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FEIGNED ISSUES.

Two extraordinary cases were recently brought in the County Court of the county of York in the Province of Ontario against the Toronto Railway Company. The plaintiffs in both cases went to a respectable solicitor and represented that they had sustained injuries owing to the negligence of the servants of the company, and requested him to bring actions on their behalf against the company to recover damages for injuries said to have been received. It appeared that the plaintiffs in each case also went to a medical practitioner in good standing and also represented to him that they were suffering from these alleged injuries. This practitioner examined them and treated them accordingly. On one of the cases coming on for trial, at the suggestion of the defendant's counsel, the medical practitioner was first called as a witness, and detailed the injuries from which he thought the plaintiff was suffering and their probable duration. This evidence was given very circumstantially, and would lead one to think that the examination disclosed injuries which would be observable, apart from the statements of the plaintiff, who was, as we now know, simply hoaxing the doctor when pretending to be in pain when touched in certain places. It might of course be very difficult for any medical man to discover on such an examination that he was being hoaxed, especially when the patient was presumably telling the truth, and there was no apparent reason to expect any fraud.

After the doctor had given his evidence the plaintiff went into the box and deposed that he was not suffering, and never had suffered from any injury whatever, that he had hoaxed both his own solicitor and the medical practitioner when he had represented to them that he had suffered the injury in respect of

which the action was brought. Under these circumstances the action was dismissed; and, it being also stated that the other action stood on the same footing, it was likewise dismissed.

It therefore appeared that both actions were feigned actions to the knowledge of the plaintiffs and defendants, and also to the knowledge of the counsel for the defendants. The counsel for the plaintiffs was innocent of any knowledge of deception and acted in perfect good faith throughout.

It was clear that these actions were not brought to enforce any real claims, but for the ulterior purpose of shewing that the evidence of the practitioner in question was unreliable, and also presumably to shew that all expert evidence in cases of the class in question must be received with hesitation, or at all events with suspicion as to its good faith.

Just here a word as to the law on the subject. It is laid down in Hawkins' Pleas of the Crown that to bring on a feigned issue for trial, without the leave of the court, is a contempt of court: (Hawk, P.C., b. 2, c. 22, ss. 39-42, 44) and if the issue in question was brought on without the leave of the court, the court had the power to vindicate its dignity and authority by suitable punishment of all persons concerned in the contempt.

The profession as well as the Bench know perfectly well that expert evidence must be taken cum grano salis. Judges have frequently been compelled to criticize evidence of that character, and especially medical evidence. An evil undoubtedly exists in the administration of the law in actions for personal injury, where corporation cases are concerned arising from sympathy with an apparently unfortunate claimant. This sympathy is manifested in adverse verdicts of juries, given against weight of evidence, and in the difficulty in obtaining accurate testimony from expert witnesses. Anyone who has had anything to do with defending cases of this character will recognize the existence of this sympathetic immorality and will appreciate its force and extent. For the erroneous verdicts of juries no remedy is in sight; for the straining of facts by adverse witnesses proceedings in perjury are sometimes, though very rarely, a partial

redress; but for the loose giving of expert or opinion evidence no remedy has yet been found. At best one can call attention to it by cross-examination which usually makes the witness more stubborn.

The evils and difficulties above outlined are so great that those that suffer from them naturally look for some remedy. The railway company apparently came to the conclusion that the only remedy was these fictitious actions. These certainly have, in a very marked manner, drawn attention to the evils complained of; and it may be that good will result, but we cannot accede to the doctrine that evil can be done so that good may result; and, in our opinion, the remedy adopted would be prejudicial to the general administration of the law.

As regards expert evidence, referring now especially to that of medical practitioners, it will be admitted that every such expert in giving so-called opinion evidence should exercise the maximum of caution and reserve, in view of the possibility of error. It is the frequent disregard of this caution, by some experts, too enthusiastic in their client's interests, that has in many cases brought expert testimony into disrepute; and perhaps it may be claimed by the company that the evidence given by the medical practitioner in the cases before us was no exception to what has become almost the rule.

If the only possible remedy (and it is certainly difficult to find any remedy) be the bringing of fictitious actions, and if the law is to be taken as stated in the old authority we have quoted, it would seem that the proper course might have been to apply to the Crown for leave to bring such an action. What the result of such an application would have been, and how it would have worked out, is not at present worth discussing. But the question is whether the means adopted by these defendants and their legal advisor to protect themselves from an admitted abuse was one which should be permitted. In other words, was it legitimate to make a court of justice an unconscious instrument for the desired end? In our opinion it was not a legitimate use of the court, nor one which ought to have been adopted.

The ulterior purpose of the action in question, even though good might eventually result, does not afford any excuse or justification for such a misuse of the process of a court of justice. The trial, it is true, may have demonstrated that in those particular actions a medical man and a lawyer were deceived; but that a man has been deceived by a liar proves nothing of any value, and courts of law are altogether misused when they are resorted to for the purpose of demonstrating that an ingenious liar may deceive respectable and honest men; nor does it prove that all persons who bring actions against the Toronto Railway are liars, nor that their solicitors, counsel and medical witnesses are always the victims of false information.

We understand the learned judge who tried the case has stated that he was not aware that these actions were what have been styled "fake actions," and therefore, of course, he did not give leave to bring them; but admittedly both the plaintiffs and defendants and the solicitors and counsel for the defendant all concurred in and were cognizant of the scheme. Surely, we venture to think, they ought then and there to have been called to account by the court. Indeed it is remarkable that the judge saw fit to suffer such a proceeding to pass, not only without punishment, but even without comment on its impropriety, for it is needless to say that to degrade courts of justice into mere detective agencies is most improper, and constitutes a serious offence against the administration of justice.

The judge should have remembered that, when presiding in court, he is the representative of no less a person than His Majesty the King. He was sitting on the judgment seat to do justice as and for the Fountain of Justice, and contempts of court do not mean contempts of Mr. A. or Mr. B. who happens to be sitting on the Bench, but contempts of His Majesty, whose officer and representative he is. Contempts which a judge as an individual might be willing to overlook, cannot be overlooked when offered to the King, as representing the Empire. The jurisdiction of the courts in cases of contempt rests on the foundation that contempt of the court is contempt of the sovereign, a fact

which the parties to the improper proceedings to which we have referred have altogether failed to realize.

We have only referred to the scheme which resulted in these actions being said to be contempts of court. Possibly it may have been more, viz., a conspiracy; but we do not pursue any enquiry as to that, as we understand the judge of the County Court (not the junior judge who presided at these trials) has ordered an indictment for conspiracy to be preferred against some of the parties concerned.

OUR COURT OF FINAL APPEAL.

After the news came to this country of the result of the case of *Winnipeg Electric Light Co.* v. *City of Winnipeg*, in which the Judicial Committee of the Privy Council gave judgment in favour of the company, there was the usual clamour of certain newspapers passionately declaiming against appeals to England, where cases seemed nearly always to go against municipalities and in favour of companies.

This, of course, is an old story, and not a very creditable one to Canadian journalism. We only refer to it now to quote some observations in a leading article in the *Mail and Empire*, where the subject is dealt with in a manner which shews that one at least of our newspapers is competent to discuss the situation on its merits, and is not afraid to express views which appeal to the sane and thoughtful rather than to pander, as so many of our journals do, to the growing socialistic and anarchistic tendency of the age. The article is, in part, as follows:—

"The thing alleged or implied is that the law lords of the Privy Council are not respecters of persons. It is imputed to them as a fault that they do not know enough about the circumstances of the Canadian cases appealed to them. That is no more than to say that they are insulated from the prejudices, passions, party feelings and other influences tending to deflect the mind from the strict line of legal justice. If partiality or incapacity was the fault attributed to the Judicial Committee, the position of the critics would not be more tenable, but it would be more

respectable. They admit in effect that the Judicial Committee is made up of great jurists who are absolutely impartial. The complaint that these jurists are too detached from Canadian affairs to give the kind of judgments that are popularly wanted carries the implication that our own courts are more or less swayed by extraneous circumstances, or by a desire to please the majority. And with that implication goes the suggestion that our courts would be well advised to consult the popular wish, or the will of a ruling party, or the desire of a strong municipality. As long as there are courts of lower and higher jurisdiction there will be appeals, and however long or short the series, there will be cases to run the whole length of it. It would seem right that the last word on constitutional controversies should be spoken by the final court of the Empire, our written Constitution being an Act of the Imperial Parliament. As to other cases as good an argument could be made for cutting off appeal to the Supreme Court of Canada from the Ontario Court of Appeal or the Quebec Superior Court as for cutting off appeal to the Judicial Committee of the Privy Council. As a matter of fact our Supreme Court is often 'skipped' in the course of appeal. Decisions such as that rendered by the Judicial Committee of the Privy Council as to the implementing of the bond guarantee provision of the Dominion Government's agreement with the Grand Trunk Pacific Railway Company; such as that given the other day against the municipal corporation of Winnipeg and in favour of the Winnipeg Electric Railway Company; and such as that in favour of the Toronto Railway Company in the matter of rights upon our streets, have a strong influence to make our Legislatures study, as carefully as the British Parliament does, so to draft their measures as to put the intention beyond controversy. It also should have a strong influence to make our municipal governments less slovenly in their methods of transacting such important public business as the framing of agreements with private corporations."

