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COMPANY LAW IN ONTARIO.

Company law in Ontario is inelastic. It has not developed to meet commercial and financial needs. The draughtsmen of the early Acts were no doubt influenced by an idea of paternalism.

Recent inquiries by the Departmental Committee of the British Board of Trade and the Parliamentary Committee of the House of Lords shew that the public is better protected by the greatest freedom in corporate powers accompanied by publicity, or the fullest opportunity for inquiries being made by the investing public in the management and control of company affairs than by limitations and restrictions of company powers and management. Limitations and restrictions lend false security, and merely make the corporation lawyer more expert. The education of the public in inquiry and investigation before investing, and the provision for proper sources of inquiry must do more to assist the investing public than limitations which may be evaded.

The existing statute is largely based upon former Table A. of the Imperial Companies Act with such modifications as are necessitated by change of circumstances and in departmental practice. This is a large limitation of the freedom of company management, and in fact places all regulations for the management of companies on one dead level.

Under the Imperial Act it is otherwise. Table A. applies only when no other provisions are enacted by the company. Not only was the origin inelastic, but has become more so by piecemeal amendments. No better example of this could be instanced than that of the issue and redemption of preference shares. The provisions for redemption were passed to meet particular cases, and again changed to meet others, and are now incapable of general application.

It is now not only in the interests of members of the profes-

sion in Ontario, but it is their duty, to see that the Bill at present before the Legislature is made effective, not only for the purposes of the corporations, but also of the public. Company law has become more specialized, and it is to the profession alone that the Government may look with confidence for suggestions regarding the Bill. No doubt many business men have views upon the subject that are worth considering, but the layman can only express what the result should be, and his means of attaining it are usually ineffective.

The number of special statutes relating to companies has multiplied. It is in the public interest that the multiplication should cease, and that these Acts should be consolidated. This has led to a great increase of the statute law and created legal difficulties as well as anomalies. In the Timber Slide Companies Act are found many provisions relating to the rights and duties of owners of river improvements, which are repeated in the Act respecting Public Property in Rivers and Streams. There are at least four methods of proceeding in cases of expropriation. There are three methods of incorporating companies, and in two of them the record of incorporation is defective, and no means of ascertaining the public to ascertain who may be the officers or what may be the scope of the corporate powers is provided. The Cemetery Companies Act makes proper provisions for the care and protection of cemeteries owned by companies, and the way of interring bodies. There is nothing in the statute law making similar provisions for other cemeteries. The statute overlooks the fact that a cemetery company as a company is no different from another company, but a cemetery is very different from another piece of land.

However, in the consolidation the greatest care should be taken. Many companies have been incorporated under these various Acts which if repealed may leave the companies without means of carrying on their business or perpetuating their existence. For instance, many insurance companies incorporated under the Provident and Benevolent Societies Act are carrying on extensive businesses throughout the province and elsewhere.

The Bill as drawn does not apply to insurance companies, but it repeals the Provident and Benevolent Societies Act. Therefore, as drawn, the Bill leaves this class of company without statutory support. This will no doubt be seen to, but the instance shews why it is necessary that every member of the profession watching the business of such corporations should see that proper provisions are introduced, and that these companies may be enabled to properly carry on their business.

Another instance arises under the Co-operative Associations Act, which is also repealed. A company incorporated under that Act continues its existence under the Companies Act, as provided in the Bill. There is provision in the Co-operative Association Act that business shall not be done on credit. There is no such provision in the Companies Act, and it may be an injustice to many shareholders in such concerns that the corporate character of the company should be thus changed.

Another change of considerable importance is in the character of the report to be given by the directors to the shareholders at the annual meeting, and also the reports to be made to the Government. This opens up a very large question for consideration. On the one hand, it is impossible that the directors of a company should deal with their shareholders' capital without making a report, or by making such a report as gives very little information to the shareholders. On the other hand, it is most irritating and unbusinesslike for directors to whom the control of a company has been committed to be under the espionage of dissatisfied shareholders. There must be some fair position between these extremes, and it is a matter for investigation and discussion to arrive at it. In some of the neighbouring States shareholders have a right at any reasonable time to investigate the business of their company. In others, returns must be made not only of the names of the shareholders and the shares held by them, but also of the assets and liabilities. In some States the details with which these returns are made are set out in the statutes.

Still another innovation is the introduction of the clauses of

the Imperial Act of 1900 relating to the issue of shares for public subscription.

A number of other clauses were introduced at the last session of the Legislature in the Act relating to Prospectuses. That Act seems to have corrected some of the difficulties of the Imperial Act which render that Act practically nugatory, but it still remains to be seen whether any decided advantage has been gained by its enactment. Here the clauses relating to the issue of shares for public subscription are of far greater importance and would no doubt have far greater effect. It is doubtful whether under the financial circumstances of this province these clauses should be adopted in their entirety. On the one hand, there can be no doubt that the public should be protected from improvident flotations. The very want of capital in this province brings about the squander of capital in flotation. On the other hand, restrictive clauses which would work no hardship in England may render the flotation of legitimate enterprises a matter of great difficulty in Ontario.

The sections relating to public utility companies also require the most careful scrutiny. The subject of public ownership is one which is up at the present time. It may be that public ownership and private operation is the most satisfactory solution of the difficulty. Capital should receive every inducement for enterprise. Many corporations now paying large dividends commenced in an humble way. Many of them were experiments, speculations. It is but fair and just that enterprise should be handsomely rewarded. In a prowing country like this, restrictions on the investment of capital must be disastrous when generally applied to the whole province.

Some franchises which were hastily and improvidently granted a few years ago are now saddled upon the public and are drawing exorbitant and burdensome profits. Here again is a case where the middle and safe position is the one to be strived for. While capital should not be deterred, the incubus should not be created.

It is a matter for consideration whether the brief sections of

this part of the Bill are sufficient. A public utility is not defined. The underlying idea appears to be that where a company through a concession from the Government of the province or from a municipality undertakes a service for the public, greater duties and restrictions should be provided. Provisions for such concessions are to be found in the Municipal Act and other germane enactments. The "unearned increment" is here also a matter for consideration. While capital and private enterprise should have all proper advantage, how far should the interests of the public be conserved when the public make the enterprise profitable.

Corporations have no souls: nevertheless they die. If the Master is not a recording angel he holds the books, and the members of the legal profession take a large part not only in the interest, but in the judgment. The present Ontario Winding-up Act is admittedly useless. It is not even necessary to cite *In re Cosmopolitan Life* to shew this. In so far as companies are concerned the Act regulating assignments and preference appears to be as inadequate. It is questionable whether the winding up part of the Bill will overcome these difficulties. It is for the Court to say whether the machinery provided is sufficient, and if so, there is no reason why a winding-up under the Ontario Companies Act should be superseded by proceedings under the Dominion Winding-up Act.

THOMAS MULVEY.

JUDGES AND EXTRA JUDICIAL BUSINESS.

Mr. Haughton Lennox, member for South Simcoe in the House of Commons, has again introduced with some slight alterations his Bill of last session to amend section 7 of the Act respecting the judges of Provincial Courts, 4 & 5 Edw. VII. c. 31. That section provides that: "No judge mentioned in this Act shall, either directly, or indirectly as director or manager of any corporation, company or firm, or in any other manner whatever, for

himself, or others, engage in any occupation or business other than his judicial duties."

It will be seen that Mr. Lennox's amendment seeks to prevent judges acting as arbitrators or referees, except where they are called upon to act in the performance of duties imposed by the statute or by special appointment from the Crown.

One would have supposed that section 7 above referred to was sufficiently explicit without any amplifications, but it would seem not to be so. Certainly there is such a broad hint given that one might be excused from expressing some surprise that any judge should thereafter think of acting as an arbitrator.

