Canada Law Journal.

VOL. XLV. TORONTO, NOVEMBER 1. No. 21.

MARRIED WOMEN—INDEPENDENT ADVICE.

STUART V. BANK OF MONTREAL.

The decision in *Stuart* v. *Bank of Montreal*, 41 S.C.R. 516, following *Cox* v. *Adams*, 35 S.C.R. 393, was one that did not entirely commend itself to the profession, and it has been rudely shaken by a recent judgment of the Court of Appeal in England, which discusses the cases on the authority of which *Cox* v. *Adams* was decided. The question, it will be remembered, is whether a wife, who voluntarily signs an instrument for the benefit of her husband, without pressure or undue influence and with full knowledge of what she is doing, can afterwards avoid the transaction because she signed it without independent advice?

In the *Stuart* case the wife signed a guarantee to the bank for a large amount to secure advances to her husband. She was a woman of intelligence and was the sole executrix and devisee under her father's will. She admitted that she acted in no way under the control or influence of her husband, but exercised her own free will and was sanguine, if the bank made the advances, of the success of the business in which her husband had invested all his means and of which their only son was manager. She further said that she consulted no one about the wisdom of entering into the guarantee and that she would have scorned to consult any one about the transaction and regarded it solely as a matter between herself and her husband, and said that if her husband had told her not to enter into the guarantee without some advice she would have refused to consult any other person.

The rule upon which the liability of the wife was denied on these facts is succinctly stated in judgment of Davies, J., in the *Cox* case, at p. 415: "I rest my decision upon the principle that both the wife and the daughter at the time they signed the notes sued on, stood towards the husband in the position of parties

having confidential relationship with him; that the law, on grounds of public policy, presumes that the transaction was the effect of influence induced by these relations and that the burden lay upon the endorsee of the notes, who took them with notice and full knowledge of the relationship, of shewing that the makers had independent advice." In other words, that the relation of husband and wife raises a presumption of undue influence in the transaction which can only be rebutted by shewing that she had independent advice. Authorities binding on the court do not support this conclusion. The relation of husband and wife is not one of the confidential relationships from which in the absence of direct proof, undue influence is presumed, within the rule enunciated in *Hugenin* v. *Basely*, 14 Vesey 273, upon which all the latter cases depend.

The Court of Appeal in England in *Howes* v. *Bishop* (1909) 2 K.B. 390 (ante, p. 605), adopts and approves the statement of the law of Cozens-Hardy, J., in *Barron* v. *Willis* (1899) 2 Chy., p. 585: "It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Hugenin* v. *Basely* applies. In other words there is no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid. The onus probandi lies on the party who impugns the instrument and not on the party who supports it. This was clearly decided by Sir James Parker in 1852 in *Nedby* v. *Nedby*, 5 DeG. & Sm. 377, and it accords with what Lord Hardwicke said in *Grigsby* v. *Cox* (1750) 1 Ves. Sen. 517."

The decision of Wright, J., in *Bischoff's Trustees* v. *Frank*, 89 L.J. 188, referred to by Anglin, J., in the *Stuart* case, as to the question of the presumption in the case of husband and wife, is shewn not to have been adopted by Collins, M.R., and Romer, L.J., in their unreported decision on the appeal from Wright, J. *Turnbull* v. *Duval* (1902) A.C. 434, is also cited where a security was obtained by a trustee from his cestui que trust by pressure and concealment and without independent advice, and in

which Lord Lindley in delivering the judgment of the Board says: "Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it." The Lord Chief Justice in *Howes* v. *Bishop* concludes: "For this reason I think there may be circumstances in which the equitable doctrine that the onus of proof rests on the person supporting the document which creates a gift inter vivos would apply to the relationship of husband and wife, but I am not prepared to assent to the contention that the relation necessarily comes within the application of the doctrine; on this point I think that the view of Cozens-Hardy, J., in *Barron* v. *Willis* was quite right."

The facts in *Howes* v. *Bishop* raised the point squarely, whether the lack of independent advice was sufficient of itself to invalidate the document signed by the wife. The plaintiff had recovered judgment against one Benson. Dr. Bishop and his wife, and the judgment debtor subsequently signed a document agreeing to pay the judgment in instalments. The jury found that the transaction was sufficiently explained to Mrs. Bishop, and that she knew the nature of the document she signed, and that she was incurring a possible liability for the benefit of the judgment debtor in so signing, and that her signature was procured by the influence of her husband, but could not agree as to whether it was procured by his undue influence. The trial judge, Jelf, J., gave judgment against the wife (judgment having gone by default against the husband), and on appeal by the wife the Court of Appeal (Lord Alverstone, C.J., Fletcher-Moulton and Farwell, L.JJ.), without calling upon counsel for respondent, affirmed the judgment, holding that notwithstanding the absence of independent advice the wife was liable. It would have been quite a different matter if undue influence had been proved in fact, or there had been want of knowledge by the wife of the nature of the document signed, or wrongful concealment or the

relation of trustee and cestui que trust had existed between the parties.

It would follow from the rule laid down by the Judicial Committee in *Trimble* v. *Hill*, 5 A.C. 342, and *City Bank* v. *Barrow*, 5 A.C. 664, acted upon in *Mason* v. *Johnson*, 20 A.R., p. 414, and *Hollender* v. *Ffoulkes*, 26 O.R., p. 66, that the decision in *Howes* v. *Bishop* should be followed in our courts.

PROVINCIAL POLICE.

The need for efficient police protection in rural districts has long been felt and acknowledged. The subject was adverted to in this journal more than a year ago, and the Government urged to take methods with regards to it. We are therefore glad to note that it is now being dealt with. The matter being one of great importance, we have no doubt the Attorney-General has given the utmost attention to it, and we trust that the scheme to be adopted will be a serviceable one.

The establishment of such a force presents no difficulty. Models of proved efficiency are at hand, which, with some modifications, would suit the emergency. The North-West Police are now doing very much the same duties which will be required of the force now to be created; and the Irish Constabulary, perhaps the most efficient police force in the world, has similar duties to perform. It is true that these have a military side, but that makes these men none the less efficient for the civil duties cast upon them. The English County Constabulary offer another example of an efficient rural police exactly similar to that which we require in Ontario. Therefore, as we say, the organization of the force should present no difficulty, and we have no doubt that the Attorney-General, in forming his system, has given due weight to the lessons that the experience of such organizations afford him.

But no system, however perfect, can be successfully worked unless it is in the hands of men who know how to use it. The

raw material of which the force is to be composed can be found, but the men to direct and govern are not so easily obtained. Whatever system the Attorney-General may adopt, it must, to be effective, be on the same lines as the organizations to which we have referred. Would it not, then have been well for him to have looked to one of them for the men to set his machine going —men trained to the work and knowing what can be done and should be done, and the best way of doing it? We fear that this feature of the measure, if the information given in the public press be correct, has not been sufficiently thought out, for those who have been appointed to take charge of it cannot, in the very nature of things, have the experience and qualifications required. They may be, and probably are, excellent in the line of the duties which they have had to perform in the past, which have been mainly in the line of detective work, and the fact that they have been so long in the service of the Government would seem to indicate this; but detectives, even if as clever as Sherlock Holmes, do not necessarily possess the qualifications for the organizing and management of a provincial police force, and a man may be a very active police officer but may be entirely lacking in the peculiar qualifications of a useful detective. The force that is being formed is for the prevention, not the detection, of crime. If the scheme of the Attorney-General is for the creation of an extended detective agency, then his selection may be all right, but that is not what is required, and is not what the rural municipalities are looking for.

We are strongly of the opinion that for the organization and control of such a force, especially in its inception, certain qualifications are required, which, with all respect to the gentlemen referred to, they do not and cannot possess, as they have had no opportunity of acquiring the practical fitness and experience that is essential. Having a great desire for the success of Mr. Foy's scheme, and giving him full credit for bringing it to a practical issue, we trust that it may not be maimed at the start by an unwise selection of those to whom it is to be entrusted.

AS OTHERS SEE US.

Evidence in abundance has been published to shew that in the great centres of financial operations—in the places to which we must go if the necessity for borrowing money arises—very great distrust in our sense of commercial probity has been created by the methods adopted in carrying out the work of the Hydro-Electric Commission of Ontario. All who desire to see the principle of constitutional government fairly carried out, and who naturally expected that in this boasted land of freedom they would be carried out to their fullest extent, have been amazed alike at the audacity of the government in setting them aside and at the indifference of the public to their violation. This indifference may have partly been due to the idea that our action could affect nobody but ourselves, and that if we choose to accept legislation which violated public contracts and closed the doors of justice, it was no affair of any one outside of the Province. The facts, however, appear to be otherwise. The action of the legislature of the Province of Ontario appears to be of sufficient importance to be watched with interest by even very distant parts of the Empire, and its dealing with the subject of electrical development has not passed without notice.

