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LOCAL OPTION BY-LAWS IN ONTARIO.

At the present time many municipalities are proposing to submit local option by-laws to the electors. If carried, these by-laws may be attacked for faults either antecedent to, or during the vote, or before the final passage by the council. If the by-law is apparently defeated there is machinery provided by which the courts can compel the passing by the council of the by-law, provided there has, in fact, been a majority of three-fifths of the votes in its favour. But if there is a failure to reach that majority local option is dead for three years. It is in the interests of the community that such a measure should be so adopted or rejected as to leave no loophole for attack. Nothing can do more harm than a victory or a defeat gained in such a manner as to lead to a suspicion that the apparent result is not the real will of the electors.

The most important legislation on the subject is that passed in 1906 (6 Edw. VII. c. 24, as amended by 7 Edw. VII. c. 46, s. 11, and by 8 Edw. VII. c. 54, ss. 10 and 11). The effect of the 1906 statute is to give 25 per cent. of the total number of persons appearing upon the last revised voters' list the power to compel the submission of the by-law. If a majority of three-fifths of the electors voting is in favour of local option, the council is bound to pass the by-law, and no by-law preceded by the petition referred to can be repealed for three years and then only by a like three-fifths majority. The petition must be presented before the 1st of November by filing it with the clerk of the municipality (7 Edw. VII. c. 46, s. 11). There is another sort of by-law, one submitted sua sponte by the council to the electors, as to which the power to compel its final passage does not exist, and which may be repealed with the approval of a majority of the electors. To this by-law, s. 373 is applicable

and Mr. Justice Anglin in *Re Dewar and East Williams* (1905) 10 O.L.R. 463, has expressed the opinion that this section is not imperative. That case also decides that the council may pass the by-law notwithstanding that they have refused to do so at a previous meeting. But it would seem that the final passing must be within the six weeks after its approval by the electors (s. 373, Municipal Act, 1903).

By-laws may be either for total prohibition, that is, may include both shops and taverns; or for partial prohibition, that is, may be confined either to shops or to taverns: see *Frawley and Orillia* (1907) 14 O.L.R. 99; *Re Hickey and Orillia* (1908) Divisional Court. In the opinion of one learned judge if a by-law is passed affecting shops only, no total prohibition by-law can then be passed: see *Re Hickey and Orillia*, ante, but the effect of both the Orillia cases gives an apparent majority against that view.

The day for voting on local option by-laws is now municipal election day, though the polling subdivisions need not be identical, and indeed must not be, if a larger number of voters than can be conveniently accommodated is included in the municipal polling subdivision: *Wynn* v. *Weston* (1907) 15 O.L.R. 1, and *Re Hickey and Orillia*, ante.

If a by-law is passed by the requisite majority then notwithstanding its quashing by the court either for technical or substantial reasons, no liquor licenses can be issued without the written consent of the Provincial Secretary, and where such consent is withheld, leave to appeal against the quashing has in one case been refused apart from the merits: see *Re Hickey and Orillia* (1908), Osler, J., in Chambers, not reported.

The provisions of the Municipal Act regarding the preliminaries to the submission to the electors are found in ss. 338 et seq. of the Act: see *Sinclair* v. *Owen Sound* (1907) 39 S.C.R. 239.

Those preliminaries are the first and second reading of the by-law by the council, which by-law shall (1) fix the day and hour and places for taking the vote, which may now be done

by stating that they shall be the same as for the municipal elections (4 Edw. VII. c. 22, s. 8) but still having regard to the opinions expressed in *Hickey and Orillia*, ante, (2) name a deputy returning officer for each poll; (3) fix a place and time for the clerk to sum up the votes; (4) fix a time and place for the appointment of persons to attend at the various polling places and at the final summing up by the clerk on behalf of promoters and opponents of the by-law. The omission from the by-law of the time and place for summing up the votes renders the by-law invalid: *Re Bell and Elma* (1906) 13 O.L.R. 80, and see and compare *Coxwell and Henshall* (1908) not reported.

The by-law must be first advertised n ' less than three nor more than five weeks before election day: *In re Henderson and Mono* (1907) not reported, and *In re Armstrong and Toronto* (1889) 17 O.R. 766, a first publication more than five weeks before election day, when continued and adopted invalidated the by-law. In *Re Vandyke and Grimsby* (1906) 12 O.L.R. 211, a similar first publication which was abandoned was held to have no such effect. These weeks are ordinary weeks, not periods of seven days excluding Sundays and holidays: *Re Armour and Onondaga* (1907) 14 O.L.R. 606, and *Re Duncan* v. *Midland* (1907) 16 O.L.R. 132.

Publication must be made for three successive weeks by inserting a true copy in some public newspaper published either (1) in the municipality; (2) or in the county town; (3) or in an adjoining or neighbouring local municipality. And where it is to be published must be determined by resolution of council. A copy of the by-law must also be posted up at four or more of the most public places in the municipality. This should be done, of course, before the voting.

Care must be taken that the copy is a true copy and the clerk must append to the copy so published and posted up a certificate (1) that it is a true copy, (2) that the by-law is the one that has been taken into consideration by the council, (3) and that the same will be passed, if assented to by the electors, after one month from the first publication, (4) and giving the

date of first publication, (5) and stating the day, hour and place where the vote will be taken. Care must also be taken to see that the first publication gives room for the month to expire and yet not to be more than five weeks before the vote.

After the day for voting has been fixed the clerk must have the ballots printed in the form given in 8 Edw. VII. c. 54, s. 10. The head of the municipality must also, at the time and place named in the by-law, appoint in writing two persons to attend at the final summing up by the clerk and one person to attend on behalf of each side at each polling place. Such person must, before appointment, sign a declaration before the head of the municipality in the form given in sched. "K." to the Municipal Act that he is interested in promoting or opposing the by-law.

The taking of the vote is conducted in the usual way. The voters are those entitled to vote at municipal elections: *Re Croft and Peterboro* (1890) 17 A.R. 1, and each elector has one vote: sec. 158, and *Re Sinclair* v. *Owen Sound*, supra.

"Electors" are defined in the Municipal Act (3 Edw. VII. c. 19, s. 22, s.-s. 5) as the persons entitled for the time being to vote at any municipal election or in respect to any by-law, resolution or question. Those answering that description are detailed in ss. 86, 88, 89, 92, 93, while s. 355 is applicable where the ward system prevails but is not effective to give a double vote. It relates solely to voting on money by-laws: see *Sinclair* v. *Owen Sound* (1906) 12 O.L.R. 488, (1906) 13 O.L.R. 447. (1907) 39 S.C.R. 236.

The voters' list is the one referred to in s. 148 and following sections. The provisions of s. 348 are meaningless as they appear at present, having regard to the amendment 8 Edw. VII. c. 48, s. 4, unless they provide a list of those income voters whose names appear on the last revised assessment roll—which and possibly those who, having disfranchised themselves, may be different from that on which the voters' list is based—become entitled to vote under section 38. See views quoted and expressed in *Re McGrath and Durham* (1908) not reported.

Deputy returning officers and poll clerks may vote if they

provide themselves with a certificate under s. 347, and agents if given a certificate under s. 163.

The right of deputy returning officers to vote has been held in the negative by Riddell, J., in *Re Armour and Onondaga*, ante, and in the affirmative in *Re Saltfleet* (1908) 16 O.L.R. 293, and in *Re Joyce and Pittsburg* (1908) 16 O.L.R. 380. Ballot boxes may be used for concurrent voting for other objects: *Re Duncan* v. *Midland* (1907) 16 O.L.R. 132.

Voting takes place as at municipal elections (see s. 351). The provisions of the Act applied by that section include those from s. 138 to s. 206, except s. 179, "so far as the same are applicable and except so far as is herein otherwise provided." Among other things these provide for the delivery to every deputy returning officer of directions for voting which are to be posted up inside and outside of the polling place (s. 147) of certificates of the dates of the last day for making complaints to the county judge with respect to the voters' list and of the day on which the assessment roll was finally revised and corrected (s. 156).

The mode of voting is set out in s. 168, and while a voter is in the compartment provided in each polling place (see s. 145) no other person shall be allowed therein or to be in any position from which he can observe how the ballot paper is marked (s. 169). This has been held important in *Hickey* v. *Orillia*, ante.

The voter must leave his ballot with the deputy returning officer, but putting it in the ballot box himself is not a forfeiture of the right to vote: see *Duncan* v. *Midland* (1907) 16 O.L.R. 132.

The summing up of the votes takes place at the close of the poll and the statement to be made by each deputy returning officer is set out in s. 359 and the latter's duties are detailed in s. 360, 361, 362 and 363. Then the clerk of the municipality at the time and place mentioned in the by-law, in the presence of those appointed to be present, sums up the numbers of votes and forthwith thereafter certifies to the council the result (s.