STERILIZATION OF THE UNFIT.

Some eighteen months ago (46 C.L.J. 614) we called attention to this subject, stating that it had been brought before the British American Medical Association by a prominent physician who had made a study of it; and also referred to the fact that in the States of Indiana and California Acts had been passed along the line referred to above. The necessity for some prompt and effective measure to prevent the bringing into the world of children with an inherited tendency to crime, insanity, idiocy or imbecility, has recently been brought prominently to the attention of the public in the Province of Ontario; and its Legislature has also become seized of the matter by the introduction of a bill by Dr. Godfrey seeking for an Act authorising the Lieutenant-Governor-in-Council to appoint for each of the provincial institutions for the care of the insane, feeble-minded and epileptic, boards of skilled surgeons whose duty it would be to examine their inmates, and, under certain safeguards, and when advisable, to perform operations which would prevent the procreation of children by those who might thus be declared unfit for parentage.

This would be a drastic measure, touching the liberty of the subject, but it would seem to be warranted under the conditions and necessities which permeate society as it exists. The rights of personal liberty are subject to "the right of the state to prevent by force the power of doing mischief, which is a necessary incident to a state of freedom;" and again, it is said that "there is indeed nothing, even among the most isolated groups of savage life, which approaches absolute liberty," if such terms be used in the sense of each doing what seems good in his own eyes, regardless of what is done by others: Patterson on the Liberty of the Subject, I. 74.

The duty which would be cast upon such a board as is referred to in Dr. Godfrey's bill is confined to inmates of the institutions there referred to. If and when any such legislation should take effect it might perhaps have a somewhat wider application, as there are other institutions, such as havens, or refuges for fallen women, which have to harbour such characters, who should be subject to the same law as would apply to inmates of provincial

institutions for the care of the insane, feeble-minded and epileptic. A discussion of this subject cannot but have a good effect. It has, moreover, its note of warning for those of the class indicated who are outside of the walls of the above-named place.

Dr. Godfrey's bill has, for the present, been withdrawn, but the country is indebted to him for bringing the matter thus prominently before the public, and it will have an educative effect that will very probably result, in the near future, in some such legislation as has taken place in other countries.

THE LAW AS TO TRADE SECRETS.

The X Company was engaged in the manufacture of powder by a secret process upon which no patent had been obtained. The company employed A as its chemist, one of the terms of the contract being that all knowledge or information which might be acquired by A while connected with the company in any capacity, relative to the mode of doing business, and processes of manufacture should be received in strict confidence by him and for the exclusive benefit of the X Company, and that no secrets of the business should ever be disclosed by him to any outsider. A, during the course of his employment, acquired knowledge of the secret process used by the X Company. He resigned his position, went to the Y Company, a rival of the X Company, and offered to sell this process which he claimed to have invented. The Y Company knew nothing of his former employment and in perfect good faith bought the secret, and began to manufacture powder by the process.

May the X Company enjoin the Y Company from using the process so obtained?

Before attempting to answer this question, it seems fitting to solve two other simpler questions which lead up to the one just put.

1. Suppose that A, instead of selling the secret, had proceeded to make use of it himself. Should he be enjoined?

2. Suppose that the Y Company knew the facts in the case or paid no value for the secret. Would there be any remedy against them?

The proper solution of any of these problems involves a consideration of the nature of a trade secret.

A trade secret consists of information which is valuable because it is known only to a few. The term, in its broader interpretation, may include a secret process, recipe, or formula; a list of customers, the contents of a book upon which no copyright has been obtained, or even private information as to stock quotations.

It has been established by a reputable line of decisions in this country, beginning with *Peabody* v. *Norfolk*, that a trade secret is property. In that case the Massachusetts court, citing the English cases of *Yovatt* v. *Wingard*, and *Morrison* v. *Moat*, held that one who invents or discovers and keeps secret a process of manufacture whether or not a proper subject of patent, has in it an exclusive property which a Court of Chancery will protect against anyone who, in violation of contract and in breach of confidence, undertakes to apply it to his own use or to disclose it to third persons. This idea has been consistently followed in the later cases cited elsewhere in this article.

Likewise, it has been held that a trade secret is the proper subject of sale and that the sale of the secret carries with it the right of protection against disclosure.

Again, a contract to convey a trade secret is one which will be specifically enforced in equity. In cases of this kind the question is often raised as to whether contracts entered into by the seller not to disclose, etc., are in restraint of trade. It seems to have been well settled that such a contract cannot be attacked on that score. Nor is such a contract by an employee contrary to public policy.

Part I.—Being property of a peculiar kind, for the loss of which money damages would be inadequate and hard to estimate, it would seem to follow that a confidential agent or

employee under contract not to disclose, should be enjoined from disclosing a trade secret, and the cases so hold.

And the doctrine of these cases has been rightly extended to cases where employers were enjoined from disclosing secrets invented by such employees themselves during the course of their employment.

There is a quasi-contractual duty arising out of the relationship and running from the employee to employer which equity will enforce and it makes no difference in such cases that the employee's duty is comparatively unimportant.

A plaintiff in such case, if he choose to make use of his legal remedy, should be allowed his action in tort against one who in breach of confidence discloses a trade secret. The tort is in the nature of a breach of duty arising out of the relationship existing between the parties. Action on the case is the proper remedy, and so held in *Royston* v. *Woodbury Institute*. In that same case it was said that trover would not lie since the thing converted was neither tangible personal property nor tangible evidence of title to intangible or real property. In addition to getting his injunction, a plaintiff in such a case should be allowed damages if he can shew that there were actual damages.

Of course it goes without saying that the communication of a trade secret to one employed in a confidential capacity is not such publication that after that time the public are free to make use of the secret.

Part II.—When we come to consider third parties, various situations are suggested. It may be that the third party has colluded with the confidential employee, and induced him to disclose the secret in breach of his confidence. In fact it would be safe to say that a majority of cases which have arisen on this point have been based on facts similar to those just stated. In such case the third party so colluding is guilty of a legal wrong in the nature of a tort for inducing the employee to violate his quasi-contractual obligation or to break his express contract as the case may be.

For the same reasons suggested in Part I, equity has concurrent jurisdiction and will restrain such third person from making use of the secret so obtained.

Equity will not only enjoin, but defendant will be made to account for profits made by the use of this secret.

If the confidential agent tells the secret to the third party but receives no value for it and such third party has no knowledge of the relationship, there is no legal wrong so far as he is concerned, but it would seem to present a proper case for the exclusive jurisdiction of equity. The big principle underlying this whole matter is that equity will not allow one man unjustly to enrich himself at the expense of another. So the solution to our first two cases is easy even granting that legal title to the trade secret passes to the employee or third person.

Part III.—The case which is really difficult is the one where the third party buys the secret from the agent in good faith or buys the manufactured substance and by analysis discovers the secret process of manufacture.

These cases should doubtless be treated separately. In the latter case, the owner of the process has placed his wares upon the market and has invited the public to buy. Having taken no measures to protect his secret, he has virtually estopped himself from denying its publication. He has given his secret to the public and must take the consequences. It is not contended that this estoppel theory is the only one upon which to support this line of decisions, but this much may be said that in the former case this feature is eliminated.

It frequently happens that a manufacturing company puts out a product by the analysis of which the process of its manufacture could not be found out. Now, suppose the confidential employee who has knowledge of such process sells such knowledge to a bona fide purchaser. In such case the owner has made no representation to this third party and has taken no inconsistent position. Nor can you say that he is negligent in entrusting this secret to his employees, for such confidence is necessarily incident to the business as carried on.

The case thus far decided indicates the tendency of the courts to decide this case in the same way as the case where the secret is found out by analysis.

It is interesting in this connection to notice the language used by the various courts. In *Tabor* v. *Hoffman*, the court says: "If a valuable medicine not protected by patent, is put upon the market anyone may, if he can, by chemical analysis and a series of experiments, discover the ingredients and their proper proportions and may use the process without danger of interference, but because this discovery may be possible by fair means it would not justify a discovery by unfair means such as the bribery of a clerk who, in the course of his employment, had aided in compounding the medicine and had thus become familiar with the formula." In *Park* v. *Hartman*, we find the language: "A trade secret or medical formula protects its owner only against disclosure and, as we have already seen, one is free not only to use the process of formula, if discovered by skill and investigation, without breach of trust, but to make and sell the thing or preparation as made by the process of formula of the original discoverer, if that be the truth." The old case of *Morrison* v. *Moat*, contributes the following: "The defendant derives under that breach of faith and contract, and I think he can gain no title by it. It might, indeed, be different if the defendant were a purchaser for value of the secret without notice of the obligation affecting it."

