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Rumour has it that very shortly important changes will be made in the Bench of the Supreme Court of Canada. At the end of last month Justice Gwynne entered upon his eighty-eighth year, and can very justly claim relief from judicial duties. Considering the smallness of judges' salaries and Mr. Gwynne's faithful service for so many years, no one would object, but rather all would be glad if it might be so arranged that he should retire on full pay. It is said that Sir Henry Strong's resignation may shortly be received. It is rumored in Ottawa that his successor would be Sir Louis Davies. Others speak of Sir John Alexander Boyd, Chancellor of Ontario, as the one they would like to see appointed. Whether he would feel disposed to leave Toronto for Ottawa may be questioned. It is certainly a great misfortune that the temptation of a proper salary is not added to the dignity of the position so as to induce the best men of the Dominion to accept the office. The names of Mr. Justice MacMahon and Hon. David Mills are mentioned in connection with the next vacancy amongst the puisne judges of the Supreme Court.

It is also an on dit at Ottawa that some definite action will shortly be taken to increase the salaries of the judges, and that the measure is to be somewhat of a general one. As to Ontario, if the judges of the High Court of Justice should be relieved from abou half their work as proposed by the Attorney-General, there would not be the same crying need for increase, but there would be good excuse for the county judges asking for more pay. We trust however, that the proposed legislation, making such drastic changes in procedure and jurisdiction, may not take place. It may be true that county judges are not overpaid; but the question is rather whether there should not be fewer of them and that all should have plenty of work to do, in which case the objection to their being paid better salaries would be removed.

The decision of Mr. Justice Archibald in the Delpit case upholding the validity of the marriage of the parties, will be generally received with satisfaction by the public in the Dominion.

Any other conclusion than he has arrived at, would have been unfortunate, for while it is true that the Code provides that a marriage though declared null produces civil effects in favour of both parties, or the one of them, acting in good faith, and also in favour of the issue of the marriage—yet while this may to some extent relieve innocent parties in the Province of Quebec from the odium attaching to illicit intercourse, it cannot do so we think, in any other part of the Dominion where the question would simply be, whether the marriage has been validly contracted or not, and if it has not, then, we apprehend, none of the consequences of marriage can attach to either of the parties or to their children, however honestly the parties to the marriage which is annulled may have entered into the transaction, and the issue could only be regarded as illegitimate, and liable to all the odium and social and legal disabilities which that unfortunate status involves. This, under the circumstances of the Delpit case, where both parties appear to have acted in good faith, would certainly have been a deplorable result; and if the Quebec law was indeed in such an invidious condition as the plaintiff claimed, so that a marriage would be valid as between one class of its inhabitants, and invalid as to another, though contracted under precisely similar conditions, merely on the ground of the religion of the parties, it would certainly have called for instant legislative amendment. It is probable that the case may be carried to a higher court, but Mr. Justice Archibald's decision seems to be based on such plain and indubitable principles of law and justice, that we shall be very much surprised if any court can arrive at any other conclusion.

It seems that the experiment of the Dominion Government in relation to Doukhobor immigration bids fair to be very much of a failure. This extraordinary people are now crying out against the restrictions that Canadian law imposes upon their freedom of action and liberty of conscience. What a blow to our national pride in "the freest country on top of the earth!" They want the government to grant a block of land to them as a community, and when it is pointed out to them that under the existing legislation this cannot be done, but that if they want the land to be held in common all they have to do is for the individual grantees to hand it over to the community, they protest that their consciences

have too fine an edge to allow them to indulge in so hollow a compromise. Then they have religious (!) scruples against taking out a marriage license, and paying the incidental fee therefor. This objection is alleged to inhere in the view that no ceremony of any kind is necessary to constitute marriage—in other words, they endorse the (to us) very shocking sentiment of the poet who cried: "A curse on all laws but those which love has made." When marriage is so informal a proceeding, we are not surprised to find that divorce may be compassed among them with equal facility. Then, they have other abnormal usages, all nicely justified on religious grounds, which, combined with the facts we have mentioned, constitute these people as a wholly undesirable and impossible graft upon Canadian nationality. It would seem to us to be far better to allow the fertile fields of our great North-West to lie utterly fallow, than to colonize them with the sort of people which Old World countries find unmanageable and are glad to be rid of.

The rejection by the Boers of the terms of peace offered them by the British Government through General Lord Kitchener seems to have had the effect of destroying the sympathy of one section of their whilom well-wishers in England. The anti-bellum class consisted of two sections or divisions: those who opposed the government in the prosecution of the war for political reasons; and, those who deprecated the conflict from humanitarian considerations—although it would be a mistake to regard the latter as being entirely composed of "peace-at-any-price" men. It is the latter section that has been disaffected by General Botha's rejection of the peace proposals. Even Sir Edward Clarke, who retired from the government because he dissented from the war policy of his colleagues, is reported as declaring that the Boers, in rejecting fair terms of peace, have no right now to expect anything but complete subjugation. The British proposals were substantially as follows: The replacing of the military rule immediately upon the cessation of hostilities by a Crown Colony Administration, consisting of a nominated executive and elected assembly, this to be followed after a period by a representative government. The Boers were to be licensed to have rifles to protect themselves against the natives; the Dutch and English languages were to have equal rights; Kaffirs were not to have the

franchise until after representative government had been granted; the present laws in the Orange Free State respecting the status of Kaffirs were to regarded; church property and government trusts were not to be prejudicially affected; no war tax was to be levied upon the farmers, and the burghers were to be rendered assistance in restoring damaged farms. Even the colonists who had joined the republics in the war were to be penalized only by disenfranchisement. Surely these terms were generous in view of all the circumstances of the war; and, had they been accepted would have given rise to some just dissatisfaction both in England and in the South African colonies. For instance, the provisions which would have operated to free the farmers in the belligerent districts from any liability in respect of the expenses of the war, leaving them to be paid by the loyal colonists, were, to put it mildly, hardly equitable to the latter. Clearly, the British Government was in no wise despotic in its proposals, and their rejection by the Boers is only another manifestation of the utter unreasonableness that has characterized that race from the inception of the conflict.

COUNTY COURTS AND LEGAL PROCEDURE.

It is sincerely to be hoped that the bill respecting legal procedure and County Courts jurisdiction introduced by the Attorney-General will not be pressed. The more its provisions are discussed the clearer it becomes that it will effect changes much greater and more far-reaching than were either supposed or intended. Increasing the jurisdiction of County Courts might not of itself be of so much moment, but the consequences which are likely to flow from it would in our opinion be very injurious not only to the profession but to the public.

Without at present going into details, various objections to this legislation lie on the surface. The main one is that it will go a long way in the direction of decentralization. The best minds in England, and we venture to think the most thoughtful men in this country, look upon this as an evil. In England it is considered that centralization is a necessity for a strong, independent bar, and for a high-class bench. It is clear that this increased jurisdiction would largely destroy circuit business. The great educational advantages resulting from the presence of a High Court judge and leaders of the bar at county towns from time to time

was strongly put by Mr. S. H. Blake to the Attorney-General when a deputation of the bar recently waited on the latter to remonstrate against the passing of the proposed bill. Mr. Christopher Robinson on the same occasion called attention to the question of appeals which, under the suggested system, would lead to the time of the High Court being largely taken up with the large crop of appeals which would surely grow therefrom. He also alluded to the unwisdom of placing the power of quashing by-laws and increased jurisdiction in matters affecting real estate, wills etc., in the hands of County Judges. As he pointed out, it is highly desirable that in matters such as these (and, in fact, as far as possible in all matters), there should be uniformity and certainty of decision. This uniformity and certainty is so overwhelmingly important that it should be the aim of all legislation affecting the administration of justice to obtain it even though it costs expense and trouble to do so. Theoretically there should be one central fountain of justice. This of course is not possible, but every step away from it is fraught with peril and loss.

Manifestly these desiderata are less and less attainable as business is distributed amongst a number of local judges, pr ably of less calibre than the High Court judges, with fewe advantages in the way of books, with the help of a local bar only, and with no brother judges to consult; and all this without any disparagement to either bench or bar. Many of the County judges have from time to time been quite equal to some of the judges on the Superior Court bench; and the leaders of the bar have largely been recruited from outside Toronto. To Barrie, Toronto owed the late D'Alton McCarthy and the present Mr. Justice Lount; to Dundas, the late B. B. Osler; to Cobourg, the late Mr. Justice Patterson; to London, the Chief Justice of the Common Pleas Division, and others who could be named. But the position of a local judge is really a difficult one. He lives in a comparatively small place where free criticism, otherwise so beneficial, would almost of necessity degenerate into unseemly wrangling—he is surrounded by local prejudices and petty scandals where everyone knows everyone else's business, and takes perhaps an undue interest in it—minor faults in the judge are unduly magnified—if he has personal peculiarities, or takes strong ground on any subject, even though in the right, these things are made much of to his detriment, etc., etc. All this tends to

destroy the usefulness of a local judge, and results in lowering the standard.

The deputation that waited on the Attorney-General was a representative one, and it was a subject of remark that members of the country bar were as strongly opposed to the proposed changes as the leaders of the bar from Toronto and other large cities. This fact makes it more evident that there must be indeed some good cause of alarm.

A variety of other questions and difficulties arise under the proposed bill, which, however, it is not worth while at present discussing.

THE LEGAL STATUS OF OUR MILITIA.

The fact that Canadian militiamen, enrolled and equipped by our Militia authorities, and sent by them to the scene of action, have taken active part in a contest carried on in a foreign country, and for objects in which this country has no direct concern, naturally suggests an enquiry as to the legal status of our military force. Subject to certain limitations as to age, and certain specified exemptions, every able bodied man in Canada is liable to military duty, and may be called upon for active service by the properly constituted authority whenever the necessity for doing so shall arise. It is to be noted that throughout the Act constituting the militia, the paramount authority is vested in "Her Majesty," meaning the reigning Sovereign for the time being. Her Majesty may not only call out the regular militia but Her Majesty may require all the male inhabitants of Canada capable of bearing arms to serve in case of a 'Levee en masse.' Her Majesty may also arrange the military divisions into which for military purposes Canada may be divided, and fix the proportions of the different arms of the service, and may at any time disband any portion of the same. It is to Her Majesty that the militiaman swears allegiance, and it is by Her Majesty that all commissioned officers are appointed. By the Militia Act it is also provided that an officer of Her Majesty's regular army shall command the militia, and, that the relative rank and authority of officers in the militia shall be the same as that in Her Majesty's regular army. Her Majesty also shall direct what arms and accoutrements shall be used by the militia, and shall also make regulations for the drill and training

thereof. The active militia shall also be subject to the "Queen's Regulations and Orders for the Army," and every officer and man when in the uniform of his corps "shall be subject to the Army Act passed by the *Parliament of the United Kingdom*."

Again, it is in Her Majesty that the power of calling out the militia for active service is vested, "at any time when it appears advisable to do so by reason of *war*, invasion, or insurrection, or danger of any of them."

It is evident then that the militia of Canada is no mere local force intended to aid the civil power in case of domestic disturbance, or to repel invasion of our own soil. The militia of Canada is Her Majesty's regular army in Canada—not a provincial force, but an integral part of the Imperial Army, subject to the direct authority of the Crown exercised through its representative, the Governor-General. But, as the Governor-General can only act on the advice of his responsible ministers, of whom one is the head of the Department of Militia, a conflict of authority, or at least of interest, may arise, attended possibly with very serious consequences. The first question to be settled, and it should be settled definitely in time of peace, is—what, in time of war, would be the legal status of our militia? We use the term "war" in distinction from "invasion" or "insurrection" which are terms clearly defined, yet all three are used, as already mentioned, as causes for which the Sovereign may call out the militia. As this country cannot engage in war on its own authority the term must refer to a war declared either by, or against the authority of the Sovereign, in whose prerogative it rests. And the war may be one in which we have no direct concern. Can in such case the Sovereign, by constitutional right, or by virtue of the power given by our Militia Act, direct the Governor-General to put this Act in force? The answer to the question is obvious, and it only requires to be put to shew how illogical our position is; and how necessary it is, that now, and with as little delay as possible, our position in regard to military service should be considered and defined, and not left in its present state of uncertainty.

