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LAWYERS AND LAW REFORM.

MEETING OF THE ONTARIO BAR ASSOCIATION.

The discussion on the subject of law reform which took place at the recent meeting of the Ontario Bar Association was in the main confined to criticisms of the resolutions of the Attorney-General passed at the last session of the House of Assembly for Ontario. It can scarcely be denied that these resolutions were framed at that time rather as an attempt to meet a supposed popular demand originating with and fomented by certain sections of the lay press, than to formulate a well-thought-out scheme for the simplification of practice and procedure and the consequent lessening of delays and expense in litigation. The general result therefore cannot be said to be entirely adequate or satisfactory. As a further consequence of this inception of the resolutions many matters of more vital importance and more in need of reformation were not discussed at all, or only casually referred to. Upon the whole it may be said that the arguments adduced shewed that so far as the matters referred to in the resolutions were concerned there is no pressing necessity to make much change.

But to lawyers, as a class, this gathering was of interest as it indicated a dawning of a larger esprit de corps in the profession, and the recognition of the need of more coming together of individual members of it for greater cohesion not merely for the purpose of protecting the just rights of the profession, but for consultation as to the most efficient ways of securing the speedy administration of justice at the lowest cost compatible with efficiency, a result which is for the benefit of the country at large. The solidarity of the profession in reality makes for the good of the community, a proposition which the ignorant and prejudiced may scoff at, but which is

nevertheless a truism to those who have made a study of the subject.

These things being so it is high time that we should see the wisdom of pulling together as a class, and that we should also appreciate the influence which we could and ought to wield in the halls of the legislatures. Let it be remembered, that this influence has never been exercised towards the aggrandizement of the profession—quite the contrary. It is also noteworthy that all measures which have resulted in simplicity and speed in procedure and in lessening the cost of litigation have been initiated by lawyers. Some of these changes have indeed been largely detrimental even to the scanty emoluments which have been accorded to us. The trouble has been that lawyers so far have been more loyal to the call of party politics than to the claims of their profession.

The subject of appeals was the one which most largely engaged the attention of the speakers at the recent meeting of the Ontario Bar Association. We are glad that it has received full enquiry, for the investigation of those who spoke on the subject has destroyed the bugaboo created by the lay press. The statistics for the Province of Ontario settled the matter, and came as a surprise even to members of the profession.

In 1905 there were 866 cases tried by High Court judges. Some of these went on appeal to Divisional Courts and some direct to the Court of Appeal. The appeals from trial judges and from Divisional Courts to the Court of Appeal amounted to 94. The appeals to the Supreme Court were 21 and to the Privy Council none at all. In 1906 out of 1094 cases tried by High Court judges 79 went to the Court of Appeal and of these 28 went to the Supreme Court and only one to the Privy Council. In 1907, out of 1020 cases tried, 94 went to the Court of Appeal, 23 to the Supreme Court and 5 to England.

Put in another way it would appear that the average number of cases tried by High Court judges in each of the years 1905, 1906 and 1907 was 960. The average number of cases in which there were two appeals (in Ontario) was 31. The average number of cases in which there were two appeals (two

in Ontario and one beyond) was 21, and the average number of cases in which there were three appeals (two in Ontario and one beyond) was 4.

In view of these figures it is clear that the outcry of the lay press for the limitation of appeals is unreasonable, misleading and results from ignorance or prejudice or perhaps both. It is also manifest that the profit to lawyers on appellate business is comparatively small; and we much doubt if the few litigants who desire to thrash out their cases to a finish will thank their self-constituted champions for their interference.

In the discussion as to appeals, many and various opinions were expressed, but on the main points there was unanimity. The arguments for a permanent Court of Appeal seemed to be unanswerable, and a resolution was passed that "the Association places itself on record as considering that it is not in the best interests of the country and of sound jurisprudence that the permanent character of the Court of Appeal should be interfered with." With this we heartily agree.

It was also recognized that the evils claimed by the lay press as existing in reference to appeals, were almost entirely limited to cases of negligence where actions were brought against large companies or wealthy manufacturers. It was thought by some that these actions should be tried without a jury as are such actions against municipal corporations. Whilst this would largely reduce the number of appeals plaintiffs might in the end be sufferers as much as defendants. The subject, however, is too extensive for us to discuss at present. Possibly some such suggestion as the following might be worthy of consideration, viz., that the plaintiff should have the right to elect whether his case should be tried by a jury or by a judge, and then provide that in the latter case there should be only one appeal, say to the Court of Appeal of the province.

As to appeals to the Judicial Committee of the Privy Council we remain as strongly as ever of the opinion that this right of access to the adjudication of men of such eminent ability and learning as sit at that tribunal—men who are some of the

greatest lawyers in the Empire, absolutely free from any bias or prejudice—should not be interfered with; and this, apart from any question of sentiment, which, however, cannot and should not be entirely ignored. Possibly some change in procedure might lessen expense, but after all, as has been shewn, the cases that go to England are so few and of such large interests as to make the question of expense of minor importance.

When speaking of the Ontario Bar Association one's thoughts naturally turn to the Law Society of Upper Canada, and it might seem that because the Benchers are elected by the Bar they thereby become its representatives as to all its interests. The procedure at the recent meeting of the association would seem to shew that its mission is to occupy a field not open to the Law Society as a corporation, and yet one in which Convocation is greatly interested. The legal profession has always acknowledged the duty of the Benchers in regard to the education, admission and discipline of the Bar: to properly care for those who are preparing to enter its ranks, to examine into their fitness and admit them when qualified, and when in practice to see that they honourably and faithfully discharge their duties, and discipline them when they do not. Hence the incorporated Law Society of Upper Canada has for 100 years elected its Benchers and has confided to them (1) legal education, (2) calls to the Bar, (3) discipline, (4) reporting of cases. Beyond these it has not gone; nor, possibly, is it necessary or advisable that it should go further.

Many questions, however, lie outside these somewhat scholastic limits. The profession has to practice in the light of day and it finds itself inseparably bound up with and interested in numberless public questions, municipal, public and social as well as legal. It possesses a body of men who are better equipped in these directions than those in any other profession or calling. But it owes a duty to itself and that is so to conduct itself that its individual members may not fall below the high standard which is demanded of lawyers. Hence, it is necessary that they should finds means of coming together with intent not to loosen

the bonds by which, as members of a great profession, they rejoice to be bound, but to so formulate and restate their obligations that the principles which in public matters and in their more domestic concerns they regard as essential may be clearly set before them.

The honour and dignity of the profession belongs to itself and it cannot delegate its responsibility by electing representatives to administer its concerns. And the support and countenance given by the Benchers to the various local county associations indicate that in their view there is not only scope but an actual necessity for some body which, outside themselves, will represent the Bar in some corporate manner in its relations to the public. The Ontario Bar Association has happily adopted the position that its surest support lies with these local associations. There are many subjects such as the relation of the Bench and Bar, the methods of procedure, the administration of criminal justice, the relations of solicitor and client and others which touch the public and the profession, and in which it is desirable that some body, not legally constituted, but yet thoroughly representative, should be able to keep alive an esprit de corps and what is just as important, its proper relation to the public at large.

Proceedings of the Association.

The proceedings of the association, which was held in Toronto on the 17th and 18th of December last, were varied, comprehensive and of much interest. The chairman was the vice-president of the association, Mr. F. E. Hodgins, K.C., the president, Mr. A. H. Clarke, K.C., being unable to attend.

The chairman, after referring to the increase in membership, from 200 to 276, during the past year, announced that the council had decided to broaden the base upon which the association rested. This important step, he said, was really the natural outcome of the idea which underlay the formation of an Ontario Bar Association, namely, that it should be a federation of the county law associations. It has been decided to

make the president of each of these county organizations members of the governing council so that the direction of the associations' policy would be controlled by the chief officers of the local associations. He promised that the constitution which really contemplated this position would be so expressed as to bring about the desired result automatically.

The chairman then dealt with the respective functions of the Benchers of the Incorporated Law Society and such an organization as that now in session, and referred to the attitude of the New York State Bar Association upon some of the constitutional changes desired by President Roosevelt.

After the chairman's address, a paper was read by Mr. Ludwig on legal ethics, in which was properly advocated the high standard which the best men of our Bar have always sought to retain as its heritage from the great men who were its leaders in its more youthful days.

At its evening session, those present listened with great attention to an interesting and instructive address from Mr. Justice Anglin in which he referred to the pleasant and satisfactory relationship in the Province of Ontario between the Bench and the Bar; and commented upon their respective duties and privileges, giving appropriate and wholesome advice to those entering upon their life work in the ranks of the profession.

Hon. A. B. Morine, K.C., briefly discussed the place of the Bar in relation to public life in Canada, and the effect of public life on the career of individual members of the Bar, distinguishing its bearing as to city and country practitioners respectively. He referred to the many in the profession who were members of various provincial legislatures and many more in these than in the Dominion Parliament; and remarked that whilst their presence in the former was most desirable, it was important that issues in provincial and civic life should not limit their vision to the broader views which should scan the affairs of the country as a whole.

Appellate Jurisdiction.

The paper read by Mr. E. R. Cameron, K.C., registrar of the Supreme Court of Canada on this subject was a valuable addition to its literature, exhibiting much research and being particularly interesting in reference to historical incidents connected with the Supreme Court, its scope and intended usefulness. We make the following extracts:—

"What I have said perhaps may reasonably be considered an introduction to this important subject. I have attempted to shew that in principle three appeals, namely, to the Divisional Court, the Court of Appeal, and the Supreme Court are not in conflict with the procedure finally adopted in England after many centuries' experience with appellate courts, and which appears to have resulted in a consensus of opinion amongst the Law Lords, perhaps a body the most competent in the world to judge, that every additional appellate tribunal has better opportunities of pronouncing a correct judgment than any or all of the intermediate tribunals, by reason of the fact that the judges have for their assistance the reasons for judgment of all the judges of the courts below, and after the fullest argument of counsel."

In speaking of the desirability of uniformity in the conditions for appeals to the Supreme Court he said:—

"What is the condition now? Whereas in Quebec the amount required to give jurisdiction to the Supreme Court is $2,000, in Ontario it is $1,000. In Quebec, in real property actions, it is only where title to lands is involved an appeal lies, whereas in Ontario, it is title to real estate or some interest therein. In Ontario an appeal lies if the matter in dispute is a patent. Not so in Quebec. In Quebec there is an appeal if the matter in controversy relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, while in Ontario it is where the matter in question relates to the taking of any annual or other rent, customary or other duty or fee. The difference in phraseology which is wholly unnecessary, leaves it doubtful how far decisions of the Supreme

Court on the Quebec section are applicable to the corresponding section relating to Ontario appeals. An appeal lies in Ontario by leave of the Court of Appeal or of the Supreme Court, whereas in Quebec no leave to appeal can be granted. In Quebec there is an appeal from the Court of Review, whereas in Ontario there is no appeal from the High Court. In Quebec it is the amount demanded in an action that governs the jurisdiction of the Supreme Court, where it differs from the amount recovered by the judgment. In Ontario it has been held by the Supreme Court that the converse applies.