This was clearly the opinion of Hon. Charles Fitzpatrick, the then Minister of Justice, when this section was enacted in 1905. Speaking in reply to Mr. Lennox and others as to the arbitration phase of the question and the effect of section 7, he said: "This amendment to the Act respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest they should be so employed. I think the less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the Bench."

And again Mr. Fitzpatrick during the debate on this subject last March said: "I have up to the present construed the Act that we passed last session very strictly and once or twice judges have applied to me to know whether or not on a true construction of the statute it would be permissible for them to act as arbitrators in dispute between private parties. The answer I have invariably given them is that it is not competent for them to do so, and to-night I regret that I am obliged to deliberately say that the judges of this country have not observed the law passed by Parliament, and that they certainly have not given that example of obedience to the law which we are entitled to expect of them." Mr. Lennox recently obtained an order of the House for all correspondence between the judges and the Department of Justice. When this is brought down it will be seen what argu-

ments have been advanced in favour of permitting the present practice.

Whatever excuse a judge could find for acting as an arbitrator, there surely can be none for his flying directly in the face of section 7 by sitting on a Board of Directors of a company, and so engaging in an occupation or business other than his judicial duties. And yet we see the name of one of the Justices of the High Court of Ontario advertised as being a director of a large trust company. We hope this is a mistake on the part of some official; if so, the mistake should be at once rectified and the name struck off the list.

The Minister of Justice during the debate on a question as to judges participating in business outside their judicial duties is reported in Hansard as having said in answer to a question by a member, "The Government is of the opinion that the judges ought to obey the Act of Parliament . . . the judges ought to conform to the law." It is difficult to conceive any condition of things that would make such a solemn expression of opinion necessary. Possibly the remark was grimly satirical and intended as a well merited rebuke.

MORE LAW BREAKING IN HIGH PLACES.

In our last issue we gave an illustration of the way in which law makers occasionally become law breakers. A more striking example of this evil tendency is furnished by a recent event in the City of Toronto. On this occasion it was in connection with a change made by the street railway company in certain routes, the legality of which is now sub judice. Whether there was any legal justification for the refusal of the company to comply with the directions of the city engineer to return to the old routes is immaterial. What all law abiding people take exception to is the method adopted by the Council for the purpose of enforcing their claim.

This method was a resolution of the Board of Control instructing the city engineer "to secure from the Board of Police

Commissioners the assistance of the police and such other assistance as may be necessary to compel the railway company to obey his order." The corporation counsel gave his opinion, as might have been expected, that it was "not legal or proper to so use the police force to so compel the running of cars." In this view the Mayor concurred, but the resolution being sent to the Council was passed with only four dissentient voices. On the mandate of the Council being conveyed to the Chief of Police, he refused to act upon it until authorized by the Police Commissioners. After some delay and differences of opinion among the Commissioners, their authorization was obtained and policemen were stationed at various points who forcibly prevented the company from operating their cars on their new routes, popularly known as the "loop lines." As might have been expected the company refused to comply with this demand and withdrew the service from these loop lines. The recently appointed Ontario Railway and Municipal Board thereupon took a hand in the matter and ordered that the company should restore the car service to the loop lines, from which the Council sought to drive them, until the final determination of the question in dispute by the proper tribunal.

Comment on this illegal and high-handed action by the Council might perhaps be thought scarcely needful were it not for the strange lack of discernment by the press and public as to the real nature and vital importance of the issue involved. It simply means that the action of the Council and the Police Commissioners from start to finish was nothing more or less than anarchy in high places, deliberately advised, promoted and carried into effect by those who are sworn and bound above all other members of the community to observe the law. Yet we find a Toronto journal, which has posed for half a century or more as the special champion of constitutional liberty, and takes for its motto in every issue the saying of Junius that "the subject who is truly loyal to the Chief Magistrate will neither advise nor submit to arbitrary measures," advising and encouraging a course of action which the chief magistrate of the chief

city of this province and the majority of the Police Commissioners knew to be illegal, for their own legal adviser told them so. They yielded (weakly, we think) to pressure put on them by irresponsible persons, and adopted a principle which has within it the germ of that worst of all forms of anarchy, which prevails when the ministers of government use the power entrusted to them to aid in the breach of those laws which it is their peculiar privilege and most sacred obligation to honour and maintain. The truth is, the city authorities seem to have been "stampeded" (to use an appropriate prairie expression) by the daily press which unhappily is blindly following the prevailing anarchistic spirit which naturally leads to the disregard of private rights, to communism and to the destruction of the safeguards for law and order.

The delay in filling a vacancy in the Nova Scotia Bench has been the subject of a somewhat acrimonious debate in the House of Commons. This vacancy has existed for about ten months. Much too long a time, by the way. It would not seem unreasonable to remark that if there is no need for this additional judge, it would be well to abolish the seat; if there is, it should be filled. Some member suggested that the Government did not make the appointment for reasons purely political. Not being politicians we cannot suppose that any self-respecting Government would act so improperly. We would rather take for granted that there is some good and proper reason for the delay. Possibly no member of the Nova Scotia Bar can be found who will relinquish his lucrative practice for the beggarly pittance given to judges. To such a one we would say, however, that he ought to be more patriotic. Let him remember Horatius Cocles and his noble self-sacrifice in the brave days of old.

As our readers are aware the committee having in hand the memorial to the late Christopher Robinson have decided "a fitting memorial would be (*a*) a brass tablet with a suitable inscription placed in Osgoode Hall, and (*b*) a scholarship or scholar-

ships founded in connection with the Law Society, to be known as the Christopher Robinson Scholarship." To meet the outlay contributions were asked from the profession not to exceed $5 each. The sum required is about $2,000, and of this over $1,600 has been sent in. It would be well that the remaining sum should be sent in without delay.

A very curious and unique incident is reported in connection with the Northampton Quarter Sessions. It seems that a prisoner was indicted on a charge of arson. The grand jury returned "no true bill," which, through the mistake of the clerk, was read as "a true bill." The prisoner was thereupon put on his trial before the petty jury, and pleaded guilty. While the question of his sentence was under consideration the mistake was discovered and the prisoner was discharged. This raises a question whether, under such circumstances, the prisoner could be tried again on this charge. According to Archbold, where the grand jury throw out a bill, no fresh one can be preferred during the same sessions or assizes but a fresh bill can be preferred at the next session or assizes if in time, or if no time be limited for preferring it; so that it is clear that in an ordinary case the ignoring of a bill is no bar to a subsequent prosecution. But the present case is rather different, because here the prisoner was, notwithstanding the bill was thrown out by the grand jury, actually tried and then discharged.

One of the recently appointed justices of the High Court of Justice of Ontario (as we learn from a Montreal newspaper) during a long and rambling argument handed to his colleagues the following adaptation of Rudyard Kipling's lines:—

"'Oo is it makes that bloomin' noise?" asked Files-on-Parade.
"It's counsel's openin' argument," the color-sergeant said.
"'Oo 'as to 'ear the bally stuff?" asked Files-on-Parade.
"The chief and his two hired men," the color-sergeant said.
"For he doesn't know his law, he misrepresents the facts;
"His logic is so rotten you can see through all the cracks,
"And he's pretty sure to get it where the chicken got the axe,
"When the Court delivers judgment in the morning."

REVIEW OF CURRENT ENGLISH CASES.

LANDLORD AND TENANT — UNFURNISHED HOUSE — DEFAULT OF LANDLORD IN REPAIRING—INJURY TO TENANT'S WIFE BY REASON OF DEFECT IN DEMISED PREMISES.

Cavalier v. *Pope* (1906) A.C. 428. Considering the small amount involved it is somewhat surprising to find that this case has reached the House of Lords. We notice the plaintiff is described as a pauper, it is to be hoped that that sad condition is not the consequence of this litigation. The point involved was a narrow one. The appellant's husband rented an unfurnished house from the defendant, the defendant promised to make some repairs but did not, the appellant owing to the want of repair fell and injured herself. The Court of Appeal decided she could not recover (1905) 2 K.B. 757 (noted, ante, [vol. 42] p. 62), and the House of Lords (Lord Loreburn, L.C. and Lords Macnaghten, James, Robertson and Atkinson), unanimously affirmed the decision.