Of this we have a remarkable proof in the fact that in the far-away region of Northern India, where, of all places, it might be supposed that little concern would be felt in the doings of a North American colony, the action of our legislature has been unexpectedly remarked upon. Our attention has been called to a legal journal published at Lahore, called the *Punjab Legal Reporter*, in a recent number of which we find copied in full and adopted as its leading editorial an article on the "Unjust and impolitic legislation in the Province of Ontario," which appeared in these columns in our July issue, quoting the opinion of Prof. A. V. Dicey, K.C., D.C.L., the best living authority on constitutional law. It may be assumed from this reproduction of Prof. Dicey's views that the "wise men of the East" are much of the same opinion as the learned writer as to the objectionable character of

the legislation of this province connected with the Hydro-Electric Power Commission. It will be remembered that Prof. Dicey has characterized these Acts as being in several respects "strange, unfair and un-British"—Legislation which may "work gross injustice to the whole people of the Dominion"—Sections which "seem to me strange and manifestly unjust," etc. The appearance of this article in such a far-away place confirms the opinion expressed in England as to the harmfulness to this country of this kind of legislation. We are evidently being watched, and it behoves us therefore to be all the more careful, lest in our political action we may be set down by our fellow subjects in other parts of the Empire as either ignorant of, or careless about, those principles of equity and justice by which alone the good government of a country is possible and its best interest conserved. Our material resources will avail us little if once the idea gets abroad that they may be dealt with as this great asset of electrical power has been dealt with by the government and legislature of Ontario.

The incident to which we refer is also interesting as evidence of the solidarity of the Empire and as shewing how the pulsations of the political heart vibrate throughout it as do the heart-beats of every body in a healthful state of existence.

MORE JUDGES.

The question of a shortage in the judicial strength of the Superior Court Bench in the Province of Ontario has recently been discussed by the judges. Resolutions were passed and sent to the Attorney-General by Sir Charles Moss, President of the Supreme Court of Judicature for Ontario, which read as follows:—

1. That it is the opinion of the judges that, in the public interest, and for the due and proper dispatch of business, there is an urgent need of an increase in the number of judges in the Supreme Court of Judicature.

2. The judges recommend that provision be made for the appointment of three additional judges.

The attention of the Attorney-General was also drawn to the fact that the development of New Ontario has thrown much more work upon the judges. This is a recommendation that should be carefully considered. It is better to have too many judges than too few.

There should be ample time given for the consideration of cases, though this should not be an excuse for delays in the delivery of judgments. Again, judges, like other mortals, are occasionally laid by from illness or other unforeseen cause; the result is that the judicial machine sometimes gets a little out of gear. It is only fair also that judges should have time for an occasional furlough, but when a Bench is only just strong enough in numbers for its ordinary business, extra work is thrown on those who have already all that they can properly accomplish.

It is the poorest sort of economy as well as injurious to public interests, to keep the number down to the lowest possible notch. The judges are the servants of the State, which means the public, and if the latter would only take time to think, and not be influenced by newspaper writers who too often pander to ignorant popular prejudice, there would not only be a sufficient staff of judges, but they would be paid adequate salaries which at present they are not. One newspaper writer, for example, sneers at the recommendation, remarking that it would mean "three fat appointments for lawyers, as the judges now receive $7,000 per year from the Dominion Government, with an additional $1,000 from the Province." Surely, a person holding the laborious and most responsible position of a judge, who has often to decide matters of enormous importance to the public, as well as to individuals, involving, it may be, questions of life and death, should be as well paid as the manager of a bank or an insurance company, but they are not. If it is said that the best men of the Bar are not promoted to the Bench, the answers are: (1) the smallness of salary and (2) the exigencies of party politics. Such answers are miserably inadequate and discreditable to the country, but the people love to have it so, and it looks as if this

state of things were growing worse instead of better. These two factors are in the main responsible for the fact that, with occasional exceptions, the best men at the Bar do not find their way to the Bench.

A different condition of things exists in England. There, happily, the practice has been to make the best choice possible, having regard to the qualifications of those who would be willing to give up their practice and retire to the Bench; and the selections, speaking generally, have been made without reference to politics. The salaries being ample, there has not been the difficulty that has obtained in this Province. One result of this is that the position there is looked upon as a more distinguished one than it is in this country.

As we gather from our exchanges, there appears to be a demand in England also for more judges, and a writer in the last *Law Quarterly Review* discusses the situation, and makes suggestions for a cheaper and more efficient administration of justice in view of such demand. We cannot do better than give our readers the benefit of his observations, which are as follows:—

"England has, in proportion to business and population, a smaller number of judges, at any rate in its Superior Courts, than any other civilized country in the world. Either justice is much understaffed here, or it is grossly overstaffed in Scotland and Ireland, whilst in Canada every Province has an establishment on our High Court scale, and the United States, in addition to the Federal Courts, has forty-six independent superior jurisdictions. But it is believed that the salaries and retiring pensions of the judges in these countries are, with few if any exceptions, on a much less liberal scale than that which prevails in England. If the committee of ten appointed to enquire into this matter agree that one or more judges of the K.B.D. should be appointed at a cost of £5,000 per annum each, plus expenses, it will only do so on being convinced that no other plan for dealing with the matter is available.

I ask to be allowed to state very shortly the broad outlines of a plan for the cheaper and more efficient administration of

justice which I have considered for many years past, and which may commend itself to some persons. How does this matter stand at present? About eighty-two judges (exclusive of the presidents) administer the laws of the country, civil or criminal. Of these, twenty-three (excluding the presidents) are judges of the High Court (the 'Superior Court' so-called) each of whom has a salary of £5,000 per annum, plus incidental allowances, making a total of about £115,000. The remaining fifty-nine judges are judges of County Courts ('Inferior Courts' so-called) and each has a salary of £1,500 per annum, in all £88,500, making a total for the salaries of the judicial staff of the High Court and County Courts of £203,500 per annum.

The history of these 'Inferior Courts' from the Act of 1846, when an effort was made to enable poor persons to obtain some modicum of civil justice, to recent times, is very clearly and pleasantly told by His Honour Judge Sir Thomas Snagge, LL.D., in his excellent pamphlet on the 'Evolution of the County Court' (1904), reprinted from the Nineteenth Century, to which those who desire full information on that subject should refer, and from which I will cite a few passages pertinent to this article.

This Act of 1846 was a 'crude experiment,' but 'from being a useful and handy tool at first' it was improved 'into a kind of judicial steam hammer capable of dealing with a claim in bankruptcy for £100,000 or determining an action of debt to recover half-a-sovereign' (p. 19). 'The volume and extent of the business now disposed of in the County Courts is enormous, and it increases year by year.' 'The bulk of litigation in England and Wales is carried on in the County Courts' (p. 26). 'Two-thirds of what once formed the ordinary civil business of the King's Bench Division, has drifted to the County Court' (ib. p. 31). These 'Inferior' Courts have, in fact, become as efficient as the 'Superior Courts, and are more popular.

Here, then, arises the question, the answer to which lies at the very root of this cry and of the administration of justice generally. Are judges of the County Courts *as a body* and at the present time 'inferior' to their brethren of the High Court?

Are they, *as a body*, wanting in any of those qualities which we are accustomed to consider as essential in our judges? *The Times*, in an article, November 1, 1897, when this question was very much debated, wrote as follows: 'The whole theory of the separation between the jurisdiction of the High Court and the County Courts is founded on the assumption that there is a remarkable difference between the qualifications of the judges of the two tribunals, all the fine wheat being collected in London, the coarser grain sent to the provinces. It is a distinction which, it is not wronging the County Court judges to admit, was once substantially correct. Things are now somewhat different. Among the County Court judges are men of great legal attainments and experience who would be fit to sit in any tribunal.'

This was written twelve years ago; critics of our judicial system will admit with thankfulness that appointments to either bench which were frequent a short time since would be impossible now, and of late years the County Court bench 'has been replenished and strengthened by a great number of men, King's counsel and others, able and prominent in the profession, who merely missed promotion to the higher bench by mischance or collateral circumstances.' It would be, moreover, unfair to the authorities to suppose that they would extend to substantially 'inferior' courts and judges the jurisdiction those judges now possess of 'dealing with claims in bankruptcy for £100,000, and of directing exceptional proceedings to be taken in their courts under a hundred and more Acts of Parliament' (ib. p. 15. But it is not necessary to press this point further. No one in the profession would now assert that the judges of our County Courts are *as a body* 'inferior' to their brethren of the higher bench.