"In Manitoba we have the exceptional condition of a Court of Appeal with no limitation upon appeals, different from what existed when the only Superior Court was the Court of King's Bench. Turning now to the provinces in which there is no Court of Appeal, the same incongruities and anomalies prevail. Whereas the Supreme Court Act generally provides that to be appealable the cause or action must arise in a Superior Court, in Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, an appeal lies in a case arising in an inferior court if it involves $250, or in Quebec if it involves $2,000. In Alberta and Saskatchewan, on the other hand, there is an appeal from an action instituted in an inferior court by leave of a judge of the Supreme Court. There is an appeal in cases arising in a Probate Court in all provinces except Quebec, where the amount involved is $500, but again, this does not include the Surrogate Court of Ontario. In the Yukon Territory there is an appeal in a case arising before the gold commissioner, but not so in Nova Scotia. At present there is no appeal to the Supreme Court either from the Province of Quebec or Ontario in cases of an injunction unless it can be established that more than $1,000 in Ontario, and $2,000 in Quebec, is involved. Many actions of the very highest importance, where an injunction only is asked, and involving perhaps the powers of directors of corporations or of executors and trustees, however vast the interests concerned, are not now appealable. Then again, in none of the provinces except Ontario, Quebec and the Yukon Territory, is there any limitation upon appeals by reason of the

small and trifling amount involved, so that frequently appeals reach the Supreme Court where the parties are litigating over $50 or $100. As to this the former chief justice of the Supreme Court, Sir Elzear Taschereau, had occasion to remark, in *Gorman* v. *Dixon*, 26 S.C.R. 87: 'The Maritime Provinces enjoy the costly privilege of bringing appeals to this Court upon paltry amounts. That such appeals should be possible is a blot upon the administration of justice. I hope the Bar of the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things.' What has been the result? Until the new rules of the Supreme Court were promulgated, which required matters of jurisdiction to be raised before the registrar at the time, or shortly after, the allowance of the security, every session of the court witnessed a number of motions to quash the appeal for want of jurisdiction. Leaving out of consideration the cases in which the motion failed, in ten years the official reports of the court shew that fifty appeals were quashed for want of jurisdiction, and in most cases after the appeal case had been printed and counsel were in attendance on the court to argue the appeal on the merits. Who can coolly contemplate the ruinous effect of this upon the unhappy litigant who has gone to all this expense. In one case I remember, there were 2,000 pages of a printed case, the enormous cost of which was absolutely wasted, as the appellant never got a hearing. I am glad to say we have partially overcome this by the new rules. I brought the matter to the attention of the present chief justice upon his appointment to the Supreme Court Bench, and I was instructed to draft some rules which would prevent the continuance of this condition of affairs. Now there is provision for the appellant, if he has doubt as to the jurisdiction of the court, to apply to have the jurisdiction affirmed before any expense has been incurred. If he fails to do this, it is the duty of the respondent to make a similar motion at the earliest possible moment, and if he fails in the performance of this duty, if the appeal is quashed, there is provision made for his not only getting no costs of the motion, but he may also be compelled to pay the costs of the appellant."

Mr. Cameron concluded with the following suggestion:—

"That your association recommend the Attorney-General of the Province to communicate with the Attorneys-General of the other Provinces, and the Attorney-General of Canada, with the object of appointing representatives to meet and settle upon some uniform provision respecting appeals to the Supreme Court. If you in Ontario want to limit appeals further than at present, no one can doubt that any reasonable request will be granted. If $2,000 is a better limit with respect to the amount involved than $1,000, then adopt the proviso now in force as respects the Province of Quebec. If it is desirable that there should be an appeal where the exceptional remedy by injunction is awarded or refused, let it be uniform."

Ontario Appeals.

The paper on this subject was entrusted to Mr. J. H. Moss, K.C., who approached the subject entirely from the point of view of what he believed to be the best interests of the community at large, and not from the narrow consideration of the interests or supposed interests of the profession; and it may here be said that this was the spirit of all the papers and discussions which took place.

After referring to the clauses of the Attorney-General's resolutions, with which our readers are familiar, Mr. Moss observed that the changes suggested would in effect do away with the present permanent character of the Court of Appeal and merge that court with the High Court of Justice, at least for appellate purposes, and so constitute one appellate court, comprised of all the judges of the Supreme Court of Judicature; with the result that the tribunal which would hear all appeals in the province would be of a transient character and constantly changing membership.

In dealing with the nature and extent of the alleged evil which it was sought to cure and the appropriateness of the suggested remedy, it was clear from the figures furnished by the inspector of legal offices, which have already been referred

to, that the supposed evil is not very serious or widespread, for during the three years of 1905, 1906 and 1907 an average of 31 cases in each year have been before more than one appellate court in the province which gives an average of slightly more than three per cent. of all the cases tried.

As to newspaper comments directed to appeals from interlocutory orders the writers were apparently ignorant that appeals of that character had been practically abolished by amendments to the rule introduced by the judges under the Judicature Act.

The popular interest in the subject of appeals arises almost entirely in connection with negligence actions, brought for the most part by poor men or their widows and orphans against corporations, in respect of which the plaintiff must, of course, obtain a finding of negligence in order to succeed. A jury naturally sympathizes with the plaintiff, and often finds a verdict on very flimsy evidence of negligence, and the defendants then naturally exhaust every possible means of escaping from verdicts which are believed to be based rather on sympathy than on a fair consideration of the evidence in the light of the existing law. The result is that defendants appeal these cases as much and as often as they possibly can, and the procedure and constitution of our courts is blamed for what is in reality rather a defect in the administration of the law.

As to the government proposal "that there should be but one appellate court for the province," he said: "It may be frankly conceded that as a matter of pure law the idea of one appeal within the province is attractive, as it unquestionably conduces to a simpler and more symmetrical procedure than that now in use. It is, however, the experience of mankind that in dealing with practical institutions symmetry and simplicity from a theoretical point of view may be achieved at too dear a price in the sacrifice of utility and efficiency, and if the theoretical perfection represented by the idea of one appeal in the province can only be achieved by a reconstruction of our appellate courts on a less satisfactory basis than now exists,

I think the members of the profession will agree with me that too dear a price is being paid for this theoretical perfection.

"The function of an appellate court may be said to be threefold: First, and most obvious, to reverse and over-rule judgments wrongly decided by the lower courts. Second, and less obvious, but more important, to prevent lower courts from going wrong. Third, and most important of all, to impart by its decisions continuity and consistency to the jurisprudence of the country so as to insure as much certainty as possible to the law of this province. I believe the concensus of opinion of the profession to be that no one of these functions can be as satisfactorily performed by a court with a constantly changing membership as by a permanent tribunal.

"It is essential to a proper discharge of its duties by an appellate court that its members should have ample opportunity of discussion in arriving at its decisions. The absence of such discussion deprives the court largely of its entity and makes it merely an assembly of individual judges each of whom may approach the case under consideration in total ignorance of the manner in which the other members of the court have approached it. Both the opportunity and inclination for discussion must be largely eliminated from a court with a constantly changing membership. Judges of an appellate court get the 'team' spirit. They deliver not the judgments of the individual, but of an entity, matured after consideration and mutual discussion. Such judgments must be far better and far more likely to be correct expositions of the law than judgments pronounced by five or three individuals who simply meet together for the purpose of hearing argument, separate, and then trust to chance and opportunity to meet together again before delivering judgment. In a court of that character not only is the opportunity of discussion rare and difficult, but I think it is only fair to say—because we may admit among ourselves that judges are mortal and human—that the inclination for discussion is not so likely to be present. The absence of that spirit of oneness—of the court consisting of a whole—must

militate against the inclination to full discussion which should prevail in the court of last resort in the province."

After referring to other reasons against a non-permanent Court of Appeal it was claimed that the sense of responsibility for the continuity of the law of the province must be far greater with the members of a permanent Court of Appeal than in those of a changing tribunal, and the belief was expressed that the profession would be unanimous in the view that if there was only one Court of Appeal it should be to a court of a permanent character and not to judges engaged in nisi prius work.

Mr. Moss concluded his paper by suggesting that instead of changing the constitution of our courts, which have proved satisfactory for almost every case of litigation, it would be better to deal with the real evil and devise some means of achieving more satisfactory results in connection with negligence cases, as the withdrawal of these from a jury would unquestionably tend greatly to put litigation of this character on a much more satisfactory footing, and be much more sensible than altering the constitution of our appellate courts.

Supreme Court and Privy Council Appeals.

Mr. John T. Small, K.C., said:—The subjects with which your association has asked me to deal are the Fifth and Sixth Resolutions of the Attorney-General carried at the last sittings of the local legislature.

The Fifth Resolution is: That the decision of the Court of Appeal should be final in all cases except where

(*a*) constitutional questions arise, or

(*b*) questions in which the construction or application of a statute of Canada are involved, or

(*c*) the action is between a resident of Ontario and a person residing out of the province.

The Sixth Resolution is: That the appeal of right to the Judicial Committee of the Imperial Privy Council should be abolished, and the prerogative right of granting leave to appeal to that tribunal, if retained, should be limited to cases in which

large amounts are involved, or important questions of general interest arise.

On the general question of appeals, I am sure that most members of the profession present are in agreement with me that it should be and is the desire of the profession to limit the number of appeals in any case so far as is compatible with the due administration of justice, and the rights of the subject. "Law Reform" is a catching term, but we lawyers know well that a whole world of fallacy may be concealed in a word, and we must not be led astray by the mere outcry for law reform.

It is our duty, being in a position to ascertain the facts, to analyze the situation very carefully and when we hear it said that there may be three, four or more appeals in an action, the first thing to be considered is, in how many cases tried, has there been any appeal at all, and where there have been appeals, how many appeals?

Now, I am not dealing with the appeals to the Court of Appeal from the Divisional Court, as Mr. Moss has gone into that. The returns for the past three years shew that in 1905 there were 866 cases tried. There were only 21 appeals to the Supreme Court and none to the Privy Council direct from our Court of Appeal. In the year 1906, 1094 cases were tried. There were 28 appeals from the Court of Appeal to the Supreme Court and one appeal from it to the Privy Council. In the year 1907, 1020 cases were tried. There were 23 appeals to the Supreme Court and 5 to the Privy Council direct from the Court of Appeal. In other words, in three years there were 72 appeals to the Supreme Court, being only 3 per cent. of the 2980 cases tried, and there were 6 appeals to the Privy Council direct from the Court of Appeal, being only one case in 500. With respect therefore to appeals either to the Supreme Court or Privy Council, the area of mischief is not large, and we may well pause before coming to the conclusion that the present system of appeal is objectionable.

I am sure we all agree that it is not in the interests of the state that litigation in matters of moment should be like a prize

fight, and decided by the first knock-out blow, or like the old wager of battle, as to which Coke quaintly remarks: "For there if the defendant be slain the plaintiff hath the effect of his suit, that is, the death of the defendant." The more correct idea as to appeal is shortly stated in a note respecting one of the Teutonic Codes, in Mr. Holland's work on Jurisprudence. He says: "It gave a right of appeal even to a dissentient member of the court, as having an interest on public grounds that the law should be correctly stated."

Now, both in the interests of the litigants and of the state, this is what should be. Those who have the misfortune to be in litigation wish to feel that their rights are determined by no rough-and-ready, hap-hazard method, but that they have been well considered and decided according to the established principles of the law of the land. Then for the public generally, no one knows better than we lawyers how important it is that the principles of the law, as it advances from stage to stage, should be fully and clearly elucidated, as guides to us who have to advise our clients respecting their business, property and rights.

For these reasons it is my opinion that in matters of moment there should be more than one appeal in the province. We have already heard that the Divisional Courts sift out practically 75 per cent. of all the cases heard in appeal from the trial judge, and that only 25 per cent. pass on to the Court of Appeal. If more stability were given to the Divisional Courts by providing that the same judges should constitute such a court for six months or a year, the greater opportunity for consultation and for consideration of their judgments would doubtless produce even better results, but when we have reached that point it is in the general interest that there should be another appeal with respect to the remaining percentage of cases in which an appeal is now allowed. We, whose duty it has been to follow cases through their various stages, know that as causes of importance advance, the points are narrowed down and those which remain are usually more fully, amply and satisfactorily considered. For these reasons, after a great deal of considera-

tion, I am myself firmly of the opinion that one appeal only in the province would not be advantageous to the individual or the community.

Now, to deal specifically with the proposed changes in the appeals to the Supreme Court of Canada. You have heard Mr. Cameron's view (and there is no one better able to judge), that it is extremely unlikely that the Parliament of Canada would materially limit appeals to the Supreme Court, and as I fancy most of you will agree with me in that, it will not be necessary to take up much time with it.

My own view is that if the limit of $1,000 were raised to $2,000 that would be a good step.

