Canada Law Journal.

VOL. XL. MAY 1, 1904 NO. 9.

We are more than sorry to observe that, notwithstanding the oiling of the ways for confederation by the settlement of the French treaty shore question Newfoundland sentiment is decidedly averse to joining with the Dominion of Canada. We hope and believe that this is only a passing phase of insular sentiment, susceptible of entire removal by judicious treatment by large-minded men in both colonies and in the mother country. The Imperial authorities can do much to persuade the people of Newfoundland that the whole trend of British interests is in the direction of such a union; and Canada cannot afford to dicker about the cost of "rounding-out" her Atlantic sea-board. The solution of the difficulty lies in the Britishers of North America following the recent example of their brethren in Australia and putting the great sentiment of Imperial patriotism before any smaller considerations, such as local jealousies and the laissez-faire policy of an antiquated colonialism.

There is but small satisfaction and little to be gained by attempting to criticise bills of provincial legislatures affecting the administration of justice, inasmuch as they either are strangled in infancy, or become law before there is time for more than perfunctory criticism. This is one of the many reasons why we deprecate this everlasting tinkering of statutes, referring especially in this regard to the Province of Ontario. It would be wisdom and save much public money if things were allowed to abide-a-wee. Frequent amendments, even in the line of probable improvement, which are merely experimental, generally do more harm than good.

The proposed changes in the Judicature Act are apparently aimed at relieving the Court of Appeal and throwing more work into the High Court. This is said to be desirable at the present juncture as the Court of Appeal is over-worked and the High Court Judges, with those recently appointed, have time on their

hands. The suggestion of making two divisions of the Court of Appeal, composed of three judges each (borrowing a judge from the High Court), has properly enough, perhaps, been abandoned. Shortly stated, it is proposed, in the bill before us, to send to the Divisional Courts for final adjudication all appeals from judgments of trial judges or single judges where the amount in dispute (except in certain specified cases) is under $1,000. Before next session it may very possibly be found that this scheme throws too much work upon the High Court judges, or has some other injurious effect, or it may perchance be urged that it does not give litigants, whose smaller sums are as much to them as larger ones are to others, the recourse they ought to have to a fully constituted appellate tribunal, presumably of more weight and authority than three judges of the High Court.

The Toronto Bar Association has expressed to the Attorney-General the opinion of its members, who had the matter under consideration, that it would be advisable to give the appellant the option to print or typewrite appeal books, and to provide that the costs, whether the books are printed or typewritten, should be costs on the appeal in the discretion of the Court, and to be paid by the respondent, if so ordered, whether or not he had consented to the books being printed instead of typewritten. It was also suggested that it would be a great saving of time and an improvement in the present procedure if provision were made authorizing the appellate courts to make rules limiting the time allotted to arguments and giving the right to either or both parties to put in a written argument if so advised.

Members of the profession should always be glad of every effort to advance its interests in any legitimate way; and for this reason we welcome the appearance of the Toronto Bar Association. It would seem to have within it the germ of usefulness, and we trust it may be carried on with energy and with due regard to its objects as set forth in the constitution. These are as follows: "To maintain the honour and dignity of the profession of the law; to elevate the standard of integrity, honour and courtesy in the profession; to cultivate the science of jurisprudence; to promote

reform in the law, and increase its usefulness in the administrattion of justice; to conserve and advance the interest of the profession, and to cultivate social intercourse and cherish the spirit of brotherhood among the members" The officers and trustees are well known and esteemed members of the profession and compose an energetic body of men from whose management good results should be obtained. It was thought by some that the formation of this association was in some way a reflection upon the County of York Law Association and might have the effect of weakening that organization. We should regret any such result, as the County Association has done good service in the past in the line of work in which it took a special interest, viz., the establishment and maintenance of an excellent local law library; but any feeling of the sort indicated is happily passing away. There would appear to be room for both associations, and they will doubtless work harmoniously together for the benefit and advantage of the profession as a whole. The members of the new association have, we believe, been very active in connection with the effort made to solve the unlicensed conveyancing problem, and when anything practical has been accomplished in that direction the entire profession will be greatly indebted to them There are many other ways in which such an organization can be helpful. We trust that the work of its officers may be continuous, and characterized by the energy exhibited in the inception of the undertaking. We are glad to see that the older society is now arranging for some informal social gatherings. A little wholesome and friendly rivalry in such matters will do no harm so long as all combine together to protect our interests against foes from without and traitors within. The executive of Toronto Bar Association is as follows: President, Christopher Robinson, K.C., Vice-President, R. C. Clute, K.C.; Secretary, Thomas Reid; Treasurer, James W. Bain; Board of Trustees, Messrs. W. D. McPherson, Chairman; Adam Ballantyne, Vice-Chairman; Frank E. Hodgins, K.C., A. C. Macdonell, F. C. Cooke, E. J. B. Duncan, W. R. Smyth, W. B. Raymond, E. E. A. DuVernet, W. N. Ferguson, E. B. Ryckman, R. J. Maclennan, C. D. Scott, W. G. Thurston.

The great metropolis of Chicago has declared for municipal ownership of street railways. On the 5th of April the so-called Mueller Street Railway Act was accepted by the municipal electorate by a large majority of votes. The Mueller law was enacted by the Illinois legislature in May, 1903, and it empowers any city in the State to "own, construct, acquire, buy and operate" street railways as municipal property, upon its acceptance by a majority vote. The city, however, cannot raise the money to buy the railway property without statutory authorization; and a modus vivendi inhering in the question: "Shall the Council, instead of granting any franchises, proceed to license the street railway companies until municipal ownership can be secured, and to compel them to give satisfactory service?" was adopted by the Chicagoans by a vote of 120,181 yeas to 48,055 nays. Mayor Carter H. Harrison is not at all sanguine of the outcome of this venture of municipal ownership for the good people of his borough. He fears that "the unsatisfactory condition of Chicago's civil service, which of late has given rise to a succession of serious scandals, indicates that the addition of 10,000 street car employees to the municipal pay-rolls would be injurious to the city government, and would not render less acute the existing evils of the traction system."

The trouble is that municipal ownership demands a fine sense of probity if the people who exploit it would have it a success, and this fine sense does not at present exist. For our part we are distinctly of the opinion, formed after much enquiry and careful consideration, that municipal ownership, no matter how excellent it may appear in theory, in the present condition of things, political and municipal, would generally be disastrous to the interests of the state and lower still further the present low standard of public morality. What may be possible in England is not necessarily possible in this country.

INQUIRIES BY MAGISTRATES IN CAMERA.

The action of the Police Magistrate of the City of Woodstock in conducting behind closed doors the trials of participants in the cocking main, which last month attracted an unusual amount of public attention, reveals a most objectionable wresting of this magisterial authority from its proper objects. It would appear from that functionary's own admission, that, on assuming office in November last, he formed a compact with local newspapers, by which the name of any Woodstock resident whom he should try by virtue of his summary jurisdiction, whether that of a Justice of the Peace, or such as might be conferred specially, would be suppressed by them, if he, on his part, aided in the suppression of publicity by turning his court into a secret chamber. This certainly seems to be rather an amazing proposal.

Section 849 of the Criminal Code enacts that the room or place in which the Justice (a Police Magistrate is declared to fall within the definition) sits to hear and try any complaint or information shall be deemed an open and public court to which the public generally may have access, so far as the same can conveniently contain them.

With s. 586, sub-s. *d*, read in connection with this regulation, there ought to be nothing else required to establish the Magistrate's radical error. That provision is as follows: "A Justice, may (when holding a *preliminary* inquiry) in his discretion order that no person, other than the prosecutor and accused, their counsel, and solicitor, shall have access to, or remain in the room or building in which the enquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing." It would, therefore, appear that the compact, above referred to, provides for an exact reversal of these statutory directions, for by it privacy was to be observed in the case of persons to be tried *summarily*, and it is not part of the agreement that persons appearing before the Police Magistrate on *preliminary* hearings were to have the screen removed from their misdoings.

The genesis of trials in camera is but partially understood. The usage depends upon a rule of practice, not of law. In the Encyclopedia of the Laws of England it is affirmed "that notwithstanding changes in procedure, an English court of justice is,

in theory, open to as many citizens as can crowd into it without disturbing its proceedings." And in the same work, the information is vouchsafed that adult women and children will be excluded by order of the Court, where the subject of inquiry might unfold anything morally pernicious.

The present Lord Chief Justice of England, when Attorney-General, advised the Brewers' Society, in a well-considered opinion (See Stone's Justices Manual, 1904, p. 771), that Justices of the Peace could not, in ordinary cases, bar any one from hearings, unless he were obstreperous, and, in special cases, no more than a section of the public, namely, women and children, in matters of an indecent nature, as to which it would not be fitting to bring out the full details. To put it shortly, salacious diet was not to be furnished those to whom it could endanger. It will not be out of place in this connection to remark that no order of the Court of this description is, so far as adult women are concerned, enforceable by process.