The suggestion I submit is as follows: There are 500 or more County Courts in England, some of which, however, stand in a different position to others, for instance, the metropolitan courts, and those of the 'large centres' of population, e.g., Liverpool, Birmingham, Leeds, etc., and to these 'large centres' it has, for some time, been usual to appoint, or transfer, the most energetic

and most competent of the County Court judges. Select, then, from these 'large centre' courts the number of extra judges required, give them the status, and jurisdiction, of judges of the High Court and a salary of £2,500 per annum (that is, a salary larger than that of any other European or American puisne judge, or of the presidents of our Government boards. When a vacancy occurs in the King's Bench Division or the High Court Bench, or when for any other reason a new judge is required, let him, as a *general rule*, be selected from the judges of these 'larger centres,' upon the same terms as to salary and jurisdiction, appointing him to do such work as the Lord Chief may from time to time appoint. To fill the vacancies thus caused in these 'large centre' County Courts, select again from the remainder of the County Court judges those most conspicuous for judicial essentials; but having regard to the amount of work done by the judge of these 'large centres,' and to the responsibility attaching to such work, it would seem equitable that their salaries should be increased, say, to the extent of an extra £500 per annum. The vacancy in the County Courts caused by these last appointments would be filled with the care and discretion which is now usual. The effect would be to make the judges of these 'large centre' courts gradually judges of the High Court, and these courts of 'large centres' would thus become one of the recognized 'ante-rooms' to the High Court bench. Thus, in the course of a few years, all the eighty-two judges would be of equal standing. Then (and possibly earlier) the ineptitude of keeping on foot two jurisdictions, and two codes of practice, with all the annoyance, delay and expense consequent thereon, would disappear, and therewith would disappear the fantastic indecency of labelling 'Justice' (as if she were divisible like butter) into a 'superior' and 'inferior' brands, and discriminating between her officers by a wage on the one hand extravagant, on the other derisory. Other incidental advantages would accrue. The High Court would be refreshed and strengthened by the addition to its members of men in the prime of life, whose fitness for office would have been tested by their conduct on the

judicial bench in the courts of 'large centres' (a training which would be of great value even to experienced advocates. It would furnish an ample supply of highly-trained judges available for any emergency. It would interfere with no vested interest and would cause no disturbance of business, and would act as a beneficial stimulus to the County Court bench and to the junior bar.

Lastly—the financial position would be bettered. On the plan suggested, £5,000 would be at once saved by the appointment of (say two) additional judges, at a cost of £5,000 in place of £10,000. Further, as the scheme worked, we should have in a few years a judicial staff of more than eighty judges all possessed of *full jurisdiction* (that is, so to speak, of 100 horse-power each instead of, as at present, twenty-three of such power, and fifty-nine of only 50 horse-power). In short, we should have an enormously powerful judicial machine compared with that we now possess, and one which, by some re-arrangement of our County Court circuits and other judicious arrangements of business, would admit of some reduction in the judicial staff."

THE DEVOLUTION OF ESTATES ACT.

Copies of the draft of this Act in its amended form are now being circulated with a view to obtaining suggestions from the profession before the Act is introduced.

In your issue for December, 1907 (43 C.L.J. 753), I called attention to certain points in respect of which there seemed to be much room for improvement in the Act as it then stood. They were shortly: (1) That the Act lacked proper words of vesting when it was intended that the legal estate should shift to the beneficiaries. (2) That it improperly expressed, or rather entirely failed to express, the effect which it was intended the registration of belated cautions should have. Both these defects have been remedied in the proposed new Act. (3) Can the procedure relating to belated cautions be properly resorted to where there are no debts of the estate unsatisfied? (4) As to the right to inchoate dower of the wife of a beneficiary to whom the estate

had shifted, in case of the estate being brought back to the legal representative by the registration of a belated caution.

Let me deal with these two latter points separately.

As to the first. For the reasons stated in the article in question there would seem to be very grave doubt whether it was ever the intention of the legislature that the procedure in question should be open to adoption when there were no debts, or at least some special circumstance (other than the mere convenience of making a sale of the realty for the purposes of distribution) requiring a sale by the personal representative. Indeed, one might go further and say that it would seem very doubtful whether that procedure, under the Act as it now stands, is capable of adoption, for the simple reason that in strictness a personal representative, under the circumstances mentioned, is not in a position to make the necessary statements to admit of his being permitted to register a belated caution; and yet we all know the statements are made and accepted and belated cautions registered under those circumstances every day. On this point it would seem that any form of words introduced into the Act doing away with doubt upon the point, and making it clear whether personal representatives are or are not to be allowed to register belated cautions and to sell the realty under the circumstances mentioned would be a great boon.

As to the second point the introduction of words providing that, whenever the estate was re-vested in the legal representatives by the registration of a belated caution, all rights of dower whether inchoate or consummate, which had arisen by reason of the shifting of the legal estate to the beneficiaries, should be ipso facto extinguished, would also be, in the writer's opinion, a decided boon. At present the law on this point is certainly in a doubtful and unsatisfactory condition. In practice I believe it is the very general custom to ignore such dower estates or to assume that the re-shifting of the legal estate has re-vested also any estate that the wives may have acquired. But if the writer's view is correct, this practice is an exceedingly dangerous one, as it seems clear the dower estate undoubtedly attaches, and equally

clear that it cannot be affected by the re-vesting, being expressly preserved by the saving clause.

It may be remarked that in the draft of the new Act there has been an omission (no doubt by mere oversight) to change the old "one year" to "three years" in the side notes of sections 11 and 13.

F. P. BETTS.

EXPROPRIATION OF EASEMENTS.

A motion to continue an injunction recently granted by the judge of the County Court of Welland, in the case of *Felker* v. *McGuigan*, has revived a discussion referred to on a previous occasion (ante p. 497). In the above action it was claimed that the Hydro-Electric Commission had no power to expropriate easements and compel landowners to arbitrate on the supposition that the Public Works Act was applicable. The defendants were the contractors and sub-contractors engaged by the Commission in the building of the transmission line. An injunction was granted restraining them from entering upon the plaintiff's land for that purpose. It was expected that on this application, as stated by counsel for the plaintiff, that the whole question of the legality of the proceedings would have been discussed, but no argument was offered in opposition to the application. It cannot, of course, be said that this continuance of the injunction to the hearing is a decision on the merits of the case or as to the right of expropriation of easements as claimed by the defendants; but the granting of an injunction by one judge and the continuance of it by another, and the fact that the defendants did not oppose the continuance of the injunction, is sufficient to shew that the proceedings which were restrained thereby were at least of doubtful validity; in other words, the views expressed in this journal on a previous occasion are so far uncontroverted, and, to the above limited extent, have been judicially endorsed.

BILLS AND NOTES.

FRAUDULENT HOLDER PASSING TITLE TO BONA FIDE PURCHASER.

There is a difference between an innocent purchaser for value of stolen property, where it is a negotiable instrument or other personal property.

That decision is well expressed in an opinion by the Supreme Court of Errors of Connecticut, as follows: "The position of the holder of negotiable paper is of an exceptional character. He may acquire a title through a thief, and yet maintain it against the original owner." *Parsons* v. *Utica Cement Co.*, 73 Atl. 785.

But then again there appears a difference as to this source of acquisition, and where there appears to be a defence between the original parties. In the *Parsons* case it was further said: "But his (the holder's) possession is not enough to support a recovery, after it once appears that he must trace his title through fraudulent practices and unclean hands. *Totten* v. *Bucy*, 57 Ind. 452. This is equally true whether the fraudulent practices were connected with the original inception of the paper, or as in the present instance, occurred subsequently, to the prejudice of an intermediate holder. *Fulton Bank* v. *Phoenix Bank*, 1 Hall (N.Y.), 562; 2 Parsons Notes and Bills, 283; 4 Am. & Eng. Encycl. of Law, 322. The case of *Kinney* v. *Kruse*, 28 Wis. 183, asserts the contrary, but is opposed to the strong current of authority." A late Oklahoma case, *Johnson* v. *Acme Harvesting Mach. Co.*, 103 Pac. 638, illustrates how, when a negotiable instrument once gets beyond the point where defences may be set up as between original parties, it may continue, upon transfers as well after maturity as before, to be unaffected by collateral matters. Thus in the *Johnson* case the statement from a North Carolina case (*Neal* v. *Lea*, 64 N.C. 678), as follows, was offered: In North Carolina in an action on a note made by the defendant to one W., and by him indorsed for value when overdue to the plaintiff, it was held that the defendant could not set up, by way of counterclaim, an indebtedness of the assignor to such defendant, unless such counterclaim had attached itself to the note in the hands of the assignor previous to the assignment." See Waterman on Set-off and Counterclaim, sec. 602. We think

also the authorities shew without any exception that if the paper passes out of the hands of original payee before maturity, and from his indorsee after maturity, no equities between intermediate holder and maker can be shewn. Thus the distinction to which we allude is merely one on the question of the competency of evidence—the bona fide purchaser in any case having the right to recover, but if his title comes through unclean hands, this being shewn, the burden is cast upon him to shew his bona fides—while if an equity or set-off is claimed, the evidence to shew same is not admissible.