Another question which has been mooted, and not determined, is of equal importance. Has the Government of this country the right, or the power of sending Canadian troops out of this country to take part in military operations elsewhere—as for instance in South Africa? This brings us back to the question whether our

force is a purely defensive one, only intended for the defence of our own borders. There is nothing in the Militia Act to point to such a conclusion, and, as already shewn, the whole constitution of the force is of an Imperial character. From a military point of view, even for purposes of defence, to confine our operations strictly to our own territory would be absurd, for often the best means of defending your own country may be to make an attack upon that of your opponent. Would the Imperial Government undertake the defence of this country if our own troops were to be strictly held within the borders of Canada, and not available for any service beyond them?

The fact is, that the whole situation has been so completely changed by political necessity, that what might have seemed a reasonable proposition before Confederation can no longer be maintained, and therefore the necessity for a reconsideration of our position and of our responsibilities, before a crisis arrives which may compel a decision at a moment when there will be no time for the consideration of fine points of constitutional doctrine, is an absolute and pressing necessity.

A somewhat novel case recently came before the Appellate Division of the New York Supreme Court. The right of the fair sex to wear long skirts, and thereby become most useful scavengers, has never been denied, however much such an occupation may horrify onlookers. The right, however, to use them in travelling and thereby contributing to an accident, was denied in the case of *Smith* v. *Kingston City R.W. Co.*, when a lady thus attired came to grief on descending from the platform of a street car. The conductor gave the lady plenty of time to alight, but not sufficient time to disentangle her train, which caught on the platform, and resulted in her being dragged some distance thereby. The Appellate Division, with due gallantry, (whether they were married men or not does not appear), held, that a woman was entitled not only to wear long skirts, but to a sufficient allowance of time to enable her to step off the car herself as well as to clear her skirts, laying down the rule that it was the duty of a conductor to see that a woman descending from a car was free from any attachment connecting her with the vehicle before starting again.

MANITOBA LIQUOR ACT CASE.

A careful study of the judgment of Killam, C.J., annulling as ultra vires the "Manitoba Liquor Act," 63-4 Vict. c. 22, leads to the conclusion that the decision turned upon a very narrow point. In fact, it would seem that the temperance party in Manitoba lost their case by reason of a casus omissus in the Act, or that, at any rate, a very slight amendment of the Act would render it in all probability constitutionally unassailable.

Constitutionally the case deals with a subject full of bright hope for the lawyers, namely, the question what is and what is not a matter of a merely local or private nature in the province within the meaning of No. 16 of s. 92 of the British North America Act, but so far as concerns the constitutional principles involved in it, the judgment does not seriously contest the proposition which appears indisputable when the judgment in the Liquor Prohibition Appeal 1895, [1896] A.C. 348, is read in connection with the decision of the Privy Council in *Hodge* v. *The Queen*, viz: that a provincial law prohibiting traffic in intoxicating liquors and restricting the consumption of liquor within the ambit of the province, and not affecting transactions in such liquors between persons in the province and persons in other provinces or in foreign countries, may be constitutionally valid as an Act in relation to a matter of a merely local or private nature in the province within the said No. 16 of s. 92; and that No. 16 of s. 92 serves the same office in connection with provincial powers, which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subject fulfils in section 91. At the same time the learned Chief Justice prefers to formulate the conclusion which he draws from the Privy Council decision in the Liquor Prohibition Appeal, 1895, in these words:—

"By legislation properly coming under one of the clauses No. 13 and No. 16 of s. 92, a Provincial Legislature may, to some extent, deal with the suppression of trade in intoxicating liquors, provided that the legislation is confined to matters which are provincial or local within the meaning of those clauses."

On one other constitutional point, indeed, the judgment possesses some interest, viz: in holding that a Liquor Act such as the one before the court, which would appear not to have been

passed for the protection of the property dealt with itself, viz: intoxicating liquors, nor for the purpose of merely affecting that property, and which dealt not so much with contracts for the sale of such property as with the purposes of such contracts, thus stretching out beyond the contracts themselves to deal with moral qualities and intentions, and which is not enacted for the purpose of directly avoiding contracts and thus affecting the material rights of the parties, but merely forbids certain transactions upon pain of punishment,—cannot be properly regarded as an Act in relation to property and civil rights in the province within No. 13 of s. 92. In this, the judgment simply applies to the Act before the court the reasoning of the Privy Council in *Russell* v. *The Queen* as to what is and what is not to be considered to be an Act within No. 13.

The Manitoba Liquor Act before the Court in the present case commences with a recital that it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor, and then, as the judgment points out, proceeds mainly upon the same lines as The Canada Temperance Act, though purporting, of course, to be restricted in its operation to the province. It deals only with intoxicating liquors and expressly allows sales or dealings in such liquors for certain specific purposes of a scientific, medical and sacramental character, in very limited quantities, and under stringent conditions; but, except as so allowed, prohibits sales of and traffic in such liquors within the province of Manitoba and between parties in the province. It allows no sale of such liquors to persons within the province excepting by those who hold one or other of two kinds of licenses, viz.: either a druggist wholesale license or a druggist retail license; and, in either case, the licensee must be one who is authorized to engage in and who is lawfully engaged in the business of chemist and druggist as the true owner thereof. Now, it is provided that the holder of a druggist wholesale license may sell in such limited quantities only to one who buys for mechanical or scientific purposes, or to a duly registered medical practitioner, or to a druggist holding a druggist's retail license, but to no other; and, the holder of a druggist's retail license is only authorized to sell liquor for medical and sacramental purposes. By s. 51 even brewers and distillers or other persons holding a Dominion license for the manufacture of such liquors may only sell liquors so manufactured by them to a person

in another province or in a foreign country or to a licensee under the Act. Moreover, by s. 49, no one in Manitoba is to have or keep or give liquor in any place wheresoever, other than in his private dwelling house, unless he holds a druggist's wholesale or retail license under the Act, and then only as authorized by such license, with immaterial exceptions not necessary to notice here.

Now, it is true that by s. 119 it is specially declared that the Act is intended only to prohibit transactions in liquor which take place wholly within Manitoba, except under a license, or if otherwise specially provided, and to restrict the consumption of liquor within the province, but that it "shall not affect and is not intended to affect bona fide transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act should be construed accordingly." But it is quite clear that a person in Manitoba cannot very well have "transactions in liquor" with persons in another province or in a foreign country, however great his bona fides, if he is prevented from either buying or keeping liquor in the province, pending such transactions, and he is so prevented under the Act in question, unless he is a manufacturer himself, acting under a Dominion license. Obviously, even though he holds a druggist's license such as provided for by the Act, it would not help him. Now, it is on this point that the actual decision turns. Here, then, is, as it seems to me, the salient passage in the judgment:—

"In cases of this kind we must look, I think, not only to the class in which we would place the evil dealt with but also to the remedy. This appears to me to be involved in the view that the power to act depends on local conditions. To enact a remedy which has a direct effect beyond the locality of the province is to encroach on the field of the Dominion parliament with reference to the same subject under its general powers. . . . The evils at which the Liquor Act appears to me to be directed are intemperance and its results. The remedy is to suppress traffic in liquors within the province except for certain purposes, and thereby to restrict consumption. This is worked out by licensing certain classes to sell for certain purposes or to those who are to use only for certain purposes, and by limiting sales by manufacturers and wholesale dealers, to licensees and to persons out of the province. By these methods, direct and indirect, traffic in the province is limited to certain purposes. This is, in effect, the same as if all the

other conceivable purposes were enumerated and traffic for those directly prohibited. In this way manufacturers are prohibited from selling to the dealers who have warehouses here for export trade. These manufacturers and these dealers cannot sell to parties in the province for export trade. They cannot sell to parties in Manitoba licensed by the Government of Canada to carry on the business of compounders here. . . . This legislation just as directly prevents sales for the purposes for which I have mentioned as it does for the purposes of local consumption. The effect is not incidental but direct. . . . The legislature seems to have considered it necessary for the purpose of rendering its enactment effective, to lay its hand upon the manufacturer as well as the export dealer, and to make them submit to regulations, which in some views may or may not be allowable. But all these things indicate that the Legislature in attempting to deal with what in some aspects may be a local matter has gone further. It does not seem possible even with the aid of s. 119 to interpret the Act so as to produce a narrower and purely local effect, and it certainly is not possible to pick out any one portion as severable from the rest."

To fully explain the concluding part of this extract I should refer, as perhaps I might better have done sooner, to s. 55, which provides that no one shall sell or deliver liquors of any kind to any person not entitled to sell liquor, and who sells such liquor, and who buys for the purpose of re-selling, and that no one shall take or allow anyone else to take or carry any liquor out of any premises where the same is lawfully kept for sale for the purpose of being sold in the province by any person except a druggist or retail licensee. Consequently the Act closes out dealers, other than druggists, from purchasing liquors in the province, even though they wish to deal with them purely for export trade; and this the Court holds is enough to prevent the Act being classed as one in relation to a merely local or private matter in the province. Now seeing that s. 119, which I have quoted above, so clearly indicates that it was not the intention of the legislature to affect bona fides transactions in liquor between a person in the province and a person outside, the conclusion would seem inevitable that unintentionally the provisions of the Act produce a result which was not aimed at.

The moral of the decision therefore seems to be that you cannot be too careful in the draughtsmanship of legislative Bills,

A. H. F. LEFROY.

Correspondence.

DRAINAGE WORKS AND THE SUPREME COURT.

To the Editor, CANADA LAW JOURNAL.

SIR.—A criticism in a recent number of the Toronto *Globe* of the decision of the Supreme Court of Canada in the case of *The Sutherland-Innes Co.* v *Township of Romney*, 30 S.C.R. 495, if it reflects anything more than the feelings of a disappointed litigant goes some distance in shewing that there is still some need of higher appellate tribunals to protect individual rights against the arbitrary views of municipal authorities, impressed with their own importance and the infallibility of all courts and judges residing in the immediate vicinity of the St. Clair marshes. The judgment is first quarrelled with as having been rendered by a *French* judge, who consequently is assumed to know nothing of what he is talking about. But this objection is quite as good as the rest of the complaint as will appear by referring to the official report of the judgment, carefully reasoned out by Mr. Justice Gwynne, a native of Dublin, for many years an ornament of the Upper Canada Bar, who sat for many years as a judge of its Court of Common Pleas and, after refusing appointment as a permanent judge of the Ontario Court of Appeal, was elevated to the Supreme Court Bench as an expert in the laws of that province. The critic must be innocent who supposes that any one is likely to believe his proposition that an appeal court judge delivering the unanimous decision of the bench is giving merely a personal opinion on the matter. As to the quorum constituting the court, it may be news to this critic that no hearing could have taken place before four judges had not the parties themselves specially consented that their differences should be so disposed of; they, in fact constituted their own tribunal. Why should anyone complain?

It is true that, in some respects, this decision, in its result reversing the judgment of the court below as reported, (26 O.A.R. 495,) rather gives the impression that the arguments in the Ontario Court of Appeal were quite different in their nature, and much less exhaustive than those before the Supreme Court of Canada, and it is quite possible that, looked at from the new points of view thus presented, the Ontario court might have come to different conclusions. Now, as to the matter of the judgment. In about 38

pages of the reports, Mr. Justice Gwynne makes a careful study of legislation, initiated, amended, repealed, consolidated and otherwise dealt with by the Ontario Legislature from 1873 to date, leading to the conclusion that the intention of the legislature, as shewn by the language used, in at least five different statutes and three revisions and consolidations, purporting to deal with the subject of drainage, provincial, municipal and inter-municipal, was to leave alone the fundamental principle that there must be some actual or assumed benefit as the basis of assessments for taxes. Qui sentit commodum sentire debet et onus. Pray tell me who desires to quarrel with this maxim? Or with the other two main reasons of the decision, that an "embankment" is not a "ditch," and that the redemption of drowned lands by dyking is not a drainage work? The article seems inspired by some person who knows very well what he is after, but has not so clear an idea of where he is at.

Ottawa, March, 1901. L. W. COUTLEE.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.] [Feb. 18.

ATTORNEY-GENERAL OF ONTARIO *v.* NEWMAN.

