Canada Law Journal.

VOL. XXXIX. JUNE 1, 1903. NO. 11.

It is not a matter for regret that there is an increasing tendency on the part of Provincial Legislatures to provide for the appointment of Boards of Commissioners for various matters which would seem naturally to fall within the original scope of municipal government. A notable example is in the new Ontario Assessment Bill as to the appointment of a Board of Commissioners to deal with the assessment of franchises of companies. Apart from the question as to whether the assessment of franchises is wise (and we much doubt the wisdom), there is no doubt but that this inroad is a step in the right direction. Municipal management in country places is a very different matter from that in large cities. In the latter municipal government has not proved an unmixed success. This is not surprising when the power of dealing with matters affecting large financial operations, and incidentally the investment and safety of large amounts of capital is in the hands of aldermen whose seats mainly depend upon the vote of those who have practically nothing at stake Labour unions and popular unreasoning clamour are not consistent with the careful, not to say honest, dealing with great financial interests and economic questions.

The subject of lawyers advertising for business is referred to in a case in the Supreme Court of Illinois with some appropriate remarks by the editor of the *Central Law Journal*. It appears that a certain attorney of that state published an advertisement as follows: "Loyal, wealthy, atty., guarantees family freedom in month; no advance costs; witnesses quietly volunteered," intending thereby to advertise to obtain divorces which it was claimed was in violation of a statute on the subject and that such conduct showed such a lack of good moral character as unfitted the advertiser from practicing law and justified his disbarment. The Court made absolute a rule nisi to that effect filed by the State Attorney of Cook County, and the offender was very properly struck off the roll of Attorneys. We have some unprofessional advertisers in this

country, but have seen nothing so scandalous as the advertisement above referred to. In our contemporary's note to this case the writer says that amongst the younger generation of commercial lawyers the sentiment seems strong "to pull away from the old ideas of the profession and to look upon the law more in the nature of a business. Some of the most radical of this class of lawyers have gone to the extent of calling the law a business, and claiming the right to resort to any and all methods made use of in ordinary trade and commerce. Such statements have had the unfortunate effect of leading some of the weaker members of the profession into practices which, though they might be tolerated in business, cannot be tolerated in an officer of the court. And herein lies the secret of the distinction between law and business. The law is not a business, nor an independant profession as that of medicine or dentistry, it is an adjunct to courts of justice. The lawyer is an officer, and as an officer he owes his superior, the court, every consideration of respect. He can therefore indulge in no practice that would bring the court or the law in disrepute."

It is now some forty years since, alarmed by the remarkable moral decadence of the Parisian gamin, a number of French philanthropists, founded a society for the purpose of reclaiming young criminals who, while confessedly unfit for prison and its hardening influences, were still more unfit to be allowed to run at large and ravage the community. In an interesting article in the *Nouvelle Revue*, M. Garien deals with the excellent work of this society and informs us that the houses of correction to which they are consigned are now fifteen in number of which six are practically "agricultural colleges," six "industrial schools,", and the remaining three being confined to the reformation of the female degenerate. There is one fact pointed out by M. Garien which should not be overlooked by lawyers and criminalogists in our own country, namely, that under French *legislation criminelle*, every criminal under the age of eighteen years is now deemed to be "a child," and unfit for prison sojourn and discipline; and, further, that when this law was first introduced it was found that the juvenile criminals preferred the prison and its brutalizing ways to the soul and body saving processes of the institutions above referred to. Verbum sat sapienti.

THE COMMON LAW THEORY OF CONTRACT.

The deeper one goes into the literature of the subject the stronger becomes the conviction that nowhere does the philosophy of the early Common Law shew itself so tenuous as in the province of Contract. Doubtless it was the recognition of this fact that impelled such writers as Sir Frederick Pollock and Sir William Anson to attempt to ingraft the consensual theory of the Continental jurists upon the English system, and to argue that in the Common Law as well as in the Civil Law the conception of contractual obligation is derived from Agreement—Conventio vincit legem. That the courts of our own day are disposed to countenance this heresy is patent to every student of case-law, but that the English system of Contract has been developed along this line has no support in history. Strange as it may seem, the Common Law evolved no general conception of contractual obligation until comparatively recent times.

Reference to the ancient books discloses a singular poverty of ideas in respect of this great branch of jurisprudence. Bracton (*a*), finding the native law *tabula rasa* in this province, was bold enough to borrow somewhat from Azo and more from the Institutes, and to set down the pilfered matter as the indigenous product of English soil. The conspicuous lack of success which Bracton experienced in this venture is admitted by Professor Maitland, who may be regarded generally as an apologist for the medieval writer (*b*), and Professor Salmond, in a monograph entitled "The History of Contract" (*c*) speaks of it as follows: "In Bracton and Fleta, indeed, we find an attempt to employ the general principles of the Roman Law as a setting for English contracts, but the chief significance of this attempt lies in its failure. Perhaps in no other part of the law have Roman principles been so prominently introduced only to be so completely rejected."

It is quite true that the 'lex mercatoria' was recognized in England at a very early date, and in that body of law the

(*a*) De Leg. Angl. 99, 100. Both Britton and Fleta take their cues from Bracton in respect of furtive enterprises upon the Civil Law.

(*b*) See Publications of Selden Society, vol. ii (The Fair of St. Ives), p. 32. Also Pollock & Maitland's History Eng. Law (2nd ed.) vol. ii, p. 194.

(*c*) 3 Law Quart. Review, p. 166.

principles of Contract had been advanced to a very remarkable degree of order even before the close of the thirteenth century. But, as Professor Maitland points out (*d*), the 'lex mercatoria' was simply a code of private international law. By the charter (Carta Mercatoria) granted by Edward I. to the foreign merchants trading in the kingdom, it was provided that "Every contract between the said merchants and any persons whencesoever they may come, touching any kind of merchandize, shall be firm and stable, so that neither of the said merchants shall be able to retract or resile from the said contract when once the 'God's penny' shall have been given and received between the parties to the contract" (*e*). But this provision of the Edwardian contribution to the 'lex mercatoria' was in direct opposition to the rule of the Common Law, which expressly denied to the transfer of the 'God's penny' the effect of confirming the contract, or, in the language of a later stage of legal development, constituting an "earnest to bind the bargain".

A careful examination of the sources of our juridical history will justify the conclusion that the English law of Contract was, in its inception, merely an escape from the fertile garden of Procedure. Indeed, it may be said generally that the moulders of the Common Law only saw Rights through the refracting medium of Remedies.

In early times the King's Court provided no means for the general enforcement of conventional obligations. The writs by which actions of any kind might have been instituted were few in number, and the rules of pleading so technical and inelastic as to exclude the generalizations necessary to the existence of any body of substantive law. At the close of the thirteenth century

(*d*) Publ. Selden Soc., vol. ii (The Fair of St. Ives), p. 133. See also Black. Com. i, 273.

