly interesting articles on the subject of an Imperial Court of Appeal. At the forthcoming Imperial Conference the Australian Government will propose that it is desirable that the judicial functions in regard to the dominions now exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court which should also be the final Court of Appeal for Great Britain and Ireland. It is useless disguising the fact that in certain portions of our oversea dominions, especially in Australia, the Judicial Committee of the Privy Council has by no means been regarded with a favourable eye. From a logical point of view, it has always been difficult to understand why the court of final appeal from the courts of Great Britain should be the House of Lords, while in the case of the colonies final appeals should be to the Judicial Committee of the Privy Council, when, save for the changes brought about a year or two ago, the personality of those tribunals is largely identcial.

The fact that different systems of law have to be administered forms no answer, inasmuch as there is considerable diver-

gence between the Scottish and English systems, both of which are considered by the House of Lords. Rightly or wrongly, there is undoubtedly an impression steadily growing amongst our colonies that the Judicial Committee is not the strongest and most efficient tribunal that might be obtained, and considerable stress is laid upon the fact that its decisions are not binding upon the courts of this country, and it is exceedingly doubtful whether its decisions on cases coming from one part of the Empire are binding upon the courts of another. The ideal court of final resort would certainly seem to be one upon which our oversea dominions were adequately represented, and one whose decisions would be binding throughout the whole of the Empire. It would seem that the institution of such an Imperial Court of Appeal is not impossible of attainment, and no doubt the discussion at the forthcoming conference will make clear what are the feelings of our colonies with reference thereto.—*Law Times.*

The subject of manners, good and bad, is one which though not directly connected with the legal profession, has an important relation thereto as every client knows. A lawyer with good manners, pleasant address, and courteous demeanour, is always, other things being equal, ahead of a boorish and ill-mannered competitor. The acquiring of good manners is an educational process, which should begin at the very earliest age. Recently the Governor-General very pointedly called attention to the bad manners of the children of Ontario, thereby doing a great service to the country, though probably rendering himself somewhat unpopular to a class of persons whose popularity is, however, of no value. We notice an item on this subject which is going the rounds of the English papers. It appears that on a recent occasion, the Bishop of Worcester spoke to some scholars on the subject of "Manners"; and—in order to point the moral—recalled a conversation of his own with King George when he was Duke of York. Said the then Duke to the Bishop, who was at the time on his way to speak to schoolboys:—

"Why do you not ask that at public schools manners should be taught? As you know, I mix among all sorts and conditions of men, and it has been a positive distress to me to see how often when abroad Englishmen lose in the race with Frenchmen, Italians, and Germans, because of the Englishman's want of manners. The foreigners know when to bow, to shake hands, to converse, to stand up or sit down in the presence of their superiors, while the Englishman is wanting in these manners; and when vacancies have to be filled up those are the points which very often tell, and that is where the Englishman does not shine."

The people of at least some of the Provinces of the Dominion are apt to brag of their educational systems. They would have more cause to do so if they were to adopt the King's suggestion and teach manners in the public schools.

Mr. Justice Eve has decided in *Re Sir S. M. Maryon-Wilson's Estate*, [1911] 2 Ch. 58, that a Province of Canada is not a "British colony or dependency" within the meaning of those words in an investment clause in a will dated since the British North America Act. We cannot help doubting whether this decision is correct. "Colony" has been differently defined for different purposes by modern statutes, and these definitions only shew that the word may have a wider or a narrower sense in other cases. Nova Scotia and British Columbia were certainly colonies before 1867. Is it to be presumed that the scope of a very usual investment clause was automatically narrowed by the Confederation Act? Then, even if a Province of Canada is not a colony, why is it not a dependency? Neither the argument nor the judgment answers this question. The moral, however, is that conveyancers must revise the old form of colonial investment clause if they have not done so already.—*Law Quarterly.*

REVIEW OF CURRENT ENGLISH CASES.

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—BRIEFS OF COUNCIL—PRIVILEGED DOCUMENTS.

Curtis v. *Beaney* (1911) P. 181. This was a probate action in which the claim to probate was resisted on the ground that the deceased was of unsound mind. In her lifetime she had been a sole defendant in an action for money alleged to be due by her, and one of the plaintiffs who was also named as one of the executors of the will propounded, had acted as her solicitor in that action, and had in his possession briefs prepared by him for counsel in that action, which he objected to produce as being privileged documents, and Deane, J., held that the briefs were privileged documents as claimed.

LANDLORD AND TENANT—COVENANT TO REPAIR—BREACH OF COVENANT BY LESSEE—WASTE BY LESSEE—CONVERSION OF DEMISED PREMISES FROM CHAPEL TO THEATRE—RELIEF AGAINST FORFEITURE — STRUCTURAL ALTERATIONS — CONVEYANCING ACT, 1881 (44-45 VICT. C. 41) S. 14, SUB-SS. 1, 2, 3—LANDLORD AND TENANT ACT (ONT.) (1 GEO. V. C. 37, SS. 20, 21 (ONT.)).

Rose v. *Spicer* (1911) 2 K.B. 234. In this case a landlord sued for recovery of possession of the demised premises for breach of a covenant to repair, and an assignee of the term intervened, claiming to be relieved from the forfeiture. The facts of the case were somewhat unusual. The lease had been originally granted for 99 years for the purpose of erecting a chapel for religious worship. The chapel had been duly erected and enclosed from the highway with an iron fence. After being so used for sixty years, the chapel had ceased to be used, and the lessee, with the consent of the Charity Commissioners, had been authorized to sell the unexpired term, which he accordingly did. The lease contained the usual covenant by the lessee to repair and keep and maintain the premises in repair. Prior to the sale of the lease notice had been served on the lessee under the statute of the breach of the covenant, and the premises not having been put in repair the action of *Rose* v. *Spicer* was commenced by the landlord to recover possession. The purchasers of

