THE
CANADA LAW JOURNAL

EDITOR:
HENRY O'BRIEN, K.C.

ASSOCIATE EDITOR:
C. B. LABATT

VOL. XLVI

1910

TORONTO:
CANADA LAW BOOK COMPANY, LIMITED
LAW PUBLISHERS
32-34 TORONTO ST.

TABLE OF CASES

REPORTED AND NOTED IN THIS VOLUME

Canada Law Journal.

VOL. XLVI. TORONTO, JANUARY. Nos. 1 & 2.

LORD CAMPBELL'S ACT.

The last number of the Ontario Law Reports contains the decision of the Court of Appeal affirming the judgment of a Divisional Court and of Chief Justice Falconbridge in the case of *McKeown* v. *The Toronto Railway Co.*, 19 Ont. L.R. 361, which carries the principle of Lord Campbell's Act considerably farther than any court has gone hitherto. In this case a parent recovered $300 damages for the loss of a child slightly over four years of age, who was killed through the negligence of the defendant company.

In view of the importance of this decision, it is not surprising to find considerable diversity of opinion among the judges. Chief Justice Moss and Mr. Justice Maclaren dissented, and Mr. Justice Garrow gave a reluctant assent in the Court of Appeal; and, while Mr. Justice MacMahon concurred with his two colleagues in the Divisional Court, he is reported as saying, "I give a grumbling assent."

The majority in both courts followed the decision of a Divisional Court in *Ricketts* v. *Village of Markdale*, 31 O.R. 180, 610, in which the child killed was eight years old. That case, however, contained an important element which was wanting in the other. The judge who tried the case, without a jury, found as a fact that the child had already been of pecuniary benefit to his father and, as pointed out by Mr. Justice Robinson, there was good reason to assume that, had he lived, such benefit would continue and increase as had been the case with his older brothers. There is no such finding in the *McKeown* case, nor any evidence on which one could be based.

The jury's findings are given in the report. They found negligence by defendants, negatived contributory negligence and assessed the compensation at $300. That is all. The judge's charge

is not published, but there is nothing in the report to shew that their attention was especially called to the probability of the child, had he lived, being able to assist his father financially in the future and the importance of such expectation to the plaintiff's case. The only evidence, apparently, on which such expectation could be based is set out in the dissenting opinion of Moss, C.J.O., and will be referred to later.

Meredith, C.J., delivered judgment for the Divisional Court, and after dealing with questions of misdirection complained of, evidence as to negligence, the quantum of damages, and the point whether or not it is necessary in these cases to prove actual benefit received or if a reasonable expectation for the future is sufficient of itself, concludes as follows:—

"Though no reported case had been cited, nor have I found any, in which an award of damages has been made in the case of a child so young as the deceased child in this case, it is impossible to say that, as a matter of law, his being of such tender years precluded the plaintiff from obtaining the benefit of the Act, the provisions of which he is invoking by his action. All that can be said is that the younger the child is the more difficult it is to determine whether there is such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and to estimate the damages which should be awarded; and there remains, as a insuperable difficulty in the way of the defendants' success, the fact that it was for the jury to determine both of these matters, there being, as I have already said, evidence proper to be submitted to them."

Mr. Justice Osler says:—

"It is the extreme youth of the child for whose death this action is brought which alone causes hesitation in maintaining the plaintiff's right to recover. The damages recoverable under the Act cannot be founded on sentimental considerations, but are to be given in respect of some pecuniary loss only, and that not merely nominal, caused by the death. Here the child was an infant of four years of age, healthy, intelligent and with as good a prospect of prolonged life as any infant of that age can

be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that in the case of a child of that description damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence."

The remainder of His Lordship's opinion deals with the question of the necessity to prove actual benefit received and that of the quantum of damages, except where he said, "I am on the whole of opinion that on the evidence a recovery is warranted by the rule or principle established in the *Pym* case, etc."

The only other opinion published, except that of Moss, C.J.O., in dissent, is by Mr. Justice Garrow, who starts by saying: "No case of authority in this province was cited, nor have I been able to find one, in which a recovery was had in the case of the death of a child so young (four years) as that of the plaintiff The nearest is *Ricketts* v. *Village of Markdale*, 31 O.R. 610, in which the age was eight."

The next paragraph relates to actual benefit and he winds up as follows:—

"A reasonable prospect of future pecuniary benefit, although somewhat longer postponed, may not unreasonably be regarded as almost as certain in the case of a four year old child as in that of one twice that age. I at least am unable to see how it can be said that in the one case there is evidence proper for a jury and in the other none. If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically, and I, therefore, agree, reluctantly I admit, that there was evidence which could not have been withdrawn from the jury; and the judgment must therefore be affirmed."

Their Lordships say there was evidence proper to be submitted to the jury. They must mean evidence of such "a reasonable and well-founded expectation of pecuniary benefit as

can be estimated in money," to quote from Sir William Meredith. In the judgment of Moss, C.J.O., at page 374 of the report, we have the evidence said to be sufficient. Summarized it is this. The child was healthy, noted for his intellectual abilities, and of use to his mother in several ways, "being able to go a message for her if necessary and other minor things in the house." That is all the evidence as to the child, and all that is known of the father is that he is a bookkeeper. His means or other resources are not further disclosed.

Then Mr. Justice Osler says that a verdict for the plaintiff is warranted by the principle established in *Pym* v. *The Great Northern Ry. Co.*, 2 B. & S. 750; *Franklin* v. *The South Eastern Ry. Co.*, 3 H. & N. 211, and a number of other cases which he cites. None of those cases, however, go so far as the one under discussion. They are all authority for the position that a reasonable expectation alone is sufficient, but in all except *Pym's* case actual benefit already received was proved. In *Pym's* case the question of future benefit was the only one. A man had been killed and his wife and children lost the educational and social advantages they would have enjoyed from his expenditure of an income of £4,000 derived from a life estate. It was held that damages could be given for such loss.

Taking the evidence adduced in the case so far as shewn in the report and considering the grounds upon which the learned judges who affirmed the verdict came to that conclusion, the position appears to be this: Given a healthy and intelligent child of any age, there is a reasonable probability that he will be of pecuniary benefit to his father in the future which will entitle the latter to compensation in damages if the child is killed through negligence. It does not go quite as far as counsel for the railway company suggested to the Court of Appeal, namely, to cover the case of an unborn child, because their Lordships seem to consider the health and intelligence of the child to be essential elements. But so soon as a healthy child is old enough to exhibit mental characteristics, if these prove to be of the proper calibre, all the conditions exist to give his parents a pecuniary interest in his life.

C. H. MASTERS.

GOVERNMENT INSPECTION OF BANKS.

Mr. McLeod, the General Manager of the Bank of Nova Scotia, has issued a pamphlet calling public attention to the necessity of some system of public inspection of our chartered banks, which seems a praiseworthy effort to provide some means whereby the interests of shareholders and others interested in such corporations may be more efficiently protected than they are at present.

The history of Canadian banks which have failed, will shew that banks entering on the downward path do not, as a rule, immediately go to ruin, the process is gradual, and is usually preceded by a resort to improper, not to say dishonest, methods and practices with the frantic hope that some lucky turn of fortune will redeem the situation, but this, after all, is nothing but the gambler's method of retrieving his fortunes, and as a rule it only results in plunging those who adopt that course more deeply in the mire.

The pamphlet speaks of various objections which have been raised against the independent inspection of banks, the only one, however, which seems at all formidable is that an inspection of accounts without a valuation of assets would be worthless.

It is quite true that a bank may on paper be made to appear perfectly solvent, when a proper valuation of its assets would shew the contrary. The remedy, however, for this is to provide that there shall be not only an inspection of accounts, but also a valuation of assets. It is said this cannot be done effectively except by officers of the bank, which seems to be likely, but then it should be competent for the inspectors to put such officers on oath as to such matters if thought necessary.

In England by 25-26 Vict. c. 89, s. 69, a special system of inspection of limited banking companies is provided for and can be made under the direction of the Board of Trade on the application of persons holding not less than one-third of the entire shares of the company.

The officers of the company are bound to furnish the inspectors with all the information in their power, to produce all

books and documents required, and may be, if thought necessary, examined under oath. Officers refusing to produce books and answer questions are subject to a penalty of £5 for each offence.

The inspectors report to the Board of Trade, and their report is to be forwarded by the Board to the company and to members at whose instance the inspection was made. These latter persons have to defray the expense of the investigation.

But in addition to this provision for a special inspection at the instance of shareholders, the English Companies Act provides that every limited banking company must annually appoint an independent auditor, and in default of its so doing the Board of Trade may appoint one. No director, or officer, of the company is eligible for the office, but the auditor, however appointed, is to be paid by the company.