Daubney v. *Cooper*, 10 B. & C. 240, determines that a Justice of the Peace, who caused a person not found to have misbehaved himself in such a way as to hinder or obstruct the proceedings to be ejected from a sitting of his court, was liable therefor in trespass. *Young* v. *Saylor*, 22 O.R. 513 (affirmed on appeal, 20 A.R. 645) is to the same effect. Bayley, J., pronouncing the judgment of the Court in *Daubney* v. *Cooper*, says :—"The ground upon which our present opinion is formed is that the magistrate was proceeding upon a summary conviction, and, therefore, exercising a judicial authority ; and we are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, have a right to be present for the purpose of hearing what is going on."

In *Reg.* v. *Justices of Hampshire*, 39 J.P. 101, a defendant obtained a rule nisi (the force of his objection would seem to have been admitted, since the case did not go further) for the purpose of quashing his conviction, made where the room in which the trial occurred was kept locked during its progress, and his friends, with others, to the number of 20 or 30, who were outside, had been refused admittance. Nor only this, for it has been laid down that

any member of the community whose rights have been violated by reason of a magistrate's departure from his line of duty may apply to the court (R.S.O. c. 88, s. 6) to compel him to proceed with a trial in accordance with law.

In *Collier* v. *Hicks*, 2 B. & A., Tenterden, C.J., says, at p. 668: "This (being a case of a court proceeding on a summary conviction) is undoubtedly an open court, and the public had a right to be present, as in other courts." Park, J., remarks, at p. 671: "All the king's subjects may be present."

Sir Frederick Pollock, in his address on the expansion of the Common Law, published in the *Harvard Law Review* says: "When we pass from the second to the third quarter of the nineteenth century, we find that the Parliament of Queen Victoria has taken a widely different course from the Parliament of King Philip and Queen Mary. The secret inquisitorial proceeding has become open and judicial; there is no longer an examination of the prisoner, but a preliminary trial in court, the police court, which in modern times is to many citizens the only visible and understood symbol of law and justice. The magistrate's office is more public than ever; the feeling that judgment should be done in the light of day has been strong enough to reassert itself after a partial eclipse. . . In this we have a tradition which has persisted through all changes. Like other rules of patience, the rule of publicity is not quite inflexible; some few exceptions are allowed on grounds of decency or policy, and in some jurisdictions they have been confirmed or extended by statute. . . The settled judgment of our ancestors and ourselves is that publicity in the administration of the law is on the whole—to borrow words used by my friend, Mr. Justice O. W. Holmes, in another context—"worth more to society than it costs."

In challenging the course of the magistrate in respect of these inquiries, the amendment of the Criminal Code of 1901, 550 *a* 2, has not been overlooked. There is no doubt that, with regard to the crimes and offences particularized (all of them cases where the matter of sex is concerned, and those ejusdem generis with them), the rule of practice as to excluding adult women and children only becomes superseded, and that every class of auditors may be turned out; but the saving clause found in sub-s. 2 could have no operation here, for, even if the section, as a whole, embraced a Justice of the Peace, which admits of considerable doubt, the com-

mon law powe: sought to be conserved would in his case at any rate, consist of nothing beyond the right to exclude for unseemly behaviour, either directly or mediately by commitment as for contempt in face of the court.

It may be a question how far the compact between the parties hereinbefore referred to is an agreement to violate a statute, and legally a conspiracy. Of late there have been tentative casts of the judicial plummet in these waters, but there is some doubt whether bottom has been reached. In the case before us the principal actor is a lawyer, and, apart from any question as to the propriety of such a compact, he entirely misunderstood, according to our view, his position in the premises. It is quite true that the Attorney-General in answer to a question in the House, when the matter was brought to its attention, made an off-hand statement that the magistrate had the right to act as he did, but we venture to think that the Attorney-General did not take time to look into the matter.

ACTIONS FOR MALICIOUS PROSECUTION.

To what extent does opinion of counsel protect in actions of malicious prosecution?

For many years the respective functions of judges and juries as to the questions of the existence or non-existence of reasonable and probable cause, and the presence or absence of malice, in actions of malicious prosecution, have been definitely settled. Sometimes the judge lays down the factors that must co-exist in order to support the action, and directs a general verdict, either for plaintiff or defendant, in accordance as the evidence establishes on the one hand, or fails to establish on the other, the issues submitted for determination by the parties to the suit; in other words, that the finding of certain facts would or would not constitute reasonable and probable cause, and would or would not indicate malice, and that their verdict should be in accordance therewith. Or the judge directs specific findings on questions submitted by him, and on these findings will order judgment to be entered either for defendant or plaintiff, as he finds there was, or was not, reasonable and probable cause for instituting proceedings.

When the prosecutor has taken the opinion of counsel on facts submitted for his decision before laying information, another factor enters into the consideration of the question.

In 1813 it was held by the Court in *Hewlett* v. *Cruchley*, 5 Taunt., page 277, that in an action for malicious prosecution it is no answer that the defendant took the opinion of counsel in what he did, if the statement of facts was incorrect or the opinion ill-founded. Mansfield, C.J., on motion for a new trial, said: "But one would at least expect that the defendant, in order to purge himself by the testimony of the opinion of a barrister, ought to shew that he laid a most full statement of the case before him upon which he could form a full judgment of the propriety of the case." Heath, J., said: "It would, however, be a most pernicious practice if we were to introduce the principle that a man, by obtaining an opinion of counsel, by applying to a weak man or an ignorant man, may shelter his malice by bringing an unfounded prosecution."

Chief Justice Abbott, in *Ravenga* v. *Mackintosh*, 2 B. & C., p. 693 (1824), substantially charged the jury to find a verdict for the defendant if they were of the opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his legal adviser; but to find for the plaintiff if they were of the opinion he intended to use the opinion as a protection, in case the proceedings were afterwards called in question. Bayley, J., in delivering judgment on motion for a new trial, said: "I accede to the proposition that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description."

This question is set in clear light by the great leading case of *Abrath* v. *North Eastern Railway Company*, L.R. 11 Q.B.D. 440 (1893). Briefly summarized, the facts were these: The plaintiff, a medical doctor, had attended one Mr. McMann for injuries sustained in a collision in two trains upon defendant's railway. Principally upon the representations of the doctor, who described the injuries as of a most serious character, the defendants compromised Mr. McMann's claim for a large amount. In consequence of certain inquiries set on foot, it seemed to the company they had been made the victim of a conspiracy on the part of the doctor and his patient, the injuries being far less serious than

represented. The facts as disclosed were submitted by the directors of the company to counsel, and he advised that there was a good case for prosecuting a charge of conspiracy against both McMann and Dr. Abrath, his medical adviser. In addition to this, two eminent medical men were of the opinion that the case of the alleged injuries to McMann was a fabrication amounting to an imposture. Information was laid and Dr. Abrath committed for trial. He was acquitted, and thereupon brought an action of malicious prosecution against the defendants. The trial judge, Cave, J., left three questions to the jury: (1) Did the defendants, in prosecuting the plaintiff, take reasonable care to inform themselves of the true state of the case; (2) did they honestly believe the case which they laid before the magistrate; (3) were the defendants actuated by any indirect motive in preferring the charge against the plaintiff. The jury answered the two first questions in the affirmative, but gave no answer to the third, whereupon the judge upon these findings drew the inference of reasonable and probable cause, and directed a verdict to be entered for the defendants, and accordingly gave judgment for them. On appeal to the Queen's Bench Division, this judgment was set aside, and a new trial ordered. On appeal to the Court of Appeal, the judgment of the Court of the Queen's Bench Division was set aside, and the appeal from the order for a new trial allowed.

In his judgment in the Court of Appeal, Brett, M.R., characterized the charge of Cave, J., to the jury as most masterly. Among other things he said: "I wish I could express what I intend to say as clearly and as concisely as he stated this case to the jury. A summing up in an action for malicious prosecution I have never read which I more admired."

This model charge was as follows: "I think the material thing for you to examine about is whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves: Did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless, they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff

to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then there is another point, and that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before magistrates with a case which appears to be good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore I shall have to ask you that question along with the others, and according as you find one way or the other then I shall tell you presently, or I shall direct you whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause, or rather that those two questions should be answered in the affirmative—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices—then I shall tell you, in point of law, that this amounts to reasonable and probable cause, and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion, if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the case which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question: Were they in what they did actuated by malice—that is to say, were they actuated by some motive other than an honest desire to bring a man, whom they believed to have offended against the criminal law, to justice? If you come to the conclusion that they did honestly believe that, then they are entitled again to your verdict; but if you come to the conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict, and then it will become necessary to consider the question of damages."

The divergence of opinion in this case between the Court of Appeal of the Queen's Bench Division and the Court of Appeal arose in a misconception, on the part of the former, as to the mode of proof. The Court of Appeal of the Queen's Bench Division held that the burden of proof was on the part of the defendants to establish probable and reasonable cause, since the facts necessary for such proof would lie peculiarly within their knowledge. That if it rested with the plaintiff, he would be called upon to prove a negative. Before this it was contended by many that when the plaintiff had proved the prosecution and that it had terminated favourably to himself, the burden was shifted upon the defendant, and consequently the plaintiff would be entitled to recover, unless the defendant could shew reasonable and probable cause for having prosecuted.