PRACTICE—DISCOVERY—AFFIDAVIT ON PRODUCTION — CONSPIRACY —CRIMINAL OFFENCE.

National Association of Plasterers v. *Smithies* (1906) A.C. 434 is an important decision by the House of Lords on a question of practice. Smithies brought an action against the National Association of Plasterers for conspiring to induce workmen to break their contract with the plaintiff. The usual order for production of documents by the defendants was made, from which the defendants appealed on the ground that conspiracy being charged they were not liable to make production. The order was affirmed by the Court of Appeal, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson and Atkinson), on the ground that the fact that though the plaintiff's claim involved a charge of a criminal act, yet that did not per se disentitle the plaintiff to the usual order for production, and it would be for the defendants to shew by their affidavit that their answer to the order would tend to criminate them. But as Lord Macnaghten puts it, the party cannot say in answer to such an order: "I have a bundle of documents; I will not tell you what they are, but I think some of them possibly may tend to criminate me."

COMPANY—SHARE CERTIFICATE FRAUDULENTLY ISSUED BY SECRETARY—FORGERY—MASTER AND SERVANT SCOPE OF EMPLOYMENT—ESTOPPEL.

Ruben v. *Great Fingall Consolidated* (1906) A.C. 439. This was an appeal from the decision of the Court of Appeal (1904) 2 K.B. 712, (noted, ante, vol. 40, p. 844). The facts were briefly as follows: The appellants had in good faith advanced money to the secretary of the respondent company for his own purposes on the security of a share certificate issued by the secretary certifying that the appellants were duly registered in the company's books as transferee of shares. The certificate was to all appearance in due and proper form, and purported to be duly sealed, and signed by two of the directors. The seal was however, fixed fraudulently, and the signatures of the directors were forged. The action was brought against the company for damages for refusing to register the appellants as owners of the shares. The Court of Appeal dismissed the action, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Davey, James, Robertson and Atkinson), have now affirmed that conclusion.

COMPANY—RESIDENCE—"PERSON RESIDING IN THE UNITED KINGDOM"—COMPANY REGISTERED ABROAD—HEAD OFFICE ABROAD—MEETINGS IN ENGLAND OF DIRECTORS.

De Beers Consolidated Mines v. *Howe* (1906) A.C. 455 is an important decision as to the place of residence of a joint stock company. The company in question was registered abroad and had its head office abroad, but the majority of its directors resided in England and a principal part of its business was transacted in England. The question arose on the claim of the surveyor of taxes to levy income tax on the company in England. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James and Robertson), found as a fact that the central control and management of the company was carried on in England, and that England must be deemed its place of residence, where the principal office was, notwithstanding that the head office of the concern was formally in South Africa.

SALMON FISHERY—IMPEDING FREE PASSAGE OF FISH UP A SALMON RIVER BY ABSTRACTION OF WATER—INJUNCTION.

Pirie v. *Kintore* (1906) A.C. 478 was a Scotch appeal in which the plaintiff, who owned a salmon fishery, sought to re-

strain the defendants, who owned a mill on the river, from impeding the passage of salmon up the river by increasing the diversion of the water from its natural channel into artificial channels for the use of their mill. The Court below granted the injunction, and the House of Lords affirmed the judgment.

SHIP—COLLISION—BOTH SHIPS AT FAULT—REOPENING QUESTION OF DAMAGE BY CARGO OWNERS—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT. c. 60), ss. 503, 504.

Van Eijck v. *Somerville* (1906) A.C. 489 was also an appeal from a Scotch Court in which the House of Lords (Lords Loreburn, L.C., and Lords James, and Robertson), reversed the Court appealed from. That Court had held that where a collision had taken place between two vessels and both ships were at fault, and the question of liability for damages had been settled in an action between the ship owners, it was not open to cargo owners thereafter to re-open the question of the amount of the liability imposed on the vessels respectively, but the House of Lords have reversed the decision holding that the cargo owners were not concluded by the previous adjustment made as between the ship owners to which they were no parties.

PARTNERSHIP—PURCHASE BY TWO PARTNERS WITHOUT KNOWLEDGE OF A THIRD—SCOPE OF PARTNERSHIP—RIGHTS OF PARTNERS.

Trimble v. *Goldberg* (1906) A.C. 494 was an action brought by a partner against his two co-partners in the following circumstances. The partnership was formed for the purchase of buying certain lands for the purpose of speculation. Two of the partners subsequently with their own funds bought certain other lands in the same neighbourhood, and for the like purpose, without giving their co-partner any share therein. There was nothing in the articles of partnership to preclude the partners from making such purchase on their own account. The Supreme Court of the Transvaal had nevertheless held that the purchase must be deemed to have been bought for the benefit of all three partners but the Judicial Committee of the Privy Council (Lords Halsbury and Macnaghten, and Sir A. Wilson and Sir A. Wills), could find no ground of law or equity to support the decision, and it was accordingly reversed.

POLICE PENSION SOCIETY—JUDICIAL DUTY OF DIRECTORS—CLAIM TO PENSION—ADJUDICATION ON CLAIM OF APPLICANT.

La pointe v. *L'Association, etc., de Montreal* (1906) A.C. 535. The plaintiff in this case had been a member of the police force of Montreal and as such a member entitled to the benefits of a police pension fund association of which the defendants were directors. By the rules of the society it was provided that the application for a pension should be fully gone into by the board of directors, and in particular that any member dismissed or obliged to resign from the force, should have his case considered by the board and his right thereto determined by the majority. The plaintiff who had been obliged to resign appl.. for a pension, but the defendants without any judicial inquiry into the circumstances refused the claim "seeing that he was obliged to tender his resignation." The Quebec Court of King's Bench thought this sufficient, but the Judicial Committee of the Privy Council held that the resolution was wholly void, and remitted the case with directions that the application should be duly considered by a differently constituted board, a right of which the poor ex-policeman would otherwise have been deprived.

POWER OF DOMINION PARLIAMENT—60 & 61 VICT. C. 11, S. 6 AMENDED BY 1 EDW. VII. C 13—VALIDITY OF STATUTE—POWER TO EXPEL OR DEPORT ALIENS.

Attorney-General v. *Cain; Attorney-General* v. *Gilhula* (1906) A.C. 542. The Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Atkinson, and Sir Arthur Wilson and Sir H. E. Taschereau), have upheld the validity of the Dominion statute 60 & 61 Vict. c. 11, s. 6 as amended by 1 Edw. VII. c. 13, authorizing the expulsion and deporting of aliens from Canada as therein provided, and overruled the decision of Anglin, J., to the contrary.

BANKER AND CUSTOMER—CHEQUE DRAWN WITH SPACES AFTERWARDS FRAUDULENTLY FILLED UP—LIABILITY OF BANK—DUTY OF DRAWER—NEGLIGENCE.

In *Colonial Bank of Australasia* v. *Marshall* (1906) A.C. 559 the Judicial Committee of the Privy Council (Lords Halsbury, and Macnaghten and Sir Arthur Wilson and Sir Alfred Wills), have adopted and followed the decision of the House of Lords

in *Schofield* v. *Londesborough* (1896) A.C. 514 (noted, ante, vol. 33, p. 65), to the effect that where a bank pays a cheque which a customer has drawn leaving blank spaces which have afterwards been filled up so as to apparently increase the amount of the cheque, the bank cannot charge its customer with such increased amount, and the customer is not guilty of contributory negligence in leaving such spaces, and although a jury found as a fact that the bank could not by the exercise of ordinary care and caution have avoided paying the cheques as altered, and that the cheques were drawn by the plaintiffs in neglect of their duty to the bank; yet the Judicial Committee held that there was no evidence to support such finding of negligence on the part of the plaintiff, and that the High Court of Australia was right in rejecting such finding and giving judgment for the plaintiff.