Revenue—Succession duty—Deposits in banks—Foreigner.

Payment of duty under the Succession Duty Act is based upon administration and duty is payable upon any property which can properly be administered only in Ontario.

Payment of non-negotiable deposit receipts, payable after notice at branches in Ontario of Canadian banks, held by a foreigner at the time of his death in the foreign country, cannot be enforced except by his personal representative in Ontario, and succession duty is payable there in respect of the amount covered by them. Judgment of BOYD, C., 31 O.R. 340; 36 C. L. J. 99, affirmed.

Aylesworth, K.C., and *J. H. Rodd*, for appellant. *Shepley*, K.C., *A. Macdougall* and *W. E. Middleton*, for respondent.

From Boyd, C.] [Feb. 23.

TOWN OF WHITBY *v.* GRAND TRUNK RAILWAY COMPANY.

Railways—Bond—Recital—Bonus.

A railway company had power to receive and take grants and donations of land and other property made to it to aid in the construction and maintenance of the railway and any municipality was authorized to pay by way of bonus or donation any portion of the preliminary expenses of the railway, or to grant to the railway sums of money or debentures by way of bonus or donations to aid in the construction or equipment of the railway. The railway company in consideration of a bonus by a municipality, agreed to keep for all time its head office and machine shops in the municipality.

Held, that the recital of an agreement in a bond signed by the railway company amounted to a covenant on their part to observe its terms, but that such an agreement was not justified by the statutory provisions and was not enforceable. Judgment of BOYD, C., 32 O.R. 99; 36 C.L.J. 572, reversed.

Cassels, K.C., for appellants. *Aylesworth*, K.C., and *Farewell*, K.C., for respondents.

From Drainage Referee.] [March 2.

TOWNSHIP OF WARWICK *v.* TOWNSHIP OF BROOKE.

Drainage—Status of petitioners—Finality of assessment roll—Farmers' sons.

In proceedings under the Drainage Act the assessment roll is conclusive as to the status of the persons mentioned in it, and evidence is not admissible to shew that a person entered on the roll as owner is in fact a farmer's son and has been entered on the roll as owner by the assessor's error. Judgment of the Drainage Referee on this point reversed, ARMOUR, C.J.O., dissenting, but affirmed per Curiam on other grounds.

Aylesworth, K.C., and *John Cowan*, for appellants. *Shepley*, K.C., *W. J. Hanna* and *John R. Logan*, for respondents.

From Divisional Court.] LEARN *v.* BAGNALL. [March 2.

Bond—Breach—Agreement to exchange land—Infant.

The plaintiff and an infant owner of land entered into an agreement for the exchange of land, the land of the plaintiff being subject to a mortgage, the interest upon which to a certain date he agreed to pay, nothing being said in the agreement as to payment of the interest after that date. The defendant gave a bond to the plaintiff conditioned to be void if the infant owner after arriving at the age of twenty-one years should convey his land to the plaintiff, and should "do and perform all acts, covenants and agreements to be done and performed by him as in the said agreement mentioned." The infant went into possession of the plaintiff's land but

the interest after the named date not having been paid the land was sold by the mortgagee before the infant attained the age of twenty-one years, and the infant upon attaining that age did not convey his land to the plaintiff.

Held, though the infant was impliedly bound to indemnify the plaintiff against payment of interest after the named date, yet that that right of indemnity was not to be enforced until the infant attained his majority, the plaintiff in the meantime being primarily liable to pay the interest; and that not having done so he was in default and not in a position to complain of the infant's refusal to convey or to enforce the bond.

Held, also, that the implied obligation to indemnify was not an act, covenant, or agreement within the agreement, and, therefore, not within the bond. Judgment of a Divisional Court affirmed.

J. Montgomery, for appellant. *Aylesworth*, K.C., and *John Crawford*, for respondent.

From Meredith, J.] [March 2.

HOPE *v.* HAMILTON PARK COMMISSIONERS.

Parties—Attorney-General—Ratepayers.

Ratepayers who are affected thereby only to the same extent as all other ratepayers in the city cannot bring an action against the park commissioners of the city to set aside resolutions as to the management of a city park; such an action must be brought by the Attorney-General. Judgment of MEREDITH, J., affirmed.

Armour, K.C., and *W. L. Ross*, for appellants. *MacKelcan*, K.C., and *J. L. Counsell*, for respondents, the Commissioners. *J. G. Gauld*, for respondent, Stroud.

From Drainage Referee.] [March 2.

WIGLE *v.* TOWNSHIP OF GOSFIELD SOUTH.

Drainage—Township drain—Division of township.

A township in which extensive drainage works had been constructed was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the new municipalities, each remaining liable as surety for the portion of the debts it was not primarily liable to pay, and the provisions of the Municipal Act as to the separation of a junior from a senior township to be applied as far as possible:—

Held, that an action for damages caused by the drainage works, incurred before the division and asking to have the drains kept in repair, must be brought against both townships and not against that one only in which the plaintiff's land was situate. Judgment of the Drainage Referee reversed.

Matthew Wilson, K.C., and *A. H. Clarke*, K.C., for appellants. *Mabee*, K.C., for respondents.

From Meredith, J.] COLLINS *v.* KILROY. [March 2.

Will—Undue influence—Spiritual adviser—Onus of proof.

The influence of a person standing in a specially confidential relation to a testator (in the present case a spiritual adviser and confessor) may lawfully be exerted to obtain a will or legacy in his favour so long as the testator thoroughly understands what he is doing and is a free agent, and the burden of proof of undue influence lies upon those who assert it; but if the person who obtains the benefit takes part in the actual drawing of the will the onus is cast upon him of shewing the righteousness of the transaction. Judgment of MEREDITH, J., affirmed.

S. H. Blake, K.C., and *Mabee*, K.C., for appellant. *Woods*, K.C., and *J. J. Coughlin*, for respondent.

From Meredith, J.] BOGART *v.* TOWNSHIP OF KING. [March 2.

Municipal corporations—Bonus—Debentures—Railway.

By a by-law passed under the provisions of ss. 386, 694 and 696 of the Municipal Act, R.S.O. 1897, c. 223, a township corporation was authorized to raise a sum by issuing debentures, to be met by special rate, to provide a bonus in aid of a railway company, payable upon its compliance with certain conditions, no time for compliance being limited.

Held, that until the sale or negotiations of the debentures there was no debt on the part of the township and that the special rate was not leviable, though the time fixed for payment of some of the debentures had passed. Judgment of MEREDITH, J., 32 O.R. 135; 36 C.L.J. 596, reversed.

S. H. Blake, K.C., for appellant. *Shepley*, K.C. and *A. B. Armstrong*, for respondents.

From Robertson, J.] FENTON *v.* MACDONALD. [March 2.

Defamation—Libel—Privilege—Malice.

A niece wrote to her aunt, with whom she was on terms of great intimacy and whom she was in the habit of staying with, a letter, making, on the authority of a correspondent, statements derogatory to the character of a gentleman well known to niece and aunt, who was a frequent visitor at the aunt's house, and it was alleged on the one side and denied on the other, that in the letter, which had been destroyed, the niece told the aunt "to spread this about town at once":—

Held, that such a moral and social duty existed as made the communication a privileged one; and, that though the direction to spread the statement about would be some evidence of malice, it should be left to the jury to say whether that direction had been in fact given. Judgment of ROBERTSON, J., reversed.

Johnston, K.C., and *H. M. Mowat*, K.C., for appellants. *A. Monro Grier*, for respondent.

From Ferguson, J.] JACKSON *v.* SCOTT. [March 2.

Vendor and purchaser—Judgment for purchase money—Subsequent rescission by vendor.

A vendor obtained judgment against a purchaser for certain instalments of the purchase money, less a sum allowed to the purchaser by way of set-off. The agreement for sale provided that the vendor might rescind in case of default, and that all moneys theretofore paid should be forfeited, and after execution under the judgment had been returned unsatisfied and after default in payment of further instalments, the vendor gave notice of recission.

Held, that he was entitled to do this, and that the judgment remained in force as far as the amount allowed by way of set-off and the costs were concerned. Judgment of FERGUSON, J., reversed.

H. T. Beck, and *J. W. McCullough*, for appellant. *George Wilkie*, for respondent.

From MacMahon, J.] GODWIN *v.* NEWCOMBE. [March 2.

Master and servant—Workmen's compensation for Injuries' Act—Dangerous machine—Absence of guard—Contributory negligence.

The plaintiff was employed by the defendant to "edge" boards at a machine known as a jointer, which consisted of two revolving knives about sixteen inches wide driven by steam power set in and projecting slightly above the surface of an iron table about three feet high and eight feet long. The knives were not guarded, and it was proved that a guard could have been used; that without one the machine was dangerous; and that defendant's foreman knew this. The workman as he edged each board stood it on end against the table at his left hand for removal by other workmen. One of the boards, owing either to the vibration of the machinery, or to a knock given to it by another workman, fell upon the plaintiff's arm and forced his hand upon the knives, and he was seriously injured:—

Held, that the absence of a guard was a defect in the machine; that the foreman's knowledge of this defect and his failure to remedy it constituted negligence for which the defendants were liable; that the absence of the guard and not the placing the board against the table was the proximate cause of the accident; and, therefore, that the plaintiff was entitled to damages. Judgment of MACMAHON, J., affirmed.

Aylesworth, K.C., and *C. A. Moss*, for appellant. *Du Vernet* and *McKeown*, for respondent.

From Meredith, J.] SIMS *v.* HARRIS. [March 12.

Master and servant—Share of profits of business—Sale of business.

The plaintiff and the defendant entered into a contract of hiring and service, which was to continue for a year unless the plaintiff's business was

disposed of before that time, and the defendant was to be paid a certain sum each week, and also, at the end of the year, a precentage of the net profits of the business.

Held, that the sale of the business before the expiration of the year did not deprive the defendant of his right to the precentage of the net profits up to that time, but that he had no interest in the assets of the business and therefore no right to a percentage of the profits made by the plaintiff on the sale of the assets. Judgment of MEREDITH, J., reversed, MACLENNAN, J.A., dissenting.

Chrysler, K.C., for appellant. *Geo. F. Henderson*, for respondent.

From Divisional Court.] MITCHELL *v.* SAYLOR. [March 12.

Mortgage—Rents and profits—Collateral indebtedness—Appropriation of receipts.

A mortgagee in receipt of the rents and profits of the mortgaged premises from time to time sold goods to the mortgagor, and the latter upon a settlement of accounts assented to the receipts being applied first in payment of the account for goods sold.

Held, that an encumbrancer whose rights accrued after the settlement could not complain of this, and was not entitled to take the position that the rents and profits necessarily and irrevocably reduced the mortgage debt as they were received. Judgment of a Divisional Court affirmed.

Aylesworth, K.C., and *P. C. Macnee*, for appellant. *J. B. Clarke*, K.C., for respondent.

From Divisional Court.] KENNEDY *v.* GAUDAUR. [March 13.

Partnership—Dissolution—Accounts.

One of two partners at will in an hotel business agreed to sell his share to a third person and then went away to another province. The purchaser refused to complete because of alleged non-compliance with certain conditions, and the vendor brought this action claiming as against him specific performance, and, in the alternative, as against his partner who had continued to carry on the business, a dissolution of the partnership.

Held, upon the evidence, that the vendor was not entitled to specific performance; that his withdrawal was absolute and not conditional upon completion of the purchase; that the withdrawal had worked a dissolution; and that the partnership accounts should be taken as of the date of the withdrawal, and an opportunity given to the continuing partner of acquiring the interest of the vendor as at that date. Judgment of a Divisional Court reversed.

N. W. Rowell, for appellant. *S. H. Blake*, K.C., for respondent.

From Meredith, C.J.] [March 13.

MANN *v.* GRAND TRUNK RAILWAY COMPANY.

Deed—Construction—Gravel.

An appeal by the defendants from the judgment of MEREDITH, C.J., reported 32 O.R. 240, 36 C. L. J. 714, was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A., on the 7th of February, 1901. On the 13th of March, 1901, the Court, on the ground that there had been a misunderstanding as to the extent of the defendants' admission as to the removal of gravel, gave them the option of a new trial upon payment of the costs of the former trial and of the appeal, and in default dismissed the appeal with costs.