This mode of appointment hardly seems satisfactory, and in order to secure the entire independence of such officers, their remuneration should be fixed and paid by the government, who should be reimbursed by a tax to be levied on all chartered banks.

Mr. McLeod's proposal is to provide an inspection, as of course, without any special request of shareholders. He proposes that a board of fourteen auditors should be appointed by the Bankers' Association, and that the Board so appointed (four of whom are to be a quorum) shall make an annual inspection of each bank and if on such audit the annual statement to the shareholders is found to be a fair and conservative representation of the bank's affairs, the chairman of the Board of Auditors is to certify it, and no statement is to be issued without this certificate.

Mr. McLead does not propose to give the auditors power to get information from officers of the bank under oath. One of the English Acts above referred to gives that power, and the Insurance Act, R.S.C. c. 34, s. 36(3), gives that power to the inspector of insurance companies, and it is a power which the inspector of banks should also possess in order to enable them to make their work thorough and effective.

Mr. McLeod does not propose to give the auditors power to ally as a matter of course is preferable to leaving inspection to be made only on a special request of shareholders. As such a request is only likely to be made when suspicion has arisen as to the state of a bank's affairs, the result would often be a mere "shutting of the door after the horse is stolen." The present Bank Act recognizes that some information should from time to time be given to the government as to the condition of each bank's affairs, but experience has shewn that the bank returns have in some cases been unreliable. The proposal for inspection has for its object to check these returns and to insure as far as practicable, that they are faithful and accurate statements.

Mr. McLeod's proposals perhaps do not go far enough. They seem, however, to be clearly a step in the right direction and deserving of the careful consideration of the government.

Correspondence.

THE DOCTRINE OF PROVINCIAL RIGHTS AS INTERPRETED IN ONTARIO.

To the Editor, CANADA LAW JOURNAL:

Sir,—There is, we are glad to be able to say, some reason to believe that the firm stand which your journal has taken, on legal and constitutional grounds, in opposition to the policy pursued by the Ontario Government with regard to the supply of electric power has not been without its effect. The judgments of the courts, to which you have called attention, have made it very plain that though overruled by the despotic action of the Legislature and prevented from even hearing the complaints of those who appealed to them for redress, they had no doubt of the illegality of many of the proceedings which they have been compelled to uphold.

The recent case of *Felker* v. *The McGuigan Construction Co.*, in which the power of the Legislature to confiscate private property, if it chose so to do, is stated as being without any ques-

tion, as well as the inability of the court to interfere, has had a powerful effect in opening the eyes of the advocates of public ownership to the necessity of taking care that, in pursuit of that object, justice, as well as economy, is kept in view. The language of Chief Justice Falconbridge in giving judgment in the case referred to may well be taken as shewing the dangers to which the doctrine of provincial rights, unrestrained by any authority either of the courts of justice, or of a superior legislature, may expose the people of this country. He says:—

"We have heard a great deal recently," the judge says, "about the jurisdiction of the province, a great deal of complaint about the exercise of its powers; but there is no doubt the highest authority has declared that within its own jurisdiction it is supreme; in fact, while it seems rather severe, I suppose there is not any doubt it has been conceded in recent cases that if the Legislature had chosen to confiscate—the word that is used—the farm of the plaintiff without any compensation they would have had a perfect right to do it in law, if not in morals."

Public or municipal ownership of what are called public utilities may be something to be desired, but it must not be sought for at the expense of private property unless full compensation is awarded, nor in violation of contracts without the consent of all concerned, and not at all if a breach of any personal right, or denial of justice, is involved. In the attempt to carry out the scheme of the Hydro-Electric Commission every one of these principles is violated, and for this statement we have the unquestioned authority of the most eminent judges of the land.

The power of confiscation, so plainly referred to in the case of *Felker* v. *McGuigan*, conveys a very unpleasant idea to all but the confirmed socialist, who scoffs at the notion of private rights, and it has caused a decided change in the view of this question by one leading journal which has hitherto given an unhesitating support to the policy of the Ontario Government, but which now declares that the judgment above quoted "can-

not be read without the gravest misgivings." When those who in support of the plan of public ownership, and of opposition to "monopoly," have steadily upheld the most objectionable features of the government policy, and have had no fault to find with the legislation passed to uphold it; who have accepted with complacency the denial of justice to all who questioned the validity of such legislation, and have seen nothing wrong in the virtual confiscation of private rights though they are based upon a promise of protection by the same power which now threatens them with destruction; who have been content that the lives and property of our people should be liable to all the risks attendant upon the use of the most dangerous of nature's agencies—a risk, in a similar case, the Government of the Dominion had carefully guarded against by insisting on a fenced right of way—who have taken no heed of the warnings which the leaders of the financial world have given of the loss which the action of the Provincial Government was certain to cause by the injury to its credit, and consequent refusal of the capital necessary for the future prosperity of the country; who were willing that the Provincial Assembly should override the rights of municipalities, and declare valid contracts entered into in direct violation of its own previous enactments, and the judgments of the courts—when those who have so felt and acted begin to feel "grave misgivings" as to the result, there is some hope for the country.

It has now become evident that the doctrine of provincial rights is resolved into this—that the Provincial Legislatures, being supreme in their dealings with all subjects which, by the B. N. A. Act, are committed to their jurisdiction, may do, without let or hindrance, the most objectionable things they have done in this matter of electric power; may confiscate a man's farm without giving him any compensation, and may shut the courts of justice in his face—a right to which every British subject is supposed to be entitled.

After reading the judgment in the case of *Felker* v. *The McGuigan Construction Co.* the journal referred to may well say,

"it is not possible for any one schooled in British ideas of the sanctity of property to read that passage, and other passages of the learned judge's judgment, without a twinge." He should not indeed! The learned judge says, "if the Legislature had chosen to confiscate—the word that is used—the farm of the plaintiff *without any compensation* they would have had a perfect right to do it, in law if not in morals," or, as a learned judge had previously ironically remarked, "without being bound by the law which says, thou shalt not steal."

It is well that, at last, through the press, the note of alarm has been sounded, even in a quarter from which every encouragement has been given to those engaged in bringing about the danger now apprehended. We hope also that those members of the Legislature who have the courage to think for themselves will carefully weigh the responsibility which attaches to them before they undertake to exercise the enormous powers which they are now declared to possess.

Those who have made a study of this subject are not surprised that the Dominion Government has been asked to disallow the Hydro-Electric Commission Act of 1909 on the ground that the legalizing of the municipal contracts already adjudged to be illegal, the declaring that they shall not be open to question in any Court, and the staying forever of pending suits which would have succeeded in the courts, must have the effect of impairing the credit of the securities of Canada in the British market; and, I presume, on the further ground that the staying of actions is an infringement of the inherent right of every British subject, and affects the administration of justice, which is not included among the powers of provincial legislatures being of course a matter of Federal jurisdiction.

I enclose an article from the *Financial Post* of recent date, which I think states the case as to disallowance with much force, and which may have escaped your attention.

Shanty Bay. W. E. O'BRIEN.

The article referred to by our correspondent is as follows:—

"The effect of the socialistic programme in Great Britain and the undue taxation proposed by the Liberal Finance Bills has been not merely to drive surplus funds for investment abroad, but having had experience of socialistic measures at home, the British investor will in the future scrutinize more closely the attitude of governments towards capital in the countries where he proposes to employ his money. Canada would naturally attract his first attention, but the country's reputation has unquestionably been tarnished by the legislation of the Ontario Government, which has in effect abrogated Magna Charta by closing the courts, in all matters relating to the municipal contracts of the Hydro-Electric Commission. Having been bitten by the mad dogs of socialism at home, the British capitalist will be careful to ascertain that there are none of these animals running amuck in the countries abroad. Ontario will not escape his scrutiny. When he finds that a government has entered into active competition with private companies without making any offer of purchase or compensation, and when in addition he finds this government overriding the action of the courts it will not be difficult for him to arrive at a conclusion unfavourable to many Canadian investments. The effect on the fair name of the country, that is to say, its credit, has already been considerable, but it takes time for its force to be felt in a pecuniary sense, especially when there has been a glut of money available for all purposes. The opportunity is now open to the Dominion Government to give Canada's credit at a most opportune time a notable uplift. If it disallows the oppressive, un-British and unconstitutional act of the Ontario Government it will prove to the world abroad that not only is our constitution on a sound basis, but that our regard for property and civil rights is securely fixed. If, on the other hand, the legislation is continued in force, the foreign investor will be unfavourably impressed by the system of government whereby the single chamber of a province can override all rights usually guaranteed by the British Constitution, and has the power of absolute confiscation without any means of recourse whatever on the part of those whose property has been confiscated."

We have at present nothing further to add to what has been so well said by our correspondent and our contemporary.—Ed., C.L.J.

