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ENGLISH AND ROMAN LAW.

Notwithstanding what has been said by Coke and Blackstone in favour of the supposed autochthonous character of English law, very few modern lawyers, who have considered the matter, can doubt that in many most important particulars English law is really founded and built up on principles derived from the Roman law. That majestic creation of human genius which for so long dominated Europe and even to-day is the fountain of most of its jurisprudence, forms a mine of juristic learning fortified by experience, which it would have been folly for English lawyers in search of sound rules of decision to neglect or ignore. English law cannot be said to have been founded on Roman law in the sense in which that of countries which have adopted the civil law may be said to be, at the same time our indebtedness to it is a matter of no reasonable doubt, and in this respect the eclectic genius of the English people is manifested in the way in which they have selected from its principles what seemed best for themselves, adopting what makes for freedom and liberty, and rejecting what makes for absolutism.

The debt we owe to Roman jurisprudence is obviously well indicated by our legal phraseology—where, for instance, does the word "action" as applied to legal proceedings come from, except it be the Roman "actio," and when we classify actions as being either in rem, or in personam, we are clearly following Roman precedent. Where does our idea of a writ of summons as the way of beginning an action come from but from the Roman proceeding of "vocatio in jus?"

Where we talk of vindicating our rights is it not the Roman procedure of "vindicatio" which is probably at the foundation of the idea which we wish to express. Possession in its legal and technical sense is undoubtedly derived from the Roman "possessio."

Title by "prescription" is, when we come to think of it, a curious term well known amongst us; it has, as we all know, nothing to do with doctors or their prescriptions, but why and how did "prescription" come to designate a title acquired by length of possession with which it appears to have no connection? If we would find an answer we must seek it in the Roman law, where we shall find that the "prescriptio" was a formal part of the "formula" or pleading at one time in force under the Roman law, and that the "prescriptio" as its name denotes, was placed at the beginning of the whole "formula" for the purpose of limiting the injury; and where a defendant claimed to have acquired a title by length of possession to the subject matter of the action, he set it up in the "prescriptio," which had the effect of limiting the injury to that one point, and hence it came to pass that this mode of pleading gave its name to a title acquired by length of possession, as it has also done with us who have never adopted the mode of pleading which gave birth to the term.

When we talk of taking "exceptions" to pleadings or evidence, the Roman "exceptio" is probably at the root of the idea.

In our law affecting testate and intestate estates we should naturally expect to find Roman terms of art employed, because it is well known the civil lawyers had a good deal to do with moulding that branch of the law, nor are we disappointed. "Testament," "codicil," "legacy," "ademption" of legacies, "nuncupative" wills, "bona vacantia," "donatio mortis causa" are all terms of art, derived from Roman law. It is true we use the word "codicil" in a somewhat different sense—with the Romans it was a sort of supplementary will, but not necessarily executed with the formalities of an ordinary testament.

Even the Roman law which rendered a will invalid unless the heir was expressly named therein, and which was never adopted in English law, has lingered amongst us as a sort of popular traditionary law, expressed in the popular phrase of "cutting off the heir with a shilling."

In the field of contract we find the words "contract," "stipulation," "obligation," "debtor," and "creditor," are all deriva-

tives from Roman words expressing the same ideas. And when we talk of novation of contracts, we are borrowing the "novatio" Roman law—and "undum pactum" is also a distinctly Roman law term.

Our equity law, which took its rise in circumstances somewhat similar to those which gave rise to the prætorian law of ancient Rome, has borrowed many of its principles from Roman jurisprudence.

The fiduciary is none other than the "fiduciarius" of Roman law in an English dress. Our process of discovery seems to have its origin in the practice of the Roman law which enabled a cestui que trust to examine his trustee on oath as to the alleged trust. Injunctions have their prototypes in the interdict of Roman law, and many other instances might be found to shew how much this branch of law has been built up on Roman principles.

Our law relating to partnerships and corporations has in like manner been similarily inspired. Even the idea that the fees paid to members of the learned professions, such as doctors and lawyers, were in the nature of "honoraria" and not the subject of action, is plainly derived from Roman law.

But it is not the object of this paper to trace all the particulars in which our law, or legal ideas, and principles, are derived from the law of ancient Rome, but rather to call attention more particularly to our legal phraseology which has so palpably a Roman origin, and to suggest, that whenever we find English and Roman law alike, or very similar, we may not unreasonably conclude that our legal ancestors who so evidently adopted the language of Roman Law, may have also adopted its principles.

A very striking and concrete case, shewing the method employed appears to be furnished by Lord Holt's celebrated judgment in the case of *Coggs* v. *Bernard*, where he adopts the phraseology of Roman law with regard to the different kinds of bailments, and founds himself on Bracton, who in turn borrowed his law from the Institutes without acknowledgment.

GEO S. HOLMESTED.

LAW BREAKING IN HIGH PLACES.

If we read aright the information contained in the daily papers of Toronto we have an illustration as to how law makers occasionally become law breakers.

Chapter 15 of the statutes of Ontario for 1906 is an Act to provide for the supply and transmission of electric power for the use of municipalities. The Hydro-Electric Power Commission of Ontario is created by that statute, one of the members thereof being a member of the Executive Council of Ontario, and upon this Commission are conferred most extensive powers, including the exercise of judicial functions in certain cases.

Section 6 makes provisions for the furnishing by the Commission to municipalities desiring to take the benefit of the Act all necessary estimates, plans and specifications as to the works necessary for the distrubution of power so to be supplied, and a statement of the terms and conditions upon which such electrical power may be transmitted and supplied, together with a form of the contract to be entered into between the municipal corporation and the Commission.

Section 7 then authorizes the municipal corporation to submit to the duly qualified electors a by-law authorizing the municipal corporation to enter into the contract above referred to, and, in case such by-law receives the assent of the majority of the electors voting thereon, such contract may be entered into and executed by the Commission and the corporation, subject to the approval of the Lieutenant-Governor in Council.

It would appear that the Chairman of the Commission, who is a member of the Ontario Government, has been on a tour through the Province for the purpose of explaining the meaning of the Act, and urging municipalities to take advantage of its provisions.

A by-law purporting to be the child of s. 7, prepared by the Commission and endorsed by the Council of the city of Toronto was recently submitted to the electors, and carried by a large majority. Before the submission of this by-law, at a public meeting held in the city, the Chairman of the Commission, in

answer to a question, admitted that the conditions precedent required by s. 6 had not been complied with, and that no contract had been prepared or even discussed; but he nevertheless urged the public to vote for the by-law, which, though it purported to be made pursuant to the statute, gave none of the information which the legislature provided should be given to electors to enable them to record an intelligent vote. There would seem therefore to be no doubt that the by-law is illegal, and the vote not the expression of the will of the people in the manner desired and intended by the legislature.

It is not material for the present discussion whether the Commission or its Chairman or the municipal council of the City of Toronto is to blame for the defective and therefore illegal by-law, which was sent to the people. The fact remains that both the Chairman and the Commission and the Mayor and Board of Control of the city were very active in favour of obtaining an affirmative vote on the by-law.

All this presents a somewhat striking spectacle and one which is not merely of passing interest, for it concerns the administration of the laws of the land by those entrusted therewith. The Commission being given judicial powers in certain cases it is necessary that its members should act judicially in all matters connected with the Commission. The governing body of a municipality has also large powers and great responsibility and should act with due regard thereto. It may safely be said that in this very important matter they have one and all acted without that consideration and regard to the obligation imposed upon them by their respective positions to observe the law which they undertook to administer.

Apart from the question as to whether it is desirable or dignified for a member of the Government and one holding a judicial position to travel the country and make strong appeals to the electors to avail themselves of the services of the Commission of which he is the head (which is perhaps more than a mere matter of taste), it certainly is desirable to comment upon the more important features of this matter to which we have already

alluded, even though, in this case, no great harm may have resulted. And further it may be remarked that if no protest is entered (and as yet we have heard nothing of any motion to quash this by-law, probably because it is not thought worth while) the action of those occupying these high positions might be looked upon as a precedent for further breaches of a very important Act, which, as we have already stated, for certain purposes, creates a new judicial forum or Court having very extensive powers, of the extent of which no one can at present form an opinion.

