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DAMAGES FOR BREACH OF CONTRACT FOR NON-DELIVERY OR NON-ACCEPTANCE OF SHARES.

In two recent cases in Ontario, the question has arisen as to the proper measure of damages for breach of a contract to take or deliver shares, and in both of these cases the conclusion arrived at appears to have been unsatisfactory from a legal point of view, and based on what we cannot help regarding as erroneous principles. In the first of these cases, *Sharpe* v. *White*, 2 O.W.N. 849, the action was by the vendor against the vendee for breach of a contract for the sale of shares. It would appear from the statement of facts in the note of the judgment, that the plaintiff contended that the damages should be assessed at the difference of the price agreed to be paid at the date of the breach, and the price the shares were then worth; but that the defendant claimed that the shares had subsequently appreciated in value and that such subsequent appreciation must be taken into account in estimating the plaintiff's damages. The referee refused to give effect to this contention, and Clute, J., affirmed his decision. With great respect to the learned judge we venture to think both he and the referee proceeded on an erroneous principle. The object of the action was to compensate the plaintiff for the loss he had sustained by reason of the defendant's default in carrying out the contract, but if and when those damages come to be ascertained it was found that the plaintiff had actually sustained none, but had in fact made a gain by reason of the defendant's default; it seems to offend against common sense and law and justice to suppose that he could in that event recover more than nominal damages. An action for breach of contract of this kind must be amenable to the same principles as govern other actions, and if it can be demonstrated at any time up to the assessment of damages that no loss has been actually sustained, nothing but nominal damages ought to be recoverable.

The case of *Oldershaw* v. *Holt*, 12 Ad. & E. 590, is instructive on this point. That was an action for breach of a contract contained in an agreement for a building lease for 99 years. The rent was to be £115 a year and the lessee contracted to build houses, and in default that the plaintiff might re-enter. Before the expiration of 5 years he made default and the plaintiff re-entered and subsequently re-let the premises for the residue of the former tenant's term at a peppercorn for the first year, £70 for the second, and £140 for the rest of the term. The plaintiff claimed the difference between the rent he was to have received from the defendant and the rent he was to receive for the first two years under the second lease. It was admitted that the new lease would ultimately be more advantageous than the first if the tenant continued solvent and fulfilled his engagement. The jury in these circumstances gave a verdict for the defendant, and the court refused a new trial, holding that the jury might properly take into account in estimating the damages the increased rent secured under the second lease. In the recent case of the *British Westinghouse Co.* v. *Underground Ry.* (1911) 1 K.B. 575, the Court of Appeal held that it is the duty of a contracting party to minimize the damages he sustains by reason of a breach of a contract, and that he may recover an outlay which he incurs for the purpose of diminishing, and which in effect does diminish the damages.

The principle on which both these cases proceed is that the actual loss is what is recoverable and that if the plaintiff does, as a matter of fact, save himself from loss he cannot recover substantial damages from the defendant. This principle was recognized and acted upon by the Judicial Committee of the Privy Council in *Erie County Natural Gas Co.* v. *Carroll* (1911) A.C. 105.

Clute, J., quotes the following passage from Halsbury's Laws of England: "In an action for the non-delivery of shares the measure of damages is the difference between the contract price and the market price at the date of the breach."

In the case before the court, however, the action was not for non-delivery, but for non-acceptance, which is a vitally different

situation. The proposition quoted is based on the theory that the purchaser can on that day go into the market and buy shares, and the difference between the price he would then have to pay and the price he has contracted to pay forms the measure of damages. But when the vendor retains his shares and ultimately sells them at a profit, to say that he can still recover substantial damages for breach of a contract to sell them at a less price is certainly against reason and common sense, and we also venture to think unsupportable in law.

The other case to which we referred is that of *Goodall* v. *Clarke*, 23 O.L.R. 57, which was an action for breach of contract for delivery of shares, to which the proposition above quoted would apply, but in that case there was the difficulty that the shares had no recognized market value. They were mining shares of fluctuating and uncertain and speculative value. An injunction had been obtained pendente lite to restrain the defendant from parting with the shares in question, which had been subsequently dissolved, on consent, to enable the defendant to carry out a sale of them at 26c. a share. A sale had been made in exceptional circumstances about the time of the breach at 40c. and the referee had fixed the damages on that basis. Meredith, C.J., on appeal from his report, fixed them on the basis of 26c. per share, the price at which they had been actually sold, a Divisional Court fixed them on a basis of 33⅓c. on some sort of indiscoverable rule of thumb, and the Court of Appeal affirmed that decision, Meredith, J.A., dissenting; the reasoning of Mr. Justice Meredith seems unanswerable and to carry conviction. While there was reasonable ground for fixing the value of the shares at 26c. there appears to have been no evidence at all for fixing it at 32½c., there being no evidence whatever of any sale at that figure, and though, as Mr. Justice Meredith points out, the onus was on the plaintiff of proving the damage he had sustained, yet the Divisional Court and the Court of Appeal seem to have come to the conclusion that the court was at liberty to guess at the damages, and to determine them on some sort of conjecture and not on the evidence adduced. If we had a receptacle for "bad law" we are inclined to the opinion that both of these cases would be fitting subjects for such a depository.

SIR ELZEAR TASCHEREAU.

The death of Sir Henri Elzear Taschereau, which took place at his home in Ottawa on the 14th of April, has removed from amongst us a man who, in his day, was eminent at the Bar, on the Bench and in public affairs; in private life esteemed and respected by all who knew him. Born in 1836 at Ste. Marie de la Beauce, in the Province of Quebec, he died at the age of 75, full of years and of well-earned honours.

Sir Elzear was educated at the Seminary of Quebec. He studied law, was called to the Bar in 1857, and practised in the city of Quebec, being at one time partner of the late Mr. Justice Blanchet. He was appointed K.C. in 1867, and in the following year was appointed clerk of the District of Quebec. In 1861 he was elected to Parliament for the County of Beauce, was re-elected in 1863, but defeated in 1867, which was the end of his political career. While in Parliament he was a supporter of Macdonald and Cartier, and of the measures which led to the Confederation of Canada.

In 1878, at the age of thirty-five, he was appointed a puisne judge of the Superior Court of the Province of Quebec. In 1873 he was transferred from the Ditsriet of Quebec to that of Kamouraska, his residence being at Riviere du Loup, a place where for many years he made his home for the summer months. In the year 1878 he was appointed a judge of the Supreme Court of Canada, of which he became Chief Justice in 1902, being knighted the same year. In 1906 he retired from the Bench and spent the remaining years of his life in study and the management of his private affairs.

Sir Elzear came by descent Seigneur of Ste. Marie de la Beauce, which had been ceded to his great grandfather in 1746. Always a student he devoted his leisure hours to the advancement of learning in relation to his profession and was the author of several works of great value to its members, besides frequent contributions to journals in connection with it. He wrote and published in the year 1874, "The Criminal Law of Canada, with Notes, Commentaries, Precedents and Indictments, etc.," con-

sisting of two volumes, and also "The Code de Procedure Civile du Bas Canada, with Annotations." Other publications were the "Criminal Code of the Dominion of Canada as amended in 1893, with Commentaries, etc.," and "Notes Genealogique sur la Famille Taschereau," in the year 1896. He received the degree of LL.D. from Laval University in the year 1890. Besides his connection with Laval he was also interested in the University of Ottawa, and succeeded Sir John Thompson as Dean of the Faculty of Law in that institution.

As Chief Justice of the Supreme Court Sir E. Taschereau was appointed to act as administrator of the Government in the interval between the departure of Lord Minto and the arrival of Earl Grey, and at the same time was made a member of the Privy Council. He attended several sittings of the Judicial Committee of that body, and, before his illness took a fatal turn, was thinking of going again to England to attend the Coronation.

The ability of the late Chief Justice as a jurist, and his great qualities as a judge, are so well known to the profession that no comment upon them is needed at our hands. To few men in this country has it been given to fill so many distinguished positions, and to discharge duties of such importance; and few men are so gifted as to be able to do so much with credit to themselves and benefit to their country.

In private life the deceased was always found a broad-minded, well-informed and courteous gentleman, of irreproachable character, strict in the discharge of the duties connected with his religion, and of all those which pertained to the high position which he so honourably occupied.

PROFESSIONAL MEN FOR LEGAL OFFICES.

We have been compelled on various occasions to criticize, sometimes adversely, the legislative action of the Government of the Province of Ontario. It is pleasant, therefore, to give credit when credit is possible. It had been the practice of previous governments to appoint men to offices of a quasi legal and quasi judicial character who had no qualifications for such

positions a practice which did not and could not be expected to give good results. We have called attention to the absurdity of appointing a farmer to the position of a County Court clerk; it is difficult also to imagine what qualifications an auctioneer could have for the position of a registrar of deeds, or a baker to perform the duties of a Surrogate Court clerk. We might enlarge on these incongruities indefinitely, but these samples are sufficient. Why were these offices not filled by professional men who could enter upon the discharge of their duties with a full knowledge of their duties, and who could, therefore, give better service than could possibly be given by laymen necessarily ignorant of such duties?