REVIEW OF CURRENT ENGLISH CASES.

NEGLIGENCE—PUBLIC HOSPITAL—LIABILITY OF GOVERNORS OF HOSPITAL—OPERATION—INJURY TO PATIENT—HOSPITAL STAFF.

Hillyer v. *St. Bartholomew's Hospital* (1909) 2 K.B. 820 was an action brought by the plaintiff against the governors of a public hospital to recover damages for injuries sustained through the alleged negligence of the hospital staff while the plaintiff was undergoing an operation. The facts were that the plaintiff was placed on the operating table for the purpose of examination under an anæsthetic, and that his arms had been suffered to hang over its side; his left arm coming in contact with a hot water radiator projecting from beneath the table whereby it was burned and the upper part of his right arm being bruised by the operator or some other person pressing against it, the result of the injuries being trumatic neuritis and paralysis of both arms. Grantham, J., who tried the action held that the defendants were not responsible for the alleged negligence and he dismissed the action; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.), who held that the hospital surgeons engaged in the operation, though employed by the defendants were not in the relation of servants, inasmuch as the defendants had no power or control over them in the way they exercised their duties, nor were they in any way bound to conform to the directions of the defendants in the discharge of their duties, and the only duty the defendants were under in the matter was to exercise reasonable care in the appointment of competent persons on their hospital staff. The nurses and carriers it was conceded stood in a somewhat different position to the surgeons, and though they were servants of the defendants for general purposes, yet when engaged in assisting at operations they ceased to be servants of defendants and were then under the control and orders of the surgeons.

HUSBAND AND WIFE—MARRIED WOMAN—WEARING APPAREL OF WIFE PURCHASED BY HER—WIFE'S SEPARATE ESTATE—PARAPHERNALIA—MARRIED WOMAN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75)—(R.S.O. C. 163, S. 5(2)).

Masson v. *De Fries* (1909) 2 K.B. 831 was an action brought against a husband and wife for the price of wearing apparel furnished to the wife. The husband set up that he had supplied

his wife with sufficient money to buy apparel for cash and had never authorized her to buy goods on credit. In the result judgment was recovered against the wife alone and execution thereon was issued against her separate estate, and under this execution some dresses and other wearing apparel of the wife were seized, which were claimed by the husband as belonging to him as paraphernalia. An interpleader issue was directed to try the question of ownership. The issue was tried in a County Court and the judge directed the jury that on the authority of what was said by Jeune, P.P.D., in the case of *Tasker* v. *Tasker* (1895), P. 1, that they should find the issue in favour of the husband, which, "with regret" they accordingly did. From this decision an appeal was had to a Divisional Court who, thinking there was some evidence to support the finding of the jury, dismissed the appeal. The plaintiffs then appealed to the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) who came to the conclusion that though the decision in *Tasker* v. *Tasker* was correct, the dicta of Jeune, P.P.D., which the County Court judge had quoted to the jury on the subject of paraphernalia were not correct, and they therefore allowed the appeal and found the issue in favour of the execution creditors. Jeune, P.P.D., as the Court of Appeal point out, had treated paraphernalia as being a subject of property by the husband, whereas it is a species of property which only arises in favour of a wife after her husband's death, whereby she becomes entitled to claim as her own, as against his estate, articles of personal use and apparel and ornament suitable to her station in life. Under the Married Woman's Property Act, goods purchased for herself by a wife, even though with money supplied by the husband, become the wife's separate property, and as such liable to execution against her separate estate.

WORKMEN'S COMPENSATION ACT, 1906—DEFENDANT—TRANSMISSION OF INTEREST OF DEFENDANT—ACTIO PERSONALIS MORITUR CUM PERSONA.

The United Collieries v. *Simpson* (1909) A.C. 383, although a case arising under the Workmen's Compensation Act of 1906, which has not been adopted in Ontario, is nevertheless deserving of attention inasmuch as the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Shaw and Dunedin) have determined that under it the right of a defendant to compensation is a transmissible interest to which the maxim actio personalis, etc., has no application, and that if a defendant die without making a claim, his or her personal representative is entitled to enforce

the claim, provided it be made within the time limited by the Act. It seems probable that the same rule would hold good under the Fatal Accidents Act, R.S.O. c. 135. We may note that Lord Dunedin dissented.

INSURANCE (LIFE)—ACCIDENT INSURANCE—CONDITION IN POLICY—REGISTRATION—CLAIM TO BE MADE WITHIN A YEAR OF REGISTRATION.

General Accident F. & L. Assurance Corporation v. *Robertson* (1909) A.C. 404. This was an appeal from the Scotch Court of Session. The action was brought on an accident policy contained in a copy of Lett's Diary for the year 1906. By the terms of the policy it was provided that any person desiring to take the benefit of the policy must send an application to the defendants for registration, together with 6d., and that any claim on the policy must be made within a year of registration. It appeared that the defendants in fact kept no register, but as applications were received, within a few days they were put into packets and kept together until the time for making claims had expired. In the present case the insured sent in his application, dated December 25, 1905. This was delivered at the defendants' office on 26 December, 1905, which was observed as a holiday, and it was opened on the following day, and was then stamped as received on 27 December, 1905. On 29 December, 1905, a formal acknowledgment was made out but not sent to the insured until 3rd January, 1906. The insured was injured in a railway accident on 28 December, 1905, from which he died the next day. Notice of the claim was given by the plaintiff on 2nd January, 1906. The case therefore turned on what was meant by "registration," and the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, James, Gorrell and Shaw) agreed with the Court of Session that the sending of the letter of acknowledgment on 3rd January, 1906, must be taken as the date of registration, and therefore that the claim was made in time.

LEASE—CONSTRUCTION—MINERALS—CLAUSE AGAINST WORKING ADJOINING MINERALS—ABSOLUTE PROHIBITION.

In *Forrest* v. *Merry* (1909) A.C. 417 a mining lease was in question, whereby the defendants were empowered to work certain coal seams under certain lands, and by a contemporaneous agreement it was agreed that the lessees would work the coal under certain adjoining lands only to such extent as would enable them to pay £550, being the amount of fixed rents payable to the owners of such adjoining lands, and that if they exceeded

that amount they should pay 1d. per cwt. for the excess. The question was whether this amounted to an absolute prohibition from mining under the adjoining lands in excess of the £550, or whether it meant that the lessees were at liberty to mine as much as they pleased, paying for the excess the 1d. per cwt. The case caused some diversity of opinion. The Lord Ordinary held that the clause amounted to an absolute prohibition, and gave judgment in favour of the pursuers, but the Court of Session "recalled the Lord Ordinary's interlocutor and assoilzied the defenders," to use the technical language of Scots law, the Lord President dissenting. The House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Gorrell and Shaw) agreed with the Lord Ordinary and the Lord President, and reversed the decision of the Court of Session, being of the opinion that the first part of the clause limiting the right of working to £550 would be nullified unless it were taken to imply a prohibition.

RAILWAY COMPANY—STATUTORY POWERS—LIMITATION OF TIME FOR EXERCISE OF POWERS—COMPANY IN POSSESSION OF LAND—COMMON LAW RIGHT OF COMPANY.

Midland Ry. v. *Great Western Ry.* (1909) A.C. 445. This case, known in the courts below as the *Great Western Ry.* v. *Midland,* is an appeal from the Court of Appeal (1908) 2 Ch. 644 (noted ante, p. 67). The House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Atkinson, Gorrell and Shaw) have affirmed the judgment of the Court of Appeal, on the ground that the plaintiffs were exercising their common law rights over their own land. As Lord Loreburn, L.C., succinctly puts it: "The point arising from the fact that the powers of the Great Western Railway Co. under their Act of 1896 expired in five years has no substance whatever. By the time those powers expired the company had become possessors of all the land that was needed, and also of a license, which, taken together, were sufficient to enable them to complete the works that were prescribed by the Act. . . In completing the junctions, even after the five years, the company were not resorting to the powers of the Act at all."

WILL—POWER OF APPOINTMENT—EXERCISE OF POWER BY WILL MADE ACCORDING TO ENGLISH LAW, BUT INVALID ACCORDING TO LAW OF DOMICIL.

Murphy v. *Deichler* (1909) A.C. 446. This was an appeal from the Irish Court of Appeal. By a will the testator gave a power of appointment by deed or will over a sum of £13,000. The donee of the power lived in Germany, where she had her domicil.

She made a will in accordance with English law in exercise of the power, but the will was invalid as a will according to German law. The question, therefore, arose whether it was a valid exercise of the power. The Irish Court of Appeal held that it was, and a good will for the purpose of the appointment, and that the document should be admitted to probate limited to the estate or interest of the testatrix, over which she had a power of appointment, although it was not admissible for other purposes. This decision the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne,, Atkinson and Shaw) affirmed, as being in accordance with long established usage.

