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THE LAW OF BILLS AND NOTES.

FICTITIOUS OR NON-EXISTING PAYEE.

The two recent English cases of *Vinden* v. *Hughes* (1905) 1 K.B. 795, and *Macbeth* v. *North & South Wales Bank* (1906) 2 K.B. 718, raise the interesting question whether the named payee of a bill of exchange or promissory note or cheque, although he is a real person and intended by the drawer to be the payee, may nevertheless be "a fictitious or non-existing person" within the Bills of Exchange Act, if there is no real transaction with the payee upon which the bill might be based and which would justify the payee in endorsing the bill. The cases referred to answer the question in the negative, and invite a comparison with the case of *London Life Ins. Co.* v. *Molsons Bank* (1904) 8 O.L.R. 238, in which the contrary conclusion appears to have been reached.

The Bills of Exchange Act provides that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." This provision is also applicable to notes and cheques and is contained in sub-s. 5 of s. 21 of the Act as revised in 1906 (R.S.C., c. 119), and in s. 7 both of the English Bills of Exchange Act, 1882, and of the Canadian Bills of Exchange Act, 1890.

PREVIOUS LAW:—

Before referring to the cases in which the statutory provision has been considered, it is desirable to state with precision what was the law upon the subject before the statute, and for this purpose one cannot do better than quote the words of Lord Justice Bowen in *Vagliano* v. *Bank of England* (1889) 23 Q.B.D. 243, beginning at page 257:—

"The law merchant seems to have been clear, and to have

been based throughout on the principle of the law of estoppel, which in its turn is conformable with reason and business principles. An acceptance after sight of a bill is an admission by the acceptor of the genuineness of the signature of the drawer, an admission, that is to say, that the signature is either in his handwriting or placed to the draft by somebody who has authority to sign for him, and the acceptance is also a representation by the acceptor in favour of all bona fide holders that, so far as he knows, the payee exists and is a person of a capacity to indorse: *Drayton* v. *Dale* (1823) 2 B. & C. 293, and *Mead* v. *Young* (1790) 4 T.R. 28.

"The genuineness of the indorsement of the payee was, however, a matter as to which, except in one special instance, no estoppel prevailed. The one exception to the rule was the case described as follows in Story on Bills of Exchange, ss. 56, 200. Sec. 56: "A bill made payable to a fictitious person or his order and indorsed in the name of such fictitious payee in favour of a bona fide holder without notice of the fiction, will be deemed payable to the bearer and may be declared on as such against all the parties who knew the fictitious character of the transaction." Sec. 200. "If the bill is payable to a fictitious person or order (as has been sometimes, although rarely, done), then, as against all the persons who are parties thereto and aware of the fiction (as, for example, against the drawer, indorser or acceptor), it will be deemed a bill payable to the bearer in favour of a bona fide holder without notice of the fiction." This exceptional rule in the case of fictitious bills is based as has been stated, on a special application to a particular case of the principle of estoppel, which plays so important a part in the law merchant. Its history, so far as English law books are concerned, dates back to a century ago, and is set out in a note to *Bennett* v. *Farnell* (1807) 1 Camp. 130, at p. 180. In the first case which bears on the subject—*Tatlock* v. *Harris* (1789) 3 T.R. 174—at the time the bill was drawn there was no such person in existence as the payee, a fact which was notorious to all the parties in the transaction and particularly to the acceptor. It was

suggested by the Court in argument that if a bill were made payable to the Pump at Aldgate or order it might be recovered on as in effect a bill to bearer. And in *Vere* v. *Lewis* (1789) 3 T.R. 182 a case decided upon the same day, the Court intimated an opinion that a similar bill, drawn and accepted under similar circumstances to those in *Tatlock* v. *Harris*, might be so treated. In *Gibson* v. *Minet* (1791) 1 H.Bl. 569 the same point was distinctly raised, subject to this qualification that the indorsement by the fictitious payee was there made before acceptance and was itself known not to be genuine by the acceptor at the time of such acceptance. The Queen's Bench held that the bill was in effect payable to bearer, and the decision was confirmed by the House of Lords. A perusal of the opinions of the judges in that case shews that they considered the exception in the case of such fictitious bills to be in reality nothing but a further application of the doctrine of estoppel in a case in which knowledge of the fiction by the acceptor gave rise to an estoppel of the kind.

In *Gibson* v. *Hunter* (1794) 2 H.Bl. 187, 288 the House of Lords appears to have expressly decided that it was only where the fictitious character of the bill was known to the acceptor at the time of acceptance that the bill could be treated against the acceptor as a bill payable to bearer. The question arose on a demurrer to evidence, and it is to be observed that the fourth count alleged merely that the supposed payee was fictitious without alleging that the acceptor knew of this. It was proved in evidence that no such person as the payee existed, and that the name of the payee indorsed on the instrument was not in the handwriting of any person of that name, but on the evidence it was still left in doubt whether the acceptor was privy to the fact of the payee being fictitious. The judges advised the House, and the House of Lords decided in conformity with their advice, that upon this record no judgment could be given, and a venire de novo was awarded. If the knowledge of the acceptor had been immaterial, judgment ought to have been given on the record on the fourth count. The case, how-

ever, went down again to be tried and again came before the House of Lords on a demurrer to evidence, and it was finally held that in an action on a bill of this sort against the acceptor to shew that he was aware that the payee was fictitious, evidence was admissible of the circumstances under which he had paid other bills to fictitious persons. Not only, therefore, is the first case of *Gibson* v. *Hunter*, an authority to the effect that the exceptional doctrine under discussion only applies where the acceptor knows that the payee of the bill which he is accepting is fictitious, but the whole of the subsequent litigation becomes unintelligible upon any other hypothesis.

In *Bennett* v. *Farnell* (1807) 1 Camp. 130, 180c. a bill of exchange made payable to a fictitious person was sued upon as a bill to bearer, but there was no evidence that the acceptor knew of the fiction. Lord Ellenborough nonsuited the plaintiff. In Lord Campbell's head-note to the case the effect of the decision is thus stated: 'A bill of exchange made payable to a fictitious person or his order is neither in effect payable to the order of the drawer nor to bearer.' But at page 180c of the addenda, there is this further note by Lord Campbell: 'In *Bennett* v. *Farnell*, the doctrine supposed to have been held that "a bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer nor to bearer" must be taken with this qualification—unless it can be shewn that the circumstance of the payee being a fictitious person was known to the acceptor. A new trial was refused in this case, because no such evidence had been offered at nisi prius. Lord Ellenborough said he conceived himself bound by *Gibson* v. *Minet* (1791) 1 H.Bl. 569 and the other cases on this subject which had been carried to the House of Lords (though by no means disposed to give them any extension), and that if it had appeared that the defendant knew George Abney, the payee, to be a fictitious person he should have directed the jury to find for the plaintiff.'

The above authorities relate to the case of fictitious persons. In *Asphitel* v. *Bryan* (1863) 5 B. & S. 723 a similar question

occurred where a bill by arrangement between the acceptor and the drawer was drawn and indorsed in the name of a dead man. A similar application was there made of the same principle of estoppel. Probably it was with reference to this case that the term 'non-existing' is introduced into the sub-section which we have to interpret. Down, therefore, to the date of the passing of the recent statute the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or of the non-existence of the supposed payee.

The principle that lies at the root of the exception is that a reasonable effect must be given in favour of bona fide holders to the act of acceptance, and that, where it appears that although there was a named payee he was so completely fictitious or non-existing that the acceptor could not have intended to restrict payment to such payee or to his order, the acceptor, who must be taken to have intended that his acceptance should have some commercial validity, was estopped from saying that the bill was not a bill payable to bearer.

CONSTRUCTION OF THE STATUTE:—

Such was the law upon the subject prior to the statute. The statute provides that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." In the case from which Lord Justice Bowen's judgment has been quoted above, *Vagliano* v. *Bank of England* (1889) 23 Q.B.D. 243 the Court of Appeal read the statute as not extending the previous law, and held therefore that a bill might be treated as payable to bearer only as against a person who knew, when he took it, that the payee was a fictitious or non-existing person.