the lease proceeded to convert the chapel into a theatre, and for that purpose removed the front fence, opened a new door into the building and made several other structural alterations in the interior; and, while these alterations were in progress, the lessor commenced the action of *Rose* v. *Hyman* to restrain the assignees of the lease from proceeding with the alterations, and for damages to the reversion. The defendants in the latter action obtained ex parte leave to defend the action of *Rose* v. *Spicer,* and in both actions applied to be relieved from the forfeiture, and the plaintiff in *Rose* v. *Spicer* appealed from the order allowing the defendants Hyman et al. to intervene in that action. The Master, who heard the applications, refused to rescind the order allowing the defendants in *Rose* v. *Hyman* to intervene in the action of *Rose* v. *Spicer,* but made no order as to the relief from forfeiture, but without prejudice to any application for relief to the judge at the trial, and directed the two actions to be tried together. Ridley, J., on appeal by the plaintiff struck out the appearance of the defendants Hyman et al. in *Rose* v. *Spicer,* and dismissed the defendants, Hyman et al.'s, appeal from the refusal to grant relief from the forfeiture. In *Rose* v. *Hyman* Horridge, J., granted the plaintiff an interlocutory injunction against the continuance of the structural alterations, and an appeal was brought from both these orders of Ridley and Horridge, JJ. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) were not unanimous, but the majority (Cozens-Hardy, M.R., and Moulton, L.J.) were of the opinion that the removal of the fence and the opening of a new doorway were breaches of the covenant to repair and keep in repair, and that no relief against the forfeiture could be granted except upon the terms of the restoration of the premises to their former condition. Buckley, L.J., on the other hand, was of the opinion that the assignees of the lease might, without breach of the covenant make such alterations as were necessary for carrying on the business of a theatre, and especially as the assignees offered to deposit in court a sum sufficient to restore the premises to their original condition, at the expiration of the term, and to provide against any public right being acquired by reason of the removal of the fence. In the result both appeals were dismissed, the defendants having refused to accept the terms on which alone the majority of the court considered relief from the forfeiture could be granted.

FISHERY ACT—"USING NET FOR CATCHING SALMON"—NET READY TO BE USED BUT NOT ACTUALLY USED.

Moses v. *Raywood* (1911) 2 K.B. 271. This was a prosecution for breach of a Fishery Act, forbidding the use of nets to catch salmon without having a license. The evidence shewed that the defendant was in a boat with another man in a river in a fishery district where salmon were usually caught, and that he got out of the boat and walked near the edge of the river looking for salmon. That he had in the boat a net resembling a landing net, and when interrupted by the water bailiff, the net was dry and had not been used. On a case stated by the justices who dismissed the information, a Divisional Court (Lord Alverstone, C.J., and Ridley and Channel, JJ.) held that the defendant ought to be convicted, as he had begun to search for salmon and had the net ready for use, and was therefore "using" the net within the meaning of the section.

WARRANT OF ARREST—"TRAVELLING TO EXECUTE WARRANT"—MILEAGE.

In re Cropley (1911) 2 K.B. 309. In this case Phillimore, J., decided that a warrant of arrest of a person is not completely executed until the person is lodged in the prison named in the warrant, and therefore that a bailiff executing such a warrant is entitled to mileage to the place of arrest, but also from the place of arrest to the prison.

JUSTICE OF THE PEACE—OUSTER OF JURISDICTION—BONA FIDE CLAIM OF RIGHT—TRESPASS—CLAIM THAT LAND IN QUESTION WAS A HIGHWAY—RAILWAY—DEDICATION OF HIGHWAY.

Arnold v. *Morgan* (1911) 2 K.B. 314. This was a case stated by magistrates. The defendant was accused of trespassing on a railway in such a manner as to expose himself to danger. The defendant alleged that he was lawfully on the railway in exercise of a right which he claimed as one of the public to pass upon the railway as upon a highway dedicated by the railway company or another company with which it had been amalgamated. The Divisional Court (Ridley, Pickford and Hamilton, JJ.) held that the jurisdiction of the justices was ousted, because a railway like any other public body may dedicate a highway over land vested in it by statute, provided the dedication is not incompatible with the object prescribed by the statute, and that the question

of compatibility is not triable by justices, nor is the question whether a highway dedicated before the passing of a statute has been subsequently extinguished thereby.

CONTRACT—CONSIDERATION—MUTUAL AGREEMENT OF CREDITORS TO FOREGO CLAIMS—DEBTOR PARTY TO AGREEMENT BY CREDITORS TO FOREGO CLAIMS—RIGHT OF DEBTOR TO SET UP AGREEMENT.

West Yorkshire Daracq v. *Coleridge* (1911) 2 K.B. 326 is a case which does not appear to have been previously covered by authority, although the point in question seems to be one which must have previously arisen. The directors of a company in liquidation by mutual agreement to which the liquidator was also a party, agreed to forego their claims for directors' fees. The company subsequently brought the present action against one of the directors for work done, and in this action the defendant set up a cross-claim for his fees as a director, and the question was whether the company were entitled to set up the agreement to forego the claim for fees. No consideration for the agreement was given by the company, but it was held by Horridge, J., that as the company, represented by the liquidator, was a party to the agreement, it was entitled to the benefit of the consideration proceeding from the other directors, and was therefore entitled to set up the agreement as a bar to the defendants' claim.

ACCORD AND SATISFACTION—SUM LESS THAN AMOUNT DUE, OFFERED BY THIRD PARTY IN SATISFACTION OF DEBT OF ANOTHER—ACCEPTANCE BY CREDITOR—EXTINCTION OF DEBT.

Hirachand v. *Temple* (1911) 2 K.B. 330. This was an action on a promissory note made by the defendant, to which the defendant set up as a defence that his father had offered to the plaintiff a sum of money less than the amount due in satisfaction, and the plaintiffs had accepted the sum offered. The money was remitted by draft, which the plaintiffs cashed, and retained the proceeds, and now sued for the balance of the debt. Scrutton, J., held that the facts above mentioned constituted no defence, but the Court of Appeal (Williams, Moulton and Farwell, L.JJ.) held that by cashing the draft and retaining the proceeds, the plaintiffs must be held to have accepted the money on the terms on which it was offered, and therefore that the debt was extin-

guished. Williams, L.J., considers that although the defendant could not set up the facts as an accord and satisfaction, yet that he was entitled to say that they amounted to an extinction of the note, just as effectually as if his name had been erased from it; and on the other hand from an equitable point of view the plaintiff could have no claim to the balance except as trustee for the father, and the correspondence produced shewed that the father never intended to make any claim therefor; and, further, that it would be a fraud on the father, who had paid part of the debt in discharge of the whole, if the creditor were thereafter to sue the debtor.

DEED—ASSIGNMENT OF LEASE—DELIVERY OF DEED NOT TO TAKE EFFECT TILL DEATH OF GRANTOR—ESCROW—TESTAMENTARY DOCUMENT.

Foundling Hospital v. *Crane* (1911) 2 K.B. 367. This was an action for rent against the executors of a deceased lessee. The defendants pleaded that prior to his death the lessee had assigned the lease to a Mrs. Browne, and that they had never entered into possession of the demised premises or claimed any interest therein. The evidence shewed that the defendant's testator, Hoe, being in possession, about the year 1905 executed an assignment of the lease in favour of Mrs. Browne, which he left with his solicitors with instructions that they were to be at liberty to fill in the date so that it might take effect on his death in case Mrs. Browne survived him. He died 22 Sept., 1909, and Mrs. Browne having survived him, the solicitors, after his death, filled in the date 20 September, 1909, as the date of the deed. The testator had been in possession up to the date of his death and retained the title deeds and paid the rates and taxes. Scrutton, J., who tried the action, with some doubt gave judgment in favour of the defendants, thinking the assignment had been validly delivered as an escrow; but the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) held that inasmuch as the deed was not to take effect until the testator's death, it was in the nature of a testamentary document, which failed of effect, not having been executed in accordance with the requirement of the Wills Act, and could not be regarded as a deed inter vivos, notwithstanding the fact that Mrs. Browne had also executed it. The defence, therefore, failed.