It was decided in *Vulcan Detinning Co.* v. *American Can Co.*, that where one becomes bound by contract or confidence to another not to reveal a trade secret possessed by the other, he cannot in a suit to restrain him from utilizing such trade secret, set up that the complainant had no right to it because it had been obtained honestly from owners who had dishonestly obtained the knowledge from the discoverer.

Two of the cases nearest in point are *Chadwick* v. *Covell*, and *Stewart* v. *Hook*, and both of these cases hold that the defendant may be restrained only when it can be shewn that he is doing something in fraud of the plaintiff's rights.

The case of *Stewart* v. *Hook*, was a case where one Tilden manufactured and sold an opium cure of which he was the inventor and sole owner. Tilden sold to the plaintiffs his interest in the opium cure, including all formulas, recipes, etc., and covenanted not to manufacture any medicine under the name used for the opium cure and not to reveal any secret of manufacture. Later, Tilden, in violation of his covenant and of the plaintiff's rights, sold the formulas to defendants who proceeded to use them in manufacturing an opium cure and selling it under its original name. There was no allegation that the defendants came by their knowledge of the formula in any unfair way or that they committed any fraud or breach of trust of which the plaintiffs could complain. Upon these facts the Georgia court refused to enjoin the defendants. The following language of the court is significant: "The property right in an unpatented preparation, however, is not an unqualified one and is only exclusive until, by publication, it becomes the property of the public. In other words, the discoverer may keep his formula a secret and no one may by fraud or artifice obtain his secret from him. . . . If, however, one honestly and fairly comes into possession of the formula of an unpatented preparation, he has the right to use it and to sell it and equity will not restrain him from so doing."

The cases cited shew the overwhelming weight of authority favouring a negative answer to the query put at the outset. On what proper theory can we support the case? If we treat a trade secret as we would a tangible chattel, we would be forced to say that the purchaser from a thief acquired no title and so a purchaser of a secret process from one who in the course of his confidential employment had virtually stolen the process from his employer, could not hide himself under the cloak of a b. f. p. It might be answered that the employer has entrusted the employee with possession of the secret and so there is no larceny. But did the employee obtain title? Thereby hangs the answer to our query. On the other hand we would be slow to admit that the right of the owner of a trade secret was only

an equitable right. It is clear that he has a legal property right in such secrets. At what point does his right change from a legal right to a mere equity?

All the earlier decisions seem to go off on the broad general doctrine of fairness. It is not until we come to the case of *Pomeroy Sub. Co.* v. *Pomeroy*, that we find the court theorizing about the matter. In that case the New Jersey court said: "The nature of the right of an inventor or discoverer to a process of manufacture or a composition of matter which has been invented, or discovered is well settled. Such invention or discovery does not of itself confer upon the discoverer an exclusive property right, good against all the world as does the ownership of tangible chattels. . . . But he has a kind of property right in his discovery or invention which he may transfer either absolutely or to a limited extent. Such transfer will pass to the vendee the title either absolute or limited, against the discoverer but as against other than the vendor or transferor, the title depends upon the right of the inventor or discoverer, or his grantee, to prevent the use of the invention or secret process by persons claiming to use them, and this right of prevention is based on special equities or rights against such person which disentitle him to the use. If knowledge has come to such claimant fairly and honestly, and under circumstances which give the inventor no personal claim against him, the use will not be enjoined. In most cases this equity against the use is based on the confidential communication of the invention or process by an employer to employees, and in this case the employee or his grantee will be enjoined from using or communicating the process or invention of his employer."

This court, in the *Pomeroy* case, refers to the right against third persons as an equity. In the light of the cases cited it is submitted that the true theory is that although a trade secret is property, it consists merely of information differing from ordinary chattels in that it is intangible and not capable of being dealt with as we deal with chattels generally. In case of a tangible chattel the purchaser from a thief is not protected, because the fault is with his getting. He may be in good faith

and pay value but he gets nothing, for the thief has nothing to give him but possession and that is wrongful possession. In the case of a trade secret, the wrongdoer has possession in the form of knowledge and this it is impossible to take away. So it seems from the necessity of the case that in the case of property of this kind, there is no such thing as title as distinguished from possession. That being true, the wrongful employee has title which he passes on to his transferee, leaving only an equity in the true owner. If such transferee takes in good faith and for value he should be protected.

The language of the courts as to fairness, etc., it seems to me, should go no further in their interpretation than to include that maxim of equity that what one gets in good faith and for value equity will not take away. Having reached this conclusion, the general doctrine of bona fide purchasers would apply as to subsequent transferees and assignees.—*Central Law Journal.*

(All propositions are fortified by authorities. See Vol. 74, pp. 81 et seq.).

REVIEW OF CURRENT ENGLISH CASES.

SOLICITOR — PROFESSIONAL MISCONDUCT — DEBT-COLLECTING AGENCY—PAYMENT OF SOLICITOR BY COMMISSION ON DEBTS COLLECTED—CHAMPERTY—51 & 52 VICT. c. 65—(R.S.O., c. 172, s. 44.)

In re Solicitor (1912) 1 K.B. 302. This was an application to strike a solicitor off the rolls for professional misconduct. The application, as required by the English Solicitors Act, 1888, was made to the Law Society, (see R.S.O., c. 172, s. 4). It appeared that the solicitor had been party to the formation of a debt-collecting company, and had financed it, and controlled its affairs, and had used it as an adjunct to his business as a solicitor, and by means thereof he systematically solicited debt-collecting business, without disclosing his connection with the company; that he acted as solicitor for the company in collecting debts and was paid by a commission proportionate to the amount collected, and in unsuccessful cases disbursements only were charged. The Committee of the Law Society found that this constituted professional misconduct. The Divisional Court (Darling, Bankes, and Hamilton, JJ.) held that the Committee was justified in their finding, and also held that the terms on which the solicitor conducted actions for the company amounted to champerty; and the court also held that the definition of "infamous conduct in a professional respect" on the part of a medical man in *Allison* v. *General Council of Medical Education, etc.* (1894) 1 Q.B. 750, applied to professional misconduct on the part of a solicitor; viz., that "if it is shewn that a medical man in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of infamous conduct in a professional respect."

SOLICITOR—BILL OF COSTS—DELIVERY OF SOLICITOR'S BILL—DELIVERY BY POST—DATE OF DELIVERY—SOLICITOR'S ACT, 1843, 6 — 7 VICT., c. 73, s. 37—(R.S.O., c. 174, s. 34.)

Browne v. *Black* (1912) 1 K.B. 316. In this case the Court of Appeal (Williams and Kennedy, L.JJ., Buckley, L.J., dissenting) has affirmed the judgment of the Divisional Court (1911)

1 K.B. 975 (noted ante, vol. 47, p. 383) to the effect that where a solicitor's bill of costs is sent by post to the client, the date of delivery, for the purpose of bringing an action, is the date when in the ordinary course it would be delivered, and not the day of posting.

JUSTICES—DISMISSAL OF CHARGE—ORDER FOR PAYMENT OF COSTS BY PROSECUTOR—COSTS—POWER OF JUSTICES TO STATE A CASE—8 EDW. VII. c. 15, s. 6 (3)—(CRIMINAL CODE, ss. 736, 761.)

The King v. *Allen* (1912) 1 K.B. 365. In this case two policemen were charged before justices of the peace with having committed perjury. After hearing the evidence the justices dismissed the charge and ordered the prosecutor to pay the costs, on the ground that he had not acted bona fide. The justices then, at the request of the prosecutor, stated a case as to whether they were justified in ordering payment of costs. It was objected on the part of the defendants that in such circumstances the justices had no power to state a case, on the ground that the Summary Jurisdiction Act, 1879, only empowers justices to state a case when acting as a court of summary jurisdiction, and it was claimed that the justices in this case were merely acting as examining justices, and not as a court of summary jurisdiction; but the Divisional Court (Lord Alverstone, C.J., and Hamilton and Bankes, JJ.), were of opinion that the justices were acting as a court, and as such were bound to weigh the evidence judicially for the purpose of determining whether or not the accused should be committed for trial, and held that they had power to state a case; (see Criminal Code, ss. 736, 761;) but on the merits the rule was discharged.

PRACTICE—DISCOVERY—ADMISSION OF POSSESSION OF DOCUMENTS OTHER THAN THOSE PRODUCED—AFFIDAVIT OF DOCUMENTS—FURTHER AFFIDAVIT.

British Association of Glass Bottle Manufacturers v. *Nettlefold* (1912) 1 K.B. 369. The Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.) overruled Bucknill, J., on a point of practice. The defendant applied to compel the plaintiffs to file a better affidavit on production of documents, on the ground that their solicitors had admitted that the plaintiffs had another document in their possession in addition to those referred to in their affidavit, although also denying its relevance. On an application by the defendant that document was found to be relevant and was ordered

to be produced. On production of this document it became apparent that there must of necessity have been other documents which led up to the document thus ordered to be produced, and the defendant applied for an order requiring the plaintiffs to file a better affidavit. Bucknill, J., refused the motion, considering himself bound by *Jones* v. *Monte Video Gas Co.*, 5 Q.B.D. 556, to hold that the affidavit of documents is conclusive; but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.) were of the opinion that the case of *Kent Coal Concessions* v. *Duguid* (1910) A.C. 452 entitled the court to draw inferences from the documents produced that there were others which had not been produced, and that that was the proper inference from the document which had been withheld, and had been specially ordered to be produced, and therefore the order was made as asked.