(*e*) See Smith's Mercantile Law, 10 ed. Introd. lxxiv. It may be explained here that the 'God's penny' (denarius Dei) was originally a tribute levied by the Church upon the business transactions of the faithful, and constituted a medium whereby such transactions received a religious sanction. The denarius Dei must not be confounded with the 'arrha' of the Roman law, because it was not regarded as 'part payment' but simply as a symbol of the conclusion of the bargain between the parties. There is some doubt as to whether the English doctrine of 'Earnest' is derived from the denarius Dei. Fry, L.J., in *Howe* v. *Smith* (27 Ch. D. at p. 102) adheres to the former derivation, and it certainly has strong etymological support (arrha, erles, ernes). Pollock & Maitland, however, in their learned 'History of English Law' (2nd ed. vol. ii, p. 209) express the view that the origin of this doctrine is to be traced to the provision concerning the denarius Dei in the Carta Mercatoria, quoted in the text.

not only in matters savoring of contract, but also in the province of civil wrongs, the remedies to be had in the King's Court were so restricted and inedequate that the maxim, Ubi jus, ib iremedium—the proud boast of the Common Law in a later era—could only have been quoted in derision. But public opinion at length demanded a reformation of this state of things, and in the year 1296 the Statute of Westminster II. (13 Edw. I. c. 24) (*f*) enacted that "whensoever from thenceforth a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring like remedy, no precedent of a writ can be produced, the Clerks in Chancery shall agree in forming a new one; and if they cannot agree, it shall be adjourned till the next Parliament, when a writ shall be framed by the consent of the learned in law, lest it happen for the future that the Court of our Lord the King be deficient in doing justice to the suitors". It was this statute which, leading as it eventually did to the introduction of actions of Trespass upon the Case, laid the foundations of the modern English law of contract (*g*).

The most ancient remedy in the King's Court that we have to consider is the action of Debt. Looking solely to the meaning of the word 'debt' in present legal use, one would be persuaded that the origin of the remedy must necessarily have been postponed to the development of some definite conception of contractual obligation. Such, however, is not the case.

In its origin the Writ of Debt was not based upon any idea of Contract, but sought to enforce a *duty* against the defendant. It contemplated a duty on his part of which the plaintiff had a right to exact fulfilment (*h*). In other words the theory of the action was *droitural* rather than contractual. Recourse to the text of Glanvill will illustrate the correctness of this view. "Pleas concerning the debts of the Laity also belong to the King's Crown

(*f*) Some writers would have us believe that this statute was passed not with a view to increasing Common Law remedies, which, they say, were always commensurate with Common Law rights, but simply to quicken the diligence of the Clerks in the Chancery, who were too much attached to precedents (See Broom's Legal Maxims, 9th ed., p. 151). But the above-quoted words of the statute do not lead to that conclusion; and it is undeniable that he who made the writ, made the law, in that period of our legal history.

(*g*) See infra.

(*h*) Cf. Holmes, Common Law, p. 264; Pollock & Maitl. Hist. Eng. Law (2nd ed.) vol. ii, p. 212; Ames, 8 Harv. Law Rev., p. 260

and Dignity. When, therefore, any one complains to the Court concerning a Debt that is due to him, and he is desirous of drawing the suit to the King's Court, he shall have the following Writ for making the first summons: '*The King to the Sheriff, Health.* Command N. that justly and without delay, he render to R. one hundred marks which he owes him, as he says, and of which he claims that he has unjustly deforced him. And unless he does so summon him", &c. (*i*)

Clearly, upon the face of the writ, this remedy contemplates the restoration of property wrongfully withheld rather than the enforcement of a promise to pay a certain sum of money due. The obligation upon the defendant is to right a wrong, not to perform an undertaking. The word 'deforced' is eloquent of the tortious side of remedies in the Common Law; and later on in history we see damages allowed for the 'detention' of the debt, an element which removes Contract still further from the theory of this action (*j*). 'Debt', as we have seen from the form of the writ given by Glanvill, was originally an action in rem. By the time of Edward I the action was subdivided into: (a) *Debet* and *Detinet*, and (b) *Detinet* only. The writ in the *Detinet* ('Detinue') had become the proper remedy for the recovery of specified chattels belonging to the plaintiff, while 'Debt' lay for the recovery of a specific amount of unascertained chattels (*k*) As the purely 'Detinue' side of this action played no part in the development of the English Law of Contract, it needs no further mention here (*l*)

At the time when Glanvill wrote, the plea-rolls show that there were very few actions of Debt. It is true that he enumerates (*m*) a number of *conventiones* in respect of which the writ would lie in the King's Court—such as sale, loan, and hiring of services—but he concludes his enumeration of them as follows: "We briefly pass over the foregoing contracts, arising as they do from the consent of private individuals, because . . . . the King's Court

(*i*) Glanvill, Bk. X. cc. 1 and 2.

(*j*) "The creditor is being 'deforced' of money, just as the defendant who brings a writ of right is being 'deforced' of land. The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods". Poll. & Maitl. Hist. Eng. Law. (2nd ed.) ii, p. 205.

(*k*) Cf. Ames on 'Parol Contracts', &c., 8 Harv. Law. Rev., p. 260; Terry's 'Leading Principles of Anglo-American Law,' sec. 147.

(*l*) Cf. Salmond's Hist. of Contract, 3 Law Quart. Rev. 167.

(*m*) Book X.

does not usually take cognizance of them ; nor, indeed, with such contracts as may be considered in the light of private agreements (privatae conventiones) (*n*) does the King's Court intermeddle". Possibly the reason why the King's Court did not 'usually', as Glanvill naively puts it, take cognizance of private conventions inhered in the fact that at least down to the reign of Edward I. the King's Court was extensively used as a medium for augmenting the royal revenues, and only the rich could afford the luxury of litigation there (*o*). However that might be, the paucity of writs of Debt on the plea-rolls is notable in the early stages of the history of Common Law actions ; and it is not until the time of Fleta that we find authority in the books to the effect that private agreements are enforceable in the King's Court (*p*). But even this widening of the province of Procedure does not carry us very far in the development of a general theory of Contract, for it was only private agreements in writing under seal (covenants) that the King's Court then condescended to take cognizance of.

A further reference to Glanvill's text discloses that the old action of Debt required the plaintiff to do two things to entitle him to succeed : First, to allege "a just cause inducing a debt" (justa causa debendi) ; and, secondly, to furnish sufficient proof of the matter alleged.

We have been careful to point out above that this action did not contemplate an obligation arising upon a promise or agreement, and we wish to repeat here that none of the causa debendi mentioned by the early Common Law writers (although we hear much talk of 'Contracts' by Glanvill (*q*) and find an ambitious attempt at a definition of contractual obligation in Britton (*r*)), are matters of simple or parol contract. Let us take, for example, the contract of sale. It was not until the title to the thing sold passed from the seller to the buyer that an action of Debt would lie for the price ; so long as the contract remained executory on both sides there was no obligation in the contempla-

(*n*) A 'private agreement', as Glanvill used the term, meant an agreement made outside the King's Court. See Salmond, 3 Law Quar. Rev. at p. 169.

(*o*) Cf. Poll. & Maitl. Hist. Eng. Law (2nd ed.) ii, 205.

(*p*) Fleta, iii, 14, 3.

(*q*) See ante.