Wallace Nesbitt, K.C., for appellants. *J. H. Moss*, for respondents.

Practice.] CHALLONER *v.* TOWNSHIP OF LOBO. [March 13.

Appeal—Effect of allowing—Non-appealing party—Costs.

Action to restrain a township corporation and a contractor from constructing a drain authorized by by-law of the township. The judgment of the High Court granted an injunction against, and ordered costs to be paid by both defendants, and ordered the corporation to indemnify the contractor if he paid them. The corporation appealed to the Court of Appeal, making the contractor a respondent; the latter appeared at the hearing of that appeal, but did not himself appeal. The appeal was allowed with costs.

Held, that the result of allowing the corporation's appeal was that the action should be dismissed as against both defendants, but the contractor should have no costs of the appeal.

Semble, that he should have his costs below against the plaintiff.

Peterkin v. *McFarlane*, 6 A.R. 254, *Re Gabourie, Casey* v. *Gabourie*, 12 P.R. 252, *Esdaile* v. *Payne*, 40 Ch. D. 520, and *Dilke* v. *Douglas*, 5 A.R. 43, distinguished. *McDermott* v. *McDermott*, 3 Ch. 38, approved.

Aylesworth, K.C., for plaintiff, *H. J. Scott*, K.C., for defendant corporation. *R. U. McPherson*, for defendant Oliver.

Practice.] REX *v.* BURNS. [March, 19.

Criminal law—Procedure—Leave to appeal—Acquittal by magistrate—Application by prosecutor—Perjury—Corroboration—Criminal Code, s. 744.

Motion by prosecutor, under s. 744 of the Criminal Code (as amended by 63 & 64 Vict., c. 46), for leave to appeal from the decision of a police magistrate acquitting the defendant of perjury, and refusing to reserve for the opinion of the Court of Appeal the questions whether there was

corroborative evidence of the prosecutor in any material particular, and whether the magistrate exercised a legal discretion under s. 791 of the Code in declining to adjudicate summarily upon the case, and had jurisdiction to try the defendant, who was a client of the County Crown Attorney, in the absence of counsel for the Crown.

Held, per CURIAM, that leave should be refused.

Per ARMOUR, C.J.O.—Assuming that the magistrate had no right to try the defendant for the offence charged, the acquittal might be treated as equivalent to a discharge of the defendant upon a preliminary inquiry, which he was undoubtedly authorized to make; and so treating it, the prosecutor would be at liberty to be bound over to prosecute under s. 595 of the Code, and, having that special remedy, the motion for leave to appeal would not be open to him. But, assuming that the magistrate had jurisdiction to try the defendant, he was right in acquitting him, for the letters relied on by the prosecutor were no corroboration, in fact or in law, of the prosecutor's own evidence.

Per OSLER, J. A.—The magistrate tried the case summarily and acquitted the defendant and that was the only way the case could be looked at. The circumstances under which leave to appeal should be granted to a prosecutor must be nothing short of extraordinary. In this case it was for the magistrate to determine whether in fact the prosecutor was sufficiently corroborated. Even if the magistrate rejected the letters altogether as not being evidence, the Court was not bound, in the case of a prosecution which was admittedly brought to enforce payment of a debt, to give leave to appeal merely because the magistrate was deemed to be wrong in his law. If the magistrate had no jurisdiction to try the charge, that would be no ground for giving leave to appeal, the defendant having been acquitted.

Per MOSS, J.A.—The magistrate had undoubted jurisdiction to deal with the case up to a certain point, and whether he was dealing with it under s. 782 or s. 590 et seq. was immaterial, for it was competent for him at that point to decide as he did. There was not sufficient doubt as to the correctness of his decision that the prosecutor was not corroborated in any material particular to make it proper to grant leave. The objection that the accused was a client of the County Crown Attorney was not sufficient, under the circumstances, to oust the jurisdiction.

W. H. Bartram, for the motion.

Province of Ontario.

HIGH COURT OF JUSTICE.

Rose, J.] TODD *v.* LINKLATER. [Dec. 27, 1900.

Mortgage—Power of sale—Payment of arrears—R.S.O. 1897 c. 126, sch. B, cl. 16—Acceleration.

The effect of the acceleration clause No. 16, sch. B, of the Act Respecting Short Forms of Mortgages, R.S.O. 1897 c. 126, is to give a right in every case to the mortgagor, his heirs and assigns to pay all arrears and lawful charges except when a judgment has been recovered.

The plaintiff as assignor of the mortgagor, was held entitled to restrain proceedings under the power of sale in the mortgages upon payment of arrears of interest and costs, the principal not being due except under the above acceleration clause.

Middleton, for motion. *Lennox*, contra.

This went to Divisional Court by way of appeal, and appeal dismissed with costs.

Falconbridge, C.J.] MCKINNON *v.* MCTAGUE. [Jan. 15.

Assessment and taxes—Notice or demand—Removal of goods from municipality—Magistrate's warrant for distress—"Good reason to believe"—Onus.

It is essential to the validity of a notice or demand under R.S.O. c. 224, s. 134 (1) that it should, as required by sub-s. (2), contain a schedule specifying the different rates, etc. The question whether the collector has such "good reason to believe" a ratepayer is about to remove his goods as would justify him in obtaining a magistrate's warrant of distress under s. 135 (4) is one for the judge or jury, the onus being upon the collector to prove that he had.

Held, under the circumstances of this case that he had not, and that the plaintiff was entitled to recover damages for illegal distress.

Du Vernet and *W. J. Milligan*, for plaintiffs. *E. J. Beaumont*, for defendant Patterson. *W. D. Card*, for defendant Gillies.

Falconbridge, C.J., Street, J.] [Jan. 17.

MARSHALL *v.* INDUSTRIAL EXHIBITION ASSOCIATION.

Negligence—Right to sell refreshments in Exhibition grounds—Lessee—Licensee—Platform—Highway—Keep in repair—Invitation.

The plaintiff purchased from an Exhibition Association the privilege of selling refreshments under a certain building, during the holding of the

exhibition on grounds leased from a city corporation for two months in the year for the purpose of holding the exhibition. The city covenanted to repair, but the practice was for the association to repair and charge the repairs to the city. In walking across a platform which was constructed between the building and the public sidewalk, to give access to people requiring refreshments, the female plaintiff put her foot into a hole in the platform which was out of repair, and was injured.

Held, that she was not a lessee of the premises but a mere licensee; that she was lawfully there upon the invitation of the association; that the association owed a duty to the persons whom they induced to go there to keep the place in proper repair; that there was no liability on the city corporation as they were not the occupiers of the grounds and did not invite the plaintiff to go where she was hurt, and there was no highway to be kept in repair by them, but that the association who knew the place was out of repair, and who had by their negligence caused the accident, were liable.

Judgment of ROSE, J. reversed.

Lindsey, Q.C., for plaintiff. *Wallace Nesbitt*, Q.C., for association. *Chisholm*, for City Corporation.

Falconbridge, C.J., Street, J.] [Jan. 18.

GRAVES *v.* GORRIE.

Copyright—Works of fine art—Imp. Act, 25 & 26 Vict., c. 68—Non-extension to colonies.

The judgment of ROSE, J., reported in 36 C.L.J. 710, was affirmed on appeal to a Divisional Court.

J. T. Small, for appeal. *Riddell*, Q.C., and *J. H. Denton*, contra.

Falconbridge, C.J., Street, J.] [Feb. 5.

RE MERCHANTS LIFE ASSOCIATION, VERNON'S CASES.

Insurance—Insolvent company—Proof of claim of policy holder creditor.

The amount for which the holder of an unmatured policy is to rank against an insolvent life assurance company in liquidation under the Ontario Insurance Act is the difference between the present value of the sum assured at the decease of the life and the present value of a life annuity of an amount equal to the future premiums for which the company stipulated. Judgment of Master in Ordinary reversed.

H. T. Beck, for appeal. *J. H. Hunter*, contra.

Armour, C.J., MacMahon, J.] [Feb. 12

KENNEDY *v.* MACDONELL.

Landlord and tenant—Assignment f. b. o. c.—Acceleration clause—Forfeiture—Election by assignee to retain premises—New lease—Further rent—Payment under protest—Recovery back—R.S.O. c. 174, s. 34—Voluntary payment—Division Court jurisdiction.

Defendant, by lease in writing dated 15th July, 1899, leased certain premises to one S. for the term of one year at a rental of $60 per month in advance, in which lease was contained a provision that if S. made an assignment for the benefit of creditors, then three months rent in advance should immediately become due and payable and the term should immediately become forfeited and void. On 24th April, 1900, S. made an assignment for the benefit of creditors to the plaintiff, and on the following day the defendant distrained for a balance of $40 of rent due in advance on 15th March and $60 the month's rent due in advance on 15th April, and subsequently learning of the assignment threatened to distrain for the further sum of $120, all of which sums, with solicitor's and bailiff's fees, the plaintiff undertook to pay. Plaintiff subsequently paid these sums and then elected to retain the premises for the unexpired term of the lease. Defendant while admitting the plaintiff's right to retain the premises for the unexpired term insisted that the lease was at an end and that the $120 was not rent but a penalty, and that plaintiff should pay rent from the date of the assignment and the plaintiff paid $60, one month's rent, under protest. In an action to recover the $60 back,

Held, that the effect of R.S.O. c. 174, s. 34, was to place the plaintiff in the same position as S. would have been if the assignment had not been made, the landlord being entitled to the full amount of the rent reserved by the lease but to nothing more, and that the payment of the $60 was wholly without consideration.

That that payment was not voluntary.

And that the Divison Court had no jurisdiction to try the question of the recovery of the $60 rent. Judgment of the County Court of the County of York reversed.

J. F. Roche, for appeal. *S. C. Smoke*, contra.

Trial of actions. Ferguson, J.] [Feb. 18.

TUCKETT-LAWRY *v.* LAMOREAUX.

Will—Ademption of legacy—Admissibility of evidence.

The testator bequeathed an annuity of $6,000 to his daughter E., and a like annuity to another daughter. Afterwards he purchased securities producing an income of $1,200 which he transferred to E., and executed a codicil referring to his having so done, and revoking the legacy to her, and substituting for it an annuity of $4,800. But afterwards the testator

purchased other securities also sufficient to produce an income of $1,200 a year which he transferred to the plaintiff, and entered a memorandum in a private book, as he had also done when he purchased the securities assigned to E., to the effect that the gift was to be deducted from the transferee's share of his estate. Evidence was also given by the testator's solicitor that after the transfer to the plaintiff the testator had said to him that they must now attend to changing the will by a codicil; and the solicitor had suggested redrawing the will which the testator had acceded to, but had almost immediately fallen ill, and the solicitor had never seen him again. He died within a week afterwards.

Held, that the evidence of the above declarations and facts shewing the intention of the testator, was admissible to prove that the transfer of the securities to the plaintiff was intended by the testator to operate as a proportionate ademption of the legacy to her, in the same way as he had provided with regard to the legacy to E.

Martin, K.C., for plaintiff. *Shepley*, K.C., for defendant.

Boyd, C., Robertson, J.] [Feb. 18.

PATTERSON *v.* FANNING.

Negligence—Horse at large on highway—Right of action.

The defendant knew that the fences of his field in which he let his horses loose were not in proper condition. Owing to the defective state of the fences the horses escaped from the premises and went upon the highway, and were there startled into running, from the mischievious conduct of a third person, and while running knocked the plaintiff down and injured her.

Held, that the plaintiff had a good cause of action for damages *Cox* v. *Burbridge*, 13 C.B.N.S. 430 discussed.

Washington, K.C., for plaintiff. *Lynch Staunton*, K.C. and *Lazier*, for defendants.

Armour, C.J.O., Falconbridge, C.J.] [Feb. 18.

DEACON *v.* CHADWICK.

Constitutional law—Administration of justice—Resident of one province sued in another—Jurisdiction—B.N.A. Act.