CROWN LAND IN NEW BRUNSWICK—ADVERSE POSSESSION FOR LESS THAN SIXTY YEARS—GRANT BY THE CROWN DURING ADVERSE POSSESSION—RIGHT OF GRANTEE—21 JAC. I, C. 14—CONSTRUCTION—NULLUM TEMPUS ACT (9 GEO. III. C. 16)—(R.S.O. C. 324, S. 41).

Emmerson v. *Maddison* (1906) A.C. 569 is a New Brunswick case in which the point in contention was whether a grant by the Crown of lands, which at the time of the grant were in the adverse possession of a stranger, but whose possession had been for less than sixty years, was valid. The action was for ejectment against the grantee of the Crown and the plaintiff who claimed title under the prior adverse possession contended that under 21 Jac. I. c. 14, s. 1, the grant was invalid because the Crown had not first established its title by information of intrusion. The Supreme Court of Canada had upheld the validity of the grant, and the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Atkinson and Sir A. Wilson and Sir A. Wills), uphold that conclusion, and they hold that 21 Jac. I. c. 14, s. 1, merely regulates precedure in informations for intrusion (for that reason we may observe it was not included in the third volume of R.S.O.), but in nowise prevented the Crown from making a grant of lands in the adverse possession of a stranger, or of preventing the grantee from taking and maintaining peaceable possession thereunder. The decision of the New Brunswick Courts to the contrary were overruled. That case practically affirms the decision in *Doe d. Fitzgerald* v. *Finn*, 1 U.C.Q.B. 70.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [Nov. 8. 1906.

CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO.

Appeal—Action for declaration and injunction.

The Act 60 & 61 Vict. 34 (d), relating to appeals from the Court of Appeal for Ontario does not authorize an appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement.

A by-law providing for a special water rate from certain industries does not bring in question the taking of an annual or other rent, custom or other duty or fee under s. (d) of the Act.

Blackstock, K.C., and *Rose*, for appellants. *Shepley*, K.C., and *Bell*, for respondents.

Ex. Ct.] DODGE *v.* THE KING. [Nov. 15, 1906.

Expropriation of land — Payment — Market value — Potential value—Evidence.

D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown, on expropriating the land, offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The Referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed.

Held, reversing the judgment of the Exchequer Court, 10 Ex. C.R. 208, Girouard, J., dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.

D. claimed the larger price as potential value of the land for orchard purposes, to which he had intended to devote it.

Held, that as he had not proved the land to be fit for such

purpose, and the evidence tended to disprove it, he could not receive compensation on that ground.

By 2 Edw. VII. c. 9, s. 1, only five expert witnesses can be called by either side on the trial of a case.

Quære, if more are called without objection by the opposite party is the testimony of the extra witnesses valid?

Appeal dismissed, and cross-appeal allowed with costs.

Roscoe, K.C., for appellant. *Newcombe*, K.C., and *MacIlreith* for respondent.

Que.] COTE *v.* RICHARDSON. [Nov. 19, 1906.

Appeal—Intervention—Amount in controversy.

In an action in the Province of Quebec to recover $804.49, a writ of attachment before judgment issued at the same time as the writ of summons, and goods in possession of the defendant, of the value of $4,000 were provisionally attached. The respondent company subsequently intervened in the action claiming the goods thus attached. The judgment maintained the plaintiff's action, quashed the attachment, maintained the intervention, and declared that the company were owners of the goods. On motion to quash an appeal by the plaintiff,

Held, Girouard, J., dissenting, that the intervention was a "judicial proceeding" within the meaning of section 29 of "The Supreme and Exchequer Courts Act," and that the right of appealing to the Supreme Court of Canada was determined by the matter in controversy upon the intervention. *Turcotte* v. *Dansereau*, 26 S.C.R. 578, and *King* v. *Dupuis*, 28 S.C.R. 388 followed. *Atlantic, etc. Ry Co.* v. *Turcotte*, Q.R. 2 Q.B. 305. *Allan* v. *Pratt*, 13 App. Cas. 780, and *Kinghorn* v. *Larue*, 22 S.C.R. 347, distinguished. Motion to quash dismissed.

Flynn, K.C., for appellant. *Stuart*, K.C., and *Garneau*, K.C., for respondent.

Que.] [Nov. 22, 1906.

QUEBEC NORTH SHORE TURNPIKE ROAD *v.* THE KING.

Crown—Purchase of debentures—Illegal purpose—Breach of trust.

In an action by the Crown to recover interest due upon debentures purchased by the Government of the late Province

of Canada with moneys belonging to the Common School Fund, (of which the Crown is trustee), from the Quebec North Shore Turnpike Road Trustees, the defendants pleaded that the debentures could not be lawfully held or recovery had thereon inasmuch as the advisers of the Crown, at the time of their purchase, were aware that the debentures had been issued in breach of trust and their proceeds misapplied towards payment of interest on other debentures due by them.

Held, that, as there was statutory authority for the issue of the debentures in question, knowledge of any breach of trust, or misapplication of moneys in respect thereto, by such advisers of the Crown could not be set up by the defendants as a defence to the action. Appeal dismissed with costs.

Lafleur, K.C., and *Stuart* K.C., for appellants. *Shepley,* K.C., for respondent.

Que.] MOREL *v.* LEFRANCAIS. [Nov. 23, 1906.

Contract—License to cut timber—Description of land—Boundaries—Winding river—Ambiguity.

A license to cut timber on lands traversed by a water-course described the portion on which the timber was to be cut as "bounded on the south" by the river. The river crossed the width of the land almost entirely at a point about seven arpents from its northern boundary, and again crossed it completely at another point about nineteen arpents further south.

Held, that there was no ambiguity in the description, but even if any doubt existed, the language of the instrument must be construed literally, and the party bound thereby could not be allowed to give evidence of extraneous circumstances to shew a different intention. Appeal allowed with costs.

C. E. Dorion, K. C., for appellant. *L. P. Pelletier,* K.C., for respondent.

Ont.] WABASH RAILROAD CO. *v.* MISENER. [Dec. 11, 1906.

Negligence—Railway company—Findings of jury—"Look and Listen."

M. attempted to drive over a railway track which crossed a highway at an acute angle where his back was almost turned to

a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching from behind which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given, and a verdict was given for the plaintiffs and affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, (12 O.L.R. 71), Fitzpatrick, C.J., hesitante, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. Appeal dismissed with costs.

Rose, for appellants. *German*, K.C., for respondents.

Ont.] [Dec. 11, 1906.

HAMILTON STREET RAILWAY CO. *v.* CITY OF HAMILTON.

Municipal corporation—Use of streets by electric railway—Payment for—Percentage of receipts—Traffic beyond city.

By agreement between the City of Hamilton and the Hamilton Street Railway Co. the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, inter alia, certain percentages on their gross receipts.

Held, following *Montreal Street Ry. Co.* v. *City of Montreal*, (1906) App. Cas. 100, that such payment applied in respect to all traffic in the city, including that originating or terminating in the adjoining Township of Barton.

2. As when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not in the portion within the city only.

3. The power of the company to construct its railway was not derived wholly from its charter but was subject to the permission of the city corporation, the city had therefore a right to stipulate for payment of such percentages and the agreement therefor was intra vires. Appeal dismissed with costs.

Nesbitt, K.C., and *Armour*, K.C., for appellants. *Blackstock*, K.C., and *Rose*, for respondents.

Y. T. C.] [Dec. 11, 1906.

KLONDYKE GOVERNMENT CONCESSION *v.* MCDONALD.

Mining lease—Hydraulic grant—Legislation—Riparian rights.

An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then subsisting rights, for working his placer mining claims adjacent thereto.