DEED—CONSTRUCTION—COVENANT CONTROLLED BY RECITAL—SEPARATION DEED—DUM CASTA CLAUSE.

In *Crouch* v. *Crouch* (1912) 1 K.B. 378, the plaintiff sued on a covenant for maintenance contained in a separation deed. The deed recited that the husband had agreed to allow the wife a certain sum as maintenance "while she shall remain chaste"; the covenant for payment contained no such limitation. It was held by a County Court judge that the defendant was liable to pay notwithstanding the plaintiff had committed adultery, of which fact he refused to receive evidence; but the Divisional Court (Coleridge and Horridge, JJ.) reversed his decision, holding that the covenant was controlled by the recital, and therefore that the plaintiff's adultery would be a bar to her right of action. on the covenant; and the case was therefore remitted for re-trial.

INSOLVENT TRADER—TRANSFER OF BUSINESS TO ONE-MAN COMPANY—MORTGAGEE OF BUSINESS ACCEPTING DEBENTURES OF COMPANY IN SUBSTITUTION FOR MORTGAGE—TRANSFER SET ASIDE—RIGHTS OF MORTGAGEE.

In re Goldburg (1912) 1 K.B. 384. In this case an insolvent trader, whose business was subject to a mortgage for £700 in favour of one Silverstone, transferred his business to a one-man company for £2,500, to be paid in £1,500 debentures of the company, and the balance in £1,000 shares. He then induced the mortgagee Silverthorne to accept £700 of debentures of the company in substitution for his mortgage. The transfer to the company was subsequently set aside as fraudulent under 13 Eliz. c. 5, and also as being an act of bankruptcy under the

Bankruptcy Act, 1883. The company's debentures were worthless. In these circumstances Silverthorne claimed that he should be remitted to his original position as mortgagee and as having a first charge in respect of his £700 on the assets of the business; but Phillimore, J., held that he was not so entitled, having given up the substance for a shadow, but, in dismissing his claim as a secured creditor, he did so without prejudice to his right to prove in the bankruptcy for the damages he had suffered by reason of his being induced to accept the worthless debentures.

DEBTOR AND CREDITOR—INSOLVENT DEBTOR—PREFERENTIAL PAYMENT—MISREPRESENTATION AS TO SOURCE OF FUND PAID—RIGHT OF TRUSTEE IN BANKRUPTCY TO RECOVER PREFERENTIAL PAYMENT.

In re Ashwell (1912) 1 K.B. 390, though a bankruptcy case, is deserving of attention. In this case the debtor obtained the adjournment of a bankruptcy petition on payment of £125, which he untruly represented to the creditors was not his money but that of a third party. Within three months the debtor was adjudicated bankrupt, and the trustee claimed to recover the £125, and Phillimore, J., held that he was entitled to do so and was not estopped by the misrepresentation of the debtor as to the source from which the money was obtained.

BROKER—PLEDGE OF CUSTOMER'S AND BROKER'S SECURITIES—SALE OF CUSTOMER'S SECURITIES TO PAY DEBT OF BROKER—MARSHALLING SECURITIES.

In re Burge (1912) 1 K.B. 393. This was also a bankruptcy case involving a point of general interest. The bankrupts were a firm of brokers who had been employed by one Skryme to buy shares on margin, the arrangement being that on each occasion they advanced him part of the purchase money, and he paid the margin in cash or on account. It was also part of the arrangement that the money so advanced by the brokers should be obtained by them from their bankers on deposit of the shares purchased for Skryme. The brokers deposited Skryme's shares and also securities of their own with their bankers to secure their current overdraft. The brokers having been adjudicated bankrupts, the bankers sold Skryme's shares and paid the debt due by the brokers to them out of the proceeds, and handed over the surplus securities to the trustee in bankruptcy. Skryme, in these circumstances, claimed that, by analogy to the doctrine of marshalling the securities should be marshalled in his favour, and that to the

extent to which his shares had been used to pay the brokers' own debt he was entitled to a prior charge on the surplus securities handed over by the bankers to the trustee, and Phillimore, J., held him to be entitled to that relief.

INSURANCE—CONDITION PRECEDENT—CONDITION AS TO KEEPING WAGES BOOK.

In re Bradley and Essex and Suffolk Accident Society (1912) 1 K.B. 415. This was an action on a policy of insurance by way of indemnity against claims under the Workmen's Compensation Act. The policy contained a clause that the first premium and all renewal premiums were to be regulated by the amount of wages paid to employees by the insured, and it provided "that the name of every employee and the amount of wages, salary and other earnings paid to him shall be duly recorded in a proper wages book." This book was to be open to inspection by the insurers. The policy provided that the due observance and fulfilment of the conditions of this policy shall be a condition precedent to any liability of the insurers. The insured only employed one person, his son, who was paid £75 a year, to whom an accident happened, and the insured had to pay him compensation under the Act. No wages book had been kept, and the defendants resisted payment on the ground that the omission to keep a wages book was a breach of a condition precedent. Arbitrators found that the insurers were liable, subject to the opinion of the court as to whether the keeping of a wages book was a condition precedent. Bray, J., held that it was not, and the majority of the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.) affirmed his decision; but Moulton, L.J., dissented, thinking the wording of the policy did make the keeping of a wages book a condition precedent.

SHIP—CHARTER-PARTY—CONSTRUCTION—DEMURRAGE—EJUSDEM GENERIS.

Northfield Steamship Co. v. *Compagnie L'Union Des Gaz* (1912) 1 K.B. 434. This was an action to recover demurrage. The charter-party provided that the ship was to proceed to Genoa or Savona, and there deliver her cargo alongside wharf and vessel as ordered, and the cargo was to be discharged at the average rate of 500 tons a day, provided steamer can deliver at that rate; if longer detained, a rate of demurrage to be paid by the consignees was fixed; and it provided that the time was to commence when the vessel was ready to unload and written notice given, "whether

in berth or not." Delay occasioned by strikes, lockouts, or civil commotions was not to count. The steamer arrived at Savona and was moored inside the harbour on September 22nd, 1909, and notice given to the consignees of her readiness to unload. All berths alongside the wharves were filled, and the steamer could not get to a berth until 25th September, when unloading commenced. By virtue of rules made by the shore labourers, and sanctioned by the port authorities, shore labourers would not discharge a vessel until she was alongside a wharf. The shipowners claimed for demurrage from 22nd to 25th of September. The defendants contended they were not liable, because (1) the vessel was not ready to unload until she reached the wharf, and (2) that the delay being due to the rules of the port the case was within the clause as to strikes, etc. But Hamilton, J., held that the vessel was ready to unload "whether in berth or not" when the notice was given, and that the delay caused by the rules of the port were not ejusdem generis with strikes, etc., and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.).

SEAMAN — DESERTION — FORFEITURE OF WAGES — EXPENSES CAUSED BY DESERTION—MERCHANT SHIPPING ACT, 1894, 57 & 58 VICT. C. 60, SS. 221, 232—MERCHANT SHIPPING ACT, 1906, 6 EDW. VII. C. 48, S. 28.

Deacon v. *Quayle* (1912) 1 K.B. 445. This was an appeal by a master of a vessel from the decision of a magistrate in the following circumstances. By the Merchants Shipping Act, 1894, s. 221, if a seaman deserts his ship he forfeits the wages he had earned at the time of his desertion, and by s. 232 the forfeited wages are to be applied in reimbursing the master or owner of the ship the expenses incurred by reason of the desertion, and by s. 28 of the Merchant Shipping Act, 1906, the master is to furnish a "reimbursement" account of any expenses caused by "the absence of the seaman where the absence is due to desertion," and the master is entitled to be reimbursed out of the forfeited wages any sums in the reimbursement account which are properly chargeable. On the arrival of the ship at San Francisco sixteen seamen deserted. The ship remained over five months at that port, being used as a coal hulk. At the end of that period sixteen seamen were engaged as substitutes for the deserters at a higher rate of pay. The amount saved at San Francisco in the wages of the deserters exceeded the excess of wages paid to the substitutes. It was claimed that the amount saved ought to be set off against the ex-

cess of wages paid to the substitutes, but the Divisional Court (Lord Alverstone, C.J., and Hamilton and Bankes, JJ.) held that the magistrate had properly allowed the extra wages paid to the substitutes, and that to give effect to the appellant's contention would necessitate the taking an account to ascertain the net result upon the whole adventure of the desertions, which was considered not to be the purpose of the Act. In another case of *Neate* v. *Wilson*, reported with the above case, another question arose. Owing to the desertion of several seamen the ship was detained a day longer than it would otherwise have been, and the master claimed to be reimbursed out of the forfeited wages a sum of £16, representing one day's expenses for wages, keep of the crew, and coal consumed on the ship; but the Court of Appeal held that this expenditure was not an expense caused by the desertions, and the claim was therefore disallowed as being too remote.