INSURANCE—SHIP—DAMAGE TO HULL—LATENT DEFECT EXISTING PRIOR TO INSURANCE—COSTS OF REPLACING STERN FRAME OWING TO LATENT DEFECT.

Hutchins v. *Royal Exchange Assurance Corporation* (1911) 2 K.B. 398 was an action on a policy of marine insurance which contained what is known as the Inchmaree clause, providing that the policy should cover loss or damage to the hull through any latent defect in the hull. At the time the insurance was effected there was an unknown latent defect in the stern frame, which defect during the currency of the policy was discovered, and a new stern frame had to be substituted, and the question in the action was whether the cost of the new stern frame was a loss recoverable under the policy. Scrutton, J., who tried the action came to the conclusion that under the Inchmaree clause the loss recoverable is (1) actual total loss of part of the hull or machinery, through a latent defect coming into existence and causing the loss during the currency of the policy; (2) constructive total loss under the same circumstances, as where part of the hull survives, but is, by reason of the latent defect, of no value and cannot be profitably repaired, and (3) damage to other parts of the hull happening during the currency of the policy, through a latent defect, even if the latter came into existence before the policy. But he held that the pre-existing latent defect is not itself damage for which indemnity is recoverable, even if by wear and tear it first becomes visible during the currency of the policy. The action was, therefore, dismissed, and the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.) affirmed the decision.

COUNTY COURT—REMOVAL OF ACTION FROM COUNTY COURT TO HIGH COURT—DISCRETION OF JUDGE—(ONT. JUD. ACT, S. 93(1))—COSTS.

In *Donkin* v. *Pearson* (1911) 2 K.B. 412, the defendants applied to remove the action from the County Court to the High Court. The Master made the order on the terms that the defendants should in any event pay the difference between the costs of the County Court and High Court. Horridge, J., reversed the order, but gave leave to appeal. The action was by a member of a trade union against the union, and the defence raised a difficult question of law, and the Divisional Court (Lord Alverstone, C.J., and Bray, and Coleridge, JJ.) held that that

was a sufficient ground for making the order, and notwithstanding the order of Horridge, J., was discretionary, reversed it, and restored the order of the Master.

ATTACHMENT OF DEBTS—GARNISHEE PROCEEDINGS—JUDGMENT PAYABLE AT FUTURE DAY.

In *White* v. *Stennings* (1911) 2 K.B. 418 the plaintiffs recovered a judgment payable at a future day; before that day had arrived, they commenced proceedings to attach a debt due to the defendant. The defendant applied to discharge the attaching order and summons, and the County Court judge refused the application, the defendant then appealed to a Divisional Court (Ridley and Channel, JJ.) who dismissed the appeal; but the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) were unanimously of opinion that the attachment proceedings were premature and set them aside.

COUNTY COURT—DEPUTY JUDGE—CONSENT OF PARTIES—COUNTY COURTS ACT (10 EDW. VII. c. 30, ONT.) s. 4—APPEAL.

McInally v. *Blackledge* (1911) 2 K.B. 432. By the English County Courts Act, a County Court judge is empowered in case of unavoidable absence or illness to appoint as his deputy a barrister of not less than seven years' standing (see 10 Edw. VII. c. 30, s. 4, Ont.). A judge, with the consent of the parties, appointed the registrar of the court, who was not a barrister of seven years' standing, to act as his deputy, and it was held by a Divisional Court (Phillimore and Horridge, JJ.) that there was no jurisdiction, even with consent of parties, to appoint any one as deputy who did not fulfil the statutory requirements, and therefore no appeal lay from the registrar's decision.

MASTER AND SERVANT—DOMESTIC SERVANT—DETERMINATION OF SERVICE—CUSTOM—NOTICE GIVEN DURING FIRST FORTNIGHT—DETERMINATION OF EMPLOYMENT AT THE END OF FIRST MONTH—SERVANT LEAVING IN BREACH OF CONTRACT—WAGES.

George v. *Davies* (1911) 2 K.B. 445. This is an addition to the case law on the subject of domestic servants. The plaintiff, a domestic servant, entered the defendant's service on November 3, 1910, at yearly wages, payable monthly, there being no express agreement as to notice. On November 17, 1910, she gave notice

of her intention to leave at the expiration of the first month's service. She accordingly left, and the defendant refused to pay her wages on the ground that she had left without giving a month's notice. She brought an action in the County Court to recover the month's wages, alleging a custom that in the absence of agreement to the contrary either party was at liberty to terminate the service at the end of the first month on giving a fortnight's notice. The plaintiff called no evidence to prove the custom, but the judge said he had taken judicial notice of the custom in other cases and would do so in this case, and gave judgment for the plaintiff. A Divisional Court (Bray, and Coleridge, JJ.) held that the judge was entitled to take judicial notice of the custom, and that, apart from the custom, and even if the plaintiff wrongfully quitted service without proper notice, she was, nevertheless, entitled to recover the month's wages, which had accrued due to her.

PUBLIC OFFICE—OBLIGATION OF APPOINTEE TO PUBLIC OFFICE TO SERVE—COMMITTEE OF MUNICIPAL COUNCIL—POWER OF MEMBER OF COMMITTEE TO RESIGN.

The King v. *Sunderland* (1911) 2 K.B. 458 was an application for a mandamus to a municipal corporation to compel it to elect a person as a member of a committee appointed by the council, in place of a member who had been appointed and resigned. The contention of the municipality was, that the membership of the committee (the appointment of which was authorized by statute), was a public office, and that the person appointed to it was bound to serve, and that his resignation against the will of the council was therefore null and void; but the Divisional Court (Lord Alverstone, C.J., and Bray, J.), held that the membership of such a committee is not an independent public office, which according to the rule of the common law cannot be resigned against the will of the council; the application therefore to compel the filling of the vacancy caused by the resignation was therefore granted.

RESTRICTIVE COVENANT—PURCHASER FOR VALUE WITHOUT NOTICE OF RESTRICTIVE COVENANT—SUBSEQUENT PURCHASER WITH NOTICE.

