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UNIFORMITY OF LAW IN CANADA.

It has more than once been pointed out in this journal that there is a provision in the British North America Act which it is most desirable should be carried out, but which up to the present time has been virtually a dead letter. The section we refer to is s. 94, which reads as follows:—

"94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the courts in those provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act, shall notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adapted and enacted as law by the legislature thereof."

It will be observed that the section is confined to three of the provinces only. It ought to be extended to all, including Quebec.

Again, the rights of provinces are perhaps too much safeguarded by the concluding clause, which is a somewhat anomalous provision inserted no doubt in the supposed interest of the provinces. At any rate it is there, and after the proposed law has been made by the Parliament of Canada it will only take effect in those provinces which choose to adopt it. But having adopted it their legislative competence to deal with the matter will thenceforth cease.

If the Provincial Legislatures were to be guided by what is the best for the whole Dominion and were not led away by mere provincialism, it would be apparent to them, as to every unprejudiced person that there are some subjects of such general and

universal interest that it would be in the highest degree beneficial that they should be dealt with and governed by one uniform law extending throughout the whole Dominion, even at the expense of a sacrifice of provincial legislative power over such subjects.

Whatever facilitates trade and commerce is beneficial to the whole community, and our great facility for trade and commerce would be the uniformity of commercial law throughout the Dominion. We have, fortunately, some branches of commercial law which are already uniform, for instance, the law relating to Banks and Banking, the law relating to Bills and Notes, the law relating to Shipping, the law relating to Railways, to a very large extent. No one in his senses would wish that the provinces should be at liberty to make different laws on these subjects. Everybody who is engaged in commerce has daily experience, though he may not realize it, of the benefit of there being one, and not a multiplicity of varying laws in the above subjects. But if it is beneficial to the whole Dominion that there is this uniformity law in the class of subjects above mentioned, it would be still more beneficial if the uniformity were extended to some other classes of subjects.

The Imperial Parliament has, with the benefit of the most varied experience, and with the assistance of the best legal talent the Empire can furnish, recently consolidated that very important branch of the law which relates to limited companies. If the Parliament of Canada, taking that as the model, were to frame an Act which could be adopted throughout the Dominion, it would be of inestimable benefit.

There are three other branches of law which the Imperial Parliament has codified, viz.: Partnership, Insurance and the Sale of Goods, which it would also be most desirable to have enacted as the uniform law of the Dominion.

There are two other subjects which might also be made the subject of Federal legislation with immense advantage to the working classes, and they are, Mechanics' Liens, and Workmen's Compensation for Injuries. Workmen going from one province

to another would be conscious that their rights would be everywhere governed by the same laws. Merchants in one province dealing with customers in another province would have the same confidence.

Unfortunately we do not appear to have at present in the Parliament of Canada any statesmen willing to devote his attention to this important subject, or to take any steps whatever to carry out the provisions of the British North America Act to which we have referred, and yet it is one which the fathers of federation evidently thought of importance, or the provision would not have been made.

EASEMENTS AND LAW OF LIMITATIONS.

The case of *Mykel* v. *Doyle*, 45 U.C.R. 65, may be considered to have received another "black eye." It may be remembered that in that case it was decided by the majority of the Court of Queen's Bench (Hagarty, C.J., and Cameron, J.), affirming Patterson, J.A., that the ten years' limitation does not apply to actions to recover easements. Armour, J., dissented, pointing out that the definition of land in our Limitation Act (R.S.O. c. 133) includes incorporeal hereditaments, under which head an easement would come. The case was referred to in *Bell* v. *Golding*, 23 App. R. 485, and Burton, J.A., then said: "Without expressing any decided opinion I incline to the view that the dissenting judgment of Armour, C.J. (sic.), in *Mykel* v. *Doyle*, 45 U.C.R. 65, was correct." And now Meredith, C.J.C.P., has said in the recent case of *Ihde* v. *Starr*, 19 O.L.R., at p. 178, "if the matter were res integra I should be of the same opinion as Armour, J." After two such knocks, it would seem possible if the point were carried to an appellate court that a different conclusion might be arrived at. There is now an equal division of judicial opinion on the point in question represented by Patterson, J.A., Hagarty, C.J., and Cameron, J., on one side, and Armour, J., Burton, J.A., and Meredith, C.J.C.P., on the other.

GETTING MONEY OUT OF COURT.

Many years ago, an official of the Court of Chancery in old Upper Canada, made his way into the strong room at Osgoode Hall and took therefrom a considerable sum of money in the custody of that venerable institution. In those days it was very easy to pay money into court, but much red tape had to be untied before it could be got out, and the difficulty in this regard became proverbial. One of the common law judges of that day, well known for his Irish humour, expressed in his own witty way his delight that success had at last crowned an effort to get money out of court. There appears to be a different way of doing things in Germany, for, if a newspaper is to be believed, the most recent practice there is for men who desire to get money out of court to obtain access to the court rooms late in the afternoon, put on the judicial caps and gowns, and thus deceiving the janitor, examine the court records, make a note of the names and addresses of persons having money in court, draw up the necessary documents for the collection of these debts, making free use of the court seal for that purpose. These quondam judges then transform themselves into bailiffs, and collect the moneys, for which court orders have been made. We confess that this proceeding sounds rather apochryphal, but there is a flavour of novelty about it which is refreshing, and the suggestion may be helpful in any difficult case that may arise as to getting money out of court.

It seems somewhat odd to discuss the constitutional rights of citizens of the United States as to "liberty in the pursuit of happiness" in connection with lawyers, as such; especially when this happy liberty is attempted to be interfered with by a statute forbidding lawyers to solicit business. It gives a new view of the delights of "ambulance chasers." Doubtless the "liberty and pursuit of happiness" claimed by an attorney in Washington Territory, who was also a "solicitor," should not be rudely dealt with.

REVIEW OF CURRENT ENGLISH CASES.

WILL—DESTRUCTION—INTENTION—WILL FOUND TORN IN PIECES —EXECUTORS ACCORDING TO TENOR—UNIVERSAL LEGATEES IN TRUST—FORM OF GRANT.

In re MacKenzie (1909) P. 305. This was an application for probate of a will. The testatrix had executed the will in due form, whereby she left all she possessed to two persons, Pennycock and Lane, in trust to pay the income to the testatrix's husband for life, and after his death divide the estate between the four children. She had frequently referred to the will in her lifetime as an existing will, and had stated where it would be found on her death, and had never expressed any intention of destroying it. On her death the will was found sealed up in a linen bag, but it was all torn to pieces, which, when put together, formed the complete will. Deane, J., held that there had been no revocation of the will, and that notwithstanding it had been torn to pieces it was valid, but he held the two legatees in trust, not being directed to pay debts, could not be deemed executors according to the tendor, but that as universal legatees they had a paramount right to the husband, and administration with the will annexed was granted to the trustees.

EASEMENT—RIGHT OF WAY—PRESUMPTION OF LOST GRANT.

Hulbert v. *Dale* (1909) 2 Ch. 570. This was an action to restrain the defendant from using a certain road over the plaintiff's premises and over which the defendant claimed a right of way. By an inclosure award made in 1904 certain common lands were allotted to three adjoining owners, including the predecessors in title of the plaintiffs, and the defendant's lessor, and a private carriage road was awarded to the same persons leading from a specified point to the defendant's farm. This awarded road was never in fact used, and part of the plaintiff's buildings had stood for many years on part of the site of it. It was shewn by the evidence that as far as living memory went, up to the time of the dispute between the plaintiff and defendant, the road in question had been used by the defendant and his predecessors in title or occupation, and that it ran parallel with the road awarded. There had been unity of possession however of the plaintiff's and defendant's farms from 1889 to 1905, so that no

title could have been acquired by possession. In these circumstances Joyce, J., was of the opinion that, on the evidence, a lost grant of a right of way over the road in question ought to be presumed, and he dismissed the action; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.)

HIGHWAY — DEDICATION — PRESUMPTION—DISUSED TRAMWAY — RAILWAY COMPANY — CAPACITY TO DEDICATE HIGHWAY — COSTS.

Coats v. *Herefordshire* (1909) 2 Ch. 579 may be briefly noticed for the fact that the Court of Appeal (of whom the court was composed is not stated) have affirmed the judgment of Eve, J., that a railway company, being owners of a disused strip of land alongside a highway, may by non-user themselves, and by suffering the public to use it as part of the highway, effectually dedicate such strip as a highway. The plaintiffs, however, having succeeded as to part of the land in question, were ordered to pay only five-sixths of the costs.

LANDLORD AND TENANT—LEASE AT RACK RENT—COVENANT BY LESSOR TO PAY TAXES—SUB-LEASE AT A PROFIT—INCREASE OF TAXES CONSEQUENT ON SUB-LEASE—LIABILITY OF LESSOR.