It ought not to be necessary at this time of day to re-assert the proposition that no circumstances or motives of expediency or alleged benefit of the public should be permitted to form an excuse for those clothed with judicial powers or statutory authority as makers of the laws or administrators thereof to aid in the breach of any law; especially in a case of this kind, where the enactment was evidently intended for the protection of the community by requiring information to be given without which no intelligent vote could be cast.

THE LORD CHANCELLOR ON JUDICIAL APPOINTMENTS.

In England the selection of men to hold the position of justices of the peace is of much more importance than it is in Canada, their jurisdiction and duties being more extensive, and a greater responsibility being thrown upon them. In that country the Lord Chancellor acts for the Government in appointing its justices of the peace as well as the other judges of the land. The exigencies of party politics are detrimental even in staid old England. Here appointments have been made, more especially of late years, at the instigation and demand of party men, which have brought discredit upon the Government making them.

The evil in England is considered to be so great that recently sixty-eight Liberal members of the House of Commons pre-

sented to the Lord Chancellor a memorial praying for some new system of appointment of these magistrates, which would be non-political. The reply of the Lord Chancellor, Lord Loreburn, is well worthy of being reproduced, and should be carefully noted by the powers that be, and not only noted but acted upon, if the Bench in Canada is to retain anything of its historic dignity and efficiency. The Chancellor's remarks were as follows:—

"It is one thing to correct monopolies and open the Bench to the honourable ambition of men of all parties. It is quite a different thing to treat the position of justice as merely or mainly a reward of party services. Yet this is what I am constantly and most unfortunately asked to do, not, indeed, by the great bulk of members, but by some of them, and by many outside. And it is most significant that, with the exception of two or three names, I cannot recall any application from any Conservative member for the appointment of any person as justice of the peace. So widespread and so deeply-rooted seems to be the persuasion that the Bench of justices is the appanage of party, and the Lord Chancellor the mere registrar of party selections. Now this is, in my judgment, a serious danger. Justices of the peace in England and Wales deal with an immense proportion of the total number of criminal cases at one stage or another, and have a jurisdiction which ranges from long terms of penal servitude at Quarter Sessions to slight punishment at Petty Sessions, with practically little chance of appeal. I am certain that I ought not to allow an office which places in men's hands the liberty and reputation of their humblest neighbours to become the subject of political traffic. The principle upon which I have acted, and shall continue to act, is that, if a man is suitable, the fact that he is a strong party man, on whatever side, is no objection. A great proportion of the ablest and most vigorous men are so; and justices, being unpaid, cannot be required as judges are, to lay aside political activity. But I shall not allow a defect in the necessary qualities to be made good by political services or restrict the choice to those who have been politically active. My purpose is that the Bench of justices

shall be constituted on a fair balance of classes and opinions, excluding none; in particular not excluding those who take no part whatever in politics. As for the claims of local members, I must exercise my own discretion as to whom I may consult in any particular case; and I certainly am not prepared to render an account to anyone of my reasons for choosing one man or omitting another. To make appointments on such a footing would be fatal."

A LAWYER'S ACCOUNTS.

The English Law Society, as we learn from the *Law Times* of Dec. 22, ult., has been discussing the appointment of a special committee to consider the advisability of framing rules and regulations as to the method in which a solicitor should (1) keep his accounts and audit them, (2) keep and audit trust accounts, (3) conduct his professional business, etc.

It would appear that recent events across the water have awakened in the public mind a certain sense of uneasiness in these matters, and it was thought that some safeguards, such as proposed, would be helpful.

There is unfortunately some need for more careful bookkeeping and auditing of accounts in this country as well as in England, and possibly our Law Society might do some good, both to the profession and to the public, by discussing this subject and making some suggestions, and if necessary regulations, which would insure more accuracy in the matters referred to, and in safeguarding the public and protecting solicitors against themselves by the auditing of trust accounts, etc.

We all know that the weak spot in almost every lawyer's office is the bookkeeping part of it. In large offices there is necessarily kept a bookkeeper or accountant; but in smaller offices this is generally too expensive a luxury. But even some of those who are in a smaller way of business think it quite worth while to have their clients' accounts, in fact, all their accounts, audited from time to time. This should be a rule and not an exception.

The most important safeguard for both solicitor and client is always to keep a special bank account for moneys belonging to clients; this account never to be drawn on under any circumstances or on any excuse whatever except on client's account. If this proper course had always been adopted, many disasters would have been averted. No careful business man would be likely to entrust his affairs to a solicitor if he knew that his money was to be mixed up with that of his lawyer.

Some of the leading journals in England and the United States have been discussing the position which the British Government would take in case of a war between the United States and Japan. Whilst the danger of such an event seems happily to have passed away, it will be of interest to refer to the treaty between England and Japan, which during its continuance would necessarily govern England's action in case of Japan being involved in war with other powers. The question having been asked whether this treaty would require the British Government to side with Japan in case of a war with the United States, the London *Standard* admitted that such an obligation existed and declared that it would be discharged. As to this treaty, it was signed on August 12, 1905; article 2 providing that:—"Should either of the high contracting parties be involved in war in defence of its territorial rights or special interest, the other party will at once come to the assistance of its ally, and both parties will conduct the war in common and make peace in mutual agreement with any power or powers involved in such war." The words of doubtful import would be "special interest" and diplomatists would have ample scope for lengthy discussion as to their meaning.

The number of that excellent serial the *Living Age* for Jan. 12, reproduces a very readable article from the *Monthly Review* entitled, "The Lords as the Supreme Court of Appeal." This

title is not quite accurate, nor does the writer speak correctly when he styles the House of Lords "the Supreme Court of this Realm." It is only the Court of last resort for the Courts of that part of the Realm known as the British Isles. The writer does incidentally refer to "the Judicial Committee of the Privy Council, which hears appeals from India and the colonies." This is not an unusual mode of expression on the part of some English writers, when speaking of the Greater Britain, including, as it does, such enormous and important territories as the larger part of the North American continent, known as the Dominion of Canada, the great empire of India, the Australian continent and a considerable portion of the continent of Africa. However, even untravelled and insular Englishmen are beginning to learn a few things, and we have hopes of them in time. Eye-openers come to them occasionally. To mention a very small one (but perhaps for that reason to be more appreciated) the "Lady of the Snows," so called, a few weeks ago saw a butterfly enjoying the balmy air of Canada, whilst at the same time men were perishing in the snow storms which swept over the frozen fields of England. We trust our enterprising neighbours to the south of us have not been making any radical changes in the Gulf of Mexico, which would affect the flow of the Gulf Stream.

One of the most important subjects that will engage the attention of the Ontario Legislature at its present session, at least to professional men, is that of company law. The Provincial Secretary has introduced a Bill, which has been widely distributed amongst the profession and others with a most laudable desire of obtaining any suggestion which might be helpful in framing an Act dealing with the many important and difficult problems arising in connection with company law. Want of space prevents further reference to this Bill at present; but we hope to refer to it more fully in our next issue. In the meantime we would suggest to those of our readers who feel any interest

in this matter to read the Bill (copies may be had upon application to the Department), and make any suggestion to the member having it in charge. Now is the time to suggest any alteration, amendment or addition.

"Good wine needs no bush," and we are sure our readers will appreciate the fine rich flavour of the following samples of answers given by candidates at a law examination held in a sister Province somewhat less than a hundred years ago. We are particularly struck by the clear crisp definition given in No. 2, and the more long drawn-out sweetness of No. 3, the author of which must surely have been an unlicensed conveyancer in some previous state of existence.

The questions and answers are as follows:—

1. Explain and illustrate the maxim "Equality is equity."

ANS. Where the performance of something which has been undertaken has become impossible, and another agreement is proposed of equal value to take its place equity will favour such new arrangement for "equality is equity."

2. What is an executory consideration?

ANS. An executory consideration is a consideration paid to an executor.

3. Outline an essential feature of a valid conveyance?

ANS. A valid conveyance must contain "This Indenture" whether in duplicate or triplicate, the date, the party hereinafter referred to as the party of the first part, and the party hereinafter referred to as the party of the second part, and then a little lower down there is "To Have and to Hold," which is usually put in capital letters.