The Provinces of Manitoba and Ontario are independent provinces so far as the power to make laws in respect of the classes of subjects enumerated in s. 92 of the British North America Act is concerned, among which are property and civil rights in the province and the administration of justice in the province, including procedure in civil matters in the courts of the province; and to neither is any power given to pass laws having any operation outside its own territory; and no tribunal established by either can extend its process beyond its own territory so as to subject either person

or property to its decisions, and consequently a defendant who is a resident of one of those provinces and is sued in that province upon a judgment obtained against him in the other, can always shew that the judgment was without jurisdiction for the above reasons.

It is a well settled rule in the United States that where the entire object of an action is to determine the personal rights and obligations of the defendant, that is where the suit is merely in personam, constructive service by publication upon a non-resident of the State where the action is proceeding is ineffectual for any purpose. Process from the tribunal of one State cannot run into another State and summon parties there domiciled to leave its territory, and respond to proceedings against them; publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon such a non-resident to appear, any more than process sent to him out of the State. Both of them are equally unavailing in proceedings to establish his personal liability. This rule is equally applicable to the Provinces of the Dominion.

Ferguson, for plaintiff. *Douglas*, K.C., for defendant.

Trial of action. Meredith, J.] [Feb. 23.

BOARD OF EDUCATION OF CITY OF LONDON *v.* CITY OF LONDON.

Public schools—Municipal corporations—Estimate of expenses—Taxes.

Under s. 62, sub-s. 9 of the Public Schools Act, it is the duty of a Board of Education formed under s. 10, to submit to the municipal council from time to time "an estimate" of the expense of the schools under their charge for the twelve months next following.

Held, that such estimate should furnish the council with the like details upon which the board bases its own calculation and not merely state a certain sum is required. If, as in this case, the sum in question is for repairs and improvements, there ought to be information given as to the schools to be repaired and improved, and the amounts required in respect of each, as well as some indication of the nature and extent of the repairs and improvements. The municipal council has the right, indeed it is its duty, to take some care that it is not made the instrument by which any intentional or unintentional excess of the powers of the school board are given effect to by levying for them any sum of money which the law does not authorize them to exact.

Hellmuth and *Ivey*, for plaintiff. *T. G. Meredith*, for defendant.

Master in Chambers.] [March 1.

REX EX REL. CARR *v.* CUTHBERT.

Municipal election—Proceeding to avoid—Bribery or undue influence—Evidence—Affidavits in answer—Statute—Heading.

Upon an application in the nature of a quo warranto to set aside a

municipal election upon the ground of bribery or undue influence, as defined in ss. 245 and 246 of the Municipal Act, R.S.O. c. 223, all the evidence both pro and con, and not merely the evidence adduced by the relator in support of the charge, is to be taken viva voce; this is the true construction of s. 248, to aid which the heading, "evidence as to corrupt practices to be taken viva voce," may be read into the section; and affidavits in answer to oral evidence cannot be received.

F. A. Anglin, for relator. *J. G. Wallace*, for respondent.

Falconbridge, C.J.] IN RE DREW AND MCGOWAN. [March 4.

Will—Life estate with power to devise in fee—Covenant against exercise of power—Vendor and purchaser—Petition.

A testator devised to his widow for life, and then to D. for life, with the power to D. to devise in fee.

Held, that the widow and D. and the heirs of the testator, ascertained at the time of his death, could make a good title in fee simple to a purchaser, who should be assured against exercise of the power, by D.'s covenant.

Held, also, that subsequent words in the will referring to "that part I have directed not to be sold;" did not import a restriction on the sale, no direction not to sell being found in the will.

J. J. Drew, for vendor. *Watson*, K.C. and *Osborne*, for purchaser.

MacMahon, J.] [March 5.

IN RE BRENNAN AND OTTAWA ELECTRIC R.W. CO.

Railway—Expropriation—Arbitration—Appeal from award—51 Vict., c. 29, s. 161 (D)—Evidence—Reasons for award—Value of lands taken—Injury to lands not taken—Mode of estimating amounts.

The railway company, in February, 1900, gave notice of their intention to expropriate 2.57 acres of land in the Township of Nepean, near the City of Ottawa, consisting of a parallelogram 131 feet in length by 99 feet in width, the middle of such parallelogram being the centre line of the railway, and offered to pay $2,124.60 as compensation for the lands and all damages which might be caused by the exercise of their corporate powers in respect of such lands. This offer being refused, an arbitration took place, and a majority of the three arbitrators appointed awarded the claimants $2,856 for the lands expropriated and the damages occasioned to the remaining portion. The claimants appealed from the award upon the ground that the amount awarded was insufficient, and the railway company appealed upon the ground that such amount was excessive.

Held, that written reasons for the award which had, before the award was made, been prepared by the third arbitrator and signed by him, and which formed the basis of the award made by him and one of the others, was admissible as evidence upon the appeal.

In re Dare Valley R. W. Co., L.R. 6 Eq. 429, and *Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 Ex. 231, followed.

Since the Railway Act of Canada, 51 Vict., c. 29, s. 161, where the award exceeds $400, any party to the arbitration may appeal from the award upon any question of law or fact; and upon the hearing of the appeal the court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction. The admission or rejection of the reasons upon which the arbitrators made their award is not a matter of such moment as it would be in the case of a voluntary submission to arbitration, or as it would have been prior to s. 161; see *Atlantic and North-West R. W. Co.* v. *Wood* (1895), A.C. at p. 263, where it is said that the court should review the judgment of the arbitrators as they would that of a subordinate court in a case of original jurisdiction; and where reasons have been given, the court is not entirely to disregard the judgment of the arbitrators and the reasoning in support of it.

The reasons of the third arbitrator shewed that the property of the claimants consisted of about 153 acres, unimproved; that it was purchased in 1895 for $25,000 for speculative purposes, the intention being to subdivide it and sell it in lots; that since its acquisition the property had been unproductive, except that sufficient of it had been rented as pasture land to pay the taxes; that no portion of the property had been sold in lots or otherwise, and therefore that actual sales of similar and similarly situated property should guide the arbitrators in determining such value and afford evidence as to the property being in demand; that it was established by the evidence that there was no present demand for the property, or, if any at all, that it was limited to the portion north of the railway; that the portion south of the railway must be considered as farm lands; that the loss of the streets projected by the claimants and of the crossings which they had lost through their own neglect to register their plan, could not be much considered as an element of damage.

The majority of the arbitrators (as shewn by the reasons) based their award of $2,856 upon the following figures:

Cost of property.....		$30,000
Present value of 23 acres north of the railway at $800.	$18,400	
85 acres at $90.....	7,650	
45 acres at $70.....	3,150	29,200
Shewing damages to land.....		800
And adding thereto for 2.57 acres taken at $800 per acre.....		2,056
		$2,856

Held, by the judge, upon the appeal, that the farm consisted of 143 acres, instead of 153 as found by the arbitrators; and that the arbitrators

were wrong in putting the cost of the property arbitrarily at $30,000; they should have put it at $32,125, made up of $25,000 and $7,125 for four years and nine months' interest; but that in other respects their estimate was properly made; and, making allowances for their mistakes, the award should be increased to $3,681.

Held, that it can make no difference as to the principle upon which compensation is to be awarded for lands injuriously affected, that such lands have or have not been laid out in building lots; the fact that a survey has been made dividing the land into building lots cannot enhance the value of the property, if there is no demand for the lots; nor can the value of the land be diminished by reason of its not having been subdivided into lots, if there is a demand for such lots; and therefore in this case evidence of the condition of the real estate market in this locality was of the utmost importance upon the question of damages.

G. F. Henderson, for Brennan. *Wyld*, for railway company.

Meredith, J.] [March 5.

ONTARIO LANDS AND OIL CO. *v.* CANADA SOUTHERN R.W. CO.

Railways—Farm crossings—Duty to provide—51 Vict., c. 29, s. 191 (D.)—Retroactivity.

Before the Dominion Railway Act of 1888, there was no statutable obligation upon a railway company to provide and maintain a farm crossing where the railway severed a farm, and s. 191 of that Act, providing that every company shall make crossings for persons across whose lands the railway is carried, is not retrospective.

Vezina v. *The Queen*, 17 S.C.R. 1, and *Quay* v. *The Queen*, ib. 30, in effect overrule *Canada Southern R. W. Co.* v. *Clouse*, 13 S.C.R. 139, and approve *Brown* v. *Toronto and Nipissing R. W. Co.*, 26 C.P. 206.

Shepley, K.C., and *J. Cowan*, for plaintiffs. *Hellmuth*, and *W. P. Torrance*, for defendants.

Falconbridge, C.J., Street, J.] IN RE NICHOL. [March 6.

Surrogate Court appeal—Security—Affidavit—R.S.O. c. 59, s. 36—Surrogate Rule 57—Con. Rule 825.

An appeal to a Divisional Court from an order of a Surrogate Court is not duly lodged, and will be quashed, if security has not been given, and an affidavit of the value of the property affected filed, as required by Rule 57 of the Surrogate Court Rules of 1892, which are made applicable by s. 36 of the Surrogate Courts Act, R.S.O. c. 59, notwithstanding the provision of Con. Rule 825, that no security for costs shall be required on a motion or appeal to a Divisional Court: *In re Wilson, Trusts Corporation of Ontario* v. *Irvine*, 17 P.R. 407, applied and followed.

Skeans, for appellants. *J. H. Moss*, for executors.

Boyd, C.] [March 11.

ONTARIO BANK *v.* MERCHANTS BANK OF HALIFAX.

Interpleader—Security for goods—Sole bond of chartered bank.

The sole bond of a chartered bank, the claimant of the goods in question in an interpleader, is sufficient security for the forthcoming of the goods; it is not necessary to procure sureties, nor to give proof by affidavit of the responsibility of the bank.

Glyn Osler, for plaintiffs. *J. F. Smellie*, for defendants.

Lount, J.] McCOLLUM *v.* CASTON. [March 11.

Action—Compromise—Setting aside—Summary application—Fresh action—Mortgage.

A motion by the plaintiff in a mortgage action to change the relief sought from sale to foreclosure, was opposed on the ground of an agreement for a compromise, under which money had been paid to the plaintiff.

Held, that the motion was virtually one to set aside the agreement, and this could not be done upon a summary application in the present action, but a fresh action must be brought.

W. E. Middleton, for plaintiff. *H. E. Caston*, for defendants.

Lount, J.] EAVES *v.* NESBITT. [March 12.

Costs—Security for—Public officer—Police sergeant—Information.

Held, that the defendant, a police sergeant, laying an information against a cab-driver for using obscene and grossly insulting language, was an officer or person fulfilling a public duty, and acting in the performance of such public duty within the meaning of R.S.O. c. 88, s. 1, and was therefore entitled under R.S.O. c. 89 to security for costs of an action brought against him by the cab-driver for falsely and maliciously laying such information.

J. H. Moss, for plaintiff. *D. L. McCarthy*, for defendant.

Boyd, C.] McLAUGHLIN *v.* STEWART. [March 13.

Mortgage—Action for foreclosure—Parties—Irregularity—Appeal from report.

An action for foreclosure and possession was begun by a mortgagee against the mortgagor and a tenant of the latter in possession. The tenant entered an appearance disputing the amount, and pending the action the mortgagor dispossessed her by other means. Judgment by default was obtained by the plaintiff against the mortgagor, without taking any notice of the tenant.

Held, that this was irregular; the action should have been dismissed or discontinued as against her.

Upon the reference directed by the judgment, and in his report the Master continued the tenant as a defendant by original motion, and also added her as a party in his office by serving her with a notice to incumbrancers, although she was not a subsequent incumbrancer.

Held, that her name should be struck out, both as an original and added party, upon her appeal from the report, notwithstanding that she had not moved to discharge the notice served upon her. *Cowan* v. *Allen*, 26 S.C.R. 292, followed.

J. H. Moss, for defendant. *F. A. Anglin*, for plaintiff.

Boyd, C.] GIBSON *v.* HIEB. [March 15.

Pleading—Statement of claim—Extension of claim in writ—Rule 244—Service by posting—Subsequent appearance—Waiver—Validating order.

The claim endorsed on the writ of summons was for specific performance of an agreement for the purchase and sale of land. The statement of claim prayed cancellation of the agreement and possession of the land.

Held, a legitimate extension of the claim within Rule 244.