The result of this decision establishes the principle, that in actions of malicious prosecution the burden of proof throughout rests upon the plaintiff, as well to shew want of reasonable and probable cause, as to prove malice, although the knowledge of its existence lies peculiarly within the knowledge of the defendant.

Further, this case demonstrates how small a part the fact that defendants took the opinion of counsel before prosecuting played in its ultimate decision. It would seem, however, to follow as a legitimate inference, that taking the opinion of counsel as a precautionary measure may have been a material factor in leading the jury to find as they did.

It is only when the prosecutor acts bona fide upon the legal advice or opinion of counsel on facts apparently credible and fully disclosed to his counsel, and with a mind free from the taint of malice, his defence can be said to be assured. While the onus of proving malice rests upon the plaintiff, the jury may infer it from the want of reasonable or probable cause. Yet they are not bound so to do. On the other hand, however, the want of reasonable or probable cause cannot be inferred from proof of malice.

In *Rex* v. *Stewart*, 6 M.L.R., p. 264 (1889), Chief Justice Taylor is thus reported: "The law certainly seems to be now settled, that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel, he is not liable to an action."

In *St. Denis* v. *Shoultz*, 25 O.A.C., p. 131 (1898), the court held that notwithstanding the prosecution was instituted on the advice

of counsel, it was not sufficient to protect the prosecutor, if he did not exercise reasonable care to ascertain the facts in reference to the alleged offence.

The question arose incidentally in *Horsely* v. *Style*, 9 Times L. R. 605 (1893). This was an action on the case brought to recover damages for the wrongful registration of an inventory and receipt as a bill of sale, which was not a bill of sale, whereby the plaintiff was injured as alleged in his credit A verdict having been awarded plaintiff, on appeal to the Court of Appeal the verdict was set aside and judgment ordered to be entered for the defendant.

Lord Justice Esher, M.R., in delivering the judgment of the Court of Appeal, said: "That the defendant had used the law, which said that a person who was the grantee of a bill of sale could register it. The defendant had an inventory and receipt which his solicitor advised him should be registered as a bill of sale. The defendant, therefore, was using the law relating to bills of sale. It must be taken that he used the law erroneously. That was not enough to make him liable in this action. It must be proved that he used it maliciously and without reasonable and probable cause. It could not be said that there was a want of reasonable and probable cause, for his solicitor advised him to register it. Then as to malice, that was doing a thing from an improper and indirect motive. There must be actual malice. It was not enough that there should be legal malice, if there was such a thing. The learned judge, therefore, was wrong in telling the jury that malice in fact was not necessary. In the present case all the witnesses had been called and no further evidence could be given, and no evidence of malice had been given. There was no use in sending the case for a new trial, and judgment must be entered for the defendant."

In *Peck* v. *Peck*, 35 N. B. R., p. 484, it was shewn the charge upon which plaintiff was arrested was made on the advice of counsel, but it was further shewn the defendants did not disclose the facts fully to him. A verdict having been found for the plaintiff, a rule for a nonsuit or new trial was refused by the court en banc.

The following general rules should be borne strictly in mind:

1. In actions for malicious prosecution, the plaintiff must allege and prove absence of reasonable and probable cause and

malice. The affirmative of these allegations is upon him. If he fails to establish both, he fails altogether.

2. The factors necessary on the part of the defence to establish reasonable and probable cause are threefold: first, belief of the accuser in the guilt of the accused; second, belief in the existence of the facts upon which he proceeded to prosecute; and thirdly, that such belief was based upon such reasonable grounds as would lead any fairly cautious man so to believe and so to act. Upon the findings of the jury on these points, the judge draws his inference and determines whether they disclose or not reasonable and probable cause. The inference of the judge is an inference of fact and not of law, drawn by him from the facts found by the jury and from all the circumstances of the case.

3. The malice necessary to be established is not malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact. Any indirect, sinister or improper motive would be malice in fact.

4. Taking the opinion of counsel before proceeding to prosecute amounts only to a circumstance, which the jury is bound to consider in determining whether the accuser was actuated by an honest and sincere desire to bring a guilty party to justice, or whether it was resorted to merely as a cloak to cover some covert or indirect purpose.

5. From want of reasonable and probable cause, malice may be inferred. The question then arises: Can the jury, for the purpose of determining the question of malice, draw themselves for such purpose the inference of the presence or absence of reasonable and probable cause? Such is the view put forward by Sir Henry Hawkins in his judgment in *Hicks* v. *Faulkner*, L.R. 8, Q.B.D. 167. At page 175 he is thus reported. "Absence of reasonable cause to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the judge alone to determine, upon the facts found, for the jury; as evidence

of malice it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interests of justice—in which case they ought not, in my opinion, to find the existence of malice. It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the judge—but such at present is the law."

6. The recognized distinction between actions for false imprisonment and malicious prosecution should be carefully observed. In false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; whereas, in an action for malicious prosecution, the plaintiff must allege and prove affirmatively its non-existence.

St. John, N.B. SILAS ALWARD.

The murder of Gonzales in South Carolina by that brutal ruffian, Ex-Lieutenant-Governor Tillman, is doubtless in the memory of our readers. It is said that his acquittal was secured in the following ingenious manner. Shortly before the trial a number of his agents went through the county where the trial was to take place soliciting orders for the enlargement of photographs. The head of the family was always interviewed, and, as an example of the work that would be done, there was produced a picture of Tillman. This was used to bring on a conversation about the pending trial. The views of the possible juryman were thus ascertained, and, being carefully noted, were reported to the prisoner's attorney. This work was done so thoroughly that the views of the whole panel were in his possession. When the trial came on those who were called as jurymen and known to be unfavourable to the prisoner were confronted with the statement, and, having expressed an opinion on the case, they were, according to United States law, ineligible for service as jurymen. A favourable jury was thus secured and the murderer escaped the hangman's noose which he so well merited. It will thus be seen that there are many things connected with the administration of justice in which our criminal lawyers are behind the age.

ENGLISH CASES

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—DIRECTOR—FORFEITURE OF OFFICE—CONTINUING TO ACT AFTER FORFEITURE—FEES PAID TO DIRECTOR AFTER OFFICE FORFEITED—MONEY PAID BY MISTAKE—REPAYMENT OF FEES—LIEN—QUANTUM MERUIT.

In re Bodega Co. (1904) 1 Ch. 276. In this case a director of a joint stock company under the articles of association forfeited his office if he became interested in any contract with the company. Wolseley, one of the directors of the company, on 24th December, 1900, became secretly interested in such a contract. He continued to act as director and received fees for so acting, and in July, 1901, received £400 as special remuneration for his services as director. He continued interested in the contract till the end of June, 1901. At the general meetings in July, 1901, and 1902, he retired and was re-elected to the board. In February, 1903, his secret interest in the contract of 1900 was first discovered. He then ceased to act as director and sold his shares, and the company refused to register the transfer, claiming a lien on the shares for the fees paid him, including the special remuneration for services when he was not in fact a director. Farwell, J., held that Wolseley automatically vacated his office on becoming interested in the contract, but his disqualification ceased when his interest in the contract came to an end, and that his re-elections in July, 1901, 1902, were valid. He also held that the defendant was not entitled to any quantum meruit for his services as director between 24th December, 1900, and July 8th, 1901, but that the company were entitled to all fees paid him during that period as being moneys paid under mistake of fact, and was entitled to the lien they claimed on his shares for the amount so due from him.

PRACTICE—ADMINISTRATION — NEGLECT TO RENDER ACCOUNTS—COSTS OF TAKING ACCOUNT.

In re Skinner, Cooper v. *Skinner* (1904) 1 Ch. 289. Farwell, J., held that where trustees neglect and refuse to give a proper account without suit they may be ordered to pay the costs of proceedings by way of originating summons to compel them to

account, including the costs of taking and vouching their accounts: *Hewett* v. *Foster*, 7 Beav. 348; 64 R.R. 98, which decided that the costs of taking the account should be paid out of the estate, was held not to be in accordance with the modern practice.

ADMINISTRATION—WILL—FOREIGN BONDS—FOREIGN SHARES TRANSFERABLE ABROAD OR IN LONDON—LOCALITY OF ASSETS.

In re Clark, McKicknie v. *Clark* (1904) 1 Ch. 294, was a case in which it became necessary to determine the locality of certain personal assets. A testator domiciled in England by his will had appointed certain trustees, whom he called his "home trustees," to whom he bequeathed all his personal estate in the United Kingdom. He also appointed others, whom he called his "foreign trustees," to whom he bequeathed all his personal property in South Africa. At the time of his decease he owned a number of bonds payable to bearer of a waterworks company in South Africa, where the bonds were payable. He also owned a number of shares in mining companies in South Africa. These companies were constituted according to the laws of the Transvaal and Orange River Free States and had their head offices in South Africa, where the register of shareholders was kept and the directors met; but they had also offices in London, where a duplicate register was kept and where shares might be transferred. The testator's name was on the London register of the companies, and all his bonds and share certificates were at his banker's in London. On this state of facts, Farwell, J., held that the waterworks bonds passed to the "foreign trustees" and the shares to the "home trustees," the certificates being in England and the shares being also transferable there.