364) but he has no vote. The by-law must receive a majority of three-fifths of those voting, otherwise it is defeated.

After the clerk has certified the result to the council a period of two weeks should be allowed for the scrutiny under s. 369, before the by-law is read a third time even although no one asks for such a scrutiny. This is to avoid trouble in view of the decision of the Court of Appeal in *Re Duncan and Midland,* ante. But the point is still doubtful as the Divisional Court reversed Mulock, C.J., on this point and the Court of Appeal was equally divided, Moss, C.J., only agreeing in the result which was to dismiss the appeal from the Divisional Court. Mulock, C.J., in *Re Coxwell and Henshall* (1908) not reported, has since refused to give effect to that objection.

Section 204 is applicable to the carrying of these local option by-laws. It provides in effect that the vote which gives the assent of the electors shall not be declared invalid by reason of a non-compliance with the provisions of the Municipal Act (1) as to the taking of the poll, (2) the counting of the votes, (3) as to any mistake in the use of the forms, (4) or by reason of any irregularity, if it appears to the court that the voting was conducted in accordance with the principles laid down in the Act and if such non-compliance, mistake or irregularity did not affect the result of the voting.

This provision is most important. The courts have generally striven to apply it where fair attention has been given to the conduct of the voting and no one has been prevented from voting. The following have been held to be within the saving provisions of this section.

1. No newspaper designated in the by-law: *Dillon* v. *Cardinal* (1905) 10 O.L.R. 371; and no places specifically designated for the voting: *Re Coxwell and Henshall,* ante.

2. Persons allowed in the polling place who were not entitled to be there: idem and *Re Sinclair* v. *Owen Sound* (1906) 12 O.L.R. 488; *Re Rickey* v. *Marlborough* (1907) 14 O.L.R. 587, but see *Re Hickey* v. *Orillia,* ante, a case strikingly similar on the facts to the *Cardinal Case.* But the Divisional Court held in the *Orillia Case* this offended against the principle of secrecy.

3. Non-performance by the deputy returning officer of various duties required of him at and after the close of the poll (idem and *Re Eickey and Marlborough*, ante, and other cases noted below).

4. Irregular voters' lists: *Re Sinclair* v. *Owen Sound* (1906) 12 O.L.R. 488; *Re Duncan and Midland* (1907) 16 O.L.R. 132.

5. Omission to enter the electors as voting: idem, and *Sinclair* v. *Owen Sound*, ante.

6. Declarations missing or not taken: idem.

7. Defaulters' list not supplied: idem.

8. Certificates not furnished to deputy returning officer: idem.

9. Oath of secrecy not taken: idem, and *Wynn* v. *Weston* (1907) 15 O.L.R. 1.

10. Number who voted not certified by deputy returning officer: idem.

11. Publication of by-law defective: idem, and *Re Robinson and Beamsville* (1906); (1907) not reported.

The following have been held not to be within the curative provisions of s. 204:—

1. Omission to post directions to voters: *Re Salter and Beckwith* (1902) 4 O.L.R. 51.

2. Want of posting up of copies of by-law: idem.

3. Illegal voting if it affects the result: *Re Cleary and Nepean* (1907) 14 O.L.R. 392.

4. Want of proper publication: *Re Cartwright and Napanee* (1905) 11 O.L.R. 69; *Re Rickey and Marlborough* (1907) 14 O.L.R. 587.

There are a few further points to be noted: In *Re Dillon and Cardinal* (1905) 10 O.L.R. 371, Mr. Justice Magee and the Divisional Court were of opinion that in voting on by-laws there is no obligation to secrecy upon the subject of requesting or depositing a ballot and that the presence of other electors in the polling place who are voting is unobjectionable. This is not the view of the Divisional Court in *Re Hickey and Orillia*, ante, but as the latter case was not fully argued on this point, the

whole question of the amount of secrecy required and the effect of its partial absence needs thorough consideration.

In *Re Armour and Onondaga* (1907) 14 O.L.R. 606, Riddell, J., says the proper method of deducting votes improperly cast was that of deducting those votes from the total and then taking three-fifths of the remainder.

The question of how far the court will go into the right of the individual voters to vote has been much debated. In *Re Coe and Pickering* (1865) 24 U.C.R. 439, the court seem to have thought a single judge might do it, but not the court in banc. In *Re Leahy and Lakefield* (1906) not reported, and in *Re Young and Binbrook* (1899) 31 O.R. 108, the court went behind the voters' list and held the voting to be illegal because of improper votes or of improper omissions from the list.

In *Re Salter and Beckwith* (1902) 4 O.L.R. 51, Britton, J., decided that the voters objected to were qualified. In *Re Dillon and Cardinal*, ante, Magee, J., thought illegal votes were a ground for quashing; and Mabee, J., in *Re Sinclair* v. *Owen Sound* (1906) 12 O.L.R. 166, had no doubt that it was an element for the consideration of the court on a motion to quash. The Divisional Court discussed the question and decided that even if proved and the votes deducted, it did not affect the result. Mabee, J., in *Re Cleary and Nepean* (1907) 14 O.L.R. 392, decided that the foregoing cases bound him to consider the illegality of votes. Riddell, J., in *Re Armour and Onondaga* (1907) 14 O.L.R. 606, went into the question of qualification at length and deducted those improperly voting, but he limited his enquiry to those bad or good by reason of circumstances arising after the final revision of the roll, holding himself bound by *Reg. ex rel. McKenzie and Martin* (1897) 28 O.R. 523. In *Re Saltfleet* (1906) 16 O.L.R. 293, the Divisional Court laid down the rule that the voters' list is final and that all that can be considered by a judge upon these applications are the cases excepted by the Voters' List Act itself, that is, those guilty of corrupt practices, those who have become non-resident after the list was revised, and persons not qualified or competent to vote

under the Voters' List Act, 7 Edw. VII. c. 4, s. 24, and (unless the change in the statute renders *Wynn* v. *Weston* (1907) 15 O.L.R. 1, inapplicable) also those added by the county judge under 8 Edw. VII. c. 4, s. 24. *Re Salifeet* was followed in *Re Mitchell and Campbellford* (1908) 16 O.L.R. 578, and by a Divisional Court in *Re McGrath and Town of Durham*, decided November 20, 1908, not reported.

The voters' list cannot be added to, and, semble, s. 348, in its present form applies only to money by-laws: *Re Sinclair and Owen Sound* (1906) 13 O.L.R. 447; *Re McGrath and Durham* (1908) not reported.

The effect of the above decisions would seem to confine "electors" to those on the voters' list. It is possible that this may be too narrow a view and it may do injustice if the voters' list is based upon a prior assessment roll and not upon that which is actually the last one revised, the electors on which have the right to compel the submission of the by-law.

FRANK E. HODGINS.

LAW REFORM.

PART III—COSTS.

The above sub-title comes very close to the subject of law reform, though as intimated before, no attempt will be made to present it as one within the range of any immediate legislative action; but rather as a matter for consideration by members of the profession in order to see whether in the interests of both public and profession some general principles cannot be formulated which will bring the remuneration paid to solicitors somewhat more nearly to present-day requirements so that no more and no less than the value of the solicitor's services may be paid for every piece of work that he does. If the subject of settlements is one barren of authority, the question of costs is a department teeming with precedents; but so far as they deal with tariffs such precedents are perhaps somewhat foreign to

this article. The first principle to bear in mind is that costs are payment for lawyer's services; the means by which he makes his living and that if the practice of law ic to be decently and honourably conducted, it must offer to good men a fair and liberal return. For solicitors in England their fees were never looked upon as honoraria, they were always the lawyer's "wages" for work done and something to which he was entitled by right (see *Germyn* v. *Rolls*, Cro. Eliz. 425 to 459; *Thursby* v. *Warren*, Cro. Car. 159), and in our country where the two professions are combined the right to recover fees is expressly given by statute. No sensitiveness, therefore, on the subject such as was manifested by Erle, C.J., in *Kennedy* v. *Brown*, 13 C.B.N.S. 677, should preclude us from considering the payment of fees in their true light, namely, as the lawyer's means of livelihood, and, when this is applied to modern conditions and cost of living, we shall at least have a sensible view point from which to observe this important topic.