ADMIRALTY—SHIP—BILL OF LADING—EXCEPTION AND CONDITIONS —DAMAGE TO CARGO—SEAWORTHINESS—NEGLIGENCE OF SHIPOWNERS.

Lyle v. *The Schwan* (1909) A.C. 450. This is a case which has undergone various vicissitudes. The action was for damage to a cargo arising from alleged negligence of the shipowners. The damage arose from the fact that a three-way cock was inadvertently left open whereby an inflow of sea water took place, damaging the cargo. Deane, J., held that this was due to the negligence of the defendants' agents, for which they were liable (1908) P. 356 (noted ante, p. 66). The Court of Appeal reversed this decision, holding that there was no evidence of the ship being unseaworthy, and, so far as the damage in question arose from improper adjustment of the three-way cock, this was a defect of machinery, or a defect caused by the neglect of the engineer, against both of which, by the terms of the bill of lading, the defendants were protected: (1908) P. 356 (noted ante, p. 281). The House of Lords (Lords Atkinson, Macnaghten, James, Collins, Gorrell, Shaw and Loreburn, L.C.) have now unanimously reversed the judgment of the Court of Appeal and restored that of Deane, J. Lord Gorrell, who delivered the most elaborate judgment, sums up the turning point of the case thus: "Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption, that the fitting was of the ordinary and proper character, which would not permit of water so passing, however the fitting was used? I think this question should be answered in the negative."

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

ONT.] PITT v. DICKSON. [Dec. 13, 1909.

Action for deceit—False representations—Agreement for sale—Compromise—Release—Notice.

P., living in Montreal, owned 15,000 shares in a Cobalt mining company and D., of Ottawa, also a shareholder, was looking after his interests in respect to them. Being informed by D. that the mine was badly managed and the property of little value, P. signed an agreement to sell his stock at par which D. assigned to a third party. Later P., believing he had acted imprudently in signing the agreement, entered into negotiations with the assignee and a compromise was finally effected by which 3,000 shares of his stock were sold to the latter at par, and the remainder re-transferred to P. It turned out that the assignee and D. were acting in collusion to get possession of P.'s stock and it having greatly increased in value, he brought action against D. for damages.

Held, reversing the judgment of the Court of Appeal and restoring that of a Divisional Court, which affirmed the verdict at the trial, that the said compromise having been effected when P. was ignorant of the real state of affairs he was not bound by it, and was entitled to recover from D. the difference between par value and the price at the date of the compromise. Appeal allowed with costs.

Lafleur, K.C., for appellant. *Chrysler*, K.C., and *Larmonth*, for respondent.

N. S.] [Dec. 13, 1909.

AINSLIE MINING & RY. CO. v. MCDOUGALL.

Negligence—Employer and employee—Duty of employer—Proper system—Common employment.

M. was working in a mine about 30 feet below the surface, the overhanging wall having an inclination of about 30 degrees.

To protect the workmen from stones and earth falling on them a scaffolding had been built about half way down by placing timbers across at intervals and covering them with poles with earth on top of the whole. Several tons of earth and rock fell from the top and crashed through the scaffolding, whereby M. was killed. In an action by his father against the company operating the mine, the jury found that the place for the men to work in was not safe.

Held, that the company had not fulfilled its primary obligation to provide a safe place for its workmen, and that the company itself being negligent the doctrine of common employment could not be invoked. Appeal dismissed with costs.

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

Province of Ontario.

COURT OF APPEAL.

Meredith, C.J.C.P., Teetzel, J., Riddell, J.] [Nov. 30, 1909.

HORRIGAN *v.* CITY OF PORT ARTHUR.

Municipal corporations—Contracts—Powers of council.

Appeal from judgment of CLUTE, J., on an application for an injunction restraining the defendants from exercising a contract with the Hydro-Electric Power Commission of Ontario.

Held, that when there is a statutory prerequisite to the taking of a vote in reference to a by-law whereon to found a contract to be made in pursuance of it, such by-law is invalid unless such prerequisite has been observed.

H. Cassels, K.C., for plaintiff. *Hellmuth*, K.C., for defendants.

Teetzel, J.] [Dec. 3, 1909.

SASKATCHEWAN LAND & HOMESTEAD CO. *v.* LEADLEY.

Mortgage—Compound interest—Construction of covenant.

A covenant in a mortgage read as follows: "That interest in arrear and premiums of insurance or other sums of money paid by the mortgagees for the protection of this security, such as taxes, repairs, or other incumbrances, and all costs, charges and expenses connected therewith, including the costs of any abortive

sale or sales, shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the said first day of November and May in each year until all arrears of principal and interest and such other sums are paid, and that we will pay the same and every part thereof."

Held, that all moneys expended by the mortgagee for any of the matters above set forth, both before and after maturity of the principal money carried compound interest until repayment.

Further, that the principle laid down in *Popple* v. *Sylvester* (1882) 22 Ch. D. 98, applied; and that the case of *Imperial Trusts Co.* v. *New York Security and Trusts Co.*, 10 O.L.R. 289, was not applicable, as in that case there was no corresponding covenant.

Kappelle, K.C., *Cunningham* and *Russell Snow*, K.C., for various parties.

Teetzel, J.] RE DOWLING. [Dec. 3, 1909.

Infant—Money improperly paid into court—Paying out.

Application by the father of an infant for payment of money out of court standing to the credit of the infant. The money was paid in under the direction of a Surrogate judge upon the passing of the accounts of the executors of the will of the deceased testator. The bequest was of $500 to the infant, "to be kept out at interest until he becomes of age—I devise William James Dowling to be paid the $500 willed to his son, William Loyal, above, and he to be his guardian and to keep this money at interest as above mentioned."

Held, that this money was improperly paid into court. It should have been paid directly to the father of the infant pursuant to the terms of the will, and should be at once paid out to him, notwithstanding the general rule that money in court belonging to infants will not be paid out (except for their maintenance) until they have attained their majority.

J. T. White, for applicant. *J. R. Meredith*, for infant.

Falconbridge, C.J.K.B., Teetzel, J., Riddell, J.] [Dec. 4, 1909.

RYAN v. MCINTOSH.

Negligence—Horse left unattended on highway running away and causing injury—Trial by judge without a jury.

The action was for damages for injuries sustained by the plaintiffs by reason of defendants leaving their horses unattended

upon a highway, so that they ran away and ran into a waggon on which the plaintiffs were seated and so injured them. The case was tried without a jury and the trial judge found that there was no negligence and dismissed the action.

Held, unless that which the defendants did or failed to do was negligence per se, the judgment could not be disturbed, as the court should not interfere unless it was of the opinion that the trial judge (who tried the case without a jury) was clearly wrong, which in this case did not appear.

TEETZEL, J., dissented, being of opinion that the admitted facts established a clear case of negligence, having regard to the legal duty imposed upon every person who has charge of horses on a public highway to use reasonable and proper care and skill in their management and control, so as not to injure other persons using the highway.

H. Thompson, K.C., for plaintiffs. *J. M. Best*, for defendants.

NOTE.—The editor ventures to think that under the circumstances of this case the opinion of the dissenting judge was well founded so far as the question of negligence was concerned.

Divisional Court, Chy.] [Dec. 16, 1909.

SMITH *v.* CITY OF LONDON.

Constitutional law—7 Edw. VII. c. 19—8 Edw. VII. c. 22 and 9 Edw. VII. c. 19—Municipal corporations carrying on a commercial business—Interference with private rights—Contracts between municipal corporations and the Hydro-Electric Power Commission—Legislative contracts—Remarks upon the character of this legislation.

The plaintiff, a ratepayer of the city of London, brought action in June, 1908, to declare invalid a contract between the defendants and the Hydro-Electric Commission, and for an injunction restraining the defendants from acting thereon. The contract was executed on May 4, 1908, by the defendants and by some fifteen other municipalities in Western Ontario.