FORGERY—PARTNER FORGING FIRM NAME—BILL OF EXCHANGE—ACCEPTANCE BY PARTNER IN FIRM NAME IN FRAUD OF FIRM—FORGERY ACT, 1861, 24 & 25 VICT. c. 98, s. 24—CRIMINAL CODE, s. 466.

The King v. *Holden* (1912) 1 K.B. 483. In this case the defendant was in partnership with one Hugh Fullerton under the style or firm of Houlden & Fullerton. With intent to defraud, and without lawful authority or excuse, he accepted a bill of exchange in manner following: "Payable at the L. and W. Bank Limited, London. Holden & Fullerton." The Forgery Act, 1861, 24 & 25 Vict. c. 98, s. 24, provides that whosoever with intent to defraud shall accept any bill of exchange by procuration or otherwise in the name of any other person without lawful authority or excuse shall be guilty of felony. The Court of Criminal Appeal (Lord Alverstone, C.J., and Hamilton and Bankes, JJ.) held that the act of the defendant was an offence within the Act. It may be noted that the Criminal Code, s. 466 et seq., is not quite so explicit as the English Act in this respect.

TRESPASS—JUSTIFICATION—ACT DONE IN PRESERVATION OF TRESPASSER'S PROPERTY—ACTUAL NECESSITY—REASONABLE ACT.

Cope v. *Sharpe* (1912) 1 K.B. 496, is a much-litigated case. On a motion for a new trial, (1910) 1 K.B. 168, it was noted ante, vol. 46, p. 171; and on appeal from the judgment on the new trial to a Divisional Court (1911) 2 K.B. 837, it was noted ante, vol. 47, p. 763; and from the latter decision the present appeal was

brought to the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.). It may be remembered that the action was brought to recover damages for setting fire to the heather on the plaintiff's land, in the following circumstances. The defendant's master had sporting rights over the land, and in order to protect his master's shooting rights, and for the purpose of staying the spread of a fire which was in progress on the land, the defendant had set fire to patches of heather at some distance from the main fire. The result of the trial was that the jury found that the defendant had acted reasonably but, as the event proved, unnecessarily, in setting fire to the patches in question. In this state of circumstances the Divisional Court held that the plaintiff was entitled to recover; but the majority of the Court of Appeal (Buckley and Kennedy, L.JJ.) take the view that it was not requisite that the act of the defendant should have been proved by the event to have been actually necessary to prevent the spread of the fire, in order to justify his act; but that it was enough that at the time it was done it was an act which a reasonable man would do to meet the threatened danger. Williams, L.J., dissented, taking a different view to that of the rest of the court as to the meaning of the jury's findings.

ADMIRALTY—BILL OF LADING—INCORPORATION IN BILL OF LADING OF CONDITIONS OF CHARTER-PARTY—ARBITRATION CLAUSE.

Thomas v. *Portsea SS. Co.* (1912) A.C. 1. In this case (known in the court below by the title of "*The Portsmouth*") the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell, and Robson) have affirmed the judgment of the Court of Appeal (1911) P. 54 (noted ante vol. 47, p. 254). The question involved turns upon the construction of a bill of lading, which provided that the goods shipped thereunder should be delivered to the shipper or his assigns, "he or they paying freight for the said goods, with other conditions as per charter-party," and in the margin was written in ink, "deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party including negligence clause." The charter-party provided that "any dispute or claim arising out of any of the conditions of this charter shall be adjusted at a port where it occurs, and the same shall be settled by arbitration." The goods were to be delivered at Swansea, and the action was brought to recover £200, eight days' demurrage at the port of discharge. The defendants applied to stay proceedings on the ground that the arbitration clause in the charter-party was incorporated into

the bill of lading. Their Lordships held that neither of the clauses above quoted had the effect of incorporating the arbitration clause of the charter-party, and therefore the motion to stay the proceedings was rightly dismissed.

SHIP—CHARTER-PARTY—CONSTRUCTION—TIME CHARTER—PAYMENT OF HIRE—EXEMPTION CLAUSE—STRIKE.

Brown v. *Turner* (1912) A.C. 12. In this case the construction of a charter-party was in question. By the charter-party a ship was let for a certain time at a monthly hire, to be employed in such lawful trades as the charterers should direct within specified geographical limits. The charter-party contained a clause which provided that "the owners and charterers shall be mutually absolved from liability in carrying out this contract, in so far as they may be hindered or prevented by (inter alia) strikes." During the currency of the charter-party the charterers ordered the ship to a port where, to their knowledge, a strike of colliers was in operation, for the purpose of loading a cargo of coal, and, owing to the strike, the ship was delayed several weeks in getting the cargo. The question was whether the charterers were liable for the hire during this period. The Court of Appeal held that they were, and the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Shaw, and Mersey) considered that the words "carrying out this contract" meant performing the obligations imposed by the contract, and did not include the exercising of rights conferred by the contract. With this view Lord Shaw did not agree, thinking the words covered both the obligations and the rights of the parties under the contract; but all of their Lordships agreed that the charterers were not prevented by the strike from carrying out the contract, inasmuch as they could have withdrawn the ship from the strike area. Therefore they held the hire was payable.

SALE OF GOODS—C.I.F. CONTRACT—TERMS "NET CASH"—PAYMENT AGAINST SHIPPING DOCUMENTS—SALE OF GOODS ACT, 1893, (56 & 57 VICT. C. 71,) S. 28.

E. Clemens Horst Co. v. *Biddell* (1912) A.C. 18. In this case the plaintiffs purchased goods from the defendants, and the contract provided that the buyer should pay for the goods at a specified rate per lb. "c.i.f. to London, Liverpool or Hull. Terms net cash." The contract contained no term expressly providing for payment against shipping documents. The plaintiffs refused to pay for the goods on tender of the bill of lading, and claimed

the right to make an examination of the goods to see if they were according to sample before they were liable to pay. The defendants thereupon refused to ship the goods, and the action was brought for breach of contract. Hamilton, J., who tried the action, held that under the contract the plaintiffs were bound to pay the price on tender of the bill of lading. He also gave judgment for the defendants on their counterclaim for the difference between the amount the plaintiffs had agreed to pay and the highest price which they could get for the goods on a re-sale. The Court of Appeal (Kennedy, L.J., dissenting) reversed the judgment of Hamilton, J., holding that the plaintiffs were entitled to make inspection of the goods before payment. The House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell, and Shaw) have now reversed the judgment of the Court of Appeal and restored that of Hamilton, J. Their Lordships hold that under s. 28 of the Sale of Goods Act, payment on such a contract is to be made on "delivery," and that in the case of goods at sea on shipboard "delivery" is made by the delivery of the bill of lading; and where, as in this contract, no time is fixed when the shipper may tender the bill of lading, he is entitled to deliver it at any reasonable time.

CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—MEMORANDUM IN WRITING—AGREEMENT FOR SERVICE FOR DEFINITE PERIOD EXCEEDING ONE YEAR—PROVISION FOR DETERMINATION BY NOTICE BY EITHER PARTY WITHIN A YEAR—STATUTE OF FRAUDS, 29 CAR. II., c. 3, s. 4; (R.S.O., c. 338, s. 5.)

Hanan v. *Ehrlich* (1912) A.C. 39. In this case the House of Lords (Lord Loreburn, L.C., and Lords Alverstone, Atkinson and Shaw) have affirmed the judgment of the Court of Appeal (1911) 2 K.B. 1056 (noted ante. p. 18) holding that a contract for service for a definite period exceeding a year, though subject to a proviso entitling either party to terminate it on six months' notice during the year, is within the Statute of Frauds and must be in writing.

MORTGAGE — CLOG ON REDEMPTION — DEBENTURES — FLOATING CHARGE—AGREEMENT BETWEEN MORTGAGOR AND MORTGAGEE DEHORS THE MORTGAGE.

In *DeBeers Cons. Mines* v. *British South Africa Co.* (1912) A.C. 52, the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Halsbury and Gorrell) have been unable to agree with the judgment of the Court of Appeal (1910) 2 Ch. 502 (noted ante, vol. 47, p. 95). It may be remembered that the defendants

were mortgagees of the plaintiff company by way of floating charge on its property and undertaking. The charge had been paid off, and the plaintiff company claimed to be released from an agreement whereby they had given to the defendants an exclusive right to mine for diamonds within a certain part of the plaintiffs' territory, on the ground that this agreement was a clog on redemption and therefore void. The Court of Appeal thought that the agreement was part of the mortgage transaction, but the House of Lords came to the conclusion that the agreement in question was anterior to the mortgage and an independent agreement, and was unaffected by the mortgage.

STATUTE—MINERALS—"FREESTONE"—QUESTION OF FACT.

Symington v. *The Caledonian Railway Co.* (1912) A.C. 87 was an appeal from the Scotch Court of Session, and the simple point involved appears to have been whether, in the construction of a statute relating to "minerals," it is a question of law or fact whether a particular substratum (in this case "freestone") is to be regarded as a mineral. The House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Gorrell and Shaw) reversed the Court below, and held it was a question of fact, to be determined on evidence.