(*r*) Bk. I, 62.

tion of the law at that time (*s*). What was necessary to the creation of an obligation (causa debendi) in respect of a simple contract, enforceable by the action of Debt, was part performance of the contract. The simple contract did not become a causa debendi until the debtor had received something from the creditor which stood as an equivalent for the obligation sought to be enforced against him. Hence it is obvious that in such a case the obligation was not derived from a promise but from the receipt of a quid pro quo (*t*); and so while it is possible to say that the old action of Debt developed a conception of an element of Contract akin to the modern doctrine of Consideration, it would be quite wrong to say that Debt affords any prototype of the theory of obligation as derived wholly from Agreement (*u*). And we can reach this conclusion without adopting Prof. Langdell's view that the legal mode of creating a debt is not by contract, but by grant, *i. e.*, by the transfer of a sum of money from the debtor to the creditor without delivering possession (*v*).

Adverting now to the proof of the debt, there were two methods in vogue in the early history of the action. It was incumbent upon the plaintiff to produce a written acknowledgement of the causa debendi ('carta'), or a train of witnesses ('secta') to establish his plaint. (*w*). Now it is not surprising to find that suitors were not slow to appreciate the advantages of the 'carta' over the 'secta' mode of proof; and it did not require a very long period of time to convert the 'carta' from the mere evidence of a debt into a debt per se. Thus we have it stated by Bracton: "Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sine pecunia numerata sit, sive non, obligatur ex scriptura,

(*s*) Cf. Langdell Contr. (Summ.) ii, p. 1041.

(*t*) Mr. Justice Holmes (Com. Law, pp. 247-288) thinks that the quid pro quo as evolved by the action of Debt was the real parent of the modern doctrine of Consideration; but Prof. Salmond (3 Law Quart. Rev. 178, 179) very strongly argues that the latter was derived wholly from Assumpsit.

(*u*) An illuminating side-light is thrown upon the subject in hand by Holt, C.J., in *Smith* v. *Airey*, 2 Ld. Raym. 1034. He is there reported as saying "winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an indebitatus assumpsit would not lie for it; but the only ground of the action in such cases was the mutual promises. That though there were a promise, yet Debt would not lie upon that." See also *Walker* v. *Walker*, Holt, 328; 5 Mod. 13.

(*v*) It is fair to say that Prof. Langdell admits that his view does not apply to the creation of every kind of debt. See Langdell Contr. (Summ.), ii, 1040.

(*w*) Cf. Glanvill, Bk x, cc. iii and xii.

nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere et non solum obligatur quis per verba, sed per scripturam, et per literas, non ut literae quidem ipsae vel figura literarum obliget, sed oratio significativa quam exprimunt literae, sed utrumque cooperatur ad obligationem oratio significativa simul cum litera" (*x*).

In this passage Bracton is honestly expounding the native law of his day, and it will be observed how paramount a part the principle of Estoppel plays in the formal obligation of the Common Law, for he declares that if a person "shall write that he owes money to another, whether the money has been paid to him or not he is bound by the writing, nor can he object that the money has not been paid, in the face of the writing."

It remains to be said that the necessity for the 'carta' to be under seal effectually prevented the extension of the remedy under consideration to parol contracts, and destroyed its usefulness toward the building up of any general theory of conventional law. Thenceforward Debt, as a distinctive legal remedy, began its decline towards obsolescence; and perhaps the chief interest that it holds to-day is for the student of comparative jurisprudence, who finds in the method by which it evolved the formal contract of English law a striking analogy to the development of the contract 'literis' in the Roman law (*y*).

The origin of the Writ of Covenant (breve de conventione) is not at all clear from the books. It would be reasonable to think that it was an off-shoot from the action of Debt, coming into use when the sealed writing ('carta') became recognized as a good causa debendi; but so far from that being the case we find that this writ was never allowed as a remedy for the recovery of a mere debt, even though the debt was acknowledged by a sealed instrument (*z*). The reason for this discrimination is to be traced (1st) to the recognition of the non-contractual nature of the obligation in Debt; and (2nd) to the fact that the over-lapping of actions was not favoured in the early history of Procedure. Then

(*x*) Leg. et Cons. Angl. iii, f. 100b.

(*y*) "The literal contract is, in short, merely an example of the doctrine of Estoppel". Hunter's Rom. Law, 3rd ed., 527.

(*z*) Professor Ames (2 Harv. Law Rev. 56) says that prior to the xviith century he could discover no case where plaintiff succeeded in an action of covenant brought in respect of a debt.

we have advocates of the view that, as its name plainly suggests, the action of Covenant was an inheritance from the law of Real Property (*a*). However this may be, it is abundantly clear that although the action as it first appears on the plea-rolls relates wholly to contracts in respect of land—the earliest conventions being leases of land for life or years—attempts were subsequently made to extend the scope of the action to other classes of conventions. Indeed we have a declaration in the Statute of Wales (A.D. 1284) that the list of enforceable conventions at that time was so great that they could not be enumerated. But these efforts at generalization were effectually nipped in the bud by the stringent rule of evidence in the King's Court, formulated about the middle of the fourteenth century, which regarded a sealed writing as the only admissible proof of a 'convention' between the parties to the action (*b*). Thus the operation of the formal contract in the action of Covenant did little to advance a general theory of contractual obligation in the Common Law. But this much must be said for it, namely, that it marks the first step in the march of English jural conceptions from the pseudo-contracts, both real and formal, of Debt, to the true contract derived from Agreement as it obtains in the Civil Law.

It is interesting to note in the early history of procedure how continually the more liberal-minded of the English judges fretted against the restriction of the seal in actions of Covenant, and how many unsuccessful attempts were made to throw open the doors of the remedy to contracts generally. Three centuries after the rule of procedure above referred to had been formulated, and long after the sealed convention had been accorded a distinctive place in substantive law, we find two great judges in the Court of King's Bench (*c*) espousing the heterodox view that a seal was not necessary to give validity to a written promise without consideration; in other words, that there could be no 'nudum pactum' in writing. As might have been expected, however, this 'merveillous ley' was soon repudiated. In *Rann* v. *Hughes* (*d*) it was

(*a*) Cf. Prof. Salmon's Hist. Contr. 3 Law Quart. Rev. 169; Digby's Hist. Law Real Prop., 4th ed. 175.

(*b*) Y.B. 21 Edw. III, 7-20.

(*c*) In *Pillans* v. *Van Mierop*, 3 Burr. at pp. 1669-1671.

(*d*) 7 T.R. at p. 351.

authoritatively laid down that there is no such thing in English law as a mere 'contract in writing'. If the contract is not by specialty (writing under seal) then it is by parol, and requires a consideration.

The Writ of Account merits a passing notice here from the fact that it was formerly used to enforce claims which in a later stage of our juridical development were enforced by actions of Assumpsit. But inasmuch as it was a droitural writ, like Debt, and not based upon Agreement, it did little or nothing to advance a general conception of obligation ex contractu in English law (*e*). When the wider and more convenient remedy of Account in Equity came into use it speedily superseded the action as it obtained in the Courts of Common Law (*f*).

We have before observed that the Statute of Westminster II, (13 Edw. I, c. 24) by leading to the introduction of actions of Trespass on the Case, laid the foundations of the English law of contract. Let us now endeavor to substantiate this statement by an examination of the 'bold and subtle devices', as Sir Frederick Pollock styles them (*g*), employed by the lawyers of the fifteenth and sixteenth centuries to circumvent the narrow formalism of the King's Court, and to throw open its doors to those who sought to enforce obligations arising upon agreements in general.