In *Wilkes* v. *Spooner* (1911) 2 K.B. 473, the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), overruling Scrutton, J., held that where a person purchases land for value

without notice of a prior restrictive covenant affecting it, he is not bound by the covenant, nor is a purchaser from him, even though such purchaser may have actual, or constructive, notice of the covenant. There are, it is conceded, exceptions to the rule, which would prevent persons taking advantage of their own wrong, as, for example, a trustee in breach of trust selling trust property to a bona fide purchaser without notice, cannot himself buy it back so as to hold the property freed from the trust.

SOLICITOR AND CLIENT—MANAGING CLERK—PRINCIPAL AND AGENT—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.

Lloyd v. *Grace* (1911) 2 K.B. 489 was happily a somewhat unusual case. The plaintiff went to the office of the defendant, a solicitor, to consult about her investments, and there conferred with the managing clerk, and on his advice and suggestion handed to him the title deeds of certain freehold property, and also a mortgage on land, and she also executed in favour of the clerk a conveyance of the freehold and an assignment of the mortgage. The clerk deposited the title deeds as security for an advance to himself which he retained for his own use, and he also called in the mortgage and misappropriated the proceeds. The plaintiff claimed that the defendant as the employer of the fraudulent clerk was bound to make good the losses she had sustained by his fraud. Scrutton, J., who tried the action gave judgment in favour of the plaintiff, but the majority of the Court of Appeal (Farwell and Kennedy, L.JJ.), allowed the appeal, on the ground that the clerk's taking in his own name a conveyance of the land and a transfer of the mortgage was not acting within the scope of his authority as managing clerk, and therefore the defendant was not liable for his acts. Williams, L.J., was for granting a new trial, not being satisfied, that there was not some evidence of such a holding out by the defendant of the clerk as being authorized to act on his own behalf, as would estop him from denying the authority of the clerk to take transfers of the plaintiff's property. The case shews the difficulty in the way of a client consulting a solicitor. He goes to one solicitor and is advised by the person apparently in charge of the business to do a certain thing, but before he does it, he ought to go to another solicitor to find out how far he will be justified in acting on the advice he has received. This might go on *ad infinitum*. Fortunately cases of this

kind are rare, but the decision does not appear to be altogether satisfactory, but whichever way it was determined, it was bound to involve a hardship on an innocent person.

PRACTICE—FOREIGN CORPORATION—CARRYING ON BUSINESS WITHIN THE JURISDICTION—SERVICE OF WRIT WITHIN THE JURISDICTION—AGENT'S OFFICE—HEAD OFFICER—RULE 55—(ONT. RULE 147).

Saccharin Corporation v. *Chemische Fabrik & Co.* (1911) 2 K.B. 516. In this case the defendants were a foreign corporation, having a sole agent for the United Kingdom, who rented an office in London, and was paid by commission on orders obtained by him for the defendants' goods. The agent had also authority to enter into contracts for sale on the defendants' behalf, without first transmitting them to the defendants. Deliveries of goods sold by the agent were made out of goods of defendant lying at wharves in London, and in other cases out of a stock of defendants' goods kept at the agent's office. Goods so delivered were paid for by cheques sent to the agent. In these circumstances the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), held that the defendants were carrying on business within the jurisdiction, and a writ of summons served on the London agent was a good service on the defendants, he being for the purposes of service a head officer of the defendants; and the decision of Bray, J., to the contrary was reversed.

PRACTICE—DISCOVERY—MALICIOUS PROSECUTION—INQUIRY AS TO INFORMATION ON WHICH DEFENDANT COMMENCED PROSECUTION.

Maass v. *Gas Light & Coke Co.* (1911) 2 K.B. 543, although involving merely a point of practice, was evidently regarded one of great importance inasmuch as no less than the entire Bench of the Court of Appeal sat to hear the appeal from the order of Ridley, J., disallowing certain interrogatories for the purpose of discovery. The action was for malicious prosecution of the plaintiff by the defendants for stealing gas, of which offence the plaintiff had been acquitted. The plaintiff delivered the following interrogatories for discovery. (4) What information, if any, had you that induced you to prosecute the plaintiff for stealing gas? What steps, if any, had you taken before commencing the prosecution to ascertain whether the charge was

true or not? What grounds, if any, had you for supposing that the plaintiff had committed the offence charged? Did you before you commenced the said prosecution take any and what precautions, or make any, and what inquiries, as to the truth of the said charge, and what was the result of each such inquiry? (5) What are the facts and circumstances on which you rely as shewing that you had reasonable and proper cause for the said prosecution? Both interrogatories were disallowed by the Master, and judge in Chambers, and the Court of Appeal (Cozens-Hardy, M.R., Williams, Moulton, Farwell, and Buckley, L.JJ., Kennedy, L.J., dissenting), held rightly so, and all but Kennedy, L.J., also held, that, in the absence of special circumstances, such an interrogatory as the 4th ought not to be allowed in an action for malicious prosecution, in which cases there were special reasons for caution in allowing interrogatories to be administered to a defendant, as, if defendants were compellable to disclose all information given, it might deter persons from doing their duty to the public in the prosecution of crime. Williams, L.J., expressed regret that there is not some rule making the decision of a judge in Chambers on such questions of discretion final.

SHERIFF'S FEES—EXECUTION—LIABILITY OF EXECUTION CREDITOR FOR SHERIFF'S FEES—"PERSON AT WHOSE INSTANCE SALE IS STOPPED"—STAY OF EXECUTION ON APPLICATION OF LIQUIDATOR.

Montague v. *Davies* (1911) 2 K.B. 595. By the English rules of court it is provided that in every case where an execution is withdrawn, satisfied, or stopped, the fees the sheriff is entitled to under the rule "shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be." In this case the plaintiff issued an execution against the defendant company, which subsequently went into voluntary liquidation, and on the liquidator's application the sale under the execution was stopped. The execution creditor contended that the liquidator was bound to pay the sheriff's fees under the rule above referred to, but Bankes, J., held that the rule had not altered the common law liability of the execution creditor who had issued the execution, and that he was liable for the sheriff's fees and not the liquidator: and that "the person at whose instance the sale is stopped" refers to a trustee in bankruptcy, who under the Bankruptcy

Act may demand possession of goods taken in execution and thereby stop the sale.

SALE OF GOODS—GOODS NOT ACCORDING TO CONTRACT—RE-SALE BY PURCHASER—WARRANTY—CONDITION NEGATIVING WARRANTY.

In *Wallis* v. *Pratt* (1911) A.C. 394, the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Alverstone, and Shaw), have reversed the decision of the Court of Appeal (1910) 2 K.B. 1003 (noted ante p. 101), for the reasons given by Moulton, L.J., who dissented from the judgment of the other members of the Court of Appeal, and held that the plaintiffs were entitled to recover damages consequent on defendant's breach of warranty, including the damages which the plaintiffs had been compelled to pay to third parties to whom they sold the goods in question.