This distinction between illegality or criminality and an ordinary defence is further illustrated in an Iowa ruling, where it was said: "If the note was given for an illegal consideration, as charged, then the burden shifted upon the plaintiff to prove that he was the holder in due course." And this involved something more than the mere presumption arising from an indorsement regular in form. To this is cited sections of Negotiable Instruments Act and much Iowa decision.—*Central Law Journal.*

The crop of motor car accidents does not seem to decrease, notwithstanding the pressure of public opinion and legislation. What Lord Justice Vaughan Williams said on the subject has much common sense. "In cases of collision with motor cars the onus of proving that the motorist was not to blame ought to be imposed on him. Such a rule prevails, we believe, in at least one Continental State, and although it is opposed to the ordinary principle of our law of evidence, there is much to be said in its favour. At any rate, when a motor car is driven at such a speed that a slight hesitation or error of judgment on the part of another person may bring about a collision, it would not be an unfair presumption that the driver of the car is responsible for any accident in which he concerned. Certainly, as regards the great majority of the casualties, it is impossible to resist the conclusion that if the car had been driven at a more moderate speed the accident would not have occurred. The motorist who travels fast to satisfy what has aptly been called his 'lust of speed,' trusting to a vigorous horn or bell to clear a path for him, when

he meets other people is in truth a nuisance, and hardly deserves to have the rules of negligence and contributory negligence applied with any degree of nicety in his favour."

The vacancy in the Superior Court Bench of Ontario caused by the promotion of Mr. Justice Anglin to the Supreme Court of Canada has been filled by the appointment of the Hon. R. F. Sutherland, K.C., recently Speaker of the House of Commons. Mr. Sutherland was born at Newmarket, Ont., in the year 1859, called to the Bar in 1886, and has for many years been practising in the town of Windsor, in the county of Essex.

A curious dog case has just been before the courts in Vienna. A citizen had a fox terrier of which he was very fond, and, as might be expected, the dog was lost. After a tedious search the dog was found in the bacteriological institute. The terrier greeted his master joyfully; he barked, jumped and gambolled. One thing was very evident, the dog's health had not suffered by separation from his master. He was more alert, and more lively than heretofore. The master sought the cause of his liveliness, and then discovered that at the institution the dog's spleen had been removed. He was very indignant, and demanded compensation. The doctor refused, asserting that the spleen was a useless organ, and supported his contention with the story of a medical student who was under viva voce examination. "Of what use is the spleen?" asked the examiner. "Excuse me," replied the candidate for his diploma. "I did know, but I have quite forgotten." "That is most unfortunate," observed the examiner, "for you are the only man that did know, and very naturally you have forgotten it." As the spleen was of no known service, the candidate was allowed through—at least, so the doctor said. The owner of the dog was not satisfied with this reasoning, and insisted upon his demand for compensation. The doctor held to his view, and refused to entertain the demand, pointing out that the dog, since the spleen had been removed,

was more lively and shewed greater resistance to fatigue, as his distracted gambols bore witness, so, in the absence of any injury, he repudiated the claim. The master sued the doctor for damages, and was successful. Counsel for the owner of the dog argued that there were many rich collectors who never looked at their collection, never opened their coin cabinets, or visited their galleries, and bibliophiles who never opened their books. If the doctor's contention were sound, any person could break open the cabinets, the galleries, or the libraries, and take away what they pleased because they were organes superflus. It was the same with the human body; there were organs that were said to serve no purpose—for example, the appendix. If the court held that the Viennese dog had not suffered damage by the loss of his spleen, then the first surgeon a man met would have the right to inveigle him into the operating room and remove the appendix, for the pure love of his art, or to keep his hand in practice. The court took this view and awarded damages as craved.—*Law Times.*

The question of the right of the House of Lords to reject the budget, inasmuch as that august body has nothing to do with money bills, is of course a very prominent question in England at the present time. We notice that Sir Robert Finlay, who a few years ago was Attorney-General of England, and whose opinion must necessarily carry great weight, has expressed the opinion that the Lords have an undoubted and incontestible right to take this course if they see fit, asserting that to say the contrary is "to display the grossest ignorance of constitutional history." Fifteen years ago the late Lord Herschell, Lord Chancellor, whilst remarking upon the serious nature of such a step, maintained that the Lords had a legal right to throw out the budget. Lord Courtney, in his book on "The Workings of our Constitution," likewise expresses the same opinion. However this may be, it would be easy to dilate upon the necessity for great caution in the exercise of such a power, as it would be difficult to foretell the results that might ensue.

REVIEW OF CURRENT ENGLISH CASES.

NUISANCE—NEGLIGENCE—MOTOR OMNIBUS—MOTOR SKIDDING ON SLIPPERY ROAD — ACCIDENT TO PASSENGER — "RES IPSA LOQUITUR."

Wing v. *London General Omnibus Co.* (1909) 2 K.B. 652 was an action by a passenger on a motor omnibus against the owners to recover damages for injuries sustained by the plaintiff owing to the omnibus skidding on the road, which had become slippery through rain, and running into an electric light standard. No other evidence of negligence was given by the plaintiff than the above facts, and it was assumed and not disputed that motor omnibuses had a tendency to skid when the road was in that condition. The defendants called no witnesses except as to the quantum of damages, and a jury in the County Court, where the action was tried, found a verdict for the plaintiff, but the judge being of opinion that there was no evidence of negligence on the part of the defendants, dismissed the action. The Divisional Court (Bigham and Walton, JJ.) reversed the decision of the County Court judge, but a majority of the Court of Appeal (Williams and Moulton, L.JJ.) reversed the judgment of the Divisional Court (Buckley, L.J., dissenting). The majority basing their conclusion on the ground of the want of any evidence that the defendants, allowing the motor omnibus to run in the circumstances, constituted a nuisance. Buckley, L.J., on the other hand, was of the opinion that the mere fact of the defendants allowing the motor omnibus to run when the road was in that condition, of itself constituted evidence of negligence on their part.

EVIDENCE—DYING DECLARATION.

The King v. *Perry* (1909) 2 K.B. 697. This was a prosecution for murder, and the question was whether a declaration of the deceased was admissible. The prisoner was accused of procuring an abortion. Between 9 and 10 a.m. of the day of her death the deceased made a statement to her sister implicating the prisoner; this she prefaced with the words, "Oh, Gert, I shall go, but keep this a secret." She died on the same day at about 5.30 p.m. Lawrance, J., who tried the case, admitted the evidence as a dying declaration, and the Court of Criminal Appeal

(Lord Alverstone, C.J., and Darling and Lawrance, JJ.) affirmed his ruling, that court refusing to follow the decision of Lush. J., in *Reg.* v. *Osman* (1881) 15 Cox C.C. 1, in which that learned judge ruled that to be admissible the declaration must be in prospect of immediate death. The court being of opinion that it is enough that the declarant is under a "settled, hopeless expectation of death." In other words, the true test is whether all hope of life has been abandoned when the declaration is made.

STATUTE OF LIMITATIONS—ACTION ON BOND—ACKNOWLEDGMENT IN WRITING—SECONDARY EVIDENCE—EXECUTOR OF DECEASED JOINT OBLIGOR — JOINT AND SEVERAL LIABILITY — 3-4 WM. IV. C. 42, SS. 3-5—(R.S.O. C. 72, SS. 1-8; C. 146, S. 2).

In *Read* v. *Price* (1909) 2 K.B. 724, the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Channel, J. (1909) 1 K.B. 577 (noted ante p. 321). It is not necessary here to repeat what was previously said as to the applicability of this case in Ontario.

LANDLORD AND TENANT — LEASE — BEERHOUSE COVENANT BY LESSEE TO USE PREMISES ONLY AS A BEERHOUSE—NON-RENEWAL OF LICENSE—IMPOSSIBILITY OF PERFORMING COVENANT.

In *Grimsdick* v. *Sweetman* (1909) 2 K.B. 740, the action was brought by the plaintiff as landlord to recover rent. The defendant held the premises under lease dated in 1895, and in which the defendant had covenanted to continue to use the premises as a beerhouse only during the lease. The house was then licensed, but in 1905 the renewal of the license was refused, on the ground that it was not necessary for the requirements of the neighbourhood. The action was to recover a half-year's rent due in January, 1908. The defendant contended that the effect of the refusal of license was to put an end to the lease, and the County Court judge who tried the action so held, but the Divisional Court (Darling and Jelf, JJ.,) reversed his decision, holding that the lease could not be held to be at an end unless there had been a total failure of consideration, and here, though the defendant might no longer be able to carry on the business of a beerhouse, the premises were still capable of being used and enjoyed by him.

CRIMINAL LAW—CRUELTY TO ANIMALS—CRUELTY TO FOUR ANIMALS —INFORMATION CHARGING ONE OFFENCE—CONVICTION GOING BEYOND CHARGE—VALIDITY—CRUELTY TO ANIMALS ACT, 1849 (12-13 VICT. C. 92) S. 2—(CR. CODE SS. 542, 543.)

