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THE MORAL RESPONSIBILITY OF CORPORATIONS.

In a recent issue of this journal (vol. 44, p. 781) a correspondent directed attention to a remark alleged to have fallen from a learned chief justice in an accident case against a railway company, to the effect that it was a dishonest act on the part of the company to set up as a defence the want of notice, required by statute. It may therefore be worth considering whether or not there is any moral liability on the part of corporations in such cases.

A corporation, it is needless to remind our readers, is a mere legal entity created by operation of law; it is not like an ordinary partnership, the shareholders who compose it are not the corporation, nor are the officers who direct its operation, the corporation, but it is a distinct entity of itself and, as has been truly said, "it has neither a body to be kicked nor a soul to be damned." A body such as this has no moral emotions of any kind. It is entirely destitute of any ethical principle It is the product of a legal Frankenstein. People are apt to ascribe to corporations the feelings and emotions of sentient beings, but a corporation is a being created by law, having no powers, duties or obligations or attributes other than its creator sees fit and is able to endow it with. The law cannot endow a corporation with a moral sense nor with ethical attributes. A corporation may commit legal wrongs, but it cannot commit moral wrongs, because it is not a moral being, or capable either of morality or immorality any more than a log of wood can. When, therefore, it is said that a corporation is honest or dishonest it is like ascribing those qualities to a log of wood.

The law has brought into existence a legal entity without a soul, and beyond the rights, duties and obligations which the law imposes on it, it has none. From the very nature of its existence,

it cannot act except through the agency of men. Men have moral duties and obligations apart from their legal duties and obligations, but you cannot import their moral duties and obligations into the duties and liabilities of the corporation whose servants they are. It is the duty of a servant to pay his debts, but a master, or a corporation who happens to be master, is under no obligation to fulfil that obligation of the servant. It is the moral duty of a servant not to injure another fellow being, but an ordinary master is only by law compelled to make good the damage done by his servant to another, within certain well-defined limitations, and this, not on the ground of any moral, but of a purely legal obligation. The liability of a corporation for the wrongful acts of its servants is also strictly a legal liability, and any defence which the statute imposing the liability authorizes, can not properly be called dishonest. The moral duty of a fellow creature to compensate a fellow creature whom he has injured, can hardly by any ethical process be transferred from him to some one else whose servant he happens to be, and who in no way participates in or profits by the wrong, even though that someone else be a fellow being, and still less when that someone else is a mere legal abstraction.

In carrying out the business or purpose for which a corporation is called into existence, the public naturally expects that those who control the operations of the corporation shall do so, as far as possible, in accordance with those moral rules of conduct which govern good and reputable people, and it is when they fall short of that standard that their moral short-comings are erroneously attributed to the corporation whose servants they are. In the ordinary course of things a man who does another an injury, is the only person who is morally responsible to make compensation, and this moral liability to make compensation cannot attach to anyone else, unless it be that the wrong was done by the express direction of or for the benefit of another who has, in some way, profited by it. But where some unfortunate is killed or injured by the carelessness of a railway servant, the railway company has neither directed the wrong to be done, nor

does it derive any benefit whatever from the act, directly or indirectly. Where then could any moral obligation arise for it to make compensation, even if it were an individual? The law, it is true, has in such cases imposed a legal liability, but to attempt to escape a merely legal liability on legal grounds cannot properly be said to be dishonest.

The popular view of the matter is that whenever someone has been injured or killed, compensation should be made by someone, and as the person who actually does the injury is ordinarily financially no good, in popular estimation, resort should be had to his employer if he happens to have one, though he be personally innocent of any wrong-doing. This view is largely adopted by judges and the legislature, but it seems ridiculous to place that liability if it be imposed by either judicial decision or legislative enactment, as resting on any moral ground. There are some obligations which are both moral and legal, and to attempt to evade such an obligation by any means may clearly be said to be dishonest, but the case seems to be wholly different where the obligation is purely legal. To escape from such an obligation, any defence which the law allows may properly be resorted to, without the breach of any moral law.

But it may be asked, is counsel acting for a corporation guilty of any moral wrong in setting up or insisting on any such defence on behalf of a corporation? It is obvious that he, as the servant of the corporation, is the person to whom any moral delinquency, if any there be in this respect, must attach. The corporation as we have seen is not a moral being. Its servants and agents are, and they may be guilty of immoral acts. For instance, it would be a distinctly immoral act for a servant of a corporation to tell lies or commit frauds on its behalf. But it is he and not the corporation which is guilty of the immorality. So, therefore, any charge of immorality against a corporation is really levelled against those who, as its agents, commit in its name the acts for which blame is imputed to the corporation.

When, therefore, it is said that a corporation is dishonest, what is really meant is that those who are acting on its behalf

are dishonest. The moral duty of counsel is clearly to refrain from advising, or being party to, the setting up of defences which savour of dishonesty; but does the defence of a want of a statutory notice of an accident come within the category of such defences? The learned chief justice has intimated that it does. With great respect, we venture to think for the reasons already given, that it does not.

An imputation of dishonesty is of all imputations one of the most offensive which one gentleman can apply to another, and it is one that ought not lightly to be made, and yet imputations of that kind are sometimes made indirectly by people who would shrink from making them directly. The president and officers of the railway company in question are honourable and reputable men, the counsel employed by the company are honourable and reputable men against whom no one in his senses, and least of all, the learned chief justice, would care to bring a charge of dishonesty, and yet it is by these men that the corporation acts, and if any dishonesty is perpetrated it must be by them.

As we have already pointed out, the liability imposed on companies is a legal liability made subject by the legislature which creates the obligation to certain conditions, among others, that notice shall be given. Whether this is a reasonable condition or not, it is thought to be so by the legislature, and, we think, with very good reason. If a third person is to be called on to pay for the act of some other, it is a very reasonable and proper thing that such third person should get notice speedily of the claim, and particularly as where the third person is a corporation, whose business necessarily involves the employment of different persons to deal with different branches of work. It is manifestly fair and right that the corporation should be in a position, by its servants to whom this duty belongs, to make proper inquiry into all the circumstances while the matter is still fresh, and that they may be enabled to preserve and secure all necessary evidence bearing on the matter. This just and reasonable provision the legislature has made; and yet we fear that the observation of the learned chief justice may lead the public

to believe that whenever the want of notice is set up by a corporation, a dishonest act is being perpetrated on its behalf.

This, we think, is an unfortunate state of things, because it is an imputation of dishonesty against the agents of a corporation in setting up such a defence, as well as against the legislature of the province which enables such defences to be raised.

WIFE'S RIGHT TO INDEPENDENT ADVICE.

Cox v. Adams—Stuart v. Bank of Montreal.

Four years ago legal and financial circles in this province were somewhat disturbed by the judgment of the Supreme Court in *Cox* v. *Adams*, 35 S.C.R. 393, in which the majority of that court, over-ruling a decision of the Chief Justice of the King's Bench which had been affirmed by the unanimous judgment of the full Bench of the Court of Appeal, relieved a wife from liability on a note signed by her as security for her husband on the ground, as stated in the head-note of the case, that she was "subject to influence" by her husband "and entitled to independent advice." There is no doubt that this decision, to quote an expression used by the trial judge, "added new terrors to the conduct of the banking business," but bankers were reminded by Mr. Justice Girouard in his learned and elaborate judgment that it was no part of the court's duty "to find out what would be the most beneficial to banks and money-lenders," and that "the same banks which deal in Ontario find it profitable to have offices in the Province of Quebec where the law is far more sweeping."

It is, of course, well known with what stringent and far-reaching safeguards the law of Quebec has protected the property of married women, but there can be no doubt that much surprise was felt by lawyers in this province at a decision which seemed to deprive a wife of no small portion of that freedom of contract which she is supposed to have acquired by legislative enactment. A careful perusal of the majority judgments, however, led some to doubt whether after all they went so far as to

hold that the existence of the mere relation of husband and wife gives rise to a presumption that the giving of security by a wife for a husband has been obtained by undue influence, which presumption throws on the party obtaining the security the onus of shewing that the wife had independent advice in connection with the transaction.

It may be interesting to our readers to call their attention to the fact that this very point came before the Court of Appeal in the recent case of *Stuart* v. *Bank of Montreal*, when the court, consisting of four judges, was equally divided as to whether or not *Cox* v. *Adams* was a binding authority to the effect above stated. The Chief Justice of Ontario, who is one of the two judges who hold that the earlier is a binding authority in the later case, says with regard to *Stuart* v. *Bank of Montreal*, that, "As far as disclosed by an examination of cases decided in the English courts, no case has yet arisen similar to the present one; a case free of all the sinister elements of imposition, deception, misrepresentation, pressure by threats, intimidation, or any other sort of duress or undue influence, and where there was knowledge of what was required of the wife and an intention on her part to do it of her own free will, and presenting only the one point of absence of independent advice." In his opinion, however, *Cox* v. *Adams* is a binding authority to the effect that, even in such a case, the absence of independent advice is fatal, and that in this province, at all events, a married woman "must, it seems, be protected, not only against her husband, but against herself, so that, even in a case where, as in the present one, she would reject the suggestion of the intervention of an independent adviser and refuse absolutely to be guided by any but her own judgment, she is utterly incapacitated, and the position is, that no one can safely deal with her in respect of a transaction in which her husband is personally interested."