The defendant not having appeared within the proper time, service of the statement of claim was effected, pursuant to Rule 330, by posting up a copy in the proper office, after which the defendant entered an appearance and therein required the delivery of a statement of claim.

Held, that the defendant had [illegible] any right to complain of the variation made in the extended pleading; and the order made upon a motion to set aside the statement of claim, allowing it to stand as of the date of the order, was the proper one. *Gee* v. *Bell*, 35 Ch. D. distinguished.

A. Cecil Gibson, for plaintiff. *W. R. P. Parker*, for defendant.

Meredith, C. J., MacMahon, J., Lount J.] [March 19.

THOMPSON *v.* TOWN OF SANDWICH.

Municipal corporation—Public dock—Invitation to use—Loading goods on—Collapse—Liability.

Under the authority conferred by s. 562 of the Municipal Act, R.S.O. c. 223, the defendants, a municipal corporation, built a dock on the Detroit river, and passed a by-law providing for the collection of wharfage fees from those using the dock, one item of the tariff of fees being ten cents per thousand for loading and unloading bricks; a period of forty-eight hours was allowed for removing freight placed on the dock, and fifty per cent. was to be added if that period was exceeded. The plaintiff unloaded 34,000 bricks from a vessel upon the dock, whereupon the dock, being by

reason of some defect incapable of sustaining such a weight, collapsed, and the greater part of the bricks were sunk and lost to the plaintiff.

Held, that the defendants, having placed the dock in such a position as invited any vessel owner desiring to unload a cargo to do so if prepared to pay the dock charges which the statute gave the defendants authority to levy, and having passed a by-law establishing tolls for the use of it, thereby invited the public to make use of it for such purposes as public docks are ordinarily used for, and, if they wished to limit the use of it, they should have made that known in some public way; and, the evidence shewing that the mode adopted in this case of unloading and piling was that usually adopted at public docks, the defendants were liable for the loss.

A. St. G. Ellis, for plaintiff. *Aylesworth*, K.C., for defendants.

Meredith, C.J., MacMahon, J., Lount, J.] [March 19.

HOMEWOOD *v.* CITY OF HAMILTON.

Way—Non-repair—Opening in sidewalk—Injury to pedestrian—Defective eyesight—Want of guard—Municipal corporation—Negligence—Liability—Relief over.

The plaintiff, whose eyesight was defective, was walking in a city street, when, stepping into a doorway leading into a tavern, he stubbed his toe against the step or door-sill, and, stumbling back, fell into an area in the sidewalk used by the tavern-keeper, by the permission of the municipality, for the purpose of putting beer into his cellar, and then open and being used for such purpose. A keg had been placed at each of the outside corners of the opening to warn passers by.

Held, that the municipality were liable for negligence in leaving the opening without an adequate guard; that contributory negligence could not be imputed to the plaintiff; and that the tavern-keeper was liable over to the defendants.

Nesbitt, K.C., for plaintiff. *MacKelcan*, K.C., for defendants. *W. W. Osborne*, for third party.

Meredith, C.J.] FULFORD *v.* WALLACE. [March 25.

Defamation — Pleading — Statement of defence — Striking out — Embarrassment.

In an action for slander the plaintiff, a merchant and a Senator, complained of words spoken by the defendant to the effect that the plaintiff had paid $50,000 to the Government for his title, and was advertising in Europe that he was made a Senator by the people of Canada because of the benefits conferred upon them by his discovery in pills; the innuendo being that the plaintiff had corruptly bribed members of the Government and had purchased the office of Senator, etc. In par. 2 of his defence the defendant pleaded that, if he did speak the words, they, even with the innuendo, were

not libellous, and he denied the innuendo, and said that without it the words were not libellous.

Held, that this was not open to objection and not embarrassing.

Par. 3 justified the slander, and asserted, in addition, that the plaintiff did pay to the Government, either directly or indirectly or through some member thereof (to the defendant unknown), or to some person or persons (to the defendant unknown), the sum of $50,000 "in order that he, the plaintiff, might be appointed a Senator," and did advertise as alleged; and that the particulars were well known to the plaintiff, but not to the defendant.

Held, not embarrassing nor open to objection.

By par. 4 the defendant alleged that, if he did speak the words he did so not as stating a fact but as stating a rumour generally believed throughout Canada.

Held, that the defendant was not at liberty to allege by way of defence that the words actually spoken were different from those charged in the statement of claim to have been spoken, and to plead as to those other words something either by way of answer or in mitigation of damages; and this paragraph should be struck out. *Beaton* v. *Intelligencer Printing Co.*, 220 A.R. 97, distinguished; *Rassam* v. *Budge*, [1893] 1 Q.B. 571, followed.

Held, also, that the remaining paragraphs of the defence, which were pleaded to a hypothetical case, which might never arise, and could arise only on an amended statement of claim, were objectionable and should be struck out.

J. H. Moss, for plaintiff. *Riddell*, K.C., for defendant.

Meredith, C.J.] SMITH *v.* SMITH. [March 25.

Partition—Summary application—Practice—Opposition—Title—Action to try—Adjournment of application.

Where a motion is made under Rule 956 for a summary order for partition or sale of lands, and it appears on the motion that such order should not be made until after a question of title has been determined, and then only in the event of the determination being against the title set up in opposition to the motion, the practice which should now be adopted is to adjourn the further hearing of the motion, with liberty to the applicant to bring an action to try the question of title. *Macdonell* v. *McGillis*, 8 P.R. 339, and *Hopkins* v. *Hopkins*, 9 P.R. 71, not followed.

H. W. Mickle, for applicant. *P. D. Crerar*, for respondents. *F. W. Harcourt*, for official guardian.

Boyd, C.] SMITH *v.* HUNT. [March 25.

Discovery—Production of documents—Privilege—Solicitor and client—Fraud.

There is no valid claim of privilege in regard to the production of documents passing between solicitor and client when the transaction im-

peached is charged to be based upon fraud. *Williams* v. *Quebrada Railway, Land and Copper Co.* (1895) 2 Ch. 751, followed.

Where the action was by the mortgagor to set aside as fraudulent a sale under the power in the mortgage and for redemption,

Held, that an admission made by one of the defendants, though sufficient to entitle the plaintiff to redeem, not being of efficacy against some of the other defendants, did not remove the issue of fraud from the record so as to enable the defendant making the admission to escape discovery.

F. A. Anglin, for plaintiff. *W. M. Douglas*, K.C., for defendant Roberts.

CRIMINAL CASES.

ANON.

Criminal Code, s. 785, et seq—Summary trial before Police Magistrate—Trial for lesser offence after acquittal on greater.

Upon an information under s. 269 of the Criminal Code for carnally knowing a girl under fourteen years, where the accused consents to be tried summarily by the Police Magistrate under s. 785, the magistrate has power under s. 713 to convict of any offence included in that for which the information is laid. The accused having been acquitted by the Police Magistrate, of the charge under s. 269,

Held, that the magistrate had no power to try the accused under a new information under s. 259, charging indecent assault on the same facts, as he might have been convicted of this offence under the first information.

Held, also, that the effect of the certificate of dismissal which the magistrate must deliver to the accused in case of acquittal under s. 797, is to release the accused from all further criminal proceedings on the same state of facts.

[TORONTO, Feb. 13.—MACMAHON, J.

This was a case submitted by consent of the Police Magistrate, and of counsel for the Crown and for the accused, for the opinion of Mr. Justice MACMAHON, and came on to be argued on the 11th of February, 1901.

J. W. Curry, K.C., for the Crown. *E. F. B. Johnston*, K.C., for the accused.

The facts sufficiently appear in the judgment of

MACMAHON, J.:—

The accused was charged before the Police Magistrate of Toronto under s. 269 of the Code with having carnal knowledge of a girl under the age of fourteen years. He consented to be tried summarily under s. 785, and was so tried and acquitted of the charge. After his acquittal an information was laid against him under s. 259 of the Code, with having on the same occasion indecently assaulted the same female who was the prosecutrix on the charge of having carnal knowledge of her.

Under s. 713, "Every count shall be deemed divisible, and if the commission of the offence charged as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he

may be convicted of an attempt to commit any offence so included." So that upon the trial of an indictment under s. 269, the accused might have been found guilty of an indecent assault or a common assault, because the greater offence includes the lesser of a kindred character: *Reg.* v. *Read*, 1 De l. 377; *Reg.* v. *Connolly*, 26 U.C.R. 317; *Reg.* v. *Bradley*, 17 Cox, 463; even if the girl assented: Taschereau, p. 275.

My opinion is asked as to whether the Police Magistrate has authority to try the accused on the charge of having committed an indecent assault upon the same female on the same occasion as he was alleged to have had carnal knowledge of her.

The Police Magistrate, I think, has no such power. Under s. 785, where a person is charged before a Police Magistrate with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, such person may with his own consent be tried before such magistrate and may, if found guilty of any such offence, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. And, where the accused consents to be tried by the magistrate, the magistrate is (s. 786) to reduce the charge to writing and read the same to the accused, and if he pleads not guilty the magistrate is to examine the witnesses for the prosecution and also to hear the witnesses for the defence, if the accused desires to call any.

When the accused consented to be tried by the Police Magistrate, he was put upon his trial charged with an offence the commission of which included the commission of another offence, i.e., an indecent assault, or a common assault, and the accused might have been convicted of any offence so included which was proved although the whole offence charged had not been proved.

There being no sufficient evidence to convict on the charge of having carnal knowledge of the prosecutrix, if there was evidence upon which the accused would have been found guilty of an indecent assault or of a common assault, the Police Magistrate should have convicted him of which ever of these offences the evidence warranted, as they were included in the commission of the more serious offence with which he was charged.

The fact that under an Act respecting Speedy Trials of Indictable Offences, (being Part LIV. of the Code, s. 774) where "the judge in any case tried before him shall have the same power as to . . convicting of any other offence than that charged as a jury would have in case the prisoner were tried at a sittings of any court mentioned in this part," etc., has not changed my mind as to the powers of a Police Magistrate trying an accused person under sections 785 and 786.

The accused might have been tried for the offence charged at a Court of General Sessions of the Peace, but consented to be tried summarily on the charge by the Police Magistrate. And, although tried summarily, the trial must be subject to the same rules of law as a trial at the General

Sessions of the Peace. And the same results follow on the conviction of the accused, as he may "be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace." So that when tried by a magistrate "on a charge of being guilty of any such offence," it must mean that the magistrate may find the accused guilty of "any such offence" as is included in the charge.

Were it not so, this anomalous result would follow: By s. 797: "Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal." And s. 798 provides that: "Every conviction under this part" (that is, Part 55, "The Summary Trial of Indictable Offences) "shall have the same effect as a conviction upon an indictment for the same offence." By s. 799 it is provided that: "Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause."

Upon the acquittal of the accused upon the charge preferred against him under s. 269, of having carnal knowledge of the prosecutrix, it was the duty of the Police Magistrate to deliver to the accused a certificate of dismissal. And, if, after the delivery of such certificate of dismissal to the accused, he was charged with having committed an indecent assault on the prosecutrix at the time he was accused of having carnal knowledge of her (and therefore necessarily included in that charge), and he elected to be tried by a jury, and an indictment was found against him for such indecent assault, say, at the Court of General Sessions of the Peace, the certificate of dismissal by the Police Magistrate on the first charge would be a complete bar under a plea of autrefois acquit. It would be an anomalous and an unheard of thing that such a certificate of dismissal should form a bar to such further criminal proceedings in another court, and be of no avail whatever in the court from which the certificate issued.

Or suppose a person is charged with the commission of an offence and there is not sufficient evidence to convict him of the offence charged, but there is evidence of an attempt to commit the offence. If the magistrate acquitted the accused, he could not again be put on trial for an attempt to commit the offence for that was included in the charge on which he was tried, and he should have been convicted of the attempt. (See s. 711 of the Code.) "An acquittal upon an indictment for murder may be pleaded in bar to another indictment for manslaughter: Fost, 392; 2 Hale 246; because he might have been convicted of the manslaughter on the first indictment. A person cannot after being acquitted on an indictment for felony be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony. So also a person indicted and acquitted on an indictment for robbery cannot afterwards be indicted for an assault with intent to commit it!" Archbold's Criminal Pleading (20th ed.) 148.