It was held, however, by the House of Lords in *Bank of England* v. *Vagliano* (1891) A.C. 107, that such a qualification of the express words of the statute could not be properly implied

from the earlier cases. If the payee is fictitious or non-existing, the bill may, as regards all persons, be treated as payable to bearer. It was held further that the word "fictitious" is applicable not only to a creature of the imagination having no real existence, but also to a real person named as payee who has not, and never was intended by the drawer to have, any right upon or arising out of the bill. The section applies, although the bill (so called) is not in reality a bill, but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the documents for payment, both the named drawer and the named payee being entirely ignorant of the circumstances: ib.

SUMMARY OF LEADING CASES:—

At this point it may be convenient to give a summary of the facts of the *Vagliano Case* and of the other leading cases decided under the Act:

1. A bill purporting to be drawn by A. to the order of C. & Co., and to be endorsed by them, is accepted by the drawee payable at his bankers'. The bankers pay it at maturity. A. is a correspondent of the acceptor's, who often draws bills in favour of C. & Co. It turns out afterwards that the names and signatures of the drawer and payees were forged by the acceptor's clerk, who obtained the money. Under these circumstances C. & Co., are fictitious payees and the bankers can debit the acceptor's account with the sum so paid: *Bank of England* v. *Vagliano* (1891) A.C. 107; discussed in 7 L.Q.R. 216, 10 L.Q.R. 40.

2. A clerk, by false pretences, induces the plaintiff, his employer, to draw cheques in favour of B., a non-existing person. He then forges an endorsement in B.'s name, and negotiates the cheques to the defendant for value. The bankers pay the defendant. The plaintiff cannot recover from the defendant the money so paid: *Clutton* v. *Attenborough* (1897) A.C. 90; cf. *Vinden* v. *Hughes* (1905) 1 K.B. at p. 800.

3. N. was the assistant superintendent of the plaintiff, a life insurance company, and the local agent at one of its branches. N. sent in a number of fictitious applications for insurance in the names of existing persons. Subsequently he represented to the company that the insured persons were dead and that the claims were payable, and sent in to the head office claim papers with forged signatures. Thereupon the company sent to N. cheques made by the company in favour of the alleged claimants and payable at a branch of the defendant bank. N. forged the payees' names, and the cheques were presented to and paid by the bank in good faith (to whom or how did not appear) and the amounts charged to the company's account. Held, that under the circumstances the cheques must be regarded as payable to fictitious or non-existent persons, and therefore payable to bearer, and the bank was justified in paying and charging the company with the amounts: *London Life Ins. Co.* v. *Molsons Bank*, 1904, 8 O.L.R. 238.

4. The plaintiffs' confidential clerk made out a number of cheques to the order of various customers of the plaintiffs for sums not actually owing to the respective customers at the time the cheques were signed, obtained the plaintiffs' signature thereto, misappropriated the cheques, forged the payees' endorsements and negotiated the cheques with the defendant, who gave full value for them in good faith and obtained payment of them from the plaintiffs' bankers. Held, that the payees were not "fictitious" persons, and the plaintiffs were entitled to judgment for the amounts of the cheques: *Vinden* v. *Hughes* (1905) 1 K.B. 795.

5. W. by falsely representing to the plaintiff that he had agreed to purchase from K. certain shares then held by K. in a company, and that he had arranged to resell the shares at a profit, induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a cheque on the C. Bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged

K.'s endorsement to the cheque and paid it into his own account with the defendant bank, who credited him with the amount, and collected the money from the C. Bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company. Held, that the payee was not a "fictitious person" and that the defendant bank was liable to pay to the plaintiff the amount of the cheque as damages for conversion of the cheque: *Macbeth* v. *North and South Wales Bank* (1906) 2 K.B. 718.

6. A bill purporting to be drawn by A. and endorsed in blank by C., the payee, is accepted supra protest for the honour of the drawer. It turns out that A.'s signature was forged, and that C. was a fictitious person. The acceptor for honour is estopped from setting up these facts if the bill is in the hands of a holder in due course: *Phillips* v. *In Thurn* (1856) 18 C.B.N.S. 694, L.R. 1 C.P. 463.

7. By arrangement between the endorsee and acceptor a bill is drawn and endorsed in the name of a deceased person. The endorsee can recover from the acceptor: *Ashpitel* v. *Bryan* (1863) 33 L.J. Q.B. 328; cf. *Vagliano* v. *Bank of England* (1889) 23 Q.B.D. at p. 260.

THE CASES COMPARED:—

The *Vagliano Case* was applied by the Court of Appeal for Ontario in *London Life* v. *Molsons Bank* (1904) 8 O.L.R. 238, In the *London Life Case* there was a real drawer. In the *Vagliano Case* the name of the pretended drawee was forged, but the acceptor was estopped from denying the genuineness of the drawer's signature. In neither case was there any genuine transaction on which the bills could be based. A real difference between the two cases is that in the *London Life Case* the drawer really intended its cheques to be paid to the named payees while in the *Vagliano Case* the drawer had no intention to pay any one, his name having been forged.

In *Clutton* v. *Attenborough* (1897) A.C. 90 the drawers believed and intended the cheque to be payable to the order of

a real person, but in fact there was no such person as the named payee, and it was held that the case came within the section, and the cheque might be treated as payable to bearer.

Both the *Vagliano Case* and *Clutton* v. *Attenborough* were distinguished in *Vinden* v. *Hughes* (1905) 1 K.B. 795. In that case the drawers signed cheques at the instance of their clerk and cashier in favour of various customers to whom the drawers did not owe anything or did not owe an amount equal to that mentioned in the cheques payable to them respectively. The clerk forged the payees' endorsements, and negotiated the cheques to a holder for value in good faith who in turn obtained payment from the drawers' bankers. Warrington, J., who tried the case distinguished *Clutton* v. *Attenborough* because there the payee was a non-existing rather than a fictitious person. He also distinguished the *Vagliano Case* because in that case there was no drawer in fact and the use of a name as payee was a mere fiction, whereas in the case before him the drawer intended to issue the document and intended to issue it with the name of the particular payee upon it, that payee being a real person. Warrington, J., refers especially to the judgment of Lord Herschell (1891) A.C. at p. 152, as summing up the meaning of "fictitious" as applied to a real person, namely that the payee is named "by way of pretence only, without the intention that he shall be the person to receive payment."

Vinden v. *Hughes* was approved and followed in the case of *Macbeth* v. *North and South Wales Bank* (1906) 2 K.B. 718, decided by Bray, J. Bray, J., at p. 725, says:—"The plaintiff was told that Kerr was an engineer formerly living at Bootle, but then near Manchester. That was true. He was told that Kerr had agreed to sell the 5,000 shares to White. That was untrue, and he in fact held no shares. There had been no such transaction, but the plaintiff believed the statements made to him, and made the cheque payable to Kerr in order that he and no one else should get the money. Can Kerr, under such circumstances, be said to be a fictitious payee? I will first examine the authorities. In *Vinden* v. *Hughes* (1905)

1 K.B. 795 the facts were in my opinion, indistinguishable from the present case. Vinden had a real person in his mind when he drew the cheque, although in fact the payee was not his creditor as he supposed, and had had no transaction with him giving rise to such a debt. He had been deceived by his clerk, but he intended the payee and no one else to receive the money. Warrington, J., held that the payee was not fictitious. He says (at p. 802): "It was not a mere pretence at the time he drew it. He had every reason to believe, and he did believe, that the cheques were being drawn in the ordinary course of business for the pu pose of the money being paid to the persons whose names appeared on the face of those cheques." That seems to me to fit exactly the present case. . . . . Kerr was a real person intended by the plaintiff, the drawer, as I have found, to be the person who should receive payment. It is a fallacy to say that Kerr was fictitious because he had no shares and had never agreed to sell any to White. The plaintiff believed he had, and intended him, and no one else, to receive the money. It seems to me that when there is a real drawer who has designated an existing person as the payee and intended that that person should be the payee, it is impossible that that payee can be fictitious. I think that the word "fictitious" implies that the name has been inserted by the person who has put it in for some dishonest purpose, without any intention that the cheque should be paid to that person only, and therefore it is that such a drawer is not permitted to say what he did not intend, viz., that the cheque shall be paid to that person only, and the only way of effecting this is to say that it shall be payable to bearer. It matters not in my opinion how much the drawer of the cheque may have been deceived, if he honestly intends that the cheque shall be paid to the person designated by him. I think Warrington, J., has not in any way misread the judgments in *Bank of England* v. *Vagliano*. I think his decision and mine are really founded on the principles laid down in that case."