SHIPPING—THROUGH BILL OF LADING—TRANSIT OF GOODS PARTLY BY LAND AND PARTLY BY WATER—DUTY OF SHIPOWNER TO NOTIFY INLAND CARRIER OF DAMAGE TO GOODS—SEVERAL CARRIERS, EACH LIABLE ONLY FOR HIS OWN ACTS.

Crawford v. *Allan SS. Co.* (1912) A.C. 130. This was also an appeal from the Scotch Court of Session, and involves a point of general interest. The goods in question were shipped from Minneapolis to Glasgow under a through bill of lading, to be carried partly by land and partly by sea by different carriers, each of whom was to be liable only for damage occasioned by themselves respectively. The goods consisted of 41,000 bags of flour. The defendants, a steamship company, received the goods at New York, and gave a receipt for the goods to the inland carrier stating that the goods were in apparent good order except that 110 bags were damaged by caking. On the arrival of the goods in Glasgow it was found that 4,132 bags were damaged by caking. The House of Lords (Lords Halsbury, Atkinson, Gorrell and Shaw) held in these circumstances the onus of proving that the damage, except so far as they had notified the inland carrier,

was in fact done before the defendants received the goods, was on the defendants, and not having been discharged, they were liable therefor.

ACTION OF DECEIT—UNTRUE STATEMENT TO THIRD PARTY—FRAUDULENT INTENT—EVIDENCE.

Tackey v. *McBain* (1912) A.C. 186. This was an action of deceit. The facts were, that the defendant was agent and manager in Shanghai of an oil company whose property was situate in Sumatra, in which company the plaintiff was a shareholder. On April 10th, 1909, the defendant received a telegram announcing the finding on the company's property of an oil deposit of large extent; and it was alleged that the defendant concealed this information from the general body of shareholders until April 19th, 1909, and in the interval denied to persons other than the plaintiff that such information had been received, thereby deceiving the plaintiff and inducing him to sell his shares below their true market value. The jury found that the defendant had made a false representation to third persons to the effect that no news had been received affecting the value of the company's property in Sumatra, and that the plaintiff had acted on such representation and had suffered damage; but the jury also found that such false representation was not made with intent that it should be acted on by the plaintiff or any other person. In these circumstances the action was dismissed at the trial, and, as the Judicial Committee of the Privy Council (Lords Macnaghten, Mersey and Robson) held, rightly so, their Lordships being of the opinion that it is of the essence of an action of deceit that the alleged untrue statement was made with a fraudulent intent, and that having been negatived by the jury on a proper direction from the court, a new trial had been properly refused.

CONTRACT FOR LEASE—CONDITION PRECEDENT—CONTINUOUS BREACH—LIQUIDATED DAMAGES OR PENALTY—"USUAL COVENANTS"—COVENANT NOT TO ASSIGN WITHOUT LEAVE—EXPRESS AGREEMENT NOT TO WITHHOLD UNREASONABLY CONSENT TO ASSIGNMENT.

DeSoysa v. *De Pless Pol* (1912) A.C. 194 was an appeal from the Supreme Court of Ceylon. It deals with some points of general interest. The plaintiff DePless Pol entered into an agreement with the defendant Soysa to take a lease of certain premises from the defendant, subject to a condition that the defendant should first within a specified time erect certain buildings on the premises,

and it was provided that the sum of Rs. 150 should be paid by defendant to the plaintiff in respect of every day after the day fixed for completion that the buildings remained uncompleted. The contract provided that the lease was to contain the usual covenants, but it did not expressly provide that the lessee should covenant not to assign without the lessor's consent, but did stipulate that the lessor would not withhold his consent to an assignment unreasonably. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Robson), affirming the judgment of the court below, came to the conclusion (1) that the omission to complete the buildings was a continuous breach of the agreement after the fixed date, and that the stipulated daily sum was liquidated damages and not a penalty; and (2) that the stipulation that the lease should contain usual covenants did not include a covenant not to assign without the leave of the lessors, nor did the agreement by the lessor not unreasonably to withhold his consent to such assignment by implication entitle the lessor to a covenant by the lessee not to assign.

STATUTE—CONSTRUCTION—3 EDW. VII. c. 71 (D.); 4 EDW. VII. c. 24 (D.).

Grand Trunk Pacific Railway v. *The King* (1912) A.C. 204. This is the case in which the construction of the Dominion Acts, 3 Edw. VII. c. 71, and 4 Edw. VII., c. 24, was in question. By the first of these Acts the Dominion Government became bound to guarantee, to the extent of 75 per cent. of the cost of construction of a certain section of the Grand Trunk Pacific Railway, first mortgage bonds charged on the company's whole undertaking; and the balance of the cost was to be raised by second mortgage bonds of the railway. By the second Act the Government became bound to implement its guarantee so as to make the proceeds of the guaranteed bonds, which had, in fact, proved insufficient to meet the 75 per cent. of the cost of construction, equal thereto. Under this latter Act the Supreme Court of Canada had held that the railway was bound to issue additional first mortgage bonds to the extent of the deficit, and that the Government should guarantee them. But the Judicial Committee of the Privy Council (Lords Haldane, Macnaghten, Shaw and Robson) came to the conclusion that the true meaning of the second Act was that the Government was bound to provide money or its equivalent to meet the deficiency without imposing any further liability on the company.

NEW BRUNSWICK SUCCESSION DUTY ACT, 1896, SEC. 1 (5)—CONSTRUCTION—LOCALITY OF SIMPLE CONTRACT DEBT—BANK DEPOSIT—HEAD OFFICE OF BANK IN ENGLAND.

The King v. *Lovitt* (1912) A.C. 212. In this case a testator domiciled in Nova Scotia died entitled to a sum of money on deposit in a branch of the Bank of British North America in New Brunswick. An ancillary probate of the testator's will was granted in New Brunswick, and the executors obtained payment of the money. Succession duty was claimed by the New Brunswick Government in respect of this money. The Supreme Court of Canada held that the duty was not payable, the court being divided in their reasons; Fitzpatrick, C.J., thinking that the Province of New Brunswick could not by its Act affect property or persons outside of its jurisdiction, and that the property in question was outside the Province. Girouard, J., held that the property followed the testator's domicile and was not taxable in New Brunswick. Davies and Anglin, JJ., considered that, as the head office of the bank was in England, the debt was owed by a debtor outside of the jurisdiction of New Brunswick, and therefore it was not taxable by that Province. On the other hand, Idington, J., thought the property was de facto within New Brunswick, and therefore taxable; Duff, J., agreed that the debt was due in New Brunswick, and therefore taxable there. The Judicial Committee of the Privy Council (Lords Haldane, Macnaghten, Shaw and Robson) allowed the appeal, holding that the property consisted of a simple contract debt primarily payable in New Brunswick, and must be regarded as locally situate there, and therefore subject to the Succession Duty Act of that Province.

DOMINION RAILWAY ACT, 1906, SS. 47, 159, 237 (3)—POWER OF BOARD OF RAILWAY COMMISSIONERS—ORDER APPROVING LOCATION OF RAILWAY SUBJECT TO CONDITION OF MAKING COMPENSATION.

Grand Trunk Pacific Railway v. *Landowners of Fort William* (1912) A.C. 224. In this case the Board of Railway Commissioners, in assumed exercise of their powers under the Railway Act, 1906, had approved of the location of the appellants' railway line in the town of Fort William, but had attached to such approval the condition that the appellants should make full compensation to all persons interested for all damages sustained by reason thereof. The Judicial Committee of the Privy Council (Lords Atkinson, Shaw, Mersey and Robson) considered that the Board

had exceeded its powers in attaching this condition, because its power to award damages is limited to damages in respect of construction under s. 237 (5), and s. 47 cannot be extended to enlarge that power to meet the case of damages arising from the location of the railway. As the condition failed, therefore there was no effective approval of the proposed location of the line, and the order of the Board was rescinded.

ADMIRALTY—SHIP—COLLISION—VESSEL IN TOW—TOW IN COLLISION WITH THIRD VESSEL—TUG AND THIRD VESSEL TO BLAME—LIABILITY OF THIRD VESSEL.

The Seacombe (1912) P. 21. In this case the facts were as follows: a barge in tow of a tug came into collision with a third vessel, owing to the fault of the tug and such third vessel. The owners of the barge sued the third vessel for the damages occasioned by the collision. For the defendants it was contended that the tow was so identified with the tug, that it was responsible for its negligence, therefore it was a collision caused by the negligence of both vessels, and, therefore, according to the rule of admiralty law each vessel was liable for half the damages. The majority of the Court of Appeal (Moulton and Buckley, L.JJ.) affirmed the judgment of Deane, J., and Evans, P.P.D., to the effect that the tow in such a case is not identified with the tug so as to be liable for its negligence; but that both the tug and third vessel were each liable to the tow for the whole damages sustained by the tow, and that the owners thereof might sue either or both of them for the whole damages. Williams, L.J., dissented, thinking that the tug and the third vessel were respectively liable each for only one-half the damages.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Middleton, J.] GOODFRIEND *v.* GOODFRIEND. [March 1.