We are glad to see that the present government of Ontario has entered upon a new departure in these matters. Two lawyers have in succession been appointed to the position of Registrar in the city of Toronto. Another professional man, Mr. G. F. Harman, is now clerk of the Surrogate Court of the County of York, taking the place of the deceased baker. No one could have been appointed to this office who would be more acceptable to the profession than Mr. Harman as he is thoroughly familiar with the duties of the position, as well as being both painstaking and courteous. The same may be said as to the appointment of Mr. R. H. Bowes as Registrar for West Toronto. We trust that all other provincial governments will see the propriety of filling positions of the nature referred to from the ranks of the profession. Not only are lawyers entitled to it, but it is for the benefit of the public that they should fill such positions. The trouble is the profession does not assert itself in matters of this kind or look after their own interests as other classes do.

THE PREROGATIVES OF THE CROWN AND THE PRIVILEGES OF THE PEOPLE.

Two episodes within a few days of each other, the one in the House of Lords on the 30th ult., and the other in the House of Commons on the 6th inst., illustrate very forcibly the trend of constitutional development by which the prerogatives of the Crown have become virtually the privileges of the people. In

the House of Lords, Lord Lansdowne moved an address to the King praying that His Majesty would be graciously pleased to consent to a bill being introduced limiting the prerogatives and powers of the Crown in so far as they relate to the creation of peerages and the issue of writs of summons to Lords Temporal and Spiritual to sit and vote in the House of Lords. The King's consent, in accordance with well-established Parliamentary practice, must be given at some stage of their progress in the House in which they are introduced to bills which concern the Royal prerogative, and must be formally communicated to that House by a Privy Councillor. Viscount Morely, on behalf of the Government, intimated that the Cabinet would offer their advice to the Sovereign to consent to the prayer of the address moved by the noble marquis. When it is remembered that the Cabinet are responsible to the House of Commons, and through the House of Commons to the people, for advice offered to the Sovereign, and that the Sovereign will act on that advice or dismiss the advisers, it is demonstrably clear that, in the exercise by the Crown of the Royal prerogatives on such advice, in reality the exercise of the Royal prerogatives is in accordance with the wants and wishes of the people, to whom ultimately the Cabinet are responsible. In the discussion on the Archer Shee case in the House of Commons on the 6th inst., the action of the Crown in raising a demurrer to the claim, which if eventually successful would have been a barrier to the hearing of the case and the deciding of it on the facts, was thus justified by Mr. McKenna, the First Lord of the Admiralty: "Now I come to the question of the demurrer. There are certain rights and prerogatives which we speak of as the prerogatives of the Crown. In these days the prerogatives of the Crown are not exercised for the benefit of the Crown, but for the benefit of the public. These prerogatives are in existence, and any Minister in charge of his office is a trustee for the maintenance of these prerogatives. I should not have been doing my duty if as long as Parliament leaves these powers in my hand I did not exercise them." The Attorney-General, whose intervention in debate was strictly con-

fined to explanation and the removal of misunderstandings, thus spoke of the raising of the demurrer as a barrier to the hearing of the action and the disclosure of the evidence on which the action was based:—

"Being an officer, the boy could not go to a court of justice in respect of his dismissal. It was for him as a law officer not to make the law, but to administer the law as he found it, and the books were full of the judgments of the courts declaring that there was no such right of action. The late Lord Esher, when Master of the Rolls, said it was quite impossible for the court to discuss questions of this kind, and added that not even the Queen herself could alter that. In order that there should be no misapprehension, it should be pointed out that, when the rights of the Crown were spoken of, the meaning was the rights of the public, and it has been held that it was in the interests of the community, on the ground of public policy, that there should be no right of action in the courts in such cases. . . . Was it the view of the honourable and learned member (Mr. Cave, K.C.) that it would be the duty of the law officers to say that they were content to have such actions tried? This was one of the matters in which a law officer had no right to waive the privileges of the Crown, which were the rights of the public."

The doctrine thus so emphatically laid down, that the prerogatives of the Crown are the privileges of the people, would before the Revolution of 1688 have been regarded as a travesty of our whole constitutional system. In a collusive action brought by his servant against Sir Edward Hales, a Roman Catholic, to recover the penalty of £500 imposed by the Test Act for accepting the commission of a colonel of a regiment without the previous qualification of receiving the Sacrament in the Church of England, from which he had been dispensed by the King in the exercise of his Royal prerogative, eleven judges out of the twelve held that the prerogative of the King could be exercised in his own interest and at his own discretion quite irrespective of the interest of the public. The Chief Justice (Herbert) laid it down that the Kings of England were sovereign princes, but

the laws of England were the King's laws, and that it was consequently an inseparable prerogative of the Crown to dispense with penal laws in particular cases. There was no law, he said, which might not be dispensed with by the supreme law-giver: (State Trials, XI., pp. 1165-1280). The unadvised assertion of this principle made, in the words of Mr. Hallam, "the co-existence of an hereditary line claiming a sovereign prerogative paramount to the liberties they had vouchsafed to concede incompatible with the security and probable duration of these liberties. This incompatibility is the true basis of the Revolution of 1688": (Hallam's Constitutional History, III., p. 63).

The Revolution of 1688, although it substituted a statutory King for a monarch who claimed to reign by an indefeasible right and to possess prerogatives paramount to the liberties and privileges of his people, did not immediately convert the Royal prerogatives into privileges of the people. Mr. Hallam, writing in 1818, takes a far different view from Sir Rufus Isaacs of the prerogatives of the Crown nearly a century and a half after the Revolution.

"The word 'prerogative,'" he writes, "is of a peculiar import and scarcely understood by those who come from the studies of political philosophy. We cannot define it by any theory of executive functions. All these may be comprehended in it, but also a great deal more. It is best, perhaps, understood by its derivation, and has been said to be that law in the case of the King, which is law in no case of the subject. . . . It is said, commonly enough, that all prerogatives are given for the subjects' good. I must confess that no part of this assertion corresponds with my view of the subject. It neither appears to me that these prerogatives were ever given nor that they necessarily redound to the subjects' good. Prerogative, in its old sense, might be defined as an advantage obtained by the Crown over the subject in cases where their interests came into competition by reason of its greater strength. They sprang from the nature of the Norman government, which rather resembled a scramble of wild beasts, where the strongest takes the best share, than a system

founded on principles of common utility. And modified as the exercise of most prerogatives has been by the more liberal tone which now pervades our course of government, whoever attends to the common practice of courts of justice, and, still more, whoever consults the law books, will not only be astonished at their extent and multiplicity, but very frequently at their injustice and severity": (Hallam's Middle Ages, III., p. 148).

Professor Dicey, writing in 1885, presents a far different estimate of the effect of the prerogatives of the Crown which have been by the practice of the Constitution in its modern development, as stated without fear of contradiction in the House of Commons and as impliedly acknowledged and accepted in the House of Lords, been virtually transferred to the Cabinet, who are themselves the servants of the people.

"The survival," writes Professor Dicey, "of the prerogative, conferring, as it does, wide discretionary authority upon the Cabinet, involves a consequence which constantly escapes attention. It increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the State. When the King was the chief member of the sovereign body, Ministers were in fact no less than in name the King's servants. At periods of our history when the peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out, or tend to carry out, the will of the House. When, however, the Cabinet cannot act except by means of legislation, other considerations came into play. . . . While every action which is done by virtue of the prerogative is in fact, though not in name, under the direct control of the representative Chamber, all powers which can be exercised only in virtue of a statute are still more or less controlled in their exercise by the interference of the courts. One example taken from the history of recent

years illustrates the practical effect of this difference. In 1872 the Ministry of the day carried a bill through the House of Commons abolishing the system of purchase in the army. The bill was rejected by the Lords. The Cabinet then discovered that purchase could be abolished by Royal Warrant—*i.e.*, by something very like the exercise of the prerogative. The system was then and there abolished. The change, it will probably be conceded, met with the approval, not only of the Commons, but of the electors. But it will also be conceded that, had the alteration required statutory authority, the system of purchase might have continued in force up to the present day. The existence of the prerogative enabled the Ministry in this particular case to give immediate effect to the wishes of the electors, and this is the result which under the circumstances of modern politics the survival of the prerogative will in every case produce. The prerogatives of the Crown have become the privileges of the people'': (Law of the Constitution, pp. 392-394).

The example cited by Mr. Lecky of the exercise of the prerogative of the Crown by the Cabinet as a privilege of the people is peculiarly significant if we remember that the fiercest contest between Charles I. and the Parliament was in reference to the control of the army. The prerogative, however, which was claimed by Charles I. for a personal purpose, has been exercised in our own times by Ministers of the Crown in the interests of the people, whose servants they acknowledge themselves to be. The Royal prerogative debate in the House of Lords and the Archer Shee debate in the House of Commons, as illustrations of this great development of our Constitution, are of supreme value.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

PROBATE—ADMINISTRATION—"SPECIAL CIRCUMSTANCES"—PROBATE ACT, 1857 (20-21 VICT. C. 77), S. 73—(10 EDW. VII. C. 31, S. 54(2) (ONT.))—HUSBAND AND WIFE—MURDER OF WIFE BY HUSBAND—HUSBAND'S EXECUTOR APPLYING FOR ADMINISTRATION OF WIFE'S ESTATE—GRANT TO NEXT OF KIN OF WIFE—EVIDENCE.