CANADIAN RAILWAY ACT, 1906, S. 2, SUB-S. 11; S. 2, SUB-S. 28; S. 56, SUB-SS. 2, 3, 9; S. 238—RAILWAY BOARD—HIGHWAY—56 VICT. C. 48 (D.)—PREROGATIVE RIGHT TO GRANT SPECIAL LEAVE TO APPEAL.

Canadian Pacific Ry. v. *Toronto, and Grand Trunk Ry.* (1911) A.C. 461. This was an appeal to His Majesty in Council from a decision of the Supreme Court of Canada. In January, 1904, the Railway Committee of the Privy Council in London in the exercise of its powers preserved to it under s. 238 of the Railway Act (now R.S.C. c. 37), ordered the appellants and respondent railway to construct bridges over their lines of railway where they crossed Yonge street in the city of Toronto. Subsequently the Railway Board, which was instituted by the Railway Act of 1903, in June, 1909, ordered the appellant and respondent railways to construct a viaduct several miles long for the purpose of carrying their railways over, inter alia, Yonge street. The Supreme Court of Canada had upheld the order of the Railway Board. The appellants obtained special leave to appeal to His Majesty in Council, and on the opening of the appeal, counsel for the City of Toronto contended that no appeal lay, as under s. 56 (3) of the Railway Act, the decision of the Supreme Court is declared to be final. This point, however, was overruled, their Lordships holding that the statute does not do away with the prerogative right to grant special leave to appeal. On the merits their Lordships (Lord Loreburn, L.C., Macnaghten, Atkinson, Shaw, and Robson) agreed with the

Supreme Court, and dismissed the appeal, holding that the Railway Board had jurisdiction to make the order, which in effect superseded the prior order of the Railway Committee. They also held that 56 Vict. c. 48 (D.) is not a special Act conflicting with the Railway Act of 1906 as to the matter in question.

RIGHTS OF FISHING—CROWN GRANTS—LOTS ON OPPOSITE SIDE OF NAVIGABLE RIVER—SILENCE OF PATENT AS TO FISHING—EXCLUSIVE RIGHT OF CROWN TO FISHERY.

Wyatt v. *Attorney-General of Quebec* (1911) A.C. 489 was an appeal from the Supreme Court of Canada. The appellants were, under a patent from the Crown dated in June, 1883, grantees of the lots on either side of, and fronting on, the Moisie river in the Province of Quebec. This river, where it flows between the lots in question, is a navigable stream. The patent contained no grant of the right of fishing, but the appellants claimed the right as riparian proprietors. At the trial evidence was given as to negotiations between the grantee and the Crown prior to the issue of the patent, but the judge at the trial held that the negotiations did not contradict the clear language of the patent. The Court of Appeal, however, held that prior to the issuing of the patent there had been a concluded bargain between the grantee and the Crown, that the grantee was to have the right of fishing opposite the lots granted, and gave judgment against the Crown. The Supreme Court reversed this decision on the ground that the terms of the patent could not be altered, or added, or diminished, by any previous negotiations, written or oral, and that as the patent contained no grant of fishing rights the appellants were not entitled to any. The Judicial Committee of the Privy Council (Lords Macnaghten, Mersey, and Robson, and Sir A. Wilson) agreed with the Supreme Court and dismissed the appeal and this, notwithstanding that the appellants, since the date of the patent, had exercised the right of fishing, without interference by the officials of the Crown, or the Governor of Quebec who had considered they had the right so to do.

SALE OF RAILWAY TO A COMPANY BY PROMOTERS—PURCHASE AUTHORIZED BY INCORPORATING ACT—PROMOTERS THE ONLY SHAREHOLDERS—3 EDW. VII. c. 21 (D.)—4-5 EDW. VII. c. 158 (D.).

Attorney-General of Canada v. *Standard Trust Co.* (1911) A.C. 498. In this case the point in controversy was whether a

railway undertaking purchased by the promoters of a company of which they were the sole shareholders, could be legally sold by them to the company, its act of incorporation authorizing the purchase. The facts were that a syndicate of four persons procured a Quebec Act incorporating a railway company, $300,000 of the capital of which was taken up by the promoters, (and was all that had been issued), and they were, with others whom they had qualified, the directors of the company. The syndicate then purchased this railway undertaking, and sold it to another company which they had organized, for $648,000 which was paid for in part by the promoters getting credit for $300,000 on the shares subscribed by them, and the company acknowledged its indebtedness for the balance $348,000 to the said four persons in equal shares. This company, and another with which it had become amalgamated, became insolvent, and their railways were sold, and the promoters claimed to rank as creditors in respect of the $348,000 against the assets of the insolvent companies. The Judicial Committee of the Privy Council (Lords Haldane, Macnaghten, Mersey, and Robson) affirmed the judgment of the Supreme Court allowing the claim; their Lordships holding that the Act of incorporation authorized the purchase, and that it was not material whether or not the price was in fact excessive, as everyone interested in the capital of the company had concurred in the purchase, with full knowledge of all the circumstances.

EXPROPRIATION OF GAS COMPANY—SALE AND PURCHASE AS GOING CONCERN—STATUTORY POWER OF PURCHASE—BASIS FOR ESTIMATING PURCHASE MONEY.

Perth Gas Co. v. *Perth* (1911) A.C. 506. By an Act of the Western Australian Legislature the city of Perth was empowered to purchase all the lands, buildings, works, hereditaments, lamps, pipes, stocks, and appurtenances of and belonging to the appellants, upon giving to the directors six months' notice so to do, upon such terms and conditions as should be mutually agreed on between the directors and corporation, but in case of dispute the amount of the purchase money was to be determined by arbitration, and by the same Act the powers of the gas company were extended and, besides, the ordinary powers of gas companies, it was enabled to exercise its powers over a vast area of which the city of Perth constituted only a small portion, and no limit was placed on the amount of its profits. The Act also

confirmed the mortgages and securities already given by the company and made them a valid charge on its property and assets, and authorized the increase of its capital and the issue of debentures charged on its undertaking. The city of Perth having elected to purchase the undertaking, and arbitrators having been appointed to determine the amount of the purchase money, on a case stated by arbitrators, it was claimed on behalf of the city that the basis for determining the amount of the purchase money should be merely the value of the land and buildings, and the plant regarded as being in situ capable of earning a profit, and should not include the value of the company's statutory powers and privileges, or the amount of profits that had been or could be earned by means of the property or the exercise of its statutory powers. The Supreme Court of Australia gave effect to this contention; but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Mersey, and Robson) reversed that decision, and came to the conclusion that on the true construction of the Act, in the absence of any express provision to the contrary, it must be held to contemplate the sale and transfer, with the consent of the incumbrancers, of the whole undertaking as a going concern; and not merely the physical apparatus by which the business was carried on, but also the statutory powers, and that the value of the whole must be included in the calculation of the purchase money.