Held, that the hydraulic grant was governed by the provisions of the Mining Regulations in respect to the user of flowing waters and conferred no priority as to privileges or riparian rights upon the lessee whereby the plaintiff could be prevented building dams and flumes for the diversion of the waters of the creek at the point mentioned, for the purpose of working his placer claims, as his grant was of a substantive user of those waters and not subject to the common law rights of riparian owners on the stream. Appeal dismissed with costs.

Ewart, K.C., and *Chrysler*, K.C., for appellants. *Auguste Noel*, for respondent.

Ex. Ct.] PAUL *v.* THE KING. [Dec. 11, 1906.

Negligence—Navigation of inland waters—Collision—Government ships and vessels—"Public Work"—Exchequer Court Act, section 16*—Construction of statute—Right of action.*

His Majesty's steamship "Champlain" while navigating the River St. Lawrence at some distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam-barge, which was also navigating the river, and the barge sustained injuries.

Held, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of officers or servants, as the injury had not been sustained on a public work within the meaning of the sixteenth section of "The Exchequer Court Act." *Chambers* v. *Whitehaven Harbour Commissioners*,

(1899) 2 Q.B. 132; *Hall* v. *Snowdon*, (1899), 2 Q.B. 136; and *Lowth* v. *Ibbotson*, (1899), 1 Q.B. 1003, referred to.

Appeal dismissed with costs.

Mignault, K.C., and *Martineau*, K.C., for appellant. *Newcombe*, K.C., and *Decarie*, K.C., for respondent.

Ex. Ct.] SS. ARRANMORE *v.* RUDOLPH. [Dec. 26, 1906.

Shipping—Collision—Violation of rules not effecting accident—Steering wrong course.

The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the Local Judge, unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton*, 4 S.C.R. 648, followed.

A steamer coming up Halifax Harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow, and the latter starboarded her helm to pass astern and then ported. He then was so close that he stopped the engines, but too late to prevent the collision.

Held, that though under the rules the schooner should have kept her course and also was to blame for not having a proper look-out, neither fault contributed to the collision. Appeal dismissed with costs.

Harris, K.C., and *Mellish*, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondents.

Davies, J.] THE KING *v.* GILBERT. [Feb. 1.

Criminal law—Extension of time for notice of appeal—Jurisdiction.

The power given by s. 1024 of Crim. Code (R.S.C., 1906, c. 146) to a judge of the Supreme Court of Canada to extend the time for the service on the Attorney-General of notice of an appeal in a reserved Crown case, may be exercised after the expiration of the time limited by the code for the service of such notice. *Banner* v. *Johnston*, L.R. 5 H.L. 157, and *Vaughan* v. *Richardson*, 17 S.C.R. 703, followed.

Bethune and *Balfour*, for the application.

Province of Ontario.

COURT OF APPEAL.

Full Court.] McCarthy *v.* Kilgour. [Nov. 3, 1906.

Master and servant—Injury to servant—Negligence—Defect in machine—Workmen's Compensation Act.

The plaintiff, seventeen years of age, was employed by the defendant, a paper box manufacturer, to work a machine for cutting cardboard used in making boxes. The machine was controlled by a lever which worked on a horizontal plane three or four inches wide, the machine being at rest when the lever was at the centre of this plane, which was called neutral, and was put in motion or stopped by the pushing the lever from or drawing it to neutral. While working the machine a piece of cardboard missed the guides which kept it in position, and to enable the plaintiff to place it in proper position, he attempted to stop the machine, when, as he claimed, by reason of the absence of a catch or clutch at neutral to stop the lever, or by reason of the lever being too loose, the lever went too far and the plaintiff's hand was caught and injured. No complaint had heretofore been made as to the working of the machine, nor had there been any prior accident, the expert evidence shewing there was nothing amiss in the working of it, or any defect to be remedied: while the finding as to the cause of the accident was on the evidence, a mere matter of conjecture. A verdict for the plaintiff was therefore set aside, and the action was dismissed with costs.

DuVernet, and *Greer*, for appellant. *McBrady*, K.C., for respondent.

Full Court.] Macoomb *v.* Town of Welland. [Jan. 22.

Highway—Dedication—User by public—Action—Parties—Attorney-General.

In an action for a declaration that a portion of the river road lying between Burgar and Dorothy Streets, in the Town of Welland, was not a highway, but the private property of the plaintiffs,

Held, reversing the judgment of Anglin, J., 12 O.L.R. 362,

that the evidence did not establish dedication, and that the plaintiffs were entitled to succeed.

Held, also, that the Attorney-General was not a necessary party.

Lynch-Staunton, K.C., *Douglas*, K.C., and *T. D. Cowper*, for plaintiffs (appellants). *Armour*, K.C., for the defendants.

Full Court.] [Jan. 22

NORTHERN ELEVATOR CO. *v.* LAKE HURON AND MANITOBA MILLING CO.

Contract—Construction—Sale of wheat—Correspondence by telegraph—Price of wheat—Ascertainment by reference to quotations—Evidence—Trade usage or custom.

On the 22nd May, 1903, the plaintiffs, grain merchants at Winnipeg, Manitoba, telegraphed to the defendants at Goderich, Ontario: "Referring to my telegram we offer subject to immediate reply by telegraph one cargo, about eighty thousand bus., part number one hard, three over part number two Northern, one- quarter under New York July c.i.f. Goderich in ten days; terms twenty-five thousand sight draft, balance weekly payments as suggested int. and ins. Goderich paid by you as before if you wish will fix price to-day's close hard eighty-two cents two Northern seventy-eight and three-quarters; telegraph immediately whether you accept or not; can give you more two Northern than one H." The defendants telegraphed to the plaintiffs on the next day: "We accept half one hard, half two Northern, price fixed date shipment or sooner." Five days later the plaintiffs telegraphed to the defendants: "Probably send Algonquin to-morrow takes about fifty-eight thousand two Northern, thirty-seven thousand one hard, do you want the surplus fifteen thousand two Northern one-half under July, telegraph immediately on receipt." And on the same day the defendants telegraphed to the plaintiffs: "We accept, will provide insurance here, see to-day's letter." The 95,000 bushels mentioned were shipped and received by the defendants, and, a dispute having arisen as to the price, the plaintiffs withheld the bill of lading for 10,000 bushels of the 95,000 and the defendants having, notwithstanding the absence of the document, taken the 10,000 bushels, the plaintiffs brought this action for conversion thereof, or alternatively for the balance of the price. The defendants maintained that the price was paid in full:—

Held, that there was a complete contract for the sale of the goods in question, at a price to be fixed, on or before the date of shipment, by reference to New York quotations; and that the words used by the plaintiffs "three over . . . one-quarter under New York July," had not the effect of importing into the contract a term in accordance with a custom or trade usage of the wheat market at Winnipeg, of which evidence was given at the trial subject to objection, that the buyer was bound to sell a similar quantity of New York wheat to the original vendor.

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

J. H. Moss, and *F. Aylesworth*, for plaintiffs (appellants). *W. Proudfoot*, K.C., and *Skeans*, for defendants.

Full Court.] LOVELL *v.* LOVELL. [Jan. 28.

Supreme Court of Canada—Leave to appeal—Special grounds—Dissenting judgments.

Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal (See 42 C.L.J. 356) was refused the majority of the Court holding that it was not necessary to consider, upon an application for leave, the question whether an appeal would lie without leave, and being of opinion that no special reasons were shewn for granting leave, the circumstance that out of the nine judges of the Provincial Courts who heard the case two dissented from the opinion of the majority, not being a special ground.

MEREDITH, J.A., dissenting, was of opinion that an appeal lay without leave, and therefore the Court of Appeal had no jurisdiction to entertain the application for leave; but that, if there were jurisdiction, the leave should be granted.

Watson, K.C., for applicant, the defendant. *King*, K.C., for plaintiff.

HIGH COURT OF JUSTICE.

Garrow, J.A.] [Nov. 5. 1906.

STEPHENS *v.* TORONTO RY. CO.