Re Crippen (1911) P. 108. This was an application by one of the next of kin of the murdered wife of the notorious Dr. Crippen for administration to her estate. The application was opposed by Ethel Le Neve, whom the doctor had appointed his sole legatee and executrix. It was contended on her behalf that the conviction of the deceased doctor of the murder of his wife was res inter alios acta and not admissible evidence of the commission of the crime in the present proceeding, and that by his death he had expiated his crime, and that his personal representative was entitled to the grant, but Evans, P.P.D., rejected this claim, and made the grant as asked on the ground that the facts presented "special circumstances" within the meaning of the Probate Act, 1857, s. 73 (10 Edw. VII. c. 31, s. 54(2) (Ont.)), justifying his passing over the husband's representative, and he comes to the conclusion that the alterations in the laws of evidence have practically destroyed the basis on which some of the elder cases rested, in which it was held that a record of a conviction was inadmissible evidence of the commission of the crime, in other proceedings in which the fact had to be proved.

SOLICITOR—AGREEMENT FOR SERVICE—RESTRICTIVE UNDERTAKING—CARRYING ON BUSINESS OF A SOLICITOR—CONSTRUCTION—LETTER WRITTEN OUTSIDE TO PERSON WITHIN PROHIBITED AREA—INJUNCTION.

Woodbridge v. *Bellamy* (1911) 1 Ch. 326 was an action by solicitors against a solicitor to enforce an undertaking not to carry on the business of a solicitor within a specified area. The breach complained of was the writing of a letter by the defendant in his character of a solicitor from London, where he carried on business to a person resident within the prescribed area demanding payment of a debt on behalf of a client residing also within

the prohibited area. The recipient of the letter who was not in fact the debtor, as a result of the correspondence which ensued, purchased the debt, and for his services to both parties in the matter the defendant received payment. Eve, J., thought this was a carrying on business within the prescribed area contrary to the agreement and granted an interim injunction, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that it was not, and dissolved the injunction. Buckley, L.J., remarks that, according to the construction Eve, J., put on the agreement, if a solicitor in London wrote to Toronto to demand payment of a debt, he would be carrying on business at Toronto which he thought an extravagant and absurd proposition.

COMPANY—DIRECTORS—QUALIFICATION SHARES HELD BY DIRECTORS IN TRUST FOR PROMOTERS—MISFEASANCE—DAMAGE.

In re London & South Western Canal (1911) 1 Ch. 346. This was an application in a winding-up proceeding to make certain directors of the company liable in respect of their qualification shares for which they had paid no consideration, and which some held as a gift from, and others as, trustees for, the promoter. By the English Companies Act the first directors of a company appear to be bound to acquire their qualification shares by purchase from the company, and Eady, J., held that their acquisition from the promoter, either as a gift from, or in trust for him, was a misfeasance on the part of the directors, for which they were liable to the company for the value of the shares which would have been received by the company, had the shares been acquired from it; and as it appeared that some shares had been sold at par, each director was held liable for the full amount of his qualification shares at their par value.

WILL—GIFT TO COLLATERALS—DEATH OF DONEE BEFORE TESTATOR—ATTEMPT TO INCLUDE REPRESENTATIVES OF DONEE PREDECEASING TESTATOR LEAVING ISSUE—WILLS ACT, 1837 (1 VICT. C. 26), S. 33—(10 EDW. VII. C. 57, S. 37 (ONT.)).

In re Gresley, Willoughly v. *Drummond* (1911) 1 Ch. 358. A testatrix, in the exercise of a general testamentary power, appointed a trust fund to a class of collaterals who should be living at the period of distribution, and attempted to include in the class the issue of members of the class who should predecease her

leaving issue, using words similar to those contained in the Wills Act, s. 33 (10 Edw. VII. c. 57, s. 37 (Ont.)), but Eady, J., held that the provisions of that section only apply to gifts to issue of a testator, and are inapplicable to gifts to collateral relatives.

CONTRACT—COVENANT BY COVENANTOR WITH HIMSELF AND OTHERS —JOINT CONTRACT—LEASE—ASSIGNEE—COVENANT RUNNING WITH LAND.

Napier v. *Williams* (1911) 1 Ch. 361. This was an action brought by lessors against the assignee of a lease to obtain a declaration that the assignees were bound by certain covenants in the lease, and held the premises subject thereto. The premises formed part of the estate of a testator who by his will authorized his trustees to lease them to his son Carlton Roberts, if he desired, the lease to contain covenants to repair and other usual covenants. Carlton Roberts elected to take a lease which was accordingly made for 21 years to Carlton Roberts, his executors, administrators and assigns, he himself being one of the trustees, and he thereby covenanted with himself and his co-trustees to repair, etc. He entered into possession, and carried on business for a certain number of years, when he assigned the lease to a company. The company issued debentures secured by a trust deed, which included the lease, and the action was against the debenture trustees. The defendants had never been in possession, and contended that the covenantor being himself one of the covenantees, the covenants in the lease were void and were, therefore, not binding on the defendants. Warrington, J., held that there was no ground for rectification of the lease so as to make the covenant joint and several, or for holding that the defendants were to be deemed tenants from year to year, because the lease was not void in law; but the covenants being by one person with himself and others jointly (following *Ellis* v. *Kerr* (1910) 1 Ch. 529, noted ante, vol. 46, p. 420, were void; consequently there was no covenant which could run with the land and impose any personal liability on the defendants. The action, therefore, failed.

COPYRIGHT—PHOTOGRAPHS—SUPPLY FOR ILLUSTRATING MAGAZINE —PUBLICATION AFTER TERMINATION OF AGREEMENT—INJUNCTION—FINE ARTS COPYRIGHT ACT, 1862 (25-26 VICT. c. 68), ss. 1. 4, 6, 11.

Bowden v. *Amalgamated Pictorials* (1911) 1 Ch. 386. In this case the plaintiffs were proprietors of photographs, some of which

were copyrighted and some not. They from time to time furnished the defendants, the proprietors of weekly journals, with photographs for reproduction in such journals at certain charges for each user. While the defendants had some of the plaintiffs' photographs still in their hands, the plaintiffs' terminated the agreement, but the defendants continued to publish the copyright photographs and also those not copyrighted. This action was brought to restrain them from so doing. The defendants claimed that under the agreement they had the right to retain the photographs supplied by the plaintiff and use them as, and when, they desired, paying the stipulated charges; but Parker, J., held that the plaintiffs had a right to put an end to the agreement, and thereafter the defendants' right to reproduce the photographs ceased; and that the plaintiffs were entitled to an injunction to restrain the defendants infringing the plaintiffs' copyright and also their common law rights in the photographs for which they had not registered copyrights.

NUISANCE—POLLUTION OF RIVER—DISCHARGE OF SEWAGE INTO RIVER—RIPARIAN OWNER—INJUNCTION—RIGHT OF PRIVATE PERSON TO RESTRAIN NUISANCE.

Jones v. *Llanrwst District Council* (1911) 1 Ch. 393. In this case the plaintiff, a riparian proprietor, brought an action to restrain the defendant, a municipal body, from discharging sewage into the stream as being a nuisance and injury to his riparian rights. The action was resisted on the ground that the plaintiff was not the owner of any part of the bed of the stream, and that the plaintiff being only a reversioner could not maintain the action, whether for trespass or nuisance, without joining the tenant in possession; but Parker, J., held that none of these objections could prevail and that the plaintiff as a riparian proprietor in reversion had a right to have the water of the stream flow past his land in a natural state of purity, and was entitled to the injunction claimed, and that a private individual is entitled to restrain a municipal authority from allowing sewage to escape from its sewer to his injury.

COVENANT—MORTGAGE BY PARTNERS OF REAL ESTATE—DEATHS OF PARTNERS—RELEASE BY TRUSTEES OF ONE PARTNER TO TRUSTEES OF THE OTHER PARTNER—COVENANT BY TRUSTEES TO INDEMNIFY RELEASOR AGAINST MORTGAGE—LIMITATION OF LIABILITY UNDER COVENANT.

Watling v. *Lewis* (1911) 1 Ch. 414. In this case, two partners

having died entitled to partnership real estate subject to a mortgage, the trustee of one partner released to the trustees of the other partner the interest of the releasor in the equity of redemption in this property, and the releasees covenanted with the releasor "as such trustees, but not so as to create any personal liability on the part of them or either of them" to indemnify the releasor against all claim under the mortgage. The mortgagees having sold the mortgaged property for less than sufficient to satisfy the mortgage debt, demanded payment of the deficiency from the releasor, who paid it, and brought the present actior to recover it from his covenantors, who contended that by reason of the restrictive words of the covenant they were not personally liable under the covenant; but Warrington, J., held that the attempted restriction of liability was nugatory, as the effect of the words if valid, would be not merely to limit but destroy the covenant altogether, and inasmuch as there was a covenant to pay and indemnify, the proviso was repugnant and of no effect.