Trespass arising out of injuries by actual force is the earliest action for damages simpliciter known to English law; and it is worthy of notice in passing that the word 'trespass' (transgressio) (*h*) was employed as the generic term for civil injuries for a long period in our legal history. Bracton says that every felony is a trespass, although the converse would not be true (*i*). Britton makes the same connotation, and on the other hand uses the word 'torts' to denote certain minor criminal offences (*j*). The latter term

(*e*) See Pollock's 'Contracts in Early English Law', 6 Harv. Law Rev. 401; Langdell's 'Survey of Eq. Juris', 2 Harv. Law Rev. 243.

(*f*) See Story's Eq. Juris., chap. viii, sec. 446.

(*g*) 'Contracts in Early English Law', 6 Harv. Law Rev. 402.

(*h*) "Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property." Black. Com. iii, 208.

(*i*) De Leg. et Cons. Angl. f. 119b.

(*j*) Cf. Britton, i, 105 with i, 77. The Stat. West. II also uses 'trespass' in its ancient generic sense. See Coke's Inst. ii, 418.

however, became nomen generalissimum in the substantive law of Wrongs after Trespass took a definite and peculiar place in the law of Procedure.

Before the Statute of Westminster II for an injury done to property in possession, or to the person accompanied by actual contact, the proper remedy was the Writ of Trespass 'vi et armis, contra pacem'. Now it is obvious that many cases of wrongs would arise lacking the element of violence or force committed by the wrong-doer, and yet in every way as worthy of redress as complaints for which the 'breve de transgressione' would lie. What more natural, then, when the Edwardian statute authorized the framing of new writs analogous to those already in use, that writs of Trespass on the Case should make their appearance on the plea-rolls? And so careful are the Clerks in Chancery to observe the statutory injunction concerning analogy that while the new writs omit the allegation of 'force and arms' they scrupulously aver that the wrong was done 'contra pacem.' This last averment, by the way, did much to preserve the original theory of the action; for a trespass in strictness should be redressed by a fine paid to the Crown as well as by a private satisfaction to the person suing for the injury done him (*k*). It was not until 46 Edw. III that 'contra pacem' came to be dropped from declarations in actions on the Case (*l*).

There are instances of the 'action sur le Case' in the Year-Books of both Edward I and Edward II, but the evolution of Case for breach of a promise, or any undertaking, (assumpsit) occurred between the twenty-second and forty-second years of the reign of Edward III. In the former year (*m*) we find a plaintiff alleging that the defendant had undertaken to ferry plaintiff's horse over the Humber safely, but that he had overladen his boat so that the plaintiff's horse perished "à tort et à damages, &c." It was contended for defendant that upon such an undertaking the plaintiff's remedy was in Covenant; but it was decided that the defendant had committed a trespass in overloading his boat, and that Case would lie therefor. It is apparent at a glance that the theory upon which this case was decided was 'tort'

(*k*) Cf. Stephen's Com. iii. Bk. 5, c. vii.

(*l*) See Reeves Hist. Eng. Law, iii, c. 16.

(*m*) Y.B. Edward III, 22 Ass., pl. 41, fol. 94.

although there had been an express undertaking (assumpsit) by the defendant to carry safely the plaintiff's horse.

In another action on the Case in the same reign we find the conception of Tort in its generic scope laying hold of the minds of the medieval lawyers. Y.B. 42 Edw. III, 13, discloses a claim brought against an inn-keeper in which the plaintiff declared that he came to the defendant's inn, and left personal belongings in the chamber allotted to him there; and while he was absent from the room they were taken away, through, as plaintiff alleged, the neglect of the defendant and his servants, "per tort et enconter les peas", and "to the damage to the plaintiff, &c." Plaintiff got a writ according to his case, and the action was held good.

The above instances show that efforts at classification were coeval with the enlargement of legal remedies under the Statute of Westminster the Second. As would be expected the medieval lawyers saw the incongruity inhering in the fact that one and the same remedy lay for the enforcement of such divergent rights as those arising out of Wrongs and those dependent upon Agreement; but it is a matter of history that this desire of the pleaders for classification was not accomplished for a century after the statute referred to was passed.

Four years after the adjudication of the case last mentioned the books disclose a case in which counsel for the defendant objected to the form of the action (*n*). The plaintiff brought suit against the defendant, a farrier, for that being employed to shoe the plaintiff's horse "quare clavem fixit in pede equi sui in certo loco per quod proficium equi sui per longum tempus amissit," &c. It was objected that while the writ was in trespass, it was not laid 'vi et armis.' To this objection plaintiff answered that his writ was according to his case; and though it was further contended that if any trespass was done the writ should aver, 'vi et armis', or 'malitiose fixit', besides 'contra pacem', the plaintiff's action was maintained.

On the other hand, we have a case (*o*) wherein the plaintiff charged that the defendant took two bushels of corn from the plaintiff 'with force and arms', out of a certain quantity left with the defendant to be ground. Defendant objected that as plaintiff

(*n*) Y.B. 46 Edw. III, 19 pl.

(*o*) Y.B. 44 Edw. III, 20.

had alleged in his declaration that the defendant 'took toll', he might have had a general writ of 'cepit et asportavit' his corn, with force and arms; and that he was not entitled to a special writ on the case. This objection was sustained by the court. However, a special writ in a similar case a short time afterwards was held good (*p*).

From all these instances it will be seen that the procedure in Trespass on the Case was in a very immature and unsettled state in the reign of Edward III. It was not until the reign of Henry IV that the line of demarcation between trespass proper and trespass on the case was effectually established. In 12 Hen. IV, 3, in an action for stopping up a sewer, the distinction between the two remedies was drawn as follows: An averment of 'vi et armis' as to the stopping up of the sewer was good, because it was by force and so properly remediable in Trespass; on the other hand, the consequential damage, which was the gist of the action, was not recoverable in Trespass but required a special writ. The principle was then laid down that the causa causans might be forcible, as in the case then before the Court, and be declared 'vi et armis' even in an action upon the case; although that action is properly grounded upon the consequence of the causa causans.

The case last cited was based upon malfeasance, and although the gap between that and non-feasance in respect of a duty is ethically a narrow one, it was a long time before it was bridged in legal procedure. The lay mind sees little reason why a right arising from the doing of a wrongful act is enforceable, while one arising out of the breach of a promise to do a lawful act is not; but to the lawyer the distinction is wide enough to cut the province of civil remedies in twain. And so in the early history of Procedure the defendant was prone to present these troublesome questions to the plaintiff: "You say I am guilty of a trespass, what was my act of force? If I am liable upon a promise, where is your covenant?" But with the evolution of Assumpsit from the action on the Case came the enforcement of simple contracts in the Superior Courts of Common Law.