WILL—UNATTESTED ALTERATION—CONFIRMATION BY CODICIL—WILLS ACT 1837 (1 VICT. C. 26) S. 31—(R.S.O. C. 128, S. 23.)

In re Hay, Kerr v *Stinnear* (1904) 1 Ch. 317, shews the necessity for attesting alteration in wills in the manner required by the Wills Act, s. 31 (R.S.O. c. 128, s. 23). In this case a testatrix had made a will on 1st February, 1901, bequeathing many legacies, including (a) £200 to C., (b) £500 to M., and (c) £3,000 to S. On 19th October, 1901, by her direction her servant struck out the three legacies. Subsequently, on 21st October, 1901, the testatrix executed a codicil referring to her will as of 1st February, 1901, and thereby revoked legacy (b), but did not refer to the other two

legacies, and concluded by ratifying and confirming the will in other respects; and it was held by Buckley, J., that only legacy (b) was revoked, and that no effect could be given to the unattested alterations.

RIVER—RIPARIAN PROPRIETOR—PRESUMPTION THAT RIPARIAN OWNER IS ENTITLED TO BED OF RIVER AND MEDIUM FILUM—ISLAND IN RIVER.

In *Great Tonington* v. *Stevens* (1904) 1 Ch. 347, the plaintiffs were grantees of land abutting on a river, but they had no express grant of the river. There was an island in the middle of the river opposite the property. The defendant took gravel from the bed of the river between the plaintiffs' land and the island, but nearer the island. The plaintiffs claimed that by presumption of law they were entitled to the bed of the river and medium filum and that such presumption extended to the whole river and entitled them to half of the island, and they sought to restrain the defendant from removing the gravel. Joyce, J., dismissed the action, holding that if the presumption applied, the medium filum aquæ ought to be drawn between the island and the plaintiffs' land.

CONTRACT—SALE TO WHOLESALE DEALER WITH CONDITIONS AS TO SALES BY RETAIL—"WHOLESALE DEALER TO BE DEEMED AGENT OF MANUFACTURER" PURCHASE WITH NOTICE OF CONTRACT OF VENDOR—CONDITION ATTACHED TO GOODS—INJUNCTION.

In *Taddy* v. *Sterious* (1904) 1 Ch. 354, the plaintiffs were manufacturers of tobacco which they sold in packets, subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing this proviso: "Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer the latter shall be deemed to be the agent of T. & Co." The plaintiffs sold to one Ritten, a wholesale dealer, who resold to the defendants Sterious & Co., who had notice of the conditions. The defendants nevertheless sold the goods at less than the minimum price mentioned in the notice, and the present action was brought to restrain them from so doing; but Eady, J., held that there was no contract between the defendants and the plaintiffs which the plaintiffs could enforce, and that conditions of the kind in question cannot be attached to goods so as to bind purchasers with notice. The stipulation that the wholesale dealer was to be deemed the plaintiffs' agent was nugatory in this case because Ritten sold the

goods as his own and not for the plaintiffs or as their agent; and in the opinion of Eady, J., it could only apply to cases where the wholesale dealer was in fact the plaintiff's agent.

COMPANY—WINDING UP—PROOF OF CLAIM AS UNSECURED CREDITOR—MISTAKE—SOLICITOR—LIEN.

In re Safety Explosives (1904) 1 Ch. 226. The solicitors of the company in liquidation, having a lien on the deeds and papers of the company, filed a claim, in which in forgetfulness of this lien, they stated they held no security. They subsequently applied to Buckley, J., to be allowed to withdraw the proof and file a new claim as secured creditors and valuing their security. Buckley, J., granted the application, but the Court of Appeal (Williams and Stirling, L.JJ.) held that it was not a case in which leave should have been granted but on different grounds. Williams, L.J., on the ground that the solicitors had not made out a case of inadvertence on their part, but even if they had they had lost their lien by parting with the deeds without calling the attention of the liquidator to their lien, and on the ground (with which Stirling, J., agreed) that the position of all parties, and especially that of the liquidator, had been altered since the proof was made.

STATUTE OF LIMITATIONS—PRINCIPAL AND AGENT—MONEYS REMITTED TO AGENT FOR SPECIAL PURPOSE AND NOT ACCOUNTED FOR—EXPRESS TRUST—ACTION FOR ACCOUNT—(R.S.O. c. 129, s. 32.)

North American Timber Co. v. *Watkins* (1904) 1 Ch. 242, was an action by principals against their agent for an account, in which the defendant pleaded the Statute of Limitations. The facts were, that in 1883 the plaintiffs remitted to the defendant in America moneys for the purpose of buying therewith prairie lands. Lands were bought and paid for out of the moneys. In 1901 the plaintiffs, for the first time, discovered that the defendant had charged the plaintiffs more for the lands than he had actually paid. Kekewich, J. held that the defendant was an express trustee of the money and the Statute of Limitations was no defence.

PRACTICE—PARTIES—BREACH OF TRUST—REPRESENTATIVES OF TRUST ESTATE.

In re Jordan, Hayward v. *Hamilton* (1904) 1 Ch. 260, was an action brought by a cestui que trust in respect of an alleged breach of the trusts of a marriage settlement. The original trustees of the settlement were Charles Jordan and Daniel Ludlow. Both

were dead. Jordan died in 1882 and Ludlow in 1886. There had been no new trustees appointed in their place: the action was against the executors of Jordan and the alleged breaches of trust were committed by both trustees. On a preliminary objection to the constitution of the suit, Byrne, J., held that the representatives of the last surviving trustee not being before the Court and no new trustees having been appointed, the trust estate was not represented, and no one having the legal title to the trust fund in question was before the Court. The case was, therefore, ordered to stand over to enable the representatives of the surviving trustee to be joined, or to enable new trustees to be appointed and added as defendants.

WILL—"TESTAMENTARY EXPENSES"—SETTLEMENT ESTATE DUTY.

In re King, Travers v. *Kelly* (1904) 1 Ch. 363, a testator directed his testamentary expenses to be paid out of his residuary estate. By statute a certain duty imposed in respect of property settled by will is payable by the executor. The question was, whether this duty was part of the "testamentary expenses." Eady, J., held that it was not, but was chargeable against the settled property.

COSTS—TAXATION—COSTS BEFORE ACTION—PREPARATION FOR DEFENCE BEFORE WRIT—RULE 1002 (29)—(ONT. RULE 1176).

In *Bright* v. *Sellar* (1904) 1 Ch. 369, the defendant being threatened with the present action for being party or privy to a fraud disclosed in a previous action to which he was not a party, in anticipation of the action and with a view to defending himself, procured a transcript of the speeches, evidence, and judgment in the previous action. The action having been dismissed, for want of prosecution, with costs it was held by Eady, J., that under Rule 1002 (29), (Ont. Rule 1176), the defendant was only entitled to the costs of so much of the transcript of the evidence and judgment as related to the present action.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.B.] TRAVERS *v.* CASEY. [March 10.

Will—Roman Catholic Bishop—Devise of personal and ecclesiastical property—Construction.

The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property: "Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real and personal, wherever situated; to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established."

Held, affirming the judgment appealed from (36 N.B.R. 229) that the private property of the testator as well as the ecclesiastical property vested in him as bishop was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction. Appeal dismissed with costs.

Pugsley, K.C., and *Quigley*, K.C., for appellants. *Stockton*, K.C., and *Barry*, K.C., for respondents.

N.B.] PEOPLE'S BANK *v.* ESTEY. [March 10.

Sale of goods—Owner not in possession—Authority to sell—Secret agreement—Estoppel.

The owner of logs by contract in writing agreed to sell and deliver them to McK., the title not to pass until they were paid for. The logs being in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner, asking if he had them for sale and was answered "No, I have sold them to McK." E.

then purchased a portion of them from McK., who did not pay the owner therefor and he brought an action of trover against E.

Held, affirming the judgment under appeal (36 N.B.R. 169), NESBITT and KILLAM, JJ., dissenting, that the owner having induced E. to believe that he could safely purchase from McK. could not afterwards deny the authority of the latter to sell.

Held, per NESBITT and KILLAM, JJ., that as there was no evidence that the owner knew the identity of the person making the inquiry by telephone, and nothing was said by the latter to indicate that he would not make further inquiry as to McK.'s authority to sell, there was no estoppel.

Held, per TASCHEREAU, C.J., that as the owner had given McK. an apparent authority to sell, and knew that he had agreed to buy for that purpose, a sale by him to a bona fide purchaser was valid. Appeal dismissed with costs.

Connell, K.C., and *Carvell*, for appellants. *Pugsley*, K.C., and *Gregory*, K.C., for respondent.

Que.] CITY OF MONTREAL *v.* MONTREAL STREET RAILWAY CO. [March 25.

Operation of tramway—Municipal franchise—Construction of contract—Suburban lines—Percentages upon earnings outside city limits.