The authority under which these defendants executed the contract was a by-law submitted to the people under 6 Edw. VII. c. 15, carried and finally passed by the council on Jan. 14, 1907. It enacted "that it shall be lawful for the said mayor and clerk of the said corporation to execute a contract with the Hydro-Electric Commission of Ontario for the supply to the said corporation of

electric power or energy for the use of the corporation and the inhabitants thereof for light, heating and power purposes at from $17.20 to $23.50 per h.p. per annum ready to be distributed by the said corporation, such price to include all charges for interest, sinking fund, cost of construction and cost to operate, maintain, repair, renew and insure the plant, machinery and appliances to be used by the said Commission." The contract entered into was not in accordance with this by-law, but was for the purchase of power at Niagara Falls at a price dependent on voltage, and, in addition, to pay annually a proportionate part of the money expended by the Commission for the construction of transmission line and to bear a proportionate part of the line loss, cost to operate, maintain, repair, etc. On April 4, 1908, 8 Edw. VII. c. 22, was assented to, validating the different by-laws of the municipalities and setting forth a form of contract between the Commission and the corporations, and, when executed, the said contract was to be legal, valid and binding. Whilst this action was pending, 9 Edw. VII. c. 19 was passed, altering the contract by changing the parties thereto and making other variations and declaring the contract as varied to be binding on the defendants and the other corporations named therein, and executing the same on behalf of the town of Galt, and declaring that the contract as so varied should be conclusively deemed to be a contract executed by the various corporations and further declaring that these corporations should be conclusively deemed to have entered into such contract with the Commission; and, by s. 8, every action which had been theretofore brought and was then pending wherein the validity of the said contract or any by-law is attacked or called in question, or calling in question the jurisdiction, power or authority of the Commission or of any municipal corporation or councils thereof to exercise any power or to do any of the acts authorized to be exercised or done by the Commission or by any municipal corporation or the council thereof, "shall be and the same is forever stayed."

Held, 1. Both by-law and contract would have been open to successful attack in the courts, but for their legislative validation.

2. That it is open to the court, notwithstanding the wide language used as to staying proceedings, to take cognizance of the legislative competence to deal with the whole subject-matter. If these statutes were found to be beyond the powers of the provincial legislature it was the duty of the court under the British North America Act so to adjudicate and determine.

It was urged that electric energy being a commodity, becomes, if traded in, a subject of "trade and commerce," and that no municipality could carry on such a commercial undertaking or interfere with the rights of individual inhabitants as to privat. lighting. Also that the electors even by unanimous vote could not warrant such legislation; it was never intended under the British North America Act that municipal institutions should carry on such a commercial undertaking.

Held, 1. That these Acts upon their faces by their very details claim to be classified under the heading "municipal institutions in the province." (See British North America Act, s. 92(8).) They deal with the transmission of electricity from Niagara Falls to and through various municipalities, making it available for all municipal corporations to apply. The installation of an electric plant in the city of London would be per se a local work or undertaking, a matter of merely a local or private nature of the province. Such legislation in England always falls under the heading of "local Acts." The supplying of light, whether by gas or other illumination, is a proper function of municipal administration, and so to hold does not at all infringe upon the meaning of "trade and commerce" where exclusive powers are conferred upon the Dominion to legislate as to regulation of trade and commerce. Sec. 92(2). These words would point to political arrangements with regard to trade requiring a sanction of Parliament. Regulation of trade in matters of inter-provincial concern and the like as indicated in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 110.

2. In reference to the proposition advanced that the supply of house light is a purely private matter and that no public body can interfere with a right of a man to use any kind of light he pleases, and that there is no right to tax him for the supply of special light to other people, the court said: "In regard to electric light to be made from power transmitted from Niagara Falls the following considerations enter into the question. The individual cannot procure his own supply, it has to come to him by means of material conveyance over private and public property. The transmission and storing of electric energy necessitates a system of control and regulation for the interest of public and private safety and exclude the undertaking from the area of private enterprise and ordinary business."

3. As to whether the plaintiff, as a ratepayer of the city, has a right to be heard in seeking relief after the validation of the contract, the court said:—"He starts with a good cause of action.

The terms of the contract being changed after the vote, primâ facie the vote has been cast away, and there is no valid contract which binds the ratepayers, and the levy of rates based on contract and by-law is illegal. Then comes the special Act with double aspect, not only validating everything, but closing the courts against the aggrieved ratepayers. The legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary and no court can change the situation. The legislative action is no doubt a violation pro tanto of the principle of local self control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But whatever be its character or effect the investigation is not for the courts."

Action dismissed, no order as to costs, but there may be a declaration that the several Acts are intra vires.

Johnston, K.C., and *McEvoy*, for plaintiff. *DuVernet*, K.C., and *Lefroy*, K.C., for defendants. *Cartwright*, K.C., for the Attorney-General of Ontario.

NOTE.—It was apparently assumed that the various Acts had reference only to power from Niagara Falls, whereas in fact the legislation is of general character, applicable to the whole province.)

COUNTY COURT—STORMONT, DUNDAS AND GLENGARRY.

Liddell, Co. J.] BLONDIN *v.* SEGUIN. [Oct. 16, 1909.

Sale of goods—Diseased animal—Caveat emptor—Implied warranty.

The defendant sold a cow to the plaintiff who inspected it before purchase. When slaughtered it was discovered that the animal had tuberculosis and the carcase was confiscated by the government inspector. The sale was without express warranty as to quality or condition.

Held, that as there was no warranty of the quality or condition of the animal, or that the meat was wholesome and fit for food, and as the purchaser bought after examination and inspection he could not recover back his money as for a consideration that had failed. Judgment for the defendant without costs. See *Emmerton* v. *Mathews*, 7 H. & N. 858; *Burnby* v. *Bollett*, 16 M. & W. 644; *Ward* v. *Hobb*, 4 App. Cas. 13; Benjamin on Sale, 7th Am. ed., p. 691.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 9, 1909.

KENDALL v. SYDNEY POST PUBLISHING CO.

Newspaper—Criminal libel—Perverse verdict—New trial.

The publication in a newspaper of an article charging that the person referred to withdrew his name from the convention of persons assembled to nominate a candidate to represent the county, for a consideration, and that for such consideration he agreed to support another candidate imputes a criminal charge within R.S.C. c. 6, s. 265, and where such publication is clearly proved and the meaning of the words is clear, the only question for the jury is that of damages, and if, under such circumstances, they return a verdict for the defendant a new trial will be ordered with costs

Mellish, K.C., for plaintiff. *W. B. A. Ritchie*, K.C., and *O'Connor*, for defendant.

Full Court.] ST. MARY'S SOCIETY v. ALBEE. [Dec. 11, 1909.

Landlord and tenant—Construction of lease—Liability for taxes —Ejusdem generis.

Plaintiffs were owners of a building part of which was occupied exclusively for the purposes of the society and part of which was let from time to time for public entertainments and purposes other than those of the society. The portion of the building occupied exclusively by the society was exempted from taxation but in respect of that portion used for public purposes the society was assessed on a valuation of $1,000. The latter portion was leased to defendants for a term of years and it was provided in the lease that defendants should pay "any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax or chargeable against said premises by reason of the manner in which the same are used or occupied by the lessees hereafter . . . the said lessof, however, agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates, and assessments levied upon or with respect to said premises." After the making of the lease the valuation for assessment purposes of the portion of the premises occupied by defendants was increased from $1,000 to $10,000.

Held, (1) per TOWNSHEND, C.J., GRAHAM, E.J., and DRYSDALE, J., that the increased assessment came under the class of regular and ordinary taxes and assessments and that defendants were not liable therefor.

(2) The rule ejusdem generis applied in full force, and the kind or class of taxes which defendants bound themselves to pay being "all license fees or other rates or assessments chargeable by reason of the manner in which the premises are used or occupied by defendants," the "regular and ordinary taxes, etc.," which plaintiff bound itself to pay could not be placed in that category.

(3) There was no ambiguity in the language used and parol evidence should not have been admitted.

O'Connor, in support of appeal. *Mellish*, K.C., contra.

Full Court.] [Dec. 11, 1909.

TRUSTEES OF SCHOOL SECTION NO. 8 RICHMOND *v.* LANGRY.

Amendment—Adding and striking out parties—Statement of claim.

The plaintiff school section brought an action to recover land but subsequently gave instructions to have the action discontinued. This was opposed by M. a ratepayer of the section, who applied to be made a party plaintiff, and obtained an order to that effect from a master of the court.

Held, that the order could not be supported, but that the court, in the exercise of its power of amendment, under the circumstances disclosed, would direct an amendment adding M. as a plaintiff, suing on behalf of himself and other ratepayers, and also adding the Attorney-General, if his consent could be secured, as a plaintiff on the relation of M., and striking out the trustees as plaintiffs and joining them as defendants, and giving leave to file a new statement of claim appropriate to the circumstances.

W. B. A. Ritchie, K.C., in support of appeal. *Wall*, contra.

Full Court.] THE KING *v.* FRANEY. [Dec. 11, 1909.

Canada Temperance Act—Irregularity in service of summons—Conviction set aside—Code, s. 658, *sub-s.* (4)—*Certiorari.*

On motion for a writ of certiorari to remove a conviction for a violation of the Canada Temperance Act it appeared that the

writ of summons which was dated July 26th, 1909, and was returnable two days later was served by a constable who delivered it to a brother of defendant, the defendant himself being absent from home at the time. The affidavit of the constable shewed that the summons was served on the evening of the same day on which it was dated, between the hours of nine and ten o'clock, and that the person to whom it was delivered was of sufficient age, but it was not made to appear that such person was an "inmate" of defendant's last or most usual place of abode, the affidavit merely stating on this point that he stayed there most of the time.