It should next be pointed out that no system of fees can be satisfactory that does not consider the various elements of cost that enter into the conduct of this as of any other business or manufactory. A lawyer would make much fairer charges which he could more fully justify if to each piece of work done he could allot approximately the initial cost incurred in carrying it out. The elements of rent, taxes, wages, office expenses and interest on capital are just as real and just as insistently present in his business as in any mercantile pursuit, and no lawyer can say that his work has cost him nothing, because he has paid no cash for government fees, stamps or other out of pocket disbursements. If it were realized that everything done has cost money and if the amount of cost could be allotted in each case (and there is nothing to prevent it) a lawyer would know just how much he is giving a client when he undercharges or does work for nothing, and how much, therefore (and this is most important) he is overcharging some one else in order to bring his receipts up to a point that will enable him to live. It is not pretended that work must not sometimes be done for nothing

or for less than its value. It is the privilege of every professional man to help those who would otherwise be without legal assistance; but he ought to know what his charities are costing him and ought to see to it that his generosity is not visited upon some other client whose means may enable him to pay for the work done not for him only but also for someone else. Similarly just as the man who sells goods below cost is an object of suspicion and a menace to his confrères in the business, so a man who habitually undercharges is a danger to the profession for as he must live, his livelihood is necessarily derived from some other and possibly some questionable source or else he is bringing the standard of living down to a point which will necessarily drive better men into some more remunerative employment where they can live and do business according to higher notions of propriety than the rewards in law will permit. One of the first reforms suggested, therefore, is some system of charges that will enable lawyers to ascertain and to charge according to the original cost of the work done. It is scarcely necessary to point out that our tariff absolutely ignores this. The only disbursements provided for are such as are paid out of pocket, and many things that are nothing but disbursements, such as the copying of documents, can only be charged for according to arbitrary fees. Now the copying of documents is a disbursement pure and simple, involving generally the purchase of a typewriter, the use of so much paper, the payment of so much wages and the interest upon capital invested in office fixtures and required in the work; and the first essential would be to find out what, under modern conditions, is the cost of such work and what is a fair profit to the solicitor for his share in the production of the document. Much of the work done in an office has similarly its own initial cost, but probably such a thing is never considered in making charges and it is certainly never contemplated in our tariff.

The tariff itself is not only extremely antiquated but is very partial. It makes no provision for work done in the criminal courts, for the vast amount of work done in connection with

dealings in land or with companies and it has many charges such as fees on orders, term fees, and other charges made in litigation which have no real connection with the work done in an office. Then the necessity for rendering itemized bills for work done with their paltry charges for letters, attendances and postage have been the subject of constant ridicule and criticism, and it is safe to say that almost every bill rendered as required by the tariff is unintelligible and annoying to the average layman. No criticism of the habit of making charges is offered. Some record of work done is necessary and such records should unquestionably be carefully kept; but it is submitted that in most case the results merely of that record need in the first instance be furnished the client and those only in a condensed form.

In practice lawyers' bills are not usually excessive, nor are they generally or even frequently disputed and solicitors will probably find that criticism is disarmed rather than invited by rendering bills containing only a short summary of the work done, a reference to the disbursements, if they are not merely negligible, and a lump sum for fees. It is probably the experience of many that such bills sent with some regularity, on half a sheet of paper are less frequently criticized than the bulky document containing every item, which from the labour involved in its preparation, leads frequently to such a delay in rendering it as to itself create difficulty when at last sent out. Itemized bills will, perhaps, always be necessary for purposes of taxation or suit (though it is submitted that even for these objects they might be much simplified), but few bills are either sued or taxed, and for practical purposes a short summary is a great inducement to solicitors to render bills promptly. Clients too are better pleased, and if it could be made a practice to render bills either immediately the work is done, or at the end of the month in which it is completed, an immense amount of trouble would be saved and much money gained, for a bill promptly rendered is a bill more likely to be promptly paid, while lawyers will find as merchants do, that bills long delayed in their offices before rendering will be paid also in a casual manner and that

other claims upon the debtor's purse will receive first consideration.

The "account rendered" habit is also a good one. It consists in keeping a list of all accounts rendered in a book devoted to that purpose. It shews the date of sending the account, the name of the debtor and the amount, and has spaces to shew the dates of payment and amounts paid. It is gone over at regular intervals, say at the end of each month, and short reminders may be sent out shewing the date rendered, and the amount, etc., as follows:—

John Smith, Esq.,
In account with

. . . . . .

1908		Solicitors, etc.
June 30th.	To account rendered	$30.00

Dated Nov. 30th, 1908.

This is frankly mercantile, but sensible, and in no way unprofessional, nor does it offend anyone in ninety-nine cases out of one hundred; while it assists wonderfully in putting a lawyer's finances upon a sounder basis and removing one incentive to overcharging or improper dealing with funds by insuring a somewhat more prompt return for work done. Such simple practices are not by any means beneath the consideration of the profession, for where a man is fair to himself and his partners in the matter of bills and payments, he will have that much less temptation to be unfair or unscrupulous in dealing with his clients. One addition to our tariff might well be some recognized standard of fees for honest, though unsuccessful efforts, to settle or shorten litigation. No one denies the importance of such work, but our tariffs only permit the recovery of costs between party and party where such attempts to settle have borne fruit. Any extension of the rule, unless carefully safeguarded, might be made the subject of great abuses, but where one party succeeds in drawing up on paper a feasible scheme which will reduce costs and submits it to the other side, the expenses thereby incurred might well be made part of the taxable costs between party and party, unless the other side has

some good reason to shew for declining it. Such costs might properly be added to the bill of the successful party where the proposal comes from him or deducted from his bill where it emanates from the opposite side and has been rejected.

One matter which has been already agitated a good deal in the profession is the question of drawing up some scale of fees for the work done in the organization of companies and the ordinary transactions in real estate such as the purchase and mortgage of lands. There is no tariff expressly covering these matters and in the case of companies there is no general experience such as will accurately guide a solicitor engaged in such matters. Various firms make different charges; in all cases probably based, to some extent, upon the amount involved in the transaction and the responsibility incurred, as well as upon the work actually done, and it is a remarkable thing that such bills scarcely, if ever, appear before a taxing officer on solicitor and client taxations. These matters have been considered by a Committee of the County of York Law Association, but no report has yet been made.

Real estate agents have a recognized commission pretty well adhered to by them. This commission is generally two and one-half per cent. on the amount involved, and is based largely upon the fact that no charge is made unless a deal is consummated. A lawyer's work is usually just as great and the responsibility much greater, but he expects to receive his fee whether the deal is closed or not, and there is theoretically no element of uncertainty in it. the fees, therefore, should not be as high. In the writer's judgment one or two difficulties which will be encountered in fixing fees at a percentage of the amount involved in the case of real estate transactions is the fact that people may be tempted in the larger transactions to suggest a fee which, while based somewhat upon the responsibility, will be disproportionate to the amount of work required. It would probably be found, however, to be of great assistance to the rank and file of the profession if a general scale of charges for work of this kind could be arrived at, based in all cases upon a

percentage; and while there might be some objection from the larger and more important firms to depart from practices which they have found to be satisfactory, both to themselves and their own clients, any self-sacrifice on their part by agreeing to a general tariff would probably be of much assistance to the ordinary practitioner. In theory there seems to be no reason why in the case of real estate, percentages should not be arrived at, which, while they differ somewhat in different localities, would fairly repay solicitors for the work which they do and which would have the inestimable value from the client's point of view of enabling him to tell accurately what it would cost him to buy or sell land. It is easier to act generally for a vendor than a purchaser, and the responsibility is much less. In the Land Titles Office, a solicitor for the purchaser finds his work and responsibility greatly reduced, and in transactions where the purchase money is small, the work may be almost as great as in much larger transactions, though the responsibility is not so considerable. Therefore, a sliding scale where the percentage is somewhat larger for small transactions than for important ones would probably be fair. These considerations would most likely be found to form a sufficient basis for the discussion of such a percentage.

The necessity for some simple, certain and general system of charges upon real estate transactions has, in this province, become acute. Nearly all companies who lend money on mortgages have their tariff for such work to which solicitors acting for them are expected to conform. Unless one's office is organized to do that class of work by wholesale, these tariffs will be found to be unremunerative, and there is a movement to introduce into this province from the United States, title guarantee companies, who will absorb much of this business, unless it can be found that work can be done by a lawyer with the same accuracy and according to a stated scale of charges which will enable the client to tell, beforehand, what his dealings will cost him. In a country like ours, where the Land Titles System is already in vogue, where titles are comparatively simple and land registers

fairly accurate and complete, there will be but little inducement for the exploitation of title guarantee companies, provided only the scale of fees on transfers are moderate, certain and simple.

For the incorporation and organization of companies, fees will be found to vary wonderfully. One instance is known to the writer where a company of $40,000 was incorporated and organized for a fee of $25. This is probably almost unique. Others have said that for similar work their charges have been as much as $300 or $400. This amount seems to be extreme. It is possible that the tendency in discussing these matters amongst the profession is to state a sum in excess of what is actually charged; but there is a great field for usefulness for a representative committee to meet and draw up a tariff which would lay down proper fees for such services, and which would put an end to the wide divergence which at present exists. There is no doubt a good deal of canvassing done amongst persons about to incorporate a company to find out who will do the work most cheaply, and there are chartered accountants who do such business, having all the forms which they consider necessary for that purpose and whose fees are usually considerably less than those which any professional man would be willing to charge. The only consolation the profession can derive from the fact that such work is done now by accountants is the feeling akin to that which possesses us when we find that a man has been his own lawyer and has drawn his own will.