The city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city which extend into adjoining municipalities. The contract, dated 8th March, 1893, granted the franchise to the company for the period of thirty years from August 1, 1892. A clause in the contract provided that the company should pay to the city annually during the term of the franchise, "from Sept. 1, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on Sept. 1, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city. In an action by the city to recover percentages upon the gross earnings of the lines of tramway both inside and outside of the city limits:

Held, reversing the judgment appealed from, the CHIEF JUSTICE and KILLAM, J., dissenting, that the city was entitled to the specified percentages upon the gross earnings of the company arising from the operation of

the tramway both within and outside of the city limits. Appeal allowed with costs.

Atwater, K.C., and *Ethier*, K.C., for appellants. *Campbell*, K.C., for respondents.

Ex. C.] POUPORE *v.* THE KING. [March 30.

Contract—Construction—Public work—Finding of referees.

The specifications accompanying a call for tenders for the widening and deepening of a part of the St. Lawrence Canals which were a part of the contract subsequently entered into contained the following: "Parties tendering for the works are requested to bear in mind that no part of the work can be unwatered during the season of navigation, but that the water may be taken out of the canal at the close of navigation when the work of widening and deepening the channel way to the full capacity can in the usual way be at once proceeded with; otherwise the work below the surface water-line must be done by sub-aqueous excavation." The contractor for the work claimed payment for extra work and increased cost on account of the Government refusing to unwater during the winter months.

Held, that the contractor might be called upon to work under water during the time the canal was closed to navigation as well as when it was open and was not entitled to extra payment therefor especially as no demand was made for unwatering.

The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered and spread in a satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, the resident engineer returned 69,000 as falling under the above provision and the Government allowed 23,000 yards. The Exchequer Court Judge referred it to the registrar of the court and two engineers who reported that the amount allowed by the Crown was a sufficient allowance and their report was confirmed by the Court.

Held, that the Supreme Court would not overrate the judgment of the expert referees.

Other clauses of the contract required the contractors to make and repeat their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works and every month until adjusted or rejected. By the order-in-council referring the claims of the appellant to the Exchequer Court these clausese were waived "in so far as the repeated submission of claims is required."

Held, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to it having arisen but only from repeating it after the following certificate. Appeal dismissed with costs.

Aylesworth, K.C., and *Christie*, for appellants. *Chrysler*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [Jan. 25.

HOGG *v.* TOWNSHIP OF BROOKE.

Municipal corporations—Highway—Snow drifts—Temporary side track.

Plaintiff in travelling on a highway in the defendant corporation with a team of horses and waggon came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a frame fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard; but a thaw was in progress, which had commenced three days before. When those in the waggon sought to use the track the horses broke through, and the waggon was in danger of being upset. Plaintiff got out and in assisting the horses was injured by one of them.

Held, that under the circumstances it was the duty of the defendants to have opened up a way through the drifts sufficient to enable vehicles, such as the waggon in which the plaintiff was travelling, to have passed in safety along this highway; that the defendants had notice that the highway was out of repair and that the plaintiff was entitled to recover.

Judgment of a Divisional Court (MEREDITH, C.J., and MACMAHON, J.) reversing the judgment of FALCONBRIDGE, C.J., affirmed.

Shepley, K.C., and *John Cowan*, K.C., for the appeal. *T. G. Meredith*, K.C., contra.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.] [March 4

ROGERS *v.* MARSHALL.

Chattel mortgage—Renewal—Statement of payments—Non-repetition of in subsequent statements.

In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor in which the validity of the renewals of a chattel mortgage was questioned on the ground that while the first renewal statement shewed all the payments made during the year and the total amount due; the subsequent renewal statements began with the total amount due in the preceding statement and did not repeat the payments there set out and credited.

Held, sufficient.

Judgment of the Second Division Court of the County of Lambton affirmed.

Christin v. *Christin* (1899), 1 O.L.R. 634, followed. *Kerr* v. *Roberts* (1897) 33 C. L. J. 695, overruled.

D. L. McCarthy, for the appeal. *Riddell*, K.C., contra.

Boyd, C.] [March 22.

KIRCHOFFER *v.* IMPERIAL LOAN AND INVESTMENT CO.

Evidence—Discovery—Order of foreign court—Refusal to attend—Order compelling attendance.

R. S. C. 1886, c. 140, extends to parties as well as witnesses; and a former manager of a company (while the matters in dispute in the action were taking place), as such officer, is a quasi party and stands for the person to be examined for discovery for the corporation defendant. This person had refused to attend and be examined in pursuance of an order of a Manitoba court, made on an ex parte application. An order was made on the present application to compel his attendance.

A. Hoskin, K.C., for the motion. *Beaumont*, contra.

Cartwright, Master in Chambers.] [March 30.

ATTORNEY-GENERAL OF ONTARIO *v.* TORONTO JUNCTION RECREATION CLUB.

Evidence—Production of membership roll—Recreation club—Revocation of charter—Common betting house.

In an action against the defendants for a declaration that they were using their premises as a common betting house, contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter.

Held, that the President of club was not bound to produce the membership roll of the club as it might lead to a criminal prosecution against him.

D'Ivry v. *World Newspaper* (1897) 17 P.R. 387, and *Hopkins* v. *Smith* (1901) 1 O.L.R. 659, followed.

Dewart, K.C., for the motion. *Johnston*, K.C., contra.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [April 19.

REX *v.* FRASER

Certiorari—Insufficient return—Annexing papers.

In obedience to a writ of certiorari, proceedings were transmitted by the person to whom the writ was directed, by letter to the proper officer, but they were in a loose condition, with no symptom having been annexed to the certiorari.

Held, to be a bad return which could not be looked at by the Court.

McCullough, for the applicant. *Holman*, contra.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] REG *v.* BIGELOW. [March 8.

Liquor License Act of 1886—Sale in violation of provisions—Evidence—Conviction affirmed.

Defendant's clerk received at Truro, N.S., an order addressed to Bigelow and Hood Ltd., Halifax, for one bottle of whisky. The order was sent to Halifax and returned the following day indorsed "Deliver this order from our Truro warehouse and charge, etc." Bigelow and Hood Ltd., rented from defendant, who was president of the Company, premises at Truro which they used as a bonded warehouse, but the evidence showed that the order in question was filled, not from the bonded warehouse, but from an open case in defendant's cellar, which was kept there for that purpose.

Held, that the evidence shewed a sale by defendant and that the appeal from the judgment of the County Court Judge for District No 4 affirming the conviction must be dismissed with costs.

Full Court.] CAPE BRETON ELECTRIC CO. *v.* SLAYTER. [March 8.

Electric Company—Obligation to supply meter reading to consumer—Burden to shew compliance—Offer to compromise—Not a waiver of right under statute—Payment of previous bills.

The Dominion Acts, 1894, c. 13, s. 13, sub. s. 2 enacts that "Whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser the contractor shall cause a duplicate of such reading to be left with the purchaser." In an action by the plaintiff company seeking to recover for electric lighting and rent of meter.

Held. 1. The burden was upon plaintiff to shew compliance with the Act, and that non compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it.

2. An offer to compromise made on the part of defendant could not in any sense be treated as a wavier of the right conferred by the statute.

3. Per TOWNSHEND, J. The fact of previous billls having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid.

C. P. Fullerton, for appellant. *H. Mellish*, for respondent.

Full Court.] REX *v.* TOWN OF GLACE BAY. [March 3.

Arbitration—Arbitrator being interested as ratepayer—No disqualification—Certiorari.

By the Acts of 1902, c. 80, the town of Glace Bay was empowered for the purpose of obtaining a water supply to enter upon any lands in the County of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town.

Held, dismissing with costs the appeal from the decision of TOWNSHEND, J., refusing a writ of certiorari.

1. That if the arbitrators were acting in a judicial capacity, c. 39 R.S. applied, and the fact of the arbitrator being a ratepayer afforded no valid objection to the award made by him.

2. That if the arbitrators were not acting in a judicial capacity a writ of certiorari would not lie to remove into this Court any award made by them.

H. McInnes, K.C., for appellant. *W. B. A. Ritchie*, K.C., and *T. R. Robertson*, for respondent.

Full Court.] REX *v.* COOLEN. [March 8.

Criminal Code, ss. 262, 265, 713, 787—Information charging assault causing bodily harm—Conviction for common assault—Held good—Words "indictment" and "count."

Defendant was tried before the Stipendiary Magistrate of the City of Halifax on an information charging him with committing an assault upon J. F., causing bodily harm. The accused having consented to be tried summarily in accordance with s. 787 of the Code was tried and convicted of a common assault only.

Held, 1. Sec. 713 of the Code enabled the magistrate to convict of the common assault under s. 265, notwithstanding that the information was for an indictable offence under s. 262 as the latter section includes common assault.

2. The contention that s. 713 only applies to indictments, "counts" being the only word used, was disposed of by s. 3 sub-sec. (b) of the Code where it is provided that the expressions "indictment" and "count" respectively include information and presentment as well as indictment and also any plea, replication or other pleading and any record.

3. Independently of the statute the conviction was good.

See *Queen* v. *Oliver*, 30 L.J.M.C. 12, and *The Queen* v. *Taylor*, L.R. 1 C.C.R. 194.

Leahy, for appellant. *O'Hearn*, contra.

Full Court.] REX *v.* GAUL. [March 8.

Criminal Code, s. 55—Punishment of child by teacher.