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—BEQUEST—"MONEY INVESTED IN" SPECIFIED SECURITIES—SUBSEQUENT CHANGE OF INVESTMENT—WILLS ACT, 1837 (1 VICT. C. 26) S. 24—(R.S.O. C. 128, S. 26).

In *Re Slater, Slater* v. *Slater* (1906) 2 Ch. 480 a testator had bequeathed the interest arising from his money invested in the Lambeth Water Works Company. After the date of the will and before the testator's death the Lambeth Water Works Company's undertaking had been taken over by the Water Board under the provisions of a statute, and a sum of Metropolitan Water Stock had been issued to the testator in lieu of his shares in the company, and these substituted shares were held by him at the time of his death. Joyce, J., held that the Metropolitan Water Stock did not pass, that the will as to the property described in it must, under s. 24 of the Wills Act (R.S.O. c. 128, s. 26), be taken to speak and take effect as if executed immediately before the testator's death, and at that date there was no money invested in the specified security on which the bequest could operate.

COSTS—SEVERAL ACTIONS—SEVERAL APPEARANCES IN SEPARATE ACTIONS ENTERED AT THE SAME TIME—ENTERING APPEARANCE.

In *Price* v. *Clinton* (1906) 2 Ch. 487 Joyce, J., held that where there are numerous actions by different plaintiffs against the same defendant, and the defendant's solicitor enters appearance in all the actions at the same time, he is entitled to be allowed for a separate attendance in respect of each entry.

COPYRIGHT—ILLUSTRATED TRADE CATALOGUE—"BOOK" COPYRIGHT ACT, 1842 (5 & 6 VICT. 3. 45), S. 2.

Davis v. *Benjamin* (1906) 2 Ch. 491 need only be briefly mentioned. It deals with a matter of copyright law and Eady, J., holds that a trade catalogue illustrated, with no letter press except the names of the advertising firm and the names and prices of the articles, is a sheet of letter press and therefore a

"book" within the meaning of the Copyright Act, 1842 (5 & 6 Vict. c. 45), and an injunction restraining the infringement of the copyright was granted.

PLEADING—PARTICULARS—LOST GRANT.

Palmer v. *Guadagni* (1906) 2 Ch. 494 deals with a narrow point of practice. The defendants in their defence set up a lost grant, but omitted to state the date or the names of the parties thereto. The plaintiff applied to strike out this allegation unless particulars of dates and parties were furnished. Eady, J., refused the application holding that under the modern practice such particulars could not be required in the case of a lost grant where, as here, the defendants were insisting that the facts warranted a presumption of the existence of such lost grant.

PRACTICE—DECLARATORY JUDGMENT — DECLARATION THAT EXPIRED PATENT WAS INVALID—RULE 289—(ONT. JUD. ACT S. 57(5)).

In *North Eastern M.E. Co.* v. *Leeds Forge Co.* (1906) 2 Ch. 498 the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.), have affirmed the decision of Joyce, J. (1906), 1 Ch. 324 (noted, ante, vol. p. 339), to the effect that an action will not lie merely to obtain a declaration that a patent which has expired was invalid.

LESSOR AND LESSEE—OPTION TO PURCHASE—CONTRACT TO CONVEY —REMOTENESS—PERPETUITY—DAMAGES.

Worthing v. *Heather* (1906) 2 Ch. 532 was an action for alternative relief. The plaintiff claimed specific performance of a contract to convey certain lands pursuant to an option, or for damages for breach of the covenant to convey upon the plaintiffs electing to exercise the option to purchase. The lease in which the option was contained was one for 30 years, and the option was thereby given to the lessees to purchase the reversion in fee of the demised premises at any time during the continuance of the term. This option Warrington, J., held was invalid as being an infringement of the rule against perpetuities and therefore could not be enforced by specific performance, and the fact that lessees were a charitable corporation was held to make no difference, but he held that the plaintiffs were entitled to damages for breach of the covenant to convey.

ANCIENT LIGHTS—EASEMENT—ALTERATION OF DOMINANT TENEMENT—INCREASED BURDEN ON SERVIENT TENEMENT—DESTRUCTION OF EASEMENT—ACTION FOR DECLARATION THAT TENEMENT IS NOT SUBJECT TO AN EASEMENT.

Ankerson v. *Connelly* (1906) 2 Ch. 544 was an action for a declaration that the plaintiff's tenement was not subject to an easement of light in favour of the defendant's adjoining tenement. The defendant had acquired an easement of light as against the plaintiff's tenement, but subsequently he had altered his own premises so as to prevent the access of light except over the plaintiff's premises, and if he had not done this the plaintiff could have built on his land without interfering with the defendant's right to light. Warrington, J., held that this alteration had the effect of destroying the easement altogether, and he made the declaration asked.

COPYRIGHT—EQUITABLE ASSIGNMENT—BARGAIN WITH AUTHOR TO WRITE AND SELL STORY TO PUBLISHER—SUBSEQUENT SALE OF COPYRIGHT TO ANOTHER—COPYRIGHT ACT, 1842 (5 & 6 VICT. C. 45), SS. 2, 18.

Ward v. *Long* (1906) 2 Ch. 550 was an action to restrain the infringement of a copyright. The plaintiff's right was acquired under a contract made with one Shiel to write for the plaintiff for a certain sum a story of a certain length. The story was written, but proved not to be of the specified number of words and the plaintiffs refused to pay the full price agreed. Shiel then purported to sell the copyright in the story to the defendants who bought without notice of the plaintiff's rights. Kekewich, J., held that the contract with the plaintiff constituted a good contract for the purchase of the copyright of the story and a good equitable assignment of it to the plaintiffs and therefor that they were entitled to the injunction they claimed.

PRACTICE—SPECIAL LEAVE TO APPEAL TO KING IN COUNCIL.

In *Victorian Railway Commissioners* v. *Brown* (1906) A.C. 381 the Judicial Committee of the Privy Council have applied to Australian appeals the same rule as they have laid down with regard to Canadian appeals in *Clergue* v. *Murray* (1903) A.C. 521, viz., that where the petitioners for leave to appeal elected to appeal to a colonial Court from which it is known there is

no further appeal except by leave. Their Lordships will not grant that leave except in a very special case.

TRADE UNION—LIABILITY OF UNION FOR ACTS OF DELEGATES—PRINCIPAL AND AGENT—AUTHORITY OF BRANCH OFFICIALS TO BIND UNION—RATIFICATION—PAYMENTS TO WORKMEN ON STRIKE.

Denaby and C. M. Collieries v. *Yorkshire Miners' Association* (1906) A.C. 384 was an action brought by the plaintiffs against a trade union to recover damages on the ground that the defendants by their officials had induced the plaintiffs' workmen to break their contracts with the plaintiffs and that the union had ratified and adopted the act of their officials. At the trial the jury appear to have given a sweeping verdict in favour of the plaintiffs for whom judgment was given by Lawrance, J., which was subsequently reversed by the Court of Appeal. The House of Lords (Lord Loreburn, L.C. and Lords Macnaghten, Davey, James, Robertson and Atkinson), affirmed the decision of the Court of Appeal principally on the ground that the findings of the jury were not warranted by the evidence. It appeared that the officials whose action was complained of, were representatives of local branches in the council of the union, but that their action was not expressly authorized by the union, and, on the contrary, was contrary to the rules of the union, and their Lordships held that their position as representatives did not make them agents of the union, and that the payment of maintenance to the plaintiff's workmen who went on strike did not make the union in anyway liable to the plaintiffs.

PATENT—CONSTRUCTION—INFRINGEMENT—EXERCISE AND VEND—SALE IN ENGLAND—DELIVERY ABROAD.

In *Badische Anilin und Soda Fabrik* v. *Hickson* (1906) A. C. 419, the House of Lords (Lord Loreburn, L.C., and Lords Davey, James, Robertson and Atkinson), have unanimously affirmed the judgment of the Court of Appeal (1905) 2 Ch. 495 to the effect that where a contract is made in the United Kingdom to sell patented goods which are abroad and the contract is completed by the appropriation or delivery of the goods abroad, the vendor does not "use, exercise or vend" the invention in the United Kingdom within the meaning of the patent, and consequently that it is no infringement.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Osler, Garrow, MacLaren, JJ.A., Teetzel, J.] [Nov. 12, 1906.