Held, that the service was sufficient in point of time but that in the absence of evidence to shew that the summons was delivered to the defendant personally, or, in his absence, to an inmate of his last or most usual place of abode as required by the Code s. 658, sub-s. (4), the conviction must be set aside.

W. B. A. Ritchie, K.C., in support of application. *Roscoe*, K.C., contra.

Full Court.] HUTCHINS v. MCDONALD. [Dec. 11, 1909.

New trial—Irregular act on part of foreman and member of jury—Costs.

On the trial of an action claiming damages for negligence on the part of defendant in connection with the running of his automobile on a public street whereby plaintiff's husband while proceeding along the street on his bicycle was knocked down and received injuries which caused his death, the foreman and one other member of the jury, without the consent of the parties and without the order of the court or judge, viewed the locus and made experiments with an automobile for the purpose of gathering information to be used by them in connection with the trial. The jury having found a verdict for plaintiff, and the facts having been brought to the notice of the court by affidavit,

Held, that there must be a new trial; and that costs of the appeal should be defendant's costs in the cause.

Mellish, K.C., and *O'Mullin*, in support of appeal. *W. B. A. Ritchie*, K.C., contra.

Full Court.] [Dec. 11, 1909.

ATTORNEY-GENERAL OF CANADA v. SAM CHAK.

Chinese Immigration Act—Recovery of penalty—Jurisdiction of stipendiary magistrate—Powers of Dominion Parliament in respect to—Certiorari—Procedendo—Costs.

On application to quash the judgment of a stipendiary magistrate removed into this court by certiorari, in an action brought before the magistrate to recover the head tax of $100 payable by a person of Chinese origin on entering Canada, R.S.C. c. 95, s. 7,

Held, dismissing the application with costs and ordering a precedendo,

1. It is competent for the Parliament of Canada to confer upon a provincial court (stipendiary magistrate's) having jurisdiction in respect to matters of debt not exceeding $80 jurisdiction in respect to amounts above that sum. *Attorney-General* v. *Flint*, 16 S.C.R. 707; *Valin* v. *Langlois*, 5 App. Cas. 114; *The King* v. *Wipper*, 34 N.S.R. 202, followed.

2. Where the procedure of the court provides for trial by jury and the use of a jury is not inappropriate in the case the employment of the jury is not ground for attacking the judgment of the magistrate.

Per RUSSELL, J., parliament in making use of the court must be understood to have adopted its procedure. In any case the point as to the use of the jury was not open, not having been taken in the notice of motion for the certiorari. (Crown Rule 33.)

O'Connor and *F. McDonald*, in support of application. *MacIlreith*, contra.

Full Court.] [Dec. 11, 1909.

[illegible]UN v. CAMPBELL.

Arrest—Liability of person preferring charge—Damage—Costs.

A number of persons of Chinese origin who were suspected of attempting to enter Canada without payment of the head tax, in contravention of the provisions of the Chinese Immigration Act, R.S.C. c. 95, were arrested by a constable without a warrant and were detained for a time in the lockup. This was done at the instance of defendant a preventive officer, who was acting under instructions received from the collector of customs. Subsequently there was an information made by defendant and a warrant

issued and a preliminary investigation held, as the result of which plaintiff with seven other persons was committed for trial. He elected to be tried before the judge of the County Court and was convicted and sentenced to pay a fine of $100, which was paid. The conviction was afterwards set aside, on a case stated for the opinion of this court, and the return of the fine ordered. Plaintiff thereupon brought an action claiming damages for false imprisonment, in connection with his detention without a warrant, and the trial judge awarded him as part of such damages the sum of $100 paid as a fine under the judgment in the County Court, and the sum of $16 additional for legal and other expenses.

Held, that while defendant might be responsible in damages for the detention up to the time of the issue of the warrant he was not responsible after that in the absence of evidence of direct interference on his part; that he was not liable in respect to the fine which never reached him and that his appeal, to that extent must be allowed with costs. That the additional amount of $16 allowed plaintiff for damages was not unreasonable under the circumstances and with respect to that amount the appeal must be dismissed with costs, costs to be set off.

MacIlreith, in support of appeal. *O'Connor* and *F. McDonald*, contra.

Full Court.] [Dec. 11, 1909.

SAM CHAK *v.* CAMPBELL.

Chinese Immigration Act, R.S.C. c. 95—Arrest for attempted evasion of—Absence of warrant—Liability of officer causing arrest—Verdict—Entry of amended—Costs.

Plaintiff was arrested on the 30th August, 1907, at the instance of defendant, a preventive officer, acting under instructions from the collectors of customs for an attempted evasion of the provisions of the Chinese Immigration Act, R.S.C. c. 95, and was detained for some days in custody without a warrant having been issued and without having been brought before a magistrate for examination. Plaintiff brought an action claiming damages for such arrest and detention on the trial of which the learned judge directed the jury, among other things, that defendant was only liable from the time he preferred a charge against plaintiff, which was on the 6th day of September The jury came into Court and the foreman announced that they found a verdict for defendant and handed in a memorandum

to that effect. On another piece of paper handed in, signed by the foreman but not attached to the verdict was a memorandum to the effect that the jury found that plaintiff was entitled to $1 a day $7, and that his solicitor was entitled to the sum of $40 for securing his release. This the learned trial judge treated as a verdict for plaintiff and ordered judgment accordingly in favour of plaintiff for the sum of $47 with costs to be taxed.

Held, setting aside the verdict and ordering a new trial, with costs that the only matter in respect to which defendant could be held liable was the detention between the date of the arrest and the date (6th September) when the charges were laid before the magistrate, or whether plaintiff having been arrested (justifiably) without warrant was not held an unreasonable length of time before being brought before the magistrate.

Also that defendant was entitled to costs of his application to have the entry of the verdict made in accordance with the oral announcement of the jury and the entry thereof made by the prothonotary.

MacIlreith, in support of appeal. *O'Connor* and *F. McDonald*, contra.

Full Court.] ANGLE v. MUSGRAVE. [Dec. 22, 1909.

Will—Proof of where executed in Quebec—Witnesses and Evidence Act, R.S. 1900, *c.* 163, *s.* 27—*Mense profits—Recovery of—Amount—Cross-appeal—Failure to take.*

In an action to recover land and for mense profits plaintiff claimed as devisee under the last will of B. who was proved to have died at Quebec, April 28th, 1907. On the trial a copy of the will was produced from which it appeared that the original was subscribed by testator in the presence of two notaries public who signed it in his presence and in the presence of each other;

Held, TOWNSHEND, C.J., that this was in all respects a sufficient compliance with the Wills Act, and sufficient to pass real estate in this province, and that the copy of the will produced at the trial was sufficiently proved under the Witnesses and Evidence Act, R.S. (1900), c. 163, s. 27, which provides that "a copy of a notarial act or instrument in writing made in Quebec before a notary public, and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession—shall be received in evidence—and shall have the same force and effect as the original would have if produced and proved."

2. With respect to mense profits, plaintiff, who was a devisee, could not recover for profits which accrued to the testator, but was only entitled to recover for those which accrued during the period of his own title.

3. Although the court were of opinion that plaintiff was entitled to recover a larger sum than was allowed him by the trial judge, as there was no cross-appeal judgment must remain at the sum fixed below.

O'Connor, in support of appeal. *D. A. Hearn*, K.C., contra.

Full Court.] [Dec. 22, 1909.

THE KING v. SIMMONDS.

Intoxicating liquors—Incorporated club—Sale by steward to members illegal.

Defendant, the steward of an incorporated club, was charged before the stipendiary magistrate of the city of Halifax with an offence against the Nova Scotia Liquor License Act. It appeared from the evidence that the liquor alleged to have been sold was the property of the club and was sold by defendant in his capacity of steward, at a fixed tariff rate to members only. On a case stated for the opinion of the court,

Held, 1. Distinguishing the case from *Graff* v. *Evans* and other cases of a like character, that the legal entity in this case was distinct from the shareholders and that the supplying to members at a tariff rate of the goods of the corporation could not properly be said to be a distribution among the shareholders of their own property.

2. The supplying of the liquor under the circumstances mentioned could not mean any transaction known to the law except that of a sale, and for this reason the conviction should be affirmed.

O'Connor, for the prosecutor. *O'Hearn*, for defendant.

Full Court.] THE KING v. BUCHANAN. [Dec. 22, 1909.

Public schools—Election of trustees—Abortive meeting—Powers of district board—De facto officers—Trial judge—Finding on questions of fact—Courses and distances—Uncertainty of.