Salaman v. *Holford* (1909) 2 Ch. 602. In this case the Court of Appeal (Cozens-Hardy, M.R., Moulton and Farwell, L.JJ.) have affirmed the decision of Neville, J. (1909) 2 Ch. 64 (noted ante, vol. 45, p. 596). The facts, it may be remembered, being, that the plaintiff had let to one Singer certain premises at a rack rent, and had covenanted with Singer to pay all rates and taxes then or thereafter payable in respect of the premises. Singer, with the plaintiff's consent, sub-let the premises at a profit, and in consequence thereof the rates and taxes were increased, and the question was whether the plaintiff was liable for such increased taxes. Neville, J., held that he was, and the Court of Appeal now say that he was right.

BREWERY COMPANY—MORTGAGE TO SECURE DEBENTURES—MORTGAGE OF LICENSED PREMISES—REFUSAL OF LICENSE—COMPENSATION MONEY.

In re Bentley's Yorkshire Breweries (1909) 2 Ch. 609. A summary application was made to the court on behalf of trustees

to determine the following question. The applicants were trustees of a mortgage of licensed premises as security for debenture holders; the mortgage provided that on the application of the mortgagors the trustees were to concur in a sale of any of the mortgaged premises and hold the proceeds in trust for re-investment. Licenses were refused in respect of part of the mortgaged premises and compensation was paid to the trustees in respect of such refusal. The question was whether such moneys were to be treated as proceeds of a sale of part of the mortgaged premises, and subject to the trust for reinvestment, and Warrington, J., held that they were, and that if the trustees had the requisite powers they might invest such moneys in the purchase, or on mortgage, of licensed premises, and, if so advised, in the purchase or on mortgage of other licensed premises owned by the mortgagors.

INFANT—MAINTENANCE—INFANT TENANT IN TAIL—ORDER SANCTIONING MORTGAGE OF REAL ESTATE—REMAINDERMEN NOT PARTIES—DISENTAILING DEED BY WAY OF MORTGAGE—JURISDICTION—TRUSTEE ACT, 1893 (56-57 VICT. C. 53), SS. 30, 33—(R.S.O. C. 336, SS. 11, 14).

In re Hamborough, Hamborough v. *Hamborough* (1909) 2 Ch. 620 is characterized by Warrington, J., as "a somewhat extraordinary case." It arises out of the circumstance that the English court, though it has jurisdiction to order the sale or mortgage of an infant's real estate, to which he is entitled in possession, to provide for payment of past maintenance, has no jurisdiction to make such order to provide for future maintenance. And as regards estates, to which an infant is entitled in remainder, it has no jurisdiction to make any order for sale or mortgage even for past maintenance. Romer, J., in apparent forgetfulness of this distinction, on an application in Chambers, made an order authorizing the mortgage of the estate of an infant tenant in tail in remainder to raise money for his future maintenance, and by a subsequent order assuming to act under the Trustee Act, 1893, ss. 30, 33 (R.S.O. c. 336, ss. 11, 14), he declared the infant a trustee of the estate and ordered certain persons to execute the mortgage on his behalf, which included a disentailing deed, which was duly enrolled for the purpose of barring the entail. This was an action at the suit of the person entitled in remainder expectant on the infant's estate tail to have it declared that this mortgage was null and void, and that the estate re-

mained subject to the limitations of the settlement under which the infant was entitled; and Neville, J., so declared. It may be noted that the mortgage had been paid off, so that no question arose as to the mortgagees' rights. It may also be noted that although Neville, J., mentions the point as to whether the mortgage being paid off the estate tail revested, but it was not necessary for him to adjudicate upon it. In Ontario it may be taken to be settled that a mortgage is as effectual as an absolute conveyance to bar an entail, and that, on payment and discharge of the mortgage, the entail does not revive: *Lawlor* v. *Lawlor*, 10 S.C.R. 194.

STREET RAILWAY—COMMON CARRIER OF PASSENGERS—MUNICIPALLY OWNED STREET RAILWAY—NEGLIGENCE—LIABILITY FOR PERSONAL INJURIES—CONDITION LIMITING LIABILITY.

In *Clarke* v. *West Ham* (1909) 2 K.B. 858 the plaintiff claimed to recover from the defendants, a municipal corporation, damages for injuries sustained by the plaintiff while travelling on a street railway owned and operated by the defendants. The defendants had endeavoured to limit their liability to the sum of £25, by posting a notice in their cars, stating, as the fact was, that they carried passengers at a less rate than that allowed by law, upon the condition that the maximum sum for which they were liable to any passenger for any injury suffered on the car was £25. But the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) affirmed the judgment of Coleridge, J., that that notice did not relieve the defendants from their common law liability as common carriers, and that the defendants were not entitled to limit their liability for negligence without giving the passenger the option of travelling at the higher fare without any such condition. If, on such an offer being made, a passenger elected to be carried at the lower rate the court considered that he would be bound by the condition.

LANDLORD AND TENANT — FORFEITURE OF LEASE — BREACH OF COVENANT—EJECTMENT—ELECTION TO DETERMINE LEASE—APPLICATION BY UNDER LESSEE FOR RELIEF AGAINST FORFEITURE OF HEAD LEASE—EFFECT OF ORDER RELIEVING AGAINST FORFEITURE—CONVEYANCING AND PROPERTY ACT, 1881 (44-45 VICT. C. 41) S. 14—(R.S.O. C. 170, S. 13).

Dendy v. *Evans* (1909) 2 K.B. 894. In this case a lease was made of certain premises containing a covenant by the lessee to

repair, with a proviso for re-entry in case of breach. The lessee made an under lease of the premises to the defendant, who gave a covenant to repair with a similar proviso for re-entry. The premises became out of repair and the head lessor issued a writ against the lessee to recover possession. The lessee then assigned the under lease and the benefit of all arrears of rent due thereunder to the plaintiff in the present action, who without being made a party to the ejectment action, applied to the court under the Conveyancing and Property Act, 1881, s. 14 (R.S.O. c. 170, s. 13), for relief against the forfeiture, on which application an order was made that all further proceedings in the ejectment action be stayed, that the applicant be relieved from any forfeiture of the lease, and that she should hold the demised premises according to the said lease without any new lease. The plaintiff, now as assignee of the lease under which defendants held, claimed to recover the arrears of rent due by them. The defendants contended that the order relieving against the forfeiture was bad, because the plaintiff was no party to the action in which it was made, and that the effect of the order was not to revive the under lease, which had been forfeited by the issue of the writ of ejectment. But Darling, J., held that the order had been properly made, and had the effect of restoring the lease and under lease, and the plaintiff as assignee of the latter was entitled to recover.

PRACTICE—EQUITABLE EXECUTION—RECEIVER—PATENT OF INVENTION—JUDICATURE ACT, 1873 (36-37 VICT. C. 66) S. 25(8)—(R.S.O. C. 51, S. 58(9)).

Edwards v. *Picard* (1909) 2 K.B. 903. We have come to look upon a patent of invention as being, at all events in some cases, a valuable right of property, but when a judgment creditor seeks to make such a right of his debtor available in execution, he will find considerable difficulty in doing so. In the present case the plaintiff, who had recovered judgment in the action against the defendant for a sum of money, applied for the appointment of a receiver of all rents, profits and moneys receivable in respect of the defendant's interest as the owner of patents of certain inventions. It was not shewn that he was in receipt of any profits therefrom, either by way of royalties or otherwise. Sutton, J., refused the application, and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) affirmed his decision, holding that the court has no power under the Judicature Acts

to appoint a receiver in a case where, prior to those Acts, no court had power to grant such relief. Prior to the Judicature Acts the court holds such rights could not be made available in execution, neither can they now, because a patent of invention is a mere chose in action and entirely distinct from the right of property in a chattel created under it, and a chose in action is not exigible, except in the case of debts which are expressly made liable to attachment. As Williams, L.J., points out, a patent merely confers a right to prevent others from manufacturing. In Ontario the Provincial Legislature has anticipated the difficulty shewn to exist at law in the way of realizing on such rights of property, and has expressly made patent rights saleable in execution by the sheriff: 9 Edw. VII. c. 47, s. 16.

SHIP—CHARTER-PARTY—"READY FOR LOADING"—DISCHARGE OF PREVIOUS CARGO—CANCELLATION OF CHARTER-PARTY.

Lyderhorn v. *Duncan* (1909) 2 K.B. 929 is a case in which the construction of a charter-party was in question. The charter-party, dated November 15, 1907, provided that the plaintiff's vessel "Sydenham" should proceed to Iquique and Caleta Buena, and there receive a full cargo of nitrate of soda. Twenty-five lay days were to be allowed the charterers for loading the ship and for awaiting orders from abroad. The lay days were to be reckoned from the day after the master should give notice to the charterers' agents that he was ready to receive the cargo, and not to commence before January, 1908, at the respective ports and to cease when he should give the master notice that he was at liberty to proceed to sea. It also provided that stiffening of nitrate should be supplied by the charterers at Iquique as required, but not before Dec. 10, on receipt of 48 hours' notice from the master of his readiness to receive the same. Should the vessel not have arrived at the loading port and be ready for loading, in accordance with the charter, on or before January 31, 1908, the charterers were to have the option of cancelling the charter. At the date of the charter-party the vessel was discharging a cargo of coal at Caleta Buena, and it was intended to complete her discharge at Iquique. She arrived at Iquique on December 13, and by January 27, 1908, had discharged as much of her cargo of coal as could safely be unladen without some stiffening. The master therefore gave notice to the charterers' agents that he required 700 tons of nitrate for stiffening, but they refused to supply it unless he would agree to re-deliver it if the

charter-party were cancelled. It was admitted that the whole of the cargo of coal could not, even if the stiffening had been supplied, have been discharged by January 31, 1909, the time limited for her to be ready to receive the cargo under the charter-party. The defendants, the charterers, on that day cancelled the charter-party, and the question was whether they were entitled so to do. Lord Alverstone, C.J., who tried the action, decided that they were and dismissed the action with costs; and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) affirmed his decision; their lordships holding that the provision for the supply of stiffening, *i.e.*, ballast, for keeping the vessel upright, did not exonerate the owners from having the vessel ready to receive the charterers' cargo on 31 January, and that it could not be said to be ready so long as any other cargo was on board.