ROBINSON *v.* MCGILLIVARY.

Bankruptcy and insolvency—Preferential transfer of cheque—Deposit with private banker—Application by banker upon overdue note—Absence of pre-arrangement and of intent to prefer.

On an appeal from the judgment reported 12 O.L.R. 91; 42 C.L.J. 514, the judgment of Divisional Court was affirmed. *Gibbons*, K.C., and *G. S. Gibbons*, for appellants. *T. G. Meredith*, K.C., and *Blewett*, contra.

Full Court.] [Nov. 21, 1906.

IN RE ONTARIO MEDICAL ACT.

"To practise medicine"—Use of drugs and other substances —Construction—Reference by Lieutenant-Governor.

Case referred by the Lieutenant-Governor under R.S.O. 1897, c. 84.

Held, that the words "to practise medicine" in s. 49 of the Ontario Medical Act, R.S.O. 1897, c. 176, cannot be construed, except as concrete cases arise, further than in some such way as follows: If it were shewn that a person not registered under the Ontario Medical Act attempted to cure or alleviate disease by methods and courses of treatment known to medical science, and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practitioner, then, although what was done, prescribed or administered, did not involve the use or application of any drug or other substance having or supposed to have the pro-

perty of curing or alleviating disease, he might be held to be practising medicine within the meaning of this section.

Per MEREDITH, J.A.—The words "practise medicine" in s. 49, should be given their primary and popular meaning, namely, practising the art of healing the sick by means of medicine and drugs.

Held, also (GARROW, J.A., dubitante, and MEREDITH, J.A., dissentiente), that a reference to the Court to determine the construction of the above section was competent to the Lieutenant-Governor in Council, under R.S.O. 1897, c. 84, s. 1, being "An Act for expediting the decision of constitutional and other provincial questions.

Per GARROW, J.A.—A patient ought reasonably to be held to be at liberty to go to the christian scientist, the osteopath, the medical electrician, the masseuse, etc., and request, obtain and pay for the treatment which these persons give so long as he does his own diagnosing and prescribing.

W. Nesbitt, K.C., and *H. S. Osler*, for the College of Physisians and Surgeons of Ontario. *S. H. Blake*, K.C., and *J. E. Dry*, for the Osteopaths. *H. Cassels*, K.C., and *R. S. Cassels*, for the First Church of Christian Scientists. *W. M. Hall*, for other Christian Scientists.

Full Court.] [Nov. 24, 1906.

PRESTON *v.* TORONTO RAILWAY CO.

Negligence—Street railway—Piling snow at side of track—Contributory negligence—Plaintiff putting himself in peril.

On an appeal from the judgment reported 11 O.L.R. 56; 42 C.L.J. 38, the judgment of the Divisional Court was affirmed, MEREDITH, J.A., dissenting.

W. Nesbitt, K.C., and *D. L. McCarthy*, for appellants. *Sherley Denison*, contra.

Full Court.] [Dec. 1, 1906.

IN RE MCKENNA AND TOWNSHIP OF OSGOODE.

Municipal law—Drainage—Engineer's report—Delay—Extension of time.

Sec. 9, sub-s. 8 of the Municipal Drainage Act, 62 Vict. (2) c. 28(O.), provides that the report of the engineer upon a muni-

cipal drainage scheme shall be filed within six months after the filing of the petition, provided that upon the application of the engineer the time may be extended from time to time for additional periods of six months, when the council is satisfied that owing to the nature of the work it was impracticable for the report of the engineer to be completed within the time limit. In this case the engineer was appointed to make examination and report in August, 1900. No report was made until February, 1905, and no excuse was shewn for the delay except a statement of the engineer that he was unable owing to press of other work and lack of assistance to proceed with the examination of the area involved. The report was adopted in June, 1905, and in the following month was provisionally adopted by by-law. There were a number of extensions granted in connection with the making of the report, but several of them were after the extended time had expired, so that there were periods when the engineer had no authority or right to proceed with the work; and the council did not act upon the right given it by sub-s. 9 of s. 9. to procure another engineer to go on with the work.

Held, that when the report was made the petition was not on foot and there was therefore no warrant to the council for adopting the report or founding a by-law upon it.

The power of extension given can only be exercised under the condition described in sub-s. 8. It is a limited power to extend for good cause. It is dependent upon inability of the engineer owing to the nature of the work, not upon dilatoriness or supineness on his part.

Wilson, K.C., for municipality, appellants. *Latchford*, K.C., for respondent.

Full Court.] [Dec. 24, 1906.

FEDERAL LIFE ASSURANCE CO. *v.* STINSON.

Mortgage—Redemption—Priorities—Execution creditors proving claims in Master's office—Payment of mortgagee's claim—Subsequent statutory assignment by mortgagor for benefit of creditors—Rights of assignee—Assignments and Preferences Act, s. 11.

Upon the usual reference under a judgment for foreclosure or redemption in an action upon a mortgage, four judgment creditors of the mortgagor having writs of fi. fa. lands in the sheriff's hands were added as parties in the Master's office, and

proved claims upon their respective judgments. The Master made his report by which he found that they were the only incumbrancers, and appointed a day for payment by them of the amount found due to the plaintiffs as mortgagees. After confirmation of the report, the respondent obtained assignments of the judgment, and was added as a party defendant by the Master's order. He then redeemed the plaintiffs by payment of the amount found due, and the Master took a subsequent account as between him and the mortgagor in respect of his claims on the mortgage and judgments, and appointed a day for payment by the mortgagor of the total amount. After confirmation of this report, and before the day named for payment, the mortgagor made an assignment for the benefit of his creditors under the Assignments and Preferences Act to the appellant, upon whose application an order was made adding him as a party, extending the time for redemption, and directing a reference back to the Master to take a new account and appoint a new day.

Held, MEREDITH, J.A., dissenting, that, notwithstanding the provisions of s. 11 of the Assignments and Preferences Act, the appellant was not entitled to redeem by payment of the amount due upon the mortgage only, and thus take priority of the respondent in respect of his claim upon the judgments.

Per OSLER, J.A.—Before the assignment to the appellant, the respondent had acquired a new and independent status. By the adjudication of the Court he acquired a lien, charge, or incumbrance upon the lands, and the right as such incumbrancer to redeem the mortgagees—a right which he exercised before the appellant, pendente lite, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated and his right to be redeemed by the mortgagor, in respect of the whole, declared. An interest or charge of this nature is not affected by the Act.

Baker v. *Harris* (1810), 16 Ves. 397, applied.

Order of a Divisional Court affirmed.

D. L. McCarthy, for appellant. *Cassels,* K.C., and *R. S. Cassels,* for respondent.

Full Court.] KERSTEIN *v.* COHEN. [Dec. 24, 1906.

Trade mark—Infringement—Coined word—Similarity—Colourable imitation—Costs.

The judgment of Mulock, C.J. Ex. D., 11 O.L.R. 450; 42 C.L.J. 355, dismissing without costs an action to restrain the

defendants from using the coined word "Sta-Zon" to describe their eye glasses, in alleged infringement of the plaintiffs' registered trade mark "Shur-On," was affirmed on appeal.

J. A. MacIntosh, for plaintiffs, appellants. *J. H. Moss* and *C. A. Moss*, for defendants, respondents.

Full Court.] [Dec. 28, 1906.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local option by-law—Voting on by electors—Town divided into wards—Objections to by-law.

A by-law enacted under the local option provisions of the Liquor License Act, R.S.O. 1897, c. 245, to prohibit the sale by retail of spirituous liquors within the municipality, was submitted for the approval of the electors of the municipality, as provided by s. 141 of the Act, and was approved by a majority of 476. The municipality being a town divided into wards, it was objected that persons who were ratepayers in respect of property situate in different wards were not permitted to vote more than once on the by-law.

Held, upon a consideration of the provisions of ss. 338 to 375, inclusive, of the Municipal Act of 1903, which are those referred to in s. 141 of the Liquor License Act as prescribing the manner in which the vote is to be taken, that s. 355 of the Municipal Act does not apply to such a by-law; and the objection mentioned and other objections to the by-law were overruled, MEREDITH, J. A., dissenting.

Decision of a Divisional Court, 12 O.L.R. 488, affirmed.