Mr. Justice Garrow came to the same conclusion as the Chief Justice, while Mr. Justice Osler, on the other hand, followed by Mr. Justice Maclaren, thought that the trial judge had successfully distinguished *Cox* v. *Adams* from the case before the court, and that it was still open to the married women of Ontario to

transact their business without independent advice, provided no fraud or deceit is practised upon them and they understand the nature and effect of what they are doing. Such was the view of Mr. Justice Mabee, who tried the case, and of course it holds good in the meantime; but, as the case has been appealed to the same court which decided *Cox* v. *Adams*, the profession and public will look with much interest to having fresh light thrown upon a confessedly difficult and important question, upon which it will be safer at present to adopt Addison's view in the *Spectator* in another cause célèbre, that "much might be said on both sides."

There are probably some husbands who will sympathize more or less with the bitter complaint of Mr. Bumble in "Oliver Twist," when he was told that "in the eye of the law," his wife was supposed to act under his direction. "If the law supposes that, the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience!"

DEFAMERS BY TRADE.

Under the above heading a writer in the current number of an American legal journal of learning and repute (*Case and Comment*, p. 173) thus describes a certain section of the newspaper press in the United States:—

"A puny man behind a loaded 13-inch gun may work terrible havoc. So, with the use of a powerful newspaper, a man of mediocre ability and no conscience may greatly endanger the public welfare. It is all the worse when men of ability prostitute their talents and conscience to the work of a sensational and venomous press. Every public man recognizes that unselfish and patriotic service is no shield against outrageous attacks by unscrupulous journals. Sometimes their attacks are malignant; sometimes they are merely sensational, aiming to profit by pandering to suspicion, jealousy, envy, and other base passions of their readers. They have great ingenuity in torturing a simple

and upright act into a false appearance, and then calling it a scandal. Their audacity is unparalleled; their mendacity unlimited. A falsehood disproved is immediately ignored, and a new one published instead. Such journals thrive on lies like hyenas or carrion. As shameless as they are mendacious, they brazenly assume that the public has not discovered their real character. It would be a revelation to go through their files for a series of years and lis their unblushing falsehoods, fake news reports, and venomous attacks upon public men. To publish such lists would indelibly brand them as defamers by trade. America may be proud of the character and high grade of its best newspapers. It has too long tolerated the worst of them whose chief business is to deceive and debauch the people. They should be classified and listed as outlaws or pirates of the press."

Our readers can do their own classifying and listing of the newspapers in this country. As to this sort of literature, we are entirely too apt when looking across the border to say: "I thank Thee I am not as other men are, extortioners, etc." Rather let our neighbours say, "Physician, heal thyself." The Ontario black list has already got some familiar names on it, and others will soon be down to the standard referred to by our contemporary.

PUBLIC CONFIDENCE IN PUBLIC JUSTICE.

It is refreshing to note that even the lay press of Toronto has lucid intervals in connection with this most important subject. We are glad to know that the real view of at least one of them is "that public confidence in the administration of public justice is of the very essence of loyal and stable citizenship, and is fundamental to happiness for the individual and freedom for the State. What is most worth while in civil liberty is gone when the people lose confidence in the inevitableness and strength and impartiality of public justice."

These are brave words, true and to the point, but they come too late and are too much at variance with other utterances of

the same paper to be of any use. We commend them, however, to the sober second thought of the rest of the staff of the journal in which they appear, and also to other daily papers, which, when the pursuit of other prey palls upon them gladly return to the hunting grounds where they had already indulged in the congenial sport of abusing courts, judges and railway commissioners; an amusement which has the advantage that there is no danger of their being attacked in return, and which gains them a cheap popularity with disappointed litigants and others who, for various reasons, are devoid of respect for the law of the land and are restless under its administration.

An evening newspaper published in the city of Toronto recently printed in a prominent place on its front page some socialistic injunctions under the title of "Soap Box Sayings." In another column was a speech by some socialistic orator and possibly the gems under the above title were formulated from his utterances, but there was no apparent connection between them. Many of these sayings so collected were plain incitements to robbery and violence. Whilst we can scarcely believe that a respectable journal should intend such advice to be seriously taken, many of its readers might naturally think that the views there expressed were those of the editor, or at least were an endorsement of the orator's exhortations. Certainly no newspaper which could publish such stuff can have any idea of the inflammable material that is lying about in these days awaiting for a match to set it on fire, nor has it any due regard to its duties as a public journal, nor is it aware that it has apparently laid itself open to a criminal prosecution.

REVIEW OF CURRENT ENGLISH CASES.

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SPECIAL POWER OF APPOINTMENT—EXERCISE OF POWER BY EARLIER WILL—NO EXPRESS CLAUSE OF REVOCATION—LATER WILL ALONE ADMITTED TO PROBATE.

Wrigley v. *Lowndes* (1908) P. 348 was a probate action, in which the question raised, was whether the testatrix, who was donee of a special power of appointment, had effectually exercised the power. It appeared that on 25 March, 1904, the testatrix made a will expressly exercising the power; but before her death she executed a new short will, dated 28 March, 1907, which was in these terms: "I wish to leave at my death everything I have power to will to my husband, Arthur Harold Wrigley." There was no clause revoking the prior will. The will of 25 March, 1904, made a wholly different disposition of the property subject to the power. Barnes, P.P.D., held that the second will revoked the first and was an effectual execution of the power, and was therefore alone entitled to probate.

MUTUAL WILLS—CODICIL EXECUTED BY WRONG PERSON—MISTAKE —INTENTION—REFUSAL OF PROBATE.

Re Meyer (1908) P. 353 is a somewhat curious case. Two sisters desired to make codicils to their respective wills, each in favour of the other. They went together to a solicitor's office to execute them, but by mistake, instead of executing the codicil to their own wills, each executed the codicil to the other's will. Some of the provisions of each codicil were the same. It was contended that at all events as to these provisions the codicils might be valid, but Barnes, P.P.D., held that it was clear that each codicil had been executed under a mistake, and was not the document intended to be executed, and therefore it was wholly void and not entitled to probate.

ADMIRALTY—SHIP—BILL OF LADING—DAMAGE TO CARGO—NEGLIGENCE OF SHIPOWNERS' SERVANTS.

The Schwan (1908) P, 356. In this case the plaintiffs, the owners of a cargo, sued the shipowners for damage to the cargo. The shipment was made under a bill of lading which contained

(inter alia) the following exceptions and conditions: (1) all accidents, loss and damage whatsoever from defects in hull, tackle, apparatus, machinery boilers, steam, and steam navigation . . . or from any act, neglect or default whatsoever of the pilot, masters, officers, engineers, crew, stevedores, servants or agents of the owners in the management, loading, stowing or discharging or navigation of the ship, or . . . otherwise, and the owners being in no way liable for any consequences of the causes mentioned." "(2) It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery and appurtenances, shall be considered a fulfilment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage." The chief engineer of the defendants was employed to superintend the fitting of the machinery when the ship was in course of construction, and had neglected to make himself acquainted with the proper adjustment of a "three way cock" fitted on the main bilge pipe; and owing to this cock not having been turned so that it would only be open at one time in two directions, an inflow of sea water took place, and the cargo was thereby damaged. Deane, J., held that the defendants were liable, as their agent had not exercised "reasonable care," as required by the second clause in the bill of lading.

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

Great Western Ry. Co. v. *Midland Ry. Co.* (1908) 2 Chy. 644. This was an appeal from the decision of Warrington, J. (1908) 2 Ch. 455 (noted ante, vol. 44, p. 689). The action was brought claiming a declaration that the plaintiffs were entitled to running rights over part of the defendants' line of railway. The defendant company had granted the plaintiffs' company in 1898 a license to enter on and use the line in question and construct junctions therewith, but subject to the provisions of a certain Act which inter alia provided that the plaintiffs might construct the railway, but that "if the railways be not completed within 5 years from the passing of this Act, then, on the expiration of that period, the powers granted by this Act to the company for making and completing the railway or otherwise in relation thereto, shall cease except as to so much thereof as is then completed." The construction of the necessary conjunction with

the defendants' line was not completed within the five years, and the defendants contended that the plaintiffs had no longer power to construct them, and so to do would be ultra vires. Warrington, J., overruled this contention, but on the main point he held that the plaintiffs were not entitled to the relief they asked. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) held that he was right in deciding that the plaintiffs being in possession might properly proceed and complete their railway notwithstanding the expiration of the five years, but they held he was wrong on the main question and that the plaintiffs were entitled to the declaration as prayed.