It is difficult to reconcile *Vinden* v. *Hughes* and *Macbeth* v. *North & South Wales Bank* with *London Life* v. *Molsons Bank*.

If Warrington and Bray, JJ., have not "misread the judgments in *Bank of England* v. *Vagliano*," the last mentioned case decides that a named payee, being a real person intended by the drawer to be the payee, is not "fictitious or non-existing" within the meaning of the section, notwithstanding that there is no real transaction between the drawer and the payee upon which the bill might be based and which would justify the payee in endorsing the bill. If, however, this proposition is applied to the facts in the *London Life Case*, one seems to be driven to a conclusion contrary to that at which the Court of Appeal for Ontario arrived. If the local insurance agent in that case had invented names instead of using the names of actual persons who lived in his district, cheques made out in favour of such invented names would have been payable to "non-existing" persons within the principle of *Clutton* v. *Attenborough*. The agent, for his own purposes and doubtless in order to lessen the risk of the company's discovering that the insurances had no real existence, used the names of real persons. Such persons were intended by the drawer, to receive payment. "It matters not in my opinion," says Bray, J., supra, "how much the drawer of the cheque may have been deceived if he honestly intends that the cheque shall be paid to the person designated by him." According to Bray, J., the principle of the statutory provision is that the drawer, who for some dishonest purpose has inserted the name of a fictitious or non-existing person, necessarily could not have intended that the cheque should be payable to such person only, and therefore he must be deemed to have made it payable to bearer.

In the Australian case of *City Bank* v. *Rowan* (1893) 14 N. S.W.R. (Law) 127, the facts were very similar to those in *Vinden* v. *Hughes*. It was falsely represented to the defendants that certain goods had been sold to them by James Shackell & Co. and were ready to be delivered, and the defendants were induced to become makers of a note in favour of the alleged vendors for the purchase price of the goods. In face the firm of James Shackell & Co., had ceased to exist, although James Shackell a

former member of the firm resided in Melbourne, where the firm formerly carried on business. The payees' name was forged and the note negotiated to the plaintiff who took in good faith. It would seem that the case might have been disposed of in the plaintiff's favour on the ground that the note was payable to a non-existing person. The Court reached the same conclusion, but based its decision upon the ground that the case fell "precisely within the law laid down in *Bank of England* v. *Vagliano*, which is to the effect that wherever the name inserted as that of payee in a bill or note is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act and that such bill or note may be treated by a legal holder as payable to bearer." It is not easy to see the application of this doctrine to the facts before the Court as the makers of the note did in fact intend that the named payees should receive payment in conformity with the terms of the note. The judgment then proceeds, as follows, laying down a similar doctrine to that upon which the Court of Appeal relied in the *London Life Case*: "Here James Shackell & Co. the supposed payee, even if an existing firm, had no interest in the note, no right to endorse it or be paid upon it, and as they had not, then no person as payee had any such right. The payees were accordingly fictitious persons, and the plaintiffs are therefore holders of this note as if it were payable to bearer, and may as such holders sue the defendants as makers."

When a bill is payable to the order of a fictitious person, it is obvious that a genuine endorsement can never be obtained. The Act makes such a bill payable to bearer. But inasmuch as a bill payable to one person, in the hands of another, is patently irregular, it is clear that the bill should be endorsed, and perhaps a bonâ fide holder would be just in endorsing it in the payee's name. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person shall not

affect the rights of a person who has received or paid it in good faith: Chalmers, p. 23.

The signature of a fictitious person must be distinguished from (a) the forged signature of a real person, and (b) the signature of a real person using a fictitious name—for instance, John Smith may trade as "The Birmingham Hardware Company," and sign accordingly: Chalmers, p. 24; see also *Schultz* v. *Astley* (1836), 2 Bing. N.C. 544, where Thomas Wilson Richardson drew a bill as Thomas Wilson.

JOHN D. FALCONBRIDGE.

TORONTO, March, 1907.

THE STATUTE OF FRAUDS AS A DEFENCE.

Cases sometimes come before the Courts which raise very nice questions as to the Statute of Frauds, and particularly how far it can be relied on as a defence. Such a case may be shortly stated thus: A., the owner of a parcel of land, makes a verbal bargain with B. to the effect that A. will convey the land to B. and that on his so doing B. will pay $100 to C. A. conveys the land to B. and dies; and B. refuses to pay C. $100 and repudiates all liability therefor. C. thereupon sues B. to enforce the alleged contract, or in the event of his not being entitled to enforce the contract; then on the equitable ground that B. is trustee for him for $100. At the trial B. denies on oath the existence of the alleged bargain, but on the evidence it is found that it was in fact made: but the Statute of Frauds being set up, the problem the Court would have to solve would be what relief, if any, could be given to the plaintiff. The conclusion reached recently in such a case seems to have been this,—that the defendant was guilty of fraud in denying the existence of the contract, and that the Statute of Frauds was therefore no defence, and that the bargain amounted to an equitable assignment to C. of the $100, and that B. was liable to account to C. as trustee for the $100 equitably assigned.

It has been remarked that the effect of the decisions of Courts of Equity is often virtually to effect a repeal of statutes under the pretext of construing them, and it appears to us that the class of cases of which the foregoing is a specimen is justly open to that observation.

The supreme desire of British Courts of justice ought to be, and undoubtedly is, to effect substantial justice between litigants; and in cases of the kind we have mentioned the Court perceives or, thinks it perceives, that to give literal effect to the Statute of Frauds would be virtually to enable a defendant to perpetrate and profit by a fraud, whereas the statute, as its title shews, was intended to prevent frauds and perjuries. In the case we have put it may justly be said that the defendant has not only committed a fraud in denying and refusing to carry out the bargain, but he has, moreover, in order to carry out his fraud, committed wilful and corrupt perjury. Now it is certain that where that is the moral position of a defendant, he has no claim to anything but the strictest justice: but bad as his conduct from a moral standpoint may be, he is nevertheless entitled to have that measure of justice meted out to him; and, except in cases where courts of justice have a lawful discretion, no suitor is entitled to any more or any less.

The words of the 6th section of the Statute of Frauds (R.S.O. c. 338), are plain and explicit; why is not a defendant, no matter how bad he may be, entitled to rely on them? "All declarations or creations of trust or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

In the case we have put A. is the person by whom the alleged trust was created, and unfortunately A. has signed no paper or writing manifesting such trust. If C. were to sue A. or his representatives, to enforce the alleged trust, could he succeed? Manifestly not, assuming that the payment of the $100 was a mere matter of bounty. Is C. in any better position against

B? It is true that B. has received a conveyance of land upon the faith and assurance that he would pay C. $100, and it is a fraud on his part to refuse to carry out his part of the bargain; but upon whom is the fraud perpetrated? It is true C. suffers from the effect of the fraud, but the fraud appears to be one committed against A. and not against C. because as to C. B. owes no duty. If a trust was legally created, then C. would, of course, be cestui que trust and might properly claim an enforcement of the trust, but in the face of the explicit words of the statute, so far as A. purported to create a trust, what he did was "utterly void and of none effect" because not manifested by writing as required by the statute. There being therefore no valid trust created, the claim of C. against B. does not seem supportable on the ground that B. is in any sense a trustee for C. for the simple reason that there is no valid trust. C. is not injured in point of law because C. never had any legal or equitable position as a cestui que trust. At the same time it is manifest, and is found as a transparent fact, that B is a rogue and has got possession of A.'s land on the fraudulent representation that he would do something which he has not done, and refuses to do. What then should be the course of justice, should the Statute of Frauds for the purposes of this case be repealed by the Court, as Courts have sometimes made bold to do? or should the Court rather adopt this position, viz., admit that the statute forms a valid and conclusive bar to the plaintiff asserting the existence of any trust in respect of the $100, but hold that it proves no bar to declaring that the deed was obtained by fraud and that the fraudulent grantee is a trustee for his grantor and his estate? Such a conclusion could not be reached however, at the suit of C. that would be the right of A.'s real representative. But it might be answered that C. might not get any benefit by the estate being revested in the grantor or his real representative. Probably not, at most he would have a moral claim only on that estate to carry out the intention of the original grantor, and ought he to have anything else? At the very best, is it not the case of an imperfect gift, which the intended

donee has no legal or equitable right to enforce? Such, seems to us, a preferable conclusion, to one which virtually overrides the plain and explicit words of a statute. To hold that there is judicial power to suspend or repeal statue law, is as dangerous a constitutional doctrine as to hold that the sovereign has any such power.