W. Nesbitt, K.C., *Haverson*, K.C., and *W. H. Wright*, for appellant. *F. E. Hodgins*, K.C., and *J. W. Frost*, for respondents.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton, J., Clute, J.] [Oct. 6, 1906.

RE GEROW AND MUNICIPAL COUNCIL OF PICKERING.

Local option—Treating.

A cattle drover, not being a "temperance man," nor an agent in any way of the temperance people, who were promot-

ing the passage of a local option by-law, having a grudge against a local hotel keeper took an active interest in the passing of the by-law, by treating freely the electors as he travelled through the township with a view as he admitted of influencing them to vote for the by-law.

Held, under the circumstances, that such treating and conduct was not the means of passing of the by-law in violation of the provisions of ss. 245 and 246 of the Consolidated Municipal Act, 1903, which would make it liable to be quashed.

Judgment of Meredith, C.J.C.P., reversed.

Farewell, K.C., and *J. M. Godfrey*, for the appeal. *DuVernet*, contra.

Teetzel, J.] [Oct. 20, 1906.

DAVIES *v.* SOVEREIGN BANK.

Practice—Discovery—"Officer"—Member of a municipal council—Examination of.

The word "officer" in Con. Rule 1250, 439(*a*) as applied to a municipal corporation, does not extend to persons who are merely legislative officers, but only embraces such persons as are officers in the usual sense of that word and under the control of the corporation employed to administer its affairs and execute the will of the legislative body; and while aldermen are in one sense officers of the corporation they are not examinable for discovery under that rule.

Arnoldi, K.C., for the motion. *Mackelcan*, contra.

Falconbridge, C.J.K.B., Britton, J., Mabee, J.] [Oct. 23, 1906.

BURKE *v.* TOWNSHIP OF TILBURY NORTH.

Drainage Act—Variation in contract.

In an action brought against a township corporation and its contractor for damages caused by the variation of the specifications by the contractor for the building of a drain under the Municipal Drainage Act, R.S.O. 1897, c. 226.

Held, that whether the plaintiff was entitled to be compensated or not her claim fell under s. 93 of that Act as amended

and her remedy was by notice and proceedings as provided for by that section and not by writ and proceedings in an action.

H. H. Bicknell, for plaintiff. *A. H. Clarke*, K.C., for township. *C. A. Moss*, for contractor.

Meredith, C.J.C.P., McMahon, J., Anglin, J.] [Oct. 31, 1906.

PETTYPIECE *v.* TURLEY.

Will—Construction—Precatory trust—Power—Execution of.

A testator whose mother owned an estate for life in a farm in which he had a reversion in fee by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother after his death deeded the farm in fee simple to one of his sisters, the expressed condition being one dollar and natural love and affection and the deed containing no reference whatever to the will.

Held, that it was not necessary to determine whether the mother took absolutely; or whether, if she did not take absolutely, a trust was created or a power; inasmuch as even if a trust was created in the mother the conveyance by the mother operated and was intended to operate as an execution of the trust, although the whole was granted to one daughter only.

F. E. Hodgins, K.C., for plaintiff. *Rose*, for defendants.

Divisional Court.] [Nov. 7, 1906.

SCHAEFFER *v.* ARMSTRONG.

District Courts Act—Action beyond jurisdiction of County Court—Discretion of district judge as to scale of costs—Rules of Court—Application of.

Where in an action before a District County judge, without a jury, there is a recovery for an amount beyond what could be recovered in a County Courts Act, R.S.O. 1897, c. 109, read in the s. 11 of the District Courts Act, R.S.O. 1897, c. 109, read in the light of the rules of Court applicable thereto either to withhold costs altogether or to grant a certificate therefore on the High Court scale; but he has a discretionary power, and may therefore certify for costs on the County Court scale only.

J. E. Jones, for plaintiff. *A. J. Thompson*, for defendant.

Riddell, J. -Trial.] [Nov. 16, 1906.

ZI[illegible] *v.* INDEPENDENT ORDER OF FORESTERS.

Benefit society—Rights of member—Action to establish—Domestic forum—Submission to jurisdiction.

An action to establish the right of a person to membership in a benefit society will not be entertained by the Court, even where the society submits to the jurisdiction, until the remedies provided by the constitution of the society have been exhausted.

A dispute arose as to the plaintiff's right to continue to be a member of the defendant society, and a body of officials of the society decided against him; the plaintiff, instead of appealing to the Grand Lodge, as permitted by the constitution, by which he was admittedly bound, brought an action against the society, which was dismissed, but without costs, and without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted.

C. R. McKeown, for plaintiff. *W. H. Hunter*, for defendants.

Magee, J.] [Nov. 26, 1906.

MCFARLAN *v.* SCHOOL TRUSTEES OF GREENOCK.

Public schools—Change of school site—Meeting to determine—Poll—Right of farmers' sons to vote.

By the Public Schools Act, 1 Edw. VII. c. 39, s. 34 (O.), it is enacted that the trustees of every rural school section shall have power to select a site for a new school house, or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them; and no site shall be adopted, or change of site made, except in the manner hereinafter provided, without the consent of the majority of such special meeting.

Held, that there is power to hold a poll at such a meeting, and that at such polling persons entered on the assessment roll only as "farmers' sons" are entitled to vote.

Kilmer, for plaintiff. *Ballantyne*, for defendants.

Magee, J.—Trial.] [Dec. 11, 1906.

RYAN *v.* PATRIARCHE.

Arbitration—Submission—Time for award—Failure of arbitrators to extend—Action—Defence of arbitration pending—Stay of proceedings.

A submission to arbitration, dated Oct. 4, 1904, was under seal, and bound the parties to abide by the award so as it was made on or before Oct. 30, 1904, or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other proceedings. The arbitrators proceeded to consider the matters referred to them and continued the arbitration, with the assent of the parties, for nearly two years, but did not by writing extend the time for the award. The plaintiff brought this action for an account in respect of the matters referred, the arbitration being still uncompleted, and the defendant pleaded the submission and proceedings of the arbitrators as an answer to the action.

Held, that the assent of the parties to the arbitration being proceeded with after the time had expired was equivalent to a parol submission only; s. 3 of the Arbitration Act, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, applies, by virtue of s. 2, to submissions in writing only; the same is the case with s. 6, which allows an application to stay proceedings; no order extending the time had been made under s. 10; and therefore the arbitration proceedings afforded no answer.

R. D. Gunn, K.C., for plaintiff. *J. E. Day*, for defendant.

Mulock, C.J. Ex. D.—Trial.] [Dec. 12, 1906.

BIGGAR *v.* TOWNSHIP OF CROWLAND.

Highway—Obstruction—Municipal corporation—Misfeasance—Liability for wrongful acts of committee of council—Injury to traveller—Damages.

The municipal council of a township, having decided to construct a ditch along a highway, under the provisions of the Ditches and Watercourses Act, appointed three of their number a committee to meet on the highway, and there to let the contract for the work by public competition. This the committee did,

and, in order to indicate where the ditch was to be constructed, they drove stakes in the highway, one being near the centre of the travelled portion. The contract was let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. One of the plaintiffs in walking upon the highway struck her foot against one of the stakes, and was thrown to the ground, and injured.

Held, that the injury was caused by misfeasance, and that the municipal corporation were liable for the acts of the committee, who were acting within the scope of their authority.

Damages were assessed for the plaintiff who was injured at $1,500 and her husband at $500.

J. F. Gross, for plaintiffs. *W. M. German*, K.C., for defendants.

Mulock, C.J. Ex. D., Anglin, J., Clute, J.] [Dec. 17, 1906.

BOOTH *v.* CANADIAN PACIFIC RY. CO.

County Courts—Right of appeal from—Jury—Order of County Court in term.

Under s. 51 of the County Courts Act, R.S.O. 1897, c. 55, where there has been a trial by a jury of an action in a County Court and a motion has been made to the County Court in term for a new trial and dismissed, no appeal lies from the dismissing order to a Divisional Court of the High Court; but, semble, where the findings of the jury are reversed in term, an appeal lies.

Middleton, for plaintiff. *D'Arcy Scott*, for defendants.

Cartwright, Master.] [Dec. 19, 1906.

BURNS *v.* CITY OF TORONTO.