Then, as to the last paragraph of the Fifth Resolution, the Committee on Legislation of the County of York Law Association (of which I have the honour to be convener), think, and with them I entirely agree, that it is inexpedient that there should be any difference as to the right of appeal in a case where one of the parties to the action happens to be a person residing out of the province. This would lead to the evils which have arisen in the United States, where on the same point of law they have different decisions in the Federal Court in the state and in the courts of the state, so that the ultimate result in many actions depends upon whether they are tried in the one court or the other, and we are told that those who are desirous of obtaining the decision of the Federal Court, endeavour to arrange that a non-resident of the state shall be a party so that the action may be brought in the Federal Court. This is an undesirable situation and we ought rather to aim at uniformity of decision as far as possible.

I have next to deal with the Attorney-General's Sixth Resolution, concerning the Privy Council. That resolution as you will have noticed proposes to do away with the right of appeal from our Court of Appeal altogether and that even the prerogative right of granting leave of appeal should be still further limited.

The intention of further limiting these appeals requires serious consideration. Let us first consider the constitution of the

Judicial Committee of the Privy Council. I cannot give you a better description than the recent words of the Lord Chancellor: "Let me say what is the Constitution of the Privy Council and the House of Lords respectively. They consist of the same persons, who sit in different places, with this difference that all the persons who can sit in the House of Lords judicially are entitled to sit in the Privy Council and do sit there; but in the Privy Council, having regard to the fact of past opinions expressed by Colonial ministers, and to a general feeling that we want, so to speak, to enlarge the scope as much as we can, there are other additional members who are not members of the House of Lords. There are two members of the Privy Council who may be specially appointed, and receive a salary. There are two also who may be appointed without receiving any salary, and without any specific qualification. There are two such persons, distinguished men both of them. In addition to that there is the Act under which five gentlemen may be appointed, and five have been appointed, including Sir Henri Taschereau, Sir Henry De Villers, Chief Justice Way, and two other distinguished men. Besides that, all those who have held high judicial office, the conditions of which are prescribed, in any part of His Majesty's dominions, if members of the Privy Council, may sit on the Judicial Committee. Therefore it is what may be called in its composition a somewhat cosmopolitan court."

I have already mentioned that the number of appeals to the Privy Council from our Court of Appeal (and that is the matter with which we have to deal here) is very limited. In the years 1905, 1906 and 1907, there were only six appeals or an equivalent of one in every 500 cases.

Now, is it desirable to do away with those appeals? No country has greater need than Canada that the conditions surrounding the final determination should be clear of all political, racial and religious feelings or animosities. The right of appeal to the Privy Council may, in cases where public feeling is heated, put an end to serious national difficulties. It is not

many years since the Hayes-Tilden case in the United States created world-wide interest. Mr. Bryce gives a graphic account of the incident in the first volume of his admirable work on the American Commonwealth. He shews that at the Presidential election between Hayes and Tilden, Republican counters had endeavoured to throw out the votes of four states. The Democrats claimed that they had carried these states and sent in returns claiming them. It was not long after the close of the war, and as the south had voted "solid" with the Democrats, feeling ran high. It was finally decided to refer the matter to a commission of an equal number of Republicans and Democrats, and five of the judges of the Supreme Court of the United States. This special commission, as ultimately constituted, had upon it three Supreme Court judges who had been Republicans and two who had been Democrats and in every question they voted according to their previous political allegiance. As Mr. Bryce says the prospect of a peaceful settlement was remote and it is not unlikely that but for the efforts of Mr. Tilden to keep his followers quiet, there would have been a civil war.

The Judicial Committee of the Privy Council is a court which has vast experience of affairs in all parts of our world-wide Empire. One hears argued there, one day, an appeal from India as to who is the lawful heir of the ruler of some vast state in India; on another day the validity of a will in Ceylon; still again, questions as to cargoes shipped in the Straits Settlements or Hong Kong; the title to a sheep farm in Australia, or the endowments of the church at the Cape. Here is debated the old French law from Quebec, the Roman Dutch law from British Guiana and the Cape, the customs and laws of the followers of Mahomet and the disciples of Brahma from India, the Code Napoléon from Mauritius and the Chinese law from Hong Kong. It would be difficult to find a set of judges of wider training in the great principles of jurisprudence, or possessing larger knowledge of the complicated business relations between individuals and nations in this busy modern

world. With such a training and experience we may well look for able decisions and I think the majority of us will agree that we are seldom disappointed. It is all important in an empire as large as ours that the legal questions arising out of international law, maritime law, the law merchant and questions of alienage, among many others that might be mentioned, should be the same throughout the Empire.

I am glad to see that the Premier of Canada, Sir Wilfrid Laurier, is of the opinion that the present right of appeal to the Judicial Committee of the Privy Council should be maintained. At the Imperial Conference in 1907, he said: "On the other hand there are some jurists of equal eminence who believe that taking us as we are at the present time a part of the British Empire, in which so many questions of Imperial interests must necessarily arise, even in the lowest courts, it would be a good feature to retain the present appeal to the Judicial Committee of the Privy Council. The present Minister of Justice, as able a man as we have ever had in Canada, is of this opinion to-day, though some of his predecessors, and I believe his predecessor in 1901 held a different view."

Let us all unite then to retain this valuable right of appeal, and let us aim at having one law for the mighty Empire of which we form no inconsiderable a part.

Practice and Procedure.

The discussion on the Government resolutions in reference to matters of practice was opened by a paper by Mr. J. H. Spence.

The consideration given to the first of these, viz., that in matters of mere practice the decision of a judge of the Supreme Court of Judicature for Ontario whether on appeal or as a judge of first instance should be final, shewed that it was not of sufficient importance to warrant any change.

As to examinations for discovery and the suggestion that the excessive costs which were said to be often incident thereto, Mr. Spence was of the opinion that the rules in regard to examination for discovery are at the present time in a very

satisfactory condition and that much improvement could not be made. He considered that in three-fourths of the cases that came before the courts examinations for discovery were an absolute necessity, so much so that even if there were no provisions in the rule as to the costs of the examination being paid by the unsuccessful litigant, solicitors would often feel justified in recommending their clients to have these examinations, even if the latter had to pay for them. If there were no examinations there would be more new trials, and much expense and loss of time in that regard would be obviated. These examinations are necessary to enable the parties to prepare satisfactorily for the trial. They also curtail the length of the trial very materially, and often save much expense in witness fees, and lessen the length of the trials.

Another reason given was that by means of this procedure parties learn of their own and their opponents' strong and weak points and in this way settlements are frequently made. The parties themselves are generally present on these examinations and naturally a discussion of some settlement arises, so that not only do examinations for discovery assist in preparing satisfactorily for the trial and in shortening the trial, but also in a number of cases result in the final adjustment of the litigation. As to the present rules it was suggested that the senior taxing officer should have a discretion on the disallowance of all fees in connection with examinations for discovery and have the power to direct the party who had unduly prolonged the examination to pay his opponent's costs of the same.

As to the appointment of a practice judge, the opinion was expressed that this would not be conducive to the best interests of the profession and litigants. The main reasons were that the other judges of the High Court would lose their interest in practice and procedure, and, as decisions on such matters are constantly arising at nisi prius, the judges would not be as familiar with them as they should be. Another reason given was that as judges of the High Court have to make and amend rules governing procedure they would not have the necessary

familiarity with the subject. The suggestion was made that the judges should sit in rotation in chambers and single court rather than that a permanent practice judge should be appointed.

The paper also made the following suggestions:—(1) To abolish writs of summons, and commence an action by statement of claim. (2) To do away with orders to produce. (3) To have more uniformity in the practice of lodging and setting down appeals no matter from what courts they might come. (4) To have more uniformity in regard to the times in which steps are to be taken in an action, and then to have a uniform rule as to whether the periods are clear days or inclusive of the first or last days.

Report of Committee on Law Reform.

The Committee charged with the consideration of this subject made its report and after some introductory observations took the ground that reforms of substantial merit are not to be accomplished by adopting the opinions of uninformed lay critics, nor yet by the tumultuous discussion of a popular assembly. On the contrary they must be brought about by the men who are most familiar with the subject, and who are able to place their hands upon the real defects, and apply, with wisdom and caution, a suitable remedy. Lawyers in all ages have taken their fair share in the work of genuine reform, and the report expresses the hope that in the consideration of any scheme of law reform for this province the members of our profession will be fully consulted.

The committee, having taken a great deal of trouble to ascertain the view of the profession on the resolutions of the Attorney-General, summarizes the opinion received from the various Bar Associations of the province and from individual members of the Bar as follows:—

"Dealing first with the Government resolutions we find that there is an almost unanimous opinion in favour of the first resolution, namely, that there should be but one Appellate Court for the province provided that such court consists of judges

permanently and exclusively assigned thereto. The Benchers have approved of it as have also the law associations of the city of Hamilton and the counties of Ontario, Kent, Simcoe and Frontenac. A majority of the members who have given us their individual opinions also favour it. On the other hand the Law Association of the County of Elgin and a small minority of individual members seem to prefer the present Divisional Court system to that of one appellate court.

"When we come to resolution No. 2 declaring that all the judges of the Supreme Court of Judicature for Ontario shall constitute the appellate court, we meet with a greater variety of opinion. The balance, however, seems to weigh heavily against the resolution. The report of the Benchers is not altogether clear upon the subject. The Elgin association is opposed to any change at all, while the associations of the city of Hamilton and the counties of Ontario, Kent, Simcoe and Frontenac are opposed to it on the ground as they believe that the appellate court or courts should consist of judges permanently assigned to these courts, which could not be if all the judges are members. This seems to be the view also of the majority of the members of the Bar, who individually have written our corresponding secretary.

"It is felt that the effect of the proposed change would be to substitute a transient and floating tribunal for a permanent court and the argument is that this would be a serious menace to the continuity and strength of what would be in the great majority of cases the court of final resort.

"Resolutions 3 and 4 have not been dealt with in such a way as to justify our giving a summary of the views of the members upon them, but the opinion prevails that the court must necessarily consist of two divisions.

"As to resolution No. 5 dealing with appeals to the Supreme Court of Canada, we may say with certainty that the majority of the profession are in accord with the proposal to limit these appeals. Objection, however, is taken to sub-clause (c) on the ground that the right of appeal otherwise wanting could be

obtained by simply assigning the claim to a person in another province. Others including the Benchers would add a sub-clause (d) providing for an appeal where leave has been granted by the Court of Appeal.

"Dealing with resolution No. 6 referring to appeals to the Judicial Committee of the Privy Council, we find a great difference of opinion although the balance certainly inclines in favour of limiting the appeals in the manner proposed. It is but fair, however, to say that the Benchers and a considerable number of the members of the Bar including several leading counsel have decided views that it would be a mistake to interfere in any way with the present right of appeal to the Judicial Committee.

"Resolution No. 7 seems to meet with general favour although it is held by many that an appeal from a single judge to a court consisting of three judges of the Court of Appeal might well be allowed.

"Coming to resolution No. 8 we find that the profession is practically unanimous in the belief that there is no necessity for any change in the practice regarding examinations for discovery, the feeling being that the present system is satisfactory and works no hardship. The Benchers have made a suggestion that the party requiring the examination where successful in the litigation, should pay all his own costs thereof, as well as the fees of the examiner and the witness fee except a moderate limited amount, and that where unsuccessful he should bear all costs on both sides unless the trial judge orders otherwise. This is generally believed to be unnecessary.

"As to resolutions 9 and 10 dealing with the jurisdiction of County and District Courts, we find that only one county association favours any increase in the jurisdiction of these courts. This is Ontario, while the Benchers and the law associations of the city of Hamilton and the counties of Simcoe, Frontenac and Elgin are opposed. Of the members of the Bar who have expressed their opinions in letters, the majority seem to desire that the jurisdiction of these courts should not be increased."

The report concludes with the following suggestions for legislation:—

"1. That the procedure in the Surrogate Court should be simplified and the number of forms now required to be used brought down to a minimum. The number of affidavits and papers now in use is beyond all reasonable requirements.

"2. That the tariff in the Surrogate Court is not sufficiently high to insure to the practising solicitor a reasonable reward for his work.