The subject of fees in the Surrogate Court has also been discussed in the profession. It will be found that the fees do not contemplate, for instance, the work which is now done in preparing succession duty papers, and all fees are upon a scale which is not in any way proportionate to the value of services rendered to an estate of any size. This tariff also requires careful consideration and it would probably be found that if a representative committee of lawyers, either convened by the Benchers or otherwise, were to meet and prepare a tariff not only upon the matters last mentioned, but upon all questions of costs they could simplify greatly the present unsatisfactory and illogical method of keeping and rendering bills.

This article does not argue for any general increases in the charges which are made. It is only a plea for the simplification of the tariff and the introduction into offices of methods which, because they are simple, straightforward and exact, will more likely ensure a fair distribution amongst all clients of the expense of the work done for each and at the same time, a fair and liberal return to the professional man, which will enable him better to live up to and support the dignity and importance of his calling. If any general reforms such as are outlined could be introduced and a tariff drawn up which would appeal to and be adopted by the profession generally, much of the present temptation to undercharge, or to win clients from other solicitors by reducing fees to below a proper standard of living for a professional man, would be obviated.

SHIRLEY DENISON.

PROOF OF DANGEROUS TENDENCY BY EVIDENCE OF PRIOR EFFECT.

The dissenting opinion in a recent New York case illustrates a reactionary tendency which has already assumed considerable proportions. The majority held that evidence of a prior accident in a passageway through an elevator shaft was admissible, to indicate the dangerous character of the place. Two justices maintained that, since it was not shewn that the defendant knew of the former accident, the testimony was incompetent. *Cefola* v. *Siegel-Cooper Co.* (1908) 111 N.Y. Supp. 1112.

Where such knowledge of dangerous tendency or quality is possessed by the individual charged with responsibility, evidence of the accidents whether one or many, through which this knowledge was derived, is uniformly admitted. Clearly, it gives rise to an inevitable inference of negligence. *City of Chicago* v. *Powers* (1866) 42 Ill. 169. But even where such notice and knowledge are lacking, proof of prior effect, it is submitted, is relevant. In order to investigate properly the merits of a given accident, it is not merely desirable, but material to

determine the tendency, nature, and quality of the place or object involved. To determine these accurately, it is essential to apply the practical test of common experience. *Phelps* v. *R. R. Co.* (1887) 37 Minn. 487. Failure to realize the true evidentiary purpose and that negligence or due caution are, at best, merely indirect inferences, has led to much of the confusion of the cases, which a neglect of two simple conditions of admissibility has not lessened.

In the first place, to make the evidence of prior effect *legally* relevant in an action where its present effect is at issue, an underlying similarity of conditions must be shewn. *Aurora* v. *Brown* (1882) 12 Ill. App. 131; *Bailey* v. *Trumbull* (1863) 31 Conn. 581. In the absence of such proof, the evidence is of too indirect a character to be of practical probative value. *Sullivan* v. *D. & H. Canal Co.* (1900) 72 Vt. 353. Secondly, the more recent evidence of injury at the given place, the more strongly does the presumption of a continued similar condition operate. Where the accident occurred at too distant a date, evidence of it has often been excluded, on the theory, seemingly, that while ordinarily it is merely the *weight* of the evidence which varies inversely as the remoteness increases, still, at a certain point the evidence itself becomes too unimportant to be legally material, a fortiori, competent. The conditions of modern trial by jury afford an explanation. Oftentimes these two grounds of exclusion are confused, but that there are two distinct inferences involved, is clear. Cf. *Gillrie* v. *Lockwood* (1890) 122 N.Y. 403. At what precise stage the exclusionary principles should operate is a question for the trial court to determine. (Thayer, Prel. Tr. Evid., 517: "In such cases it is a question of where lies the balance of practical advantage.") Necessarily, the question must be largely one of judicial discretion; but that, it is submitted, in no way justifies an inflexible rule of exclusion. *Bemis* v. *Temple* (1894) 162 Mass. 342, 4.

In the first American case in point, *Collins* v. *Dorchester* (Mass. 1850) 6 Cush. 396, an injury occurred on a highway through an alleged defect in a railing. The Massachusetts

Supreme Court, speaking through Metcalfe, J., denied that evidence that another person under like circumstances had recently suffered a similar accident was admissible. Coming from so distinguished a source, this ruling naturally influenced subsequent development, and, together with the case of *Temperance Hall Assn.* v. *Giles* (1869) 33 N.J.L. 260, explains a long line of similar decisions. *Aldrich* v. *Pelham* (Mass. 1854) 1 Gray 510; *Parker* v. *Publishing Co.* (1879) 69 Me. 173, and cases cited. Either that the introduction of collateral events results in confusion of issues, or that the probative value is disproportionate to the incident expense of time, is the usual ratio decidendi. *Phillips* v. *Willow* (1887) 70 Wis. 6. If the two fundamental exclusionary principles, which have been indicated, are heeded, such consequences will rarely, if ever, be involved. It is far preferable to submit the proffered evidence to these preliminary tests than to adopt an invariable rule of exclusion which is not only illogical, but unnecessary. The theory of *Collins* v. *Dorchester,* supra, reached its high water mark in *Martinez* v. *Planel* (1869) 36 Cal. 578. The attack on its underlying fallacies, beginning with *Darling* v. *Westmoreland* (1872) 52 N.H. 401, culminated in the New York leading case of *Quinlan* v. *Utica* (1877) 11 Hun. 217, affirmed 74 N.Y. 603. These cases squarely hold that in any investigation, legal or scientific, a knowledge of the nature of the place or object involved is essential and that to properly ascertain this, the test of experience must necessarily be employed. This has since been repeatedly recognized as a specific ground for admitting evidence of previous accidents, *Fordham* v. *Gouverneur* (1899) 160 N.Y. 541; *Taylorville* v. *Stafford* (1902) 196 Ill. 288, though in many rulings the identical evidence, in the light of surrounding circumstances, has been likewise held competent to indicate notice to the person charged with responsibility. *Stair* v. *Kane* (1907) 156 Fed. 100. Thus, prior accidents on a defective pavement may be admissible, not only to shew that the common cause of the respective injuries possesses certain dangerous characteristics, but also to charge the municipal authorities with notice thereof, *District of Columbia* v.

Armes (1882) 107 U.S. 519; accord, *Phelps* v. *R.R. Co.*, supra. The two, however, are quite distinct.

The undeniable reactionary tendency in New York, revealed in the minority reasoning, is prevalent, also, at present, in a few other jurisdictions, and it is the more remarkable, perhaps, because of a recent liberal treatment of this evidence in Massachusetts itself. *Flaherty* v. *Powers* (1896) 167 Mass. 61; *Spaulding* v. *Lithograph, etc., Co.* (1898) 171 Mass. 271. Such a reaction seems unfortunate. It might, however, be noticed that a total absence of proof of recency or of similarity of conditions seems to discredit the actual result reached by the majority.—*Columbia Law Review.*

The preservation of the sacredness of the persons and personal liberty of the King's subjects has always been one of the boasts of the British Constitution; and this is something which should not be lightly encroached upon. It is not in these times of peace, plenty and prosperity that the need for such a safeguard is much in evidence as it is in the troublous times that have been, or in the troublous times that may be hereafter. Whilst this is so there is much in what was graphically said by Mr. Justice Riddell in a judgment recently delivered by him in the case of *Rex* v. *Leach*, on an application for a habeas corpus. He said: "It is to be hoped that the courts may long be spared the disreputable spectacle of a litigant claiming an advantage from an alleged irregularity in which he himself participated. A defendant has, undoubtedly, the right to place his back against the wall and fight with every advantage; he has, I think, no right, if he come out from the wall, to complain that his adversary gets behind him. And the rules in favour of the accused, derived from the bloody days when the mother was hanged for a petty theft to stay the hunger of her famishing brood, are not to be extended or applied where not reasonably applicable." But the pendulum may swing too far the other way. The liberty of the subject is a valuable relic.