The Criminal Code, s. 55, authorizes parents, persons in the place of parent, school masters, etc., to use force by way of correction towards any child, etc., under his care "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorized to use force is criminally responsible for any excess." Defendant, a teacher in one of the public schools of the city, was charged before the Stipendiary Magistrate of the city of Halifax for assaulting, beating and ill using J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on the part of defendant or of permanent injury to the child.

Held, 1. The only question properly before the Stipendiary Magistrate was whether the punishment was reasonable under the circumstances, or, in other words, whether there was excess.

2. There is no warrant in the Code for the test applied in the American case of *State* v. *Pendergrass*, 31 Am. Dec. 365, and adopted by the Stipendiary Magistrate that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child.

W. A. Henry and *R. T. Murray*, for appeal. *H. McInnes*, *K. C.*, contra.

Full Court.] REX *v.* BIGELOW. [March 8.

Liquor License Act of 1886—Conviction as for third offence—Use of previous convictions to establish.

Previous convictions may be used as evidence upon which to base a coviction for a third offence against the provisions of the Liquor License Act as often as such an offence is charged and proved.

It is not now necessary under the statute (s. 131) to ask the defendant whether he has been previously convicted unless he is present in person.

Where at the conclusion of each of several cases tried before him the magistrate decided to convict, but at the instance of defendant's counsel refrained from imposing sentence and drawing up the formal conviction until the County Court Judge should have decided a question raised on the trial as to the use of previous convictions.

Held, dismissing defendant's motion to quash and ordering a writ of procedendo, that the magistrate was not precluded from proceeding with the convictions at a later stage.

J. A. Chisholm and *H. V. Bigelow*, for motion to quash. *S. D. McLellan*, contra.

Ritchie, J.] REX *v.* TURPIN. [March 21.

Criminal Code, ss. 241, 265, 668, 760—Indictment for wounding with intent and for common assault—Motion to quash refused—Peremptory challenges.

The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts, charging him (1) for that he in the city of Halifax on the 13th day of November, in the year of our Lord one thousand nine hundred and three, with intent to do grievous bodily harm to one Thomas J. Weatherdon, did unlawfully wound the said Thomas J. Weatherdon, and (2) for that he did in the city of Halifax on the 13th day of November, in the year of our Lord one thousand nine hundred and three, unlawfully assault one Thomas J. Weatherdon. After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it on the ground that the Clerk of the Crown had not sent the deposition taken on the prisoner's preliminary examination, before the grand jury of the County of Halifax, as required by s. 760 of the Criminal Code. When the jury was being sworn the prisoner claimed the right to sixteen peremptory challenges on the ground that these counts before the Code would have been for a felony and misdemeanor respectively, and as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was under the above section, being tried on two indictments.

Held, 1. The indictment was properly found.

2. The prisoner was only entitled under s. 668 of the Criminal Code at twelve peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence if the evidence warranted it.

The prisoner was then tried and acquitted on both counts in the indictment.

M. V. Doyle and *J. A. Knight*, for the Crown. *John J. Power*, for prisoner.

COUNTY COURT, DISTRICT No. 1.

Wallace, Co. J.] RE MYERS *v.* MURRANS. [March 24.

Landlord and tenant—Overholding Tenant's Act, R.S. 1900, c. 174—Demand for possession held bad for uncertainty—Evidence of overholding—Writ of possession refused.

An application was made by the landlord for a writ of possession against the tenant under the Overholding Tenant's Act, R.S. 1900, c. 174,

based on the following demand for possession, which was served on the tenant on March 9, 1904:

Halifax, N.S., March 9, 1903.

Lawrence D. Murrans, Esq.,
Gottingen Street, City,

Dear Sir,—

Your lease to the premises, No. 94 Gottingen St., Halifax, N.S., expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith.

Yours truly, J. E. MYERS.

The tenant had held under a lease by deed, dated in 1901 for a term of three years, but owing to erasures and alterations in the indenture there was some doubt as to whether or not the tenancy terminated on March 1, 1904, or May 1, 1904. Before service of the above demand the landlord had on the 1st February, 1904, given to the tenant a three months' notice in writing to quit (not called for by the lease) on May 1, 1904. On the hearing it was contended that no evidence had been given that the tenant had refused after the service on March 9th, 1904, of the above demand in writing to go out of possession.

Held, that the written demand for possession was bad for uncertainty and under all the circumstances, following *Re Magann* v. *Bonner*, 28 O.R. 37 and *Re Snure* v. *Davis*, 4 O.L.R., 82, as the case was not one clearly coming within the true intent and meaning of the Act, the application should be refused.

O'Mullin and *W. S. Gray*, for landlord. *John J. Power*, for tenant.

Province of New Brunswick.

SUPREME COURT.

En Banc.] EX PARTE VANCINI [Feb. 5.

Jurisdiction of police and stipendiary magistrates in cities and towns—Made effective by Provincial Act of 1889.

The Legislature of New Brunswick in 1889 passed the following Act with reference to the jurisdiction of police and stipendiary magistrates in criminal cases: "Each and every stipendiary or police magistrate is hereby created, declared and constituted a court, and is hereby declared to have always heretofore been constituted a court, with all the powers and jurisdictions which any Act of the Parliament of Canada has conferred or may confer, or which any Act of the Parliament of Canada purports to confer upon any stipendiary or police magistrate within the province." In 1900, s. 785 of the Criminal Code, which empowers or purports to empower any police or stipendiary magistrate in Ontario to try, with the consent of the accused, any person charged in the province of Ontario with any offence "for which he may be tried at a Court of General Sessions of the Peace," by adding thereto the following sub-section: "This section

shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders, where they exercise judicial functions." The applicant consented to be tried before the police magistrate of Fredericton on a charge of stealing goods of the value of $100, pleaded guilty and was sentenced to three years' imprisonment in Dorchester Penitentiary.

Held, on application for his discharge on habeas corpus, that the provincial Act of 1889 was constitutional (it having been urged in support of the application that it was not so, being a delegation of the legislative functions of the provincial legislature with reference to the jurisdiction of provincial courts), and that the enactment made effective in New Brunswick the amendment of the Criminal Code above quoted, which it was contended was ultra vires of the Parliament of Canada.

Held, also, that the fact that there are no Courts of General Sessions of the Peace in New Brunswick, and that no person therefore could be charged in New Brunswick with an offence "for which he may be tried at a Court of General Sessions of the Peace," does not render the amendment of 1900 inapplicable to this province; and that the section is to be construed by reading into it the words "if he were in the province of Ontario."

Application refused.

Crocket, for the applicant. *Barry*, K.C., for the Crown.

En Banc.] EX PARTE PORTER. [Feb. 5.

Arrest, imprisonment and examination of debtors—Order of discharge—Failure to shew jurisdiction on its face.

An order of discharge made by a clerk of the peace under 59 Vict. 28 described the defendant as "in custody of the gaoler of Victoria county," and was signed by the "clerk of the peace in and for the county of Victoria." The notice stated that the application for discharge was to be heard at Andover, in the county of Victoria.

The Court refused under these circumstances, BARKER and GREGORY, JJ., dissenting, to quash the order of discharge for not showing on its face that the clerk of the peace was acting within his territorial jurisdiction.

Rule refused.

Carter, in support of rule. *Lawson*, contra.

Province of Manitoba.

KING'S BENCH.

Full Court.] TOWN OF EMERSON *v.* WRIGHT. [March 5.

Municipal corporation—Retainer of solicitor to bring suit may be by resolution—Subsequent ratification where suit commenced without sufficient authority.

By 57 Vict., c. 10, all the powers and authority of the Mayor and Council of the Town of Emerson were put an end to, and it was provided

that such powers under The Municipal Act and otherwise should be vested in a receiver to be appointed by the Lieutenant-Governor in Council, and that the receiver should have power to recommend the passage of such by-laws as might be passed by the Mayor and Council under said Acts, the same to be submitted to the Lieutenant-Governor in Council. By 63 & 64 Vict., c. 32, it was provided that the Lieutenant-Governor in Council might by order-in-council appoint or provide for the election of three persons to act as an advisory board for the town and prescribe the duties and powers of such board. Pursuant to this statute an order-in-council was passed appointing the members of such advisory board and defining their duties, one of which was to perform in an executive capacity all the duties vested in municipal councils under the provisions of the Municipal Act. They were also required to meet at least once a month for the transaction and ratification of all business affecting the town and to advise and assist the receiver and authorize and supervise the expenditure of the moneys of the town. The defendant was the receiver of the town appointed under c. 10 of 57 Vict., and acted as such until he was dismissed in February, 1901, when W. W. Unsworth was appointed receiver. This action was brought in the name of the town and W. W. Unsworth, its receiver, for an account of moneys alleged to have been received by the defendant while he was receiver of the town and not accounted for or paid over. On his examination for discovery the plaintiff, Unsworth, admitted that he had not authorized the bringing of the action, and the defendant then moved before the referee for the dismissal of the action or for a stay of proceedings on the ground that the action had been commenced without the authority of the plaintiff or either of them. On the return of the motion a retainer was produced, signed by Unsworth in the name of the town and for himself as receiver, and sealed with the corporate seal, authorizing the solicitors to prosecute the action, and ratifying, confirming and adopting it, and all things done and proceedings taken therein, and acknowledging that it had been brought with the full knowledge, sanction and approval of the said town and of himself as such receiver. The referee held that this did not shew sufficient authority to sue in the name of the town and ordered that the name of the town be struck out of the action, but refused to dismiss the action or stay the proceedings as authority from Unsworth was now shewn.