"3. That the profession should be relieved of collecting from their clients a revenue for the Government in the shape of law stamps and fees.

"4. That vacancies occurring in judicial offices should be filled by capable men belonging to the profession instead of as now in some instances, by men who have obtained the office solely as a reward for political services.

"5. That the mode of amending statutes be changed so that the section as amended may be printed in full.

"6. That an official report of Osgoode Hall legal intelligence should appear in the leading daily morning newspapers in order that the profession throughout the Province may be made aware of what is going on in the courts of justice.

"7. That county judges, magistrates and other judicial officers should be paid by salary only and not in part by fees as at present. It is not intended by this that these officers should lose any part of their income. We believe they should be amply paid but by a salary alone. We are not aware that any practical grievance has arisen from the fact that some county judges receive fees for Surrogate Court work, but the belief is very general that the practice of magistrates collecting fees is a real and substantial grievance which ought to be immediately remedied."

COMPANY LAW.

Bondholders, Creditors, and Provisional Directors.

A case of considerable interest to the profession was decided last month when the Court of Appeal gave judgment in *Johnston* v. *Wade*. The chief point involved in this case was the right of bondholders as against ordinary creditors, there being no registration of the bonds and no mortgage made to secure the bonds.

In 1904 the provisional directors of the Poole Publishing Company passed a by-law, which was afterwards confirmed by the shareholders, empowering the directors of the company to borrow money and issue bonds for such amounts as should be deemed necessary. This by-law was in effect in the same wording as s. 49 of the old Companies Act. It was, however, subsequently repealed by the directors and a new by-law in the same terms passed, but neither the repeal nor the new by-law was submitted to the shareholders for confirmation.

A short time before an assignment for benefit of creditors was made, the company pledged its bonds to the amount of $9,500 to the plaintiff as security for a loan of $3,000, the bonds being issued in blank and deposited with her. These bonds were in the form of a floating charge similar to those used in England, and purported to charge all of the company's assets, real and personal, with payment of the sum named in the bond.

Upon the assignment for the benefit of creditors being made, the bondholder claimed a first charge on all of the company's assets subject only to a prior registered mortgage on the real estate and to certain manufacturers' liens on the plant, and the assignee disputed her rights, particularly in regard to chattels, claiming that without registration under the Chattel Mortgage Act, such a charge could not be upheld as it was in effect a mortgage. The bondholder brought action and at the trial Mr. Justice MacMahon gave judgment in her favour. The assignee appealed, and the judgment was affirmed by the Court of Appeal, Mr. Justice Garrow dissenting.

There are two points of interest in the judgment of the Court of Appeal: the first is that bonds of this kind can be created by a company, and, although no mortgage is made to secure them and they themselves are not registered in any manner, they nevertheless form a first charge on all the assets of the company, even including the chattels. The basis of the judgment on this point is that the Chattel Mortgage Act is not sufficiently wide in its wording to include these bonds. Many points of distinction between the holder of such a bond and a chattel mortgagee are pointed out, the chief of them being that the bondholder has no right of property vested in him and no right of seizure given him. The bonds consequently not falling within the Chattel Mortgage Act and there being no provision in the company's act requiring registration, they were held to be valid without registration.

It had been previously held in England in *Re Standard Manufacturing Company* (1891) 1 Ch. 637, that bonds of this nature did not require registration under the English Bills of Sale Act, but this decision seemed to proceed largely on the ground that the English Companies Act made ample provision for registration. The point was, therefore, a doubtful one here, as prior to this case there was no decided case in Ontario, on the point of registration as a chattel mortgage.

The second point of interest in the judgment is that the majority of the court seem to go so far as to say that a borrowing by-law is not valid if passed by provisional directors. This is somewhat surprising in view of section 41 of the old Act and section 79 of the present Act, but is said to be in accordance with the previous judgment of the Court of Appeal is an unreported case of *In re Wakefield Mica Co.* It was held, however, that it is immaterial in this case as the bondholder was a stranger to the company, and under the doctrine in *Royal British Bank* v. *Turquand,* 6 E. & B. 327, was not affected by this irregularity. This last point is also of importance as it was generally thought that this doctrine did not extend so far as to cure irregularities in borrowing, owing to the fact that the lender always has notice of the provisions of the Companies Act.

It was furthermore held by the court that the repeal by the directors of the first borrowing by-law was ineffective, owing to 2 Edw. VII. c. 24, s. 3, and that the passing of the new by-law which was not confirmed by the shareholders was immaterial as the act must be taken to have been in pursuance of all powers vested in the directors.

The net result of the case is that bonds of the nature in question may be issued by a company and give to the bondholders a most extensive security, without any of the other creditors of the company having any knowledge or notice of the security or being in any way put on their guard. It would further seem that the decision in *Duck* v. *Tower Galvanizing Co.* (1901) 2 K.B. 314, is adopted in its entirety, and that irregularities in the internal management of the company do not affect in any way an innocent third party, even though the directions of the Companies Act have been altogether disregarded.

Some of the findings in the judgments delivered in this case will come as surprises to many in the profession whose practice lies in the direction of company law, and it may be used to emphasize the need for a recasting of the Ontario Companies Act and then more upon the basis of the English Act.

ANARCHY.

Lawlessness has been in evidence ever since Cain murdered Abel. The form it takes from time to time and in different countries depends upon an endless variety of circumstances, but the spirit of it pervades humanity. As to this, we, in this Dominion (at least in the Province of Ontario), cannot afford to throw stones at any other country. Suffragettes may be comical enough, and Lynch law may be bad enough, but there is a development of this spirit of lawlessness here, which, if not checked, will grow into serious evils, the end of which may be dimly seen in the light of history. We refer to that restlessness under authority, and that decreasing respect for the powers that

be, so aptly characterized in the old Book when it speaks of those who are "presumptuous, self-willed, and not afraid to speak evil of dignities."

This is specially noticeable in the tone taken by writers in the daily press in reference to our courts and judges. The fair criticism of judicial findings, which, of course, is perfectly legitimate and often highly beneficial, is being supplemented, or rather supplanted, by reckless and untrue allegations of gross ignorance and incompetence on the part of members of the Bench, by allegations of injustice and innuendoes of interested motives. This, of course, incites the thoughtless, the vicious and the demagogues to take a similar tone and breeds contempt for authority. It seems now to be in order, whenever a judge or a court decides adversely to what are said to be the "rights of the people," or in favour of vested rights, for large sections of the daily press and for aldermen in cities, who depend on the popular vote for their positions, to pour out the vials of their wrath upon the judge who happens to differ from what these self-constituted judges think the law ought to be.

It is unnecessary to go into details, but all know, if they chose to acknowledge it, that what we say is substantially correct. To illustrate: In a recent case where the city of Toronto was unsuccessful in some litigation properly before the Ontario Railway Board, one of the Controllers of the city declaimed against "the city submitting to the interference of the Railway Board, as that interference is detrimental to the city." Take another case, *The City of Toronto* v. *The Toronto Railway Co.*, which came before the Privy Council on appeal during the past year. When judgment was delivered the comments of the press thereon were so reckless, and displayed such ignorance of legal matters and of the true situation, that we had occasion to protest against them (ante, vol. 43, p. 325). The same parties have just been before the Ontario Railway Board on the same subject; the same objectionable language was indulged in, though upon this occasion it could not be said, as was said on the previous occasion, that the alleged unfairness of the decision (which was as to the construction of the words of the contract) arose from

the ignorance of the judges of the practice and temper of the parties to the agreement!

In reference to this decision of the Railway Board a leading journal said that "No constructive judgment of a judicial tribunal could impair the authority of the city council." This is bad enough for an irresponsible journalist, but one is surprised to hear similar language from the Premier of the province, who, when interviewed on the same subject, is reported to have said: "Under no circumstances could any outside authority be allowed to assume control of the streets of the city."

If these words mean anything they mean that no matter what the contractual rights of the parties may be, some change in the contract is to be made by a subservient legislature to meet the views of certain newspapers and a municipal council; *i.e.*, vested rights are to be ignored, and solemn contracts torn into shreds. The Privy Council and the Railway Board agree in their construction of a contract, but the press and the aldermen, swayed by popular clamour, do not concur and call upon the legislature, which unhappily it seems to control, to undertake upon the orders of its masters to do that which has never yet been done, and never should be done, by any British Parliament. If a government should take the suggested action it would become the sort of thing described by a well-known writer in England, quoted by the *London Law Times*—"a supple tool in the hands of the clever rogues of a corrupt press."

It is difficult, in view of such instances as these, to combat the statement that the spirit of lawlessness is beginning to overmaster the sober thought which should steady and conserve the integrity of the body politic. The liberty of the press was obtained centuries ago at a great cost, but the pendulum has swung too far, and now the crying need is to restrain the license of the press and to fight against the demon of unrest which it has aroused. The daily press of the present day has become, not the exponent of the best thought of the country, or even its second best, but rather it voices the clamour of ignorance, thoughtlessness and lawlessness.

Whither are we drifting and what is to be the end?

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] VILLE DE ST. JEAN *v.* MOLLEUR. [Oct. 6, 1908.

Waterworks—Statutory contract—Exclusive franchise—Condition of defeasance—Forfeiture of monopoly—Demurrer—Right of action by municipality—Rescission.

By the Quebec statute, 40 Vict. c. 68, Louis Molleur and others, now represented by the defendants, were substituted as sole owners of the waterworks of St. John's in the place of "The Waterworks Co. of St. John," incorporated under R.S.C. (1859) c. 65, charged with all the obligations and responsibilities of said company, and, by the said Act, 40 Vict. c. 68, the new proprietors were granted the exclusive right and privilege of placing pipes or water conduits under the streets and squares of the town of Saint John's (now the city of St. John, the appellant), under certain other conditions and obligations in the last mentioned statute recited, and the monopoly created was, by section 3, liable to be forfeited in case of neglect or refusal in the discharge of the obligations thereby imposed.

Held, that the contract existing between the parties, in virtue of the above recited statutes, was liable to rescission under the provisions of article 1065 of the Civil Code of Lower Canada, upon default in the specific performance by the defendants of the obligations thereby imposed, and that, upon proof of default in the specific performance of any of the said obligations, the municipal corporation was entitled to maintain an action in its corporate capacity to have the exclusive right and privilege granted by the statute declared forfeited, surrendered and annulled.

The judgment appealed from (Q.R. 16 K.B. 559) deciding that the action would lie only for breach of obligations expressly declared to involve forfeiture, was reversed, DAVIES, J., dissenting. Appeal allowed with costs.

Bisaillon, K.C., and *Aimé Geoffrion,* K.C., for appellants. *Belcourt,* K.C., and *J. F. St. Cyr,* for respondents.

Que.] GREEN *v.* BLACKBURN. [Oct. 6, 1908.

Crown lands—Holders of location ticket—Prior right to mining rights—Privilege reserved—"Proprietor of the soil"—Construction of statute.

The expression "proprietor of the soil," in s. 1441 of the Revised Statutes of Quebec, 1888, as amended by 55 & 56 Vict. c. 20, read in connection with s. 1269 of the Revised Statutes of Quebec, 1888, is not intended to designate the holder of a location ticket, and, consequently, persons holding Crown lands, merely as locatees, have no vested preferential rights to grants from the Crown of the mining rights therein, under secs. 1440 and 1441 of the Revised Statutes of Quebec, 1888, as amended by the "Act to amend and consolidate the Mining Law," 55 & 56 Vict. c. 20 (Que.). Appeal dismissed with costs.

Arthur McConnell, for appellants. *Aylen*, K.C., for respondent.

N.S.] FARQUHAR *v.* ZWICKER. [Nov. 10, 1908.

Contract—Novation—Sub-contractor—Order from contractor on owner—Evidence.