In *The King* v. *Rawson* (1909) 2 K.B. 748, the defendant was charged by the information with cruelty to four ponies between certain dates by neglecting to supply them with nourishing food. He was tried summarily and convicted and fined £5 in respect of each pony. Four convictions were drawn up, each stating that defendant had been convicted of ill-treating "a pony" in the manner alleged in the information. The defendant had no notice before conviction that he was being charged with a separate offence in respect of each pony. On a motion to quash the convictions it was held by the Divisional Court (Lord Alverstone, C.J., and Darling and Lawrance, JJ.) that the information charged only one offence, and the defendant having no notice that he was intended to be charged with more than one offence, three of the convictions were invalid, and were accordingly quashed.

ADMIRALTY—SHIP—COLLISION—SOUND SIGNAL — CONTRIBUTORY NEGLIGENCE—REGULATIONS FOR PREVENTING COLLISIONS, ART. 28.

The Corinthian (1909) P. 260. This was an Admiralty action to recover damages for a collision in the river St. Lawrence. The plaintiffs' and defendants' steamships, while proceeding one up and the other down, the river, sighted one another at a distance of something less than a mile, being then end on, within the meaning of art. 18. Those in charge of defendants' vessel, in breach of that article, starboarded, and were found to blame for the collision. Those in charge of the plaintiffs' vessel ported, in accordance with art. 18, blew a short blast according to art. 28, and steadied. Shortly afterwards they hard-a-ported, but did not blow another short blast to indicate the course taken. At the trial before Dean, J., he held that the omission of the plaintiffs' vessel to give a second blast did not affect the collision, but, on appeal, the Court of Appeal (Williams, Moulton and Buckley, L.JJ.,) came to the conclusion that the omission to give the second blast was a breach of article 28, and that the omission might have contributed to the collision, and therefore the defendants' vessel was also to blame, and the judgment was accordingly varied by finding both vessels to blame.

VENDOR AND PURCHASER — RESTRICTIVE COVENANTS—BUILDING SCHEME—RIGHTS OF PURCHASERS INTER SE—ASSIGNS.

Reid v. *Bickerstaff* (1909) 2 Ch. 305. This was an action to enforce a restrictive covenant as to building, in the following circumstances. In 1840 the defendant's predecessor had purchased a piece of land being part of an estate of about 64 acres, which was vested in trustees for sale, and for himself, his heirs and assigns, covenanted with the vendors, their heirs and assigns, to observe certain restrictions relating to building on the land purchased. Subsequently parts of the same estate were sold to the plaintiffs' predecessors in title, who gave similar covenants respecting the land purchased by them, but there was nothing to shew that the plaintiffs' predecessors knew of the covenant of 1840, nor was there any reference thereto in the conveyances. The trustees at intervals sold other portions of the estate, taking from the purchasers varying restrictive covenants of a like nature, and eventually the whole estate was disposed of and became a residential quarter. Joyce, J., who tried the action, came to the conclusion that the evidence established the existence of a general building scheme affecting the estate of the common vendors, and that the plaintiffs were entitled to an injunction. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) however, took a different view, and held that the plaintiffs had failed to establish the essential requisites of a building scheme, namely, definite reciprocal rights and obligations extending over a defined area, and that inasmuch as the benefit of the covenants in the deed of 1840 had not been expressly assigned to the plaintiffs' predecessors, nor so annexed to the land of which they were assigns as to pass by a mere conveyance of that land, the plaintiffs were not entitled to succeed; and the judgment of Joyce, J., was therefore reversed.

HEIRLOOMS—TRUST OF CHATTELS AS HEIRLOOMS—CHATTELS TO BE ENJOYED WITH MANSION HOUSE—TENANT IN TAIL—VESTING.

In re Chesham, Valentia v. *Chesham* (1909) 2 Ch. 329. By a settlement made in 1877 certain chattels were vested in trustees "upon trust to permit the same to be used, held and enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the mansion house under the limitations thereof herein contained," yet so that they should not vest absolutely in any person thereby made tenant in tail male by pur-

chaser who should not attain the age of twenty-one years. The eldest son attained 21 years, but died in the lifetime of the tenant for life. On the death of the tenant for life, in 1907, the second son, an infant, became tenant in tail male in possession of the mansion, and as such claimed to be entitled to the heirlooms. Eve, J., who tried the action, held that they had vested absolutely in the eldest son, and passed, on his death intestate, to his legal personal representative; but the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.,) reversed his decision, holding that although the general rule as established by *Foley* v. *Burnell*, 1 Bro. C.C. 274; 4 Bro. C.C. 319, is, that you cannot strictly entail personal property, and that chattels which are given by reference to limitations in strict settlement of real estate, vest absolutely in the first tenant in tail in esse; yet there is also a well-settled rule that subject to your not infringing the rule against perpetuities, you may by sufficient words indicate that the only person who is to have a transmissible interest in the heirlooms is a person who de facto becomes a tenant in tail in possession of the real estate by reference to the limitations of which the chattels are given; and in the present case the right to the enjoyment of the chattels being limited to the person entitled to the enjoyment of the mansion house, and the eldest son never having been so entitled, it was held that they passed to the second son as tenant in tail in possession, but subject to being divested in case he should not attain twenty-one years.

ADMINISTRATION — WILL — EXECUTORS IN ENGLAND — ASSETS IN INDIA—FOREIGN ADMINISTRATOR — FRAUD — MISAPPLICATION OF ASSETS BY FOREIGN ADMINISTRATOR—PURCHASER WITHOUT NOTICE OF FRAUD—REVOCATION OF LETTERS OF ADMINISTRATION.

Crastor v. *Thomas* (1903) 2 Chy. 348, although turning on the effect of an Indian statute, is nevertheless deserving of attention. A gentleman residing in England died, leaving a will which was duly proved in England in 1898. At the time of his death the testator had assets in India consisting inter alia of shares in the Bank of Bengal, of the existence of which the executors were ignorant until 1903. In the meantime a person who had been the agent of the deceased in India, by means of a forged power of attorney, which was represented to have been given by the deceased's sole heir at law, and on a representation that the deceased had died intestate, obtained a grant of letters of administration in India, under which he realized the Indian assets and

made away with the proceeds. Some of the shares were sold in open market to the defendant Thomas, who bought them for value with notice of the fraud. Subsequently the Indian letters of administration were revoked and new letters granted to the Administrator-General in India. This official sued the sureties of the fraudulent administrator, but failed to recover more than sufficient to pay costs. The present action was by the English executors and the Indian administrator and Thomas to recover the value of the shares purchased by Thomas, but Neville, J., came to the conclusion that under the Indian statute the revocation of the letters obtained by fraud did not have the effect of annulling them ab initio, but only avoided them from the date of revocation, and therefore persons like Thomas, dealing bona fide with the de facto administrator, were protected, and the plaintiffs' action therefore failed. The provision of the Ontario Surrogate Act, R.S.O. c. 59, ss. 63, 64, seem also to protect bona fide purchasers for value of assets from administrators whose letters are subsequently revoked; bona fide payments are protected, and it would seem that payments for assets as well as payments of debts would be protected.

TRADE MARK—DISTINCTIVE MARK—"LAWSON TAIT"—ADAPTED TO DISTINGUISH.

In re Whitfield's Bedsteads (1909) 2 Ch. 373. This was an application for the registration of the words "Lawson Tait" as applied to a particular pattern of bedsteads manufactured by the applicants. It appeared that by an agreement made in 1898, between the predecessors of the applicants and one Dr. Lawson Tait, it was agreed that Dr. Tait would permit them to sell a certain pattern of bedstead manufactured by them as the "Lawson Tait" bedstead on payment of a royalty. The bedstead in question was made in three parts, and had been approved by Lawson Tait in 1881, when he gave verbal permission for the use of his name upon these bedsteads, and it appeared that since that date the name "Lawson Tait" had been continuously applied to bedsteads so constructed by the applicants and their predecessors, and to nothing else, and that the bedsteads had become well known to the trade as the Lawson Tait bedsteads. In these circumstances, Eve, J., held that the name "Lawson Tait" must be deemed to be a distinctive mark in respect of the bedsteads to which it was applied, and was proper to be registered as a trade mark.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] LOVELESS *v.* FITZGERALD. [Oct. 5.

Lease—Covenant—Assignment without leave—Right to renewal — Notice—Partners.

A lease for a term of five years containing a covenant by the lessee not to assign without leave from the lessor, and a provision that the lessee, on giving six months' notice to the lessor prior to the expiration of the term, and having performed all their covenants and agreements, would be entitled to a renewal for a further term of five years, was assigned, with the lessor's consent, to two partners in business who gave the required notice for renewal. Between the time of giving such notice and the end of the five years, one partner, without obtaining the lessor's consent, assigned to the other all his interest in the lease.