Both sides then appealed to a Judge in Chambers, and when the appeals came on to be heard the plaintiff's solicitors produced a resolution of the advisory board passed after the date of the referee's order and containing a retainer and authorization of the suit in the same terms as that formerly signed by Unsworth, and sealed with the seal of the town. By consent a pro forma order was made dismissing both appeals so that the whole matter might be dealt with by the full court.

Held, that a municipal corporation may authorize the commencement of an action by resolution under the corporate seal and that a formal by-law is not necessary: *Town of Barrie* v. *Weaymouth*, 15 P.R. 95; *Barrie*

Public School Board v. *Town of Barrie*, 19 P.R. 33, and *Brooks* v. *Mayor of Torquay* (1902) 1 K.B. 601, followed.

Quaere, whether a defendant has any locus standi, under the present practice, to ask for the dismissal of an action on the ground that it has been brought without the authority of the plaintiff.

Plaintiff's appeal allowed and defendant's appeal dismissed. Costs of the motion down to the appeal to the full court to be costs to the defendant in any event, as the authority for bringing the suit was not furnished until after the motion was made. No costs of the appeals to the full court.

Phippen and *Minty*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendant.

Full Court.] STARK *v.* SCHUSTER. [March 5.

Powers of Provincial Legislature—B.N.A. Act, 1867, ss. 91 and 92—Shops Regulation Act, R.S.M., 1902, c. 156—Municipal Act, R.S.M., 1902, c. 116, s. 527—Winnipeg Charter, 1902, c. 77, s. 931—Ultra vires—By-law requiring closing of shops at certain hours—Unreasonableness and uncertainty as grounds of objection to by-law.

Rule nisi to quash the conviction of defendant for breach of a by-law of the City of Winnipeg requiring all shops with certain exceptions to be closed after six o'clock p.m. except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, 1891, R.S.M. (1891) c. 140, which is now c. 156 of the R.S.M., 1902, which came into force March 6, 1903. In March, 1902, the Winnipeg charter, came into force and the new Municipal Act, c. 116 of the R.S.M., 1902, contains a clause (2a) providing that the City of Winnipeg is not included in the expression "municipality" where the same occurs in the Act. Section 15 of "The Shops Regulation Act," provides that any by-law passed by a municipal council under the Act shall be deemed to have been passed under and by authority of the Municipal Act and as if the preceding sections of the Act had formed part of the Municipal Act, and that the preceding sections of the Act and the Municipal Act should be read and construed together as if forming one Act. It was contended on behalf of the defendant that the present Shops Regulation Act does not apply to the City of Winnipeg by reason of its being incorporated as above mentioned in the Municipal Act, R.S.M., 1902, c. 116, which Act is expressly excluded from operation in Winnipeg.

Held, 1. Without deciding whether the present Shops Regulation Act applies to the city or not, that the joint effect of s. 931 of the Winnipeg Charter and s. 527 of the Municipal Act is to retain and keep in force all by-laws of the city theretofore lawfully passed, and that the by-law in question was in full force and effect.

2. As the by-law in question was in strict accordance with the powers conferred by the legislature in the Act under which it was passed, its pro-

visions could not be held to be unreasonable, uncertain or oppressive, so as to render it invalid or unenforceable. *Brydone* v. *Union Colliery Co.* (1899) A. C. 580; *Re Boylan*, 15 O.R. 13, and *Simmons* v. *Mallings*, 13 T.L.R., 447, followed.

3. The provisions of the Shops Regulation Act are intra vires of the Provincial Legislature under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the Province and not interfering to a material extent with the Regulation of Trade and Commerce assigned to the Dominion Parliament by s. 91.

The Court considered that the legislation in question in *Attorney-General of Ontario* v. *Attorney-General of Canada*, (1896) A.C. 348, and *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, (1902) A.C. 77, and which was held to be intra vires of the Province in each case, interfered with Trade and Commerce to a greater extent than the Shops Regulation Act could do.

Bonnar and *Potts*, for defendant. *J. Campbell*, K.C., and *A. J. Andrews*, for the City of Winnipeg.

Full Court.] AIKINS *v.* ALLEN. [March 5.

Principal and agent—Commission on sale of land.

About Dec., 1902, Pepler, a member of plaintiffs' firm, who are real estate agents, called on defendant and asked him if his house was for sale. Defendant replied that it was and that the price was $14,000. Nothing was said about a commission. In February, 1903, Pepler went again to defendant and was told that the house was still for sale, and again nothing was said about a commission. He then introduced a purchaser who, by arrangement with defendant, was shown over the property. The purchaser then authorized Pepler to make an offer of $12,500 for the property. The latter called on defendant and communicated this offer to him, when defendant said he would not take any less than $14,000 and that he wanted that net. Pepler objected to this, saying that he had understood that the price would cover the usual agent's commission, but said he would ascertain whether the purchaser would pay the extra amount asked. He did so, and the purchaser replied that he would let him know in a few days. Shortly afterwards, the purchaser, without any further communications between him and plaintiffs, entered into negotiations with defendant direct and bought the property for $14,000.

Held, Perdue, J., dissenting, that, under the circumstances, plaintiffs were entitled on a quantum meruit to the full amount of the usual commission on the purchase money. *Wolf* v. *Tait*, 4 M.R. 59; *Wilkinson* v. *Martin*, 9 C. & P. 1, and *Marson* v. *Burnside*, 31 O.R. 438, followed.

The mere fact that the agent has introduced the purchaser to the seller will not be sufficient to entitle him to recover a commission on the sale; but, if it appears that such introduction was the foundation on which

the negotiations resulting in the sale proceeded, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the agent's hands, and so deprive him of his commission.

Appeal dismissed with costs.

Robson, for plaintiffs. *McMeans*, for defendant.

Perdue, J.] ALLOWAY *v.* HRABI. [April 5.

Promissory note—Signature of maker obtained by false representations—Rights of holder in due course without notice—Bills of Exchange Act, 1890, c. 33, ss. 29, 38.

Action by the indorsees of three several promissory notes purporting to have been made by the defendants, payable to the order of the Winnipeg River Trading Company, and by it indorsed to the plaintiffs for value during currency. The defendants were Bohemians, none of whom could read English. One of them could write his name and speak a little English, but only such as would be used on the farm or in connection with farming or selling wood. The other two defendants could not speak or understand English and could not write. Their signatures were written by T. H. Corrigan, the manager of the trading company, with the usual × mark. Corrigan was the only witness who gave evidence to prove the signatures. The defendants desired to obtain homestead entries for the lands upon which they had squatted, and which were parts of an odd-numbered section not available for homesteads, and asked Corrigan's assistance in endeavouring to induce the Government to so modify the regulations that the entries might be made. Corrigan said that he agreed to do this for the defendants provided they would each pay him $125 in case he was successful, and that the notes sued on were taken by him in pursuance of that understanding, and that he succeeded in obtaining the entries for defendants before the notes matured. The defendants admitted that they had agreed to give Corrigan $125 each if he would obtain their homestead entries for them, but they said the amounts were to be paid in cordwood, to be delivered in one, two and three winters, a car-load to be delivered each winter. None of the defendants agreed to become responsible for the liability of the others.

At the time the notes were signed, Corrigan procured the defendants also to sign and swear to affidavits prepared by him in connection with their applications for homesteads, and defendants swore they had not knowingly signed any papers other than petitions to get homesteads. The trial judge's finding of fact was that defendants did not know that they were signing promissory notes, but thought they were signing only petitions for homesteads and affidavits in support thereof.

Held, following *Foster* v. *McKinnon*, L.R 4 C.P. 704, and *Lewis* v. *Clay*, 77 L.T.R. 653, that the defendants were not liable.

Prior to the coming into force of the Bills of Exchange Act, 1890, c. 33, it was well settled law that if the signature of the matter of a note was obtained upon the representation that it was a completely different document he was signing, and if he signed it without knowing it was a note he was signing, and under the belief that he was signing something else, and if he was not guilty of any negligence in so signing X, he would not be liable even to a holder of the note who acquired it during its currency for value without notice of the fraud.

Sections 29, 38 of that Act have made no change in the law, as is shewn by the case of *Lewis* v. *Clay*, supra, decided in 1897, since the coming into force of the Imperial Bills of Exchange Act, which contains exactly the same provisions upon the subject as ss. 29, 38 of our Act. Action dismissed with costs.

Haggart, K.C., for plaintiffs. *Rothwell* and *Johnson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] REX *v.* TANGEE. [Jan. 5.

Certiorari—Rule nisi to quash conviction—Motion for—Jurisdiction of single judge to hear—Practice.

Motion for a rule nisi to quash a conviction.

Held, that the full court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single judge.