The conclusion which the Courts seem to be reaching is, that the 6th section of the Statute of Frauds (R.S.O. c. 338), can never be a defence to any person except the creator of the alleged trust, and that as to third persons, a parol trust is valid and binding notwithstanding the statute. Such a construction, however, of the statute practically amounts to a repeal of its express words as far as concerns a large class of cases and persons—and might lead to serious results. For instance in the case we have put, obvious complications might arise. Let us assume that there was a direct conflict of testimony between the plaintiff and defendant, and at the trial of the civil action the defendant is thought to have been guilty of perjury, but on criminal proceedings being instituted the defendant is acquitted, and the plaintiff is found to have been the perjurer; and in the meantime judgment is awarded and possibly executed in the civil action in favour of the real perjurer, and against the defendant on the supposition that he was guilty of an offence of which he has been found to be innocent. How could such a tangle be unravelled? Possibly by another action to set aside the judgment as obtained by fraud.

From what we have said it would appear that to hold that the statute cannot be a defence to a defendant who is thought to be guilty of fraud and perjury may in some cases prove a dangerous doctrine. The statute, it is true, is styled "for the prevention of frauds and perjuries," and, it is an ingenious, but we doubt whether it is a sound doctrine to say, that wherever the Court finds the defendant guilty of fraud and perjury the statute affords him no defence,—because, the statute being "for the prevention of frauds and perjuries," it has no application to such a case. But let us suppose that a defendant admits that

there was a parol trust attempted to be created, but relies on the statute and says it was null and void. He commits no perjury, does he commit a fraud because he relies on a statutory defence? It may not be a very reputable or morally honest defence, any more than is the defence of the Statute of Limitations pleaded as a bar to a debt honestly due, but still what right has any Court of justice to say that to set up a statutory defence is a fraud? We do not think any Court has said so directly, and therefore, we may conclude that to admit the parol trust, but to plead the statutory bar is not a fraud from a legal standpoint whatever it may be in foro conscientiæ. Then how does it become any less a defence because the defendant commits perjury in saying there was no parol trust? It may not unreasonably be said that the real object of the statute was to prevent the temptation to commit perjury by both plaintiffs and defendants, by laying down the hard and fast rule that in no case can an alleged trust be legally and validly proved unless it be in writing.

Where there is a direct conflict of testimony between two litigants it is generally manifest that one of them must be speaking falsely, but to say that wherever the Court finds the defendant is the perjurer he ipso facto loses the protection of the statute, may after all be holding out the strongest inducements to plaintiffs to suborn witnesses and commit perjury, an offence which was the very evil the statute was intended to prevent. If the Court were infallible in its detection of perjury there might be a little excuse for such a doctrine, but we all know Courts are liable to err and the apparently guileless, innocent witnesses do sometimes turn out to be the most specious and accomplished perjurers.

A case that promises to be of very considerable importance from a constitutional point of view has been directed to be re-argued during the present session of the Supreme Court after notification given to the Minister of Justice and the Attorneys-General of the provinces. The Canadian Pacific Railway, desir-

ing to insure itself against any loss which it might sustain by reason of fires caused by its engines upon its line in the State of Maine, applied to the Ottawa Fire Insurance Company and obtained its policy in terms which seemed to be broad enough to cover all kinds of property. Some time afterwards one of the Railway Company's engines set fire to some standing timber and caused a considerable devastation. When the Railway Company sent in its claim to the Insurance Company, it was met with a refusal to pay upon the ground that the Insurance Company had no authority to insure standing timber. It had power, it was said, to insure houses and chattels, but not to insure standing timber. The company's charter had been issued under the general Insurance Act of the Province of Ontario, and a close inspection of its charter and the general Act bore out the company's contention. The Railway Company then claimed that the Insurance Company had no power to do business in the State of Maine at all and asked a return of the premium upon the ground that no consideration had been given by the Insurance Company for it. The Insurance Company replied that although its charter was granted under Ontario legislation, yet that under a Dominion statute it had obtained a license to do business throughout the Dominion, and that the company thereupon became in effect a Dominion company. And it was argued that a Dominion company, at all events, could do business anywhere. The Court has now formulated four subjects for debate, which are as follows:—

1st. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

2nd. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act carry on extra provincial or universal insurance business, i.e., make contracts and insure property outside of the province or make contracts within to insure property situate beyond?

3rd. Has a province power to prohibit or impose conditions

and restrictions upon extra provincial insurance companies which transact business within its limits?

4th. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

Sir Richard Henn Collins, the Master of the Rolls, has been appointed to the vacancy created in the House of Lords by the death of Lord Davey, Lord Justice Cozens-Hardy becoming Master of the Rolls, and Mr. Justice Kennedy, Lord Justice in his place. Mr. Pickford, K.C., takes the vacant place in the King's Bench Division. Lord Loreburn, the Lord Chancellor, is congratulated upon these appointments, which are the reward of merit, rather than remuneration of political service, which, unfortunately, has for some time been the practice in this Dominion.

The much discussed change in the Long Vacation in England has at length been decided upon, so that it will, in 1907, commence on the 1st day of August and terminate on the 11th day of October. This change will, it is said, be hailed with much satisfaction by the profession and the litigating public in England.

We are told that the female juror has appeared in Denver, Colorado, and appropriately in a divorce case. The principal difficulty seems to have arisen when the judge commenced his charge:—"Gentlemen of the jury"—and then, seeing a reproachful smile upon a young lady with golden hair and blue eyes in the box, added—"and lady of the jury." The world moves on.

REVIEW OF CURRENT ENGLISH CASES.

COMPANY—DEBENTURE HOLDER—FLOATING SECURITY—RECEIVER —ATTACHING CREDITOR—ORDER TO PAY OVER—PRIORITY— "CLERK OR SERVANT."

Cairney v. *Back* (1906) 2 K.B. 746 was an interpleader issue between the debenture holder of a limited company whose debenture was a floating security on all the assets of the company and an attaching creditor of the company who had obtained an order on a debtor of the company to pay over the debt due. On the 15th June, 1906, the creditor had obtained judgment against the company and on the same day he obtained a garnishee order attaching a debt due by the Bank of Scotland to the company. On the 18th June the debenture holder was notified of this order and on the 25th June an order was made for the bank to pay to the attaching creditor the debt attached. Before the money was paid the debenture holder on the 29th June obtained the appointment of a receiver of all the assets of the company, and the bank, being notified thereof, paid the money into Court and an interpleader issue was ordered. Walton, J., in these circumstances held that the debenture holder was entitled to priority over the attaching order and the order to pay over, on the ground that they do not transfer to the garnishor the property in the garnished debt. The attaching order created a charge, but subject to the prior existing charge in favour of the debenture holder, whose prior rights were preserved by the appointment of the receiver at any time before actual payment of the money. A further question in the case was whether the attaching creditor was entitled to preferential payment as being "a clerk or servant of" the company. According to the evidence he was secretary of the company, but did not give his whole time to the work, but attended about 2 hours a day, and provided a clerk who was in constant attendance during business hours. Walton, J., was of the opinion that a secretary who gave his whole time to the office might be deemed a "clerk or servant," but one who gave only partial service and discharged the general duties of the office by a clerk appointed and paid by himself, is not a "clerk or servant" within the statute entitling persons of that class to preferential payments.