COMPANY—MISFEASANCE OF DIRECTORS—DIRECTORS' GROSS NEGLIGENCE—MISSTATEMENT IN PROSPECTUS—CLAUSE EXEMPTING DIRECTORS FROM LIABILITY—NEGLIGENCE.

In re Brazilian Rubber Plantations (1911) 1 Ch. 425. This was a winding up proceeding in which it was sought to make certain directors liable for alleged misfeasance. The company was formed for the purpose of purchasing certain estates in Brazil, and for that purpose entering into with, or without, modification, a specified contract with a syndicate. On the day of incorporation the directors issued a prospectus inviting subscriptions for shares, which contained statements as to the area of the estate and number of rubber trees, which was untrue. These statements were taken from a report furnished to the directors by the member of a firm who had obtained an option to purchase the estate, and had sold it to the syndicate at an increased price. The report was fraudulent, but the directors believed it to be true, and adopted it without inquiry. Subsequently, before the whole of the purchase money was paid the directors received information from an agent that the statements contained in the report and prospectus were untrue, that instead of there being 12,500 acres there were only 2,000, and instead of there being 400,000 trees there were only 50,000, but the agent did not advise a cancellation of the contract, but led them to suppose that notwithstanding the untrue statements the property was

"satisfactory," and they, therefore, went on and completed the contract. The articles contained a provision that no director should be liable for any loss or damage occasioned by any error of judgment or oversight on his part or for any other loss or damage which should happen in the exercise of his office unless the same happened through his own dishonesty. In these circumstances Neville, J., held that the directors had not been guilty of such gross negligence as to make themselves liable for misfeasance, and that even if they had been guilty of gross negligence, without personal dishonesty, the provision of the articles relieved them from liability therefor.

MARRIAGE SETTLEMENT — CONSTRUCTION — COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY — "BECOME ENTITLED TO ANY ESTATE OR INTEREST"—ASSIGNMENT OF EVEN DATE BY WIFE—ULTIMATE TRUST FOR WIFE—CONTINGENT INTEREST—VESTING IN POSSESSION DURING COVERTURE.

In re Williams, Williams v. *Williams* (1911) 1 Ch. 441. The plaintiff, a lady, being entitled absolutely to one-third of a fund and also contingently to the remaining two-thirds in the event of her two brothers dying under 21 without issue, or to one-third if only one of them should so die, in 1909 in contemplation of her marriage by deed assigned, inter alia, her one-third share of certain mortgage debts constituting part of the fund and "all other, if any, her share or interest in the said mortgage debts," to trustees upon trust after the marriage to raise out of the securities transferred £12,000, and subject thereto to stand possessed of the property assigned in trust for the assignor absolutely. By her marriage settlement of even date the £12,000 was settled upon the usual trusts of a wife's fund, and the plaintiff covenanted with the trustees of the settlement, that if she should at any time during the intended coverture become "entitled in any manner and for any estate or interest" to any real or personal estate exceeding £500 in value she would convey the same to the trustees of the settlement for the trusts of the wife's fund. After the marriage a brother of the plaintiff died whereby she became absolutely entitled to his third share of the fund, and the question was raised as to what the rights of the parties were under the deed and settlement. Eve, J., held that the plaintiff's interest in the shares of her two brothers was in 1909 a contingent and not a vested interest; and that this contingent interest in the mortgages assigned to trustees passed to them under the deed of

1909, and that subject to the raising of the £12,000 for the purposes of the marriage settlement, the moneys representing such share were payable to the plaintiff unaffected by her covenant, which he held must be read and construed in the light of the trusts created by the assignment of even date and not so as to defeat those trusts. And he further held that the plaintiff's share in the fund (other than the mortgage debts assigned) which fell into possession on the brother's death was caught by the covenant in the settlement whereby the plaintiff bound herself to settle after-acquired property.

DISTRESS DAMAGE FEASANT—IMPOUNDING DISTRESS—POUND MORE THAN 3 MILES DISTANT—1 & 2 P. & M. c. 12, s. 1—(R.S.O. c. 342, s. 14).

Coaker v. *Willcocks* (1911) 1 K.B. 649 may be briefly noted for that a Divisional Court (Darling and Bucknill, JJ.) decided that when a distress is made of animals damage feasant, the statute 1 & 2 P. & M. c. 12, s. 1 (R.S.O. c. 342, s. 4), which provides that no distress of cattle shall be driven out of the hundred, etc., except it be to a pound overt within the shire not above three miles distant from the place the distress is taken, does not preclude the distrainor from driving the distress to a pound within the hundred, etc., although it be more than three miles from the place where the distress was taken.

LANDLORD AND TENANT—LEASE—EXECUTED CONTRACT—INNOCENT MISREPRESENTATION—RESCISSION—JURISDICTION—"VALUE OF PROPERTY"—COUNTY COURTS ACT, 188° (51-51 VICT. c. 43), s. 67—(10 EDW. VII. c. 30, s. 32 (1)(*c*), (*e*), (*i*), ONT.).

In *Angel* v. *Jay* (1911) 1 K.B. 666 the action was brought in a County Court to rescind a lease on the ground of misrepresentation. Neither the lessee's nor the lessor's interests in the property exceeded in value £500, but the value of the freehold did exceed £500. The misrepresentation complained of was that the drains were in order, when in fact they were not, the misrepresentation was made innocently and without any intention to defraud or deceive. The County Court judge granted the relief prayed; but the Divisional Court (Darling and Bucknill, JJ.) overruled his decision on two grounds; first, that the contract being executed, the court had no equitable jurisdiction to rescind it, as the misrepresentation did not amount to fraud; and second, because the jurisdiction of the County Court was

limited in such cases to "where the value of the property shall not exceed the sum of £500"; and in the judgment of the Divisional Court those words did not mean the value of the interests of the litigants in dispute, but meant the whole value of the land in question.

CRIMINAL LAW—LARCENY—EVIDENCE OF ASPORTAVIT.

The King v. *Taylor* (1911) 1 K.B. 674. In this case the defendant was indicted for larceny, and it was proved by the prosecutor, that the accused had put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its meeting an obstruction. The prosecutor grasped the purse and replaced it, and the question was whether this was sufficient evidence of an asportation of the purse to warrant the conviction of the accused. The Court of Criminal Appeal (Darling, Pickford and Bankes, JJ.) held that it was.

ORDER FOR PAYMENT OF COSTS OF MOTION TO COMMIT—ACTION TO RECOVER COSTS PAYABLE UNDER ORDER—CRIMINAL PROCEEDING.

In *Seldon* v. *Wilde* (1911) 1 K.B. 701, which was an action to enforce payment of costs payable under an order made on a motion to commit the defendant, a solicitor, for disobedience of an order of the Court, the defendant applied to stay the action on the ground that it was an abuse of the process of the court, and also on the ground that the order sued on was made in a criminal or quasi-criminal proceeding, and that therefore no action could be brought on the order. The majority of the Court of Appeal (Buckley and Kennedy, L.JJ) held that these objections were not entitled to prevail, but Williams, L.J., dissented, and considered the order was made in the exercise of a quasi-criminal jurisdiction over the defendant as an officer of the court, and therefore was not enforceable by civil action.

ARBITRATION—CONTRACT WITH MUNICIPALITY—DISPUTES TO BE REFERRED TO MUNICIPAL ENGINEER—ACTION BY CONTRACTOR STAYING PROCEEDINGS—ATTACK ON CONDUCT OF ARBITRATOR—DISCRETION OF COURT—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S. 4—(9 EDW. VII. C. 35, S. 8, ONT.).

Freeman v. *Chester* (1911) 1 K.B. 783. The plaintiffs sued on a contract made with the defendants, a municipal body, for

the price of certain works constructed for the defendants. By the terms of the contract disputes were to be referred to the municipal engineer. The defendants moved to stay proceedings under the Arbitration Act, 1889, s. 4 (9 Edw. VII. c. 35, s. 8, Ont.), and the plaintiffs resisted the motion on the ground that the engineer had by his conduct disqualified himself from being arbitrator. In these circumstances the Master refused the application, and his order was affirmed by Lush, J., and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.) dismissed an appeal from Lush, J., although neither of the members of the court was satisfied that it had been satisfactorily shewn that the engineer was really disqualified from acting impartially, but in the exercise of the discretion conferred by the Act, they refused to interfere with the order of Lush, J.

COMPANY—DEBENTURES—APPOINTMENT OF RECEIVER BY DEBENTURE HOLDERS—REMUNERATION OF RECEIVER, BY WHOM PAYABLE—RECEIVER, AGENT OF DEBENTURE HOLDERS.