C. C. McCaul, K.C., for motion.

Full Court] TRADERS' NATIONAL BANK OF SPOKANE *v.* INGRAM. [Jan. 5.

Appeal—Notice of—Court at which appeal should be brought on—Supreme Court Act, ss. 76 and 79.

Motion to quash an appeal on the ground that it was not brought in time. A final judgment was pronounced and entered on 27th February; notice of appeal to the January sitting of the full court was given on 24th October. A sitting of the full court commenced according to the statute on 3rd November:

Held, per IRVING and MARTIN, JJ., HUNTER, C.J., dissenting, that the appeal was brought in time.

W. H. P. Clement, for the motion. *S. S. Taylor*, K.C., contra.

Book Reviews.

A Treatise on International Law. By WILLIAM EDWARD HALL, M.A. Fifth edition. Edited by J. B. Atlay, M.A., barrister-at-law. Oxford: At the Clarendon Press. London: Henry Frowde, Oxford University Press Warehouse, Amen Corner; and Stevens & Sons, Limited, 119 and 120 Chancery Lane. 1904.

Mr. Hall, the learned author of this standard work, having died in 1894, after completing the fourth edition, Mr. Atlay was intrusted with the preparation of the fifth. Since the last edition many important events have taken place, such as the Venezuela boundary dispute; the Hague conference; various incidents in the Spanish-American war, and the war in South Africa; events in Japan and China, etc., etc., which demands notice at the hands of the editor. These have been touched upon in the present addition, and add largely to the value of the work. The law governing States in the relation of neutrality is especially interesting at the present time, as well as the author's opinion on the questions likely to arise or which have arisen in this connection: for example, the use of neutral territory by a belligerent as a basis of operations, the asylum which may be given to the land or naval forces of a belligerent, the definition of contraband of war, and the general position of neutral persons and property within belligerent jurisdiction, etc. It is quite unnecessary to do more than call attention to these distinctive features of the present edition, as the work is so well known, and is accepted everywhere as an authority.

There will doubtless be a very large sale of so interesting a book at the present time. Its value is largely increased by an excellent index. The work of the publisher and the printer is of course of the best.

Stone's Justices' Manual, being the Yearly Justices' Practice for 1904. 36th ed. By J. R. ROBERTS, Solicitor, etc. London: Shaw & Sons, 7 & 3 Fetter Lane; Butterworth & Co., 12 Bell Yard, 1904.

This well known and most concise compendium is of course a necessity in the British Isles, as well as useful in this country to all concerned in that branch of the administration of justice. It is interesting to notice the gradual development of criminal law in reference both to the classes of persons and the subjects affected by legislation from time to time. This last edition, for example, takes up and deals with the Employment of Children Act, the Motor Car Act and the Poor Prisoners Defence Act.

Flotsam and Jetsam.

The English law periodicals record the unexpected death of Mr. Justice Byrne, which, it is said, will cause a great loss to the profession and the public. He commenced his career as a junior of the Chancery bar, became afterwards a leader in the Court of Mr. Justice Chitty, and was subsequently appointed a judge of the Chancery Division. It is said, that a judge of his ability and learning, would in due course, have been raised to the Court of Appeal. He had a pleasing personality, an irreproachable character and unfailing tact and courtesy, and to this was added, the more solid attributes of an extensive knowledge of law.

The late Lord Coleridge was once speaking in the House of Commons in support of Womens' Rights. One of his main arguments was that there was no essential difference between the masculine and feminine intellect. For example he said: "Qualities of what is called the judicial genius sensibility, quickness, and delicacy—are peculiarly feminine." In reply Sergeant Dowse said, "The argument of the honorable and learned member compendiously stated amounts to this: 'Because some judges are old women, therefor, all old women are fit to be judges.'"

We are rather inclined to sympathize with that Southern judge whose decisions were frequently reversed by the Supreme Court. Needless to say he possessed no exalted opinion of the latter. One day a negro was brought before him, charged with the usual offence and being found guilty was duly sentenced. Defendant's counsel gave immediate notice of appeal. That evening, however, a mob broke into the jail and the morning sun saw the late prisoner dangling from a telegraph pole. The sight greeted his Honor as he was turning into the Courthouse square, and he gazed long and placidly. "Well, judge," asked a friend, "what do you think of it?" "What do I think?" he repeated, as a quiet smile of satisfaction spread over his face; "I think, sir, that there's one of my judgments that that —— Supreme Court won't reverse."—*American Lawyer.*

RETORTS COURTEOUS.—At a dinner party the other evening, says the Washington Star, a well known minister sat opposite one of the leading legal lights of Washington. During a lull which often occurs on such occasions, the minister casually asked the jurist what he thought would be the outcome of Mayor Harrison's arrest in Chicago in connection with the Iroquois Theatre disaster.

"I can't express an opinion without a retainer," promptly replied the lawyer.

"Ah!" exclaimed the dominie, "I left my pocket-book at home."

"I left my opinion at home," was the quick response.

"I don't believe you have any opinion, anyhow," said the minister.

"I don't believe you have any pocket-book," was the final rejoinder, and then everybody laughed.

"I am reminded," said the lawyer, "of a retort courteous that rather knocked me out in court one day. I made a remark which rather nettled the opposing counsel, and he replied, looking intently at my rather conspicuous bald head. 'That is a very bald statement,' with the accent on the bald.

"Well," said I, "my barber remarked yesterday that some men have hair and some have brains," and then I looked pityingly at his heavy mane.

"Yes," was the quick reply, "and some men have neither," and he looked me right in the eye."

It would appear that "unprofessional" advertisers in this country have still something to learn in that line. The following card issued by an enterprising practitioner in one of thewestern States might give them some valuable suggestions:—

Office over First National Bank.

TOM H. MILNER,
LAWYER.

"Love not sleep, lest thou come to poverty."
—Judge Solomen.

Am the read-headed, smooth-faced, freckle-wounded Legal Napoleon of the slope, and always in the stirrups. Place in every court on earth except that of Judge Lynch. Quick as a hippopotamus and gentle as a sunstroke. Refer to my friends and likewise to my enemies.

"FEES ARE THE SINUES OF WAR."

Belle Plaine, Iowa.

UNITED STATES DECISIONS.

Criminal Law.—Upon trial of an indictment for murder, proof of the killing of a third person is held, in *People* v. *Molineux* (N.Y.) 62 L.R.A. 193, not be admissible. A very elaborate note to this case reviews all the other authorities on evidence of other crimes in criminal cases.

Bees.—A keeper of bees, who locates their hives within a few feet of a post which he has fixed for fastening horses to, when he knows that they are prone to attack perspiring horses, is held, in *Parsons* v. *Manser* (Iowa) 62 L.R.A. 132, to be properly found guilty of negligence. The other cases as to liability of owner of bees for injuries done by them are collected in a note to this case.

Firm name.—As between a surviving partner and the executor of the deceased one, the firm name is held, in *Slater* v. *Slater* (N. Y.) 61 L.R.A. 796, to be an asset of partnership which the executor has a right to have sold for the settlement of the partnership affairs.

Negligence.—An aggravation of personal injuries caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance is held, in *Texas & P. R. Co.* v. *White* (C. C. App. 5th C.) 62 L.R.A. 90, not to be chargeable against the party by whose negligence the original injury was received.

Negligence.—The owner of a structure to be used as a toboggan slide at a bathing resort is held, in *Barret* v. *Lake Ontario Beach Improv. Co.* (N.Y.) 61 L.R.A. 829, to be liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant.

Married Women.—The right of a woman to enter into a partnership aggreement with her husband, under statutory authority to acquire, own, and dispose of property to the same extent as her husand may do, and to make contracts and incur liabilities to the same extent as if unmarried, is sustained, in *Hoaglin* v. *Henderson* (Iowa) 61 L.R.A. 756.

Nuisance.—Temporary occupation of a highway with rails, by a railroad company, for its convenience while elevating its roadbed to abolish a grade crossing over a highway, is held, in *McKeon* v. *New York, N. H. & H. R. Co.* (Conn.) 61 L. R. A. 730, to entitle the abutting owner whose access to and from his property is thereby destroyed, to compensation.

Railways.—One who boards a train without a ticket because the ticket office is not open for the sale of tickets as required by statute is held, in *Monnier* v. *New York C. & H. R. R. CO.* (N.Y.) 62 L.R.A. 357, to have no right to refuse to pay the extra fare required of passengers without tickets, and resist ejection on tender of the price of the ticket, but, to be required to pay the additional fare, and resort to his legal remedy to recover it and the statutory penalty for failure to have the office open.

Municipal Law.—A municipal corporation is held, in *Georgetown* v. *Com.* (Ky.) 61 L.R.A. 673, not to be subject to indictment for failure to compel the abatement of a nuisance to which it has contributed, consisting of the emptying of filth into an open drain on private property within its limits. An extensive note to this case collates all the other authorities on duty and liability of municipality with respect to drainage. An ordinance providing for the punishment of persons loitering about the streets and barrooms in idleness, without habitation or visible means of support is held, in *Re Stegenga* (Mich.) 61 L.R.A. 763, to be within the power of a municipal corporation.