LANDLORD AND TENANT—GOODS OF LODGER—ILLEGAL DISTRESS—LIABILITY OF BAILIFF TO AN ACTION—LODGERS' GOODS PROTECTION ACT 1871 (34 & 35 VICT. C. 79), S. 2—(R.S.O. C. 170, SS. 39, 40).

In *Lowe* v. *Dorling* (1906) 2 K.B. 772 the Court of Appeal (Collins, M.R. and Moulton, and Farwell, L.JJ.), have affirmed the judgment of the Divisional Court (1905) 2 K.B. 501 (noted ante, vol. 41, p. 787). The facts were simple, a landlord distrained for rent, and under the distress the bailiff seized the plaintiff's piano. The plaintiff made and served a declaration of ownership under the Lodgers' Protection Act, 1871 (see R. S.O. c. 170, ss. 39, 40), notwithstanding this the bailiff sold the piano. The plaintiff sued the bailiff for illegal distress. The only point in the case was whether the plaintiff had any right of action against the bailiff, and whether his only remedy was against the landlord. The Divisional Court held that the bailiff was liable and that conclusion is now affirmed.

SHIP—CHARTERER—BILL OF LADING INCREASING LIABILITY OF SHIPOWNER—INDEMNITY BY CHARTERER.

In *Moel Tryvan Ship Co.* v. *Kruger* (1906) 2 K.B. 792 the defendants chartered a ship from the plaintiffs; the charter-party contained a clause exempting the plaintiff from liability for losses caused by the negligence of the master or crew. The master was thereby bound to sign bills of lading is required, but without prejudice to the charter-party. The defendants presented to the master for his signature, and he signed, bills of lading which did not in fact, (though the master thought that they did) contain any clause exempting the owners from losses occasioned by the negligence of the master or crew. The ship was wrecked through the negligence of the master, and in consequence of the omission of the negligence clause in the bill of lading, the owners were made liable for the loss to third parties who were holders of the bill of lading; and they now claimed that the loss having been caused by the defendants having got the master to sign the bills of lading without the negligence clause, they were bound to indemnify the plaintiffs against the loss; and Phillimore, J., held that, in the circumstances, there was an implied agreement on the party of the defendants to indemnify the plaintiffs, and judgment was accordingly given in their favour.

SHIP—CONTRACT OF CARRIAGE—CONSTRUCTION—DAMAGE CAPABLE OF BEING INSURED.

Nelson v. *Nelson* (1906) 2 K.B. 804 was an action to recover damages for breach of a contract for the carriage of goods by sea. The agreement inter alia exempted the defendants from liability for damages caused by unseaworthiness or unfitness of the ship in which the goods were to be carried "provided all reasonable means have been taken to provide against unseaworthiness"; and the defendants were not to be liable for any damage to the goods which should be capable of being covered by insurance, or which should be wholly or in part paid for by insurance. The goods were damaged by reason of the unseaworthiness of the ship and the defendants had not taken reasonable means to provide against such unseaworthiness. The plaintiffs were partially covered by insurance and they had been paid the amount of the insurance; they claimed to recover the residue of the loss from the defendants, on the ground of their negligence. The jury assessed the damages of the plaintiff at £23,900. The defendants relied on the insurance clause, but Bray, J., held that the case came within the well settled rule of law that in shipping documents of the character of that in question, in the absence of a clear intention to the contrary, the exceptions do not affect the obligation of the ship-owner to provide a ship fit for the cargo at the commencement of the voyage, and he considered the case governed by *Price* v. *Union Lighterage Co.* (1903) 1 K.B. 750, and gave judgment for the plaintiffs.

MINES—SALT—UNDERGROUND BRINE—RIGHTS OF ADJOINING OWNERS TO PUMP BRINE.

The Salt Union v. *Brunner* (1906) 2 K.B. 822 was a somewhat curious case. The plaintiffs and defendants were adjoining proprietors of mines of rock salt. The surface water percolating through dissolved the salt and produced brine which flowed in underground channels which could not be closed. The defendants pumped up this brine, and in so doing the plaintiffs claimed that the defendants wrongfully took salt which had been dissolved from the rock salt of the plaintiffs' mine. In these circumstances Lord Alverstone, C.J., held that the defendants were not guilty of any trespass and that the action failed.

PROBATE—SOLE EXECUTRIX INCAPABLE OF ACTING—ADMINISTRATION WITH WILL ANNEXED—GRANT TO NOMINEE OF EXECUTOR—COURT OF PROBATE ACT (20 & 21 VICT. c. 77), s. 73—(R.S.O. c. 59, s. 59).

Re Davis (1906) P. 330, was an application for the grant of letters of administration with the will annexed to the nominees of a sole executrix and universal legatee who by reason of her advanced age was incapable of acting. Deane, J., granted the application as being authorized under s. 73 of the Probate Act (see R.S.O. c. 59, s. 59).

ADMIRALTY—SALVAGE—APPRAISEMENT—RE-OPENING APPRAISEMENT.

The Hohenzollern (1906) P. 339 is a case which serves to shew the great difference in the way in which property may be estimated when it is to be the basis on which the owners are to pay salvage, and when it is to be the basis on which they seek to recover its value from a third party. In this case which was a suit for salvage the defendants filed an affidavit estimating the value of the vessel and cargo salved as follows: the vessel at £25,500 and the cargo at £7,400. Appraisers were appointed to make a valuation and they reported the vessel to be worth £51,500 and the cargo £9,650. The defendants applied to re-open the appraisement and the Court appointed an independent valuation to be made and the value so assessed was for the vessel £52,800 and the cargo £8,303. In these circumstances Deane, J., held there was no ground for re-opening the first appraisement which was accordingly held binding on the parties and the salvage was awarded on the basis thereof.

MINES—EXPROPRIATION OF LANDS FOR PUBLIC PURPOSES—COMMON LAW RIGHT OF EXPROPRIATOR TO SUPPORT FROM ADJOINING LAND.

In *Manchester* v. *New Moss Colliery* (1906) 2 Ch. 564, the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have held that where a corporation, under the provisions of a statute, expropriate land including the minerals thereunder for the purpose of a reservoir, they acquire the common law rights of their vendor to support from the minerals under adjoining land, and are entitled to an injunction to restrain the working of such minerals so as to cause a subsidence of the surface of

the land expropriated; and that, statutory provisions providing for compensation in case the expropriators desire to restrain the working of minerals under the land expropriated but not acquired by the expropriators, had no application.

ADMINISTRATION OF ASSETS—EXECUTOR—PREFERENTIAL PAYMENT —SPECIALTY DEBT—ADMINISTRATION OF ESTATES ACT, 1869 (32 & 33 VICT. C. 46)—(R.S.O. C. 129, S. 34).

In re Samson, Robbins v. *Alexander* (1906) 2 Ch. 584 seems to shew that there is a material difference in the wording of the Imperial Statutes 32 & 33 Vict. c. 46 and R.S.O. c. 129, s. 34. By the former which also abolishes the distinction between specialty and simple contract debts as far as the administration of the estates of deceased persons is concerned, it is provided that they "shall be treated as standing in equal degree and be paid accordingly"; whereas the Ontario Act says they shall be paid pari passu and without any preference or priority." Under the English Act it is held by the Court of Appeal (Williams, Moulton and Buckley L.JJ.), that there is no obligation on a personal representative to pay debts pari passu, but that the effect of the Act is simply to take away the priority of specialty debts, leaving the personal representative at liberty to pay them in any order he pleases.

COPYRIGHT—AGREEMENT FOR EXCLUSIVE PUBLICATION—AUTHOR AND PUBLISHER—ASSIGNMENT OF COPYRIGHT—COPYRIGHT ACT, 1842 (5 & 6 VICT. C. 45) SS. 2, 13.