Held, affirming the judgment of the Court of Appeal (17 O.L.R. 254), that such assignment was a breach of the above-mentioned covenant which deprived the remaining lessee of his right to the renewal, and it made no difference that the breach occurred after the giving of notice by the lessees. Appeal dismissed with costs.

Gibbons, K.C., and *G. S. Gibbons*, for appellant. *Shepley*, K.C., and *Judd*, K.C., for respondents.

B.C.] BROWNELL *v.* BROWNELL. [Oct. 20.

Practice—Adduction of evidence—Cross-examination at trial—Vexatious and irrelevant questions—Discretionary order—Propriety of review.

The judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination, and where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence an appellate court is not justified in ordering a new trial on the ground that counsel has been unduly res-

tricted in cross-examination by a question being disallowed which did not, at the time it was put to the witness, have relevancy to the issues.

IDINGTON, J., dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered. Appeal allowed with costs.

Newcombe, K.C., for appellant. *Travers Lewis*, K.C., for respondent.

Ex. C.] CHAMBERLAIN *v.* THE KING. [Oct. 20.

Crown—Negligence—Injury on public work—Government railway—Fire from engine.

To render the Crown liable for injury to person or property under s. 20, sub-s. (c) of the Exchequer Court Act, R.S. 1906, c. 140, such injury must occur on a public work. Hence, where property adjoining the right of way of the Intercolonial Railway is destroyed by fire caused by sparks from a passing engine, the owner cannot recover damages from the Crown under this sub-section. Appeal dismissed with costs.

Curry, K.C., and *Mott*, K.C., for appellant. *Chrysler*, K.C., and *McAlpine*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Cartwright, Master.] [Sept. 29.

HAMILTON BRIDGE WORKS CO. *v.* GENERAL CONTRACTING CO.

Mechanic's lien—Enforcing lien—Contemporaneous action—Staying proceedings.

The plaintiffs began a summary proceeding against the defendants under the Mechanics' Lien Act, and also began an action against them to recover the sum of money in respect of which the lien was sought to be enforced.

Held, that a plaintiff is at liberty to recover a personal judgment without prejudice to a proceeding under the Mechanics' Lien Act either contemporaneous or subsequent thereto. The remedies under the two proceedings were quite different. In the personal action there may be a much more speedy recovery, as

trials under the Mechanics' Lien Act are often long drawn out, and there may be an appeal to a Divisional Court. The proceedings under the Act are also complicated by the claims of other lien-holders, and it is only after a sale in some cases that a plaintiff receives a dividend on his claim and a personal judgment for the deficiency. Motion dismissed; costs in the cause, the point being a new one.

Kilmer, K.C., for defendants. *Mowat*, K.C., for plaintiffs.

Riddell, J.] REX *v.* VAN NORMAN. [Oct. 1.

Hawkers' and peddlers' license—Conviction for breach—Retail dealers—Mode of vending.

Motion to quash conviction of defendant, who was tried before a justice of the peace for violation of a by-law of the county of Grey in selling stoves and ranges without a peddler's license. The defendant claimed to be simply an agent for a manufacturing company, and that the goods sold by him were the manufacture of the company, and that he should not therefore be obliged to take out a license. The magistrate held that the defendant was a purchaser from the company, and that an agreement under which the defendant claimed to be only an agent was not bona fide, and fined the defendant accordingly for breach of the by-law.

Held, 1. The onus of satisfying the magistrate that the defendant came within the exception in s. 583 (14) of Con. Mun. Act, 1903, as a bona fide servant of the manufacturer of the goods sold, lay upon the defendant as provided by 6 Edw. VII. c. 34, s. 26 (O.), and the magistrate was within his jurisdiction in determining against the bona fides of defendant.

2. While it was not proved that the sale was not made to a retail dealer, the same provisions of the Ontario Act and of the Dominion Act of 8 & 9 Edw. VII. c. 9, sch. 2, applied.

3. The definition of "hawker" given in s. 583 (14) (a) of the Act of 1903 is not exhaustive: *Reg.* v. *Coutts*, 5 O.R. 644.

4. The defendant claimed to have made only one sale, and that he therefore was not within the purview of the by-law. He admitted however that he went "from place to place" with ranges for sale, though there was only "one range on one occasion only"; but as there was no limitation as to "going from place to place," the defendant was within the statute and by-law: *Reg.* v. *Rawson*, 22 O.R. 467.

5. Such a by-law may be attacked upon a motion to quash conviction: *Reg.* v. *Cuthbert*, 45 U.C.R. 19.

Raney, K.C., for defendant. *Middleton*, K.C., for informant.

Falconbridge, C.J.K.B., Teetzel, J., Riddell, J.] [Oct. 8.

TOWNSHEND *v.* RUMBALL.

Covenant in restraint of trade—Liquidated damages or penalty.

Appeal by the defendants from the judgment of the County Court of Essex in favour of the plaintiffs in an action for the recovery of $500 as liquidated damages for breach of a contract. The defendants sold out part of the stock-in-trade of a business carried on by them in a village, to the plaintiffs. The defendants retained some of their stock. They covenanted not to carry on a similar business within five miles of the village for a period of ten years, and also that they would not sell the stock retained to any one except those engaged in the same business in the village, and that they would "close their doors." For any breach the defendants agreed to pay the plaintiffs $500 as liquidated damages.

The County Court judge found that the defendants had made two sales of hardware in breach of the agreement, and that the plaintiffs were entitled to recover the $500 as liquidated damages.

The appeal was heard by FALCONBRIDGE, C.J.,K.B., TEETZEL and RIDDELL, JJ.

Held, that, notwithstanding the use of the words "liquidated damages" in the agreement, the $500 was a penalty (see Encyc. of Laws of England, vol. 4, p. 325), but that an action lay for the actual damage sustained, and that as the plaintiffs had proved damages, they were assessed at $5. Judgment to be entered for the plaintiffs for that amount, with an injunction against further breaches.

Clarke, K.C., for defendants. *Wigle*, for plaintiffs.

Teetzel, J.] [Oct. 16.

RE DALE AND TOWNSHIP OF BLANCHARD.

Municipal law—By-law—Voting on—Court of Revision —Jurisdiction.

Motion to quash by-law of the township authorizing the issue of debentures for granting aid to a railway. It was

objected that the voting was not upon the list of voters based upon the last revised assessment roll as required by s. 348 of the Con. Mun. Act, 1903. An appeal was taken to the Court of Revision, which however sat on an unauthorized day.

Held. The Court of Revision is a judicial body appointed by the Act, and obtains its whole jurisdiction from the provisions of the Act. It was acting entirely beyond its jurisdiction in assuming to sit and adjudicate at a time prohibited by the statute, and anything assumed to be done at such sitting was void, and the assessment roll which it purported to revise was not the last revised assessment roll of the municipality at the time of the election, within the meaning of s. 348.

See *Hickey* v. *Township of Orillia*, 17 O.L.R. 317.

C. C. Robinson, for applicant. *J. C. Makins*, for the township.

Meredith, C.J.C.P.] [Oct. 18.

TOWNSEND *v.* NORTHERN CROWN BANK.

Practice—Statement of claim—Particulars—Inability of plaintiff to give—Postponement till after examination of defendants' officers for discovery.

Appeal by the plaintiff from an order of the Master in Chambers requiring the plaintiff to deliver to the defendants "full particulars embracing the full description of each of the conveyance, assignments and transfers referred to in the 5th sub-clause of paragraph 3 of the statement of claim," confining the plaintiff at the trial to the particulars which he should deliver pursuant to the order, and directing that in default of delivery of the particulars the sub-clause should be struck out without further order. The plaintiff was the assignee for the benefit of creditors of B., and the action was to set aside, either as fraudulent against creditors or as fraudulent preferences, certain securities alleged to have been given by B. to the defendants. In sub-clauses 1 to 4 particulars were given of certain of the securities which were impeached. Sub-clause 5 stated that B. also executed other conveyances, assignments and transfers to the defendants.

MEREDITH, C.J., said (after consultation with other judges who approved his view) that the appeal raised a somewhat important point of practice, whether such an order should be made as was made by the master, or an order allowing the plaintiff

to have discovery from the defendants' officers before the statement of defence was delivered, and requiring him to deliver particulars after discovery had been obtained. The practice given effect to by the Master appeared to be an inconvenient and cumbrous one, as applied to a case in which a plaintiff was unable to give the particulars until he had had an opportunity of examining the defendant within whose knowledge the particulars wholly lay. . . . To permit the plaintiff to have discovery now and to require the particulars to be delivered after the discovery is had, does no injustice to the defendants, and avoids the necessity of an amendment of the statement of claim, and does not put the plaintiff, as he is put by the Master's order, in such a position that he may never be able to get the discovery necessary to enable him properly to frame his pleading. . . .