CONVERSION—REAL ESTATE—INFANT—SALE BY ORDER OF COURT FOR COSTS—SURPLUS PROCEEDS—REALTY OR PERSONALTY.

In *Burgess* v. *Booth* (1908) 2 Ch. 648, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have overruled the decision of Eve, J. (1908) 1 Ch. 880 (noted ante, vol. 44, p. 484). That learned judge held that where an order of court is made for the sale of an infant's estate for the purpose of satisfying costs, the surplus proceeds in the event of the infant owner attaining majority and dying intestate, is to be deemed realty, and as such descended to the heir and not the next of kin. The Court of Appeal held that since *Steed* v. *Prince*, L.R. 18 Eq. 192, a sale by order of the court works a conversion for all purposes, unless there be a statutory exception: see R.S.O. c. 168, s. 8.

COMPANY — DEBENTURE HOLDER'S ACTION — SUPPOSED DEFICIENT SECURITY—PRINCIPAL AND INTEREST—PAYMENTS ON ACCOUNT —APPROPRIATION OF PAYMENTS—ORDER FOR PAYMENT OF DIVIDENDS—SURPLUS.

In re Calgary & Medicine Hat Land Co., Pigeon v. *The Company* (1908) 2 Ch. 652. This was an action brought to recover the amount secured by the debentures of a limited company. The trust deed whereby the debentures were secured, provided that the net proceeds of the realization of the securities should be applied first in payment of the interest, and then of the principal due on the debentures. By the judgment in the action the trusts of the deed were ordered to be carried into execution, and the usual accounts were directed. The master certified the amounts due to the debenture holders for principal, but it being supposed that the security was insufficient to realize the full

amount, he took no account of the interest due. Dividends were from time to time ordered to be paid on the amounts found due by the master, and the full amount of principal was thus paid, and a surplus remained sufficient to pay the interest in full. Joyce, J., held that what had been done was not a final and complete appropriation by the orders in question as between principal and interest, and that notwithstanding them, the debenture holders were entitled to receive the whole arrears of interest in accordance with the trust deed, before any surplus would be payable to the company, and the Court of Appeal (Cozens-Hardy and Moulton, and Farwell, L.JJ.) affirmed his decision.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS—RIGHTS OF PURCHASERS INTER SE—COVENANT TO OBSERVE COVENANTS IN GENERAL DEED—GENERAL DEED UNEXECUTED — RESERVATION TO VENDOR OF RIGHT TO DISPENSE WITH RESTRICTIONS.

Elliston v. *Reacher* (1908) 2 Ch. 665. This was an appeal from the decision of Parker, J. (1908) 2 Ch. 374 (noted ante, vol. 44, p. 613) in so far as he granted any relief to the plaintiff. It may, perhaps, be remembered that the land in question formed part of a building estate which had been sold off in lots, the purchasers agreeing to be bound by the restrictive covenants in a certain "deed." The deed referred to had been drawn up and engrossed, and purported to be made between the purchasers whose names were set out in a schedule of the first part, and the trustees for the vendors of the second part. It was intended that this deed should be executed by the purchasers, but the engrossment remained in the vendor's possession unexecuted by anybody. The defendants' predecessors in title were purchasers who had agreed to be bound by the covenants in the above mentioned "deed," and the plaintiff claimed under purchasers who had also so agreed, but the deeds to the defendants and plaintiffs were executed by their vendors only. The principal points argued on the appeal were that the reservation of the right to the original owner to dispense with the restrictive covenants shewed that there was not intended to be any general building scheme and that the agreement to be bound by covenants in a deed, when in fact it was only an unexecuted engrossment, was nugatory. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) were of the opinion that on the evidence it was plain that there was a general building scheme subject to which the property had been sold to the plaintiff, and

the defendants' respective predecessors in title, and that they were bound by the so-called covenants in the deed, although it had not been executed, and notwithstanding that there was a reservation of a right to the original owner to dispense with such covenants, and notwithstanding the defendants had not executed the deeds from their respective vendors.

ADMINISTRATION — STATUTE BARRED DEBT — RESIDUARY LEGATEE ALSO RESIDUARY LEGATEE OF DEBTOR'S ESTATE.

In re Bruce, Lawford v. *Bruce* (1908) 2 Ch. 682. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have been unable to agree with the decision of Neville, J. (1908) 1 Ch. 850 (noted ante, vol. 44, p. 483). The testator whose estate was in question died in 1882 leaving James Bruce a share of his residuary estate. In 1878 the testator had lent his sister £200 at 5 per cent. interest, which had never been repaid. She died in 1903, making James Bruce one of her executors and also her residuary legatee, and as such he received £5,000. The point in question was whether James Bruce was bound to give credit for the debt due by the testator's sister as part of his residuary share of the testator's estate. Neville, J., held that he was, relying on the case of *Courtenay* v. *Williams* (1844) 2 Hare 539, but the Court of Appeal distinguish that case, on the ground that there a legal liability for the debt existed, whereas in the present case, at no time was there any legal liability on the part of James Bruce to pay the debt in question.

APPLICATION—FATHER OF ILLEGITIMATE CHILD—BASTARDY ORDER —LIABILITY OF PUTATIVE FATHER FOR NECESSARIES—DEATH OF PUTATIVE FATHER—ENFORCING ORDER — BASTARDY LAWS AMENDMENT ACT 1872 (35-36 VICT. C. 65) S. 4—(R.S.O. C. 169, S. 1.)

In re Harrington, Wilder v. *Turner* (1908) 2 Ch. 687. An order had been made under 35-36 Vict. c. 65, above referred to, for the payment by the putative father of a weekly sum for the support of his illegitimate child, until the child should attain the age of 16 or die. The father had subsequently died, and, at the time of his death, there were arrears amounting to £37, and the payments which would accrue from his death until the child would attain 16, amounted to £119, 4s., for which two sums the mother, to whom they were payable, claimed, to prove against the estate of the deceased, but Warrington, J., held that such

orders do not have the effect of creating a debt from the father, but impose a purely personal liability on him, and that on his death neither the arrears nor future payments are recoverable from his estate. R.S.O. c. 165, s. 1 also seems to create a statutory liability on the part of the putative father only, and not one that could be enforced against his estate, unless in the case where a judgment has been actually recovered against him under that section in his lifetime.

WILL—CONVERSION OF PERSONALTY INTO REALTY—DIRECTION TO HOLD PROCEEDS OF PERSONALTY ON TRUSTS AND IN MANNER APPLICABLE IF THEY HAD ARISEN FROM SALE OF REALTY.

In re Walker, Macintosh-Walker v. *Walker* (1908) 2 Ch. 705. Parker, J., held that a declaration that personalty shall devolve or pass to persons successively as realty (though in cases of doubtful construction it may help the court to construe the instrument as creating an imperative trust for conversion) is not per se operative, and consequently a bequest of personalty on trust for sale and to hold the net proceeds "upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of" freehold hereditaments by the same will, "devised in settlement under the Settled Land Act, 1882," is not an operative trust, and the person who first took the settled land in tail became entitled absolutely to the personalty so bequeathed.

TRADE MARK—PASSING OF GOODS—"CHARTREUSE"—FRENCH LAW OF ASSOCIATIONS — VESTING OF FRENCH BUSINESS UNDER FRENCH JUDGMENT—EFFECT OF FRENCH JUDGMENT ON ENGLISH TRADE MARK.

Rey v. *Lecouturier* (1908) 2 Ch. 715 was an action by the representative of Carthusian monks to restrain the infringement of their trade mark of "Chartreuse" as applied to a liqueur. The monks formerly resided in Chartreuse in France and by a secret process manufactured a liqueur which was called "Chartreuse," and which name they had registered in England as a trade mark. Under the French law of associations the plaintiffs were compelled to quit France, and their trade and trade marks were under a judgment of a French court vested in a liquidator by whom they were sold to the defendants who continued to carry on the manufac-

ture of a liqueur, but not by the plaintiffs' secret process. The defendant had registered themselves as assignees of the plaintiffs' trade mark. The plaintiffs had removed to Spain where they carried on their business of making liqueur by their secret process, and which they continued to call "Chartreuse." They claimed to rectify the register of trade marks by striking out the entry of the defendants, and also claimed an injunction to restrain infringement. The Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) held on the evidence that the word "Chartreuse" though originally merely the name of a place, had acquired in England the secondary meaning of a liqueur made by the monks of the Grand Chartreuse, and was a good trade mark, and that the judgment of the French court was ineffectual to transfer the property of the plaintiffs in their English trade mark, and, therefore, that they were entitled to the rectification of the register by striking out the entry of the defendants being assignees of the plaintiffs' trade mark, and also to an injunction as prayed.