INSURANCE (MARINE)—NON-DISCLOSURE BY INSURER OF MATERIAL FACTS.

Thames & Mersey M.I. Co. v. *Gunford* (1911) A.C. 529. This was an action on a policy of marine insurance, the defence being that the policy was null and void owing to the non-disclosure by the insured of material facts: (1) that the master of the ship had not been at sea for twenty-two years, and that the last ship he had been master of had been lost and his certificate had been suspended, and (2) the existence of "honour policies" in favour of the managing owner for disbursements made on account of the ship. The Court of Sessions, Scotland, had held that the non-disclosure of these matters did not avoid the policy. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Alverstone, Shaw, and Robson) agreed with the Court of Sessions (Lord Shaw, dubitante), that there was no duty on the part of the owners to inform the insurers

as to the past history of the master, and that the omission to disclose the facts of his previous career did not constitute the non-disclosure of a material circumstance; but they held that the non-disclosure of the existence of the "honour policies" which were effected on the basis that no further proof of loss should be required than the policy, and which constituted them in fact gaming or wagering policies, was a material fact, the non-disclosure of which avoided the policies, and the action therefore failed.

NUISANCE—HIGHWAY—DEFECTIVE RAILING—NUISANCE CAUSED BY TRESPASSER—ABSENCE OF KNOWLEDGE OF NUISANCE BY OWNER OF PREMISES—DUTY OF OWNER.

Barker v. *Herbert* (1911) 2 K.B. 633. This was an action brought to recover damages for an injury sustained by the plaintiff owing to a nuisance on the defendant's premises, in the following circumstances. The defendant was the owner of premises fronting on a public street, and in front of the house was an area protected by a railing, which had been rendered defective owing to boys playing football in the street. The plaintiff, a child, had passed through the opening made in the railing, and was clambering along inside the railing and while so doing fell into the area and was injured. The jury found that the gap in the fence constituted a nuisance, but that the defendant did not know of it, and that such a time had not elapsed since the rail had been removed, that he would have known of it if he had used reasonable care. On these findings the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.) held that the plaintiff was not liable, the nuisance having been created by trespassers. The court was also of the opinion that the plaintiff's injuries were not due to the nuisance, as he had not fallen through the gap, but had gone safely through the gap in order to clamber along the inside of the railing.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Teetzel and Latchford, JJ.] [Aug. 23.

BARTLETT *v.* BARTLETT MINES, LIMITED.

Company—Director—Salary of, as officer of company—Resolution of director—Confirmation.

Appeal by defendants from the judgment of Sutherland, J., in favour of plaintiff in an action to recover salary as mineralogist for defendants. At the first meeting of the directors the plaintiff being also a director, a resolution was passed appointiug plaintiff as mineralogist at a certain salary. All the stock was held by these directors. At a shareholders' meeting held on the same day as the directors' meeting, the by-law of the directors was confirmed. It was contended by defendants that plaintiffs' appointment was not confirmed by by-law as required of s. 88, c. 34, 7 Edw. VII. (Ontario Companies Act) which enacts that "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting."

Held, 1. The proper finding of fact should have been that the resolution appointing the plaintiff as mineralogist of the company, was not laid before the meeting of the directors, or approved by them.

2. The purpose of s. 88 is, that those who govern the company should not have had any power to pay themselves for their services without the shareholders' sanction. In this case, there was no by-law by the directors authorizing any payment to a director, except a by-law in reference to the president; and when the resolution appointing the plaintiff as a mineralogist was passed (he was not then a director) there was no resolution or by-law of the directors after he became a director authorizing payment to him during the time he was a director.

Mackenzie v. *Maple Mountain Mining Co.*, 20 O.L.R. 615, distinguished. In that case, the statute had been complied with, but

in the present case, there was no attempt to comply with its provisions.

J. W. Bain, K.C., and *M. Lockhart Gordon*, for defendants. *H. Cassels*, K.C., for the plaintiff.

Province of Manitoba.

KING'S BENCH.

Robson, J.] WOLFSON *v.* OLDFIELD. [June 27.

Fraud—Principal and agent—Real Property Act, R.S.M. 1902, *c.* 148, *ss.* 71 *and* 76.

Held, 1. It is a fraud sufficient to vitiate the sale for a real estate agent to lead the owner of land to confide in him as his agent, to get the best possible price for the property and to allow him to close a bargain on his behalf when, as a matter of fact, he, the agent, was at the same time acting as agent for the purchaser in an endeavour to get the property at as low a price as possible, without disclosing that fact to the owner.

2. The purchaser cannot under such circumstances, although ignorant of the fraud, be allowed to retain the benefit of the transaction procured by his agent. *Pearson* v. *Dublin Corporation* (1907), A.C. 351, followed.

3. Such conduct on the part of an agent is fraud within the meaning of that word as used in ss. 71, 76 of R.S.M. 1902, c. 148, and therefore the procuring by the purchaser of a certificate of title under that Act for the property would not prevent the vendor from having the sale set aside and the property ordered to be reconveyed to him upon payment of moneys received.

Phillips, Whitla, Dennistoun, K.C., *J. C. Locke, Hoskin*, and *Montague*, for the various parties.

Macdonald, J.] REX *v.* BARNES. [July 19.

Criminal law—Criminal Code, s. 778, *s.-s.* 2 *as re-enacted by* 8 & 9 *Edw. VII. c.* 9—*Summary trial—Offer of election made by magistrate's clerk for him—Warrant of commitment—Criminal Code, s.* 1121.

Held, 1. The offer of the magistrate to a prisoner of his right

to elect for a summary trial under s. 778 of Criminal Code may be made through the magistrate's clerk speaking for him. *Rex* v. *Ridehaugh*, 7 Can. Cr. Cas, 340, followed.

2. On the application of a prisoner undergoing sentence imposed by a police magistrate after conviction on summary trial of an indictable offence, on the ground that the warrant of commitment does not shew that the prisoner consented to be tried summarily, the judge may look at the conviction if it is before him, and, if the conviction shews such consent, s. 1121 of the Code applies and the warrant should be held good. *Reg.* v. *Sears*, 17 C.L.T. 124, distinguished.

Hagel, for prisoner. *Patterson*, K.C., D.A.-G., for the Crown.

Robson, J.] [August 2.

SHONDRA *v.* WINNIPEG ELECTRIC RY. CO.

Negligence—Findings of jury—Contributory negligence—Damages for personal injury.

In an action for damages for personal injury, caused by a car of the defendants, the jury found that defendant's negligence was the cause of the accident, but also, that the plaintiff might, by the exercise of reasonable care have avoided the accident. There was evidence sufficient to justify both these findings.

Held, 1, following *London Street Railway Co.* v. *Brown*, 31 S.C.R. 642, that the plaintiff could not recover.