Municipal law—Excavation—Insecurely guarding—Non-repair of highway—Jury notice—Ontario Judicature Act.

The plaintiff's statement of claim in an action for injuries sustained by falling into an open sewer dug in the street by the defendants alleged that such injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making same safe for passengers using said street."

Held, that the failure of the defendants to guard the excavation was non-repair within the meaning of s. 104 of the Judicature Act, and a motion to strike out the jury notice was allowed.

John T. White, for the motion. *Phelan*, contra.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 8.

ENGELAND *v.* MITCHELL.

Discovery—Production of books — Postponement — Profits of business—Master and Servant Act, ss. 3, 4*—Application to contract alleged—Statement of profits—Right to impeach.*

In an action to recover a share of the profits of a business under an alleged agreement to share profits, the plaintiffs sought discovery of the books of the defendant.

Held, that the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law and not upon an interlocutory motion, (1) whether the agreement alleged by the plaintiffs was within ss. 3 and 4 of the Master and Servant Act, R.S.O. 1897, c. 157, and (2) whether (if it was) the statement of profits declared by the defendant could be impeached for fraud, error, mistake, or other like cause.

Cutten v. *Mitchell* (1905), 10 O.L.R. 734, discussed.

Cutten, for plaintiffs. *H. Guthrie*, K.C., for defendant Mitchell.

DISTRICT COURT—ALGOMA.

DICKENSON *v.* HUSSEY.

Mischievous animal—Damage by—Liability.

Held, that the owner of a bull kept on defendant's premises is liable for damages resulting from the bull escaping from such premises and entering the plaintiff's field and serving a heifer therein which resulted in loss to the plaintiff; the defendant under the above circumstances was bound to keep the bull secure at his peril, and its escape was negligence for which he was liable.

[Port Arthur, July 24.—O'Connor, J.J.

O'CONNOR, J.J.:—Is the exercise of ordinary, or even extraordinary, care in order to keep a bull from escaping and doing

damage to neighbouring cattle sufficient to exempt the owner from liability for such damage? According to all the authorities cited I cannot come to any other conclusion than that it is not.

In *Fletcher* v. *Reynolds*, L.R. 1, Ex. 279, Lord Blackburn in livering judgment of the full Court used the following language:

"We think that the true rule of law is that the person who for his own purposes brings on his lands and keeps there any thing likely to do mischief if it escapes must keep it at his peril and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. . . . But for his act in bringing it there no mischief could have accrued and it seems but just that he should at his peril keep it there so that no mischief may accrue or answer for the natural and anticipated consequences. And upon authority this we think is established to be the law whether the things so brought be beasts or water or filth or stenches."

In *May* v. *Burdett*, as quoted in L.R. 1 Q.B.D., Lord Denman sums up the authorities relating to mischievous animals saying: "The conclusion to be drawn from an examination of all the authorities appear to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril and that if it does mischief negligence is presumed without express averment."

I must therefore hold that the defendants are liable to the plaintiff for the damage occasioned by the depredation of this bull for which this suit is brought. The damage is claimed on account of the loss that season of a thoroughbred calf. No evidence was given as to whether or not it is customary to have thoroughbred heifers commence to bred at the age of two years. There is authority for holding that the damage was complete at the time of service; but how much damage? I think the possibility of a thoroughbred calf dying as did the scrub calf ought to be considered in estimating the damage. I fix the amount for which the plaintiff will have judgment at fifty dollars together with costs of suit.

O'Flynn, for the plaintiff.

Kehoe, for the defendant.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] JENNINGS *v.* CHANDLER. [Oct. 29, 1906.

Trespass to land—Claim of title by adverse possession.

Plaintiff and his brother, J., were in joint occupation of the land in question for a period of about 39 years. After they had been in occupation for about nine years J. received a deed of the land and held the title to the land continuously from that time until he conveyed to defendant about two years before the trial of the action. Plaintiff was aware that J. held the legal title and made an admission to that effect to a person who applied to time for permission to overflow a portion of the land. Defendant advanced money to J. who was being pressed by creditors upon J. undertaking to give him a deed of the land.

Plaintiff was aware of this deed being made and offered to join in it if necessary. Defendant on obtaining his deed took formal possession and notified plaintiff of the fact.

Held, that plaintiff was not in a position under these circumstances to assert a title by adverse possession as against defendant, and that his acts after the deed to and the taking possession by defendant were mere acts of trespass.

McLean, K.C., and *Freeman*, for plaintiff. *Paton*, for defendant.

Longley, J.] CONROD *v.* SIMPSON. [Oct. 29, 1906.

Judgment—Action to revive—Interest.

Defendant was arrested and placed in jail under an execution at the suit of plaintiff, and was to have come up before commissioners for examination, but before the time fixed was released from jail by order of the sheriff. In an action to revive the judgment, brought after the death of the sheriff, evidence was given by plaintiff's solicitor to shew that no authority was given by him or by plaintiff for defendant's release and that the same was wholly unauthorized.

Held, 1. The release under these circumstances was in the nature of an escape, and that plaintiff was entitled to succeed in his action.

2. The interest recoverable must be restricted to six years.

Paton, for plaintiff. *McLean*, K.C., and *Freeman* for defendant.

Graham, E.J.] WHITE *v.* ALLEN. [Nov. 12, 1906.

Contract for support—Delivery of deed—Notice.

D. in order to secure the support of himself and his wife in their old age made an arrangement with defendant to live with him and to work his farm for him, and in consideration of dedendant's agreement to do this made a deed of the farm to defendant and deposited it with a justice of the peace to be handed to defendant on the death of D. or to either of the parties with the consent of the other at any time prior thereto.

Subsequently to the making of the deed D. executed a lease of all the timber of a certain size growing upon the land to plaintiff who brought an action against defendant for cutting on the land. The trial judge found that plaintiff through the agents who were employed in the acquisition of the land had notice of the deed to defendant.

Held, 1. There was a contract between D. and defendant which would be enforced equitably against plaintiff and defeat his action.

2. Following *Allen* v. *Dodge* (unreported), that there was a delivery of the deed to defendant, the parties having acted as if there was a formal delivery at the time and as if it were deposited with the justice as security for the performance of the contract.

W. M. Christie, K.C., for plaintiff. *J. B. Kenny*, for defendant.

Townshend, J.] GARDINER *v.* SIMPSON. [Nov. 12, 1906.

Constable—Excessive levy by—Damages.

Defendant levied upon and sold a horse worth about $60, the property of plaintiff for a school rate amounting to $1.25 without making enquiry as to whether or not there was other pro-

perty upon which he could levy. The horse was sold for $15 and was purchased by defendant from the buyer for an advance of fifty cents and was re-sold by him for $55.

Held, that plaintiff was entitled to recover on the ground of excessive distress the amount received by defendant for the horse over and above the amount of the rate and legal expenses. But as plaintiff had exposed himself to the loss he suffered by an attempt to evade or delay payment of the rate, and as he did not after the seizure under the warrant make any effort to pay the legal expenses, he should be deprived of costs.

Hanright and *Knight*, for plaintiff. *Mellish*, K.C., for defendant.

Full Court.] [Dec. 1, 1906.

RE MCBEAN.

Quo warranto—Official elected under Mines Regulation Act, R. S. (1900) *c.* 19—*Estoppel by conduct.*

Motion for leave to file an information in the nature of a quo warranto for the removal from office of a check weighman appointed under the provisions of the Coal Mines Regulation Act, R.S. (1900), c. 19, on the ground that a number of the persons who voted for the official sought to be removed were improperly on the list of voters, not being on the pay sheet of the mine at the time the list of voters was made up.

Held, that the applicant was precluded from taking advantage of the objection, assuming that the list was irregularly made up, owing to the fact that on the present and previous occasions he had assented to the making up of the list in the way now objected to.

Quære, if the case were one in which quo warranto would lie.

J. J. Ritchie, K.C., for application. *W. H. Covert*, contra.

Meagher, J.] [Dec. 11, 1906.

HART *v.* CITY OF HALIFAX.

Costs—Action by party having no title to sue.

Plaintiff brought an action in his own name, without joining the Attorney-General, to compel the repayment of money alleged

to have been illegally paid to the mayor and city engineer of the City of Halifax to reimburse them for expenses incurred as delegates to the convention of the Union of Canadian Municipalities at Winnipeg.