Deyes v. *Wood* (1911) 1 K.B. 806 was an action brought by a receiver against the debenture holders of a company by whom he had been appointed receiver, to recover remuneration for his services as receiver. The debentures were issued by a limited company and were a charge on its undertaking and expressly provided that the holders might, with the consent in writing of the holders of a majority in value of the outstanding debentures, appoint a receiver, and that the receiver so appointed should have power to take possession and receive all property charged by the debentures. Under this provision the plaintiff was appointed and acted as receiver. The debentures did not provide that the receiver so to be appointed was to be the agent of the company, and it was held by Scrutton, J., that he was the agent of the debenture holders, and that they, and not the company, were liable for his remuneration, and this decision was affirmed by the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.).

LIMITATION OF ACTION—COMPENSATION UNDER LAND CLAUSES ACT—AWARD—ACTION—WHEN STATUTE BEGINS TO RUN.

Turner v. *Midland Ry.* (1911) 1 K.B. 832. By certain works which the defendants were by statute authorized to construct and which were constructed in 1903, the plaintiff's lands were injuriously affected. No claim for compensation was made by

the plaintiff until 1909; the defendants refused to pay, and the matter went to arbitration and the arbitrator awarded £10 8s. as compensation and costs £79 18s. The action was brought on the award and the defendants set up that the plaintiff's claim was barred by the Statute of Limitations. But a Divisional Court (Ridley and Avory, JJ.) held that the Statute of Limitations did not begin to run until the making of the award, as, up to that time, the plaintiff had no cause of action.

SOLICITOR—REGISTRAR OF COUNTY COURT—DEFENDANT IN PERSON OFFICER OF COURT—REGISTRAR DEFENDANT IN HIS OWN COURT —TAXATION BY REGISTRAR OF HIS OWN COSTS.

In *Tolputt* v. *Mole* (1911) 1 K.B. 836, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have affirmed the judgment of the Divisional Court (1911) 1 K.B. 87 (noted ante, p. 137), both in regard to the taxation by the defendant of his own costs; and also as to the propriety of the items allowed.

NEGOTIABLE INSTRUMENT—PROMISSORY NOTE—DURESS—KNOWLEDGE OF DURESS BY HOLDER—EVIDENCE—BURDEN OF PROOF—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61), S. 30, S.-S. 2—(R.S.C. c. 119, s. 58(2)).

Talbot v. *Von Boris* (1911) 1 K.B. 854. This was an action against husband and wife on two promissory notes to which the wife's signature had been obtained by duress. It was not proved that the plaintiff had notice of the duress, and the wife, who was called as a witness, said that she did not think the plaintiff knew of it. The plaintiff was not called as a witness, and gave no evidence to negative his knowledge of the duress. The jury found that the signature of the wife had been obtained by duress, but that the plaintiff did not know of the duress. On these findings Phillimore, J., gave judgment for the plaintiff, and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held that he was right, and that the onus was on the defendant to shew that the plaintiff had knowledge of the duress; and that the provisions of the Bills of Exchange Act, s. 30, subs. 2 (R.S.C. c. 119, s. 58(2)), do not apply to the original payee of a negotiable instrument, but only to subsequent holders.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Right Hons. Lords Macnaghten, Atkinson, Collins, and Shaw.] [March 18.

WERTHEIM *v.* CHICOUTIMI PULP COMPANY.

Sale of goods—Breach of contract to deliver—Damages.

This was an appeal from the Court of King's Bench for the Province of Quebec.

The rule that the measure of damages for delay in delivering goods in accordance with a contract is the difference between the market price at the time when the goods ought to have been delivered, and the price at the time when they were in fact delivered is intended to place the party complaining, so far as it can be done by money, in the position in which he would have been if the contract had been duly performed. Therefore where the purchaser of goods, which had not been delivered at the time fixed by the contract, had resold them before delivery at a price very little below the market price at the time when they ought to have been delivered, and considerably above the market price at the time when they were in fact delivered,

Held, that he was only entitled to recover as damages the difference between the market price at the time of the breach and the price for which the goods were actually sold.

Where a contract provided for the delivery of goods at a place where there was no market for them,

Held, that damages for non-delivery should be calculated with reference to the market at which the purchaser, to the knowledge of the vendor, intended to sell them, less cost of carriage.

Judgment of the court below affirmed with a variation.

Sir Robert Finlay, K.C., and *G. G. Stuart* (of the Quebec Bar), for appellant (plaintiff). *Atkin*, K.C., *L. Taschereau* (of the Quebec Bar), and *T. Matthew*, for respondents (defendants).

Dominion of Canada.

SUPREME COURT.

B.C.] ALLEN *v.* THE KING. [March 31.

Criminal law—Conviction for murder—Trial—Evidence improperly admitted—Substantial wrong to prisoner—New trial—Criminal Code, s. 1019.

Sec. 1019 of the Criminal Code provides that a convicted prisoner shall not be granted a new trial for improper admission of evidence or some illegal proceeding at the trial unless the Court of Appeal is of opinion that "some substantial wrong or miscarriage was thereby occasioned."

Held, Davies and Idington, JJ., dissenting, that in order to obtain a new trial under this provision the prisoner is not required to demonstrate that substantial wrong or miscarriage was in fact occasioned by the evidence improperly admitted or the illegal procedure; it is sufficient if it appears that such wrong or miscarriage might have been occasioned.

Per Davies and Idington, JJ., that if evidence was improperly admitted at the trial in this case, which is doubtful, it could not under the circumstances have affected the verdict.

New trial ordered.

J. A. Ritchie, for appellant. *McKay*, K.C., for respondent.

Ont.] TOMS *v.* TORONTO RY. CO. [April 3.

Damages—Negligence—Physical injuries—Mental shock—Severance of damages.

Plaintiff was riding in a street railway car when it collided with a train. He was thrown over to the back of the seat facing him but was able to leave the car and start to walk to his place of business, but had only proceeded a short distance when he collapsed and had to be taken home in a cab. He was laid up for several weeks and on the trial of an action against the Railway Co. for damages one doctor giving evidence testified that the physical injury he had received was the exciting cause of his condition, while others ascribed it to mental shock. Negligence on the part of the company was not denied, but the trial Judge was asked to direct the jury to separate the damages for the two, but refused. A verdict for plaintiff was upheld by the Court of Appeal.

Held, affirming the judgment appealed against (22 O.L.R. 204) that the trial Judge rightly refused to direct the jury as asked; that the evidence showed the injuries to plaintiff were the direct consequence of the negligence of the company, and that the verdict should stand. Appeal dismissed with costs.

Glyn Osler, for appellants. *Masten*, K.C., for respondent.

Ont.] RORISON *v.* BUTLER BROS. [April 3.

Negligence—Damages—New trial—Volens.

In the construction of a tunnel under the Detroit River the respondent company had an apparatus for lifting material to the surface, consisting of a crane and cable with hook and buckets hauled up and down through an air shaft by an engine on the surface. At the top of the shaft a "tag man" was stationed to signal the engineer when to start or stop the engine and when to run fast or slow. The officers and men of the respondent company and of the Detroit River Tunnel Co. engaged on the same work were in the habit of coming to the surface through the air shaft and the "tag man" gave a special signal to the engineer when a man was coming up. R., an employee of the Detroit River Co. was attempting to come up on one occasion when the apparatus did not remain in the centre but was swinging around and in a narrow part of the shaft a block on the cable with a hook over which was a ring which R. was grasping, caught in the timbers on the side and the ring came off the hook, throwing him to the bottom of the shaft and causing his death. In an action on behalf of his parents the jury found the respondent company negligent in using an unsafe hook while allowing persons to use this apparatus, and also by the tag man not signalling the engineer to stop until the cable ceased moving. They assessed the damages at $4,000, all for deceased's mother. The verdict was sustained by a Divisional Court, but the Court of Appeal granted a new trial on the ground that the question of volens on the part of R. should be passed upon by the jury.

Held, that as such question had been raised for the first time in the Court of Appeal a new trial should not have been granted on that ground.

The evidence as to damages was that the deceased gave his mother $25 per month regularly and presents in goods or money that would make his whole contribution over $500 a year.

Held, that $4,000 was an excessive sum to give the mother,

and the order for a new trial should stand but be restricted to a proper assessment of the damages.

Sale, for appellant. *Rodd* and *Kenning*, for respondents.

Ont.] CLARKE *v.* GOODALL. [April 3.

Appeal—Nature of action—Action in equity—Judicial proceeding—Declaration of rights—Injunction—Reference—Appeal from referee—Final judgment.

An action was brought claiming a declaration that plaintiff was entitled to receive a certain number of shares of the capital stock of a company and for an injunction to restrain defendant from dealing with his shares until those claimed by plaintiff were transferred to him. On the trial it was held that plaintiff was entitled to damages for breach of contract to deliver him the shares and a reference was ordered to have such damages assessed, further directions and costs being reserved. On appeal to a Judge from the referee's report, the damages were reduced, but were increased on further appeal to a Divisional Court whose judgment was affirmed by the Court of Appeal. On appeal from the judgment of the registrar of the Supreme Court affirming the jurisdiction to entertain an appeal from the Court of Appeal.