T. was contractor for building a house and F. sub-contractor for the plumbing work. When F.'s work was done he obtained an order from T. on the owner in the following terms: "Please pay F. the sum of $705 and charge to my account on building, Lucknow Street." F. took the order to the owner who agreed to pay if the architect certified that the work had been performed. F. and T. saw the owner and architect together shortly after and on being informed by the latter that the account was proper and there were funds to pay it, the owner told F. that it would be all right and retained the order when F. went away. F. filed no mechanic's lien but other sub-contractors did the next day and T. assigned in insolvency. In an action by F. against the owner,

Held, DAVIES, J., dissenting, that there was a novation of the debt due from the owner to T; that it was not merely an agreement by the owner to answer to F. for T.'s debt, nor was the order to be treated as a bill of exchange and accepted as such. Appeal allowed with costs.

Mellish, K.C., for appellant. *F. H. Bell*, for respondent.

N.B.] BLAINE *v.* JAMIESON. [Nov. 24, 1908.

Appeal—Jurisdiction—Stated case—Final judgment—Origin in superior court—Supreme Court Act, ss. 35 and 37.

An information was laid before the police magistrate of St. John, N.B., charging the License Commissioners with a violation of the Liquor License Act by the issue of more licenses in Prince Ward than the Act authorized. The informant and the Commissioners agreed to a special case being stated for the opinion of the Supreme Court of New Brunswick on the construction of the Act and that court, after hearing counsel for both parties, ordered that "the Board of License Commissioners for the city of Saint John be, and they are hereby, advised that the said Board of License Commissioners can issue eleven tavern licenses for Prince Ward in the said city of Saint John and no more." (38 N.B. Rep. 508). On appeal by the Commissioners to the Supreme Court of Canada,

Held, that the proceedings did not originate in a superior court, and are not within the cases mentioned in s. 37 of the Supreme Court Act; that they were extra cursum curiae, and that the order of the court below was not a final judgment within the meaning of sec. 36. The appeal, therefore, does not lie and must be quashed. Appeal quashed without costs.

Skinner, K.C., and *Earle*, K.C., for appellants. *Hazen*, K.C., Attorney-General of New Brunswick, for respondent.

Ex. Ct.] [Dec. 1, 1908.

THE "SENLAC" *v.* THE "ROSALIND."

Maritime law—Collision—Negligence—Failure to hear signal—Evidence.

The SS. "Senlac" was coming out of Halifax Harbour, taking the eastern side of the channel. There was a dense fog at the time and the fog signals were sounded at regular intervals. She was making about six knots, and having passed George's Island, heard the whistle of an incoming steamer. Fog signals were given in reply, and when the incoming vessel, the "Rosalind," was estimated to be about half a mile off, the "Senlac" gave a single short blast and directed her course to starboard. The "Rosalind" replied to this signal and stopped her engines. Within a few seconds the "Senlac" was seen about a ship's length away on the port bow, and almost at the same moment

the latter gave two short blasts on her whistle and swung to port, threatening to cross the "Rosalind's" bow. The "Rosalind's" engines were immediately put "full steam astern," but too late to avoid a collision, in which the "Senlac" was seriously damaged. At the trial of an action by the latter, reliance was placed on the failure of the "Rosalind" to respond to her signals, but the first signal admitted to have been heard on the "Rosalind" was the one short blast when the "Senlac" went to starboard. The result of the trial was that both vessels were found in fault, and on appeal by the "Rosalind,"

Held, that the "Senlac" was in fault in continuing on her course when the vessels were quite near together instead of stopping and reversing, and was alone to blame for the collision, and that the failure to hear her signals was not negligence on the part of the "Rosalind" and did not contribute in any material degree to the accident. Appeal allowed with costs.

Mellish, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Ont.] IRVING *v.* GRIMSBY PARK. [Dec. 15, 1908.

Appeal—Jurisdiction—Supreme Court Act—Duty or fee—Interest in land—Future rights.

Under a by-law of the defendant company every person desiring to enter the park was required to pay a fee for admission. An action was brought for a declaration as to the right of the company to exact payment of such fee from the lessee of land in the park.

Held, that the matter did not relate to the taking of a "customary or other duty or fee" nor to "a like demand of a general or public nature affecting future rights" under sub-s. (*d*) of s. 48, R.S.C. (1906), nor was "the title to real estate or some interest therein in question under sub-s. (*a*). There was, therefore, no appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in such action (16 O.L.R. 386). Appeal quashed without costs.

Shepley, K.C., for appellants. *Kilmer*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* LEACH. [Nov. 20, 1908.
REX *v.* FOGARTY.

Habeas corpus—Liquor License Act, R.S.O. c. 245, ss. 121, 142 and 143—Local option by-law—Appeal from—Deprival of right of appeal under Habeas Corpus Act, R.S.O. c. 83, s. 6.

The prisoners had been convicted by the police magistrate of the town of Owen Sound for a second offence of selling liquor without a license, a local option by-law being in force there. On the return of a writ of habeas corpus and certiorari in aid, granted by a judge in Chambers, the King's Bench Division before they had been made returnable by a unanimous judgment, refused to discharge the prisoners. The prisoners then moved by way of appeal to the Court of Appeal.

Sec. 121 of R.S.O. c. 245 enacts in part that "an appeal to the Court of Appeal shall lie from a judgment or decision of the High Court or a judge thereof upon any application to quash a conviction made under this Act, or to discharge a prisoner who is held in custody under such conviction, whether such conviction is quashed or the prisoner discharged or the application is refused; but no such appeal shall lie from the judgment of a single judge or from the judgment of the court if the court is unanimous, unless the Attorney-General certifies that he is of the opinion that the point in dispute is of sufficient importance to justify the case being appealed." Sec. 143 enacts in part that "the sale or keeping for sale of liquor in any such municipality (where a local option by-law is in force) shall nevertheless be a contravention of ss. 49 and 50 of this Act, and all the provisions of this Act respecting the sale or keeping for sale of liquor in contravention of such sections and the penalties and procedure in reference thereto shall be of full force and effect in such municipalities notwithstanding such prohibitory by-law."

Held, that in order to appeal, the certificate of the Attorney-General must be obtained by a prisoner, even although the Habeas Corpus Act gives no one but him an appeal, and s. 121 supersedes that Act as to liquor license prosecutions.

2. Where the offence has been committed in territory subject to a local option by-law the conviction would, by virtue of the different enactments, be none the less a conviction made under the Act, and not under the by-law.

J. B. Mackenzie, for prisoner. *Cartwright,* K.C., for the Crown.

HIGH COURT OF JUSTICE.

Divisional Court, K.B.] [Nov. 2, 1908.

LAMONT *v.* CANADIAN TRANSFER CO.

Carrier— Lost luggage—Contract of carriage—Receipt—Condition limiting liability—Notice—Damages limited to amount specified in notice.

This was an appeal by the plaintiff from the judgment of BOYD, C., dismissing the action. The defendants are a transfer company who have, by agreement with the railway and steamboat company bringing passengers into Toronto, the exclusive right of going upon trains and steamboats and soliciting custom for their business which is, mainly at least, the transfer of baggage from the station or wharf to residence or hotels. The plaintiff entrusted a trunk to this company at the Yonge St. wharf for transfer to 53 Robert Street, and paid for such transfer. The trunk was lost while in the care of the defendants, and although the trunk contained wearing apparel, furs, etc., of the value of nearly $500, the defendants contended that they should pay only $50. Shortly after their agent had received the trunk and the steamer check for it and had been paid for the transfer, he was asked for a receipt, whereupon he handed to the plaintiff a document which contained printed terms which it was claimed relieved the defendants from paying more than the $50.

Held, per RIDDELL, J.:—The judgment appealed from is based upon three cases: *Parker* v. *South Eastern R.W. Co.,* 2 C.P.D. 416; *Harris* v. *Great Western R.W. Co.,* 1 Q.B.D. 515; *Acton* v. *Castle Co.,* 1 Com. R. 135. The last is also (and better) reported in 73 L.T. 158 and 8 Asp. M.C. 73, and will be considered later. The other two are cases of deposit of goods in a cloak room at the station of a railway. In the case in 1 Q.B.D. the court distinguished *Henderson* v. *Stevenson,* L.R. 2 H.L. Sc. 470, the case of a common carrier, from the case then under consideration—the

"case of a person depositing goods with a company who were in no way bound to receive them, and contemporaneously receiving a ticket which he knew was to be given up when the goods were demanded back." This the plaintiff in that case did know; see p. 533. In the case in 2 C.P.D. the Lords Justices disagreed, but the majority of the court, Mellish and Baggallay, L.JJ., held that there could be no obligation on the plaintiff to read the condition upon the receipt, and that the jury should be asked whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition. In that case not only was the condition printed on the ticket, but a placard with the same information legibly printed was hung up in the cloak room.

The *Acton Case* was a trial before Lord Russell in 1895. The plaintiff bought a ticket from Durban to London; on the margin and in bold print were the words, "Issued subject to the further conditions printed upon the back hereof," and on the face of the ticket itself was printed matter which the plaintiff saw but did not read. On the face was the clause, "The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances," and on the back in italics the provision that the company would not be liable for luggage unless the passenger paid at a certain rate. The Lord Chief Justice who tried the case without a jury, first decided that under the statutes certain of the lost luggage would not be recovered for. In the judgment he then proceeds to consider whether the conditions on the ticket were the terms and conditions of the contract of passage of the plaintiff, and holds (8 Asp. M.C. at p. 75) that "the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage money was received from him, and upon which the defendants were willing to enter into a contract to carry him. . . . The plaintiff . . . must have known, and at least ought to have known, that when he was engaging a passage, in such circumstances as these, there would necessarily be conditions regulating the circumstances under and upon which he was to be carried. He candidly says that he did see that there was written and printed matter upon the face of the document, but he did not read it; that there was a printed notice of a precautionary kind in the same sense put up in his cabin, but that he did not read it until after the loss." The Lord Chief Justice, after saying that "in all cases of contracts of passage of this nature documents are delivered which are not mere

documents of receipt, but are documents which do contain conditions," adds: "I therefore come to the conclusion that the plaintiff, candidly admitting that he saw that there was not merely writing but printing upon the face of the document, ought to have assumed, and I think he must have known, that it probably did contain conditions upon which he was about to be carried. ."

These cases do not seem to me to conclude the present, for reasons which will appear later. Before discussing the effect of these and other cases which were cited before us, it will not be amiss to consider the general law.

The defendants are a transfer company, and it is well established—indeed it is admitted, and is found by the Chancellor—that they are common carriers. "Transfer companies, pursuing the business of transferring baggage or freight to and from railroad and steamboat depots, or between different parts of towns or cities, are common carriers and subject to liability as such:" 6 Am. & Eng. Encyc. of Law, 2nd ed., p. 253; cf. vol. 3, p. 581. We asked for the charter of the company, which is said to be a Dominion corporation, and we are, by the defendants, handed their provincial license as shewing their charter powers. The charter of the company, as appears from the provincial license produced, authorizes the company: (a) to collect, receive, transfer, convey, and forward baggage, luggage, goods, wares, produce, merchandise, and all articles of commerce and other effects, and to carry and convey passengers to and from any places in Ontario; (*b*) to warehouse and store (including cold storage) any of the said articles so transferred or received for transfer by the company; and (*c*) to acquire, etc., etc., . . . and operate such vehicles as may be requisite or incidental to the carrying on of the company's business." It will be seen that the company have powers of a very wide character: it is proved that they as a fact do sometimes transfer goods which are not baggage. See the evidence of Harper, p. 26—"render services in the transportation of freight and baggage to whomsoever wants it transported, and for hire." and specific instances are given. See also p. 28. No denial is attempted of the specific instances given, nor indeed of the general statement; the manager contenting himself with saying that the "waggons are all baggage waggons," and that they "have no freight waggons." It is established that the defendants are and hold themselves out as common carriers of goods—at the very least of the particular kind of goods, personal baggage. Such being their status, it is their "duty to receive

and carry the personal baggage of any person offering to pay his hire," except under circumstances which do not arise here: Macnamara, s. 22; their responsibility "is fixed by the acceptance of the goods:" ib., s. 38; that responsibility continues "until they reach the final destination to which they are addressed. . . in the absence of special limitation of liability:" ib., s. 39; and in the absence of special limitation are "liable by the custom of the realm in case of loss or injury to the goods, unless the loss or injury arises from: (1) the act of God; (2) the King's enemies; (3) contributory negligence; or (4) inherent vice or natural deterioration:" ib., s. 46. They may limit their "common law liability by receiving the goods subject to certain conditions, or in any other manner making a special contract with 'their customer:' " ib., s. 85. The existence of a special contract must be proved by the defendants, if a special contract be alleged, otherwise the defendants are insurers.