2. When the law as to contributory negligence has been properly explained to the jury, it is not necessary for the judge to ask the jury in what respect the plaintiff omitted to take reasonable care.

Trueman and *Chapman*, for plaintiff. *Anderson*, K.C., and *Guy*, for defendants.

Mathers, C.J.] SMITH *v.* DUN. [August 7.

Libel—Mercantile agency reports to subscribers—Privilege—Publication of true extract from a public record.

Held, 1. The publication without malice by a mercantile agency to its subscribers of an extract from a register kept by virtue of an Act of a Provincial Legislature, which was open to

inspection by the public, for the purpose of giving to the subscribers information, which the agency bona fide believed to be true, is privileged, and an action for libel in respect of such publication will not lie, although the extract purported to shew that the plaintiff had given a chattel mortgage when it should have shewn only a lien note given on the purchase of chattels. *Fleming* v. *Newton*, 1 H.L.C. 363; *Searles* v. *Scarlett* (1892), 2 Q.B. 56, and *Annaly* v. *Trade Auxiliary Co.*, 26 L.R.Ir. 11, 394, followed. *Williams* v. *Smith*, 22 Q.B.D. 134, and *McIntosh* v. *Dun* (1908), A.C. 390, distinguished.

2. If what is published is not a true extract from the public record, even although it is furnished by the government official in charge, it is not privileged: *Reis* v. *Perry*, 64 L.J.Q.B. 566.

Hugg, for plaintiff. *Coyne*, for defendant.

Metcalfe, J.] [August 10.

WINNIPEG SATURDAY POST *v.* COUZENS.

Injunction—Breach of contract to accept and exclusively use plaintiff's goods.

A contract entered into by the proprietor of a country newspaper to accept and use exclusively every week the "ready prints" furnished by a publisher may be enforced by an injunction restraining the defendant during the period covered by it from using or publishing any ready prints except those published by the plaintiff, who should not be limited to the recovery of damages for the breach of the contract. *Metropolitan Electric Co.* v. *Ginder* (1901), 2 Ch. 799, followed; *Whitewood Chemical Co.* v. *Hardman* (1891), 2 Ch. distinguished.

Whitla and *Chandler*, for plaintiffs. *Durie* and *A. C. Ferguson*, for defendant.

Metcalfe, J.] McNERNY *v.* FORRESTER. [August 23.

Negligence—Fall of wall of damaged building—Liability of owner for damages caused by—Burden of proof.

Held, 1. The owner of a high building which has been so damaged by fire, that the walls are in danger of falling, is not liable in all cases for the consequences of such falling, but is bound to take within a reasonable time very considerable pre-

cautions to prevent such falling when there are other buildings near enough to be damaged thereby; and, if a wall falls and damages have been caused to such other building, the onus is upon the owner to shew that he was not negligent in the matter.

2. Such onus is satisfied, however, by evidence convincing to the court, that the walls had been braced after the fire to such an extent that the architect of the building and the building inspector of the city, upon being consulted by the owner, in good faith advised him shortly before the accident that there was no danger of their falling, and that he in good faith acted upon such advice, although the result shewed that the experts consulted had been mistaken.

Phillips and *Whitla*, for plaintiffs. *Wilson*, K.C., and *Dysart*, for defendants.

Book Reviews.

The Law of Illegitimacy. By WILFRID HOOPER, LL.D. (Lond.). London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

The above was a thesis prepared and approved for the degree of Doctor of Laws in the University of London. The aim of the work is to describe the status of the bastard under English law both historically and as it at present exists. Illegitimacy can be treated from two aspects: (1) as an isolated status consisting principally of disabilities under which the bastard labours; and (2) as a branch of family law comprising the rights and obligations arising from the relation of parent and child. The author keeps this in view throughout the work which deals with the subject as follows: Part I., History of illegitimacy in mediæval law; Part II., Illegitimacy as a status in modern law; Part III., Proof of legitimacy and illegitimacy; Part IV., International law.

The style of the author is clear, scholarly and interesting, and the book is a distinct addition to every law library.

Canadian Criminal Procedure, as the same relates to summary conviction and summary trials; with an appendix of forms, compiled by Hon. T. MAYNE DALY, K.C., Police Magistrate. Toronto: Carswell & Co., Limited. 1911.

The first chapter gives a summary of the laws relating to the appointment of justices of the peace and police magistrates

and their powers. Chap. II. summarizes the Criminal Code and procedure thereunder, referring to some sections of the Code. Chap. III. deals with the jurisdiction of justices in general; Chap. IV. with responsibilities of justices and remedies against them; Chap. V. with information and complaints; Chap. VI. summary and warants of arrests in connection with indictable offences and summary convictions; Chap. VII. preliminary inquiries. Chap. VIII. refers to summary convictions, part XV. of Criminal Code; Chap. IX. to summary trial of indictable offences, part XVI. of Code. Chap. X. takes up the subject of habeas corpus and certiorari.

There would appear to be a great deal of valuable information in this book, but the trouble is to find it. This, of course, detracts from its usefulness, as practitioners have little time to read books through to find some isolated point. Readers also will look in vain for either a preface or a table of contents; nor does the introduction in Chap. I. give information as to the scope of the work. These defects should be remedied in a second edition.

Personalia.

The following Ontario lawyers were elected to Parliament at the recent elections; A. C. Boyce, K.C., T. W. Crothers, K.C., A. H. Clarke, K.C., W. S. Middlebro, K.C., E. Gus Porter, K.C., W. F. Nickle, K.C., E. N. Lewis, K.C., W. B. Northrup, K.C., Fred. Pardee, K.C., E. A. Lancaster, Samuel S. Sharpe, A. E. Fripp, K.C., J. H. Burnham, G. V. White, Hon. Charles Murphy, K.C., Haughton Lennox, K.C., W. H. Bennett, K.C., Edmund Bristol, K.C., A. C. Macdonell, K.C., W. M. German, K.C., Hugh Guthrie, K.C., E. M. Macdonald, of Pictou, N.S., and E. N. Rhodes, of Amherst, N.S., were also elected.

Judge L. W. Sicotte, for many years Clerk of the Crown at Montreal, died decently.

A. Edmund Tulk, barrister, Vancouver, has established himself in exceptionally fine offices in the Canada Life Building in that city.

Flotsam and Jetsam.