Held, 1. The action was one at common law for breach of contract, and that neither the inclusion of the demand for an injunction nor the reservation by the trial Judge of further directions, made it a judicial proceeding in the nature of a suit or proceeding in equity within the meaning of sec. 38 (*c*) of the Supreme Court Act so as to permit of an appeal to the Supreme Court whether the judgment appealed against was final or interlocutory.

2. The judgment of the Court of Appeal, varying the assessment of damages by the referee, was not a final judgment from which an appeal would lie to the Supreme Court.

Appeal from registrar allowed with costs.

Owen Ritchie, for appellant. *G. F. Henderson*, K.C., for respondent.

Exch. Court.] THE KING *v.* WALLBERG. [April 3.

Contract—Public work—Work dehors contract—Acceptance by Crown—Payment—Fair value.

W. was a contractor with the Crown for constructing a car

and locomotive repair plant at Moncton, N.B., and was subject to the orders of the Government engineer. By order of the engineer and with no contract in writing therefor, he constructed sewers and a water system in connection with said works, and on completion of his contract the Crown accepted the additional work and agreed to pay its fair value, but not the amount claimed, which was deemed excessive. The Department of Railways referred the claim to the Exchequer Court and, by consent, it was referred to the Registrar of the Court to have the damages assessed, the order of reference providing that "the amount to be ascertained shall be the fair value or price thereof allowed on a quantum meruit." The registrar fixed the amount at $53,205, as the fair value of the work reasonably executed on a somewhat different plan. The judge of the Exchequer Court added $39,000 to this amount, holding that the Crown had admitted the authority of the engineer to order the work to be done, and that W. was entitled to the actual cost plus a percentage for profit. On appeal by the Crown,

Held, Anglin, J., dissenting, that the judgment appealed against was not warranted; that the Crown had not admitted the authority of the engineer, but expressly denied it by pleadings and otherwise; that all W. was entitled to be paid was the fair value of the work to the Crown, and the amount allowed by the referee substantially represented such value. Appeal allowed with costs.

Tilley and *Friel*, for appellant. *W. Nesbitt*, K.C., and *Harold Fisher*, for respondent.

EXCHEQUER COURT.

Cassels, J.] [Feb. 28.

BROWN, LOVE & AYLMER *v.* THE KING.

Public Work — Trent Canal — Contract — Claims thereunder — Meaning of word "claim" — Waiver — Validity — Reference of questions of quantities and prices.

Held, 1. That the word "claim" as used in s. 38 of the Exchequer Court Act, R.S. 1906, c. 140, must be construed to mean a cause of action.

2. That, upon a construction of s. 48 of the Exchequer Court Act, a waiver by the Crown of stipulations in a contract respecting (*a*) the fixing of rates and prices by the engineer; (*b*)

the limitation of time for the performance of the contract; (*c*) the finality of the engineer's decision of certain matters in controversy between the parties; (*d*) the obtaining of written directions and certificates of the engineer as conditions precedent to recovery for extra work; and (*e*) the formal making and repetition of claims by the contractor, such stipulations constituting technical defences to claims by the contractor might be validly waived by a Minister of the Crown under the authority of an Order-in-Council in that behalf. *Pigott* v. *The King*, 10 Ex. C.R. 248, 38 S.C.R. 501, considered.

3. Upon a reference to the court of a claim by the Minister of Railways and Canals under the provisions of s. 38 of the Exchequer Court Act, in connection with which the above waivers were made, the court held that, under the circumstances, it might be declared that the contractors were entitled to recover in respect of certain items of work, leaving the questions of quantities and prices therefor to be fixed by the engineer to whom by consent of parties such questions were referred.

McLaughlin, for claimants. *Stewart*, for defendant.

Cassels, J.] [March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF JOHNSON *v.* THE KING.

Public work—Injury to the person—Fatal accident to workman—Negligence — Evidence — Statement of witness before the coroner's inquest—Inadmissibility.

On the trial of a petition of right for damages against the Crown, arising out of an accident on a public work, whereby the suppliant's husband was killed, the plaintiff sought to read and put in evidence the statement of a deceased witness who had been sworn and gave evidence before the coroner at the inquest into the death of the suppliant's husband some five years before the trial of the petition. At this inquest the Dominion Government was not represented by counsel, or otherwise, and had no opportunity of cross-examining the witness whose statement was so tendered.

Held, that in the absence of an opportunity on the part of the Dominion Government to cross-examine the witness before the coroner, his evidence was inadmissible. *Sills* v. *Brown*, 9 C. & P. 601, considered and not followed.

The evidence on the whole case shewing that the accident was solely due to the negligence of the deceased in attempting to climb upon a swing-bridge while it was in motion, the petition was dismissed.

Staunton, O'Heir & Morison, for suppliant. *Harcourt* and *Cowper,* for the Crown.

Cassels, J.] MORRIS *v.* THE KING. [April 12.

Customs Act—Reference by Minister of a claim to the court—Affidavit used before Minister in respect of which there was no opportunity of cross-examining the deponent—Admissibility.

By s. 183 of the Customs Act, 51 Vict. c. 14, it is provided that upon a reference of any matter to the court by the Minister of Customs, the court shall hear and consider the same upon the papers and evidence referred, and upon any further evidence produced under the direction of the court. Among the documentary evidence referred in connection with a claim for a refund of duties paid, was an affidavit by a witness, since deceased, testifying to a fact adverse to the claimant, and in respect of which no opportunity was afforded the claimant to cross-examine the deponent.

Held, that while the statements of the deponent were not as effective as if he had been examined as a witness in court, and so subject to cross-examination, yet the affidavit was admissible as evidence under the statute.

Beaudin and *Loranger,* for claimant. *Archambault,* for Crown.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* LEE. [March 24.

Criminal law—Gold and Silver Marking Act—Authority of Dominion and of Provincial legislatures—Overlapping of legislation—Ultra vires.

Case stated by one of the judges of the County Court of York, by whom the defendant was convicted of a breach of the Gold and Silver Marking Act, 7-8 Edw. VII. c. 30 (D.).

The learned judge found the defendant guilty of the charge and pursuant to an order of this court stated a case and submitted for its opinion the following question:—

Is sub-s. (*b*) of s. 16 of the said Act ultra vires the Parliament of Canada?

Moss, C.J.:—Sections 16 and 17 of the Act appear under the heading of "Offences and Penalties." They are the culmination of a series of provisions comprising ss. 9, 10, 11, 12, 13, 14, and 15, manifestly designed for the protection of purchasers, intending purchasers, and the public generally, against imposition or deception as to the quality, fineness, grade or description of the articles therein specified. Broadly stated, the means adopted are (1) to render obligatory the application of certain marks, and (2) to prohibit the application of certain other marks to articles of the kind made, sold or brought into Canada by a dealer, the governing purpose being the prevention of the use of false or misleading indicia.

Sec. 16 reads as follows: "Everyone is guilty of an indictable offence who being a dealer within the meaning of this Act—(*a*) contravenes any provision of ss. 9, 10, 11, 12, 13 or 14 of this Act; (*b*) makes use of any written or printed matter or advertisement or applies any mark to any article, of any kind referred to in s. 13 or in s. 14 of this Act, or to any part of such article, guaranteeing or purporting to guarantee by such matter, advertisement or mark that the gold or silver on, or in such part thereof, will wear or last for any specified time." Sec. 17 prescribes the penalties to be imposed in case of conviction.

The objection made to sub-s. (*b*) is that it assumes to render penal what is nothing more than the mere warranting in writing or by means of a mark that lasting quality of the article, a matter of contract or representation, not within the realm of criminal law. But assuming that to be the case, it by no means concludes the matter. It does not follow that there is not resident, either in the Parliament of the Dominion or in the Provincial Legislature, the power to declare such an act an offence and to provide punishment therefor. That the Imperial Parliament possesses the power is beyond question. And it has exercised it on much the same lines as in the Act in question here.

In the division of legislative power between the Parliament of Canada and the Legislature of the Provinces effected by the British North America Act many fields of legislation are left within the competence both of the Parliament and of the Legis-

latures. And, as more than once remarked, in one way of dealing with a particular subject it may be within s. 91, and in another way, or for another purpose, it may fall within s. 92: *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 107, 108; *Hodge* v. *The Queen*, 9 App. Cas. 130, per Osler, J.A., in *Regina* v. *Wason* (1890) 17 A.R. 221, at p. 224.

The exclusive legislative authority conferred by s. 91 upon the Parliament of Canada in relation to the criminal law, including the procedure in criminal matters, does not deprive the Provincial Legislatures of the right to legislate for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade: *Regina* v. *Wason*, supra. But on the other hand, the right of the Provincial Legislatures to so legislate does not deprive the Parliament of its powers in relation to criminal law.