ARBITRATION — ARBITRATOR — QUALIFICATION — ARBITRATOR NOT QUALIFIED—PARTY ACTING IN ARBITRATION PROCEEDINGS—IGNORANCE OF DISQUALIFICATION OF ARBITRATOR—ESTOPPEL.

In *Jungheim* v. *Foukelmann* (1909) 2 K.B. 948 the plaintiffs brought the action to have it declared that an award made on an arbitration between the plaintiffs and defendant was null and void. The plaintiffs had purchased a quantity of wheat from the defendant subject to a condition that any dispute arising out of the contract should be referred to arbitrators, one to be appointed by each of the parties, and the two arbitrators having power to appoint a third, and it was further provided that the arbitrators should all be principals engaged in the corn trade as merchants, millers, factors or brokers, and also members of one or other of certain specified associations. The contract also provided for an appeal to a committee of appeal elected for the purpose. A dispute having arisen, a resort was had to arbitration, and the parties attended the arbitration, and an award was made in favour of the defendant which was afterwards confirmed by the committee of appeal. Neither of the arbitrators appointed by the parties was in fact a member of any one of the specified associations, but this fact was not known to the plaintiffs until after the award had been confirmed in appeal. The two arbitrators had acted as arbitrators on many occasions under similar contracts containing a similar arbitration clause, and were familiar with the corn trade. In these circumstances the plaintiffs contended that the award was made by persons not

qualified to act as arbitrators under the contract, and their award therefore was null and void, and Pickford, J., who tried the action, gave effect to that contention, holding that, having acted in ignorance of the disqualification, the plaintiffs were in nowise estopped from taking the objection, for although the plaintiffs might be estopped from taking the objection that the arbitrator appointed by themselves was disqualified, yet that could not affect their right to object to the disqualification of the defendants' arbitrator when they became aware of it.

DEFAMATION—PAPER PUBLISHED BY PARLIAMENT—PRINTING EXTRACTS FROM PARLIAMENTARY PAPER—3-4 VICT. C. 9, S. 3—(9 EDW. VII. C. 40, S. 10)—RULE 461—(ONT. RULE 488).

Mangena v. *Wright* (1909) 2 K.B. 958. The plaintiff had lived in South Africa, and while there had interested himself in exciting some of the negroes to acts of rebellion. A report had been made to the Imperial Government, and the report had been printed and published in an official blue book. A reader of the London *Times*, a Natal official, seeing by a report in the paper that the plaintiff had been petitioning the King, drew attention in a letter to the *Times* to the official report, of which he sent a copy, which was published in the *Times*. The report contained severe reflections on the conduct of the plaintiff, who was stated to have acted in a reprehensible manner. The action was brought against the printer and publisher of the newspaper to recover damages for the alleged libel. The point was raised on the pleadings that under the Act of 3-4 Vict. c. 9, s. 3, the publication was protected. This question of law, and also the point whether evidence taken in a former trial in which the plaintiff had sued to recover damages for a prior alleged libel imputing similar conduct to the plaintiff; and also the point whether evidence as to the plaintiff's bad character would be admissible in mitigation of damages, were ordered to be argued, and Phillimore, J., held that if the publication in question was made in good faith, it was protected by the Act referred to. Also, that the evidence taken in the former action was admissible, saving all just exceptions; and also, that evidence of plaintiff's bad character would be admissible in mitigation of damages, and that Rule 461 (Ont. Rule 488) has not changed the law as laid down in *Scott* v. *Sampson* (1882) 8 Q.B.D. 491, on this point.

CRIMINAL LAW—FALSIFICATION OF ACCOUNTS—MACHINE—TAXIMETER—FALSIFICATION OF ACCOUNTS ACT, 1875 (39-40 VICT. C. 24) S. 1—(CR. CODE, S. 415).

The King v. *Solomons* (1909) 2 K.B. 980 serves to shew that as the improvements effected by modern inventions come into operation, old forms of offence assume new aspects. In the present case the defendant was the servant of the plaintiffs, and had been entrusted with a taximeter cab furnished with an automatic register for recording the distance travelled, and the amount earned by the driver. From the figures appearing on the dial at the end of the day the amount payable to the defendant was ascertained. For several days the defendant took certain persons as passengers to certain places, and wilfully and with intent to defraud the plaintiffs, left the lever of the machine raised so that it recorded nothing, and collected fares for such trips, for which he did not account. The returns made by him to the plaintiffs were consequently false. The defendant was convicted with falsifying an account within the meaning of 39-40 Vict. c. 24, s. 1 (see Cr. Code, s. 415), and the Divisional Court (Lord Alverstone, C.J., and Darling and Jelf, JJ.) held that he had been properly convicted.

SHIP—CONTRACT OF CARRIAGE—PASSENGER'S LUGGAGE—THEFT BY SHIPOWNERS' SERVANTS — CONDITION EXEMPTING CARRIERS FROM LIABILITY FOR "LOSS BY WHATSOEVER CAUSE OR IN WHATEVER MANNER OCCASIONED."

In *Marriott* v. *Yeoward* (1909) 2 K.B. 987 the plaintiff accepted a ticket entitling her to be carried with her luggage on the defendants' ships to a certain place. The ticket contained a condition that the defendants were not to be liable for any loss sustained by the plaintiff "by whatsoever cause or in whatever manner occasioned." This was printed in brevier type. The plaintiff denied that she noticed it, or knew of its existence. On the passage some of her luggage was stolen from trunks entrusted by the plaintiff to the defendants' servants to be placed in the hold, and which trunks were locked, and were opened while in the defendants' sole control. The plaintiff claimed she was not in any case bound by the condition, but that even if defendants were entitled to rely on it, it did not cover losses due to the fraudulent acts of their own servants. Pickford, J., who tried the action, came to the conclusion that the plaintiff was bound by the condition, and that it was sufficiently broad in its terms to cover the loss in question. The action therefore failed.

SHIP—CHARTER-PARTY—DEMURRAGE—LIEN.

Rederiactieselskabet "Superior" v. *Dewar* (1909) 2 K.B. 998. In this case the plaintiffs were the owners of a ship which had been chartered to the defendants. The charter-party provided that the charterers should be allowed 35 running days for loading and discharge, to be effected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to receive or discharge cargo. In the event of detention of the vessel by the charterers beyond the laying days, demurrage at a specified rate was to be paid by them "day by day as falling due," and the owners were to have a lien for all "freight, demurrage and all other charges whatever." This action was brought by the shipowners against an indorsee of the bill of lading which incorporated the provisions of the charter-party, to determine the amount of the plaintiffs' lien. Bray, J., who tried the action held that the lien included demurrage at the port of loading, notwithstanding it was made payable "day by day as falling due." He also held that "charges" did not include dead freight, but that it was not necessarily confined to charges specifically mentioned in the charter-party, but included certain expenses incurred by the ship's agents at Buenos Ayres at the request of the charterers' agents. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) held that the lien for "charges" could not extend as against the defendant, the indorsee of the bill of lading, to any charges not contemplated by the charter-party, and to this extent varied his judgment, which in all other respects was affirmed.

BANK—CHEQUE—CHEQUE DRAWN BY DIRECTORS ON BEHALF OF COMPANY — FORGERY—NEGLIGENCE — PASS BOOK RETURNED WITHOUT OBJECTION—SETTLED ACCOUNT.

Kepitigalla Rubber Estates v. *National Bank of India* (1909) 2 K.B. 1010. In this case the plaintiffs had a banking account with the defendants, and the plaintiffs when opening the account gave the defendants written authority to honour cheques drawn by two directors of the plaintiff company and its secretary. The secretary fraudulently issued cheques purporting to be signed by two directors, but really forged by him, and had got them cashed by the defendants and had misappropriated the proceeds. After these cheques had been paid by the defendants, the pass book had been from time to time taken out by the plaintiffs and

returned by them to the defendants without any objection being made; and the defendants contended that this amounted to a settled account. One of the names had been forged by means of a rubber stamp, which the secretary had got hold of, but not owing to any want of reasonable care on the part of the director whose name it bore. Bray, J., who tried the action, held that the plaintiffs were entitled to recover, and were not estopped by their omission to make objection when returning the pass book shewing the payments of the forged cheques. The forgeries extended over a period of two months, during which time neither the bank pass book nor the cash book of the company were examined by the directors, but this was held not to be such negligence as relieved the defendants from liability.