Under the provisions of the Public Instruction Act, R.S. (1900), c. 52, s. 37, when the annual meeting of the district fails

to elect trustees to fill vacancies, the district board may, upon the written requisition of five ratepayers, accompanied by a certificate from the inspector of schools that the alleged vacancies actually exist, appoint a trustee or trustees.

Held, per RUSSELL, J.; MEAGHER, J., concurring, GRAHAM, E.J., dissenting, that the presentation of a certificate in writing from the inspector was a prerequisite to the exercise of the power of appointment on the part of the district board.

Held, nevertheless per RUSSELL, J., that as there were no other persons than those whose title to the office was attacked who could claim to have been elected, and as there was no machinery by which any persons other than the de facto trustees could have been elected, the court should refuse the application and confirm the judgment of the trial judge, but without costs to defendants, they having failed to establish any legal title to the office.

Where a new school section was constituted and it became necessary to elect trustees, but the meeting called for that purpose was adjourned without having accomplished the purpose for which it was called.

Held, 1. There was nevertheless a meeting within the words of the statute sufficient to give jurisdiction to the district board to make the appointments which the meeting had failed to make.

2. The validity of certain of the votes cast for one or the other of two candidates being largely a question of fact depending upon the location of certain lines, the finding of the trial judge on such question should not be disturbed.

3. Per GRAHAM E.J., that where the description in determining the right of certain ratepayers to vote, depended upon courses by compass which were uncertain, the special description of the men by name, which was certain, should be taken.

O'Connor, in support of appeal. *Mackay*, K.C., contra.

Full Court.] [Dec. 11, 1909.

CHAPPELL BROS. & CO. *v.* CITY OF SYDNEY.

Municipal corporation—Liability on contract for plans and specifications—Construction of Act—Architects—Remuneration where work not proceeded with.

By a special Act of the Legislature of Nova Scotia (Acts of 1903, c. 169), reciting the gift to defendant of the sum of $15,000 for the erection of a library building on certain conditions, including the providing of a site for the building and a yearly sum

of money for its support and maintenance and that such gift had been accepted and the required expenditures approved of by the ratepayers, defendant was authorized to include in its estimates of expenditure extending over several years the amount required for the purchase of the site for the building, and also, for all time, the sum of $1,500 annually for its support. Plaintiffs were employed to prepare plans and specifications for the building and did so, but the project was abandoned and plaintiffs claimed payment of the sum of three per cent. on the estimated cost of the building as compensation for the work done by them.

Held, TOWNSHEND, C.J., dissenting, 1. While there was no specific declaration in the enacting part of the statute that defendant was empowered to erect the building, looking at the whole act, such power must be considered to be impliedly given and concluded defendant's liability to plaintiffs for the work done by them.

2. The plaintiffs, on the evidence, were entitled to recover the full amount of the percentage as claimed, and that the judgment in their favour below for a smaller amount must be varied by being increased to the full amount, and defendant's appeal dismissed with costs.

O'Connor and *F. McDonald*, in support of appeal. *Covert*, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] ROYCE *v.* MACDONALD. [Nov. 29, 1909.

Limitation of actions—Real Property Limitation Act, R.S.M. 1902, c. 100, s. 17, 24—Sale of land for taxes—Right of municipality to sell after ten years.

Appeal from decision of MACDONALD, J., 45 C.L.J. 530, allowed with costs, the court holding:—

Held, 1. Statutes of Limitation apply to municipal and other corporations as well as to persons. *Hornsey Local Board* v. *Monarch, etc., Society*, 24 Q.B.D. 1, and Wood on Limitations, 118, followed.

2. Sec. 24 of the Real Property Limitation Act, R.S.M. 1902, c. 100, applies to proceedings taken by a municipality to sell

lands for taxes which are a lien or charge on the land, and the municipality will be restrained by injunction from taking such proceedings after the lapse of ten years from the time when the taxes fell due. *Neil* v. *Almond*, 29 O.R. 63, and *McDonald* v. *Grundy*, 8 O.L.R. 113, followed.

3. The plaintiff is also entitled, under s. 17 of the Act, to a declaration that neither the levy of taxes nor the rate remains any longer a lien or charge on the land.

Andrews, K.C., and *F. M. Burbidge*, for plaintiff. *Haggart*, K.C., for defendant.

Full Court.] PATERSON v. HOUGHTON. [Nov. 29, 1909.

Vendors and purchasers—Option to purchase—Time essence of contract—Clause giving vendor power to cancel if payment not made within time fixed.

An offer, though made for valuable consideration, to sell and convey land on payment of $500 to be made on or before a fixed date only gives an option to purchase which cannot be exercised as of right after the time limited, and the addition of a clause providing that, if the payment is not then made, the vendor shall be at liberty to cancel the agreement confers no additional right upon the proposed purchaser, so that the vendor may refuse a tender of the money subsequently made, although he has given no notice and has done no positive act of cancellation. *Dibbins* v. *Dibbins* (1896) 2 Ch. 348; *Weston* v. *Collins*, 11 Jur. N.S. 190; *Waterman* v. *Banks*, 144 U.S. 394, and *Dickinson* v. *Dodds*, 2 Ch. D. 463, followed.

RICHARDS, J.A., dissented, holding that the added clause meant that the option was to remain open to acceptance for a reasonable term until cancelled in some way by the proposed vendor.

O'Connor and *Hartley*, for plaintiff. *Macneill*, for defendant.

Full Court.] ADCOCK v. FREE PRESS. Dec. 13, 1909.

Costs—Security for costs—Practice—Libel action—Libel Act, R.S.M. 1902, c. 97, s. 10—*King's Bench Act, Rules* 978, 982, 983, 987—7 & 8 *Edw. VII.* c. 12, s. 1—*Dismissal of action.*

Judgment of MACDONALD, J., 45 C.L.J., p. 756, affirmed with costs except the provision in the order for dismissal of the action in this event of non-compliance.

Rules 982, 983 and 987 of the King's Bench Act must be read with s. 10 of the Libel Act, but not Rule 978, so that there would have to be a substantive application to dismiss after non-compliance with the order.

Blackwood, for plaintiff. *Ormond,* for defendant.

Full Court.] HOTCH *v.* ROTHWELL. [Dec. 14, 1909.

Local option by-law—Liquor License Act, R.S.M. 1902, *c.* 101, *s.* 62,*as re-enacted by* 9 *Edw. VII. c.* 31, *s.* 2—*Petition to council for submission of by-law—Using petition of previous year not then acted upon—Injunction to prevent submission of by-law.*

Appeal from judgment of METCALFE, J., 45 C.L.J., p. 723, allowed with costs.

There was no sufficient irregularity in making use of the previous year's petitions to have the effect of destroying it, and there were enough names on it, notwithstanding that part of the territory had, in the meantime, been taken to form a separate village.

Andrews, K.C., and *F. M. Burbidge,* for applicant. *E. L. Taylor,* K.C., for defendants.

Full Court.] [Dec. 13, 1909.

MCCORMICK *v.* CANADIAN PACIFIC RY. CO.

Jury trial—Action for compensation for death by accident—Discretion of judge as to mode of trial.

The Court of Appeal will not interfere with the discretion of the judge in granting or refusing an application, made under sub-s. (*b*) of s. 59, of the King's Bench Act, for the trial of an action by a jury, unless that discretion has been exercised upon a wrong principle as in *Jenkins* v. *Bushby* (1901) 1 Ch. 484. *Swindell* v. *Birmingham Syndicate,* 3 Ch. D. 127, and *Rustin* v. *Tobin,* 10 Ch.D., at p. 565, followed.

Trueman, for plaintiff. *Curle,* for defendants.

KING'S BENCH.

Macdonald, J.] LARKIN v. POLSON. [Nov. 19, 1909.

Local option by-law—Petition of twenty-five per cent. of electors, sufficiency—Several petitions made into one by cutting off headings—Injunction against submission of by-law.

A number of separate petitions for the submission of a local option by-law under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII. c. 31, s. 2, containing signatures of more than the required number of the resident electors, were received by the clerk of the municipality, who handed them back to the person presenting them to carry out a suggestion as to how they should be put together. The latter then made the many petitions into one by cutting off the headings from all but one and putting all the signatures after the one heading left.

Held, distinguishing *Adams* v. *Woods*, 45 C.L.J., p. 722, that such subsequent mutilation of the original petitions would not of itself be sufficient to warrant an injunction against the submission of the by-law.

Two of the headings thus cut off, however, were altogether insufficient as petitions under the Act and, although the number of the signatures to these imperfect petitions could not, as a result of the mutilation, be definitely ascertained, it was believed by the judge that there was not the necessary percentage of the electors on the remaining petitions.

Held, that everything should be presumed in odium spoliatoris and the finding should be that there were not enough signatures to uphold the petition, and that an injunction should be issued to prevent the submission of the by-law.