The single question here is, "Has a special contract been proved by the defendants?" And the answer to that depends upon whether the "receipt," delivered as it was, is a special contract. The two cases first cited do not assist—they are cases of companies receiving goods which they were under no obligation to receive—not as common carriers at all. The duties and responsibilities of bailees of that kind are markedly different from those of common carriers, and in the *Harris Case* this is pointed out very clearly by Blackburn, J., at p. 533. The *Parker Case* is still further from being an authority in favour of the defendants, as the Court of Appeal held that, even in the case of such a bailment as is under consideration, the plaintiff must either know of the limiting condition, or the defendants must have done that which was reasonably sufficient to give him notice of the same.

The *Acton Case* presents more difficulty, but full effect may be given to it without damage to the plaintiff's case. It may well be that granting that the defendants would otherwise be common carriers in respect of the plaintiff's luggage, any reasonable person engaging a passage of such length as from Durban to London "must have supposed that in a contract of passage of this kind accompanied by baggage and by luggage it is absolutely necessary that there be conditions regulating the conduct of the passenger, and giving to those representing the ship-owner, certain powers of control, without which it would be impossible to preserve discipline and order and ensure the safety of passengers

and of their property on board ships; and, therefore, it cannot reasonably be supposed that any person taking a ticket for a passage of this kind could be under the notion that the whole contract between them was embraced in his paying passage money and merely getting a receipt for the same. A person taking a ticket under such circumstances must have understood, and must be taken to have understood, that there would be necessarily incident to such a relation as he was contemplating entering upon, certain conditions regulating the nature and character and obligations relatively of that agreement." Granting all that is said, there is an obvious distinction between hiring a passage in a ship from South Africa to England with baggage and luggage and getting a trunk transferred from the wharf to a private house. The latter is done every day by handing a check and 25 cents to a carter. There are no regulations, etc., etc., necessary. [The learned judge here referred to *Watkins* v. *Rymill*, 10 Q.B.D. 178, relied on by defendants; *Robertson* v. *Grand Trunk R.W. Co.*, 24 S.C.R. 611, 617, 618; *Zunz* v. *South Eastern R.W. Co.*, L.R. 4 Q.B. 539; *Costello* v. *Grand Trunk R.W. Co.*, 7 O.W.R. 846; *Coombs* v. *The Queen*, 26 S.C.R. 13.]

None of these cases do and none of them can overrule the decision of the House of Lords in *Henderson* v. *Stevenson*, L.R. 2 H.L. Sc. 470. This case was followed in *Bate* v. *Canadian Pacific Railway Co.*, 18 S.C.R. 697, reversing the Court of Appeal, 15 A.R. 388. (See also reference to *Richardson* v. *Rowntree*, [1894] A.C. 217.)

From the authorities it seems clear that even in the case of a ticket being handed to an intending customer of a common carrier, which contains conditions limiting the liability of the carrier, the conditions do not become by that fact alone binding upon the customer. The very highest at which the rights of the carrier can be put is that if the customer has (*a*) read the conditions, or (*b*) knows that the ticket contains conditions and abstains from reading them, or (*c*) if the circumstances are such as that he must be held to know that the ticket contains conditions, as, *e.g.*, if the carrier has done all that is reasonably necessary to give the customer notice that the ticket contains conditions, or the journey is of such a character that any reasonable man would know that there must be conditions—then the carrier may avail himself of the conditions.

I do not think that the defendants have succeeded in this case in proving the least they must prove. (*a*) Horn did not

read the receipt; did not see any wri' .t; looked at it in the same way he would look at a paper he was handed; he has seen the defendants give receipts over and over again. (*b*) Nor is there a tittle of evidence that Horn knew that the paper contained conditions. (*c*) The receipt was not handed to him at the time he paid; it apparently would never have been handed to him at all if he had not bethough himself that he was acting for another, and asked for a receipt for the trunk. The paper was handed to him in response to his request for a receipt for the trunk, and not at all as a special contract or as containing the terms upon which the trunk would be accepted for transfer and the money for payment—the trunk was already in the possession of the defendants for transfer, and they had taken off the steamer check and the money had been paid a quarter of an hour before. There were no circumstances which would induce a reasonable man, then at least, to think that the receipt contained special conditions (at least not if I am a reasonable man—I am sure I have handed my checks to the servants of the company and received receipts a dozen times without having any thought that the paper I received contained conditions). There was absolutely nothing done by the defendants to draw Horn's attention to the special conditions, or to the fact that there were special conditions or any conditions.

Then it is argued that the agents of the defendants had no authority to enter into any but the contract evidenced by the "receipt;" and *Harris* v. *Great Western R.W. Co.*, 1 Q.B.D., and the remarks of Blackburn, J., at pp. 533-4, are referred to. However the case may be where the master is other than a common carrier—and it were useless to enter upon a discussion of the general principle—it seems clear that such a company as this are bound by a contract of the agent they put forward as having the management of that part of their business: *Pickford* v. *Grand Trunk R.W. Co.*, 12 M. & W. 766; *Heald* v. *Carey*, 11 C.B. 977; *Winkfield* v. *Packington*, 2 C. & P. 600. I have said nothing about negligence, but it is hard to see how the conduct of these defendants is consistent with care—no theory is advanced for the disappearance of the trunk, and it does not seem to be a prudent system which permits the sudden vanishing of such an article.

Upon the whole, I am of the opinion that the judgment entered by the Chancellor in the trial court for the defendants should be set aside and judgment entered for the plaintiff for

the amount proved, viz., $487.35, and that the defendants should pay the costs, including the costs of this appeal. I would repeat that I think it would be an unfortunate thing if the result were different—and, if the result should be different, the fact cannot be too well known—travellers should know that those soliciting baggage to be transferred do not intend and cannot be made to pay for it, if it disappears while in their custody.

R. S. Robertson, for plaintiff. *B. N. Davis*, for defendants.

Teetzel, J.] ING KON *v.* ARCHIBALD. [Nov. 11, 1908.

Intoxicating liquors—Destruction under magistrate's order—Liquor License Act—Proprietary medicines—61 Vict. c. 30, ss. 2, 3 (O.)—Police officers—Oral direction of magistrate—Bona fides—Reasonable and probable cause—Absence of malice—Notice of action—Costs of action—R.S.O. 1897, c. 88, s. 22.

The plaintiffs were on July 9, 1906, convicted by a magistrate of keeping intoxicating liquors for sale without license, contrary to the Liquor License Act. The conviction was not formally drawn up and signed until Oct. 25, 1906, when it was made part of the return to a writ of certiorari. The conviction as returned contained a declaration that a large quantity of liquor found on the plaintiffs' premises, including portions alleged by the plaintiffs to be proprietary medicines, should be forfeited, and an order and direction to the defendants, who were police officers, to destroy the liquor and the vessels containing it. This direction was given orally at the time of the conviction, and was acted upon by the defendants about three weeks later. On the 10th December, 1906, the order for the destruction of the portions of the liquor alleged to be medicines was quashed by the order of the High Court of Justice. In an action for damages for the destruction of those portions,

Held, 1. The liquors in question came within the protection of ss. 2 and 3 of 61 Vict. c. 30(O.), as proprietary medicines or medicine wines.

2. In destroying the liquors in question the defendants in good faith believed they had the right to do so in their capacity as police officers, and it was their duty to obey the direction, though merely oral, of the police magistrate.

3. The goods being in the custody of the law, and under the jurisdiction of the magistrate, and the destruction being a minis-

terial act, there was no necessity, in the absence of statutory requirement or other authority, for the direction to the police officers to be in writing.

4. The defendants had reasonable and probable cause to believe that they had the right to destroy the liquors in question, and no malice on their part was shewn.

5. The notice of action was sufficient, as the defendants, according to their own evidence, understood the nature of the complaint and when and where the act complained of happened.

6. In view of the provisions of R.S.O. 1897, c. 88, s. 22, the successful defendants could not be deprived of their costs of the action, and were entitled thereunder to costs as between solicitor and client.

Arscott v. *Lilley* (1887) 14 A.R. 283 followed; *Bostock* v. *Ramsey Urban District Council* [1900] 2 Q.B. 357, [1900] 2 Q.B. 616 distinguished.

Raney, K.C., for plaintiffs. *Fullerton*, K.C., and *MacKelcan*, for defendants.

Anglin, J., Clute, J., Riddell, J.] [Nov. 11, 1908.

GLIDDON v. YARMOUTH PUBLIC SCHOOL TRUSTEES.

Public schools—Salary of teacher—Agreement—Validity—Meeting of Board of Trustees—Minutes—Period of service under agreement—Public Schools Act, 1901, *s.* 81, *sub-ss.* 4, 6 *—Expiration of agreement—Notice—Resignation—Penalty for non-payment—"Until paid."*

An agreement between the plaintiff, a teacher, and the defendants was signed by all the trustees and the plaintiff, and the defendants' seal affixed, at one time, at the house of the secretary-treasurer of the defendants, but no minute thereof appeared in the minute book.

Held, that the agreement was valid and binding upon the defendants.

Under the agreement the plaintiff served as teacher for the year 1907 and during the months of January and February, 1908. The 4th paragraph of the agreement provided that it might be terminated by a month's notice, and the 5th, that until so terminated the agreement was to continue from year to year. The defendants gave the plaintiff a month's notice to terminate the agreement at the end of February, 1908, and

the plaintiff also sent in his resignation to take effect at that date.

Held, that sub-s. 4 of s. 81 of the Public Schools Act, 1901, applied to the agreement, and the plaintiff was entitled to be paid for the time which he served a sum bearing the same proportion to the amount of the yearly salary as the number of days served bore to the whole number of teaching days in the year in which the service was rendered.

Held, al , that the agreement expired, within the meaning of sub-sec. 6, either as the result of the giving of notice or by the resignation; and, the agreement having so expired, it immediately became the duty of the defendants to pay the amount due; having failed to pay the full amount, they became liable to the penalty imposed by sub-sec. 6, viz., that "the salary shall continue to run at the rate mentioned in the agreement until paid"; and that did not mean merely until action brought, but until actual payment or until judgment.

Judgment of 2nd Division Court, Elgin, affirmed.

Crothers, K.C., for plaintiff. *St. Clair Leitch*, for defendants.

Boyd, C.] GUEST *v.* KNOWLES. [Dec. 9, 1908.

RE ROBERTSON.

Contempt of court—Libellous publications pending trial of action for slander—Prejudice—Fair trial—Political controversy.

Libellous language is not necessarily a contempt of court; the applicant for committal for contempt must shew that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending.

A motion by the defendant in an action for slander to commit for contempt of court the editor of a newspaper for publishing articles, pending the action and before trial, commenting on the matters in question in the action, was dismissed, and with costs, where it did not appear from the evidence, and it was not fairly to be inferred from the articles, that there would be an interference or that there was any attempt to interfere, with the ordinary course of justice in the matter of a fair trial —the slanderous words alleged having been uttered and the articles published in the course of a contested parliamentary

election, and the whole frame of the articles being to separate the legal aspect of the case from the political.

The Queen v. *Payne* (1896) 1 Q.B. 577; ***Ex parte Hooley*** (1899) 6 Mans. 44; *In re New Gold Coast Exploration Co.* (1901) 1 Ch. 860, and *McLeod* v. *St. Aubyn* (1899) A.C. 549 followed.

Morine, K.C., for defendant. *King*, K.C., for William Robertson.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Dec. 11, 1908.

RE WILLIAMS AND TOWN OF BRAMPTON.

Municipal corporations — Local option by-law — Liquor License Act, s. 141(3)—Petition for submission of by-law—Signatures—Detachment from petition—Insufficiency—Imperative enactment—Duty of court—Mandamus to council—Demand—Refusal—Appeal—Status of appellant.