In the transition period between Case and Assumpsit we find, in 19 Henry VI, 49, pl. 5, the report of an action curiously

(*p*) Y.B. 44 Edw. III, 20.

instructive as to the conservative disinclination of the courts to depart from the delictual theory in respect of remedies generally. Plaintiff declared that the defendant 'undertook' in London to treat the plaintiff's horse for a certain malady ("assuma sur luy a cure: son cheval d'un certain maladie"), and administered his remedies so negligently that the horse died. The defendant pleaded that the 'undertaking' was made at Oxford, and not at London. Plaintiff argued that the plea was bad because the action was brought for the negligence, and not on the undertaking. To this it was answered that defendant was not alleged to be a farrier by profession, and if there was no undertaking he acted gratuitously, and the action could not be maintained. This view was sustained by the court,—one of the judges observing that there was no actionable negligence unless there was a promise to cure. In this view, so far from the promise or undertaking creating a substantive right of action, it is merely an element of the remedy in Tort. It is worthy of remark here, however, that in *Coggs* v. *Bernard* (*q*) Powell, J., says that in the instance last cited the action was held to lie upon the undertaking; and that Holt, C. J., expresses the view that in such a case the confidence reposed by the plaintiff in the defendant's promise gives rise to a trust, but does not constitute a contract (*r*).

It is apparent, then, that the courts were in nowise departing from their former practice of taking cognizance of promises under seal only, when they adjudged that a recovery might be had for misfeasance in the execution of a parol undertaking. They looked upon negligence in the fulfilment of a trust or duty as the real gist of the action, and not the breach of the undertaking. But the time came, as it was bound to come in the development of English commercial life, when it began to be put forward that the neglect to perform a promise was something that the courts ought to take cognizance of as giving rise to a substantive right to relief, detached from considerations of any remedy in tort.

For a considerable time the judges of the Common Law courts withstood the demand for enlarging the domain of Procedure, and suitors were driven into Chancery to obtain their rights. The Chancellor proving complacent to the suitors, naturally enough the

(*q*) 1 Sm. Lead. Cas. (10th ed.) at p. 169.

(*r*) Ibid. at p. 181.

Common Law judges viewed the consequent loss of their business and importance with dismay; and so in 14 Hen. VI, 18, we find the Court of King's Bench entertaining an action for mere non-feasance in respect of an undertaking, which must be regarded as the laying of the corner-stone in the edifice of assumpsit as a remedy ex contractu. Action on the Case was brought upon an undertaking to procure certain releases, which defendant had neglected to perform. Plaintiff was met by the old objection that the gist of the action being the non-performance of an agreement, his remedy was in Covenant. This objection was now for the first time overruled by the Court, Paston, C.J., and Juyn, J. instancing the analogous cases of a carpenter or of a surgeon, who if they undertook to perform certain acts or services, and failed to perform them, would be liable on their parol undertaking (assumpsit) in an action on the case, and the plaintiff would not be driven to an action of covenant. This instance is supplemented by an important case in 22 Hen. VI, 44, where it was laid down that if land were sold, the vendor might have an action of debt for the money, and the vendee an action on the case, if he was not infeoffed of the land.

Undoubtedly the last-mentioned cases bring us some distance on the road to a general theory of contract in the Common Law; but it needs no great amount of care to discern that the element of consent up to this stage plays no such paramount part in the development of our system as it did in the Roman law. For instance, if we contrast one of the consensual contracts of the Roman law, e.g. locatio conductio, with its equivalent in the Common Law, letting and hiring, we find that in the former case the contract is obligatory as soon as the parties have agreed on its terms, although nothing may have been paid or done on either side, nor the contract reduced to writing; while, in the latter case, the validity of the contract does not depend upon the meeting of the minds of the parties in a common purpose, but on the consideration passing between them in respect of the subject of their agreement. The difference between the two systems is fundamental and precise: In the one case the obligation arises simultaneously with the 'aggregatio mentium'; in the other the obligation does not attach until the passing of the consideration (s).

(s) See Maine's Ancient Law, 14 ed., p. 333; and the arguments of counsel and opinion of Kent, C.J., in *Thorne* v. *Deas*; 4 Johns. 84.

As is shown in Pollock & Maitland's "History of English Law" (*t*), the English inherited the doctrine of quid pro quo from their German ancestors, whose courts would not uphold gratuitous gifts, or enforce gratuitous promises. Professor Ames (*u*) explains that the word 'contract' is used in a narrow sense throughout the Year Books. In these ancient records of case-law the word is applied only to transactions where the duty arises from the receipt of a quid pro quo—the formal or specialty contract being designated a grant, an obligation or a covenant. It is also to be remembered that the Chancellor, so far as the books disclose, never attempted to give relief upon gratuitous parol promises. The rule governing the Chancery in such matters was: "Upon nudum pactum there ought to be no more help in Chancery than there is at Common Law" (*v*). Furthermore, it must not be overlooked that the English doctrine of Consideration had its foundation in ethics rather than in the consent of the parties. The Chancellors who first gave relief in respect of the breach of parol contracts were apparently influenced by the simple desire to prevent a man from intentionally misleading another to his detriment, little attention being paid to the specific enforcement of the promise or undertaking (*w*). It is, therefore, obvious that Consideration had its origin in tort, in the deceit of one of the parties to an agreement. Hence arose the modification of Trespass on the Case known as 'Deceit', which originally applied whenever the plaintiff had been induced to part with his goods or chattels upon the parol promise of the defendant. Subsequently this particular form of action on the case was extended to all instances where the plaintiff suffered detriment by acting on the promise of the defendant. In the early part of last century Deceit lost its identity in Procedure, becoming known as a special action of Assumpsit.

The transmutation of the originally tortious remedy of Assumpsit into one peculiar to the enforcement of parol contracts

(*t*) At pp. 213, 214.

(*u*) 8 Harv. Law Rev. at p. 253.

(*v*) Cary. 7; and see Ames' "Parol contracts prior to Assumpsit," 8 Harv. Law Rev. 255. Lord Eldon's enforcement of a trust created without consideration, in *Ex parte Pye*, 18 Ves. 140, is regarded as the first instance in the books of any modification of the rule above stated.

(*w*) We adhere to this view notwithstanding Judge Story's reliance (Eq. Juris. Vol 1. ch. xviii, sec. 716) upon 8th Edw. IV 4 (b) as a recognition of Chancery jurisdiction to decree specific performance even at that early date.

went steadily forward after the decisions we have referred to in the fifteenth century. For a long time, however, it was contended that inasmuch as Assumpsit implied fraud or deceit, it should be confined to cases where the demand was for damages, and not be substituted for Debt, where it would have the effect of preventing the defendant from 'waging his law' (*x*). Now Indebitatus Assumpsit had two advantages over Debt, the first being that the defendant could not 'wage his law', and so preclude the plaintiff from submitting his case to the jury; the second being that the niceties of pleading in Debt were overcome by the plaintiff being allowed to state merely the general nature of his action. But the question was settled once for all by *Slade's Case* (*y*) in the latter part of Queen Elizabeth's reign. That was an action of Assumpsit for the price of standing grain, bought by defendant but for which he refused to pay, with intent, as was alleged, to defraud plaintiff. It was objected that Debt only lay in such a matter, and if the plaintiff had an action on the Case it would take away the defendant's benefit of wager of law. In this case the Common Pleas and Queen's Bench were at variance, and "for the the honour of the law and for the quiet of the subject, in the appeasing of such diversity of opinions" the case was twice argued before all the "Justices of England and Barons of the Exchequer", the last time by Sir Edward Coke, for the plaintiff, and Francis Bacon, for the defendant, and it was ultimately resolved in favour of the plaintiff; the result being that proof by the plaintiff of a simple contract debt is sufficient to support an action thereon, although there is no express promise by the defendant to pay the same.