ATTACHMENT OF DEBT — GARNISHEE ORDER — RETIRED PAY OF OFFICER IN THE ARMY—PENSION DUE BUT NOT PAID—BANK CREDITING AMOUNT TO CUSTOMER—ARMY ACT, 1881 (44-45 VICT. C. 58), S. 141.

In *Jones* v. *Coventry* (1909) 2 K.B. 1029 judgment was recovered against the defendant for a sum of money. He was a retired army officer and as such was entitled to retired pay in respect of past services, this was payable quarterly, and on each occasion a form of warrant had to be filled up and signed by the defendant, before payment, which contained a declaration that he was entitled to retired pay for the last quarter, and a receipt for the amount. The warrant stated that it might be presented through a banker and might be negotiated in the country or abroad, and was to be left by the banker at the Paymaster-General's office one day for examination. The defendant opened an account at a bank for the sole purpose of collecting his retired pay, no other moneys being paid into the account, and he drew against the account by cheques in the ordinary way. On January 1, 1909, a sum of £6 13s. 3d. was standing to the credit of the account, and on that day defendant handed the bank a warrant for the quarter's pay, due that day, for collection; and the bank at once credited him with the amount, £17 12s. 6d. On the same day, after this amount had been credited, the bank was served with a garnishee order. The warrant was paid by the Paymaster-General on January 7. The defendant contended that both sums were protected by the Army Act, 1841 (44-45 Vict. c. 58), s. 141. The Master, on an application to pay over, held that the whole amount standing to the credit of the bank account was liable to

attachment, and he ordered it to be paid to the plaintiffs; but the Divisional Court (Darling and Jelf, JJ.) held that although the £6 13s. 8d. had lost its character of retired pay, as it had been actually received from the Paymaster-General at the time when the attaching order was served, and was therefore liable to attachment; yet the £17 12s. 6d. was not so liable, notwithstanding that the amount had been placed by the bank to the defendant's credit, as it retained the character of retired pay until it was actually paid by the Paymaster-General. The order of the Master was varied accordingly.

MASTER AND SERVANT—BREACH OF CONTRACT—WRONGFUL DISMISSAL—MEASURE OF DAMAGES.

Addis v. *Gramophone Co.* (1909) A.C. 488 was an action by a servant for wrongful dismissal, and the only question on the appeal was as to the proper measure of damages, and it was held by the House of Lords (Lord Loreburn, L.C., and Lords James, Gorrell and Shaw—Lord Collins dissenting), reversing the Court of Appeal, that damages in such a case cannot include any compensation for injured feelings, or for the loss the servant may sustain from the fact that the dismissal has made it difficult for him to obtain fresh employment.

TRADE UNION—INDUCING DISMISSAL BY THREAT OF STRIKE—"TRADE DISPUTE"—"CONTEMPLATION OR FURTHERANCE OF A TRADE DISPUTE"—TRADE DISPUTES ACT, 1906 (6 EDW. VII. C. 47), S. 3, S. 5(3)—(R.S.C. C. 125, S. 32).

Conway v. *Wade* (1909) A.C. 506, in which the plaintiff sues as a pauper, has reached the House of Lords. The case involved a very important question. The Court of Appeal having decided that where a workman was in default to a trade union for non-payment of a fine of 10s., and a district delegate of the union went to the defaulter's employers and threatened unless he were dismissed the rest of the employees would go on strike, and he was in consequence dismissed; that this is an act done in "furtherance of a trade dispute," and is therefore made not actionable by the Trades Disputes Act, 1906 (1908), 2 K.B. 844 (noted vol. 45, p. 72). The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Atkinson, Gorrell and Shaw) have, happily for the interests of workingmen, seen their way to relieve them from the tyranny with which they were threatened, and have unanimously reversed the decision of the Court of

Appeal. The jury who tried the case found as a fact, that there was no trade dispute; but the Court of Appeal undertook to reverse this finding and, as their Lordships find, without sufficient grounds. There being in fact no trade dispute it followed as a matter of course that the matter was unaffected by the Act.

ACTION FOR MALICIOUS PROSECUTION—WANT OF REASONABLE AND PROBABLE CAUSE—ONUS PROBANDI.

Corea v. *Peiris* (1909) A.C. 549 was an appeal from Ceylon. The action was for malicious prosecution. The only evidence given by the plaintiff was that the charge had been made and failed. The Colonial Court of Appeal had set aside a judgment for the plaintiff, on the ground that the onus probandi of shewing malice, or want of reasonable and probable cause, was on the plaintiff and had not been discharged, and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins and Sir A. Wilson) affirmed the decision.

WILL—CONSTRUCTION—DIRECTION TO ACCUMULATE DURING MINORITY—GIFT TO CHILDREN OF EQUAL SHARES IN RESIDUE.

Fulford v. *Hardy* (1909) A.C. 570 was an appeal from the Ontario Court of Appeal on the question of construction of the will of the late Senator Fulford whereby he gave to each of his children an equal share of the income of the whole of his residuary estate, subject to the provision "that until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate." The Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Collins and Sir A. Wilson) agreed with the court below, that during the conventional minority of the children, the accumulations of each share were to go to increase the residuary estate, of which each child was entitled to a share on attaining twenty-five, and not for the exclusive benefit of the respective shares.

VENDOR AND PURCHASER—DEPOSIT—FORFEITURE OF DEPOSIT—DEFAULT BY PURCHASER.

Sprague v. *Booth* (1909) A.C. 576 was an appeal from the Court of Appeal of Ontario affirming a judgment of Mabee, J. The action was brought to recover a deposit of purchase money which had been made in the following circumstances. The plain-

tiff's assignor had contracted with the defendant for the purchase of the defendant's stock in a certain railway for $10,000,000, and on receipt of that sum the defendant was to transfer his stock. The agreement also provided that bonds were to be issued by the company to the amount of $11,000,000, part of which the vendor, as a creditor of the company, was beneficially entitled to, and which he agreed to transfer to the purchaser on payment of the purchase money. The purchaser undertook to have the bonds prepared for execution by the company. $250,000 was paid down by the purchaser as a deposit, which it was agreed was to be forfeited as liquidated damages in case he made default. The purchaser, or his assigns, never delivered the bonds for execution by the company, and made default in payment of his purchase money. Whereupon the defendant claimed that the deposit was forfeited, and the subject-matter of the contract was subsequently sold to other persons. The plaintiff claimed that both parties had made default, because the bonds had not been delivered as stipulated for, and therefore that he was entitled to recover back the deposit, but the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Collins, and Sir A. Wilson) were of the opinion that the plaintiff, or those through whom he claimed, were responsible for the non-delivery of the bonds, and therefore were not able to rely on their non-delivery as an excuse for their not carrying out the contract, and therefore that the action failed and was rightly dismissed.

EXCHEQUER COURT OF CANADA—JURISDICTION—ADMIRALTY—ACTION TO ENFORCE MORTGAGE OF SHIP—COUNTERCLAIM FOR BREACH OF CONTRACT.

Bow v. *The Camosun* (1909) A.C. 597, was an action in rem commenced in the Exchequer Court in British Columbia to enforce payment of a mortgage on a ship, which though given in respect of the price, was expressed to be made in consideration of money lent. The defendants set up by way of equitable defence pro tanto, a claim for damages for breach of the contract for building the ship. The local judge in British Columbia held that the Exchequer Court had jurisdiction to deal with such a claim, and his decision was affirmed by Burbidge, J., and subsequently by the Supreme Court of Canada. The Judicial Committee of the Privy Council (Lords Loreburn, L.C., and Lords Ashbourne, James, Gorrel and Shaw), however, came to the conclusion that the Exchequer Court has no jurisdiction to entertain

the claim set up by the defendants and ordered it to be struck out. Their Lordships holding that the Exchequer Court has no common law jurisdiction, and its statutory jurisdiction under Imperial Statute, 53-54 Vict. c. 27, and Dominion Act, 54-55 Vict. c. 29, is no wider than that of the Admiralty Division of the English High Court, and the defendants' remedy was therefore by cross-action in a court having jurisdiction to entertain the claim.

CONSTRUCTION OF WILL—RES JUDICATA.

Badar Bee v. *Noordin* (1909) A.C. 615 was an appeal from the Supreme Court of the Straits Settlements. The appellant had petitioned for a declaration that the devise and gifts contained in the 6th clause of the will in question were void and that the lands comprised therein and the income thereof belonged to the testator's next of kin. It appeared that in 1872 the court in a suit relating to the same will had declared the said gifts to be void and that they "fell into the undevised residue of the testator's estate," and that thereafter the gifts which were of annual sums were paid to the testator's next of kin with the assent of all parties interested, and that in 1891 in another suit relating to the same clause the court had declared that the defendants, who included the trustees of the will, were estopped from contending that the said annual sums were not wholly undisposed of. Notwithstanding this state of facts the Colonial Court had held that the prior judgments of the court did not relate to the corpus of the property comprised in clause 6, but only to the income, and that the corpus, subject to the payment of certain annual sums, fell into the residue disposed of. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins, and Sir A. Scoble), however, reversed this decision, and held that the prior decision had dealt with the matter and applied both to the income and corpus, and therefore that the matter was res judicata and could not be reopened.