Husband and wife—Alimony—Desertion by husband—Amount—Husband's income.

Held, 1. The conduct of the husband in removing and taking up his residence with some of his own relatives, with whom his wife is not on good terms and cannot reasonably be expected to reside with, amounts to desertion on his part sufficient to found an independent action for alimony if he fails to provide for her maintenance.

2. The general rule in fixing permanent alimony in an alimony action is that the wife is entitled to one-third of the husband's income, subject to deduction in respect of any independent separate income the wife may have apart from her own earnings.

3. Where the husband is incapacitated by illness from earning anything, the wife's right of action for alimony is not to be based upon his former increased income which included earnings during health, but upon his present income from any source; nor can the corpus of his estate be charged with the deficiency required for the wife's maintenance.

Hutcheson, K.C., for plaintiff. *Whiting*, K.C., for defendant.

Falconbridge, C.J.K.B.,
Britton, J., Middleton, J.] [March 7.

WARD *v.* SANDERSON.

Encroachment—Wall of building—Mistake of title—Improvements—Statutory power to make vesting order and direct compensation—Payment to mortgagee.

Held, 1. In an action for encroachment in constructing the wall of a building partly over the boundary line upon adjoining lands, the court has a discretion, under Ontario Statute 1 Geo. V. c. 25, s. 33, to award a money compensation for the encroachment if made under the belief that the land encroached upon was

within his own boundaries, and in such case the judgment should decree that upon paying the compensation awarded the portion of the land which it represents should be vested in the encroaching party.

2. If the land upon which lasting improvements have been made under mistake of title, such as the wall of a building encroaching upon neighbouring land being subject to a mortgage, the compensation money awarded on vesting the land in the trespasser must be paid to the mortgagee and not to the owner of the equity of redemption, unless the consent of the mortgagee to the adoption of the latter course is filed.

Proudfoot, K.C., for the plaintiff. *N. F. Davidson*, K.C., for the defendant.

Province of Nova Scotia.

SUPREME COURT.

Russell and Drysdale, JJ.] THE KING *v.* SWEENY. [March 12.

Justice of the peace—Jurisdiction—Offence prior to appointment—Summary conviction—Procedure before summons or warrant—Constitutional law—Appointment of stipendiary magistrate.

Held, 1. A stipendiary magistrate has power to try and to convict for an offence committed before the date of his appointment. *Regina* v. *Bachelor*, 15 O.R. 641, distinguished.

2. The provisions of Criminal Code, s. 655, as to a preliminary hearing of the allegations of "the complainant and his witnesses," apply only to cases of indictable offences and not to cases punishable on summary conviction.

3. The power of a Provincial Legislature, under the B.N.A. Act, to legislate on the subject of the administration of justice, including the constitution, maintenance and organization of Courts, and with respect to the appointment of provincial officers, extends to the appointment of stipendiary magistrates, although the power to appoint judges of Superior District and County Courts is reserved to the Governor-General of Canada.

Power, K.C., and *E. N. Clements*, for the motion. *J. J. Ritchie*, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] HICKS *v.* LAIDLAW. [March 4.

Vendor and purchaser—Cancellation of agreement of sale for default by purchaser—Abandonment—Specific performance—Removal of caveat—Laches—Declaration of forfeiture—Costs—Purchaser's right to return of money paid—Time as the essence of a contract.

On appeal by plaintiff from the judgment of Robson, J., noted ante, p. 32, the court varied it by giving plaintiff a declaration that the defendant's right under the contract had been forfeited so far as the land was concerned.

Held, also, that, when an agreement contains a clause that time is to be of the essence of the contract, a court of equity will give effect to that stipulation unless the party in default can shew a sufficient excuse for non-compliance with it and that there was no unreasonable delay on his part, but will relieve against it if it can do justice between the parties and if there is nothing in their express stipulations, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. *Tilley* v. *Thomas*, L.R. 3 Ch. 67, followed.

Held, also, that under such an agreement a mere extension of the time given by the party entitled to performance is only a waiver to the extent of substituting the extended time for the original time, and not a total destruction of the essential character of time. *Parclay* v. *Messenger*, 43 L.J. Ch., per Jessel, M.R., at p. 456, followed.

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

Full Court.] LOVE *v.* MACHRAY. [March 4.

Landlord and tenant—Liability of landlord for dangerous condition of premises causing injury to third party—By-law of municipality requiring wells to be kept properly covered.

Held, 1. There is no common law liability on the part of an owner of land in the occupation of a tenant to keep a well on the premises covered for the protection of any person going, or pasturing animals, on the land with the permission of the tenant. *Lane*

v. *Cox*, [1897] 1 Q.B. 415, and *Cavelier* v. *Pope*, [1904] 2 K.B. 757, [1906] A.C. 428, followed.

2. A by-law of a municipality requiring that every well therein that is not fenced in shall at all times be kept properly covered, except when necessarily opened for the purpose of obtaining water or of cleaning or repairing it, casts no duty upon the owner of the land if it is in the possession of a tenant, and the owner has no right to go upon the land for the purpose of attending to the covering of the well or for any other purpose.

Quære, whether a person who has been injured by reason of a breach of a by-law imposing a duty upon a particular person, and a penalty for such breach, can maintain an action for damages against such person.

Cooper, K.C., for plaintiff. *C. H. Locke*, for defendant.

Full Court.] GREEN *v.* STANDARD TRUSTS CO. [March 4.

Life insurance—Policy made payable to wife of testator—Deduction by company of amounts of loans and promissory notes made by deceased—Life Insurance Act, R.S.M. 1902, c. 83, ss. 7 and 15—Appropriation in favour of wife of policy made payable to insured or his estate—Will.

1. If a policy of insurance on a man's life is made payable to his wife, any loans effected upon it for the benefit of the husband, though secured by assignments executed by both and by the covenant of both to repay them, are debts of the husband's estate; and, if the insurance company, after the death of the insured, upon paying the amount of the policy to the widow, deducts the amounts of the loans, she will be entitled to have the moneys made good to her out of the general estate of the deceased; and the same will be the case in respect to any unpaid premiums on the policy for which the deceased had given his promissory notes, but not to any other unpaid premiums deducted by the company in pursuance of the terms of the policy.

2. A declaration of the insured, in respect of a policy of insurance on his life in favour of his personal representatives, that, if the same be subsisting at his death and not sold, surrendered, assigned or otherwise disposed of, then upon his death it shall be for the benefit of his wife, if she survives him, is not, under sec. 7 of the Life Insurance Act, R.S.M. 1902, c. 83, an effectual appropriation of the benefit of the policy to the wife. To be effective such a declaration must create an immediate trust in favour of the wife. CAMERON, J.A., dissenting.

3. Such a declaration so worded as to take effect only on the death of the insured is a testamentary document, and therefore invalid unless executed and attested as a will. CAMERON, J.A., dissenting. *Habergham* v. *Vincent*, 2 Ves. 204, and *Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367, followed.

The deceased by his will gave all his property, real and personal, "including all my life insurance," to the defendants as trustees upon certain trusts, and also said: "Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property, and are not intended to be affected by the terms of this will." He had previously executed, in respect of two of his policies not made payable to his wife, declarations as outlined in paragraph 2 above.

Held, CAMERON, J.A., dissenting, that those two policies remained part of his general estate, and that the defendants, who had received and paid over the insurance moneys to the widow, were entitled to recover the moneys from her on their counterclaim.

Hull and *J. K. Sparling*, for plaintiff. *Mulock*, K.C., and *J. W. E. Armstrong*, for defendants.

Full Court.] MERRIAM *v.* PUBLIC PARKS BOARD. [March 18.

Building contract—Covenant for payment on completion to satisfaction of engineer—Final certificate of engineer—Work not completed.

The defendants covenanted with the plaintiffs that if the work the plaintiffs were to do should be duly and properly executed and completed to the satisfaction of the engineer, the defendants would pay the plaintiffs the amount provided for in the contract, which was for the construction of a dam across the Assiniboine River, "with sheet piling so as to constitute a water-tight plane." The contract further provided as follows: "So soon as the contractor shall have completely fulfilled the contract requirements, the engineer shall forthwith so certify in writing to the parties, and thereupon it shall be deemed that he (defendants) have taken over the work." According to the evidence the plaintiffs failed to construct the dam so as to make it water-tight. They relied however, upon a certificate given by the engineer setting forth the full amount of the contract price with debits and credits as if all the work had been performed, but concluding with the expression, "Retained pending repairs, $500," and concluding

as follows: "We hereby certify that the above statement, amounting to $6,607.66, is correct and has not been previously certified."

It was not stated in the certificate that the work had been duly performed, fully executed or completed; or that it had been done to the satisfaction of the engineer.