6TH DIVISION COURT, COUNTY OF PRINCE EDWARD.

Merrill, Co. J.] SPENCER *v.* WRIGHT.

Division Court Act, ss. 84, 92—Action by bailiff—Debt or damages.

The plaintiff was the bailiff of the 1st Division Court of the county. The defendant resided and the cause of action arose within the limits of the same division (1st Division). The action was for damages, and was brought in the adjoining (6th) Division Court to that in which the plaintiff was bailiff. The question was: had this Division Court jurisdiction to try the action?

Held, that the words "debt due," in s. 92, could not be construed as including damages in tort, and that the 6th Division Court had no jurisdiction. Reference was made to Dwarris on Statutes, 193; Stroud's Jud. Dict., p. 184; *In re Hill* v. *Hicks*, 28 Ont. R. 393; *Webster* v. *McDougall*, 26 C.L.J. 85.

Widdifield, for plaintiff. *Walmsley*, for defendant.

Province of New Brunswick.

SUPREME COURT.

In Equity, Barker, J.] [Jan. 4.

TOBIQUE VALLEY R.W. CO. *v.* CANADIAN PACIFIC R.W. CO.

Railway--Lease of line—Passenger train service—Contract with government—Breach by lessee—Waiver by lessor—Mandatory injunction—Suit by lessor.

By an agreement the plaintiffs were to lease their line of railway to the defendants upon the condition, inter alia, that the defendants would run a passenger train each way each day between stations A. and B. The lease was not executed, but the defendants went into possession of and operated the line. The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the government of New Brunswick to run a passenger train each way each day between A. and B., but the contract was not set out in full. In 1897, a lease was executed by the plaintiffs and defendants by which it was provided that the defendants would run a passenger train one way each day between A. and B., "and if and whenever it may be necessary to do so in order to exonerate the [plaintiffs] from its liability to the government of New Brunswick, then the [defendants] will run at least one train carrying passengers each way each day." On July 31st, 1899, the Attorney-General of New Brunswick gave notice to the plaintiffs that their contract with

respect to running a passenger train each way each day between A. and B. must be enforced, but no further proceedings with respect to the matter were taken by the government, though the defendants continued to run a passenger train but one way each day. It did not appear whether the notice of the Attorney-General might not have been given at the plaintiffs' instance. On a motion for an interlocutory mandatory injunction in this suit, which was brought to compel the defendants to run a passenger train each way each day between A. and B.

Held, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which, by the lease of 1897, the plaintiffs had agreed to accept in the event of their liability, if any, to the government; and, that it did not appear that such liability had arisen.

James Straton, for plaintiffs. *A. O. Earle*, Q.C., and *H. H. McLean*, Q.C., for defendants.

In Equity, Barker, J.] MILLER *v.* CRONKHITE. [Jan. 25.

License—Revocation—Repairs—Refusal of licensor to allow repairs to be made.

Where license is given to lay pipes on another person's land to convey water to the licensee's land the burden of repair rests in law upon the licensee, and it is a revocation of the license to refuse to the licensee permission to go upon the licensor's land for the purpose of making repairs.

J. D. Phinney, K.C., for plaintiff. *F. St. John Bliss*, for defendant.

In Equity, Barker, J.] [Jan. 25.

WOOD *v.* CONFEDERATION LIFE INSURANCE COMPANY.

Life insurance—Note given for premium—Part payment—Extension of time—Forfeiture—Waiver—Assignment of policy—Receipt—Estoppel—Duty to assignee.

A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due the policy should be void. A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid, and an extension was granted, and in a part payment being again made a further extension was granted. The last extension was overdue and balance on note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note

in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured.

Held, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and, that the policy was void.

A. A. Stockton, K. C., and *A. J. R. Snow* (of the Ontario Bar), for defendants. *H. A. Powell*, K.C., for plaintiff.

En Banc.] BELYEA *v.* PROVINCIAL CHEMICAL FERTILIZER CO. [Feb. 22.

Negligence—Damage caused by icy road.

Plaintiff was unloading bar iron from his sled into a car on a railway siding. The rear end of the sled was against the car, and the horses were standing on a platform approach to the siding at an angle with the line of the car. Defendants' servant drove on to the approach with a load of produce to load on a car standing on the same siding, approaching from the direction in which plaintiff's horses were heading. In driving over an icy slope the sled slued towards plaintiff's horses with the result that one of them either through being struck by the sluing sled, or frightened by it, fell between the platform and the car and was injured. There was evidence from which there appeared to be quite an open space which would admit of the driver avoiding the icy slope. Defendant claimed it was an inevitable accident, but there was no evidence that the horses became unmangeable or that anything uncontrollable occurred.

Held, on appeal from a judgment of a county court judge refusing to set aside a verdict for plaintiff, TUCK, C.J., and MCLEOD, J., dissenting, that there was sufficient evidence to leave to the jury and justify their verdict. Appeal dismissed with costs.

Geo. H. V. Belyea, for plaintiff. *J. King Kelly* and *Dr. Stockton*, K.C., for defendant.

En Banc.] GRIMMER *v.* MUNICIPALITY OF GLOUCESTER. [Feb. 22.

Parish bonds—Whether municipality liable.

Held, GREGORY, J., dissenting, that the Act of Assembly, 41 Vict., c. 102, to provide for the erection of an almshouse in the parish of Bathurst, Gloucester County, does not authorize the municipality of Gloucester to pledge its own credit for the re-payment of bonds issued for the raising of money for the purpose.

Plaintiff's verdict set aside and nonsuit ordered. *W. C. H. Grimmer* and *L. A. Currey*, K.C., for plaintiff; *M. G. Teed*, K.C., for defendant.

The Act provided for the appointment by the municipal council of commissioners for purchasing the land and erecting the building, and for maintaining the institution, and authorized the county council to "cause

bonds to be issued by the municipality intituled almshouse bonds, parish of Bathurst, which bonds shall be wholly chargeable on said parish, and shall bear such interest, be in such form, and for such amount . . . as the commissioners may recommend, and shall be signed by the warden and secretary-treasurer, and have the corporate seal affixed thereto, and be placed in the hands of the secretary-treasurer of the municipality to be disposed of for the purposes of this Act," and the proceeds of which bonds "shall be placed to the credit of the said commissioners, and be paid out in their order for the purposes of this Act and for no other purpose." The county council was authorized to assess and levy upon the ratepayers of the parish of Bathurst the money necessary to pay the principal and interest of such bonds.

The bonds were issued in the form of a certificate: "that the parish of Bathurst is indebted to ——— in the sum of ———, which is payable . . . pursuant to an Act" etc., signed by the warden and secretary-treasurer, and bearing the corporate seal.

GREGORY, J., held that the Act authorized the municipality to pledge its own credit, but that it was not liable on the form of bond or certificate as issued.

En Banc.] McCATHERINE *v.* BREWER. [Feb. 22.

Written agreement—Whether evidence of goods sold and deliverd—Oral evidence in relation thereto.

Plaintiff, a dealer in sewing machines, musical instruments, etc., put defendant in charge of a branch agency on terms of allowing him one-half the profits on the goods sold. The business was continued for several years on this basis, until October, 1893, when plaintiff and defendant settled for all previous sales, and signed the following agreement in reference to the goods then on hand: "I hereby authorize M. B. to sell the stock now on hand . . . , any over $500 he is to have, that is, when he pays me $500 he is free." (Sgd.) "D. McC."

"It is agreed that when I pay D. McC. $500 all stock on hand is mine." (Sgd.) "M. B."

In the year 1900, nearly all of the goods having been disposed of, plaintiff brought an action for goods sold and delivered and an account stated. On the trial before the chief justice without a jury both parties without objection gave evidence of their respective views of the transaction and of what took place on their arriving at their understanding, plaintiff asserting that he sold the goods though not stating any words by which the sale was effected, and defendant alleging that, although he offered to buy the goods outright and give his notes for them, plaintiff refused to sell. The chief justice entered a verdict for plaintiff for $500 with leave to defendant to move for a reversal of the same or for a nonsuit.

Held, TUCK, C.J., and HANINGTON, J., dissenting, that the oral testi-

mony was irrelevant except in so far as it explained the surrounding circumstances, and that even if it should be considered, the writings so strongly tended to confirm defendant's evidence as to entitle him to prevail.

Held, also, that under the agreement defendant would be liable for money had and received to the extent he can be proved to have received it up to $500. New trial with leave to plaintiff to amend his declaration.

F. St. John Bliss, for plaintiff. *F. B. Carvell*, for defendant.

En Banc.] BENNETT *v.* CODY. [Feb. 22.

County Court action—Striking out notices of defence.

In an action of trover in a County Court defendant pleaded the general issue and gave notice of defence, that the goods in question were taken and sold under an execution issued out of a parish court upon a judgment against the plaintiff's husband, whose property, the notice alleged, they were. Plaintiff applied to the County Court judge to strike out the notice on the ground that the facts stated therein could be given in evidence under the general issue. The County Court judge refused the application with costs.

Held, on appeal, without deciding whether the defence set up by the notice would be available under the general issue, that as no possible injury could fall on plaintiff by allowing the notice to stand excepting the trifling additional costs, which might be taxed against him for such notice in the event of defendant succeeding, that the County Court judge exercised a wise discretion in refusing the application, though the costs of opposing ought not to have been allowed in view of the objectionableness of the notice on the ground of extreme prolixity. Appeal dismissed with costs.

J. R. Dunn, for appeal. *H. W. Robertson*, contra.

En Banc.] ANDERSON *v.* SHAW. [Feb. 22.

County court appeal—Costs—Set-off against judgment and cost in County Court.

The defendant appealed to the Supreme Court from an interlocutory order of the judge of a County Court setting aside notices of defence in an action for false imprisonment and had his appeal allowed with costs. Subsequently the plaintiff recovered judgment in the action in the County Court and the defendant applied to the County Court judge for an order setting off his appeal costs against the plaintiff's judgment and certain other costs which he was awarded on an interlocutory proceeding in the action in the County Court. The plaintiff's attorney resisted the application on the grounds: 1, that the County Court judge had no power to make the order; 2, that the attorney's lien was paramount; 3, that the plaintiff having agreed with his attorney that the latter should have the amount of the damages recovered by such judgment for his services in obtaining his discharge from

illegal arrest, there was an equitable assignment of such damages, which in any event would destroy the right of set-off pro tanto. The County Court judge granted the order.

Held, on appeal th. the order was properly granted. Appeal dismissed with costs.

J. D. Phinney, K.C., for appellant. *G. W. Allen*, K.C., for respondent.

En Banc.] THE KING *v.* OTTY. [Feb. 22.

Bogus election list—Certiorari.

The revisors of the parish of Rothesay, Kings Co., prepared and certified under oath a list of persons entitled to vote in such parish under the New Brunswick Elections Act. One of the revisors took this completed list for the purpose, as alleged, of forwarding it to the secretary-treasurer of the municipality. Several days afterwards the certificate and affidavit, which were attached to the list above mentioned, were received by the secretary-treasurer, annexed to another list containing over 400 additional names—of unqualified voters—the same having been mailed—registered—from the city of St. John in an adjoining county.

On motion to make absolute a rule nisi to quash the bogus list the fraud was admitted by the counsel shewing cause, but it was contended that certiorari would not lie. The court held, however, that the action of the revisors was a judicial proceeding and that certiorari would therefore lie.

Rule absolute to quash.

J. D. Hazen, K.C., *L. A. Currey*, K.C., and *Dr. Stockton*, K.C., in support of the rule. *C. N. Skinner*, K.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] SMITH *v.* SQUIRES. [March 9.

Evidence to vary written contract—Promissory note—Endorsement—Bills of Exchange Act, s. 55, sub-s. 2—Parol agreement contemporaneous with written one.

Appeal from a County Court. Plaintiff sued on a note made by defendant Squires to defendant Ferguson and endorsed by the latter to plaintiff in part payment of the price of a horse bought from plaintiff by Ferguson. Ferguson set up as a defence that he had endorsed the note merely for the purpose of transferring it to the plaintiff, and sought to prove

that it had been agreed between them at the time of the endorsement that he was not to be in any way liable to the plaintiff on the note.