CANADA RAILWAY ACT, 1903, S. 168—SUPREME AND EXCHEQUER COURTS ACT (R.S.C. 1886, C. 135), S. 26—APPEAL TO HIGH COURT—FURTHER APPEAL TO SUPREME COURT INCOMPETENT.

In *James Bay Railway* v. *Armstrong* (1909) A.C. 624 the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Collins and Sir A. Wilson) have determined that

under the Canadian Railway Act, 1903, c. 168 (see now R.S.C. c. 37, s. 209), an appeal from an award fixing compensation for land expropriated under the Act, lies either to the High Court, or the Court of Appeal; but if it is taken to the High Court no further appeal lies to the Supreme Court, whereas if the appeal is taken to the Court of Appeal an appeal will lie from that court to the Supreme Court. In this case the appeal was had to the High Court and a further appeal was then taken to the Supreme Court, which that court rejected as incompetent. The appellants appealed from that decision and also, by special leave, appealed from the decision of the High Court, both of which appeals were dismissed.

NEGLIGENCE—DEFECT IN GAS APPARATUS—INJURY TO THIRD PARTIES—LIABILITY OF CONTRACTOR TO THIRD PARTIES—DANGEROUS ARTICLE.

Dominion Natural Gas Co. v. *Collins* (1909) A.C. 640 was an appeal from the Court of Appeal for Ontario and deals with a very important point. The facts were simple, the defendant gas company supplied natural gas to a railway company and for the purpose of such supply installed the necessary apparatus, which included apparatus for the regulation of pressure, and a valve for the escape of the gas where it exceeded the desired pressure. This apparatus was installed in the machine shop of the railway company in which a boiler was placed which was heated by gas jets. The escape pipe opened directly into the boiler house, an escape of gas took place and it was ignited by the gas jets of the boiler, and this caused an explosion whereby one of the railway employees was killed, and another injured. The representatives of the deceased workman, and the injured workman, both brought actions against the railway company and the gas company. There was evidence that the workmen of the railway company had tampered with the gas plant and interfered with its working properly, and the jury found that the railway company had been negligent in permitting their men to tamper with the gas plant. The jury also found that the apparatus was negligently constructed, on the ground that the escape pipe ought to have been led to the open air. The actions were dismissed as against the railway company, but judgment was given against the gas company at the trial, which was affirmed by the Court of Appeal. On the appeal to the Judicial Committee of the Privy Council

(Lords Macnaghten, Dunedin and Collins, and Sir A. Wilson). it was urged on behalf of the gas company that they were not liable, because the gas plant had been furnished and installed under the direction and to the satisfaction of the railway company's engineer, and the gas company was bound to install whatever the company directed, and the apparatus had been accepted by the railway company with full knowledge of the alleged defect. Their Lordships in affirming the judgment against the gas company, came to the conclusion that the finding of the jury, that the escape of gas took place at the valve and that the gas company were guilty of negligence in not carrying the escape pipe to the open air, was well warranted by the evidence, and that the rule that where a person furnishes a dangerous article which may cause injury to a third person, he is bound to take reasonable care that the article is properly constructed, applied.

Correspondence.

Editor CANADA LAW JOURNAL:

SIR,—You quote, with apparent approval, in the C.L.J. of Nov. 15, p. 701, certain observations of Mr. B. E. Walker, president of the Canadian Bank of Commerce, respecting succession duties. Mr. Walker says the government may safely tax income and spend the money, but that, when a man dies and his wealth is being divided among his heirs, who will do what they please with it, it will reduce the nation's productive capital for the government to take a portion and spend it on the current expenses of governing the country. It ought to be evident that the way to reduce the productive capital of a country is for government and people to spend more on current expenses, non-productive, than the country's income. Nothing else, unless it be the exhaustion of natural resources, will reduce a nation's productive capital. If a man dies and leaves ten million dollars in bonds, bank stocks, and shares in industrial corporations, and the government takes one million dollars in succession duties, not a bond will be cancelled, and not a bank or industrial corporation will find its capital reduced by the value of a single share.

Yours,

X. X.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] TRAVES *v.* FORREST. [Oct. 20, 1909.

Mining agreement—Interest in ore to be mined—Registration —Construction of statute.

An agreement by which the owner or lessee of a mine authorizes another to work it and receive a share of the proceeds, is not an instrument requiring registration under the provisions of the British Columbia Bills of Sale Act, 5 Edw. VII. c. 8. Judgment appealed from (14 B.C. Rep. 183) affirmed.

Appeal dismissed with costs.

Robert Wetmore Hanington, for appellant. *S. S. Taylor*, K.C., for respondent.

Que.] BARTHE *v.* HUARD. [Nov. 18, 1909.

Evidence—Privilege—Notary—Jury trial—Objections to charge —Objections after verdict—New trial—Misdirection—Discretion.

H. to qualify as candidate in a municipal election procured from a friend a deed of land giving him a contre-lettre under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced and the existence of the contre-lettre proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim but the substance of the document was proved by oral testimony. A verdict having been given in favour of H.,

Held, that the trial judge erred in ruling that the notary was not obliged to produce the contre-lettre and there should be a new trial.

B. in his newspaper article, also accused H. of being drunk during the election, and the judge in charging the jury said: "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend."

Held, that this was calculated to mislead the jury and was also a reason for granting a new trial.

If objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

Appeal allowed with costs.

Alex. Taschereau, K.C., and *Cannon*, for appellant. *C. E. Dorion*, K.C., and *Alleyn Taschereau*, for respondent.

Que.] [Dec. 13, 1909.

CITY OF MONTREAL *v.* MONTREAL LIGHT, HEAT & POWER CO.

Contract—Supplying electrical energy—Delivery—Use of force—Payment at flat rate—Sale of commodity—Agreement for service.

A contract for the supply of electrical energy provided that the company should furnish to the city, at the switchboard in its pumping station, through a connection to be there made by the city with the company's wires, an electric current, equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at the rate of "$20 per horse-power per annum for the quantity of said electrical current or power *actually delivered*" under the contract.

Held, that by supplying the current on their wires up to the point of delivery the company had fulfilled their obligation under the contract, and was entitled to payment at the flat rate per horse-power per annum for the energy furnished, notwithstanding that the city had not utilized the force supplied during these specified hours by allowing it to pass into the city's motor.

Per GIROUARD and ANGLIN, JJ.—The agreement was a contract for the sale of a commodity.

Appeal dismissed with costs.

Atwater, K.C., and *W. H. Butler*, for appellant. *R. C. Smith*, K.C., and *G. H. Montgomery*, K.C., for respondent.

Ont.] [Dec. 24, 1909.

TORONTO RAILWAY CO. *v.* PAGET.

Construction of statute—General Railway Act—Charter of company—Repugnancy.

The Ontario Railway Act of 1906, 6 Edw. VII. c. 30, is by s. 5 made applicable to a Street Railway Co. incorporated by the legislature, but where there are inconsistent provisions, those of the special shall override those of the general Act. By s. 116 of the Railway Act a passenger on a railway train or car may be expelled for refusal to pay fare. By s. 17 of the special Act a passenger in such case is subjected to a fine.

Held, that these two provisions are not inconsistent and a conductor on a street railway car may lawfully eject a passenger who refuses to pay his fare.

Appeal dismissed with costs.

Nesbitt, K.C., and *D. L. McCarthy*, K.C., for appellant. *Young* and *Lennox*, for respondent.

Ref. P. C.] Dec. 24, 1909.

IN RE GUARANTEE OF BONDS OF THE GRAND TRUNK PACIFIC RY. CO.

Statutory contract—Construction bonds of railway company—Government guarantee.

By contract with the G. T. Pacific Ry. Co. published as a schedule to 3 Edw. VII. c. 71, the Government of Canada agreed to guarantee the payment of bonds of the company to be issued for an amount equal to 75% of the cost of construction of the Western division. By a subsequent contract (sch. to 4 Edw. VII. c. 24) the Government agreed, subject otherwise to the provisions of the first contract, to implement its guarantee so as to make the proceeds of said bonds a sum equal to 75% of such cost.

Held, that the liability of the Government under the second contract was only to guarantee bonds of the company, the proceeds of which would produce a defined amount and was not to make up in cash or its equivalent any deficiency between such proceeds and the said 75% of the cost.

Shepley, K.C., for Government of Canada. *Lafleur*, K.C., and *Biggar*, K.C., for Grand Trunk Ry. Co.

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge. C.J.K.B.—Trial.] [Dec. 30, 1909.

FELKER v. MCGUIGAN CONSTRUCTION CO.

Expropriation of easements—Hydro-Electric Commission—Public Works Act—Trespass—Confiscation—Compensation.