Re Jude (1906) 2 Ch. 595 was an application by an author under the Copyright Act, 1842, to remove from the register of copyrights the names of the respondents, Reid Brothers, as owners of the copyright in certain musical works composed by the applicant. The applicant had registered himself as the proprietor of the copyright in the musical compositions in question, and by agreement with one Newsome, it was provided that Newsome should have the sole and exclusive right of printing and publishing them, subject to the conditions (1) that Newsome should bear the cost of printing and publishing (2) that Newsome should pay Jude a royalty of 6d. per copy (3) that Newsome should furnish Jude with any number of copies he might require at 1s. 6d. per copy and on these copies no royalty was to be payable. Jude subsequently borrowed £100

from one Riley and as security for the loan he charged all his interest in the musical works in question and gave him a power to sell same and agreed to execute any further assignment. The loan was not repaid, and Riley assigned his rights under this agreement to Newsome who assigned the same together with his rights under the prior agreement to Reid Brothers who thereunder claimed to be assignees of the copyright. Kekewich, J., however, was of the opinion that there had been no effectual assignment of the copyright, that the first agreement was merely one for publishing and did not involve a transfer of the copyright; and as regards the mortgage or charge the transfer by Riley to Newsome and from him to Reid Bros. merely amounted to an assignment of the charge but not, as the respondents claimed, an exercise of the power of sale. The application was therefore granted.

WILL—POWER TO EXECUTORS TO RETAIN SECURITIES—HAZARDOUS SECURITIES—TENANT FOR LIFE AND REMAINDERMAN—RULE IN HOWE V. DARTMOUTH, 7 VES. 137A.

In *Re Bates, Hodgson* v. *Bates* (1907) 1 Ch. 22, Kekewich, J., had to consider the application of the rule laid down in *Howe* v. *Dartmouth*, 7 Ves. 137a. In this case the testator had at the time of his death 336 fully paid up shares in a coal company which had power to carry on business as collieryowners and workers, and ship owners and carriers, etc. He gave his executors and trustees power to retain investments belonging to him at the time of his death for such period as they might think fit without being responsible for any loss occasioned thereby and gave the income to his wife for life and after her death over. The questions raised were whether the trustees, notwithtsanding the power to retain were nevertheless bound to realize the shares above referred to, and whether until realization the tenant for life was entitled to the whole income thereof, or only such sum as would be payable if the shares were sold and proceeds invested in securities proper for trustees to invest in. Kekewich, J., was of the opinion that the shares in question did not come under the head of what are called wasting securities which he defined to be those the value of which from the intrinsic nature of the security decreases from day to day e.g., leaseholds or annuities. He considered however that they were hazardous, but that under the power in that behalf they might properly retain them and so long as they did so the tenant for life was entitled to the full income.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BANK OF MONTREAL *v.* THE KING. [Feb. 19.

Banks and banking—Forged cheque—Payment by drawee—Liability to customer—Payment to forger by third party—Recourse over.

A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the Bank of Montreal. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General.

Held, affirming the judgment appealed from (11 Ont. L.R. 595), that the Bank of Montreal was liable unless the Crown was estopped from setting up the forgery.

Per DAVIES, IDINGTON and DUFF, JJ., that estoppel could not be invoked against the Crown.

Per GIROUARD and MACLENNAN, JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case, a private person would not have been estopped had his name been forged as drawer of the cheques.

Per DAVIES and IDINGTON, JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts might be re-opened to have the mistake rectified.

The defendant bank makes claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held:—

Per GIROUARD and MACLENNAN, JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal*, 4 Burr. 1355, followed.

Per DAVIES and IDINGTON, JJ.—As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and, subsequently, paid out the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake.

In the result, the judgment appealed from (11 O.L.R. 595) was affirmed.

Shepley, K.C., *Gormully*, K.C., and *Orde*, for appellants. *Aylesworth*, K.C., Atty.-Gen. of Canada, and *J. H. Moss*, for respondent. *Lafleur*, K.C., and *Matheson*, for Quebec Bank. *G. F. Henderson* and *A. Green*, for Royal Bank. *J. A. Ritchie*, for Sovereign Bank.

Ont.] TORONTO RY. CO. v. MULVANEY. [Feb. 19.

Negligence—Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages.

A passenger on a street car in Toronto going west alighted on the side furthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow, and seeing a car coming from the west as she was about to step on the track she recoiled and at the same time the car she left started and she was crushed between the two receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and not sounding the gong before starting the west bound car. They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care.

Held, that the case having been submitted to the jury with a charge not objected to by defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed.

The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action. Appeal dismissed with costs.

W. Nesbitt, K.C., for appellants. *Davidson*, for respondent.

Ex. Ct.] [Feb. 19.

THE "D. C. WHITNEY" *v.* ST. CLAIR NAV. CO.

Admiralty law—Foreign bottoms—Collision in foreign waters —Jurisdiction

A foreign vessel passing through a river dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Court of Admiralty. The warrant to arrest a foreign vessel cannot be issued until she is within the jurisdiction of the Court.

Quaere: Have the Courts of Admiralty in Canada the same jurisdiction as those in England to try an action in rem by one foreign ship against another for damages incurred by a collision in foreign waters?

Judgment of the Exchequer Court, Toronto Admiralty District, 10 Ex. C. R., reversed, IDINGTON, J., dissenting.

W. D. McPherson, for appellants. *J. W. Hanna*, for respondents.

N.B.] ALLCROFT *v.* ADAMS. [Feb. 19.

Master and servant—Wrongful dismissal—Contract of hiring— Capacity—Statute of Frauds.

The manager of a veneer company having heard of plaintiff as likely to be useful in the business wrote to him saying: "What we want is a man who is a good veneer maker and knows how to make all kinds of built-up woods that are salable. We want you to take full charge of the mill, that is the manufactur-

ing." Plaintiff answered: "I understand fully the making of such articles as you speak of as well as others"; and in a later letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the business). I can at all times lay my hands on good competent machine men who know their business as also instruct those who do not." Subsequently plaintiff was hired by the company but was dismissed in six weeks.

Held, reversing the judgment of the Supreme Court of New Brunswick, 37 N.B. Rep. 332. IDINGTON, J., dissenting, that plaintiff was not hired as a general manager of the company's business but as an expert in veneer work, and as the evidence shewed he was not competent he was rightly dismissed.

Held, also, that defendants could not rely on the Statute of Frauds which, though pleaded, was not set up at the trial nor before the Supreme Court of New Brunswick, en banc. Appeal allowed with costs.

F. R. Taylor, for appellants. *Teed*, K.C., and *Jonah*, for respondent.

N.W.T.] GILBERT *v.* THE KING. [Feb. 28.

Indictment for murder—Evidence—Statements of victim—Res gestæ—Murder or manslaughter—Reserved case.

Evidence of statements made immediately after an assault by a person, since deceased, under apprehension of further danger and requesting assistance and protection, is admissible as part of the res gestæ, even though the person accused of the offence were absent at the time when such statements were made. *Reg.* v. *Beddingfield*, 14 Cox 342; *Reg.* v. *Foster*, 6 C. & P. 385, and *Aveson* v. *Kinnaird*, 6 East 188, followed.

Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to make some explanatory reply or remark in reference to them, are admissible as evidence.

On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally.

Held, that, in view of the character of the defence and the

evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder.

Two questions were reserved by the trial judge for the opinion of the Court of Appeal, but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada.

The majority of the Court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the Court appealed from, but it was held,

Per GIROUARD, J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the Court appealed from. *McIntosh* v. *The Queen*, 23 S.C.R. 180, followed. *Viau* v. *The Queen*, 29 S.C.R. 90; *Union Colliery Co.* v. *The Queen*, 31 Can. S.C.R. 81, and *Rice* v. *The Queen*, 32 Can. S.C.R. 480, referred to. Appeal dismissed with costs.