Our English exchanges refer with deep regret to the death of Lord Justice Mathew. Sir James Mathew had a reputation of being a great lawyer as well as having special knowledge and grasp of s' matters connected with commercial law. It will be remembered that he was the originator of the Commercial Court over which he presided for some years. He was, subsequently, appointed to the Court of Appeal, from which he retired about two years ago, owing to ill-health. The learned judge was born in 1830, and was educated at Trinity College, Dublin. In 1881 he was raised to the Bench. As a criminal judge he was said to be thoroughly human, and in striking contrast with his brother Catholic judge, Sir John Day, making allowances and being lenient in his sentences. Though he had a reputation of being a wit and the best after-dinner speaker on his circuit, he did not carry his pleasantries to the Bench. Among other good things, one of the best of his sayings was that although in the eyes of the civil law husband and wife were one person, yet if a man killed his wife it was murder, not suicide. Mr. Mathew was one of the juniors for the prosecution in the *Tichborne Case*.

We notice that *The Times* enlarges upon the suggestion of a New York paper that a retiring President of the United States should, as a matter of course, have a seat in the Senate, receiving an appropriate salary. The thought is based upon the very sensible argument that the President, whether he be one of the greatest or only one of the average type must inevitably acquire a great fund of experience and knowledge in national business. He becomes, it is said, a national asset, and it is reasonable that the knowledge and experience that he has acquired should remain at the disposal and in the service of the nation. Possibly the principle involved in this suggestion might occasionally be beneficially invoked as to the selection of men for the Senate of the Dominion. But the supposed exigencies of party politics would probably stand in the way.

REVIEW OF CURRENT ENGLISH CASES.

PRACTICE—COSTS—SOLICITOR—TAXATION OF COSTS AFTER PAYMENT — THIRD PARTY LIABLE TO PAY — "SPECIAL CIRCUMSTANCES."

Hirst v. *Fox* (1908) A.C. 416 is a case known in the court below as *Re Hirst* (1908) 1 K.B. 982 (noted ante, p. 451) and it is somewhat surprising that it should have been thought of sufficient importance to be carried to the House of Lords, and it is not surprising to find that their Lordships regarded the appeal, which took the greater part of two days, as a waste of their valuable time. The whole question was as to whether or not a solicitor's bill was liable to taxation. The costs were costs of an action which had been compromised, the defendants agreeing to pay the plaintiff's costs as between solicitor and client. The plaintiff paid her solicitors' bill without taxation, and the defendants subsequently applied as third parties liable to pay for an order to tax it. This was granted by the Court of Appeal (see ante, p. 451) and it is from that decision that the present appeal was brought by the solicitors. Their Lordships (Lord Loreburn, L.C., and Lords Ashbourne and Macnaghten) affirmed the order for taxation, but in doing so they dealt the appellants a backhanded stroke by varying that part of the order appealed from which had directed the client to pay the costs of the prior appeal, by ordering the solicitors themselves to pay them.

TRADE MARK—INFRINGEMENT—ASSIGNMENT OF TRADE MARK—CAUSE OF ACTION.

Ullmann v. *Leuba* (1908) A.C. 443. This was an appeal from the Supreme Court of Hong Kong. The action was brought to recover damages for infringement of a trade mark. The facts of the case as found by the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) were, that the plaintiffs were manufacturers of watches in Switzerland. They sold watches for the purposes of trade to a firm in Hong Kong, carried on by one Madame Bovet, who, for the purpose of trade had them marked with the trade mark in question. This trade mark had been assigned to the plaintiffs. The court below had granted the plaintiffs relief, being of

opinion that the business of Madame Bovet, in Hong Kong, had also been transferred to the plaintiffs, or that, at all events, owing to the course of the proceedings of the trial, the defendants were not in a position to say that it had not. The Judicial Committee, however, considered that it was clear upon the evidence that there had been no transfer of the business of Madame Bovet to the plaintiffs, and, consequently, they had no status to maintain the action, a mere assignment of the trade mark giving them no such right. As regards the plaintiffs, the only person who could be deceived by the defendants' use of the trade mark in question, would be Madame Bovet, and it was clear that she was not, in fact, deceived. The appeal was therefore allowed, and the action dismissed.

LEAVE TO APPEAL—JUDGMENT FINAL AND CONCLUSIVE UNDER COLONIAL STATUTE — PREROGATIVE RIGHT TO ENTERTAIN APPEAL.

Re Will of Wi Matua (1908) A.C. 448. This was an application for leave to appeal from the native Appellate Court of New Zealand. Under a statute of New Zealand establishing the court the judgment of this court was declared to be final and conclusive, but the prerogative right of the King in Council to entertain an appeal was not expressly taken away. The questions involved were such as would have been appealable to His Majesty in Council before the establishment of the native court, and it was held by the Judicial Committee (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) that the prerogative right to entertain the appeal could not be taken away except by express words. On the merits of the case, however, their Lordships did not see fit to grant leave to appeal.

BRITISH COLUMBIA PROCEDURE ACT, S. 4—(ONT. RULE 923)—STATUTORY DUTY TO SUBMIT PETITION OF RIGHT TO LIEUTENANT-GOVERNOR—DAMAGES FOR BREACH OF STATUTORY DUTY.

Fulton v. *Norton* (1908) A.C. 451 was an action brought against the Provincial Secretary of British Columbia to recover damages, for his refusing to submit the plaintiff's petition of right to the Lieutenant-Governor as required by the Provincial Procedure Act, s. 4 (see Ont. Rule 923). Pending the action the defendant presented the petition and obtained his refusal of a fiat, and he set that up as a defence and paid $5 into court as damages. At the trial, the judge dismissed the action. On

appeal to the Supreme Court of Canada a new trial was ordered on the ground that the plaintiff was entitled to have the damages asse ed by a jury, and with this conclusion their Lordships of the Judicial Committee of the Privy Council (Lords Loreburn, L.C., and Lords Robertson and Atkinson and Sirs A. Wilson and Elzear Taschereau) agreed.

RULE ABSOLUTE FOR PROHIBITION TO JUSTICES—REFUSAL TO AWARD COSTS—APPEAL AS TO COSTS.

Rieken v. *Justices for Yorke* (1908) A.C. 454. In this case a rule for a prohibition against justices of the peace had been made absolute by the Supreme Court of South Australia, but the court had refused to order the justices to pay the costs of the proceedings. From this refusal of costs the appeal was taken to His Majesty in Council. The Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) being of opinion that there had been no declining of jurisdiction on the subject of costs, nor any mistake in any matter of law, but a sound and proper exercise of discretion, dismissed the appeal with costs.

COLONIAL LEGISLATURE—VALIDITY OF STANDING ORDER OF LEGISLATIVE ASSEMBLY — EXCLUDING MEMBER OF LEGISLATURE ACCUSED OF CRIME.

Harnett v. *Crick* (1908) A.C. 470 was an appeal from the Supreme Court of New South Wales, and the question involved was whether an order of the legislative assembly, which suspended any member of the House accused of crime, until after a verdict, was valid. The Constitution Act, 1902, s. 15, empowered the Legislative Assembly to adopt rules for the orderly conduct thereof. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Sirs H. DeVilliers, A. Scoble and A. Wilson) held the order to be valid and dismissed the appeal.

CONTRACT FOR SALE OF LAND—CONSTRUCTION—UNCERTAINTY OF CONTRACT—SPECIFIC PERFORMANCE.

Douglas v. *Baynes* (1908) A.C. 477. This was an action for specific performance of a contract for the sale of land or for damages in case the defendant failed to convey pursuant to the order of the court. The contract in question provided for the transfer by the defendant to the plaintiff of a farm in the Transvaal, on which deposits of tin had been found, in consideration

of 3,700 shares of £5 each in a syndicate to be formed for the purpose of developing the same as a mining property, the 3,700 shares to represent the plaintiff's holding in a syndicate of 12,000 shares. The Supreme Court of the Transvaal refused specific performance on the ground that the syndicate, which had been formed, had not sufficient working capital to develop the property, as contemplated by the agreement. From this judgment the plaintiff appealed, but the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) dismissed the appeal, on the ground that the agreement was too uncertain in its terms. Their Lordships considered that there could not be any condition imported by implication into the contract as to sufficient working capital being provided for effectively developing the property, and to this extent they disagreed with the court below; but as to two matters "not raised in the pleadings or dealt with in the argument," viz., (1) Is the contract, as it stands, without any words being, by implication, imported into it, so ambiguous as to one material matter, that specific performance of it cannot on any principle of equity or natural justice be decreed? and, (2) If not, can damages be awarded instead? And the first of these questions they answer in the affirmative and the second in the negative. As to the first point they consider the word developing was ambiguous, and its meaning uncertain, and that as this contract to develop in fact constituted part of the consideration for which the land was agreed to be sold, the uncertainty as to its meaning disabled the court from enforcing the agreement, though the defendant might himself be responsible for the ambiguity, on the ground that it would be against conscience for a man to take advantage of the plain mistake of another, or at least that a Court of Equity would not assist him in doing so. As to the question of damages: as they were only claimed in the event of the defendant refusing to assign the farm within the time to be fixed by the court, their Lordships held they could not be awarded. In these circumstances each party was left to bear his own costs of the appeal and also of the appeal in the court below.