The defendants were contractors with the Hydro-Electric Power Commission of Ontario for the building of a line from Niagara Falls to transmit electricity to various municipalities. The line was to be carried on towers placed on private property or highways along the route, without any provision for right of way or protection of any kind; the intention being to use as an easement only such portion of the land as would be necessary to give a footing for the towers. The plaintiff objected to the placing of towers on her land on the ground that the mode of construction and operation of the line was a serious menace to life and property, and obtained an interim injunction to restrain the defendants from entering upon her land for the purpose of erecting towers. It was claimed by the plaintiff that the Hydro-Electric Power Commission and its contractors had no right to expropriate easements and compel owners of land to arbitrate on the supposition that the Public Works Act, which has a provision for compensation, was applicable. Sec. 9 of 7 Edw. VII. c. 19 provides that under certain circumstances the Commission shall have the right to proceed in the manner provided by the Public Works Act where the Minister of Public Works takes land and property for the use of the province. Sec. 10 of 9 Edw. VII. c. 19 provides that "in addition to all other powers, the Commission may, by purchase or otherwise, or without the consent of the owners thereof or persons interested therein, acquire, enter upon and take possession of and use a right or easement to construct, erect, maintain and operate transmission lines." Notices of expropriation had been served by the Commission claiming the right to take possession and to arbitrate which notices it was contended were delusive and not warranted, having no statutory authority.

Held, 1. As the jurisdiction of the provincial legislature having been held to be supreme within its own jurisdiction, it is clear that if it choses "to confiscate the farm of the plaintiff without

any compensation there was a perfect right to do so in law, if not in morals."

2. That the reading of s. 10 of the Act of 1909 shews that the words "acquire, enter upon, take possession of," etc., are disjunctive, and cannot be read as if they were "may, if acquired, enter upon and take possession of, etc. The mere act of entering upon is to acquire. The easement contemplated by the statute is a very peculiar right entirely different from the expropriation that takes place where the actual fee of the land is taken and it was the intention of the legislature that this apparently arbitrary proceedings should be placed in the hands of the Commission."

3. As to whether the Public Works Act applies the learned trial judge said: "To invoke the Public Works Act is purely in aid of the plaintiff if they choose to give her the benefit of that Act; that may be the only remedy which she has for her compensation; that is the view that apparently was taken by the solicitor for the Commission. He served a notice under s. 47 of Public Works Act, and if that Act applied by implication to the Hydro-Electric Act, then a claimant himself has his remedy which he may pursue by the arbitration clauses of the Act. If that Act does not apply, so much the worse for the plaintiff, although it is not to be conceived that the legislature of the executive would allow her to go without any remedy or compensation."

4. The defendants have acted by the delegation from the Commission and are not trespassers.

Action dismissed and injunction dissolved with costs.

Moss, K.C., for plaintiff. *Ritchie*, K.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] SPAIN *v.* MCKAY. [Dec. 11, 1909.

Landlord and tenant—Distress and sale—Landlord debarred from purchasing—Costs—Party deprived of.

A landlord who distrains upon the goods of his tenant cannot himself become a purchaser at the sale of the tenant's goods and, should he do so, will be held accountable in damages.

Where no order for judgment is taken and the whole matter is left to be disposed of by the trial judge, the court may make the order for judgment which the trial judge should have made.

The appeal was allowed with costs, but plaintiff was deprived of costs below because of the extravagance of his claims and untenable contentions set up with respect to the nature of his claim and the measure of damages.

Robertson, in support of appeal. *Kenny*, contra.

Full Court.] [Dec. 22, 1909.

HALLISEY *v.* MUSGRAVE.

Sale of goods—Railway ties—Condition as to standard size—Evidence.

Plaintiff supplied to defendant a quantity of railway ties under a contract which called for ties equal to the customary government standard. Subsequently, in response to an enquiry from defendant in relation to an additional supply, plaintiff waited upon defendant and verbally offered to furnish defendant with an additional quantity which defendant agreed to accept. Defendant thereupon addressed a letter to plaintiff embodying his understanding of the arrangement and confirming "contract for 2,000 ties, usual government standard size." This letter was received by plaintiff who thereafter commenced to supply ties, but it appeared that a number of the ties supplied were not of the size specified.

Held, setting aside the finding of the County Court judge, with costs, that considering the previous dealings between the parties and the correspondence and the whole evidence, there should have been a finding that the contract was for the supply of ties of the government standard size.

Robertson, for appeal. *King*, K.C., contra.

Full Court.] LESSER *v.* COHEN. [Dec. 22, 1909.

Arbitration and award—Failure to attend after notice—Attempt to defeat award—Estoppel.

On motion to set aside an award it appeared from the affidavits before the court that one of the parties to an arbitration, anticipating an award against him, purposely absented himself from the final meeting of arbitrators at which a conclusion was to be arrived at, and connived with one of the arbitrators to

do the same, with the view of preventing the holding of the meeting, of which both had notice, and thereby preventing the making of an award.

Held, that it was not open to such party to complain of the award made by the two remaining arbitrators in the absence of himself and the arbitrator who abstained from attending at his instance.

Morrison, K.C., in support of motion. *McCoy*, contra.

Full Court.] [Dec. 22, 1909.

ROYAL BANK *v.* SCHAFFNER.

Contract—Equity running with—Offset—Accounting—Form of action.

Defendants purchased from P. a quantity of saw logs in the Meander River, estimated at 500,000 feet, for the price of $5. per thousand feet, and, in connection with the purchase, accepted an offer of P. to cut and haul the lumber for $3 per thousand additional.

Defendants made advances to P. in connection with the contract and subsequently accepted an order in favour of the plaintiff bank for any balance due P. on account of the logs purchased, and the sawing and hauling thereof after payment of defendants' account.

The quantity of logs in the river fell largely short of that estimated and there was a breach on the part of P. of the contract to saw and haul which made it necessary for defendants to have the work done by others at an increased cost.

Held, that this was an equity running with the contract, and that defendants were entitled to offset the payments made by them resulting from the breach of contract on the part of P.

With respect to another lot of logs there appeared to have been an agreement that P. should do certain work and that defendants should supply funds and that P. should share in any margin after disposal of the lumber.

Held, that the most that P. would be entitled to under these circumstances was an accounting and that plaintiffs could not recover in their action as framed as assignee of P. for lumber sold and services and supplies furnished.

H. D. Mackenzie, K.C., and *H. B. Stairs*, in support of appeal. *Mellish*, K.C., contra.

Full Court.] WINGFIELD *v.* STEWART. [Dec. 22, 1909.

Sale of goods—Statute of Frauds—Evidence of acceptance and receipt.

In an action to recover the price of a motor boat alleged to have been sold by plaintiff to defendant, evidence was given to shew that after the date of the alleged sale, defendant on two occasions took pleasure parties out in the boat, and that he made use of plaintiff's mooring, with plaintiff's consent.

Held (MEAGHER, J., dissenting), that the evidence was sufficient to shew an acceptance and receipt of the boat by defendant within the Statute of Frauds.

Tobin, K.C., in support of appeal. *Power*, K.C., contra.

Full Court.] [Dec. 22, 1909.

SILVER *v.* BURNS ET AL.

Master and servant—Wrongful dismissal—Conditional agreement—Death of party to—Burden of proof.

In an action for wrongful dismissal it appeared that the plaintiff was employed to take charge of a fishing vessel owned by defendants for a specified fishing trip, and that at the time of hiring, a second trip was spoken of, but it was to be conditional upon the result of the first trip, and that defendants, being dissatisfied with the result of the first trip determined that they would not send the vessel upon a second trip, but would lay her up instead.

Held, that defendants were within their rights in doing so, and that plaintiff could not recover.

The contract of hiring upon which the action was brought was made verbally with one of the defendants who had died before the trial and no confirmatory evidence was given on the part of plaintiff.

Held, that plaintiff must also fail on this ground.

O'Connor, K.C., and *Matheson*, in support of appeal. *McLean*, K.C., contra.

Full Court.] DEAN *v.* MCLEAN. [Dec. 22, 1909.

Bills and notes—Defence of illegal consideration—Burden of proof.

The defence to an action on a promissory note was that the note in question was given for money advanced by the plaintiff

with knowledge that it was to be used in an illegal stock jobbing transaction.

Held, by the majority of the court that in order to succeed in this defence it was necessary for the defendant to shew that he was engaged in an illegal transaction and that plaintiff knew when he advanced the money that it was to be used for the furtherance of such transaction, and that in the absence of such evidence there should be judgment for plaintiff for the amount claimed with costs.

MEAGHER, J., held that the judgment appealed from should be affirmed.

W. B. A. Ritchie, K.C., for the appeal. *Rowlings*, contra.

Full Court.] THE KING *v.* LANDRY. [Dec. 22, 1909.

Public schools—Election of trustees—Qualification of voters—Payment of poll tax.

Application for leave to file an information in the nature of a quo warranto against defendant on the grounds that at a meeting of ratepayers called for the election of school trustees, at which defendant was elected, two of the ratepayers who voted for him were disqualified, being at the time in arrears for taxes, and a third, who desired to vote against him, was not permitted by the chairman of the meeting to do so. The evidence failed to support the first point, but it appeared that L., whose vote was rejected had only recently removed into the section and had not been assessed or paid a poll tax up to the date of the meeting, and that, at the meeting, he paid the amount of the poll tax, one dollar, to the secretary and claimed the right to vote under the Education Act, R.S. (1900), c. 52, s. 25, which provides that "on depositing $1 any person who is liable to pay a poll tax and has paid all poll taxes previously imposed, including that of the current year, shall be qualified to vote."