TRADE UNION—MEMBER OF UNION—FINE DUE TO UNION—NON-PAYMENT OF FINE—THREATENING EMPLOYER TO PROCURE DISMISSAL OF WORKMAN FOR NON-PAYMENT OF FINE—TRADE DISPUTE—TRADE DISPUTES ACT, 1906 (6 EDW. VII. c. 47) ss. 1, 3; s. 5(3)—(R.S.C. c. 125, s. 32).

In *Conway* v. *Wade* (1908) 2 K.B. 844 the plaintiff was a member of a trade union and was in 1900 fined 10s. for breach of the union rules. He did not pay the fine, and the other members of the union, who were his fellow workmen, knew that he had not paid it, and instigated the defendant, who was district delegate of the union, to represent to the foreman of the plaintiff's employer that unless the plaintiff were dismissed there would be trouble with the men. In consequence of this representation the plaintiff was dismissed. At the trial the plaintiff recovered judgment for £50, which was affirmed by the Divisional Court. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.), however, have reversed the decision, holding that the defendant was protected by the Trades Disputes Act, 1906, s. 3. Whether R.S.C. c. 125, s. 32, would equally protect such a transaction seems doubtful. Farwell, L.J., seems to think that though the Act cannot make evil good, it has at all events made it not actionable. See p. 856.

INSURANCE—AGREEMENT THAT STATEMENT SHOULD BE THE BASIS OF THE CONTRACT—EFFECT OF NSWERS MADE BY ASSURED TO MEDICAL REFEREE OF INSURERS—NON-DISCLOSURE OF MATERIAL FACTS—ABSENCE OF FRAUD.

In *Joel* v. *Law Union & Crown Ins. Co.* (1908) 2 K.B. 863 the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) have refused to affirm the judgment of Alverstone, L.C.J. (1908) 2 K.B. 431, noted ante, vol. 44, p. 532. The action was on a policy on the life of one Robina Morrison, and the defence was non-disclosure of material facts. On the application for the insurance the insured signed a declaration that the statements made in her application were true and were to form the basis of the contract. Subsequently, before the execution of the policy, she was interrogated on behalf of the company by their medical adviser, (1) as to whether she had ever suffered from mental derangement, and (2) as to the names of any doctors she had consulted. She answered the first question in the negative, as the jury found, without fraud; and in answering the second she omitted to mention the name of a doctor whom she had consulted for nervous depression, but as the jury found, she foolishly but not fraudulently, concealed the fact. At the same time she signed a further declaration that her answers were true, but this declaration did not state that her answers were to be part of the basis of the contract. The policy did not refer to the application or second declaration. The assured committed suicide. She had prior to the application suffered from acute mania, but the jury found she was ignorant of the fact; and they also found that the name of the doctor she had consulted was material for the defendants to know, but that the insured was not aware that it was material. On this state of facts Lord Alverstone, C.J., held that the plaintiff was not entitled to recover, but the Court of Appeal, though agreeing with him that the second declaration was not made part of the basis of the contract, yet were of the opinion that in the absence of any evidence of the doctor who put the questions, as to what took place at the time, and what explanation he gave the assured, it was not possible to say that the second declaration was per se sufficient evidence of such non-disclosure of a material fact as in the absence of fraud to render the policy voidable. A new trial was therefore ordered.

ARBITRATION—AWARD BASED ON SUPPOSED EXISTENCE OF TRADE CUSTOM—CUSTOM IN FACT NON-EXISTENT—SETTING ASIDE AWARD.

In re Arbitration, North-Western Rubber Co. and Huttenbach (1908) 2 K.B. 907. This was an application to set aside an award made in the following circumstances. By a contract in writing Huttenbach agreed to sell to the North Western Rubber Co. 300 tons of rubber of fair usual quality, at £18 15s. per ton c.i.f. Liverpool, for direct shipment from the East or Straits Settlements to Liverpool. The contract provided that any dispute arising out of the contract was to be settled by arbitration. On arrival of the rubber in Liverpool the buyers found it not in accordance with the contract and refused to accept it. The dispute was accordingly referred to arbitration. The arbitrators' award was based on the alleged existence of a custom applicable to all contracts for raw materials shipped to England to the effect that the buyers were bound to accept goods with an allowance for inferiority of quality, where the inferiority was in the opinion of arbitrators not excessive or unreasonable. They, therefore, awarded that the buyers were bound to accept the rubber subject to an abatement in the price of 10s. per ton. On the motion an issue was directed by the Divisional Court (Phillimore and Walton, JJ.), to determine whether the alleged custom in fact existed, and it was found that it did not, and Walton, J., who tried the issue, set aside the award. The Court of Appeal (Williams, Moulton and Buckley, L.JJ.) affirmed this decision and held that the award could not be maintained. It was argued in appeal that the issue ought not to have been directed, but the Court of Appeal came to the conclusion that as the appellants though objecting to the order, had, nevertheless, accepted the issue, and not appealed from the order, that objection was too late. No objection was taken on the ground that the award had been set aside by Walton, J., and not the Divisional Court and the Court of Appeal treated this as a mere irregularity which had been waived. The ground taken by the Court of Appeal was, first, that the arbitrators had no power conclusively to determine the existence of a custom; (2) that by the terms of the contract the goods were to be "of fair, usual quality," and the arbitrators had no right to convert what was only a condition into a warranty; and (3) that the appellants having accepted an issue as to the custom were bound by the result.

LICENSING ACTS—PERMITTING DRUNKENNESS ON LICENSED PREMISES—GUEST FOUND DRUNK AFTER CLOSING HOURS—LICENSING ACT, 1872 (35-36 VICT. c. 94) s. 13—R.S.O. c. 245, s. 76).

Lawson v. *Edminson* (1908) 2 K.B. 952. This was a case stated by justices in a prosecution for permitting drunkenness on licensed premises. The evidence was, that after closing hours two persons, whom the licensee claimed to be his private guests, were found to be drunk on his premises; and that at the time the premises were being used as private premises, and not for the purpose of licensed premises. The Court (Lord Alverstone, C.J., and Bigham and Walton, JJ.) held that an offence had been committed, and that the defendant should be convicted. That it was immaterial that the drunken persons were private guests, or that the licensed premises were closed.

INTERNATIONAL LAW — ACT OF COLONIAL LEGISLATURE — LOCAL STATUTE — STREET IMPROVEMENT — CONTRIBUTION BY LANDOWNER—ACTION IN ENGLAND.

Sydney v. *Bull* (1909) 1 K.B. 7 was an action brought by the municipality of Sydney in New South Wales to recover from the defendant a sum of money for a local improvement which as an owner of lands benefited he was under a statute of that colony liable to pay. The statute authorized the municipality to collect the amount payable by distress and in addition to the remedy by distress they were also empowered to bring an action for the amount due. The municipality being unable to recover by distress and the owner of the lands in question being resident in England the action was brought against him there. Grantham, J., however, held that the action would not lie to enforce a liability imposed by a foreign state and that quoad the English courts the colonial legislature must be deemed a "foreign" state and that the liability was imposed solely for its domestic purposes and the action was analogous to an action to recover a penalty or tax imposed by a foreign state and further that the action could not be maintained because it related to real property situated abroad.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. Ct.] DESROSIERS *v.* THE KING. [Dec. 15, 1908.

Crown—Liability for negligence — Personal action — Release— Common employment.

Under s. 16, sub-s. (*c*) of the Exchequer Court Act (50 & 51 Vict. c. 16), an action in tort will lie against the Crown represented by the Government of Canada.

Under the Quebec Civil Code in case of death by negligence of servants of the Crown, an action for damages may be brought by the widow of the deceased on behalf of herself and her children.

The action of the widow is not barred by her acceptance of insurance on the life of deceased from the Intercolonial Railway Employees Relief and Insurance Association under the constitution rules and regulations of which the Crown was to be released from liability, to make compensation for injury to, or death of, any member. *Miller* v. *Grand Trunk Ry. Co.* (1906) A.C. 187 followed.

The doctrine of common employment does not prevail in the Province of Quebec.

The right of action for compensation for injury or death by negligence of government employees does not abate on demise of the Crown.

The Judicial Committee of the Privy Council refused leave to appeal from a judgment of the Supreme Court of Canada in accord with a long series of decisions in the Dominion.

Appeal dismissed with costs.

Chrysler, K.C., for appellant. *A. Lemieux*, K.C., for respondent.

Que.] LABROSSE *v.* LANGLOIS. [Dec. 15, 1908.

Appeal—Amount in dispute—Interest—Costs—Collateral matter.