Sub-s. 3 of s. 141 of the Liquor License Act, R.S.O. 1897, c. 245, as aided by 6 Edw. VII. c. 47, s. 24, and amended by 7 Edw. VII. c. 46, s. 11, provides that "in case a petition in writing signed by at least twenty-five per cent. of the total number of persons . . . qualified to vote at municipal elections, is filed with the clerk of the municipality on or before the 1st day of November . . . praying for the submission of such by-law"—a local option by-law—"it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

Upon a motion for a mandamus to compel the council, after the filing of a petition in due time, to submit a by-law to a vote of the electors,

Held, reversing the decision of MEREDITH, C.J.C.P., that the document filed, being in the form of a petition, but signed by only two electors, with the signatures of others sufficient to make up the proper number attached thereto, having been previously affixed to, and detached from, other petitions in the same form, was not a "petition in writing signed by at least twenty-five per cent. of the total number of persons qualified to vote," within the meaning of the statute, notwithstanding that no fraud was alleged.

Held, also, that one of the members of the council had a status to maintain an appeal from an order in the nature of a mandamus requiring the council to submit the by-law.

Semble, also, per ANGLIN and CLUTE, JJ., that if a demand other than that made by the filing of the petition was necessary

to found the application for a mandamus, the action of a deputation which waited on the council and urged the submission of the by-law, was a sufficient demand; and that, although there may have been no express refusal by the council formally announciated, the proceedings in the council shew that there was a withholding of compliance with the prayer of the petition, a determination not to comply, which was the equivalent of a refusal.

Semble, also, per ANGLIN, J., that the statute is imperative, and it is the duty of the court, upon the application for a mandamus, to determine for itself whether or not a petition sufficiently signed has in fact been filed, whatever view the municipal council may have taken of it.

Haverson, K.C., for Walsh, a councillor, appellant. *Middleton*, K.C., and *McFadden*, K.C., for Williams, the applicant, and for Pringle and Ashley, councillors. *Raney*, K.C., for Jackson, deputy-reeve, and Watson, a councillor. *T. J. Blain*, for the mayor. The reeve, appeared in person.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Nov. 30, 1908.

BENT *v.* ARROWHEAD LUMBER COMPANY.

Practice — Cross appeal — King's Bench Act, rule 652(a) — Relief against party not an appellant.

The plaintiff brought this action for $50,000 commission on a sale of land. After delivery of the statement of defence the plaintiff obtained leave to amend his statement of claim by adding the president of the company (one Meredith) as a defendant, and claiming alternative relief against him in case he was not authorized by the company to employ the plaintiff on its behalf. At the trial judgment was given against the company for $25,000, and the action was dismissed as against the defendant Meredith without costs.

The company appealed and the plaintiff thereupon served a notice under rule 652(*a*) of the King's Bench Act by way of cross appeal on the solicitors for the company and also on the solicitors for Meredith, claiming that the amount awarded by

the trial judge should be increased and that, in the event of it being found that the company was not liable, the plaintiff should have judgment against Meredith.

Held, that rule 652 only justified such a notice being served upon an appellant and that as Meredith was not an appellant, the only way the plaintiff could obtain relief against him was by a substantive appeal. Hearing of the appeal postponed till next sittings, and leave given to the plaintiff to set down a substantive appeal against the judgment in so far as it failed to preserve the plaintiff's alternative claims to relief against Meredith, the appeal and the cross appeal to be heard together without the necessity of ordering any fresh evidence.

Galt, and *C. S. Tupper,* for plaintiff. *Robson,* for the company. *Wilson,* for Meredith.

Full Court.] ANDERSON *v.* DOUGLAS. [Nov. 30, 1908.

Contract—Evidence to vary written contract—Terms intentionally omitted from the writing but orally agreed on—Statute of Frauds—Specific performance—Rectification.

Appeal from judgment of CAMERON, J., noted ante, vol. 44, p. 509, allowed with costs. The plaintiff sought to enforce specific performance of an agreement in writing and under seal for the sale of 650 acres of land more or less, excepting certain rights of way of named railways, for the sum of $19,500. The agreement which was dated 14th February, 1908, provided that "the purchaser hereby accepts the title of the vendor to the said lands and shall not be entitled to call for . . . any abstract," etc., and that "the purchaser shall immediately . . . have the right of possession." There was no suggestion of accident, fraud or mistake in the preparation or execution of the agreement which, on its face, contained all the particulars necessary to make it binding under the Statute of Frauds; but the defendant was at the trial allowed to give evidence to shew that the parties had at the same time verbally agreed to vary or add to this agreement as follows: (1) The price was $30 per acre and there was to be a deduction from the $19,500 for any ascertained deficiency in the acreage below the 650 acres stated. (2) The plaintiff was to shew a good title and the defendant's solicitor was to have an opportunity to look into the title. (3) The defendant agreed to the plaintiffs' delaying until the 1st of March following, to give complete possession of the property which was a farm on which there was a house occupied by a tenant. (4) Taxes, interest on a mortgage and insurance prem-

sums were to be adjusted as of the date of the agreement. The plaintiff had title for the lands under the Real Property Act.

The reception of the evidence tendered by the defendant was strongly objected to, but the plaintiff expressed his willingness to accept a decree for specific performance of the contract with the variations as proved.

Held, that the arrangements verbally arrived at were only collateral agreements or subsidiary conditions for conveniently carrying out the binding written agreement and not essential parts of it, and that the plaintiff was entitled to specific performance of the written agreement with the proved variations and that the Statute of Frauds was not a defence.

Byers v. *McMillan*, 15 S.C.R. 194, and *Martin* v. *Pycroft*, 2 D. M. & G. 785, followed; *Green* v. *Stephenson*, 9 O.L.R. 671, distinguished.

Per PERDUE, J.A.:—The evidence tendered by the defendant in this case should not have been admitted at all.

Per HOWELL, C.J.A.:—The evidence should not have been allowed unless the defendant had raised the questions by his pleading which he had not done.

Robson, for plaintiff. *Hoskin*, for defendant.

Full Court.] FREDKIN *v.* GLINES. [Nov. 30, 1908.

Growing wild hay, whether goods or land, when purchaser is to cut and remove it—Sale of Goods Act, R.S.M. 1902, c. 152, *s.* 2(*h*).

Appeal from judgment of MATHERS, J., noted, vol. 44, p. 550, dismissed with costs. *Marshall* v. *Green*, 1 C.P.D. 35, followed.

[NOTE.—The word printed "secured" in the quotation from the Sale of Goods Act given at p 551 of vol. 44, should be "severed."]

Hudson, and *Lawrence*, for plaintiff. *Wilson* and *Jameson*, for defendant.

Full Court.] [Nov. 30, 1908.

ALLOWAY *v.* MUNICIPALITY OF MORRIS.

Sale of land—Warranty of title—Representation that land patented—Recovery of money paid under mistake of fact—Assessment Act—Caveat emptor—Limitation of actions.

Appeal from judgment of CAMERON, J., noted ante, vol. 44, p. 551, dismissed with costs.

The Court, however, directed that the defendants should be allowed one month in which to take advantage of section 168 of the Assessment Act by redeeming the lands they had sold and so preserving their claim for taxes both against the owner and the property, in which case the defendants would only have to pay the costs of the action and of the appeal.

Hudson, for plaintiff. *McLaws*, for defendants.

Full Court.] MORWICK *v.* WALTON. [Nov. 30, 1908.

Damages—Breach of warranty—Costs unnecessarily incurred.

Action for damages for breach of warranty in the sale of a stallion by the defendants to the plaintiffs. The plaintiffs had given the defendants their promissory notes for the price of the stallion, but these notes had been transferred to the Bank of Hamilton for value during their currency, and the plaintiff had no defence against the claim of the bank upon them.

Held, affirming CAMERON, J., that the plaintiffs had made out their case upon the misrepresentations and breaches of warranty of the defendants, but, varying the judgment in this respect, that the plaintiffs had no reasonable ground for defending a suit by the bank on the notes and, therefore, could not have their costs of such defence added to their other damages.

Godwin v. *Francis*, L.R. 5 C.P., at pp. 305 and 307, and *Roach* v. *Thompson*, 4 C. & P. 471, followed.

T. R. Ferguson, for plaintiffs. *Galt*, for defendants.

Full Court.] [Dec. 1, 1908.

ROBERTSON *v.* CARSTENS.

Principal and agent—Commission on sale of land—Appeal from findings of fact by trial judge.

Action for commission for finding and introducing a purchaser for land owned by defendant. The plaintiffs were carpenters and tenants of the property under defendant. They were not real estate agents, but had occasionally earned commissions on sales. Defendant had never conferred on them any agency for the sale of the property, but wanted to sell and plaintiffs knew it.

One Forrester, passing by the property and thinking that it might be suitable for his purpose, entered the plaintiffs' shop

and inquired of the plaintiff Robertson if the property was for sale. Robertson informed him it was. Did he know the owner? Yes, Mr. Carstens. And the price? $16,000. Could it not be bought for less? Robertson would inquire, and at once called up Carstens by telephone. What followed is thus stated in the judgment of the majority of the Court, reversing in part the findings of fact by the trial judge: Robertson told the defendant he had a prospective purchaser for his property and asked his best terms. Defendant said $15,000. Robertson then asked if defendant would pay his commission out of that and defendant said he would. Robertson told defendant he would have the purchaser call and see him. He then quoted the new price to Forrester, wrote defendant's name and address on a card which he handed to Forrester and asked him to present it to defendant when they met. Defendant met Forrester by appointment the same evening, when, after some negotiation he gave Forrester an option on the premises for $14,000 cash. The sale was completed next day for that sum; Forrester did not mention Robertson's name to the defendant and the latter said he did not associate Forrester with his telephone conversation with Robertson. Defendant saw plaintiffs a few hours after the sale was completed when plaintiffs promptly claimed a commission on the sale.

Held, upon the above findings, that plaintiffs were entitled to the commission claimed.

Also, that the defendant was placed upon inquiry when a prospective purchaser appeared a few hours after the conversation with Robertson and he should have ascertained that he was the person referred to by Robertson: *Cathcart* v. *Bacon*, 49 N.W.R. 331; *Quist* v. *Goodfellow*, 110 N.W.R. 65.

Robson and *Donovan* for plaintiffs. *T. R. Ferguson* and *McKay*, for defendant.

KING'S BENCH.

Cameron, J.] PICKUP *v.* NORTHERN BANK. [Oct. 29, 1908.

Bills of exchange and promissory notes—Partnership for non-trading purposes—Holder for value without notice—Alteration in indorsement on promissory note—Estoppel in pais.

The plaintiff's claim in this action was to recover from the bank for himself and the partnership the amounts of certain promissory notes made in favour of Davenport, Pickup & Co.,

a firm of accountants composed of himself and one Davenport, which had been discounted by the bank for Davenport and afterwards paid, on the ground that the bank, with knowledge that the partnership was a non-trading one, had allowed Davenport to apply the proceeds of the notes for his own purposes whereby the plaintiff was deprived of his proper share therein.

Held, that, in the absence of circumstances creating an estoppel against the plaintiff, he would have been entitled to recover: Lindley on Partnership, pp. 201, 202; *Leverson* v. *Lane*, 13 C.B. N.S. 278; *Fisher* v. *Linton*, 28 O.R. 322, and the law applicable to the issuing of negotiable paper by partnerships is applicable also to its transfer: *Garland* v. *Jacomb*, L.R. 8 Ex. 216.

The plaintiff, however, became aware in April three months after the formation of the partnership that Davenport was placing the firm's funds in his private account and took no steps then to notify the bank or dissolve the partnership. On 20th of August following, the plaintiff notified the bank by letter "that no cheques must be paid or notes drawn in the name of Davenport, Pickup & Co., and for which I may become personally liable without first obtaining my signature or written authority, also that all sums received by our firm must be deposited into a partnership account, and not in Mr. Davenport's personal account as at present." To this letter the bank replied the next day stating, "We might say that we have at present several notes made payable to the firm and held by us for account of Mr. Davenport on which you are personally liable."