Held, 1. The engineer had no power to give such final certificate at the time he did, as the contractor had not completely fulfilled the contract requirements, as the certificate itself shewed. *Davidson* v. *Francis*, 14 M.R. 141, and *Canty* v. *Clark*, 44 U.C.R. 222, followed.

2. The plaintiffs, not having fully completed the work, could recover nothing in this action. *Brydon* v. *Lutes*, 9 M.R., at pp. 471-472, followed.

3. In this action, which was to recover the balance unpaid of the whole contract price, the plaintiffs could not recover in respect of the balance remaining unpaid of the progress estimates issued from time to time by the engineers. *Tharsis* v. *McElroy*, 3 A.C., per Lord Cairns, at 1045, followed.

Symington, for plaintiff. *L. B. Hudson* and *Garland*, for Parks Board. *Hoskin*, K.C., for third parties.

KING'S BENCH.

Robson, J.] COOPER *v.* ANDERSON ET AL. [Feb. 23.

Real Property Act, R.S.M. 1902, c. 148, ss. 71 and 91—Purchaser for value without notice—Trust—Caveat.

Under ss. 71 and 91 of the Real Property Act, R.S.M. 1902, c. 148, a person who purchases land under an agreement of sale from the holder of a certificate of title under the Act without any notice or knowledge of any trust to which the land was subject in the hands of such holder, or of any other defect in the title, takes the land free from any such trust or defect and from all liability to any action at the suit of any person claiming an interest in the land as against the vendor, and it makes no difference that he receives notice of the claim of such person before he has paid all his purchase money or received his transfer.

If, therefore, in an action against the vendor charging fraud in his dealings with the land and a secret trust in the plaintiff's favour, such purchaser is made a party defendant, in respect of his agreement registered by way of caveat against the lands, he will be entitled to an order dismissing the action as against him with costs.

Crighton and *Cohen*, for plaintiffs. *Dysart*, for defendant Anderson. *Galt*, K.C., *Levinson* and *Swift* for other defendants.

Robson, J.] SMITH *v.* ERNST. [Feb. 26.

Jurisdiction—Service of statement of claim out of the jurisdiction—King's Bench Act, Rule 201 (g)—Parties to action—Vendor and purchaser—Specific performance.

When a vendor of land under an agreement of sale has conveyed the land and assigned the money payable by the purchaser to a third party, the purchaser may maintain an action against such third party for specific performance of the agreement, and the vendor is a proper, if not a necessary, party to such action.

When, therefore, such third party is duly served with the statement of claim within the jurisdiction, and the agreement was made and was to be performed within the jurisdiction, the statement of claim may, under paragraph (g) of Rule 201 of the King's Bench Act, be served upon the vendor out of the jurisdiction although he has ceased to be a resident of the Province and the land in question is not in the Province.

Trueman, for plaintiff. *Sutton*, for defendant.

Prendergast, J.] [March 1.

HAM *v.* CANADIAN NORTHERN RAILWAY COMPANY.

Damages for injury caused by shock—Neurasthenia following physical and mental shock.

Plaintiff, while travelling on a street car with which one of the defendants' engines collided, was thrown with the car down an embankment. His physical injuries, so far as they could be seen, were slight, but the mental shock he received was very serious, and a condition of acute neurasthenia and insomnia followed, and continued up to the time of the trial, incapacitating him from doing any work, and causing great suffering. Negligence on the part of the defendants was admitted.

Held, that the plaintiff was entitled to recover substantial damages in respect of the disease from which he was suffering, as the shock which brought it on was both physical and mental.

Verdict for plaintiff for $2,000.

P. C. Locke and *C. H. Locke*, for plaintiff. *Clark*, K.C., for defendants.

Robson, J.] [March 5.

RE ST. VITAL MUNICIPAL ELECTION.

Quo warranto—Municipal election—Proceeding to unseat candidate declared elected—Municipal Act, R.S.M. 1902, c. 116, ss. 217, 218.

The applicant and the respondent were both duly nominated as candidates for election as reeve of the municipality, when an objection that the applicant was a paid officer of the municipality, and therefore disqualified, was, contrary to the law as laid down in *Pritchard* v. *Mayor of Bangor*, 13 A.C. 241, given effect to by the returning officer and the respondent declared duly elected without any poll being taken. Section 218 of the Municipal Act provides that a municipal election shall not be questioned on any of the grounds mentioned in s. 217, except by an election petition under the Act.

Held, that the applicant's complaint could not be said to be on the ground that the respondent "was not duly elected by a majority of lawful votes," and that, as none of the other grounds mentioned in s. 217 could be taken, the applicant could not proceed by an election petition, and should have leave to file an information in the nature of quo warranto. *The Queen* v. *Morton*, [1892] 1 Q.B. 39, distinguished.

Hannesson, for applicant. *Phillipps*, for respondents.

Robson, J.] RE PHILLIPPS AND WHITLA. [March 5.

Solicitor and client—Costs—Fee based on percentage of amount recovered by litigation—Allowance for proceedings out of court to save costs or compromise actions.

Unless there is a contract between a solicitor and his client for a percentage, or other mode of remuneration, under s. 65 of the Law Society Act, R.S.M. 1902, c. 95, the tariff of costs promulgated under Rule 990 of the King's Bench Act provides the only measure of a solicitor's remuneration for litigious business, and it is a wrong principle for the taxing officer to award the solicitor, in lieu of fees as provided for by the tariff, a single fee based on a percentage of the amount recovered or preserved for his client by means of an action in the court, although the solicitor, by his successful efforts to procure a settlement, has secured to his client a large sum of money.

A fee so based is not warranted under the provision in the tariff that an allowance may be made by the taxing officer in his

discretion when proceedings have been taken by the solicitor out of court "to expedite proceedings, save costs or compromise actions." Appeal from certificate of taxation allowed, and bill referred back, with liberty to the solicitors to deliver an amended bill with items according to the tariff, and a direction that the taxing officer allow a fee in respect of the settlement of the litigation under the clause in the tariff above quoted. *In re Richardson*, 3 Ch. Ch. 144; *In re Attorney*, 26 U.C.C.P. 495, and *Re Johnston*, 3 O.L.R. 1, distinguished.

A. B. Hudson, for solicitors. *Jameson*, for client.

Robson, J.] MESSERVEY *v.* SIMPSON. [March 5.

Joinder of parties—Slander—Joinder of causes of action—Striking out pleading as embarrassing—King's Bench Act, Rule 326.

A number of defendants cannot be sued together for slander without an allegation that they have conspired together to slander the plaintiff; and, where the statement of claim seeks damages against a number of persons for false imprisonment in one paragraph, and for slander in other paragraphs without any allegation of a conspiracy to defame, the latter paragraphs should be struck out as embarrassing under Rule 326 of the King's Bench Act. *Carrier* v. *Garrant et al.*, 23 U.C.C.P. 276, followed.

Phillipps, for defendants, the Thiel Detective Co. *Hagel*, K.C., for the plaintiff.

Robson, J.] ALEXANDER *v.* SIMPSON. [March 5.

Joinder of parties—Joinder of causes of action—Slander—Conspiracy to defame.

Where a number of parties are charged with having "in collusion" defamed the plaintiff, this does not sufficiently indicate to the defendants that they are being charged as members of a conspiracy to defame the plaintiff, and a paragraph containing such charge should be struck out as embarrassing with leave to amend.

Phillipps, for defendants the Thiel Detective Company. *Hagel*, K.C., for plaintiff.

Prendergast, J.] KING *v.* JOHNSON. [March 6.

Criminal law—Evidence by shorthand—Oath of stenographer.

Under s. 683 of the Criminal Code, when evidence on the trial of a charge before a police magistrate is taken in shorthand by a stenographer, it is essential that the stenographer before acting as such should make oath that he shall truly and faithfully report the evidence, and, if this has not been done, no valid depositions have been taken and the conviction upon such evidence should be quashed and the prisoner discharged upon habeas corpus. *The King* v. *L'Heureux*, 14 Can. Cr. Cas. 100, followed.

F. E. Hagel, for the prisoner. *Graham*, D.A.-G., for the Crown.

Flotsam and Jetsam.

The destruction of the Law Library of 35,000 volumes was one of the unfortunate features of the recent burning down of the Equitable Building in New York, which deprived a thousand lawyers and law clerks of their offices. When the building was first completed the renting agent reported to Henry B. Hyde that it was impossible to find good tenants for the upper stories, which were too dark. For a moment Mr. Hyde bent his head in thought, then said: "We will organize a lawyers' club on one floor, an insurance men's club on another floor. We will provide a free law library and a free insurance library for both, and provide dining rooms in which the members can meet and take their meals in the daytime. That will give us an income for those floors, and make the rest of the building more desirable for lawyers and insurance men." That was the origin of the famous Lawyers' Club. The Insurance Club was not a success and was soon merged with the other. It resulted in one of the most unique organizations in the world. The Lawyers' Club at one time had 1,820 members, 1,200 resident and 520 non-resident. Their annual dues aggregated $156,000, all of which went into the Equitable treasury in place of rent. The club was organized in 1887.—*Green Bag.*