Held, that plaintiff having no title to sue must pay the usual penalty of having costs awarded against him in the absence of misconduct or oppressive conduct in connection with the litigation or leading up to it.

E. P. Allison, for plaintiff. *F. H. Bell*, for defendants.

Graham, E.J.] [Dec. 12, 1906.

FULTON *v.* DAVIDSON.

Boundaries—Uncertainty in description—Presumption.

Where the boundaries of land described in a deed are so uncertain that although they could have been identified at the time they cannot be proved in Court, years after, for want of evidence, but there has been occupation for a long period of time by those claiming under the deed, a confirmatory deed will be presumed.

McKenzie, for plaintiffs. *McLellan*, for defendants.

Full Court.] REX *v.* BURNS. [Dec. 15, 1906.

Bail—Motion to estreat—Notice to surety.

Defendant was arrested on a charge of stealing letters from the post office and was brought before the stipendiary magistrate of the city of H. for examination. At defendant's own request, and with the consent of the prosecuting officer, the examination was adjourned for ten days on condition of defendant giving bail for his appearance. M. as surety entered into a recognizance for that purpose. Defendant failed to appear and notice of the default was given to M. and of application to estreat the bail. When the motion was made objection was taken that no notice had been served upon M. requiring him to perform the condition of the recognizance. The question having been referred to the Court by the judge to whom the application was made,

Held, per TOWNSHEND, J., LONGLEY, J., concurring, RUSSELL, J., dissenting, that such notice was not necessary, the only effect of it being to require the bail to perform an impossible condition.

A. G. Morrison, in support of motion. *J. J. Power*, contra.

Note. In the case of *The Queen* v. *Creelman*, 25 N.S.R. 404, where the same question arose, the majority of the Court, MCDONALD, C.J., WEATHERBE, and HENRY, JJ., held otherwise, RITCHIE and MEAGHER, JJ., dissenting. In a later case, *The Queen* v. *Barrett*, 36 N.S.R. 135, it again arose and the Court was equally divided, MCDONALD, C.J., and GRAHAM, E.J., following the majority opinion in *The Queen* v. *Creelman*, holding that the notice was required, and the other members of the Court, TOWNSHEND and MEAGHER, JJ., holding that it was not.)

Longley, J.] [Dec. 21, 1906.

RE ESTATE OF M. MCDONALD

Probate Court—Proof of will in solemn form—Taxation of costs —Hearings and attendances—Stenographer.

On taxation of costs in connection with proof of a will in solemn form in the Probate Court the Judge of Probate, following the usual practice in such cases, treated each adjournment as a separate hearing and taxed accordingly, allowing a fee for attendance and a fee for hearing for each morning and afternoon during which the hearing lasted.

Held, that he was wrong in doing so and that the items allowed must be struck out. Also, that in the absence of statutory authority stenographer's fees could not be taxed.

Held, dubitante, that in substitution for the items struck out items for attendance and hearing should be allowed in connection with the taking of evidence and also in connection with the argument.

J. P. Foley, for appeal. *T. R. Robertson*, contra.

Full Court.] [Dec. 22, 1906.

STAMPER V. REINDRESS.

Medical practitioners—Negligence.

Plaintiff who had been severely injured as the result of a fall sought to recover damages from defendants, three medical

men by whom he was attended, for their failure to discover an injury to one of the bones of his left hip and to adopt suitable measures to relieve him of the pain and suffering caused thereby. When defendants were first called to attend plaintiff they found several of his ribs broken and a dislocation of his right hip, and treated him for these injuries. On a subsequent examination his left hip was found to be dislocated and the dislocation was reduced. The left hip became again dislocated some days later and another physician who was then called in and to whom the history of the case was stated inferred that there was a fracture of the rim of the cup or socket, and applied splints as a means of treating this injury. The evidence shewed that at the time defendants made their first and second examinations there was no reason to suspect the existence of this fracture and that it was only when the hip came out again after having been reduced that the existence of the fracture was suspected, and the other treatment adopted.

Held, that there was no evidence of negligence on the part of defendants making them liable in damages.

Drysdale, K.C., A.-G., for appellants. *R. H. Butts*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] REX *v.* DUGGAN. [Oct. 22, 1906.

Criminal law—Crim. Code, s. 503—Wilful making of erasures in voters' list.

Crown case reserved. The accused, having been appointed returning officer for the Electoral District of Selkirk, to hold an election of a member of Parliament at the general elections of 1904, assumed to divide that portion of the district comprising the Provincial Electoral Division of Springfield into polling divisions different from those who had been established under Provincial authority and used at the last preceding election, relying on ss. 22 and [illegible] of the Dominion Election Act, 1900. He then re-arranged the names on the copies of the voters' lists, sent to

him by the clerk of the Crown in Chancery under s. 21 of the Act, presumably to suit the new divisions and sent to the deputy for polling division No. 3 one of such copies with several names struck out in red ink and certified by him under s. 41 of the Act for use at the election.

Some of the persons whose names had been so struck out tendered their votes at the proper polling place and were not allowed to vote.

The accused was afterwards indicted, under s. 503 of the Criminal Code, 1892, for having wilfully, without legal justification or excuse and without colour of right, made or caused to be made erasures in a voters' list made or prepared according to the law in regard to Dominion elections. At the trial, PERDUE, J., withdrew the case from the jury and directed them to return a verdict of not guilty.

Held, 1. The copy selected by the returning officer, as the one which he intended to certify and forward to the deputy, became at once a voters' list within the meaning of s. 503, of the Code, and it was an offence under that section for him wilfully to erase names of voters from it either before or after he certified it and forwarded it to the deputy.

2. As there were in fact existing polling divisions established under Provincial authority and used at the last preceding Provincial election, the accused was not justified, under ss. 22 and 23 of the Elections Act, in making a new division.

3. The fact that the heading of the list of voters in question contained the words "registration district No. 3," instead of "polling division No. 3," did not justify the accused in believing, if he did believe, that there were no polling divisions, nor could he rely for such belief on the contention that the polling divisions actually established and previously used had not been established in strict accordance with the requirements of the Provincial statutes.

4. A returning officer who wilfully makes such erasures from a voters' list cannot escape punishment on the ground that he had to make them in consequence of having made new polling divisions which he had no authority to make.

5. The trial judge erred in withdrawing the case from the jury, and there should be a new trial.

Atkins, K.C., and *Knott*, for the Crown. *Howell*, for defendant.

Full Court.] WILLIAMS *v.* HAMMOND. [Nov. 22, 1906.

Master and servant—Wrongful dismissal—Insolence as ground of dismissal.

Appeal from judgment of PERDUE, , noted, 42 C.L.J. 574, dismissed with costs.

Haggart, K.C., for plaintiff. *Pitblado*, for defendant.

KING'S BENCH.

Mathers, J.] [Nov. 23, 1906.

BARTLETT *v.* HOUSE FURNISHING CO.

Jury trial—Illegal seizure—Trespass.

Appeal by defendants from an order of the referee refusing to strike out the plaintiff's jury notice. The statement of claim alleged that the defendants "wrongfully and illegally seized and carried away" certain household furniture from the plaintiff's dwelling house, and claimed damages.

Plaintiff insisted upon trial by a jury, relying on s. 59 of the King's Bench Act, R.S.M. 1902, c. 40, which provides that "action for . . . illegal or excessive seizure . . . shall be tried by jury unless the parties . . . expressly waive such trial."

Defendants contended that what was charged was at most a trespass and relied up sub-s. (b) of the same section which provides that, subject to its provisions, all actions shall be tried by a judge without a jury unless otherwise ordered by a judge.

Held, that an illegal seizure of goods is a trespass although every trespass to goods is not an illegal seizure, for an injury to the goods without seizure might be a trespass. The word "trespass" has a wider meaning than the words "illegal seizure" and it may be that the Legislature intended to limit the right of trial by jury to that particular form of trespass which consists in an illegal seizure, but they certainly have provided for it in the latter case.

Appeal dismissed with costs.

McMeans, for plaintiff. *Stacpoole*, for defendants.

Mathers, J.] [Nov. 26, 1906.

HOLLIDAY *v.* BUSSIAN.

Fire—Negligence.