The partnership was dissolved on Sept. 7, but no notice of the dissolution was given to the bank. Davenport absconded about 1st October, but no steps were taken by the plaintiff to hold the bank to account until he wrote to them on 5th December following, although he went to the bank about Oct. 15 and then ascertained that the bank held the notes in question.

Held, that Pickup's conduct effectually precluded him from asserting the right claimed in this action.

Ewing v. *Dominion Bank*, 35 S.C.R. 133, and *Lloyds' Bank* v. *Cooke* (1907) 1 K.B. 794 followed.

Two of the notes bore the following indorsement:—

"Pay to the order of the Home Bank of Canada, Davenport, Pickup & Co."

"Percy P. Davenport."

"Vernon Pickup," but the words "pay to the order, etc.," had been struck out after the plaintiff had indorsed his signature,

thus converting a special indorsement into an indorsement in blank.

Held, that such an alteration was not a material one such as would avoid a note: *Hirschfield* v. *Smith*, L.R. 1 C.P. 340; nor was it sufficient to put the defendants upon inquiry.

Crichton and *McClure*, for plaintiff. *Hudson* and *Garland*, for defendants.

Cameron, J.] [Nov. 3, 1908.

MACLEAN *v.* KINGDON PRINTING CO.

Pleading—Prolixity—Striking out pleadings as embarrassing.

Appeal from an order of the Referee refusing to strike out, under Rule 326 of the King's Bench Act, certain paragraphs of the plaintiff's statement of defence to the defendant's counterclaim as embarrassing and tending to prejudice and delay the fair trial of the action. The objections were that the paragraphs referred to contained passages which were merely recitals of the evidence proposed to be adduced and other passages setting out facts which were immaterial and unnecessary.

Held, that, notwithstanding the amendment of Rule 326 by 7 & 8 Edw. VII. c. 12, s. 6, by inserting the word "unnecessary," Rule 306, as to what pleadings shall contain, remains precisely as it was before, and that the allegations objected to were merely prolix, and were neither embarrassing nor tending to prejudice or delay the fair trial of the action, and that the order of the Referee was right.

Theo Noel Co. v. *Vitae Orae Co.*, 17 M.R. 319, and dictum of BOWEN, L.J., in *Knowles* v. *Roberts*, 38 Ch.D., at p. 270, followed.

Beveridge, for plaintiff. *Grundy*, for defendant.

Cameron, J.] [Nov. 3, 1908.

COUSINS *v.* CANADIAN NORTHERN RY. CO.

Practice—Particulars—Malicious prosecution.

Action for malicious prosecution. The statement of claim alleged that the defendant caused and procured one John McKenzie, to lay a series of criminal charges against the plaintiff and the referee had ordered the plaintiff to furnish "further and better particulars in writing of the manner in which the defendant caused and procured" the charges to be laid.

Held, on appeal, that the order of the referee should be varied by directing that the plaintiff do furnish the best particulars he can give of the manner in which the defendant caused and procured the charges to be laid, with liberty to supplement his particulars after obtaining production of documents and examining the company's officers, such additional particulars to be given not later than ten days before the trial of the action. *Marshall* v. *Interoceanic*, 1 Times Rep. 394; *Williams* v. *Ramsdale*, 36 W.R. 125; Annual Practice, 1908, p. 251, followed.

Costs of the appeal and of the order appealed from to be costs in the cause to the defendant.

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

Macdonald, J.] KELLY *v.* WINNIPEG. [Nov. 6, 1908.

Contract—Agreement by contractor with proprietor to pay workmen certain fixed wages—Right of proprietor to compel contractor to pay such wages.

As part of the contract between the plaintiffs and the city of Winnipeg for the doing of certain work on a bridge, the plaintiffs agreed that a minimum rate of wages for employees engaged on the works, known as "the fair wage schedule," should be paid. Payments by the city for the work were to be made on monthly progress estimates on the certificate of the city engineer.

Held, that the defendants could not withhold payment of any portion of the amount of a monthly progress estimate certified by the engineer on the ground that the contractor had paid his workmen less than the rates of wages that had been provided for.

The workmen had no claim upon the city; they were not parties to the issue, nor were they before the court, and it was not established that the city had sustained any damage in consequence of the plaintiffs' breach of their agreement. If the city engineer had withheld his certificate, possibly the plaintiffs might have been compelled to pay according to the "fair wage schedule" in order to obtain it; but, as matters stood, the workmen were without remedy for the difference in wages.

Towers, for plaintiffs. *Hunt*, for defendants. *Locke*, for workmen.

Mathers, J.] LITTLE *v.* MCCARTNEY. [Dec. 10, 1908.

Local option by-law—Injunction against voting on—Omission to publish statutory notice—Other adequate remedy—Liquor License Act, R.S.M. 1902, *c.* 101, *ss.* 62, 65, 66—*Motion for injunction.*

This action was brought by the holder of a license under R.S.M. 1902, c. 101, on behalf of himself and all other ratepayers of the rural municipality of Franklin against the corporation and the members of the council to restrain the defendants from submitting to the electors a local option by-law under ss. 62 and 65 of said Act. The chief ground relied on for the injunction was that the notices required by s. 66 had not been published in a newspaper or in the Manitoba *Gazette*.

Held, that as the plaintiff would have a complete and adequate remedy by way of application to quash this by-law under s. 427 of the Municipal Act in case the electors should carry it, and the council should give it the necessary third reading, an injunction should not be granted, for the equitable jurisdiction of the Court can only be invoked when the applicant has no adequate remedy at law.

Weber v. *Timlin*, 34 N.W.R. 29, followed. *Helm* v. *Corporation of Port Hope*, 22 Gr. 273; *Darby* v. *City of Toronto*, 17 O.R. 554, and *King* v. *City of Toronto*, 5 O.L.R. 163, distinguished.

Motion dismissed with costs in the cause to the defendants in any event.

A. J. Andrews and *Burbidge*, for plaintiff. *E. L. Taylor* and *D. Forrester*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] REX *v.* JENKINS. [Nov. 23, 1908.

Criminal law—Appeal—Case stated—Circumstantial evidence—Identity—Weight of evidence—Code ss. 1017, 1018, 1021.

The deceased was murdered, according to the only eye-witness, a girl of about 14 years, by a dark man, with a fat face, dressed in brown trousers, in the seat of which was a rent. He

also had on a black shirt with white stripes, and a dark coat. Prisoner had been seen in the vicinity of the murder, within 1,000 feet of the place, some 20 or 30 minutes previously. His dress corresponded with the shirt, coat and trousers mentioned. A knife, sworn to as having been in the prisoner's possession three days before, was found on the afternoon of the murder, still wet with blood, a few feet from the murdered woman's body. When arrested, three days later, prisoner was without the dark shirt.

Held, refusing an application for a new trial, that the jury were justified, on the evidence, in coupling the prisoner with the crime.

In a criminal, as in a civil case, on an application for a new trial on the ground that the verdict is against the weight of evidence, the court will be governed by the fact whether the evidence was such that the jury, viewing the whole of the evidence, reasonably could not properly find a verdict of guilty.

While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned.

McQuarrie, for the prisoner. *Cassidy*, K.C., for the Crown.

Morrison, J.] JAMIESON *v.* JAMIESON. [Nov. 26, 1908.

Husband and wife—Judicial separation—Residence within jurisdiction at commencement of suit—Cruelty committed outside of jurisdiction—Continuation of, within jurisdiction—Apprehension of future—Jurisdiction.

The petitioner, owing to acts of cruelty and misconduct, left her husband in Montreal, when the parties were domiciled and came to British Columbia, bringing her child of the marriage, a girl of eight years, with her. The husband followed, and commenced proceedings in British Columbia for the custody of the child. While in British Columbia he renewed the acts of cruelty, and, apprehensive of further cruelty, the wife commenced proceedings for judicial separation. He opposed the suit on the ground that there was not jurisdiction in the court, inasmuch as he was not domiciled in British Columbia.

Held, that he had established sufficient domicil to give jurisdiction to entertain the suit.

Cassidy, K.C., and *Senkler*, K.C., for the petitioner. *Sir C. H. Tupper*, K.C., and *Donaghy*, for the respondent.

Morrison, J.] IN RE ROBERTS. [Nov. 27, 1908.

Municipal law—Sale of liquor—Regulation of—Conflicting by-laws—Vancouver Incorporation Act, 1900, *ss.* 125 (19), 161, 162—*Authority of Licensing Board.*

By a by-law passed in Nov., 1900, the Licensing Board, pursuant to ss. 161 and 162 of the Vancouver Incorporation Act, 1900, defined the conditions governing the sale of liquor within the municipality. The Board again dealt with the subject in August, 1905, forbidding the sale of liquor "from or after the hour of 11 o'clock on Saturday night till six of the clock on Monday morning thereafter," and enacted that "such portions of any and all by-laws heretofore passed regulating the sale of intoxicating liquors in the city of Vancouver are hereby repealed." Sub-s. 19 of s. 125 of the Vancouver Incorporation Act, 1900, empowers the city council to pass by-laws for "the closing of saloons, hotels and stores and places of business during such hours and on Sunday as may be thought expedient." In pursuance of this sub-section, the council, in May, 1902, passed a by-law preventing the sale of liquors between the hours of 11 o'clock on Saturday night and 6 o'clock on Monday morning.

Held, that the council, in passing this last mentioned by-law, had gone beyond the powers meant to be conferred by sub-s. 19 of s. 125.

J. A. Russell, for the motion. *J. K. Kennedy,* contra.

Full Court.] EMBREE *v.* MCKEE.]Nov. 21, 1908.

Contract—Construction of—Parol evidence—Surrounding circumstances—"More or less."

Plaintiff agreed to sell and defendant agreed to purchase 75 tons of hay, more or less. The hay in question was to be the hay in a certain barn, less some 30 tons which had already been sold. To bind the bargain, plaintiff gave a receipt. "Received from D. A. McKee, $10, on account of 75 tons of hay, more or less, at $17.50 per ton, delivered on cars." There were some 122 tons in the barn, and evidence was given that the parties negotiated for "all the hay in Brown's barn" except the 30 tons sold.

Held, on appeal, affirming the judgment of HOWAY, Co. J., that parol evidence could be given to shew what particular hay the parties were dealing for.

Sir Charles Hibbert Tupper, K.C., for plaintiff, appellant. *Reid,* K.C., for defendant.

Full Court.] [Dec. 10, 1908.

DELTA MUNICIPALITY *v.* V. V. & E. RY. & N. CO.

Railways—Board of Railway Commissioners.

In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorizing the railway company to divert a portion of the said road and construct their line between such diversion. The trial judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff.

Held, on appeal, that the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to that court for relief in the premises.

Griffin, for appellants (plaintiffs). *A. H. MacNeill,* K.C., for defendant company.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Charles Julius Mickle, of the village of Chesley, Ontario, barrister-at-law, to be junior judge of the County Court of the county of Essex, in the said Province, in the room and stead of His Honour Edwin Perry Clement, resigned.

Charles Edward Hewson, of the town of Barrie, Ontario, Esquire, to be judge of the District Court of the Provincial Judicial District of Manitoulin, in the said Province, in the room and stead of His Honour Archibald B. McCallum, deceased.

Edward Augustus Wismer, of the town of Essex, Ontario, Esquire, barrister-at-law, to be junior judge of the County Court of the county of Simcoe, in the said Province, in the room and stead of His Honour William Fuller Alves Boys, retired.

Hon. Henry George Carroll, judge of the Superior Court of the Province of Quebec, to be a puisne judge of the Court of King's Bench in that province, in the room and stead of Hon. Jean Blanchet, deceased. (Dec. 24.)

François Simeon Tourigny, of the city of Three Rivers, Quebec, to be puisne judge of the Superior Court of the Province of Quebec, in the room and stead of Mr. Justice Carroll, transferred to the Court of the King's Bench. (Dec. 30.)