Chrysler, K.C., and *Balfour*, for appellant. *Latchford*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Britton, J.] BYERS *v.* KIDD. [Dec. 5, 1906.

Costs—Defamation—Verdict for defendant—Depriving defendants of costs—Discretion.

In the exercise of his discretion in depriving a successful defendant of his costs in an action of slander, the trial judge is not obliged to find under Consol. Rule 1130, what would

necessarily be good cause under the English Order 65, but at the same time he must not exercise his discretion arbitrarily, but for a reason which satisfies him that it should be so exercised.

In such an action a successful defendant was disallowed his costs, where the trial judge was satisfied that the defendant by his conduct had provoked the litigation, and had really made use of the words attributed to him, notwithstanding the finding of the jury to the contrary, and had refused to carry out a proposed settlement which he had at first acceded to, and the jury had intimated that the costs should be equally divided between the parties.

F. McWilliams, for plaintiff. *D. O'Connell*, for defendant.

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

GYORGY *v.* DAWSON.

Master and servant—Injury to servant—Death of servant—Negligence—Foreigner—Action for benefit of.

The administrator within this province of a foreigner who had resided herein and was killed in an accident, through his employer's negligence, is entitled, under the amendment to Lord Campbell's Act, as embodied in s. 2 of the R.S.O. 1897, c. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death.

F. W. Griffiths and *Maguire*, for plaintiff. *F. W. Hill* and *T. F. Battle*, for defendants.

Divisional Court.] [Dec. 20, 1906.

LONDON AND WESTERN TRUST CO. *v.* CANADIAN FIRE INS. CO.

Fire insurance—Lease—Change in nature of risk—Absence of notice or knowledge by landlord—Control of landlord—Omission to notify company.

After the owner of dwelling-house property, had effected an insurance thereon, he leased the premises to a tenant, who, without the owner's knowledge or consent, changed the occupation thereof, by bringing in a stock of goods, which he sold out to pedlers.

Held, that the owner was not affected by the second statutory condition, which required notice of any change material to the risk, which was within the control or knowledge of the insured, to be given to the company, etc., for the premises being under lease, were not under the owner's control, while the change in the occupation was without his knowledge or consent. Judgment of FALCONBRIDGE, C.J.K.B., at the trial reversed.

Gibbons, K.C., for plaintiffs. *Rowell*, K.C., for respondents.

Divisional Court.] [Dec. 21, 1906.

ADAMS *v.* FAIRWEATHER.

Way—Public lane—Strip of land adjoining used as part of—User—Easement.

To constitute a legal possession of land, not only must there be a corporal detention, or that quasi-detention, which, according to the nature of the right, is equivalent thereto, but also the intention to act as owners of the land, no legal possession is acquired by the exercise of a supposed right as one of the public. The rear portions of the plaintiffs and the defendants' lands abutted on a public lane, the defendants' rear fence being some eleven feet from the boundary of the lane, leaving the strip between the fence and the boundary unenclosed. The plaintiff, for over 20 years, believing this strip to be a part of the lane, had been accustomed to drive over it to get to his stable, doing so in the exercise of a supposed right as one of the public, and not as an easement to his land.

Held, that the plaintiff had not acquired any right to use the said strip.

H. E. Rose, for appellant. *W. H. Blake*, for respondent.

Falconbridge, C.J.K.B., Britton and Riddell, JJ.]

[Dec. 24, 1906.

TOWNSHIP OF AMELIASBURG *v.* PITCHER.

Prohibition — Division Court — Interpretation of statute — Jurisdiction.

Where it is necessary to interprete a statute in order to find out whether the Division Court should decide the rights of

the parties at all, if the Divisional Court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights prohibition will lie: but if it be necessary to interpret a statute simply to decide the rights of the parties prohibition will not lie, however far astray the Division Court Judge may go.

In re Long Point Co. v. *Anderson* (1891) 18 A.R. 401 followed.

C. J. Holman, K.C., for the appeal. *W. S. Morden*, contra.

Divisional Court.] [Jan. 14.

CUMMINGS *v.* TOWN OF DUNDAS.

Highway — Stream — Breaking through dams — Bridge over stream—Stopping flow of water—Destruction of highway —Duty of municipality to repair—Damages—Mandamus— Indictment—Injunction.

Where the destruction of a highway is caused by the gradual encroachment of the sea or lake, arising from natural causes, the water occupying the former location of the highway, which no longer exists, whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, and available for purposes of navigation, there is no liability on the municipality, by virtue of its duty to keep highways in repair, to replace the highway; but where the element of ownership does not arise, a duty to repair may exist where the destruction is of such a character, taking into consideration the cost of repair, that the restoration of the highway may not unreasonably be regarded as coming within the bounds of such duty. In the high lands above the plaintiff's land, in the town of Dundas, two streams became united, forming a creek, which flowed down past the plaintiff's land; a couple of dams in the creek, built some 60 years ago, had become broken, whereby large quantities of stones, sand and other debris were carried down and deposited in the channel adjacent to the plaintiff's land, the accumulation being added to by a bridge across the creek, built by a railway company, which choked the flow of water, in itself sluggish, the effect being that a portion of the highway in front of the plaintiff's land, and being the only mode of ingress and egress to and from it, was washed away, rendering it very difficult for two vehicles to pass each other. It was shewn that by removing the check to the flow of water, caused by the bridge,

and by the expenditure of $150 a road way 30 feet wide could be furnished, while, at a cost of $800 a permanent and satisfactory roadway could be provided.

Held, no question of ownership arising, and taking into consideration the cost of repair, the destruction of the highway was not of that character as would relieve the municipality of the size of the defendants from its obligation to repair, and that they were liable to the plaintiff, for the damages he had sustained by reason of their neglect to so repair.

A mandamus will not be granted in such a case. If the relief sought was as one of the public the remedy would be by indictment. An injunction was also refused, it not appearing that the municipality had interfered with the flow of the water. Judgment of STREET, J., 10 O.L.R. 300, reversed.

E. D. Armous, K.C., for plaintiff, appellant. *J. W. Nesbitt*, K.C., and *H. C. Gwyn*, for defendants, respondents.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] STEELE *v.* PRITCHARD. [Jan. 15.

Action of deceit—False representation—Fraud.

The findings of fact by the learned trial judge were that the then plaintiffs bought a tract of land consisting of about 47,000 acres in six separate townships from the defendants who held it under option from the Ontario and Saskatchewan Land Co.; that the 47,000 acres were part of a larger tract of land, which the Land Company had acquired from the Canadian Pacific Railway Co., out of which 7,800 acres had been sold; that the 7,800 acres were on the average worth $2.20 per acre more than the 47,000 acres; that the defendants represented to two of the plaintiffs that the 47,000 acres were all that the Land Company even owned in the six townships named, and that the two plaintiffs had been induced by such representation to become co-purchasers with Steele of the 47,000 acres at $6.60 per acre. The judge also found that, at the time the representation was made,

the defendants had no information at all as to the matter represented.

Held, that the proper inference to be drawn was that the defendants at the time they made the representation had no belief in its truth and that, upon the principles laid down in *Derry* v. *Peek*, 14 A.C. 337, they were liable in damages to the two plaintiffs for their shares of the difference between the average value of the lands received and the average value of the whole original holding of the selling company, calculated however only in respect of a 15/47 interest in the land as the then plaintiffs had sold 32/47 interest in it before the action.

I. Campbell, K.C., and *Wilson*, for plaintiffs. *Bradshaw* and *Johnson*, for defendants.

Mathers, J.] MOORE *v.* SCOTT. [Jan. 15.

Practice—Security for costs—Second application—King's Bench Act, Rule 987.

Application by defendants for increased security for costs after judgment in their favour and pending an appeal by the plaintiff. When first sued, defendants took out the ordinary præcipe order for security upon which plaintiff paid $200 into Court. They now shewed that their taxed costs amounted to $444 and that the costs of the appeal would be at least $300 more.