Laidlaw, K.C., for plaintiff. *Arnoldi*, K.C., for defendants.

Meredith, C.J.C.P.] [Oct. 20.

RE MCGLOGHLON AND TOWN OF DRESDEN.

Municipal law—Erection of school building—By-law authorizing —Site of school house—Foundation for by-law.

Motion to quash part of a by-law of the town for the raising a loan to build a school house upon the ground that the municipal council by the by-law assumed to fetter the power of the school board in the selection of a site for the school house.

Held, 1. The by-law must be quashed in its entirety. To quash that part of which provides that the money to be raised shall be paid over to the school board for the purpose of building a school house on the site now occupied by the present school building would be to bind the corporation to an expenditure not sanctioned by the ratepayers or authorized by by-law of the council.

2. The selection of the site must be determined by the school board and not by the council. The council may refuse to comply with the request of the school board to raise the money to build a school house if it is not satisfied with the site selected by the board, or, if the board refuses to say whether the school house is to be erected, the final appeal being to the electors, to whom a by-law must be submitted in the terms of the application of the board.

3. The foundation for the by-law should have been an application to the council by the board to pass a by-law for borrowing

money by the issue and sale of debentures for the purpose of erecting a school house, and in this case there was no such application as required by 9 Edw. VII. c. 89, s. 43.

E. Bell, for applicant. *Lewis*, K.C., for corporation.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Oct. 4.

ANGLO-CANADIAN LAND CO., LTD. *v.* GORDON ET AL.

Vendors and purchasers—Agreement to enter into an agreement for purchase of land—Description—Counterclaim for return of deposit.

Decision of Macdonald, J., so far as noted ante, p. 369, affirmed; but his decision that defendant Gordon was entitled to recover back the money he had paid under his agreement of purchase reversed on the ground that, although he had not signed the formal agreement sent to him and it was not in accordance with the preliminary agreement, yet he had kept the formal agreement a long time and tried to deal with the land as his own and did not object to the terms of the formal agreement, or to the nature of the plaintiff's equitable title, until after the commencement of the action.

Semble. The defendant may yet be entitled to the return of his deposit, if the plaintiffs do not within a reasonable time get in the title contemplated by the preliminary agreement and prepare and tender a formal agreement as provided for, but not if he rests his defence solely on the ground that the agreement he signed is vague and uncertain and insufficient under the Statute of Frauds.

Hoskin, K.C., for plaintiffs. *MacKay*, for defendant.

Full Court.] HYNDMAN *v.* STEPHENS. [Oct. 14

Jury trial—Action against company for damages for personal injury to employee—Questioning defendant's witness before jury as to whether the company is not indemnified against loss in the event of an adverse verdict—New trial.

It is improper for plaintiff's counsel at the trial before a jury of an action by an employee of a company for damages for

a personal injury suffered by him in the course of his employment, to ask a witness for the defendants if the company is indemnified against loss in the event of an adverse verdict. The mere asking of such a question, though the witness be not required to answer it, and does not answer it, is sufficient to warrant the court in setting aside a verdict for the plaintiff and ordering a new trial.

Longhead v. *Collingwood Shipbuilding Co.*, 16 O.L.R. 65, 21 O.W.R. 697; *Coe* v. *Van Why*, 3 A. & E. Annotated Cases 552, and *Casselman* v. *Dunfie*, 65 N.E.R. 494, followed.

Full Court.] [Oct. 18.

JOHNSON *v.* CANADIAN NORTHERN RY. CO.

Lord Campbell's Act—Action for death happening out of the jurisdiction — Necessity for administration granted by authorities in place where cause of action arose—Workmen's Compensation Act.

One Johnson, while engaged as a switchman on defendants' railway at Port Arthur, Ont., met with injuries which resulted in his death. The plaintiff, his widow, was appointed administratrix of his estate by a Manitoba Surrogate Court, and brought this action for damages, claiming both at common law and under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178.

Held, following *Couture* v. *Dominion Fish Co.*, noted ante p. 572, that the plaintiff could not sue under the corresponding Ontario Act without having been first appointed administratrix by an Ontario court, and that as the injury took place in Ontario the Manitoba Act cannot apply, and there being no such right of action at common law, the entry of a nonsuit by the trial judge was right.

Fullerton and *Moody*, for plaintiff. *Clarke*, K.C., for defendants.

Full Court.] SHILLINGLAW *v.* WHILLIER. [Oct. 20.

Slander—Costs—Substantial or nominal damages.

7 & 8 Edw. VII. c. 12, s. 3, in effect repeals both sub-s. (a) of Rule 931 of the King's Bench Act and s. 13 of the Libel Act, R.S.M. 1902, c. 97, as to the right of a plaintiff in an action of slander to costs whether he recovers substantial or only nominal

damages, so that the ordering of costs is in the absolute discretion of the trial judge.

Sec. 2 of c. 30 of 9 Edw. VII., amending s. 13 of the Libel Act, was passed inadvertently and without giving to s. 3 of c. 12 of 7 & 8 Edw. VII. the effect it has upon a proper construction being placed upon it.

Garnett v. *Bradley*, 3 A.C. 944, followed. *Curran*, for plaintiff. *McKay*, for defendant.

KING'S BENCH.

Metcalfe, J.] VON FERBER *v.* ENRIGHT. [Sept. 23.

Practice — Production of documents — Evidence exclusively in support of case of party producing.

A party to an action is not entitled to discovery of the evidences in the possession of the opposite party which exclusively relate to the case of the latter and the truth of a statement to that effect respecting any particular document made in the affidavit on production of documents sworn to by one party cannot be questioned on an application by the opposite party to compel production of that document. *Lyall* v. *Kennedy*, 8 A.C. 217; *Bidder* v. *Brydges*, 29 Ch. D. 29, and *Morris* v. *Edwards*, 15 A.C. 309, followed.

Macneil, for plaintiff. *Bergman*, for defendant.

Mathers, J.] FERNIE *v.* KENNEDY. [Oct. 15.

Pleading—Practice—Counterclaim—Third party.

Action by registered owner of land to remove a caveat filed by defendant.

Held, that the defendant had, under Rule 294 of the King's Bench Act, R.S.M. 1902, c. 40, the right to set up by way of counterclaim that a third party had agreed in writing to sell the land to the defendant, that such third party was a co-owner with the plaintiff, and in executing the agreement, had acted on behalf of himself and the plaintiff, and was authorized to do so, and to claim specific performance of the agreement against both; but there was nothing in the Rules to permit the defendant to set up a claim in the alternative against such third party alone for

damages for breach of warranty of authority to make the agreement.

Hoskin, K.C., for plaintiff. *Manning*, for defendant.

Macdonald, J.] [Oct. 20.

SEYMOUR *v.* WINNIPEG ELECTRIC RAILWAY CO.

Practice—Trial by jury.

It is proper to order, on the application of the plaintiff, under s. 59 of the King's Bench Act, R.S.M. 1902, c. 40, the trial by a jury of an action for damages caused by the alleged negligence of a street railway company resulting in the plaintiff being struck and injured by one of the company's cars.

Cohen, for plaintiff. *Anderson*, K.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Townshend, C.J.] BLIGH *v.* WARREN. [Sept. 25.

Libel—Pleas struck out as irregular and embarrassing—Immaterial matter—Mitigation of damages—Costs.

Defendant wrote a letter to the Attorney-General of Nova Scotia asking for plaintiff's removal from the office of justice of the peace on the ground that he was found guilty of stealing moneys. To an action for libel defendant pleaded inter alia that he held the rank of commander in the Royal Navy, and was possessed of extreme views in relation to matters pertaining to the prompt discharge of their duties by civil, naval, military and other servants of the Crown, and that the words complained of were written in good faith and without malice, and in the public interest, and were not intended to charge the plaintiff with any crime, but for the purpose of calling the attention of the Attorney-General to plaintiff's conduct in not making a return under certain convictions, which conduct defendant believed had a tendency to reflect on the judicial office, etc.

Held, 1. The allegation of defendant's rank was immaterial, as it could not affect his liability for uttering the libel complained of unless shewn and pleaded to be in connection with his duties as such.

2. The matters alleged in the plea must be struck out as irregular and embarrassing, the costs to be plaintiff's costs in the cause.

An action for libel must be met either by a plea of denial or justification on the ground of privilege, or that the words complained of are true, and where the defendant wishes to avail himself of matters in mitigation of damages he must give the notice as required by the rules as stated in An. Pr. 1909, p. 251.

Wasson v. *Walters*, L.R. 4 Q.B. 73, distinguished.

Roscoe, K.C., for motion. *Power*, K.C., contra.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Oct. 18.

COUGHLAN & CO. *v.* NATIONAL CONSTRUCTION CO. AND JSONG MONG LIN.

AND

MCLEAN *v.* LOO GEE WING.