TAX SALE—ASSESSMENT ACT (R.S.O. 1897, c. 224) s. 184(3)—3 EDW. VII. c. 21 (O.) s. 11—3 EDW. VII. c. 86 (O.), s. 8—4 EDW. VII. c. 23 (O.), s. 148—NOTICE IN WRITING UNDER R.S.O. c. 224, s. 184.

Toronto v. *Russell* (1908) A.C. 493 is an important decision on the subject of tax sales in which the Judicial Committee of

the Privy Council (Lords Robertson, Atkinson and Collins, and Sirs A. Wilson and Elzear Taschereau) have reversed the judgment of the Ontario Court of Appeal, 15 O.L.R. 484. The land in question belonged to Russell, the plaintiff, and was advertised to be sold on April 10, 1901, under the Assessment Act (R.S.O. c. 224) for taxes in arrears, and after an adjournment was bought by the city of Toronto. The city had advertised its intention to purchase in case the amount bid was less than the arrears due, but omitted to give Russell a notice in writing as required by 184 (3). In 1906 Russell commenced the action to set aside the sale on the grounds (1) that the land was insufficiently described in the assessment roll, and (2) that he did not receive the said notice. Their Lordships held that the defect, if any, in the assessment roll was cured by 3 Edw. VII. c. 86, s. 8, and secondly, that although the Act R.S.O. c. 224, s. 184(3) intended that the notice therein mentioned should be given to the owner, yet Russell could, and did waive it, and that even if he did not, it was "an omission on the part of an official" which was also cured by 3 Edw. VII. c. 86, s. 8; and an alleged defect in the certificate of sale given by the treasurer under s. 193 of the Assessment Act, c. 224, was also in like manner cured. And with regard to the plaintiff's alternative claim to redeem, their Lordships held that the period allowed by 3 Edw. VII. c. 68, s. 8, viz., three months after the passing of that Act, had not been extended by any subsequent legislation, and that therefore the plaintiff's action commenced in 1906 was too late.

POWERS OF PROVINCIAL LEGISLATURE—APPELLATE JURISDICTION OF SUPREME COURT—R.S.M. c. 110, s. 36, LIMITING RIGHT OF APPEAL ULTRA VIRES—B. N. A. ACT, 1867, s. 101.

In *Crown Grain Co.* v. *Day* (1908) A.C. 504, the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Robertson and Atkinson, and Sirs A. Wilson and Elzear Taschereau) have affirmed the judgment of the Supreme Court of Canada, holding that it is not competent for a provincial legislature to limit the right to appeal to the Supreme Court contrary to any statute of the Dominion giving jurisdiction to that court. The Mechanics' and Wage Earners' Act of Manitoba (R.S.M. c. 110, s. 36) which purports to make the judgment of the King's Bench final and conclusive in actions to enforce mechanics' liens, was therefore declared to be ultra

vires. The important principle therefore seems to be established that the cases in which appeals may be had to the Supreme Court is a matter within the jurisdiction of the Dominion Parliament under s. 101 of the B. N. A. Act, 1867, and no provincial legislature can in any way curtail the right of appeal given by any Dominion statute.

POWERS OF PROVINCIAL LEGISLATURES—B. N. A. ACT, 1867, s. 92 (2)—ONTARIO SUCCESSION DUTY ACT (R.S.O. c. 24)—PROVINCIAL TAXATION—PROPERTY OUT OF PROVINCE—ULTRA VIRES.

Woodruff v. *Attorney-General* (1908) A.C. 508 is an appeal from the decision of the Ontario Court of Appeal in *Attorney-General* v. *Woodruff*, 15 O.L.R. 416, in which the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) have made a further contribution to our constitutional law. The action was brought by the Attorney-General of Ontario to recover succession duties on property of a deceased person which, at the time of his death, was situate outside the territorial limits of the province. The case was debated in the court below as turning on the effect of certain settlements made by the deceased of the property in question, and it was not until the present appeal that the point was taken that the local legislature had no power of taxation over property outside the province, and it was on this contention the case ultimately turned, their Lordships holding that under the B. N. A. Act (1867), s. 92 (2) the powers of taxation conferred on the local legislatures is strictly limited to "direct taxation within the province."

TRADE UNION—ACTIONABLE CONSPIRACY—RESOLUTION OF UNION CALLING A STRIKE—MISDIRECTION.

Jose v. *Metallic Roofing Co.* (1908) A.C. 514. This was an appeal from the decision of the Court of Appeal, 14 O.L.R. 156, in the case of *Metallic Roofing Co.* v. *Jose*. The action was brought against a trade union for conspiracy in inducing the plaintiff's workmen to strike, and for maliciously combining to injure the plaintiffs, and an injunction and damages were claimed. Certain questions were submitted to the jury and answered by them in favour of the plaintiffs and damages were assessed at $7,500, but in charging the jury MacMahon, J., in the opinion of the Judicial Committee (Lords Robertson, Atkin-

son, and Collins, and Sir A. Wilson) led the jury to believe that the calling out of the men on strike, by resolutions of the union, if those resolutions were the cause of the strike, was an actionable wrong, without regard to motive and without regard to the conspiracy alleged. This, in their Lordships' opinion, was so material a misdirection as necessitated a new trial of the action which was accordingly ordered.

STREET RAILWAY — REMOVAL OF SNOW FROM TRACKS — IMPLIED OBLIGATION TO REMOVE SNOW FROM STREETS.

Shea v. *Reid-Newfoundland Co.* (1908) A.C. 520. This was on appeal from the Supreme Court of Newfoundland. The Reid-Newfoundland Co., by s. 42 of their charter, were empowered to remove snow and ice from their railway tracks so as to operate their cars in the streets of the city of St. John, but conditioned upon their levelling the snow and ice on each side of the tracks to a uniform depth to be determined by the city's engineer, and so as not to impede the ordinary traffic of the streets. The point in dispute was whether in the event of its becoming necessary to remove snow from the streets in order to comply with the city engineer's direction as to level, it was the duty of the Reid-Newfoundland Co., or the city itself, to remove it. The courts below had held that it was not the duty of the Reid-Newfoundland Co., because that duty was not expressly imposed on them, but the Judicial Committee of the Privy Council (Lords Robertson, Atkinson and Collins, and Sir A. Wilson) took the contrary view, and held that the duty of removal rested on the company, and the appeal was accordingly allowed with costs.

BRITISH COLUMBIA—DIVORCE JURISDICTION OF SUPREME COURT OF BRITISH COLUMBIA.

In *Watts* v. *Watts* (1908) A.C. 573 an appeal was brought from the somewhat startling decision of Clement, J., to the effect that the Supreme Court of British Columbia had no jurisdiction in divorce, and notwithstanding that for the last fifty years the court had been acting on the assumption that it had such jurisdiction. By proclamations having the force of law, and British Columbia statutes, the civil laws of England, as they existed on 19th November, 1858, were declared to be in force in that province, and by a proclamation having the force of law, the Supreme Court of British Columbia was constituted

with complete cognizance of all pleas whatsoever, and to have jurisdiction in all cases, civil as well as criminal, arising within the colony of British Columbia. These provisions the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Collins) held, had the effect of conferring on the colonial court jurisdiction under the English Divorce and Matrimonial Causes Act, 1857, which came into force on January 11, 1858, and also under the Amending Act, 21 & 22 Vict. c. 108, which came into force on August 2, 1858.

Correspondence.

RE JUDICIAL UTTERANCES.

To the Editor, CANADA LAW JOURNAL:

SIR,—It is to be regretted that persons whose position would give weight to their utterances are not always guarded in their expressions. The other day an alderman of the city of Toronto is reported to have said that the ladies of his native city were largely addicted to drink, because he had been informed by some one that ladies often carried a flask of spirituous liquors to provide for emergency on their journey to the seaside. One would suppose this to be a very reasonable and common precaution, but the injurious statement was published broadcast by one of the leading papers in the Dominion. Of course his remark being made in the course of a temperance lecture may account for his intemperate language, but being a lawyer he ought to have known better.

Such a charge is of course so absurd as only to cause a smile, but occasionally a remark is made from the Bench, which may do serious harm; and one of that character I would venture now to call attention to.

An action against the Canadian Pacific Railway Company recently came before a Divisional Court of Ontario in which the defendants pleaded insufficient notice of the death of the man for whose representatives action was brought. The learned chief justice is reported to have said to the counsel for the company: "This is a very petty defence for a great corporation

like the Canadian Pacific Railway Company to set up. Why don't you fight it out on the merits, and seek to prove that you were not guilty of negligence." To which the counsel is said to have retorted: "Apparently I am not on the popular side of this motion," which elicited from His Lordship the remark: "You are not on the honest side."