Held, following *Standard Trading Co.* v. *Seybold*, 5 O.L.R. 8, that the præcipe order was no bar to the application and that further security to the extent of 400 should be furnished. *Charlebois* v. *G.N.W. Central Ry. Co.*, 9 M.R. 60, distinguished.

J. F. Fischer, for plaintiff. *Burbidge*, for defendant.

Mathers, J.] [Jan. 15.

CAMPBELL *v.* CANADIAN CO-OPERATIVE CO.

Negligence—Undertaking of mortgage company to keep up insurance on mortgaged property—Undertaking not under seal—Setting off unliquidated damages against debt—Right of set-off as against assignee of debt—Notice of assignment.

The defendant investment company having a mortgage for $2,000 on plaintiffs' hotel property, a short time before the ex-

piration of a policy of insurance in the Canadian Fire Insurance Co. for $1,400 on the building, held by the company as collateral to the loan, notified the plaintiff by letter that they intended to transfer the insurance at its expiration to another company, as they had power to do under the terms of the mortgage. The plaintiff then had a conversation by telephone with the secretary-treasurer of the company respecting the transfer of the insurance and received from him the assurance that the matter would be attended to. The company about the same time notified the Canadian Fire Insurance Co. not to renew its policy and wrote to the Occidental Fire Insurance Co. of Wawanesa, asking them to insure the property for the same amount from the date of the expiration of the Canadian fire policy. The investment company took no further steps to replace the insurance, and, after it had expired, the property was destroyed by fire.

Held, 1. The investment company was guilty of gross neglect in not carrying out its undertaking to keep the building insured and was liable to the plaintiff for the loss sustained by reason of such neglect.

The law on this point is as laid down by WILLES, J., in *Skelton* v. *L. & N. W. Ry. Co.*, L.R. 2 C.P. at p. 636, as follows:

"If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it," and, as the company had taken steps towards carrying out its undertaking, they had brought themselves within that principle.

Although the company's undertaking was not under seal yet it was in respect of a matter in the usual course of its business and of a kind in which it becomes practically necessary to dispense with the seal by reason of the frequency of its occurrence and the company should be held liable.

After the expiration of the insurance and before the fire the investment company assigned the plaintiff's mortgage to its co-defendant the Northern Trust Co., but, as found by the trial judge, no notice of that assignment was given to the plaintiff before the loss.

Held, that, under s. 39 of the King's Bench Act, the plaintiff had the same right of setting off his claim for damages against the mortgage debt in the hands of the trust company as he would have had, if there had been no assignment. *Newfoundland* v. *Newfoundland*, 13 A.C. 213, followed.

Hull, for plaintiff. *Aikens*, K.C., and *Hugg*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 21.

CANADIAN BANK OF COMMERCE *v.* LEWIS.

Fixtures—Chattels—Bank safe built into rented property—Landlord and tenant—Agreement between as to removal of fixtures—Effect of agreement on subsequent purchaser of premises.

Plaintiff bank rented a building into which it moved a safe for the purposes of its banking business. The landlords at the request of the bank built around the safe a brick vault. After occupying the building about a year, the bank moved into premises of its own, and the building and safe were used by succeeding tenants until the sale of the property to defendants, who knew nothing of an alleged agreement between the bank and its landlords as to the right to remove the safe after the bank had left the premises. During the interim between the removal of the bank and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor which was partly supported by the safe.

Held, on appeal, reserving the judgment of HENDERSON, Co. J. (who decided that the safe was a chattel and had been bricked or built in merely for the purpose of its more convenient use as a chattel), that although the safe when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet that right was lost when the defendants bought the premises.

J. A. Russell, for defendants, appellants. *Davis*, K.C., for plaintiffs, respondents.

Full Court.] [Jan. 21.

DE BECK *v.* CANADA PERMANENT.

Mortgagor and mortgagee—Power of sale in mortgage—Orders nisi and absolute—Accounts—Rents, receipt of—Tender—Interest.

A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute

the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem.

Held (affirming the decision of HUNTER, C.J.), that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens* v. *Theatres, Limited* (1903) 1 Ch. 857, and *Campbell* v. *Holyland* (1877) 7 Ch.D. 166 followed.

Bodwell, K.C., and *Shaw*, for appellant. *Davis*, K.C., and *Cayley*, for respondent.

Full Court.] [Jan. 21.

BRITISH COLUMBIA MILLS TIMBER AND TRADING CO. v. HORROBIN.

Mechanics' Lien Act, R.S.B.C., 1897, *c.* 132, *C.B. Stat.*, 1900, *c.* 20—*Material man—Lien by—Appropriation of payment on account.*

Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiff to supply the lumber and building materials. Previously to this, Horrobin, who was indebted to the plaintiffs, gave them a thirty day note for $1,700 on which, about due date, he paid them $1,000 on account, in doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "re Mrs. Henshaw." This cheque Horrobin endorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshaw's payment. Plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by plaintiff's accountant that there was no appropriation by Horrobin of the $1,000 to defendant Henshaw's account, was not contradicted. Plain-

tiffs placed a lien on the building for $948.45. The trial judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to shew, dismissed the action as against defendants Henshaw and Senkler, and gave judgment against defendant Horrobin, who in the meantime had become insolvent. Plaintiffs appealed.

Held, on appeal, that there had been no appropriation, but

Held, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit the claim had been brought for too much and there should be a new trial.

Observations on the effect of granting a lien to a material man under the amendments of 1900.

Davis, K.C., for plaintiff, appellants. *Senkler*, K.C., for respondent, Henshaw.

Full Court.] BLUE *v.* RED MOUNTAIN RY. CO. [Jan. 21.

Railway right of way, what constitutes—Damages by fire caused by sparks from locomotive—Jury—Non-direction—Misdirection—Railway Act—1903, *c.* 58, *s.* 239.

Where a railway company cleared a right of way, but had not filed any plans of same under either the Dominion or Provincial Railway Acts, and, in an action for damages caused by fire alleged to have been set alight by sparks from one of their locomotives, contended that the right of way must be considered to be confined to the roadbed itself.

Held, 1. It must be considered that the company have occupied the full statutory allowance.

2. Following *Spencer* v. *Alaska Packers Association* (1904) 35 S.C.R. 362, that non-direction is not a ground for a new trial unless it causes a verdict against the weight of evidence; and in this case the only non-direction specifically complained of being that the jury should have been charged that a certain point was not within the railway right of way, and there being no evi-

dence on which the jury could find that such point was within the right of way, the learned judge would not have been justified in charging to that effect.

The jury, after answering several of certain specific questions gave a general verdict of $18,000 in objection to which s. 239 of the Dominion Railway Act was set up on appeal.

Held, that, there being a finding that the defendant company left inflammable material on their right of way, the section could not be invoked, as the limit only applies where there is no negligence. Appeal dismissed, MARTIN, J., dissentiente.

MacNeill, K.C., for defendants, appellants. *J. A. Macdonald*, K.C. and *Hamilton*, K.C., for respondents.

Bench and Bar.

Hon. Arthur Drysdale of the City of Halifax, K.C., to be a puisnè judge of the Supreme Court of Nova Scotia in the room and stead of Hon. D. C. Fraser, appointed Lieutenant-Governor of that Province. (Mar. 13, 1907).

Alexander George Cross of the City of Montreal, Esq., to be a puisnè judge of the Court of the King's Bench for the Province of Quebec in the room and stead of Hon. Robert Newton Hall resigned. (Mar. 11, 1907).

Ranald D. Gunn, of the Town of Orillia, in the Province of Ontario, barrister-at-law, to be Junior Judge of the Court Court of the County of Carleton, in the room and stead of His Honour John Joseph O'Meara, deceased. (Mar. 15, 1907.)

Flotsam and Jetsam.

In an Irish Court recently an old man was called into the witness box, and being infirm and just a little blind he went too far in more than one sense. Instead of going up the stairs that led to the box he mounted those that let to the Bench. Said the judge good-humouredly: "Is it a judge you want to be, my good man?" "Ah, sure, your Honour," was the reply. "I'm an ould man now, and mebbe it's all I'm fit for." The judge had no ready retort.—Tit-bits.