Appeal—Divisional Court—Leave to appeal from to Court of Appeal—Practice—Scale of costs—Conflicting decisions.

In an action claiming $1,000 damages for an accident through the defendants' alleged negligence, the defendants denied any

liability but with their statement of defence they paid into Court $150 in full of the plaintiff's claim, if any. This the plaintiff accepted in full satisfaction of her claim, and delivered a bill of costs on the High Court scale, which the taxing officer allowed, and granted her a certificate, though objected to by the defendants, who contended that costs only on the County Court scale should have been taxed. Appeals by the defendants to a judge in Chambers and to a Divisional Court having been dismissed, the defendants then moved for leave to appeal to the Court of Appeal.

Held, that the matter being of importance, and in view of the conflicting opinions in *Chick* v. *Toronto Electric Light Co.* (1887), 12 P.R. 58, and the later case of *Babcock* v. *Standish* (1900) 19 P.R. 195, in which the former decision was apparently not referred to, the leave should be granted, but only on the defendants paying the costs of the motion, and of the appeal to the Court of Appeal.

D. L. McCarthy, for appliant.

Divisional Court.] CRAWFORD *v.* TILDEN. [Nov. 5, 1906.

Mechanics' lien—Railway—Dominion Act—Constitutional law.

The Mechanics' Wage Earners and Lien Act, R.S.O. 1897, c. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada.

Dickinson, Proudfoot, K.C., and *A. H. McDonald*, K.C., for the various parties.

Boyd, C.—Trial.] [Dec. 1, 1906.

THOMSON & AVERY *v.* MACDONNELL.

Insurance—Assignment of policy—Informal assignment—Security for debt—R.S.O. 1897, *c.* 203, *s.* 151(5).

The holder of a policy of insurance intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated "for collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for $2,000."

Held, that the effect of the above document was to give the

equitable right and title to the policy to the lenders of the money; and that other creditors could not claim as against them for they could take no higher rights than the insured had at the time of his death.

F. H. King, for plaintiffs. *J. M. Farrell*, for defendant.

Garrow, J.A.] [Dec. 3, 1906.

PRESTON *v.* TORONTO RY. CO.

Damages—Abandonment of portion of damages—Claim held to be limited to balance—Appeal to Privy Council—Application therefor refused.

The plaintiff may in a Superior Court suit at any time abandon a part of his claim, and upon such abandonment the remainder only, is deemed to be in controversy.

On the trial of an action in which the damages were laid at $5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should on appeal be held entitled to maintain the action, the damages should be fixed at $1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the plaintiff for the $1,000. This the defendants refused to do and appealed to the Court of Appeal when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded $4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming 01,000, which he regarded as agreed upon for all purposes.

Held, that the application must be refused, for that the damages must be deemed to be limited to the $1,000; but in drawing up the order the fact of the abandonment of the excess should be stated.

Leighton McCarthy, K.C., for applicants. *Shirley Denison*, contra.

Divisional Court.] [Dec. 4, 1906.

CLARK *v.* UNION STOCK UNDERWRITER CO.

Bills and notes—Absence of consideration—Evidence—New trial.

In an action upon two promissory notes for $3,000 and $4,000, respectively, the defendants set up want of consideration

and that the plaintiff was not a bonâ fide holder for value. At the trial the defendants tendered evidence to show that the notes were given merely as receipts for stock which had been delivered to defendants for sale, that there was no consideration for the notes, and that the plaintiff who was a clerk in the office of the plaintiffs' solicitors had given no value therefor; also that a written agreement for the transfer of the stock made between the plaintiffs and one of the defendants' firm had never been acted upon, or had been abandoned.

Held, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them a new trial was directed.

Watson, K.C., and *Medd*, for plaintiff. *Rose* for defendants.

Divisional Court.] GUNN *v.* TURNER. [Dec. 7, 1906.

Vendor and purchaser—Contract—Specific performance—Title —Recital more than twenty years old—Onus of proof.

A deed more than twenty years old, by which certain lands were conveyed to the grantee in fee, contained the recital that the grantee was the administrator of his father's estate, and that the land was conveyed to him in satisfaction and discharge of a debt due to his father. It appeared that some four years prior thereto, letters of administration ad litem had been granted by a Surrogate Court to the father's widow. In an action brought for specific performance of a contract for the sale of the said land.

Held, that such recitals were sufficient evidence of the facts so recited, and were not displaced by the fact of the prior grant of administration to the widow for a limited purpose stated.

Judgment of Teetzel, J., at the trial affirmed.

H. S. Osler, K.C., for plaintiff. *Ritchie*, K.C., and *A. Hoskin*, K.C., for defendant.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [Dec. 12, 1906.

RE TAYLOR *v.* REID.

Prohibition—Division Court—Acceptance of goods—Cause of action—Statute of Frauds—Jurisdiction.

In an action for $45 the price of a coat ordered by the defendant in Toronto to be made and sent by the plaintiff to him at Belleville by express,

Held, that the plaintiff must prove as part of his case an acceptance of the coat at Belleville and that certain letters written by defendant at Belleville to the plaintiff at Toronto while evidence from which acceptance might be inferred were not the acceptance itself; and as the plaintiff failed to do this the whole cause of action did not arise at Toronto within the jurisdiction of the Division Court in which the plaint was brought, prohibition must issue.

Judgment of Teetzel, J., affirmed.

Clute, for the appeal. *Grayson Smith*, contra.

Falconbridge, C.J.K.B.] [Dec. 28, 1906.

REX EX REL. BURKE *v.* FERGUSON.

Factories Act—Privies—"Factory"—"Owner."

Held, that a store occupied by persons carrying on the business of merchant tailors, the rear part of the building being used as a tailoring department and the front part as a sales department, 14 persons being employed in the tailoring department, was a "factory" as defined by s. 2, ss. 1, cl.c. of the Ontario Factories Act, R.S.O. 1897, c. 256, and the amendments thereof.

Held, also, that under s. 15, as amended by 4 Edw. VII. c. 26, s. 3, which provides that the "owner" of every factory shall provide a sufficient number of . . . privies, etc., the owner of the building, is plainly intended, who may or may not be also the employer.

J. D. Davidson, for defendant.

Cartwright, K.C. and *McCrimmon*, for the Attorney-General and inspector of factories.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 14.

EMPEY *v.* FICK.

Parent and child—Conveyance of farm by father to daughters—Agreement for maintenance—Action to set aside transaction—Understanding and capacity of grantor—Lack of independent advice—Absence of undue influence.

A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence shewed that he understood what he was doing and approved of it afterwards till his death four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters.

Held, that the transaction was a righteous one, and that the conveyance, being executed voluntarily and deliberately with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a sine qua non, it appearing that the traction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances.

Judgment of CLUTE, J., reversed.

Douglas, K.C., and *W. C. Brown*, for defendants (appellants). *J. S. MacKay* and *R. McKay*, for plaintiff.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 15.

BOHAN *v.* GALBRAITH.

Vendor and purchaser—Contract for sale of land—Specific performance — Correspondence — Offer — Quasi-acceptance — Agent.

The defendant, the owner of land in Ontario, being abroad, arranged with an estate agent to send him any offers of purchase which he might receive. The plaintiff filled up and signed a printed form offering $13,000, naming terms of payment and other details. This was sent by the agent to the defendant, who refused it. The plaintiff then signed another offer of $14,000, on a similar form, half cash, balance payable by instalments, offer to be accepted by a certain day, and sale to be completed by a certain day. This was sent by the agent to the defendant, who,

upon receiving it, wrote to the agent a letter in which he intimated that he would take $14,000 in cash. In reply the agent, on instructions from the plaintiff, wrote to the defendant informing him that the plaintiff accepted the terms and would pay the $14,000 in cash. On receipt of this letter, the defendant drew up an offer at $14,000, containing the same terms as the offer at $13,000, and forwarded it for signature by the plaintiff. This was signed by the plaintiff and sent to defendant, who then wrote to the agent declining to accept it.