Held, per GRAHAM, E.J., and RUSSELL, J. (DRYSDALE, J., dissenting), that the vote of L. was improperly rejected.

Held, per RUSSELL, J., that nevertheless the case was not to be dealt with in the same way as if it were an election petition, but that the allowance of the writ was discretionary and should be dealt with on grounds of public policy, and it was not in the interest of the public that the election contested should be disturbed, it being morally certain that the result embodied the determination of a majority of the qualified electors.

Wall, in support of application. *W. B. A. Ritchie*, K.C., contra.

Full Court.] IN RE JONES' TRUSTS. [Dec. 22, 1909.

Wills—Devise of land with power of appointment coupled with duty—Sale of land and payment of proceeds to trust company—Effect of—Claim of apportionment—Parties.

The will of B. devised to his daughter N. certain property enumerated to be disposed of in such manner among her children as she should by her last will appoint, and failing such appointment to be divided among such children share and share alike. By a deed of separation entered into between the appellant, one of the children referred to, and her husband, appellant conveyed to trustees all real and personal estate to which she was or might become entitled in expectancy, reversion, etc., under the will of B. "in trust to sell and convert the same into money, etc." The trustees concurred in the sale of certain real estate in which N. had a life estate and the proceeds were paid into the hands of a trust company to be held by them under the terms of the will and subject to the same conditions as the land.

It was claimed on behalf of appellant that the power of appointment given to N. ceased with her connivance in the sale of the property.

Held, 1. The appellant's expectancy, under the facts stated, remained in the same position as before the sale, the only difference being that the interest was in money instead of land.

2. The power given to N. under the will being coupled with a duty, no act on her part could destroy the trust imposed upon the land or the fund realized by the sale and that the trust imposed on the land must follow the fund in the hands of the trust company.

3. Any apportionment of the fund, as claimed, even if appellant's case was in other respects good was impossible, all proper parties not being before the court.

Mellish, K.C., and *F. L. Davidson*, in support of appeal. *W. B. A. Ritchie*, K.C., contra.

Full Court.] [Dec. 22, 1909.

SYDNEY BOAT AND MOTOR CO. *v.* GILLIES.

Sale—Defence of defective condition—Evidence—Admissibility.

On the second trial of an action brought by plaintiff to recover the contract price of a motor boat constructed by plaintiff for defendant, evidence was given to shew that the hull of the boat was not constructed in a workmanlike manner, and

that it would require the expenditure of a certain sum of money to make the seams and planking conform to the terms of the specifications.

Held, that such evidence was not receivable, it appearing that after the boat was completed and tendered to defendant the latter refused to accept delivery, and the boat was suffered to lie for some months exposed to the weather, and that the defects referred to were the result of such exposure and not of any fault in the original construction.

O'Connor, K.C., in support of appeal. *Rowlings*, contra.

Longley, J.—Trial.] [Jan. 6.

SYDNEY LAND AND LOAN CO. *v.* A SOLICITOR.

Solicitor and client—Remuneration—Retainer—Commission—Debentures and interest overdue—Right to retain for—Character of instruments—Relation of debtor and creditor.

Defendant, who acted as solicitor for the plaintiff company in proceedings against R., which resulted in the recovery of a considerable sum of money claimed the right to retain, in addition to the amount of his taxed costs and disbursements, the amount of certain bonds of the plaintiff company held by him and accrued interest which were overdue and unpaid at the time of the recovery of the money in question. He also claimed commission on the amount collected by him. The bonds in question were not secured in any way for the benefit of subscribers, but were rather in the nature of promissory notes, the plaintiff company undertaking to pay to the registered holders the amounts represented by the bonds at the date fixed and until payment to pay interest at the rate fixed.

Held, 1. Defendant, after the maturity of the bonds, was in the position of an ordinary creditor, and as such entitled to retain the amount as claimed.

2. The money received by defendant from R. was not to be regarded as being held by him in trust, and that he was entitled to deduct from it the amount due him.

3. *Quære*, whether the fact that defendant was a director of the company and as such aware of its financial position would not debar him from availing himself of the remedy that would be open to an ordinary creditor.

4. As to the amount claimed for commissions, there is no principle of law which justifies a solicitor in the absence of spe-

cial contract in retaining commissions on amounts received by him in his capacity of solicitor.

W. B. A. Ritchie, K.C., for plaintiff. *O'Connor,* K.C., for defendant.

Longley, J.] DOMINION COAL CO. *v.* MCINNES. [Jan. 12.

Overholding tenant—Notice and failure to appear—Proceeding ex parte — County Court judge — Jurisdiction — Order to review proceedings refused.

Defendant, a workman in the employ of the plaintiff company occupied one of the plaintiffs' houses under a lease which provided that his tenancy should cease when he left the company's employ. Defendant left the employ of the company on strike July 6th, 1907, and proceedings were begun under the Overholding Tenants Act, R.S. (1900) c. 174, in September following, which resulted in an order in plaintiff's favour being made by the County Court judge for District No. 7. On application for an order requiring the judge of the County Court to send up his proceedings for review,

Held, 1. While the order under s. 6 of the Act is in the nature of a certiorari it must be regarded as a special provision for a specific purpose and it was not the intention that it should issue on mere application, but that the powers of review vested in the court should not be exercised unless upon reasonable and substantial grounds.

2. A variance between the lease and the notice, in the description of the location of the house was not an irregularity calling for review where the notice was served upon defendant in the house in which he was living and he could have no difficulty in knowing the premises meant.

3. Notice given when defendant had been overholding for some time was within the terms of the Act.

4. Where defendant refused to appear after notice the judge of the County Court had jurisdiction to proceed ex parte.

5. Plaintiff company did not lose its right to proceed under the Act by having permitted defendant to remain on the premises for some months after he had quit work.

W. B. A. Ritchie, K.C., in support of application. *L. A. Lovett,* contra.

Full Court.] THE KING *v.* DAVID. [Jan. 17.

Public Health Act—Removing flag or placard from house where infectious disease exists—Conviction for—Form of.

Defendant was convicted, on the information of the health officer, of a violation of the provisions of the Public Health Act, R.S. (1900) c. 102, s. 48, for that he being the proprietor of a house in which an infectious disease existed did not display and keep displayed a yellow flag or placard, during the continuance of such disease, after being directed by the Board of Health so to do. The conviction imposed a fine of $5 and costs "to be paid and applied according to law."

The evidence shewed the existence of an infectious disease in the house, and that a quarantine flag was put up under the direction of the Board of Health and that it was removed by a member of defendant's family.

Held, affirming the judgment of the County Court judge for district No. 6, that defendant was properly convicted.

Per GRAHAM, E.J., concurring, that the conviction should be amended by providing for payment of the costs of the informant and that the County Court judge's order affirming the conviction be amended by inserting a provision that the costs be paid within 30 days.

J. A. Fulton, in support of appeal. *J. L. Mackinnon*, contra.

Full Court.] [Jan. 19.

OVERSEERS OF THE POOR *v.* STEVENS.

Poor Relief Act—Support of pauper—Liability for—Directions as to mode of relief—Requirements as to past expenditures.

Plaintiffs as overseers of the poor sought to recover against defendants, the father and grandfather respectively of E. M. a pauper, for moneys paid, laid out and expended by plaintiffs as such overseers for the relief and maintenance of the pauper and for services rendered, under the provisions of the Poor Relief Act, R.S. (1900) c. 50, s. 25.

The right to recover was based upon a report of the poor committee of the municipal council made to and adopted by the council regarding the support of the pauper in which the committee recommended that the husband or father of the pauper, if able, be called upon for her maintenance.

Held, that in order to recover, there must be a direction as to the manner in which the pauper is to be relieved, and that

in the absence of such direction and a refusal, the action could not be maintained.

Held, also, that the provision of the statute referred to did not cover a claim for past expenditures.

Chesley, in support of appeal. *F. W. O'Connor,* K.C., contra.

Russell, J.] SILLIKER CAR CO., LTD. *v.* EVANS. [Jan. 25.

Company—Subscription to stock—Condition—Removal of name from register.

Defendant was solicited to take shares in a proposed company by H., who had been named a member of a committee appointed to obtain subscriptions to the stock of the company. H., acting under the alleged authorization of defendant to "put him down for $200" entered his name upon the subscription paper for that amount (defendant being unable to write). Defendant was subsequently notified by the company that the shares applied for had been allotted to him and a call was made for payment of a part of the amount due. The notice of allotment was given and the call made April 9th, 1907, and on May 6th, 1907, defendant wrote the company claiming that his consent to take shares was subject to a condition which had not been fulfilled and repudiating any liability in connection with the subscription.

Held, that as the representative of the company thought defendant was agreeing absolutely to take shares while defendant thought he was only to take them in the event of the stipulated condition being performed, there was no consensus ad idem between the parties and no contract—not even a voidable contract—and under the authority of *Baillie's* case (1898), 1 Ch. 110, defendant was entitled to have his name removed from the register of the company.