Thus was the notion of the 'implied promise' introduced into English law, and the native theory of Contract, if we may be said to have any theory of Contract as distinct from mere rules of Procedure, advanced to its present stage of development—that is to say, when stripped of the adventitious glosses of some latter-day expositors.

At the beginning of this paper we intimated that the attempt to ingraft the consensual theory of the Civil Law upon the English law of Contract was a mistake, and we look upon the instances and authorities we have collated from the books as

(*x*) See Gilbert on Debt, p. 423.

(*y*) 4 Rep. 91a and 94b.

supporting that view to a satisfactory extent. Instead of likeness we see only disparity between a theory which treats the obligation as arising wholly upon, and simultaneously with, the agreement of the parties to a contract, and one which, in face of the fact that the minds of the parties may have previously met, postpones the obligation until the passing of Consideration. To any understanding free from the illusions of the theory-monger the divergence must be abundantly clear.

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

ESTATE PUR AUTRE VIE—DEVISE OF ESTATE PUR AUTRE VIE WITHOUT WORDS OF LIMITATION—INVOLUTION OF ESTATE PUR AUTRE VIE.

In re Inman, Inman v. *Inman* (1903) 1 Ch. 241. The learning relating to the devolution of estates pur autre vie is here discussed and is perhaps not likely to be of much practical consequence in Ontario since the passing of the 2 Ed. 7, c. 1, s. 3, under which all such estates now devolve on the personal representative. In this case a testator devised certain estates pur autre vie limited to himself, "his heirs and assigns," to trustees, "their heirs and assigns" for the use of his grandson, but without any words of limitation but describing the property as freehold hereditaments. The grandson died intestate and the question was whether the estate devolved on his heir at law as special occupant, or passed to his administrator under the Wills Act (1837) s. 6. Eady, J., after reviewing the law on the subject, came to the conclusion that although the whole estate had passed to the grandson, yet there was nothing in the will to entitle his heir to claim as special occupant, and it therefore devolved on his administrator, and that as the estate was equitable the heir was not entitled as general occupant in the interval between the death of the grandson and the appointment of the administrator, because until then the legal title was vested in the trustees.

COMPANY—WINDING UP—COMPROMISE BY LIQUIDATOR—POWER TO COMPROMISE ACTION—EXTRAORDINARY RESOLUTION SANCTIONING COMPROMISE—COMPANIES ACT, 1862 (25 & 26 VICT., C. 89) S. 160—(R.S.C. C. 129, S 61).

In *Cycle Makers' C. S. Co.* v. *Sims*, (1903) 1 K.B. 477, an action was brought by the liquidator of a company in voluntarily liquidation to recover a debt of £50 due to the company. The debtor was impecunious and the liquidator compromised the action for £14. Subsequently the company was ordered to be compulsorily wound up, and another liquidator was appointed and he brought the present action, claiming that the compromise was invalid because it had not been sanctioned by a resolution of the company as required by s. 160 of the Companies Act, 1862, and the Judge of the County Court held that the plaintiffs were entitled to judgment for £36. On appeal, however, the Divisional Court (Lord Alverstone, C.J., and Wills, and Channell, JJ.) reversed his decision, holding that the sanction of a resolution was not essential to the validity of the compromise which had been acted on for two years. The Divisional Court, moreover, pointed out that so long as the de facto compromise stood, a second action was not maintainable for the same debt, and that in any case it would be necessary first to set aside the compromise before a second action could be brought. According to the procedure in Ontario it would seem that the validity of the compromise might be attacked in the action in which it was made.

BILL OF EXCHANGE—PROMISSORY NOTE—JOINT AND SEVERAL—PROVISO AS TO GIVING TIME—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61) S. 83.

Kirkwood v. *Carroll*, (1903) 1 K.B. 531, was an action brought to recover from the defendants £125 as a makers of joint and several promissory note. The note in question contained a provision: "No time given to, or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party." The document was duly stamped with the revenue stamp payable on a promissory note, but the defendants contended that by reason of the above-mentioned stipulation the document was not a promissory note and was invalid for want of being duly stamped. Wright J., on the authority of *Kirkwood* v. *Smith* (1896) 1 Q.B. 582 (noted ante vol. 32, p. 504) held that the document was

not a promissory note, but the Court of Appeal (Lord Halisbury, L.C., and Lord Alverstone, C.J., and Jeune, P.P.D.) came to the conclusion that *Kirkwood* v. *Smith* was wrongly decided and reversed the decision of Wright, J. The Lord Chancellor expresses doubt whether the clause in question had any operation whatever.

PRACTICE — CHARGING ORDER—ENFORCING CHARGING ORDER BY SALE—JURISDICTION—LEAVE FOR SERVICE OUT OF JURISDICTION—ACTION TO ENFORCE CHARGING ORDER—JUDGMENT ACT, 1838 (1 & 2 VICT., C. 110) SS. 14, 15—R.S.O. C. 324, SS. 21, 22) RULE 64 (1) E.—(ONT. RULE 161 (E).)

In *Kolchmann* v. *Menrice*, (1903) 1 K.B. 534, the plaintiff had obtained a charging order against certain shares owned by the defendant in a joint stock company, and he thereupon applied in the same suit for an order authorizing the sale of the shares and the application of the proceeds in payment of his judgment debt, this being refused by Walton, J., on the authority of *Leggott* v. *Western*, 12 Q.B.D. 287; he then commenced an action for the same purpose and applied for leave to serve the writ out of the jurisdiction, and this was refused by Joyce, J. An appeal was brought from both orders, and the appeals were argued together, and the Court of Appeal (Williams and Stirling, L.JJ.) dismissed both appeals, holding that *Leggott* v. *Western* was rightly decided and that the cause of action was not within Rule 64 (Ont. Rule 161) and therefore there was no jurisdiction to authorize service of the writ out of the jurisdiction.

PRACTICE — ACTION BY TRUSTEE—SET OFF OF UNLIQUIDATED DAMAGES DUE BY CESTUI QUE TRUST—EQUITABLE DEFENCE—JUDICATURE ACT, 1873 (36 & 37 VICT., C. 66, S. 24, SUB.SS. 2, 3—RULE 199—(ONT. JUD. ACT, S. 75 (6))—(ONT. RULE 251).

Bankes v. *Jarvis*, (1903) 1 K.B. 549, was an action to recover a debt alleged to be due by the defendant to the plaintiff as trustee. The defendant pleaded by way of defence a claim for unliquidated damages against the plaintiffs' cestui que trust. The action was brought in the County Court, and the County Court judge held the claim set up in the defence could not be set off against the plaintiffs' claim, but the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) held that he was wrong, and that the claim was properly the subject of a set off by way of equitable defence under the Jud. Act, s. 24, sub-ss. 2, 3, and Rule 199, (Ont. Jud. Act, 557 (6), Ont. Rule, 251.

PRACTICE—APPEAL—ORDER WHETHER FINAL OR INTERLOCUTORY—PRELIMINARY QUESTION—DISMISSAL OF ACTION.