Held, in an action for specific performance, that no contract binding upon the defendant could be made out from the documents and correspondence.

Harvey v. *Facey* (1903) A.C. 552 followed.

Judgment of TEETZEL, J., reversed.

J. A. Paterson, for plaintiff. *Middleton*, for defendant.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 15.

F. T. JAMES CO. *v.* DOMINION EXPRESS CO.

Carriers—Express company—Contract to forward perishable goods—Delay in transmission—Gross negligence—Railway company—Agent or servant—Notice of claim for damage to goods—"At this office."

The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract.

Held, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

A special condition that the defendants should not be liable for loss or damage unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.

Another condition was that a claim for loss or damage should be presented to the defendants in writing "at this office."

Held, that presentation at the head office of the defendants satisfied this requirement.

Judgment of CLUTE, J., affirmed.

W. Nesbitt, K.C., and *Shirley Denison*, for defendants (appellants). *Shepley*, K.C., and *G. H. D. Lee*, for plaintiffs (respondents).

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Jan. 18.

STILL *v.* HASTINGS.

Malicious prosecution—Absence of reasonable and probable cause—Functions of judge and jury—Disputed facts—Nonsuit—New trial—Judicature Act, s. 112*—Questions for jury.*

In an action for malicious prosecution the jury is to find the facts on which the question of reasonable and probable cause depends, but the judge must determine whether the facts found do constitute reasonable and probable cause. The difficulty is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass. In determining that the plaintiff has failed to shew absence of reasonable and probable cause, and withdrawing the case entirely from the jury, the judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence.

Therefore, where the defendant had prosecuted the plaintiff for the theft of some lumber, and the plaintiff admitted taking the lumber, but swore that he had done so with the defendant's consent, in exchange for lumber of his own,

Held, that it must be assumed that the exchange was actually made, and belief of the defendant, when laying the information, in the guilt of the plaintiff, necessarily implied his having forgotten that he had made such an exchange, and such forgetfulness not being admitted, was a question of fact for the jury, and so too the existence in the mind of the defendant of an honest belief in the plaintiff's guilt.

The plaintiff admitted that the defendant, before laying information, charged him orally with the theft of the lumber, and that he (the plaintiff) made no answer to the charge, no allusion to the exchange.

Held, that these facts did not warrant an assumption by the trial judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange

had in fact taken place, it had passed entirely from the defendant's mind.

Judgment of MABEE, J., nonsuiting the plaintiff set aside, and a new trial directed.

Semble, per ANGLIN, J., that sec. 112 of the Judicature Act expressly prohibits the putting of questions to the jury in actions of this kind and of the other kinds specified therein. Suggestion of an amendment of this section.

D. O'Connell, for plaintiff. *R. McKay*, for defendant.

Mulock, C.J. Ex. D., Anglin, J., Clute, J.] [Jan. 25.

BRENNER *v.* TORONTO R.W. Co.

Negligence—Contributory negligence—"Ultimate" negligence—Street railway—Injury to person crossing track—Neglect of motorman to shut off power on approaching crossing—Rule of company—Withdrawal from jury—Misdirection.

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is "ultimate" negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously, but for such disabling negligence.

Scott v. *Dublin and Wicklow R.W. Co.* (1861) 11 Ir. C.L.R. 377, approved. *Radley* v. *London and North-Western R.W. Co.* (1876) 1 App. Cas. 754, applied.

The plaintiff in crossing a city street in front of an approaching motor car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a

crossing, and that the motorman on this occasion did not do so, and in an action for the defendants' negligence causing the plaintiff's injuries the trial judge in his charge to the jury withdrew the evidence of this rule from their consideration.

Held, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be "ultimate" negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief.

W. R. Smyth, for plaintiff. *W. Nesbitt,* K.C., and *D. L. McCarthy,* for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 22, 1906.

SMITH *v.* FRAME.

Bills and notes—Consideration—Forbearance—Collection Act—Salary of Government official.

Plaintiffs recovered judgment against defendant and obtained an order from a commissioner of the Court, under the Collection Act, after examination for payment of the debt by instalments. Defendant paid the instalments for a time as required by the order and then failing to pay an order was obtained under the Act for an execution to take the body. Defendant having been arrested applied to a judge of the Court under the Judgment Debtors Act for his discharge. After a partial hearing the mat-

ter was adjourned to a later date for further consideration and on the recommendation of the judge in favour of a settlement defendant gave the promissory note sued on.

Held, that the forbearance by plaintiffs in respect to their judgment, and in respect to asking for a remand constituted good consideration for the making of the note.

At the time of the making of the commissioner's order for payment by instalments defendant was in the employ of the Dominion Government as Inspector of Weights and Measures and it was claimed that the order was illegal and that the arrest was invalid and constituted duress and that the giving of the note under the circumstances was illegal.

Held, that in the absence of statutory provisions in Nova Scotia expressly protecting the salaries of Government officials, it was a question of fact for the commissioner whethre or not the making of the order requiring payment by instalments would impair the usefulness to the Crown of the official, and that as his order made under these circumstances was not a nullity the note was not illegal for duress or other cause.

J. T. Ross, for appellant. *A. Whitman* and *I. Oakes*, for respondents.

Full Court.] [Dec. 22, 1906.

BARNES *v.* WAUGH.

Sale of goods—Perishable nature—Merchantable condition—Depreciation through exceptional or accidental cause—Burden of proof.

Defendant by telegraph ordered fifteen barrels of oysters from plaintiff at Buctouche, N.B., to be shipped to him at Halifax, N.S., "first soft weather." The oysters were shipped as directed, going forward in two lots and were delivered to defendant at Halifax about four days after shipment. The judge of the County Court found and the evidence supported his finding that the oysters were in merchantable condition at the time they were shipped, but immediately after their receipt by defendant they were found to be bad and unfit for use. The evidence shewed that they could have only reached the condition in which they were when received through some exceptional or accidental cause such as being frozen and allowed to thaw.

Held, dismissing defendant's appeal with costs, that the oysters having been shipped in good condition and injured

through an exceptional or accidental cause were at defendant's risk.

Per RUSSELL, J., dissenting, that the burden was upon plaintiff of shewing that the deterioration was due to an accidental or exceptional cause and that in the absence of such evidence the Court must conclude that the goods were not in such condition when shipped as to be merchantable for a reasonable time after their arrival at the place to which they were shipped.

F. H. Bell, for appeal. *H. Mellish*, K.C., contra.

Full Court.] [Dec. 22, 1906.

COLBIN *v.* PURCELL.

Contract for sale of business—Misrepresentation as to profits—Restitution—Counterclaim—Judgment not appealed from.

In an action claiming a balance as due on a contract for the sale of a milk route, etc., defendant relied on misrepresentation as to the profits derived from the business and counterclaimed damages for such misrepresentation. The counterclaim was dismissed and there was no appeal.

Held, 1. As defendant had received the property and had dealt with it in such a way that he could not make restitution he could not reply upon the alleged misrepresentation as ground for rescission.

2. The counterclaim having been dismissed and no appeal taken that the Court was not in a position under the order corresponding to O.. 58, r. 4 of the English rules to make the order that the judge below should have made; that the counterclaim being a independent action if defendant was dissatisfied with the judgment dismissing it he should have appealed.

J. C. O'Mullin, for appellant. *J. J. Power* and *M. M. Reynolds*, for respondent.

Full Court.] [Dec. 22, 1906.

SLIPP *v.* MORRIS.

Appeal—County Court judge—Jurisdiction to dismiss action on appeal from Justices' Court—Certiorari.

In an action to recover a small sum in the Magistrates' Court the defendant appeared and contended that the justice had no

jurisdiction inasmuch as the cause of action arose, and defendant resided and was served in another county than that in which the justice was sitting. Judgment having been given in plaintiff's favour defendant appealed to the County Court, the judge of which dismissed the appeal on the ground that the justice having had no jurisdiction to try the case he had none to hear the appeal, and that the proper remedy was by certiorari.