Mechanics' liens—Filing of claim for lien—Time of completion of work—Notes discounted by bank—Notice to owner—Mechanics' Lien Act Amendment Act, 1907, *c.* 27, *s.* 2.

By agreement dated Dec. 23, 1907, the defendant, the National Construction Company, agreed with the defendant Jsong Mong Lin to construct a building upon the property of the last-named defendant for the sum of $80,000. The plaintiffs furnished material from time to time during the course of construction. The Construction Company got into financial difficulties and was unable to complete its contract. On Oct. 24, 1908, a deed of the property from Jsong Mong Lin to her husband, Loo Gee Wing, was executed and deposited in the Land Registry Office with the application to register same. On Oct. 28, 1908, the plaintiffs' solicitors sent to the defendant Jsong Mong Lin, by registered mail, a notice addressed to her, care of Loo Gee Wing, Victoria, B.C., which notice was in the following terms: "We beg to notify you that J. Coughlan & Sons intend to file a mechanics' lien against your property in the City of Vancouver, being lots 1 and 2, westerly 10 feet of lot 3, block 29, district lot 541, for the

balance due, amounting to $5,180.92, for goods and materials supplied and work done by the National Construction Company on the building on the above-mentioned lots, if not paid to us at once." On the same day that this notice was posted the plaintiffs filed a mechanics' lien in respect of their claim in the County Court office at Vancouver, and on Nov. 27, 1908, commenced action to enforce same. McLean Bros. and other lien claimants had meanwhile commenced their actions in which Loo Gee Wing was made party defendant as owner, and on Dec. 7, 1908, an order was made by Grant, Co.J., upon the application of Loo G. Wing, consolidating this and the other actions pending. McLean Bros. had served upon Loo Gee Wing, a notice similar in terms to the above. On the trial the claim of the present plaintiffs (J. Coughlan and Company) came on first for hearing, and upon the conclusion of the evidence the learned judge dismissed the plaintiffs' action on the grounds that Loo Gee Wing, the owner of the property, was not before the court in the *Coughlan* case, that there was no notice given to the owner of the property in the terms of s. 2 of the Mechanics' Lien Act Amendment Act, 1907, c. 27, and that such notice as was given was not given within 15 days before the completion of the work.

Held, 1. Sec. 2 of the Mechanics' Lien Act Amendment Act, 1907, c. 27, has no application where action is begun more than 15 days before the completion of the work.

2. "15 days before the completion of the work" means 15 days before the completion of the work of the building as a whole and not 15 days before the completion of the delivery of the material by the vendor.

Sec. 24 of the Mechanics' Lien Act Amendment Act, 1900, enacts that where in any action for a lien the amount claimed to be owing is adjudged to be less than $250, the judgment shall be final and without appeal.

Held, that this applies only where a sum of money has been awarded, and that the existence of a valid lien is pre-supposed.

The plaintiffs, Coughlan and Company, having during the course of construction given a receipt for payments which they had never received,

Held, that they were estopped from claiming such amount against the owner.

Effect on lien of accepting note considered.

Reid, K.C., and *R. M. Macdonald*, *A. D. Taylor*, K.C., *Woodworth*, *Griffin*, and *Brydone-Jack*, for various parties.

Book Reviews.

The Legislation of the Empire; being a survey of the legislative enactments of the British Dominion from 1898 *to* 1907. Edited under the direction of the Society of Comparative Legislation, with a preface by the Rt. Hon. The Earl of Rosebery. 4 volumes. London: Butterworth & Company; Toronto: Canada Law Book Co., Ltd. 1909.

The study of comparative legislation has been generally looked upon as a subject of academic interest. The four volumes of this new work will go far to remove such an idea. While reading them one is impressed with the fact that the knowledge of the laws of other countries within the Empire will do much to strengthen Imperial relations.

In compiling the work the object has been to bring out prominently the features of importance in each new law passed during the years 1898 to 1907, a period during which statutes have been turned out with a rapidity never seen before. This work is of incalculable advantage for the legislators of any country, for while proposing legislation on any topic they can ascertain what similar legislation there is in other colonies and how it is worked.

From another standpoint too the study of comparative legislation is advantageous. It is both necessary and useful to study the Acts passed in other countries, to find out what provision another country has made with regard to a certain matter of public interest, and how far its statutes can be usefully adopted.

The ten years just passed afford peculiar advantages for such a comparison as has been made. 25,000 statutes have been passed in eighty different legislatures for four hundred millions of people.

The Commonwealth of Australia has been created, the Provinces of Alberta and Saskatchewan have been constituted, Lagos and Southern Nigeria fused and the South African constitution has grown from conditions following the war in South Africa.

No library or government office can afford to be without this work. Every lawyer who takes any part in public life must be interested in it and it will be found of immense practical value, even in ordinary practice.

The price in Canada, we understand, has been fixed at $12.00 for the 4 volumes, although in England the work is published at 50s.

The Study of the law of Mortgages. By CHARLES H. S. STEPHENSON, Solicitor. London: Effingham Wilson, 54 Threadneedle Street. 1909. 202 pp. Price, 7s. 6d.

This is one of a series known as Wilson's Legal and Useful Handy Books, all of which seem to be good in their way, and are especially intended for the use of the following students of the law (1) such as intend to make a special study of the subject in preparation for the law degree, (2) such as desire to obtain honours at their solicitor's final examination, (3) such qualified lawyers as desire to possess a handy, but at the same time a tolerably complete, guide to the solution of questions ordinarily arising on the subjects treated.

An Epitome of Company law for the use of students. By W. H. HASTINGS KELKE, barrister-at-law. 2nd edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1909. 199 pp. Price, 6s.

This is one of the "Students' Series" initiated by the enterprise of Sweet & Maxwell which is apparently meeting with the success it deserves. Every book on English company law brings the reminder of how convenient it would be if the system there and in this country were the same. Whilst there is much in common, an elementary book of this character is not of as much use in this country as it would otherwise be.

The effect of war on contracts and on trading associations in territories of belligerents. By COLEMAN PHILLIPSON, M.A., Barrister-at-law. London: Stevens & Haynes, Bell Yard. 1909.

This little book of 114 pages presents in a slightly modified and enlarged form the Quain prize essay in the department of Comparative Law at University College, London, 1908. The author in his preface, or, as he styles it, his "Foreword," says that this essay is simply a suggestion of the form that might well be taken by a work of much larger dimensions of this branch of international law. The list of writers quoted or referred to give us some idea of the extent of his research. Wars are not to cease in this dispensation, peace conference enthusiasts to the contrary notwithstanding; the need, therefore, of such a help as this author gives to those who have to litigate by reason thereof will still continue.

United States Decisions.

A railroad company is held, in *Galveston, H. & S.A.R. Co.* v. *Matzdorff* (Tex.) 112 S.W. 1036, 20 L.R.A. (N.S.) 833, not to be bound to keep its station safe as for invited guests for a mere friend or acquaintance of an intending passenger who resorts to it to see him begin his journey.

A railway company is held, in *Cogswell* v. *Atchison, T. & S. F.R. Co.* (Okla.) 99 Pac. 923, 20 L.R.A. (N.S.) 837, to be bound to exercise ordinary care for the safety of a person who is upon his premises for the purpose of meeting an incoming passenger, and to be liable to such person for injuries sustained on account of the railway company's failure to exercise such care.

A company furnishing electricity for the lighting of a shop, the inside wiring of which was done under an independent contract with the owner thereof, and accepted by him and approved by the city inspector, is held, in *Minneapolis General Electric Co.* v. *Cronin* (C.C.A.) 116 Fed. 651, 20 L.R.A. (N.S.) 816, not to be liable for injury to a person who is in such building as a mere licensee, caused by reason of such inside wiring having become imperfectly insulated by the act of the owner, without notice thereof to the electric company.

An agreement by a retiring partner "not to engage for the next two years" in the same city in competition with a business sold, in "the manner aforesaid," is held, in *Siegel* v. *Marcus* (N.D.) 119 N.W. 358, 20 L.R.A. (N.S.) 769, to be violated by the entering of such partner into the employ, as a managing clerk, of a third person whom such retiring partner was instrumental in procuring to open a rival business adjacent to that of the original firm, and it is held that such violation should be enjoined at the suit of the purchasing partner.

The contributory negligence of a child employed in violation of the terms of a statute is held, in *Stafford* v. *Republic Iron & Steel Co.*, 238 Ill. 371, 87 N.E. 358, 20 L.R.A. (N.S.) 876, to be no defence to an action against the master for personal injuries received by him in consequence of such employment, although he had temporarily abandoned the work he was employed to do, and was attempting to perform work which he had been forbidden to do.

The owner of a horse left by his servant unhitched and unattended in a public street is held, in *Corona Coal & I. Co.* v. *White* (Ala.) 48 So. 362, 20 L.R.A. (N.S.) 958, to be liable for injury done to others by its running away.