Held, affirming the decision of the County Court judge, that evidence of such contemporaneous parol agreement was not admissible to vary or contradict the contract imported by the endorsement of the note under s. 55, sub-s. 2, and s. 88 of The Bills of Exchange Act, 1890, and that the defendant was liable to plaintiff thereon.

Abrey v. *Crux*, L.R. 5 C.P. 37; *Henry* v. *Smith*, 39 Sol. J. 559, and *New London Credit Syndicate* v. *Neale* (1898) 2 Q.B. 487 followed.

Province of British Columbia.

SUPREME COURT.

Walkem, J.] LAWR *v.* PARKER. [Dec. 1900.

Mining law—Assessment work—Mineral Act, ss. 24, 28, 53.

The plaintiff, owner of the Rebecca mineral claim, and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as he believed, but in reality as shewn by subsequent survey, a few feet outside the claim, but did not file the notice required by section 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. Plaintiff received in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca.

Held, in an action of ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by s. 53 of the Act.

The omission to file the notice required by s. 24 of the Act, and the incorrect filling up of the affidavit were irregularities which were cured by the certificate of work.

Martin, J.] VICTORIA *v.* BOWES. [Jan. 17.

Practice—Dismissal of summons—Costs—Whether payable forthwith.

A summons for judgment under Order XIV., was dismissed with costs, but the question as to whether or not the costs should be payable forthwith was reserved.

Held, on a summons for judgment under Order XIV., if the case is not within the order, or there are circumstances which render it improper to

grant the application, or the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons will be dismissed with costs in any event, but not payable forthwith.

Where leave to defend is given, costs, as a general rule, will be in the cause.

It is only in exceptional circumstances that costs will be ordered to be paid forthwith.

In Chamber applications generally, costs are made payable by the unsuccessful party in any event, but not forthwith.

Bradburn, for plaintiff. *Alexis Martin*, for defendant.

Martin, J.] RE SING KEE. [Feb. 22.

Criminal law—Certiorari—Selling liquor to Indians—View by Magistrate alone.

Summons for certorari. On the trial for selling an intoxicant to an Indian, the Magistrate, after hearing the evidence, but before giving his decision, went alone and took a view of the place of sale.

Held, 1. Quashing the conviction, that the proceeding was unwarranted.

2. Sections 108 of the Indian Act and 889 of the Criminal Code do not prevent proceedings by certiorari where the ground of complaint is that something was done contrary to the fundamental principles of criminal procedure.

Howay, for applicant. *Dockrill*, contra.

Book Review.

Canadian Annual Digest for 1900, by CHARLES H. MASTERS, K.C., and CHARLES MORSE, D.C.L. Toronto 1901: Canada Law Book Company.

This, the fifth of the series of annual digests of which Messrs. Masters and Morse began the publication in 1896, is an exceedingly creditable book which cannot fail to be appreciated by the profession. Next to the Revised Statutes and the Rules of Court, a legal periodical such as the *Canada Law Journal*, which gives at short intervals news of current legal topics and decisions, is perhaps the most used book in a solicitor's office. In Canada the Canadian Annual Digest easily ranks next, in order, among the books which the busy lawyer has to look up. There are digests and there are indices, and occasionally one sees a so-called "index-digest," which is not a "digest" at all, and which lacks many of the features of a good "index."

The usefulness of a digest is to be measured by its completeness, its accuracy, its methodical arrangement, its compactness, its absence of padding inserted to catch the unwary, and its being up to date. These requirements are well sustained by Masters & Morse's Digest. The arrangement of titles and sub-headings is good.

Items relating to 'practice and procedure" are distributed among the sub-divisions of that subject as separate titles instead of being grouped in a conglomerate mass under "Practice," as is sometimes done. The Digest is in many respects in advance of the reports by noting the reversal or affirmance of decisions before the same have appeared in the reports. Amongst others, it may be noticed that the important life insurance case of *Booh* v. *Booh*, 32 Ont. R. 206, is noted as reversed on appeal, and the great patent action of *General Engineering Co.* v. *Dominion Cotton Mills*, 6 Can. Ex. C. R. 358, as reversed by the Supreme Court of Canada in December last. The House of Lords decision in *DeNicols* v. *Curlier*, [1900] A.C. 21, is reported, although not a Canadian case, but its far reaching effect as regards the extra-territorial operation of the French law of community of property as between husband and wife, in force in the province of Quebec, justifies its publication in a Canadian Digest.

The citations in matters of criminal law include that popular series of criminal law reports known as the "Canadian Criminal Cases," and the book contains as well the Privy Council decisions in all Canadian appeals of the year.

The comfort of the reader is consulted in the printing, paper and binding of this digest. There is nothing more annoying than a book which is badly printed on cheap paper, and so bound that its contents are difficult of access. All this means money, and is worth money, and is doubtless appreciated by a profession who like to have their weapons clean, sharp and handy.

The Commonwealth: A Review of To-day. Ottawa, 1901.

This is a monthly Review published at Ottawa. We have received the February number of this new candidate for public favour in the rather barren field of Canadian literature—barren, not so much from the quality of the seed sown, and the crop produced, as for the poor and uncertain return for the labours of the husbandman. This number of *The Commonwealth* fully maintains the high character aimed at in the prospectus. Among its contents is an article written in the true spirit o Imperialism, which it is the object of the periodical to promote; and a poem by W. W. Campbell, the title of which "Victoria Regina," declares the subject. Dr. W. D. LeSueur replies to an article by Mr. Goldwin Smith on "The Decay of Religion," and ably and eloquently combats the views of that gloomy spirit which finds nothing to approve of, and nothing to hope for, either in the heavens above, or in the earth beneath. With Dr. LeSueur's well-known opinions on religious questions we have in general no

sympathy, but they are as light to darkness compared to the sad forebodings of one of the greatest masters of the English tongue. Capt. C. F. Winter's paper on "Our Empire's Land Defences," is carefully thought out, and well written, and is to be continued; "Canada's Place in Literature," by Mr. De Mille; "Technical Education," by Mr. Klotz; Mr. Lewis's criticism of the poetry of Mr. Lampman; and Mr. J. W. Patterson's paper on the "Economics of Trades Unions," are all papers of high class, valuable in themselves, and shewing the desire of the publishers of *The Commonwealth* to produce a magazine superior to those ephemeral publications of which the amusement of the hour is the sole and only object. We have not in the above list exhausted the contents of the magazine, but have mentioned them as shewing the standard at which it aims. Mr. Charles Morse, D.C.L., one of the contributors to this journal, has been secured as literary editor of the new review.

NOTES OF UNITED STATES DECISIONS.

RAILWAY—NEGLIGENCE.—The duty of a railroad company to inspect its trains is held, in *Proud* v. *Philadelphia & R. Ry.* (N.J.) 50 L.R.A. 468, not to necessitate a continuous inspection or to know at each moment the condition of every part of a train, and therefore it is held that the carrier is not liable for the slipping of a passenger on steps upon which filth was frozen, where this condition was not known to the company and the car had been inspected and found to be in proper condition only a short time before.

CONTRACT — WRONGFUL USE OF ARTICLE MANUFACTURED.— An engraver who takes separate contracts, makes dies from photographs and prints pamphlets containing cuts from them is, in *Levyeau* v. *Clements* (Mass.) 50 L. R. A. 397, held to have no right to use them in pamphlets for advertising his own business, and, where he does so and the pamphlets are delivered to the employer by mistake, the engraver is denied the right to compel their return or any payment for them. With this case there is an annotation on the question of the use of negatives or engraved plates without the consent of the party who has paid for making them.

SOLICITOR AND CLIENT.—A communication made by a client to his attorney in the presence of the opposite party to the transaction in question is held, in *Stone* v. *Minter* (Ga.) 50 L. R. A. 356, not to constitute a confidential or privileged communication which the attorney will be incompetent to disclose.

LIGHT AND AIR—MALICE.—An unsightly board fence maliciously erected on one's own property in such a way as to obstruct the light, air, and view of a neighbor is held, in *Metzger* v. *Hochrein* (Wis.) 50 L. R. A. 305, to be a lawful structure, notwithstanding the malice, and this is in

accord with the majority of the decisions, as shown by a note in 40 L.R.A. 177. But a statute making it unlawful to build such structures is shewn by such note, and also by the recent case of *Karasek* v. *Peier* (Wash.) 50 L. R. A. 345, to be within the power of the legislature.

NUISANCE.—The erection of a water tank in a public street a short distance from a church, and also of a passenger railway station nearby, which causes a disturbance to the congregation by smoke, offensive odors, and cinders, as well as by loud and incessant noises is held, in *Chicago Great Western R. Co.* v. *First Methodist Episcopal Church* (C. C. A. 8th C.) 50 L. R. A. 488, to constitute a private nuisance for which compensation must be made or the nuisance removed.

NEGLIGENCE—COMMON EMPLOYMENT.—The liability of the employer for the death of a workman in a smelting factory, who fell into a pit the cover from which had been removed by other workmen during a recess for lunch, is denied in *Sofield* v. *Goggenheim Smelting Co.* (N.J.) 59 L. R. A. 417, on the ground that the negligence in failing to replace the covering was the negligence of co-servants in the common employment. With this case is a note of great length on the question: That servants are deemed to be in the same common employment at common law, where no questions arise as to vice-principalship.

GROWING CROPS.—A chattel mortgage on crops growing upon mortgaged land is held, in *Jones* v. *Adams* (Or.) 50 L. R. A. 388, not to constitute a constructive severance which will prevent the crops from passing to a purchaser of the land on foreclosure sale made while the crops are still standing.

Flotsam and Local Items.

THE following letter comes to us from a subscriber who guarantees its authenticity. It is, as will be seen, the report of an attorney living in one of the Western States to a firm of solicitors who had sent him some accounts to collect. It has a fine flavor of the prairies about it.

Plainville, Dec. 24th, 1900.

GENTLEMEN.—Yours containing account against E. S. G. received. Mr. G. is slower than Baalam's ass. It is worth more to collect an account from him at any time than it is worth. Nevertheless I will camp on his trail and if anybody can get it I think I can. As to the Rev. Mr.—— he is also a good one, I have some of his paper in my safe. It is keeping well: he don't bother me to make any credits on it or compute the interests. He is owing more than a year's salary to my knowledge. His present address is Jacksonville—a letter addressed to the general delivery will reach him. He is not worth more than the law allows him. You don't need any advice

as to how to proceed, but there is only one way to do anything and that is to threaten to arrest his character if he does not pay. I could have done that and got my money, but as I am a preacher myself I would not do it, and then it is mean ordinarily to push a poor devil of an editor or a preacher, but the Bro. has dodged so many times that I really think that the devil would not get you if you shoved him pretty close.

Respectfully, etc.

A CERTAIN Surrogate Registrar, in a city in Ontario, was at the time of his appointment a baker. He was also, however, as luck would have it, a strong politician with Orpheus C. Kerr proclivities. He was a very good baker, and it seems a pity that his customers should have been deprived of his skill in that line, more especially as there are a few little matters about Surrogate business, the proof of wills and administration proceedings with which no baker can be expected to be familiar. One of our poets impressed with the "eternal fitness of things" which pitch-forked a layman into an office that can only properly be filled with safety to the public by a professional man thus relieves his feelings by an ode on "Joey Shortcake's Court":

Of last wills I have the keeping,
Of testators calmly sleeping,
In Necropolis or other safe retreat,
Executors and guardians petition and entreat
For letters testamentary
In Joey Shortcake's Court.

And sometimes a baker's dozen,
Parents, uncle, brother, cousin,
Enter caveat and warning,
The others' claim each scorning,
Praying letters, etc.

Quoting Walkem, Grotius, Storey;
Pride of Grit, admired of Tory,
Comes our Joey wigged and smiling,
None resist his sweet beguiling,
With his letters, etc.

Who would dare the tax evade,
By deed of trust, in cunning made,
His corpse to cinders will be burned,
In oven by our Joey turned,
Signing letters, etc.

Your "last batch baked," of life aired,
Now laid in dust, or to ash fired,
The "Trusts" will come and prove your will;
With Joe, like Pooh-Bah, smiling still;
Sealing letters, etc.