In this case no question of conflicting legislation arises. And although in one way the sub-section may appear to interfere with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of methods whereby the public are, or may be exposed to deception and imposition.

The question should be answered in the negative.

G. Waldron, for the defendant. *E. Bayly*, K.C., for the Crown. *J. Jennings*, for the Minister of Justice.

HIGH COURT OF JUSTICE.

Middleton, J.] MUTRIE *v.* ALEXANDER. [March 11.

Will—Action to establish—Jurisdiction of Surrogate Courts and High Court—Declaratory judgment.

This was an action to establish the will of Andrew Alexander, deceased, and for a declaration that the executor named therein was entitled to probate. The will, it was said, was lost, but the court did not think there was adequate proof of search, but was satisfied that it had been duly executed.

Held, 1. That the High Court has no testamentary jurisdiction except when conferred upon it by the Surrogate Courts Act, 10 Edw. VII. c. 31, ss. 32 and 33 in matters commenced in the Surrogate Court and transferred to the High Court and in

actions to set aside wills in which the jurisdiction is conferred by s. 55 of the Judicature Act; and it has also the power to determine the title to land possessed by the courts of equity and law upon the issue devisavit vel non.

2. As to the additional application for a declaratory decree, the court has no power to pronounce such a decree apart from legislative authority, unless consequent relief is asked and can be given, and the High Court cannot under the guise of a declaratory decree usurp the jurisdiction conferred by legislature upon any other tribunal.

H. Guthrie, K.C., for plaintiff. *F. Denton*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] MANNING *v.* CITY OF WINNIPEG. [April 10.

Municipal corporation—Contract of, without by-law—Employment of counsel by city—Winnipeg charter.

Appeal from judgment of MATHERS, C.J., noted vol. 46, p. 548, dismissed with costs.

Full Court.] SMITH *v.* NATIONAL TRUST CO. [April 10.

Mortgage—Power of sale—Possession of mortgaged premises held by mortgagee for statutory period—Real Property Limitation Act—Real Property Act—Laches—Acquiescence.

Held, 1. A mortgagee under a mortgage of land registered under the Real Property Act, whether the power of sale contained in the mortgage may be exercised without notice or after notice, can only make a valid sale of the property (1) by the directions or order of the district registrar under section 110 of the Act, or (2) by an action in the Court of King's Bench for foreclosure or sale; and, therefore, a purchaser from the mortgagee, although the latter be lawfully in possession and purports to sell and convey the land, does not acquire a title free from the mortgagor's

right to redeem, when such sale is not made under the directions or order of the district registrar or in an action in the court.

2. In such a case section 111 of the Act does not apply so as to make the sale good.

3. Sec. 75 of the Real Property Act, which provides that "after land has been brought under this Act no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely," means the same as if the word "merely" had been omitted, and operates so as to prevent the mortgagee and all persons claiming under him from obtaining, under s. 20 of R.S.M. 1902, c. 100, a declaration of the court that the mortgagor's equity of redemption has been lost, in consequence of adverse possession for more than ten years. *Belize Estate Co.* v. *Quilter* (1897), A.C. 367, distinguished.

4. Neither can such a declaration be obtained, on the ground of the laches and acquiescence of the mortgagor or his representatives, in an action by the purchaser asserting a title in himself and claiming to be registered as the owner of the land, relying only on such a sale as is referred to in above paragraph 1.

Coyne, for plaintiff. *Galt*, K.C., for defendant.

KING'S BENCH.

Mathers, C.J.] ALDOUS *v.* GRUNDY. [March 29.

Principal and agent—Revocation of agency—Claim for work done before revocation—Commission on sale of land—Quantum meruit.

An agent who has been promised a commission on the sale of land, if made within a limited time at a price and on terms stipulated, although he had not an exclusive agency, is entitled to payment quantum meruit for his expenditure of time and money paid for advertising which resulted in his finding within the time limited a purchaser for the property able and willing to carry out the purchase, although the agency was revoked before the proposing purchaser had actually bound himself to buy the property, in a case when the principal, at the time of creating the agency, knew that the agent would, in reliance upon the

terms of his employment, spend time and money in the hope of earning the commission agreed on.

Aldous v. *Swanson,* 20 M.R. 101, followed.

Verdict for half the amount of the commission the plaintiff would have earned if the sale had been carried out.

Galt, K.C., for plaintiffs. *Stacpoole* and *Lorne Elliott,* for defendant.

Mathers, C.J.] LA FLECHE *v.* BERNARDIN. [March 30.

BERNARDIN *v.* LA FLECHE.

Warranty—Fraudulent representations—Action on promissory notes—Counterclaim—Principal and surety—Damages for breach of warranty—Consolidation of cross actions—Set-off of verdicts.

Held, 1. It is no defence to an action on a promissory note that it was given for the price of an article sold by the payee to the maker with a warranty which has been broken, unless the vendor was guilty of a fraudulent or reckless misrepresentation in making the sale; the maker's proper remedy being either to counterclaim or bring a cross action for damages for the breach of warranty.

2. A party who has signed such a note as surety for the maker may, if sued along with the maker, set off against the plaintiff any damages which the maker would be entitled to recover against him for the breach of warranty. *Bechervaise* v. *Lewis,* L.R. 7 C.P. 372, followed.

When the maker of the note brought a cross action for the breach of warranty, instead of counterclaiming in the action brought against him, and recovered a verdict for damages exceeding the amount due on the note, the two actions, having been tried together, were consolidated, one verdict was set off against the other, and final judgment ordered to be entered in the consolidated action in favour of the maker of the note for the difference only. Illustration of the proper assessment of damages for breach of a warranty that a stallion sold was a sixty per cent. foal getter.

Hagel, K.C., and *Cutler,* for La Fleche. *Blackwood* and *Manahan,* for Bernardin. *Hull* and *Sparling,* for sureties on note.

Mathers, C.J.] [April 4.

BANTING *v.* WESTERN ASSURANCE CO.

Railway Act, R.S.C. 1906, *c.* 37, *as amended by* 9 *Edw. VII. c.* 32, *s.* 9—*Loss by fire caused by sparks from locomotive—Right of company to benefit of insurance against same loss—Action by insured against insurer after recovery of judgment against railway company.*

This was an action to recover from an insurance company the amount of a policy against loss by a fire caused by sparks from a railway locomotive. The plaintiff had recovered judgment against the railway company for the amount of his loss under section 298 of the Railway Act, which judgment had been paid less the amount of the policy sued on.

The last paragraph of that section as amended by 9 Edward VII. c. 32, s. 9, is as follows: "Provided further that the company shall, to the extent of the compensation recoverable, be entitled to the benefit of any insurance effected upon the property by the owner thereof. Such insurance shall, if paid before the amount of compensation has been determined, be deducted therefrom; if not so paid, the policy or policies shall be assigned to the company, and the company may maintain an action thereon.

Held, that the statute did not of its own force vest the policy in the railway company, and that, unless it had demanded an assignment, the plaintiff was not bound to give it and might maintain an action against the insurance company upon the policy.

Corporation of Oldham v. *Bank of England* (1904), 2 Ch. at p. 716, distinguished.

Trueman, for plaintiff. *Laird*, for defendant.

Metcalfe, J. [April 4.

HANNESDOTTIR *v.* RURAL MUNICIPALITY OF BIFROST.

Taxes—Unpatented land—Sale of land after issue of patent for taxes imposed before issue.

Under s. 159 of the Assessment Act, R.S.M. 1902, c. 117, having regard to the special provisions of the Act and more particularly to s. 166, there may be a sale, after the issue of the Crown patent, for arrears of taxes assessed against the interest

of the occupant, being the homesteader, prior to the issue of the patent, and the municipality is not, in such case, limited to the special method of collection provided by s. 146.

In any event the sale will not be set aside when some of the taxes for which the lands were sold were assessed after the issue of the patent.

Trueman, for plaintiff. *Hannesson*, for defendant.

Metcalfe, J.] JOHNSON *v.* HENRY. [April 10.

Practice—Stay of proceedings—Meaning of expression "usual stay."

When, at the close of the trial, counsel for the losing party asks the judge to grant the "usual stay" and the judge ays "yes," and nothing more is said, the meaning is that the successful party may sign judgment, but may neither issue an execution nor register a certificate of judgment until after the lapse of the time allowed for appealing from the decision.

Galt, K.C., for plaintiff. *Symington*, for defendant.

Robson, J.] WRIGHT *v.* ELLIOTT. [April 13.

Practice—Costs—Action against member of legal firm, one of whom is not a solicitor—Counsel fees paid to partners in law firm—Law Society Act, R.S.M. 1902, *c.* 85, *ss.* 52 *and* 59.

Held, 1. No solicitors' fees should be allowed on the taxation as against the plaintiff of the costs of the successful defence of an action against one member of a legal firm for whom the firm acts as solicitors, when another member is not a solicitor.

Lindley on Partnership, 7th ed., at p. 136; *Plissson* v. *Skinner*, 5 Terr. L.R. 391, and *Brown* v. *Moore*, 32 S.C.R., at p. 97, followed.