Also that the delay mentioned was not fatal to defendant's right to apply to have his name removed, he being entitled to wait a reasonable time to see whether the condition would be performed.

Allison, for plaintiff. *Terrell,* for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] KING v. LAW. [Dec. 6, 1909.

Criminal law—Libel—Evidence to show that accused cherished ill-feeling towards person libelled or her relatives—Inference from similarity of style and use of common terms in libellous and admitted writings—Proof of handwriting by evidence of experts only.

1. At a trial for criminal libel, the prosecutor should not be allowed to give evidence of acts of hostility on the part of the accused towards the prosecutor or relatives leading only to the inference that the accused cherished feelings of ill-will towards the prosecutor; and, if such evidence has been admitted, although without objection, the jury should be told that they should give no weight to it.

2. A comparison of style and common forms of expression in the libellous and admitted writings should be by experts or skilled witnesses and, without such evidence, the trial judge should not invite the jury to draw any inference from such similarity in style or expressions.

Scott v. *Crerar*, 14 A.R. 152, followed.

Per PERDUE, J.A.:—When the only evidence of the handwriting of the accused is that of experts, and an equal number of experts contradict their opinions, the accused denying the authorship on oath, the jury should be told that the prosecutor had failed to establish the guilt of the accused.

Patterson, K.C., Deputy Attorney-General, for the Crown. *Dennistoun*, K.C., for the prisoner.

Full Court.] [Dec. 13, 1909.

TIMMONS v. NATIONAL LIFE ASSURANCE CO.

Practice—Particulars of malice in libel action—Interrogatories.

Where the defendant has pleaded privilege in an action for libel, and anticipates that plaintiff will endeavour to prove malice to rebut the privilege, he is not entitled to an order requiring the plaintiff to furnish particulars of express malice charged by the plaintiff against the defendant as affecting the publication com-

plained of. Odgers on Libel and Slander (4 ed.), p. 600, and *Lever* v. *Associated Newspapers* (1907) 2 K.B. 626 followed.

When the defendant has not pleaded justification in an action for libel, he is not entitled to administer interrogatories asking the plaintiff if he did certain acts with a view to shewing that the statements in the alleged libel were true.

Deacon, for plaintiff. *Robson*, K.C., for defendants.

Full Court.] RE SOMMERVILLE. [Jan. 17.

Liquor License Act, R.S.M. 1902, *c.* 101, *s.* 119—*Jurisdiction of County Court judge to entertain application to cancel license —County Court Judicial Division lying partly in one Judicial District and partly in another.*

Under s. 119 of the Liquor License Act, R.S.M. 1902, c. 101, if the licensed premises do not lie within the Judicial District for which the County Court judge is judge, he has no jurisdiction to entertain an application to cancel the license, although he is the judge for a County Court Judicial Division composed for the most part of territory in his Judicial District with the addition of a number of townships in the Judicial District in which are the licensed premises.

Andrews, K.C., for applicant. *Taylor*, K.C., contra.

Full Court.] ROBINSON *v.* C.N.R. Co. [Jan. 17.

Railway company—Railway Act, 1903, *ss.* 42, 214, 242, 253—*Spur track facilities—Damages for refusal to supply—Limitation of lien for bringing action for—Board of Railway Commissioners—Jurisdiction of.*

Appeal from decision of METCALFE, J., noted, vol. 45, p. 612, dismissed with costs.

Hudson, for plaintiff. *Clark*, K.C., for defendants.

KING'S BENCH.

Mathers, J.] [Dec. 20, 1909.

DOMINION EXPRESS CO. *v.* CITY OF BRANDON.

Injunction—Levy of illegal tax by municipality—Interim injunction—Other adequate remedy.

A party who brings an action against a municipality for a declaration that he is not liable for a tax imposed upon him,

and for an injunction to restrain the attempted levy of such tax, is not entitled to an interim injunction to restrain such levy, as he has another adequate remedy, namely, to pay the tax under protest and sue to recover it back. Joyce on Injunctions, par. 1189; *Dows* v. *City of Chicago*, 11 Wall. 108; *United Lines Telegraph Co.* v. *Grant*, 137 N.Y. 7, and *C.P.R. Co.* v. *Cornwallis*, 7 M.R. 1, followed; *Central Vermont Railway Co.* v. *St. John*, 14 S.C.R. 288, distinguished.

Matheson and *Hudson*, for plaintiffs. *Foley*, for defendant.

Macdonald, J.] IN RE NORTHERN CONSTRUCTIONS. [Jan. 10.

Company—Winding-up—Contributories—Allotment of promotion stock—Declaration of dividend impairing capital.

Held, 1. An allotment of $3,000 promotion stock in a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, as fully paid-up stock, made after incorporation in favour of one of the incorporators whose original subscription was for $4,000, for the alleged consideration of a transfer of good-will, will not, in a proceeding under the Dominion Winding-up Act, be any defence against an application by the liquidator to place such subscriber on the list of contributories for the full amount not actually paid in cash. *In re Jones & Moore Electric Co.*, 18 M.R. 549, followed.

2. The declaration of a dividend when the company is insolvent, contrary to s. 32 of the Act, and the application of such dividend in payment of shares in full cannot be allowed to stand, and in the winding up, the shareholders are entitled to no credit in respect thereof.

Anderson, K.C., for the liquidators. *Haffner*, for creditors. *Jameson*, *Higgins* and *Manahan*, for respective shareholders.

Mathers, J.] BUCHANAN v. WINNIPEG. [Jan. 10.

Contract for building—Provision for cancellation when contractor fails to make satisfactory progress—Completion of work by proprietor—Who entitled to difference when cost of completion less than balance of contract price.

After the plaintiff had done a considerable part of the work under a contract with the defendants for the building of a bridge he became unable to proceed with it, and the defendants under

a clause in the contract declared it forfeited and completed the work themselves at a cost less by about $4,000 than the unpaid balance of the original contract price of the whole work and took over and used the bridge.

That clause provided for an indemnity to the defendants against all loss occasioned by the default of the contractor also that if the damage to the defendants resulting from such default should be less than the sum due to the contractor under the contract, then the difference should be paid to the contractor. It also provided that the contractor should have no claim for payment in respect of the work done after the cancellation of the contract.

Held, notwithstanding, that the plaintiff was entitled to the full balance of the contract price less the costs and expenses incurred by the defendants in completing the work.

Elliott and *Deacon,* for Buchanan. *T. R. Ferguson,* K.C., for Stewart. *Hunt* and *Auld,* for defendants.

Mathers, J.] [Jan. 10.

CANADA FURNITURE CO. *v.* STEPHENSON.

Principal and surety—Guaranty—Release of one of two or more joint and several guarantors—Plea of non est factum—Liability of wife under document signed at request of husband.

Held, 1. If an instrument in the form of a joint and several guaranty to a number of creditors is altered after the signature of one of the guarantors by inserting the name of an additional creditor without the knowledge or consent of such guarantor, such alteration vitiates the instrument not only as against him but as against all the others who have signed, although such others signed after the alteration and with knowledge of it. *Ellesmere Brewing Co.* v. *Cooper* (1906) 1 Q.B. 75 followed.

2. A person who signs a document knowing its general character cannot succeed on a defence of non est factum, because it contains larger powers than he was led to believe by the person who induced him to execute it, or because he executed it without knowing or asking what it contained.

National v. *Jackson,* 33 Ch.D. 1, and *Howetson* v. *Webb* (1908) 1 Ch. 1 followed.

It is otherwise, however, when the document turns out to be of a character essentially different from what he supposed it to be, as in *Foster* v. *McKinnon,* L.R. 4 C.P. 704, and *Bagot* v. *Chapman* (1907), 2 Ch. 222.

3. A creditor cannot enforce a guaranty given by a married woman at the request of her husband at a time when, to the creditor's knowledge, she was not in a condition to take much interest in any document presented by her husband to her for signature, if it is proved that, as a matter of fact, the husband did not explain the nature of the document to her and she signed it without asking any questions, supposing it was something to assist her husband in his business.

Chapman v. *Bramwell* (1908) 1 K.B. 233, and *Turnbull* v. *Duval* (1902) A.C. at p. 434 followed.

4. When a married woman is induced by fraud and misrepresentation on the part of her husband and son to give her husband a power of attorney containing provisions of which she was not aware, under circumstances that should have put the husband's creditors upon inquiry as to whether deception was not being practised upon her in the matter, such creditors will not be allowed afterwards to enforce as against her a guaranty signed in their favour by the husband in her name under such power of attorney. *National* v. *Jackson*, 33 Ch.D. 1, followed.

Hoskin, K.C., and *Montague*, for plaintiffs. *Andrews*, K.C., *H. A. Burbidge*, *Fullerton* and *Foley*, for respective defendants.

Bench and Bar.

Judicial Appointments.

Charles Archer, of Montreal, K.C., to be puisne judge of the Superior Court of the Province of Quebec, vice Hon. Mr. Justice Curran, deceased. (January 11.)

Hon. William Alexander Weir, of Montreal, K.C., to be puisne judge of the Superior Court of the Province of Quebec, vice Hon. Mr. Justice Champagne, transferred to the District of Ottawa. (January 11.)