In *Bozon* v. *Altrincham* (1903), 1 K.B. 547, the Court of Appeal (Lord Halsbury, L.C., Lord Alverstone, C.J., and Jeune, P.P.D.) holds that an order made on the hearing of a preliminary question of liability whereby the action was dismissed was a final and not a mere interlocutory order.

MORTGAGOR AND MORTGAGEE—MONEY CHARGED ON PROCEEDS OF REAL AND PERSONAL ESTATE—ARREARS OF INTEREST RECOVERABLE—MORTGAGE OF REVERSIONARY INTEREST IN REALTY AND PERSONALTY—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 W. 4, C. 27), S. 42—(R.S.O. C. 133, S. 17).

In re Lloyd, *Lloyd* v. *Lloyd*, (1903) 1 Ch. 385, the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) reversed Farwell, J., upon a question arising on the Real Property Limitation Act, 1833, s. 42 (R.S.O. c. 133, s. 17). The facts were as follows: A testator had died leaving his real and personal property to trustees upon trust for his wife for her life, and after her death to sell, and divide the proceeds among his children. In 1867 Francis Lloyd, one of the children, mortgaged his reversionary interest to one Allen, giving him the usual covenant for payment of principal and interest. In 1872 a suit having been instituted for the administration of the testator's estate, the real and personal estate were sold and the proceeds paid into Court, the income being paid to the widow until her death in 1890. The representatives of Francis Lloyd now applied for payment out of his share, less the principal money, and six years' interest due to the mortgagee. The representatives of the mortgagee, on the other hand, claimed the full arrears of interest from the date of the mortgage in 1867. Farwell, J., held that the mortgagee under s. 42 (R.S.O. c. 133, s. 17) was only entitled to six years' arrears of interest, but the Court of Appeal held that as the mortgagee was not seeking to recover his arrears by "distress or action" s. 42 did not apply, and that it was really substantially a case of the mortgagor seeking to redeem, and as such he was bound to pay the arrears. In coming to this conclusion, a contrary decision of Bacon, V.C., *Re Slater*, 11 Ch. D. 227, was overruled.

EASEMENT—ANCIENT LIGHT—ENJOYMENT BY "CONSENT OR AGREEMENT"—"WINDOWS OVERLOOKING"—SKYLIGHT—PRESCRIPTION ACT, 1832 (2 & 3 W. 4, C. 71) S. 3—(R.S.O. C. 133, S. 35).

Easton v. *Isted*, (1903) 1 Ch. 405, was an action to restrain interference with an alleged easement of light. In 1873 the

plaintiff erected on property adjoining the defendant's a conservatory with a glazed roof sloping to the vertical side of the conservatory which stood on the boundary line between the plaintiff's and defendant's properties. This vertical side was glazed, and the plaintiff at the time of the erection agreed in writing to pay the defendant 1 s. a year as "acknowledgement for allowing the windows in my conservatory adjoining to open on to and overlook" the defendant's property. The annual payments under this agreement were made down to 1888, when the conservatory was converted into a passage and the glazed side was bricked up, leaving a glazed roof for the passage. In 1901 the defendant built a wall on his land which obstructed the access of light to the roof of the passage, and it was to restrain this alleged interference with the plaintiff's light that the action was brought, and the question was whether the skylight was a window "overlooking" the defendant's property within the meaning of the agreement of 1873. Both Joyce, J., and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) were agreed that it was, and therefore that the light had been enjoyed by "consent or agreement" up to 1888, and consequently the plaintiff had acquired no prescriptive right to the easement he claimed.

PRACTICE—ACTION FOR INFRINGEMENT OF SEVERAL PATENTS—SEPARATE CAUSES OF ACTION COMBINED—CONFINING CLAIM TO ONE OR MORE CAUSES—PLEADING—EMBARRASSMENT—APPEAL, FURTHER EVIDENCE ON—RULES 188, 195, 196, 223—(ONT. RULES 232, 237, 248.)

In *Saccharin Corporation* v. *Wild*, (1903) 1 Ch. 410, the plaintiff company sued to recover damages for the alleged infringement of twenty-three different patents of inventions. In the particulars of the plaintiffs' claim the plaintiffs stated generally that the defendant had infringed "all" the patents, but alleged only two specific cases of infringement. The defendant applied for further and better particulars, or that the action might be limited to such of the patents as might seem just, and Kekewich, J., ordered the application to stand over until the statement of defence had been delivered. On Appeal, however, the Court of Appeal (Collins, M.R., and Stirling, and Cozens-Hardy, L.JJ.) held that the defendant's application ought to succeed, as it was unfair to the defendant to embrace so many causes of action in one, and the plaintiffs were ordered to confine the case to such three of the

patents as they might elect, and an order was made accordingly under Rule 196, (Ont. Rule 296). On the hearing of the appeal the Court allowed further evidence to be adduced by the defendant on the merits, by consent.

VENDOR AND PURCHASER—EQUITABLE MORTGAGE—NOTICE—FRAUD OF VENDOR'S SOLICITOR—FORGED RECEIPT FOR INCUMBRANCE OF WHICH PURCHASER HAD NOTICE—PRIORITY—LEGAL ESTATE.

In *Jared* v. *Clements*, (1903) 1 Ch. 428, the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.) have affirmed the judgment of Byrne, J. (1902) 2 Ch. 399 (noted ante vol. 38, p. 752). The purchaser of land before completion had notice of the existence of an equitable mortgage: relying on the good faith of the vendor's solicitor, he was led to believe by the production of a forged receipt that it had been duly paid off, and completed his purchase, obtaining a conveyance of the legal estate and possession of the title deeds. It afterwards turned out that the equitable mortgagee had not, in fact, been paid off, and this action was brought to enforce his mortgage as against the purchaser, and Byrne, J., held he was entitled to priority, and the Court of Appeal affirmed his decision as Romer, L.J., puts it, the purchaser "knew of the existence of the equitable interest and has not got it in, and therefore he takes the property subject to that interest"; and the possession of the legal estate affords no protection to such a claim.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—MISTAKE OF PURCHASER—PURCHASE OF WRONG LOT—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS, s. 4—(R.S.O. c. 338, s. 5)—AUCTIONEER—CONTRACT—WRONG DATE.

Van Praagh v. *Everidge*, (1903) 1 Ch. 434. This was the case in which Kekewich, J., held (1902) 2 Ch. 266 (noted ante vol. 38, p. 714) that a purchaser who had attended at an auction sale and by mistake purchased a different lot from the one he intended to buy, was bound by his contract, and compellable specifically to perform it. On appeal from his decision, a point which Kekewich, J., considered immaterial, proved sufficient in the eyes of the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.) to warrant the reversal of his judgment, and that point was this: The printed particulars and conditions of sale and annexed form of contract had been prepared for a sale on "October 17, 1901"; the sale on that date had been postponed to November 18, when

the sale actually took place, but by inadvertence the original date, although altered in the particulars, remained in the conditions and form of contract. The contract had been signed by the auctioneer on behalf of the purchaser, who had refused to sign it. Under these circumstances the Court of Appeal held that there was no contract because the auctioneer had no authority to execute a contract of a sale under date of 17th October, the date being material because it regulated the time of completion and the erroneous date rendered the contract impossible of performance.