An action having been brought against the maker and indorser of a note for $2,000, the maker sued the indorser in war-

ranty, claiming that no consideration was given for the note and asking that the indorser guarantee them against any judgment obtained in the main action. They also asked that an agreement under which the makers were to become liable for $3,000 be declared null. The two actions were tried together and judgment given for the plaintiff in the action on the note, while the action in warranty was dismissed. On appeal from the latter judgment,

Held, that the amount in dispute was $2,000, the value of the note sued on; that the costs of the action in warranty could not be added, and without them the sum of £500 was not in controversy even if interest and costs in the main action were added; the appeal, therefore, did not lie.

Held, also, that the agreement which the plaintiffs in warranty sought to avoid was only a collateral matter to the issues raised on the appeal and could not be considered in determining the amount in dispute.

Motion refused with costs.

J. A. Ritchie, for motion. *Lemieux*, K.C., contra.

Man.] PONTON *v.* CITY OF WINNIPEG. [Dec. 15, 1908.

Municipal corporation—Exercise of powers—Taxes—Sale of land —Purchase by corporation—Offer for redemption—Resolution—By-law.

The city of Winnipeg sold land for taxes due becoming itself the purchaser. After receipt of the certificate perfecting its title a resolution was adopted by the city council that said land should be conveyed to P. the former owner on payment of all costs, interest and taxes. The payment was not made and some four months later the resolution was rescinded. P. then tendered the money, and the city refusing to accept it, brought an action for conveyance of the land or for damages.

Held, that said resolution did not bind the corporation as the power to convey the land would only be exercised by by-law. *Waterous Engine Works Co.* v. *Palmerston*, 21 Can. S.C.R. 556, and *North Vancouver* v. *Tracy*, 34 Can. S.C.R. 132, followed. Appeal dismissed with costs.

Armour, K.C., and *R. S. Cassels*, for appellant. *T. A. Hunt*, for respondent.

B.C.] CASTLEMAN *v.* WAGHORN. [Dec. 15, 1908.

Sale of stock—Evidence of title—Duty of vendor—Defective certificate.

Where shares in the stock of a company are sold for cash and a certificate delivered with a form of transfer indorsed purporting to be signed by the holder named therein who is not the seller the latter must be taken to affirm that a title which will enable the purchaser to become the legal holder is vested in him by virtue of such certificate and transfer. A transfer was signed by the wife of the holder at his direction but not acted upon until after his death.

Held, that the authority of the wife to deal with the certificate was revoked by the holder's death and on a cash sale of the shares the purchaser who received the certificate and transfer so signed being unable to be registered as holder had a right of action to recover back the purchase money from the seller.

The fact that the purchaser endeavoured to have himself registered as holder of the shares was not an acceptance by him of the contract of sale which deprived him of his right of action to have it rescinded. Nor was his action barred by loss of the defective certificate by no fault of his nor of the seller.

Judgment appealed from (13 B.C. Rep. 351) reversed. Appeal allowed with costs.

Nesbitt, K.C., and *Livingstone,* for appellant. *Ewart,* K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] GATES *v.* SEAGRAM. [Dec. 7, 1908.

Court of Appeal—Leave to appeal—Order of Divisional Court—Claim and counterclaim—Form of judgment—Costs.

Leave to appeal to the Court of Appeal from the order of a Divisional Court of the High Court affirming an order of a judge directing judgment to be entered for the plaintiff on his claim with costs of the action and for the defendant on his counterclaim with costs thereof, was granted, under s. 76 (1) (*e*) and

(*g*) of the Ontario Judicature Act, where the Divisional Court had given leave to appeal from the order, so far as it was open to that Court to do so, under s. 72 of the same Act, and the leave was sought in order to settle the questions as to the proper form of judgment and as to costs where a defendant proves a set-off to an amount exceeding the plaintiff's claim, having pleaded it in form as a counterclaim.

C. A. Moss, for defendant. *Middleton*, K.C., for plaintiff.

Full Court.] SUTTON *v.* TOWN OF DUNDAS. [Dec. 31, 1908.

Contribution or indemnity—Joint tort-feasors—Negligence—Injury by electric wire—Remedy over—Municipal corporation—Electric company—Municipal Act, s. 609 (1).

The plaintiff recovered judgment against two of the defendants, a town corporation (the appellants) and an electric company, for damages for the death of her husband by contact with a live wire in a street of the town. The appellants carried their fire alarm wires upon the poles of a telephone company. The electric company carried their electric current by means of wires strung upon poles, at a lower level than the fire alarm wires. Through negligence on the part of the appellants the fire alarm wire was allowed to fall and remain upon or across the wires of the electric company, passing beneath. There were no guards between the two sets of wires, and the electric company's wires were either improperly insulated in the first instance, or had become worn, and were negligently left in that condition. The fire alarm wire resting upon the live electric wire, both were melted at the point of contact, and the severed live wire fell to the sidewalk and came in contact with the deceased. It was found that his death was due to separate acts of negligence on the part of the two defendants, the combined effect of which was to bring about the fatal result.

Held, that the appellants were not entitled at common law to contribution or indemnity from the electric company; nor were they so entitled under an agreement whereby the electric company undertook to indemnify and hold the appellants harmless against all damages, actions, etc., by reason of any danger or injury from the company's electrical system, if incurred by or consequent on the negligence of the company.

Per MOSS, C.J.O., that the rule against contribution between wrong-doers has not been qualified to the extent of entitling one who is himself a wilful or negligent wrong-doer to indemnity from another involved with him in causing the injury or wrong in respect of which judgment has gone against them. *Merryweather* v. *Nixan* (1799) 8 T.R. 186 applied.

Per MEREDITH, J.A., that s. 609 (1) of the Municipal Act 3 Edw. VII. c. 19 (O.), did not apply to the claim of the appellants against the electric company.

Judgment of TEETZEL, J., affirmed.

Washington, K.C., and *Gwyn*, K.C., for Town of Dundas, appellants. *Telford*, for Dundas Electric Company, respondents.

HIGH COURT OF JUSTICE.

Mulock, C. J. Ex. D., Anglin, J., Clute, J.] [Dec. 31, 1908.

UTTERSON LUMBER CO. *v.* H. W. PETRIE, LIMITED.

Sale of goods—Conditional sale—Resale by vendee before payment of price—Repossession by vendors—Contract of sale—Construction—Rights against subsequent purchasers—Judgment against vendee—Merger—Election—Waiver—Conditional Sales Act—Laches.

The defendant supplied to B. certain machinery on the terms contained in a written order signed by B. among which were: That payment should be made in instalments, and if default should be made the whole amount should become due; that the title to the goods should not pass until all the dues, terms, and conditions of the order should have been complied with; that B. should not sell or remove the goods from his premises without the defendants' consent in writing, and in case of default of the payments or provisions of the order, and without affecting B.'s liability for purchase money, the defendants should be at liberty, with or without process of law, to enter upon B.'s premises and remove the goods, and, without notice, to sell them at such prices as, in their judgment, were advisable, and credit B. with the same, and that B. should forthwith pay the deficiency, if any, arising after such sale. B. installed the machinery in

his mill in 1905, and on Oct. 10, 1906, sold the mill, including the machinery, to M., who on March 19, 1907, sold the same to the plaintiffs. On Feb. 18, 1908, the defendants took the machinery out of plaintiffs' possession in the mill, money being then still due to the defendants under the contract. Before taking possession, the defendants recovered judgment against B. for the amount due under the contract. The plaintiffs, asserting that they were purchasers for value without notice of the defendants' rights, brought this action for wrongful removal.

Held, 1. The original indebtedness was not merged in the judgment quoad the security provided by the contract, and the defendants were entitled to retain that security until payment.

2. By suing for and obtaining judgment for the purchase money the defendants had not elected to treat the transaction as an absolute sale so as to waive their security. *McEntire* v. *Crossley* [1895] A.C 457, 464 explained and distinguished.

3. That the defendants' rights were preserved and their title to the machinery continuously asserted by having affixed thereto a stamp bearing their name and address, in compliance with the Conditional Sales Act, R.S.O. 1897, c. 49, s. 1, and there was no evidence of laches, but the contrary.

Judgment of District Court of Muskoka affirmed.

Raney, K.C., for plaintiffs. *Rose*, K.C., for defendants.

Latchford, J.] BEARDMORE *v.* CITY OF TORONTO. [Jan. 6.

Striking out statement of claim as shewing no cause of action—Staying proceedings to add party defendant—Con. Rule 261—Hydro-Electric Commission—7 Edw. VII. c. 19, s. 23—No action to be brought against the Commission without the consent of the Attorney-General—Refusal of fiat—Ultra vires—Refusal of Commission to become a party to suit—Contract—Abortive attempt of plaintiff to bring all parties before the court—Right of plaintiff to relief—Con. Rule 262.