ABERRATIONS OF COLOUR SENSE IN WITNESS.—In a lecture at Boston, March 4, before the Society of Arts, Prof. Edmund Beecher Wilson of the department of biology at Columbia University declared that eight times as many men are colour blind as women, and that a man may inherit colour blindness from one of his parents, but it takes two to transmit it to a daughter. The New International Encyclopædia says colour blindness is found in from three to four per cent. of men and less than one per cent. of women. "The most common forms of colour blindness are red blindness, green blindness, and red-green blindness." A variety of defects of vision, in respect of the colour sense, apparently afflicted many witnesses in *Tillson* v. *Maine Cent. R. Co.*, 102 Me. 463, 67 Atl. Rep. 407, and it is rather remarkable that none of them seems to have been subjected to the infallible tests now in vogue with the New York Central and some other great railroad companies. In the case cited a semaphore with convex lenses on its four sides, red glass on two opposite sides and green glass on the other two opposite sides, was set near a railroad track and for more than a score of years, as far as known, had faithfully performed its office of sending red rays, *and only red rays*, directly down the track as a signal of danger when it was set for the red. On the night of an accident when the plaintiff, a fireman on defendant's train, was injured by reason of the engineer running past the semaphore, it was conceded, and even alleged in the plaintiff's declaration, that the device was properly set for danger, but it was averred that the device was so negligently located that at some points in front of it the green light was shown, or both red and green. But the singular fact was that ten witnesses for the plaintiff had tested the contrivance since the accident, and six of them swore that the light when set for red shewed such a mixture of red and green that it was not practicable to distinguish the signal intended, while four of them declared that it displayed clear green. Several of these witnesses were experienced engineers. Fifteen witnesses for the defendant, having made similar tests, declared that when the apparatus was set for red, nothing but red was visible down the track. The court did not attempt to reconcile this conflict in testimony, but simply applied the familiar "physical facts" rule as follows:—

"Whatever variations there may appear to be in the testimony of witnesses who saw the same light set at the same

angle and shedding its light under the same conditions, there are immutable laws of physical science that cannot be disturbed by human testimony. Light, from whatever source emanating, must always traverse unobstructed space in direct lines, and, according to familiar principles in optics, rays of light falling upon a convex lens are conveyed into a narrow and intense beam. In this case the evidence is unquestioned that the rays of light emitted through the double convex lens of the semaphore lantern were so converged that the angle of refraction was less than fifteen degrees from a parallel line; whereas, without this lens, the rays would have been dispersed at an angle of about sixty degrees. Hence it would be impossible that the same light, adjusted at the same angle, should exhibit clear red to one observer, clear green to another, and a mixture of red and green to a third, under precisely the same conditions. Testimony given in direct contravention of physical laws is necessarily deemed incredible."—*Exch.*

A POETICAL LAW REPORT.

Once in a while judges will "drop into poetry," either original or quoted, and the books are full of quotations from the Bible, Shakespeare, and other classic texts; but the only case written in verse appearing in the law reports of this country is that of *State of Kansas* v. *Lewis*, 19 Kansas, 266.

IN THE SUPREME COURT OF KANSAS.

GEORGE LEWIS, Appellant, *vs.* THE STATE OF KANSAS, Appellee.

Statement of the Case by the Reporter:

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron mail,
And relocked him into jail—
Which said jail, while so corraled,
He by sockage tenure held.

Then the court met, and they tried
Lewis up and down each side;
On the good old-fashioned plan;
But the jury cleared the man.

Now, *you* think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw—
This time takes him round the cape
For effecting an escape;
He, unable to give bail,
Goes reluctantly to jail.

Lewis tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
"As my trial did attest,
"And while rightfully at large,
"Taken on a wrongful charge.
"I took back from them what they
"From me wrongly took away."

When this special plea was heard,
Thereupon the State demurred.

The defendant then was pained
When the Court was heard to say
In a cold impassioned way—
"The demurrer is sustained."

Back to jail did Lewis go,
But as liberty was dear,
He appeals and now is here
To reverse the Court below.
The opinion will contain
All the statements that remain.

Argument and Brief of Appellant:

As a matter, sir, of fact,
Who was injured by our act,
Any property, or man?—
Point it out, sir, if you can.

Can you seize us when at large
On a baseless, trumped-up charge;
And if we escape, then say

It is *crime* to get away—
When we rightfully regained
What was wrongful obtained?

Please-the-court, sir, what is crime?
What is right, and what is wrong?
Is our freedom but a song—
Or the subject of a rhyme?

Argument and Brief of Attorney for the State:

When the State, that is to say,
We take liberty away—
When the pad-lock and the hasp
Leaves one helpless in our grasp,
It's unlawful then that he
Even *dreams* of liberty—
Wicked dreams that may in time
Grow and ripen into *crime*—
Crimes of dark and damning shape;
Then, if he perchance escape,
Evermore remorse will roll
O'er his shattered sin-sick soul.

Please the Court, sir, how can we
Manage people who get free?

Reply of Appellant:

Please the Court, sir, if it's *sin*,
Where does *turpitude* begin?

Opinion of the Court. Per Curiam:

We—Don't—Make—Law. We are bound
To interpret it as found.

The defendant broke away;
When arrested he should stay.

This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur.

—*West Publishing Co. Docket.*

EXPERT EVIDENCE.—The ever present subject of expert evidence recalls an incident of some years ago, when a well-known Irish barrister began his cross-examination of a hand-writing expert with the question, "Where is the dog?" On the witness asking, "What dog?" the counsel replied, "The dog which the judge at the last assizes said he would not hang on your evidence."

"Rufus, you old loafer, do you think it's right to leave your wife at the washtub while you pass your time fishing?"

"Yes, sah, Jedge, it's all right. Mah wife don' need no watchin.' She'll sholy wuk jes' as hard as if I was dah."

Here is another old chestnut: "Mr. Justice Ridley once startled a witness who was appearing in a case tried before him. Some question had arisen as to whether the witness was speaking the truth or not, and the witness was naturally very indignant. 'I have been wedded to the truth from infancy!' he declared. 'Quite so,' agreed the judge; 'but the real question now is: How long have you been divorced?' "—*Law Notes.*

THE LIVING AGE (WEEKLY, BOSTON, MASS., U.S.A.).—The leading article in *The Living Age* for Sept. 2nd is "Morocco in liquidation," reprinted from *Blackwood's Magazine*. This gives an interesting account of the complications out of which the present dangerous situation has arisen. The strike of dock-hands and railway men in England has been settled for the present; but attention is drawn to the subject in an article in the above periodical of the same date on "British Merchant Seamen." This is timely, by reason of its presentation of the conditions which led up to the great labour war. The railway strike has since broken out in Ireland, which shews that there is still a very unsettled condition. The most serious aspect of it is that the strike question is not now so much a question of increased pay to the men, but as to whether the unions, which are now apparently socialist societies are to dictate terms not only to the railways, but also to manufacturers and others. "Punishment and Crime" is an article in the number of the *Living Age* for Sept. 16th, discussing in an illuminating way a problem of world-wide interests. The selections of this most interesting publication give a comprehensive grasp of the rapidly changing events of the day.