2. The defendant, however, may, in such a case, tax counsel fees actually paid to his partners. *Johnston* v. *Ryckman*, 7 O.L.R. 511, followed.

Tench, for plaintiff. *Deacon*, for defendant.

Robson, J.] IN RE JICKLING. [April 13.

Practice—Surrogate Court, transfer from, to King's Bench.

When a contentious matter arising in a Surrogate Court between the proponents of two different wills of the deceased is

transferred to the Court of King's Bench under s. 63 of the Surrogate Courts Act, R.S.M. 1902, c. 41, it is necessary that a statement of claim in the King's Bench should be filed and served before any other step in the cause is taken. *Doll* v. *Howard*, 11 M.R. 73, followed.

The party who commenced the litigation in the Surrogate Court by petitioning for probate should be the plaintiff in the King's Bench.

Trueman, for plaintiff. *A. B. Hudson*, for defendant.

Mathers, C.J.] DESAULNIER v. JOHNSTON. [April 22.

Practice—Solicitor and client—Præcipe order for delivery of bill of costs—Undertaking to pay amount taxed.

Held, 1. A præcipe order for the delivery and taxation of a solicitor's bill of costs, taken out by a client under Rule 964(*a*), added to the King's Bench Act by 10 Edw. VII. c. 17, s. 12, should, under s. 43 of the English Solicitor's Act, 6 & 7 Vict. c. 73, which is still in force in Manitoba, be styled in the matter of the solicitor and not in the action in which the costs were incurred.

2. It is not necessary that such an order should contain an admission of the retainer.

3. Neither is it necessary that such an order should contain a submission on the part of the client to pay the amount found due on the taxation: see King's Bench Act, Form 104; although when the client applies, after a month from the delivery of the bill, for a reference to taxation it would be proper to require such submission; and in no case is there authority to impose such a condition when the application is merely for the delivery of the bill.

4. Under said Rule 964(*a*) an order may be taken out for the delivery of a bill simply without adding the word "taxation."

In re West King and Adams (1892) 2 K.B. 107; *Duffett* v. *McEvoy*, 10 A.C. 300, and *Re McBrady* v. *O'Connor*, 19 P.R. 37, followed.

Phillipps, for plaintiff. *Blackwood*, for solicitors.

Book Reviews.

The Law of Costs in Canada. By His Honour Judge Widdifield, Junior Judge of the County of Grey. 2nd ed. Toronto: Canada Law Book Co., Limited, 32 Toronto St. 1911. Price, $6.

This book is already so well known, that it is unnecessary to say much about it, except to again commend it as a necessary adjunct to every properly equipped practitioner's library, especially in the province of Ontario. Very useful, also, in the other provinces (except Quebec) where the law and practice as to costs is almost the same. Many changes have necessarily been made and a large number of authorities, both English and Canadian, have been examined and referred to in this edition. The necessity of a new book on this subject is apparent, as it is ten years since we had any work on the subject in this country. We note, as most useful, that the differences between the English and Canadian rules are pointed out, so that the practitioner can tell at a glance the extent to which an English case is applicable to the conditions in this country.

The Law of Prohibition at Common Law and under the Justices' Acts. By H. R. Curlewis, B.A., and D. S. Edwards, B.A., Barrister-at-law, Sydney, Aust.; with a chapter of the practice in England by F. J. Wrottesley, Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane. Sydney: The Law Book Co., of Australasia, 72 Castlereagh Street. 1911.

This is a new departure, bringing into prominence our possessions in Australasia and the courts therein. The book is said to be founded on the decisions of the courts of England and Ireland; of the High Court of Australasia; the Supreme Courts of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, and the Supreme Court and Court of Appeal of the Dominion of New Zealand.

It would seem to be a great pity that the learned editors had not included in their excellent work the decisions of this Dominion on the subject treated.

The subject is an important one and there is not much help to be had from text books. The study itself is a very interesting one and is shortly referred to in the preface. The contents are

grouped as follows: Part I. Common Law of Prohibition, in which appear the nature and origin of this branch of the law; excess of jurisdiction; prohibition in aid; natural justice, and a large amount of learning under other heads; Part II. consists of Parties, Practice and Costs.

The plan of the work is to give general propositions, tersely stated, followed by a reference, the leading cases substantiating them with full notes thereon. The book, as to matter, as to mode of construction and in literary style is a first rate production. It will be found to be most interesting reading to the profession, as well as a mine of information subject of prohibition and kindred topics. Not the least part of its interest in this country is the view it gives to us here of the judicial mind in the antipodes. We hope soon to see an edition which will gather together the law on the subject of Canada as well as some other portions of the British Empire.

Introduction to the Science of Law. Systematic survey of the Law and Principles of Legal Study. By KARL GAREIS, Professor of Law at Munich. Translated from the third revised edition of the German by ALBERT KOCOUREK, of the Chicago Bar; with an introduction by ROSCOE POUND, Story Professor of Law in Harvard University. Boston Book Company, Boston, Mass. 1911.

It is said that the purpose of this translation is to make valuable to English speaking people one more important contribution to legal science; and doubtless this juristic survey of Dr. Gareis is one of the best and one of the best-known of this class of works.

It may be said without fear of contradiction that the study of the law as given in Law Schools of modern days, at least so far as this country is concerned, turns out better lawyers than the system, or rather want of system, which was in vogue before their introduction; and that it gives not only a better legal education, but also that most important knowledge, the place to find the law applicable to the case in point. Whilst this is true we doubt whether the study of legal science and the philosophy of laws is of much advantage in legal education from a general practical standpoint. At least the time that would be necessary to acquire a knowledge of the philosophical and historical learning of this branch might be better spent in other lines. Life is not long

enough to learn everything. The above work, now in its third edition, has a great reputation, and for those who have time for a full knowledge of such subjects it would be indispensable.

Questioned Documents. A study of questioned documents, with an outline of methods by which the facts may be discovered and shewn. By ALBERT S. OSBORN, Examiner of Questioned Documents, with an introduction by Professor John H. Wigmore, author of Wigmore on Evidence. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co. 1910.

The introduction begins as follows: "A century ago the science of handwriting did not exist. A crude empiricism still prevailed. This hundred years past has seen a vast progress. All relevant branches of modern science have been brought to bear. Skilled students have focused upon this field manifold appurtenant devices and apparatus. A science and an art have developed."

The work, which is to assist in the discovery and proof of the facts in hand investigation or legal enquiry involving the genuineness of a document. The writer gives the proved results of the latest investigation on such subjects; and illustrations are introduced to make clear the points under consideration. Definite instructions are also given regarding the investigation of the several classes of questioned documents, with a chapter on photography and the use of a microscope. The old Book says that the heart of man is deceitful and desperately wicked, but the wickedness develops in different lines according to circumstances; in these days it develops largely in the way of forgery; hence the value of such a work as the one before us.

The Lawyers' Reports Annotated. New Series, Book 29. BURDETT A. RICH, HENRY P. FARNHAM, editors. Rochester, N.Y.; The Lawyers' Co-Operative Publishing Co. 1911.

This series of reports comes to us with unfailing regularity and is as much a mine of legal lore as ever. We heartily recommend it to our readers. There comes with it the usual index of cases in the previous volumes.

Statutes of Practical Utility, passed in 1910, *with notes* by W. H. AGGS, M.A., LL.M., Barrister-at-law, of the Inner Temple. London: Sweet and Maxwell, 3 Chancery Lane, and Stevens and Sons, Limited, 119 and 120 Chancery Lane.

This collection of statutes is the continuation of the well-known series "Chitty Statutes." Of the 38 public general

statutes passed in Great Britain in 1910, 21 have been selected as "statutes of practical utility" applicable to the United Kingdom, England or London.

The Annual Digest. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 and 120 Chancery Lane, Law Publishers. 1911.

This volume includes all the reports of the decisions of the Superior Courts of England, with a selection from the Scottish and Irish cases. It contains also a collection of cases followed, distinguished, explained, commented on, overruled or questioned with reference to the statutes passed during the year 1910. With a view to facilitate the noting-up of these cases there is given a note of the cases printed on one side only for cutting up.

Stone's Justices' Manual for 1911. 43rd edition. By J. R. ROBERTS, Esq., Solicitor, Clerk to the Justice, etc. London: Shaw & Sons, 7 and 8 Fetter Lane; Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers. 1911.

It is only necessary to call attention to the fact that another edition of this Manual has been issued. It is indispensable to magistrates and practitioners in England; and contains much that is useful to the same classes in this country. It has now grown to a book of 1471 pages.

Flotsam and Jetsam.

The law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles, which govern specific and individual cases, as they happen to arise.—Lord Mansfield, *R.* v. *Bembridge* (1783) 22 How. St. Tr. 155.

Law grows, and though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progress in the opinion of human opinion.—Lord Coleridge, *Reg.* v. *Ramsay* (1883) 1 Cababe and Ell' ' Q.B.D. Rep. 135.