Motion by defendant under Con. Rule 261 to strike out the statement of claim on the ground that it disclosed no reasonable cause of action and to stay all proceedings until the Hydro-Electric Commission be added as a party defendant. The action was brought by a freeholder and ratepayer of the city for a declaration that a contract for the supply of electric energy

made between the defendant and the Commission was void, and for an injunction restraining the defendants from acting thereon.

The Commission was appointed under 6 Edw. VII. c. 15, which was re-enacted in 1907 by 7 Edw. VII. c. 19. Sec. 23 provides that no action shall be brought against the Commission without the consent of the Attorney-General. A by-law had been passed authorizing the city to make a contract with the Commission for the supply of electric energy at a price not exceeding $18.10 per h.p. per annum, ready to be distributed by the city, and to include all charges of every kind. The mayor and clerk, as authorized by a by-law of the council, but without any further authorization from the ratepayers, executed a contract for the supply of power at Niagara Falls at a certain price plus charges of transmission to Toronto, costs of line loss and all other charges incident to or connected with such transmission, which charges were unascertained, and as to which the Commission declined to assume any responsibility. The statement of claim also alleged that the contract was not only authorized, but also induced by misleading representations by the Chairman of the Commission and those acting under him.

The Commission not being a party to the suit the learned judge before whom the above motion came on granted an enlargement to enable an application to be made to the Attorney-General for leave to add the Commission. The acting Attorney-General refused the fiat on the ground that charges of "fraud and deception" had been made against the Commission in obtaining the contract, and that apart from this "the plaintiff's contention rests upon the view that the municipal councils had not the power under the statute to finally enter into contracts with the Hydro-Electric Power Commission without submitting the terms of them to the ratepayers. I have personal knowledge that this was not the intention of the legislature, and I cannot divest myself of that knowledge. It may be that at its next session, which cannot now be long delayed, the legislature may make a declaration on the subject."

The plaintiff in an amended statement of claim alleged that s. 23 of the Act was ultra vires of the legislature of Ontario.

Held, 1. Rule 261 does not apply where there is a question of difficulty or important points of law to be determined or where the transaction is a complicated one, giving rise to questions which ought to be tried.

2. The power to stay or dismiss an action is to be used only

in exceptional cases where the proceedings are clearly wanting in bona fides or are vexatious or oppressive, and the strong powers given should only be exercised in cases which are clear and beyond all doubt. In the present case the plaintiff's rights were unquestionably materially affected by the alleged invalid contract.

3. A contract similar to the one in controversy here had been held to be invalid in *Scott* v. *Patterson* (ante, vol. 44, p. 621), and further, that it had not been validated as claimed by the defendants by 8 Edw. VII. c. 22. The language of Mr. Justice Anglin in that case on both these points was adopted by Mr. Justice Latchford. It could not therefore be said that the plaintiff's action disclosed no cause of action or was obviously unsustainable.

4. The case of *Atlantic & Pacific Tel. Co.* v. *Dominion Tel. Co.*, 27 Grant 592, is not applicable here to prevent the plaintiff maintaining his action until the Commission should be made a party. Con. Rule 202 enables the court to adjudicate on matters arising between parties who are some only of those interested in the property in question without making the other persons interested in the property parties, and "if the court can adjudicate in regard to property in the absence of all parties interested, why cannot the court do so in regard to a contract, especially when the plaintiff has exhausted all means of bringing in the party whose absence the defendants complained. The general principle is undoubtedly that all parties interested in the subject matter of the suit should be before the court, but it is not open to the Commission to complain that the plaintiff has done all that is within his power to make the Commission a party and the Commission has resisted his efforts. I do not feel called upon to attempt to determine upon a motion of this kind whether such legislation (*i.e.*, s. 23, granting immunity to the Commission), however extraordinary from a juristic point of view, is ultra vires or not, but I am asked to close the doors of the court against a litigant who questions the power of the legislature to free the Commission from the liability which would otherwise be cast upon it by law. The ground of decision in *Atlantic & Pacific Tel. Co.* v. *Dominion Tel. Co.*, apart from the rule mentioned, is the injustice of proceeding in the absence of one of the parties to the contract without giving that party an opportunity to be heard. The Commission has been given an opportunity to be heard in this action and cannot reasonably object if, in its absence, an opportunity is given to the plaintiff to have his rights

determined, at least between himself and the defendant, and possibly to the extent of declaring the contract with the Commission to be invalid. I see no reason why the plaintiff should not be permitted to proceed with his action. He seeks a decision on difficult, important and complicated questions which ought to be tried." Motion refused.

Johnston, K.C., and *H. O'Brien*, K.C., for plaintiff. *Fullerton*, K.C., for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Dec. 11, 1908.

HARRIGAN *v.* GRANBY CONSOLIDATED MINING COMPANY.

Master and servant—Injury to workman—Negligence—Contributory negligence—Serious and wilful misconduct — Serious neglect.

Plaintiff was employed as a brakeman at defendant company's smelter. Part of his duty was to indicate to the engineer to stop at the required spot where the slag pots brought out from the smelter were to be emptied, and the engineer was not to move again until signalled to do so. Certain points existed where there were chains which were used to anchor the frame of the car to the track in order to prevent the locomotive being capsized when the pot, weighing about 12 tons, was being emptied. On the occasion in question, the engineer reached the chain point, when, considering he had gone too far, reversed, going back about two feet. Plaintiff, meanwhile, had dismounted, and not thinking that the engineer was going to back up, put his hand under to draw the chain through and anchor the car. In doing so, his hand was run over and seriously injured.

Held, on appeal, per HUNTER, C.J., and MORRISON, J. (affirming the judgment of MARTIN, J.) that the accident was due to a natural misunderstanding in the circumstances, and that there was neither negligence nor contributory negligence.

Per CLEMENT, J., the evidence did not warrant a finding that the engineer was guilty of negligence, and that the action was rightly dismissed.

S. S. Taylor, K.C., for plaintiff, appellant. *J. A. Macdonald*, K.C., for respondent company.

Full Court.] HARDY *v.* ATKINSON. [Dec. 21, 1908.

Gift—Delivery.

Appeal from verdict of a jury in favour of defendant in an action of replevin of a horse tried in a County Court. The plaintiff owned a horse of small value which was allowed to wander about the country near Lake Winnipeg. Being about to leave the lake for the winter he instructed one Rowland to let the horse to some one who would keep him until the following summer. The defendant bought the horse from one Park, who claimed that plaintiff had given him the horse. Park's story was that he had met the plaintiff in October and said, "Mr. Hardy, how's chances for that horse of yours?" to which Hardy replied: "You can have the horse, but go down and see Mr. Rowland before the horse gets back home." After seeing Rowland, Park went out on the prairie and took possession of the horse.

Held, allowing the appeal, that there was no sufficient delivery of the horse to constitute a valid gift of it to Park, even if the words used by plaintiff could be held to shew an intention to part with his ownership.

Irons v. *Smallpiece*, 2 B. & Ald. 551; *Cochrane* v. *Moore*, 25 Q.B.D. 57, and *Re Bolin*, 136 N.Y. at p. 180, followed.

Blackwood, for plaintiff. *Knott* and *Heap*, for defendant.

Full Court.] ROY *v.* HENDERSON. [Dec. 21, 1908.

Negligence—Contributory negligence—Volenti non fit injuria.

The plaintiff sued as administrator of the estate of his son, a youth of twenty years, who was killed while loading sand in a pit owned and operated by the defendants in consequence of the caving in of the frozen crust overhanging the place where he was working. Young Roy and others had excavated the sand underneath the frozen crust to such an extent that, 10 or 15 minutes before the accident, a man employed by defendants for that purpose, warned all those working in the pit that the crust was cracking. The others withdrew in time, but Roy thought he could complete loading before the roof came down and took the risk.

Held, that although it was defendant's duty to break down the crust as soon as it became dangerous to their customers, yet

the maxim "volenti non fit injuria" applied in this case and the plaintiff could not recover.

Haney and *A. C. Campbell*, for plaintiff. *Hoskin* and *Beveridge*, for defendants.

Full Court.] GARBUTT *v.* CITY OF WINNIPEG. [Dec. 21, 1908.

Negligence—Liability of municipal corporation for unsafe condition of polling booth—Agency of corporation officer.

The plaintiff, an elector of the city, entered a polling booth for the purpose of voting at a municipal election and upon certain money by-laws submitted under s. 486 of the Winnipeg charter. While there he was injured owing to defects in the apartment provided for marking ballots. The polling booth had been selected by the council and appointed by the by-laws in accordance with the statute.

Held, that the defendant city was liable to the plaintiff in damages for the injuries sustained by him, as the returning officer should be deemed to have acted as the agent of the city in submitting the by-laws. *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. at p. 110, followed.

Burbidge, for plaintiff. *Hunt*, for defendants.