The findings of fact by the trial judge were that the defendant, who was very shortsighted, which examining a fence on

his own land, observed on the prairie near him a pile of ashes and some partially burned willow roots, that he imagined he saw smoke and moved the ashes with his foot to ascertain whether or not there was fire there. A very strong wind was blowing from the south at the time and it carried burning embers into the dry grass adjoining, which at once took fire. Defendant immediately started to beat the fire out. A few yards away to the north there was a strip of burned ground extending east and west. The defendant succeeded, as he believed, in preventing the fire from spreading and it appeared to him to have burned itself out when it ran up into a pocket in the old burned strip. About an hour afterwards a prairie fire was first observed near the same place. This fire spread to the plaintiff's granaries and consumed them. He sought to recover damages from the defendant, claiming that his loss was caused by the fire started by the defendant under the circumstances above stated, and charging negligence.

Held, that on the facts as found the defendant was not guilty of negligence and the plaintiff could not recover.

Owens v. *Burgess*, 11 M.R. 75, and *Chaz* v. *Les Cistercicns Reformés*, 12 M.R. 30, followed.

Hudson and *Howell*, for plaintiff. *Wilson* and *Haffner*, for defendant.

Full Court.] [Nov. 26, 1906.

JOHNSTON *v.* O'REILLY.

Summary conviction—Certiorari to quash—Want of jurisdiction in convicting magistrate.

Rule nisi to quash a conviction of the applicant under the Liquor License Act, R.S.M. 1902, c. 101. The conviction did not shew on its face where the offence had been committed nor even that it was in the Province of Manitoba.

Held, that the jurisdiction of an inferior Court must appear on the face of the proceedings or it will be presumed to have acted without jurisdiction, and that the conviction must be quashed on the ground that it did not appear from it that the magistrate had jurisdiction.

Held, also, that, notwithstanding the provisions of s. 887 of the Cr. Code, 1892, and the fact that the applicant had taken steps to appeal to the County Court against the conviction, a

certiorari may be properly granted upon any ground which impeaches the jurisdiction of the magistrate.

Reg. v. *Starkey*, 7 M.R. 43, followed.

Ormond, for applicant. *Haggart*, K.C., for prosecutor.

Mathers, J.] [Nov. 26, 1906.

NATIONAL SUPPLY CO. *v.* HORROBIN.

Mechanics' and Wage Earners' Lien Act—Effect on lien of taking promissory note for claim.

The short point for which this case should be noted is that where a contractor or sub-contractor takes a promissory note for or on account of his claim for work done or materials supplied, and discounts such note, he forfeits pro tanto his right to a lien on the building or erection under R.S.M. 1902, c. 110, notwithstanding the provision in sub-s. (c) of s. 24 of the Act, which provides that "the acceptance of any promissory note for . . . the claim shall not merge, waive, pay, satisfy, prejudice or destroy any lien created" by that Act, "unless the lien-holder agrees in writing that it shall have that effect."

The discounting or transferring of a promissory note is not within the protection of the statute. *Edmonds* v. *Tiernan*, 21 S.C.R. 406, followed.

Bowles, for plaintiff. *Whitla* and *Sullivan*, for defendants.

Macdonald, J.] ABELL *v.* HARMS. [Nov. 20, 1906.

Charge on land executed under seal—Implied covenant to pay debt.

Defendant gave plaintiffs a written order for an engine, the price, $700, to be paid on delivery in cash or in lieu thereof "notes on approved security." He afterwards by instrument under seal created a charge or lien on certain land in favour of the plaintiffs for said price and interest to be paid in instalments. The instrument further provided that if notes should be given by defendant for the several instalments, such notes should not be a satisfaction of the said lien and charge, but the same should continue until payment in full of such notes and any

renewals thereof. It contained no covenant or promise to pay the debt. Later defendant gave plaintiffs his notes for the respective instalments.

This action was brought on the notes and also on the sealed instrument to recover the amount of the debt and interest. At the trial, plaintiffs were unable to prove the making of the notes sued on.

Held, that a covenant or provision to pay the debt could not be implied from the terms of the sealed instrument, the effect of which was only to furnish security for the debt on the land. The acknowledgment of the debt and the manner of payment were stated merely as a ground for the giving of such security and the instrument created no personal liability to pay.

Waterous Engine Works Co. v. *Wilson*, 11 M.R. 287, distinguished.

Action dismissed with costs.

Hudson, for plaintiffs. *Phillipps*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Nov. 6, 1906.

ROLFE v. CANADIAN TIMBER CO.

Master and servant—Company—Liquidation of, operating as a discharge of servants.

Plaintiff was engaged as accountant for the defendant company in the spring of 1904. In August of the same year the trustee for the debenture holders seized the company's property, and after transferring to the trustee the books of the company, plaintiff continued in the service of the trustee until November, 1905, when he was dismissed, and brought an action against the company for wrongful dismissal, on the ground that the seizure by the debenture holders was a mere shuffle and that the business was in reality continued by the company.

Held, 1. reversing Forin, Co. J.—That there had been

an actual seizure and, (2) following *Reid* v. *Explosive Company* (1887), 19 Q.B.D. 264, the appointment of a manager and receiver by the debenture holders operated as a discharge of the plaintiff, and he could not recover.

Davis, K.C., for appellants (defendants). *S. S. Taylor*, K.C., for respondent (plaintiff).

Full Court.] [Nov. 7, 1906.

FERNAN *v.* MONITOR & AJAX FRACTION.

Practice—Evidence—Commission—Examination of witness resident out of jurisdiction—Application by defendant.

Plaintiff sued for damages for dismissal and for an alleged breach by defendants of a certain agreement between the parties. Defendants counterclaimed for damages caused by plaintiff through his wilful disobedience, and also charged him with negligence and incompetence. Rossland was chosen as the place of trial. Defendants took out a summons for a commission to issue to take the evidence of one Brockman, defendants' chairman and managing-director, resident in England, and other witnesses there, which summons was dismissed by Forin, Lo. J.S.C., in so far as taking the evidence of Brockman was concerned, on the ground that there was a counterclaim for a large amount, and that Brockman was the intermediary, as mentioned by Chancellor Boyd in *Kidd* v. *Perry* (1892), 14 Pr. 364, and should be examined in open court.

Held, reversing FORIN, LO. J.S.C., that the witness required being the managing-director of the defendant company, and there being no guarantee that the company could get him to come into the jurisdiction, the commission should issue. So far as concerns the counterclaim, the plaintiff, when he brought his action, must have contemplated the probability of that being done.

Davis, K.C., for appellant. *J. A. Macdonald*, K.C., for respondent.

Clement, Co. J.] [Nov. 9, 1906.

VARESICK *v.* BRITISH COLUMBIA COPPER CO.

Master and servant—Workmen's Compensation Act, 1902—"Dependants."

Sec. 8 of Sch. 2 to the Workmen's Compensation Act, 1902, provides for the recording of any award of compensation or of

any matter decided under the Act, in the County Court for the district in which any person entitled to such compensation resides.

Held, on the facts, that the applicants had not proved that they were dependants of the deceased, but,

Semble, the principle governing Lord Campbell's Act governs in the Workmen's Compensation Act, *viz.*: Given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who stood to the deceased in any one of the relationships mentioned in the Act.

O'Shea, for applicants. *Hallett*, for respondents.

Bench and Bar.

His Honour WILLIAM HENRY POPE CLEMENT, Judge of the County Court of Yale and judge of the County Court of Kootenay, in the Province of British Columbia: to be a puisné judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Lyman Poore Duff, who has been appointed a puisné judge of the Supreme Court of Canada.—7th December, 1906.

John Robert Brown, of Greenwood, British Columbia, barrister-at-law: to be judge of the County Court of the county of Yale, in the said province, in the room and stead of the Hon. William Henry Pope Clement, promoted to the Supreme Court of this province.

Fred Calder, of Ashcroft, British Columbia, barrister-at-law: to be judge of the County Court of the county of Cariboo, in the said province, in the room and stead of His Honour Clement Francis Cornwall, resigned, 8th Jan., 1907.

F. L. Davidson, Esq., barrister, etc., of Halifax, N.S., has been admitted to the Bar of Ontario, and was sworn in before Mr. Justice Riddell.