If the above report be correct, and it is printed in inverted commas, one is led naturally to consider whether judges are appointed to decide questions of morals or points of law. With due respect to the learned chief justice, I would venture to suggest that as the company had a perfect right under the statute to raise this defence, it was not his province to discuss it from a purely moral or ethical standpoint. The company had the right to make this defence, and whether it was meritorious under the circumstances was not in question. If the judge thought such an enactment was undesirable it would be quite proper for him to make a suggestion to that effect in the proper quarter, or he might descend from the Bench and seek a repeal of the provision on the floor of the House of Assembly. But the real harmfulness of such a remark is, perhaps, made apparent by what seems to underlie the retort of the counsel. If it all means that the din of popular clamour against rich corporations, unconsciously of course, could affect the judicial mind, it is something to be guarded against. There is too much attention paid in these days to popular clamour. "Vox populi" is not "vox Dei."

ONLOOKER.

[Our readers can form an opinion of this matter as well as we can. We therefore make no comment, except to say that possibly our valued correspondent makes too much of the matter; and further, that, as to that part of the letter which takes exception to judges seeking to take the place of legislators and over-riding Acts of Parliament by judge-made laws to meet hard cases (which is, I presume, what our correspondent means), we would refer to the weighty words of Mr. Justice Meredith, J.A., in the case of *Johnston* v. *Dominion of Canada Guarantee and Accident Ins. Co.* (post infra). They are much in point.—EDITOR, *C.L.J.*]

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] FOX *v.* CORNWALL STREET RY. CO. [Nov. 10.

Duty as to highways—Municipality or company—Rails flush with street—Wearing down of highway.

This was an appeal by the plaintiff from the judgment of ANGLIN, J. (ante, p. 159). He had held that the municipality was liable for damages sustained owing to the wearing down of that portion of the highway adjacent; but his attention was not called on that occasion to R.S.O. 1897, c. 208, s. 23, which provides that unless otherwise agreed upon between the company and the municipality, the company shall at their own expense keep clean and in proper repair the streets between the rails and for 18 inches on each side of the rails.

Held, that as the accident was evidently caused by the defendants' neglect of their obligation in this respect, and the plaintiff was therefore entitled to judgment.

Appeal allowed.

G. I. Gogo, for plaintiff. *Middleton*, K.C., and *C. H. Cline*, for defendants.

Full Court.] [Nov. 10.

JOHNSTON *v.* DOMINION OF CANADA GUARANTEE & ACCIDENT INS. CO.

Accident insurance—Conditions of policy—Affirmative proof of death—Notice of death—Time—Waiver—Forfeiture.

This was an appeal by the defendants from the judgment of BOYD, C. The action was brought under a contract in an accident insurance policy in favour of deceased and his representatives. One of the terms of the policy was that immediate written notice of any "accident or injury" should be given to the insurers at Toronto; and another was that unless "affirmative proof" of death should be so furnished within 13 months no

claim based thereon should be valid. There was no breach of the first condition, but there was of the second; and, in respect of this, the defendants claimed immunity from liability. It was, however, contended that the notice of "accident and injury," which, under the terms of the policy, was to be an immediate written notice, was also the "affirmative proof of death," which, if not furnished, "within 13 months from the time of such accident" was to make the claim invalid.

Held, that this notice did not satisfy the second requirement as to "affirmative proof" of death within 13 months. One thing was to be done immediately, the other, a very different one, was to be done within 13 months. If the one or the other were the same it was not necessary to give different periods within which each was to be done and provide for the doing of different things in each.

MEREDITH, J.A., who delivered the judgment of the court said: "There is, in my opinion, no reasonable evidence of any waiver of this condition. The correspondence regarding the proofs began with a distinct statement by the appellants that it was without prejudice, and throughout, with the exception of one letter, this position was expressly declared and maintained. We ought not to strain at every gnat in the insurers' way, and swallow every sort of camel that stands in the insured's way, to success in an action such as this.

The agreement which the parties chose to make must be held binding upon them, and upon each, respectively, alike, in the absence of any ground of legal or statutable defence, or of equitable relief such as fraud or mistake. I am quite unaware of any ground, statutable or otherwise, for making a new contract between the parties by eliminating the condition in question, and giving relief upon the contract in question thus emasculated. To treat the condition as a forfeiture which any court can, in its discretion, ignore, would be to create a revolution in the law of contracts of insurance; and it would be an extraordinary thing that it should be left until this late day to discover that the courts had such power. A condition requiring proof of loss under a contract of insurance is a reasonable, and almost, if not quite, a universal one; and one which is necessary for the prevention of fraud as well as for the speedy adjustment and payment of claims. The legislature has taken great pains to regulate contracts of insurance and to prevent unjust and unreasonable conditions being imposed; but has not prohibited conditions requir-

ing proofs of loss; on the contrary, it has fully recognized the need of such proofs, and made provisions respecting them. We must look to such legislation for any relief, such as the respondent seeks, from conditions such as that in question. It would, in my opinion, be legislation, not adjudication, to extend its provisions to analogous cases; and, if it were not, it would be difficult to find a case provided for in such legislation analogous to this so as to justify any such method of dealing with this case. It is impossible for me to think that s. 57 of the Judicature Act is applicable to such a case as this, to think that it gives to any judge power to—to use the words of a late eminent Master of the Rolls—"to run his pen through that part of the contract": see *Eastern, etc., Co.* v. *Dent*, [1899] 1 Q.B. 835, and *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417. To borrow again the words of a very eminent judge, to give relief in this fashion would be "taking a prodigious liberty with a contract."

J. A. McIntosh, for plaintiff. *Blackstock*, for defendants.

HIGH COURT OF JUSTICE.

Cartwright, Master.] [Oct. 27.

SOVEREIGN BANK *v.* WILSON.

Summary judgment—Rule 603—Action by assignee of chose in action—Defence.

This was a motion by plaintiff for a summary judgment under Rule 603 in an action to recover $642.21, the amount of an account for goods sold and delivered to the defendants by the former receivers and managers of the Imperial Paper Mills, duly assigned to plaintiff.

Held, that the defence disclosed in the affidavits in answer to the motion does not differ in substance from that set up in *Sovereign Bank* v. *Parsons*, not reported. In that case it was said by the Divisional Court: "If the receiver is personally liable for the price of the goods supplied for the purposes of his receivership, it follows that he must be personally responsible for breach of the contract entered into by him." (See *Burt* v. *Bull* (1895) 1 Q.B. 276.) In the *Parsons Case* the defence was first set up by way of counterclaim. This, it was decided by MEREDITH, C.J., could not be done, and the Divisional Court held

that it was not available as a defence, even if the action had been brought by the Imperial Paper Mills. That being so judgment must go as asked.

Boland, for plaintiff. *Grayson Smith,* for defendants.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [Nov. 12.

HIGGINS *v.* CANADIAN PACIFIC RY. CO.

Railway—Animals killed on track—Sheep going from owner's field into a neighbour's field adjoining the railway track—Fences and gates.

This was an appeal by the defendants from the judgment of the judge of the County Court of the County of Simcoe awarding damages to the plaintiff in an action for the loss of sheep killed on the defendants' railway line. The plaintiff had a flock of sheep on his farm which escaped out of the field in which they were enclosed into a field in the farm of a neighbour, through which ran the line of the defendants' railway. By a verbal agreement between these farmers the gate between the neighbour's field and the railway line was raised about 2 feet from the ground. It was probable that it was under this gate that the sheep made their way to the track. There was no proof of negligence or wilful act of omission on the part of the owner of the sheep (see s. 294) (4) of R.S.C. c. 37). This section provides that when any cattle or sheep at large, whether upon the highway or not, get upon the property of the company and are killed by a train, the owner of such animal so killed shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss from the company, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent.

On behalf of the defendants it was contended that the sheep did not come within the meaning of the words "sheep at large," and that the right, if any, of the plaintiff must be under s. 254; and, consequently, that his rights were no higher than those of his neighbour through whose field the sheep escaped, and that the latter could not claim, for the reason that the defect was due to the verbal agreement between the parties. Under s. 254 the railway must erect and maintain cattle-guards on each side of the railway at the crossing and turn the fences into the cattle-guards,

the fences and cattle-guards being suitable and sufficient to prevent cattle and other animals from getting off the highways on to the railway.

Held, that the railway company having neglected the provisions of the above section and the animals having from such neglect got upon the railway and were killed, the railway company was liable; and it made no difference in this liability that the cattle had strayed through the lands of an adjoining owner.

Creswicke, K.C., for plaintiff. *Shirley Denison*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Nov. 17.

SUTHERLAND v. GRAND COUNCIL OF PROVINCIAL WORKMEN'S ASSOCIATION.

Injunction—Discretion of judge refusing not reviewed—Corporate funds and business.