Full Court.] [Dec. 21, 1908.

STREET *v.* CANADIAN PACIFIC RY. CO.

Negligence—Contributory negligence—New trial for misdirection to jury—Railway Act, R.S.C. 1906, c. 37, s. 288—Duty of company to pack frogs.

According to the findings of the jury, the plaintiff received the injuries complained of in consequence of putting his foot in an unpacked frog while in the discharge of his duty as a brakeman in uncoupling cars of the defendants. The train was in slow motion when he stepped in between two of the cars to uncouple them. In doing so his foot was caught between two rails and he was run over, losing an arm and part of his foot. The trial judge charged the jury that, if the frog was unpacked, the company would be liable under s. 288 of the Railway Act, R.S.C. 1906, c. 37, whether the plaintiff was guilty of contributory negligence or not.

Held, that this was misdirection, as contributory negligence may be a defence to an action for breach of a statutory duty. *Groves* v. *Wimborne* (1898) 2 Q.B. 419, Beven on Negligence, pp. 633, 634, 643, and the cases there cited, and that, notwithstanding the judge submitted to the jury the question of contributory negligence which they answered in plaintiff's favour, there should be a new trial. *Bray* v. *Ford* (1896) A.C. at p. 49, and *Lucas* v. *Moore*, 3 A.R., at p. 614, followed.

Elliott and *Macneill*, for plaintiff. *Aikins*, K.C., and *Curle*, for defendants.

Perdue and Phippen, JJ.A.] [Dec. 21, 1908

PROUT *v.* ROGERS FRUIT CO., LTD.

Sale of goods—Representation or warranty—Acceptance—Rescission—Damages.

Appeal from verdict of a County Court judge in favour of defendants in an action for the price of 63 cases of eggs sold and delivered to the defendants on 5th March, 1908.

Some days previously the defendants had bought from the plaintiff a large quantity of a stock of eggs known as the Kerr & Payne eggs, and these seemed to have been satisfactory. On the 5th of March, in answer to inquiry by telephone, plaintiff said he still had some of the Kerr & Payne eggs estimated at between 1,800 and 2,100 dozen, part of which had been candled. Asked how they were running, plaintiff said, in good faith, about 2½ dozen bad out of each case of 30 dozen. The price being agreed on at 15½c. for candled eggs and 14½c. for uncandled, defendants stated that they would take the lot. Plaintiff then delivered the remainder of the Kerr & Payne eggs and defendants received them at their warehouse. Upon examination by their expert, it was found that the proportion of bad eggs in each case was considerably greater than plaintiff had represented, whereupon defendants repudiated the contract and attempted to return the eggs.

Held, that the defendants could not rescind the contract, but were entitled to deduct from the price agreed on, by way of damages for breach of warranty, the sum of $23.65, on account of the extra number of bad eggs found in the lot over and above what the plaintiff had represented. Appeal allowed with costs.

Pitblado and Haig, for plaintiff. *Robson*, for defendants.

KING'S BENCH.

Mathers, J.] [Dec. 21, 1908.

BRANDON STEAM LAUNDRY CO. *v.* HANNA.

Specific performance—Agreement for sale of land—Vendors and purchasers—Incumbrances.

Action for specific performance of an agreement in writing by the defendant to purchase the property in question for $40,000, "payable as follows: $10,000 cash, and six equal notes with interest at seven per cent. for balance, to be handed over for such time payments." At the time of signing the agreement, the defendant paid $500 as a deposit on account. There were incumbrances on the property aggregating over $8,000, part of which was overdue, but the greater part was to mature at various dates in the future within four years. The agreement did not state for what time the notes were to run, but the parties understood that they were to be for six equal yearly payments, the first in one year and the last in six years, also that . transfer and bill of sale were to be given at once and a mortgage taken for the deferred payments, although the document was silent on these points.

Held, that the time for completion of the purchase was when the $10,000 should be paid, and that as the plaintiffs were unable or unwilling to clear off the incumbrances and insisted that the defendant should take the property subject to the incumbrances, the latter had a right to rescind the contract as he had done and the plaintiffs were not entitled to specific performance, also, that the defendant was entitled to recover on his counterclaim for the deposit he had paid. *In re Weston & Thomas* (1907) 1 Ch. 244 followed.

It is not necessary that a vendor should have the right immediately to give a clear title, if it appears that at the time he will be called on to convey he will be able to compel a clear title: Williams, 132; Dart, 320.

Noble v. *Edwards*, 5 Ch.D. 378; *Bellamy* v. *Debenham* (1891) 1 Ch. 412; *Cameron* v. *Carter*, 9 O.R. 431, discussed and explained.

The plaintiffs themselves treated the transaction as one to be completed at once by bringing their action as one for specific performance of the whole agreement. If the contract was not to be completed until after six years, they would have no right to

bring such an action until that time arrived: *Wardell* v. *Trenouth*, 24 Gr. 465. Specific performance is not the appropriate remedy unless the whole agreement can be executed: Fry on Specific Performance, 358.

Hudson, for plaintiffs. *Kilgour*, for defendant.

Mathers, J.] HUGHES v. HOUGHTON LAND CO. [Jan. 13.

Principal and agent—Commission on sale of land—Vendor ignorant that purchaser sent by plaintiff.

In this case the defendants sold the land to a purchaser sent to them by one Burke, acting on behalf of the plaintiff, a real estate agent, who had been authorized to find a purchaser, and had been one of about 50 agents similarly authorized, each of whom had been furnished with a typewritten statement describing in detail the property, the price and terms. Defendant's manager, who made the sale, inquired of the purchaser, who produced one of the statements, where he got it. The purchaser said in a north end hotel. The manager then asked him if he came from any real estate agency, and he said "No." The manager, then, believing that no commission would have to be paid to an agent, made an abatement from the price quoted to the plaintiff of an amount slightly in excess of what the commission would have been.

The purchaser had not got the statement from the plaintiff directly, but through Burke, who was not a real estate agent, but who had, to the knowledge of defendants' manager, been employed by the plaintiff to assist in making the sale and furnished with copies of the statement, and had also been directly authorized by the manager to find a purchaser. The purchaser had not intentionally deceived the defendants' manager in his answers.

The defendants, therefore, according to the decision in *Locators* v. *Clough*, 17 M.R. 659, would not have been liable for a commission to the plaintiff, unless there were circumstances that put their manager upon inquiry, so as to bring the case within the principle of *Lloyd* v. *Matthews*, 51 N.Y. 124, and unless the inquiries actually made were sufficient.

Held, that the circumstances were such as to put the defendants' manager upon inquiry and that the inquiry made was

not sufficient, as he should have framed his questions to the purchaser so as to include all whom he had authorized to find a purchaser and not real estate agents only, when, in all probability, the purchaser would have answered that Burke had sent him. Verdict for plaintiff for amount claimed.

Fullerton and *Foley*, for plaintiff. *F. R. Ferguson*, for defendants.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Dec. 11, 1908.

ANGLO AMERICAN LUMBER CO. *v.* MCLELLAN.

Company—Sale of shares.

Judgment of HUNTER, C.J., noted ante, vol. 44, p. 127, affirmed on appeal.

Full Court.] GRAHAM *v.* KNOTT. [Dec. 11, 1908.

Trade union — Member of — Interference with employment — Threatening employer—Refusal by union men to work with non-union men — Coercion of employer — Contractual relationship between employer and employee.

Plaintiff, a stone mason, applied for membership in the union of which defendants were officers. He made a payment on account of his initiation fee, but not being vouched for by two members of the union, the executive returned the fee. He was, at a later date, on the question of his status as a workman on a building coming up again, requested to submit to a test of workmanship preliminary to being enrolled a member. Considering the test an unfair one he declined to submit to it, whereupon the union refused him membership. The test proposed was what is known as "boulder work," the common class of work done by stonemasons in Victoria, but plaintiff claimed he had been accustomed to "sand stone work." After some delay, plaintiff was told by the committee delegated to test him that he could

submit to a test of any kind of stone work he chose, but he did not accept the offer. Subsequently, while he was at work on a building, the union, at a meeting, passed a resolution that unless the plaintiff were discharged the union men would be called out. Plaintiff having been discharged, brought action, claiming an injunction and damages.

Held, on appeal (reversing the judgment of LAMPMAN, Co.J.) that plaintiff had not shewn that the purpose of the defendants was to molest him in pursuing his calling, and prevent him, except upon conditions of their own making, from earning his living thereby.

H. B. Robertson, for appellants. *R. T. Elliott,* K.C., for respondent.

Full Court.] REX *v.* CARROLL. [Jan. 11.

Criminal law—Appeal—Certiorari—Right of appeal from single judge.

No appeal lies to the full court from the decision of a single judge quashing a conviction on an application for a writ of certiorari.

Moore, for the Crown, appellant. *Aikman,* for accused, respondent.