Appeal to the Court of Appeal December 8, dismissed with costs.

Andrews, K.C., and *F. M. Burbidge*, for plaintiff. *Taylor*, K.C., for defendants.

Mathers, J.] HOWARD v. LAWSON. [Dec. 2, 1909.

Practice—Substitutional service—Publication of notice of advertisement—Motion for final judgment—King's Bench Act, Rules 182, 183.

Motion for final judgment, after interlocutory judgment in default of defence, in an action for a declaration that certain

property standing in defendant's name in the Land Titles Office was held by him as a bare trustee for the plaintiff and for an order, inter alia, vesting the title of the property in the plaintiff.

Plaintiff had obtained and acted upon an order of the referee providing for service of the statement of claim by advertisement published in a Winnipeg daily newspaper, but his material shewed that, if the notice had been published in either of two localities in the United States, it would have been more likely to come to the knowledge of the defendant. Plaintiff had conveyed his interest in the land to the defendant by an assignment absolute in form, reciting payment of the sum of $1,500 therefor, and there was no evidence or corroborating circumstances brought forward in support of the allegations in the statement of claim.

Held, notwithstanding the very wide provisions of Rules 182 and 183 of the King's Bench Act, that, when service by publication is asked, it should not, as a rule, be granted unless there is some reason for believing that the advertisement will come to the knowledge of the defendant: Annual Practice, 1910, 64-66; that in the present case the probabilities were that the action had never come to the defendant's notice, and that, in the exercise of the caution that the court should observe when it is asked to take the property which apparently belongs to one man and vest it in another, the motion should be refused.

Fillmore, for plaintiff.

Macdonald, J.] KELLY *v.* KELLY. [Dec. 13, 1909.

Partnership—Profits made by one partner in private speculations with partnership funds.

Held, 1. Under s. 32 of the Partnership Act, R.S.M. 1902, c. 129, each partner must account to the firm for all profits from investments made or speculations entered into with the funds of the partnership by him without the consent of the other partners, although he might have been entitled, on a division of profits, to withdraw as his share more than the amount so used by him.

2. Under s. 24 of the Act, which provides that "unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm," the "contrary intention" must be that of all the partners and not that of only one.

O'Connor and *Bi·ckwood*, for plaintiff. *Metcalfe* and *Minty*, for de"·ndant.

Metcalfe, J.] MOORE v. MCKIBBIN. [Dec. 11, 1909.

Local option—By-law to repeal, submisison of—Petition, sufficiency of.

It is no objection to a petition under s. 74 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII. c. 34, s. 4, for repeal of a local option by-law, that most of the signatures are on separate sheets of paper pinned to the one containing the heading and some of the signatures, although no portion of the petition appears upon such added sheets, unless it is shewn that such sheets were not attached to the first one at the time the signatures were made thereon. *Adams* v. *Woods*, noted vol. 45, p. 722, distinguished, as in that case a number of the sheets attached had been mutilated by cutting off the headings before presentation to the council.

Maclean, for plaintiff. *Rothwell* and *F. M. Burbidge*, for defendants.

Macdonald, J.] JOHNSON v. CHALMERS. [Dec. 20, 1909.

Garnishment—Error in form of affidavit—Substitution of words "to the like effect" for words in form.

The substitution, though by an error in type-writing, of the word "jointly" for the word "justly" in an affidavit to lead a garnishee order is not cured by Rule 760 of the King's Bench Act, permitting the use of language "to the like effect" of the forms prescribed, and is such a defect as cannot be amended; but the use of the word "deductions" instead of "discounts" in such an affidavit is permissible under the Rule, as the two words mean practically the same thing in that connection.

Jamieson, for plaintiff. *Blake*, for defendant.

Mathers, J.] SUTTON v. HINCH. [Dec. 20, 1909.

Covenant—Liability of covenantor to covenantee after assignment of covenant.

B. assigned to C. an agreement by A. to purchase land from B. and to pay for same by instalments. B. also guaranteed to C. the payment by A. of the several instalments.

Held, distinguishing *Cullen* v. *Rinn*, 5 M.R. 5, that B. could not recover from A. the amount of an instalment overdue under the agreement, though he might ordinarily have asked the court

to compel A. to pay C. under *Ascherson* v. *Tredegar Dry Dock Co.* (1909), 2 Ch. 40.

Galt, K.C., for plaintiff. *Hoskin*, K.C., and *Huggard*, for defendant.

Metcalfe, J.] [Dec. 23, 1909.

ISBISTER v. DOMINION FISH CO.

Negligence—Fire on vessel—Absence of precautions against fire spreading—Dangerous conditions—Failure to warn passengers to escape.

In the absence of direct evidence as to the cause of a fire which destroyed the defendants' steamer while lying at her dock, and in consequence of which the plaintiff suffered severe personal injury and loss, proof of the existence of dangerous conditions in the furnace room, where it was probable the fire had started, of the absence of means to put out an incipient fire, that when the fire was first noticed it had gained such headway that the plaintiff could only escape by jumping into the lake, and that there was either no watchman on duty or, if on duty, he neglected to give any warning to the passengers to escape, so that some of them were burned to death in their rooms, is sufficient to warrant a finding of negligence on the part of the defendants and a verdict for the plaintiff for substantial damages.

Hagel, K.C., and *Blackwood*, for plaintiff. *Heap* and *Stratton*, for defendants.

Metcalfe, J.] SCHWEIGER v. VINEBERG. [Dec. 23, 1909.

Sale of goods—Rejection—Retention of bill of lading.

When the buyer of goods exercises his right, under s. 30 of the Sale of Goods Act, R.S.M. 1902, c. 152, to reject the goods because the seller delivered a quantity larger than that contracted for and also delivered goods contracted for mixed with goods of a different description not included in the contract, the retention by the buyer of the bill of lading creates no liability on his part.

Phillips and *Chandler*, for plaintiff. *Hoskin*, K.C., and *Montague*, for defendant.

Province of British Columbia.

SUPREME COURT.

Clement, J.] TIMMS *v.* TIMMS. [Dec. 28, 1909.

Divorce—Petition by wife—Omission to aver non-collusion—No appearance by respondent—Service of notice of subsequent proceedings.

In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties.

Held, 1. That such allegation is a positive statutory requirement preliminary to the issue of a citation.

2. Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary.

Brydone Jack, for petitioner. No one for respondent.

Book Reviews.

The law relating to public officers having executive authority in the United Kingdom. By A. W. CHASTER, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar. 1909.

This is an enquiry into the limits of the authority of public officers in their executive capacity and their liability and the remedies for breach or excess of such authority.

In 1886 a digest of cases was published under the title of Executive Officers, and the present work, in an extended and elaborate form, claims to be a complete record of the common and statutory law on the subject. As might be supposed, it deals most exclusively with the law relating to such officers under the statute law of the United Kingdom, and it is only where such statutes are similar to ours that the authorities and the statement of law therein related thereto are of help in this country. These observations have special application to Parts I. and II. of the work. Part III. is more general in its character, and is an excellent summary of the authorities on the subject of the liability of public officers, (1) under warrants and orders of Supreme Court

at common law, (2) under warrants and orders other than those above mentioned, (3) under inherent powers. Then follow statements of the law on the subjects of remedies, protection, breach of duty, excess of powers, self-defence, etc., both as to civil and criminal proceedings.

Whilst this work may not be of much use to the majority of the profession in this country, it is one which should be in the library of every law association or other libraries which claim to be at all complete.

Flotsam and Jetsam.

Judge Edward Pierce of Boston was much impressed with the rapidity with which the business of the English courts was transacted, in a recent visit abroad. He was also struck with the feeling of mutual respect between the judges and the lawyers. He says:—

"What impresses a stranger who is visiting the English courts is the thorough manner in which a judge goes into a case, and the complete mastery he has of the subject-matter in dispute, including all its minor details. The Chief Justice heard, and disposed of four separate murder cases in ten days, and yet each case was so carefully and completely heard that the rights of each of the defendants were carefully protected. In the English courts, technical and extraneous matters are eliminated, and court, counsel and jury get right down to the main facts, without unnecessary delay."—*Green Bag.*

"Dad," said the youngest son of Mr. Briefer, K.C., "I want to ask you a question about law." "Counsel's opinion is at your service, my son," smiled the genial Briefer. "Well, dad, supposing a man had a peacock and the peacock went into another man's garden and laid an egg, who would the egg belong to?" Briefer was relieved; this was an easier one than usual. "The egg, my son, would belong to the man who owned the peacock," he said, "but the man on whose garden it was laid would have good cause for an action for trespass." "Thank you, dad." Silence for a brief space, and then: "But, dad, can a peacock lay an egg?"