After the commencement of their action plaintiffs applied to a judge of the court for an interim injunction to restrain defendant corporation from carrying on business or dealing with the corporate funds pending the trial of the action. The grounds, supported by a number of affidavits, were (1) that certain persons appointed to office in the council were not persons who under the rules of the Association were qualified to hold office, and (2) that certain lodges of the Association were not properly represented at the meeting of council at which such officials were appointed.

The learned judge dismissed the application with costs, holding that the legality of the appointment of the officials in question should not be decided against defendants on an interlocutory application, and that it was not necessary to decide the rights of the lodges to representation at the meeting at which the appointments were made, it not being shewn that any different results would have followed; and also that to grant the injunction would have the effect of preventing the defendant corporation from doing business or carrying on its

affairs, and the case was not one in which the court, in the exercise of its discretion, on the evidence before it, should before trial interfere with the business of the defendant corporation or its funds.

The court dismissed plaintiff's appeal, holding that there was no reason for interfering with the discretion of the learned judge appealed from.

Harrington, in support of appeal. *Mellish*, K.C., contra.

Full Court.] NICHOLLS *v.* RAWDING. [Nov. 21.

Municipal election petition—Security—Removal of objection by deposit of cash—Construction of statute word "unsufficient."

The Nova Scotia Municipal and Town Controverted Elections Act, R.S. (1900) c. 72, s. 7(*e*) provides that "At the time of the presentation of the petition, or within three days afterwards, security shall be given on behalf of the petitioner for the payment of all costs, charges and expenses that may became payable by the petitioner, etc." It is provided by s. 9(1), " . . If an objection to the security is allowed it shall be lawful for the petitioner within a further prescribed time . . to remove such objection by a deposit in the prescribed manner of such sum of money as is deemed by the judge to make the security sufficient." There was a motion in this case to dismiss the petition, chiefly on the ground that the recognizance filed by petitioner was taken before a commissioner of the Supreme and County Courts, who had no authority to take the same, and the judge of the County Court while sustaining the objection as to the authority of the commissioner declined to hold the security absolutely void and permitted the petitioner to remove the objection by making a cash deposit as provided by s. 9 (1) quoted above.

Held, per TOWNSHEND, C.J., GRAHAM, E.J., and MEAGHER, J., that he was right in doing so and that respondent's appeal must be dismissed.

Held, also, that the word "insufficient," in the Nova Scotia Act, applies as well to a security wrong in point of form or irregularly or insufficiently entered into, as it does to the amount of it or the sufficiency of the sureties or any other objection of that kind, and that this construction is sustained by the omission from the Nova Scotia Act of the words in the Eng-

lish Act from which it is copied which specially define the objections which may be taken.

DRYSDALE and LAURANCE, JJ., dissented, holding that as no valid security was given within the time prescribed by the Act, the objection could not be cured by a deposit of cash subsequently made.

Mellish, K.C., for appellant. *Milner*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] RE NORTH CYPRESS. [Oct. 20.

Liquor License Act—Local option by-law—Receipt of petition by municipal council.

Application for mandamus to compel the council of the rural municipality of North Cypress to submit a local option by-law to a vote of the electors under s. 62 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by s. 2 of c. 26 of 7 & 8 Edw. VII. A petition duly signed has been sent in to the clerk of the municipality before the first day of October, but it had not been presented to or received by the council as there had been no session until after that date.

Held, that the receipt by the clerk of the petition was not a receiving of the same by the council within the meaning of the statute and that the judge appealed from was right in refusing a mandamus.

E. L. Taylor, for applicants. *A. J. Andrews*, for license holders.

KING'S BENCH.

Mathers, J.] MORDARSON *v.* JONES. [Oct. 20.

Assignment for creditors—Lien of execution creditor for costs when assignment made after execution placed in sheriff's hands.

After the plaintiff's writ of fieri facias had been placed in

the sheriff's hands, but before the goods in question had been actually seized the defendant made an assignment for the benefit of his creditors under the Assignments Act, R.S.M. 1902, c. 8. The sheriff refused to withdraw from possession of the goods except upon payment to him of his own and the plaintiff's costs, and the assignee obtained an order from the referee requiring the sheriff to withdraw without such payment.

Held, on appeal, that under s. 11 of the Executions Act, R.S.M. 1902, c. 58, the plaintiff had acquired a lien on the goods for his costs, which was not taken away, but, on the contrary, expressly recognized by ss. 8 and 9 of the Assignments Act, and that the appeal should be allowed with costs and the application of the assignee dismissed with costs.

Gillard v. *Milligan*, 28 O.R. 645; *Ryan* v. *Clarkson*, 17 S.C.R. 251, followed.

Howell, for the sheriff. *Hanneson*, for the plaintiff. *Monkman*, for the assignee.

Macdonald, J.] HILL *v.* ROWE. [Oct. 23.

Sale of land—Agreement to purchase on fixed date at option of vendor—Time, whether of the essence of the contract.

In consideration of the plaintiff purchasing an interest in certain lands and paying $500 on account, the defendant signed an agreement that he would purchase the plaintiff's interest for the sum of $600, if the latter desired to dispose of it on the 1st day of December, 1907. That day was a Sunday and the plaintiff was away from home until the 4th of December, when he at once notified the defendant that he wanted the agreement carried out. The defendant did not then repudiate the agreement, but asked the plaintiff to call again, saying that he had not the money just then. He afterwards refused to carry out the agreement and claimed that the plaintiff was bound to come on the very day fixed by the contract.

Held, that the circumstances shewed that it was never intended that time was to be the essence of the contract, that the plaintiff had made his demand within a reasonable time and that he was entitled to a verdict for the $600 and costs.

Monahan, for plaintiff. *Dysart* and *Wemyss*, for defendant.

Cameron, J.] MORICE *v.* KERNIGHAN. [Oct. 28.

Sale of land—Liability of purchaser to pay off mortgage—Implied covenants—Assignability of right to indemnity.

W. by a transfer under the Real Property Act, R.S.M. 1902, c. 148, conveyed to the defendants the lands in question, expressly subject to two mortgages, one of which had been made by her to the plaintiff. On the same day an agreement was executed by W. and the defendants in which it was recited that the defendants had assumed the payment of the two mortgages mentioned. W. afterwards assigned to the plaintiff any claims she had against the defendants in law or equity and all her "rights to indemnity against any person or persons under any implied covenants in any transfer given" by her to the defendants.

Held, that the plaintiff could sue the defendants upon the covenant to indemnify set forth in s. 89 of the Real Property Act, which had been effectively assigned to the plaintiff and was entitled to recover the amount of his mortgage from the defendants.

O'Connor and *Blackwood*, for plaintiff. *Hudson* and *Garland*, for defendants.

Province of British Columbia.

SUPREME COURT.

Clement, J.] REX *v.* PERTELLA. [Nov. 6.
REX *v.* LEE CHUNG.

Criminal law—Charge to jury—Exception to—When to be taken—Application for a case stated—Crim. Code, ss. 1014, 1021.

After verdict, but before sentence, it is too late to move for a reserved case.

Sec. 1014, sub-s. 2, of the Code, provides that the court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial, or on any proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal.

Held, that this means that any reservation of a case after verdict must be of the court's own motion.

A. D. Taylor, K.C., for the Crown. *Farris*, for Lee Chung. *Woods*, for Pertella.

Full Court.] WILLIAMS *v.* HAMILTON. [Nov. 12.

Vendor and purchaser—Contract for sale of land—Offer—Acceptance—Correspondence.

Judgment of HUNTER, C.J., affirmed on appeal. [Noted, ante, p. 86.]

Full Court.] ENTWISLE *v.* LENZ & LEISER. [Nov. 13.

Statutes, construction of—Judgments Act, Stat. 1908, *c.* 26, *s.* 3, *Stat.* 1906, *c.* 23, *s.* 74—*Execution debtor—Dry legal trustee.*

Execution creditors, in April, 1907, registered their judgment against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of s. 74 of Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial judge ruled that s. 74 of the Land Registry Act, making registration of conveyances a sine qua non to the passing of any interest, legal or equitable, to lands, governed.

Held, on appeal, that the Judgments Act gives the creditor only the interest in lands possessed by the judgment debtor, and that in this case the debtor having conveyed the land so long before the execution creditors' judgment was obtained, was a dry trustee of the land for the plaintiff.

S. S. Taylor, K.C., for appellant (plaintiff). *Higgins*, for respondents (defendants).

Bench and Bar.

Duncan Finlayson, of Arichat, Nova Scotia, barrister-at-law, to be judge of the County Court of District No. 7, comprising the counties of Cape Breton, Victoria and Richmond, in that province, in the room and stead of His Honour Daniel D. McKenzie, resigned.

ANALYTICAL INDEX

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