Full Court.] WILSON *v.* WARD. [Jan. 12.

Architect—Instructions to prepare plans—Limitation of cost of proposed building—Plans to comply with municipal by-law —Payment for services.

Where an architect is instructed to prepare plans for a building to cost not more than a certain sum, but which has also to comply with the provisions of a municipal by-law as to accommodation and other conditions, then, in order to comply with such by-law and other conditions, the tenders sent in are in excess of the sum mentioned, the architect cannot recover for his services.

Bodwell, K.C., for defendant, appellant. *Luxton,* K.C., for plaintiff, respondent.

Full Court.] [Jan. 14.

CORPORATION OF SLOCAN *v.* CANADIAN PACIFIC RY. CO.

County Court—Jurisdiction—Appeal—Prohibition—Judge acting outside his county at request of another judge—Persona designata—Municipal Clauses Act, B.C. Stat. 1906, *c.* 32, *s.* 137.

The judge of the County Court mentioned in s. 137 of the Municipal Clauses Act is persona designata, and the authority conferred upon him by said section may not be exercised by the judge of another county acting on his request and in his absence.

The remedy of an aggrieved party in such a case is by application for prohibition and not by way of appeal.

Griffin, for appellant. *Davis*, K.C., for respondent.

SUPREME COURT.

Clement, J.] [Dec. 15, 1908.

IN RE BRITISH COLUMBIA TIE & TIMBER CO.

Company—Winding up—Mortgagees—"Proceeding against the company."

A company being in liquidation the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that their attendance on the application and the approving of the winding-up order was such a taking part in the winding up as gave the court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the court on the ground that such sale would be a "proceeding against the company" under s. 22 of the Winding-up Act, R.S.C. c. 144.

Held, that the mortgagees were proceeding rightfully.

Whiteside, for liquidator. *Reid*, K.C., for company.

Law Associations.

HAMILTON LAW ASSOCIATION.

The Annual Meeting of the Hamilton Law Association was held January 12th, 1909. The 29th Annual Report of the Trustees for 1908, shews a membership of 71, and a law library of 4,571 volumes. On November 7, 1908, the Bar of Wentworth county, tendered a banquet to His Honour J. M. Gibson, K.C., upon the occasion of his appointment as Lieutenant-Governor of Ontario, and at the banquet a complimentary address was presented to His Honour by the Law Association.

In the past year the following business has come before this Association: The question of revising the Surrogate Court tariff was referred to the Legislation Committee and also considered by a Special Committee. A Committee on Law Reform was appointed and its report was sent to the Attorney-General, the Benchers of the Law Society and the Ontario Bar Association. The Association was held in regard, and Resolutions were passed in reference to the publication of Reports of the court proceedings in Toronto in the morning daily papers and copies sent to the Benchers to the various County Law Associations.

The following officers were elected for 1909: President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell, K.C.; Treasurer, Mr. Chas Lemon; Secretary, Mr. W. T. Evans; Trustees, Messrs. Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., P. D. Crerar, K.C., T. C. Haslett, K.C., and E. D. Cahill.

COUNTY OF CARLETON LAW ASSOCIATION.

The annual meeting of the County of Carleton Law Association was held in the Law Library in the Court House on January 16, 1909, and was well attended.

The Trustees' Report for 1908 shews a membership of 80 and a library of 2,737 volumes, of which 94 volumes were added during the year. The library is kept insured for $5,000.

The Honourable Mr. Justice Burbidge, judge of the Exchequor Court of Canada, died in February, 1908. At a largely attended meeting, a resolution was passed by the Association placing on record their appreciation of his work during his lifetime and of their profound regret at his death. During the year a new conveyancing tariff was adopted by the Association and signed by all the members of the local Bar with the exception of one or two.

The following officers were elected for 1909: President, John F. Orde, K.C.; Vice-President, C. J. R. Bethune; Secretary, Ainslie W. Greene; Treasurer, M. G. Powell; Trustees, W. D. Hogg, K.C., F. H. Chrysler, K.C., M. J. Gorman, K.C., Geo. F. Henderson, K.C., and Alfred E. Fripp, K.C. Auditors, R. J. Sims and E. F. Burritt.

Bench and Bar.

APPOINTMENTS.

George Smith, of the Town of Woodstock, Ontario, Barrister-at-law, to be Junior Judge of the County Court of the County of Essex, in the room and stead of Charles Julius Mickle, resigned. (Jan. 14.)

Arthur Henry O'Brien, Esq., M.A., Law Clerk and Parliamentary Counsel of the House of Commons of Canada, to be a Commissioner per dedimus potestatem to administer the oath of allegiance to members of the House of Commons of Canada.

Practice.

RULES OF COURT.

The new general rules and orders of the Exchequer Court of Canada bearing date January 11, 1909, appear in the *Canada Gazette*, and being signed by W. G. P. Cassels, Judge of the Exchequer Court, may be assumed are full and complete. They are 327 in number.

LAND TITLES ACT—ONTARIO.

The following memorandum has been issued by the Master of Titles at Toronto, and bears date Nov. 18, 1908:—

"In view of the prevailing and increasing tendency to incorporate business and manufacturing firms, and of the large number of small corporations which now exist, it has been deemed advisable to pass a rule prescribing the evidence required for the registration, in the Land Titles Offices, of con-

veyances by corporations, and for this purpose the annexed rule has been included in the consolidated rules recently enacted. Form 50 appended to these rules embodies what is required as to the authority of the officers executing, and also to prove the due execution of the instrument. In order to avoid possible delay, through non-acquaintance with this rule, I draw attention to it. I understand that the introduction of similar provisions into the Registry Act is contemplated."

The following forms are appended:—

Instruments executed by corporations.

RULE 57.—(1) Where a document is executed by or on behalf of a corporation, the execution thereof shall be duly proved by the affidavit of a subscribing witness, who may be an officer of the company. The affidavit of some officer of the company shall also be furnished which shall state the official position of the persons who execute the said document on behalf of the company, and that they are authorized by the by-laws of the company to execute such documents. (Form 50.) A copy of the by-law or by-laws conferring this authority shall be produced and left with the Master, if he requires the same. (2) This rule shall not take effect until the 1st of January, 1909.

FORM 50.—*Affidavit as to the authority of persons executing for a corporation under Rule* 57.

LAND TITLES ACT.

I, *E.F.*, of the *City of Toronto* in the County of *York, Gentleman,* make oath and say.

I am *Secretary* of (*name of company*).

A.B., whose signature is affixed to the annexed (*or* within) document is the *President* of the said Company, and *C.D.*, whose signature is also affixed thereto is the *Manager* thereof (*as the case may be*), and the seal affixed thereto is the corporate seal of the said company.

Under the by-laws of the said company the *President* and *Manager* are empowered to execute on behalf of the company all deeds and other instruments requiring the seal of the company.

I am well acquainted with the said *A.B.*, and *C.D.*, and saw them execute the said document and I am a subscribing witness thereto.

The said company is, I verily believe, the owner of the land mentioned in the said document.

Sworn, etc.

Flotsam and Jetsam.

In connection with the recent killing of two men at night by an automobile, the *New York American* printed a little table of automobile happenings in that vicinity during the previous few days. It ran as follows:—

Here is a police list of persons struck and injured within the last few days by automobiles whose occupants drove on without stopping to give aid:—

Thursday.—Harry Flagg, fourteen years old and a paralytic, struck in One Hundred and Twenty-fifth street; fractured skull.

Friday.—George Steiner, fourteen years old, struck in front of home, No. 107 Amsterdam avenue; injured internally.

Saturday.—J. E. Smith, Haddon, retired millionaire merchant, struck in front of Stratford House, at Madison avenue and Thirty-second street, where he had apartments; skull fractured and may die.

James V. Van Woert, receiver of Holland Trust Co., struck and killed at Fifth avenue and Twenty-fifth street, near home, at No. 48 East Twenty-fifth street.

Sunday.—William Archer Purdy and William Kramer, killed at Archville, near William Rockefeller's estate.

This is a terrible record and shews the absolute necessity of legally restraining the reckless use of so powerful a machine as an automobile. It is like permitting a steam engine to run down a public street. If it hits anything, death or frightful injury may result. Obviously civilized communities must compel automobiles to keep to a pace which does not make the streets and roads unsafe. There is no limit to this obligation. It must secure the safety of the highways, even if it drives every automobile off them. It is for the automobilists themselves to say whether they can be licensed as free and equal citizens of the road. The safety of the road is a necessity; the presence of the automobile is a desired possibility.—*Montreal Star.*

One day the office boy went to the editor of *The Soaring Eagle* and said:

"There's a tramp at the door, and he says he has had nothing to eat for six days."

"Fetch him in," said the editor. "If we can find how he does it we can run this paper for another week."—*Ex.*