Held, allowing defendant's appeal with costs, that as the judge of the County Court had jurisdiction to take evidence to establish the question of jurisdiction he had jurisdiction to determine that the action ought to have been dismissed and should have given judgment accordingly.

T. W. Murphy, for appellant. *A. Drysdale*, K.C., A.-G., for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Dec. 21, 1906.

IVESON *v.* CITY OF WINNIPEG.

Municipality—Negligence—Notice of action—Liability for non-repair of highway.

Appeal from judgment of RICHARDS, J., noted, vol. 42, p. 525, dismissed with costs.

Robson and *Coyne*, for plaintiff. *I. Campbell*, K.C., and *T. A. Hunt*, for defendants.

Full Court.] [Dec. 21, 1906.

FRASER *v.* CANADIAN PACIFIC RY. CO.

Examination of officer of company for discovery—Duty of officer to get information for answers to questions.

On the hearing of an appeal from the decision of MATHERS, J., noted, vol. 42, p. 42, counsel for defendants undertook to produce for the inspection of plaintiff's solicitor such of the papers on file in the company's offices as referred to the matters in question, whereupon the Court allowed the appeal and set

aside the order of MATHERS, J., and re-instated the order of the referee. Costs of both appeals to be costs in the cause. The documents to be produced to be all documents other than privileged ones on which the memorandum used by Mr. Whyte on his examination or any part of it had been founded.

Mulock, K.C., for plaintiff. *Aikins*, K.C., for defendants.

Full Court.] [Dec. 21, 1906.

MALCOLM *v.* MCNICHOL.

Negligence—Landlord and tenant—Liability of contractor for negligence of employee—Principal and agent—Prescription of negligence from circumstances.

Appeal of defendant McNichol from judgment of DUBUC, C.J., noted, vol. 42, p. 165, dismissed with costs except that, on the reference to the Master, nothing is to be allowed for damages to the plaintiff's goods caused by leaking of water from the room above.

Appeal of the plumbing firm, defendants, from the same judgment allowed and action as against them dismissed with costs of the appeal only.

Hudson and *Ormond*, for plaintiff. *Aikins, K.C.*, for defendant, McNichol. *Wilson*, for other defendants.

KING'S BENCH.

Mathers, J.] [Dec. 5, 1906.

KING *v.* DOUGLAS.

Criminal law—Speedy trial—Adding charges other than that upon which prisoner elected.

At the close of the preliminary hearing of a number of charges against the defendant including theft, obtaining money by false pretences, causing and inducing the prosecutor by false pretences to execute a valuable security and also fraudulently mortgaging certain real property to which he knew he had no title, the magistrate bound the accused over, under s. 601 of the Code, to take his trial at the next Superior Court of criminal jurisdiction "on the charge aforesaid." The only charge men-

tioned in the condition of the recognizance was the one for fraudulently mortgaging real estate. Having afterwards surrendered himself to the custody of the sheriff, the accused was brought before the Chief Justice, under s. 767 of the Code, and elected to be tried speedily by a judge without a jury. No account was given by the Chief Justice to include in the indictment any additional charges under s. 773.

Held, at the trial, following *King* v. *Carrien*, 14 M.R. 52, that leave should not be given to include in the indictment any of the other charges made before the magistrate and that the prisoner must waive his right to a trial by jury upon such additional charges before he can be tried upon them by a judge.

Bonnar, for the Crown. *Aikins*, K.C., for the prisoner.

Macdonald, J.] [Dec. 14, 1906.

NAGY *v.* MANITOBA FREE PRESS CO.

Slander of real estate—Publication of statement that house haunted—Damages.

This case has attained local celebrity as the "Ghost case." On Oct. 22, 1905, a policeman made an entry in the "Occurrence Book," kept at the police station in Winnipeg, as follows:

"Second house east of Main on St. John's Avenue is believed by some people to be haunted at night between 11 and 12 midnight. There are parties of men hanging around this house, also in basement awaiting the appearance of the spook. This house is at present unoccupied."

On the next day the defendant's newspaper published an article of which the plaintiff complained in this action. It was as follows:

"A north end ghost. There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John's Avenue near to Main. He appears late at night and performs strange antics so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general and at night they rendezvous in the basement and close around the haunted house to await his ghostship, but so far he still remains at large."

It was proved that the article referred to the plaintiff's house and she claimed damages alleging that the property had depreciated seriously in value in consequence of the publications of

the article and that she had suffered loss and been put to expense in other ways thereby.

Held, that there was no precedent for an action for slander of real estate.

Held, also, that the damages claimed were largely imaginary and, as a similar article had been published in another newspaper about the same time, it would be impossible to decide which of the articles caused the damages, if any in fact arose.

Action dismissed with costs.

O'Connor and *Leech*, for plaintiff. *Hudson* and *Howell*, for defendants.

Obituary.

The late Dr. Frederick W. Maitland.

On the 21st December last, Dr. Frederick William Maitland died at Grand Canary, and by his death England and the English-speaking world has lost one of its most learned and accomplished legal writers. He was the son of Mr. John Gorham Maitland, and was born in 1850. He was educated at Eton and Trinity College, Cambridge, where he distinguished himself. He was called to the Bar in 1876, and during the next thirty years was a prolific and erudite writer on legal subjects, and had the rare facility of being able to give to all his writings unique literary charm. His researches into the realms of archaic law were profound and exhaustive, and he has in his various writings thrown great light on the legal methods of by-gone ages, and invested them with a new vitality, and by his acute and critical analyses he has enabled his readers both to appreciate and understand the value of those ancient records of our law, of which England possesses such an abundant store. Among Dr. Maitland's numerous works may be mentioned his edition of Bracton's Note Book, 1887, The History of English, published in collaboration with Sir F. Pollock, 1895; Crown Law in England, 1898; The English Law and Renaissance, 1901; and he has, besides, edited several volumes of the publications of the Selden Society. His premature death will be widely and sincerely lamented.

Book Reviews.

Burial Grounds and Cemeteries, a practical guide to their administration, by EDWIN AUSTIN, Barrister-at-law, London: Butterworth & Co., law publishers, Bell Yard.

"Of comfort let no man speak, let us talk of worms, and graves, and epitaphs." This book is not of much practical use to our profession, but may be of interest at least to one of them, a bachelor friend, who some years ago took up the fad of wicker coffins, and sent to England for a sample. Being of a cheerful disposition, and practical withal, he kept it in his bedroom, not for the purpose of assisting his meditations on the shortness and uncertainty of life, but because, as he expressed it, "it is a handy thing to have around the house." We shall be glad to add this little volume to his collection.

Law Associations.

The annual meeting of the Hamilton Law Association was held in the Law Library on January 8th, 1907.

The Trustees' 27th Annual Report for 1906 shews a membership of 68, a library of 4,363 bound volumes, of which 99 were added during the year.

At the quinquennial election of Benchers, 1906, Messrs. A. Bruce, K.C., J. W. Nesbitt, K.C., and George Lynch-Staunton, K.C., were elected after nomination from this Association. Resolutions were passed placing on record the profound regret of the Association at the death of two of its most prominent members, Francis MacKelcan, Esq., K.C., who was at the time of his death President of the Association, and Henry Carscallen, Esq., K.C., M.P.P.

The following officers were elected for 1907: President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell; Treasurer, Mr. Chas. Lemon: Secretary, Mr. W. T. Evans; Trustees, Messrs. T. C. Haslett, Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., P. D. Crerar, K.C., and E. D. Cahill.

The next annual meeting of the American (meaning the United States) Bar Association will be held at Portland, Maine, on August 26, 27, and 28. The reason for selecting these days is that the International Law Association is considering holding its meeting in the United States this year, and the suggestion has been made to that body to hold its meeting at Portland on the three days following those above mentioned.