WILL—CONSTRUCTION—GIFT OF RESIDUE TO INDIVIDUALS IN SHARES—GIFT OF INCOME FOR MAINTENANCE OF ALL—VESTED OR CONTINGENT.

In re Gossling, Gossling v. *Elcock*, (1903) 1 Ch. 448. The decision of Eady, J., (1902) 1 Ch. 945 (noted ante vol. 38, p. 672) was reversed by the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.). The case turns on the construction of a will whereby a gift was made of residuary estate in equal shares to the testator's two children on their severally attaining 21, the income "during their respective minorities" to be applied towards their maintenance. Eady, J., thought that as the income was to be applied for the maintenance of both legatees that prevented the gift of the shares from vesting until the legatees attained 21. The Court of Appeal, however, ruled that upon the proper construction of the will, the income of each share was to be separately applied for the maintenance of the child entitled to that share, and therefore, according to the well settled rule in such cases, the legacies were vested and not contingent.

CONTRACT—MISTAKE—SALE OF LIFE POLICY—DEATH OF ASSURED BEFORE SALE OF POLICY—RESCISSION AFTER COMPLETION.

Scott v. *Coulson*, (1903) 1 Ch. 453, was a very simple case. The plaintiff being entitled to a policy of insurance on the life of a Mr. Death in ignorance that Death was dead, contracted to sell the policy to the defendant, who was also ignorant of Death's death. The contract was completed by the assignment of the policy on the life of Death before the death of Death was known to either party. Upon that important fact being discovered this action was instituted to rescind the contract on the ground of mutual mistake as to a material fact, and Kekewich, J., gave judgment in favour of the plaintiff.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Falconbridge, C.J.K.B.] [March 14.

HOLDEN *v.* TOWNSHIP OF YARMOUTH.

Municipal corporation—Railway crossings—Liability to repair—Railway companies.

By s. 611 of Municipal Act. R.S.O., c. 223, first introduced into the Municipal Act in 1896, no liabiliiy is now imposed on a municipal corporation by reason of want of repair of railway crossings through there being too high a grade and the omission to fence, the obligation therefor being under s. 186 of the Railway Act, 51 Vict., c. 29 (D) imposed on the railway company.

Where, therefore, under s. 186 the approach to a railway crossing must not be more than one foot rise or fall for every twenty feet of the horizontal length of such approach, unless a good and sufficient fence shall be made by the railway company on each side thereof, while the grade line was four feet without any fences, no liability is therefor imposed on the municipality.

Aylesworth, K.C., for municipality. *Riddell*, K.C., for plaintiff.

ELECTION CASES.

COURT OF APPEAL.

Maclennan, J.A., Falconbridge, C.J.K.B.] [March 18.

IN RE EAST MIDDLESEX PROVINCIAL ELECTION.

ROSE *v.* RUTLEDGE.

Parliamentary elections—Corrupt practices—Agency—Delegates to nominating convention—Authorization—Treating—Meetings of electors—Treating by "candidate"—Previous habit of treating—Rebuttal of presumption—Absence of corrupt intent.

The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and in acknowledging and accepting the nomination he said: "There are three

things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you."

Held, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election.

The respondent requested M., who was at the convention as a delegate, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would come over, he would "leave a drink for them there." This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it.

Held, that a charge of treating a meeting assembled to promote the election, under s. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under s. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men.

Upon a charge of treating a committee meeting held at a hotel, the evidence was that McC., one of the delegates to the convention, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made.

Held, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence.

The respondent admitted that he had treated on the day of the convention, after the convention was over, several times at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election.

Held, that under sub-s. 2 of s. 162 (added by 62 Vict. (2) c. 5, s. 7 (O.)), treating generally or extensively or miscellaneously is only prima facie a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected or for being elected or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of sub-s. 2. There may still be innocent treating, though if it be general or extensive or miscellaneous the onus of shewing that it is innocent

is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent.

Held, also, that although the respondent did not become a "candidate" within the meaning of s. 2, sub-s. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected.

Youghal Election, 3 Ir. R.C.L. 53, 1 O'M. & H. 291, followed.

It was shewn that the respondent and his chief agent had on several occasions in the course of the canvas treated in bars. The respondent was a physician with a large country practice and constantly on the road. He was also a horse fancier, and although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on 1st February until the writ for the election was ssued on the 22nd April.

Held, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided.

West Wellington case, 1 E.C. 16, distinguished.

W. Cassels, K.C., *E. Meredith*, K.C., *W. D. McPherson*, K.C., and *P. H. Bartlett*, for petitioner. *Aylesworth*, K.C., and *McEvoy*, for respondents.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [March 4.

HUNSBERRY *v.* KRATZ.

Attachment of interest of residuary legatee—Under a will.

A primary creditor in a Division Court by garnishee summons served on the executors attached the interest of a residuary legatee in the estate of a testator who had died within a year of the attachment. A receiver was subsequently in a High Court action appointed to receive his interest. The Division Court Judge gave judgment against the garnishees, and an application for a new trial by the garnishees on the ground that such interest was not attachable was dismissed. On an appeal to a Divisional Court it was:

Held, that the residuary devisees interest was not such a debt as could be attached and the garnishee was discharged.

Collier, K.C., for the appeal. *Keyes*, contra.

Divisional Court.]

DAVIDSON *v.* GRAND TRUNK R. W. Co. [March 4.

Railway Company—Defective fencing—Cattle getting on to highway and then on to track—Negligence.

The plaintiff was the owner of a field, bounded on the one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed and going over the land of a private owner, which was not fenced off from the switch, and then along a lane she got on to the highway and then proceeding along the highway she got to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train.

Held, that the defendants were liable therefore.

James v. *Grand Trunk R. W. Co.* (1901), 31 S.C.R. 420, distinguished.

D. L. McCarthy, for the railway company. *T. E. Godson*, contra.

Trial—Osler, J.A.] KENNAN *v.* TURNER. [March 19.

Assessment—Tax sale—Invalidity—Onus—Proof of taxes in arrear—Omission of clerk to furnish treasurer with assessor's return—Irregularity—Action not commenced within three years—Pleading—Amendment.

In an action brought April 23, 1902, for a declaration that a tax sale and conveyance under which the defendants claimed title to and were in possession of a certain town lot, were illegal and void as against the plaintiffs, the rightful owners, the plaintiffs proved a sufficient paper title. It was also proved that one of the defendants was in possession and had erected a valuable building, claiming title under a sale by the town treasurer, made October 7, 1898, for arrears of taxes for 1895, 1896 and 1897, and a deed made in pursuance thereof on Nov. 15, 1899, registered Dec. 12, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance, duly registered, to the defendant in possession.

Held, that the onus of proof of the invalidity of the tax title rested on the plaintiffs.

Taxes for the whole period of three years next preceding the 1st Jan., 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by s. 152 of the Assessment Act, R.S.O. 1897, c. 224, liable to be sold in 1898 for such arrears.

The proceedings leading up to the sale were substantially regular with one exception, the omission of the clerk of the municipality to furnish the

treasurer, as he is required to do, by the last clause of s. 153, with a true copy of the list furnished by the latter under s. 152, with the assessor's return, certified to by the clerk under the seal of the corporation.

Quære, whether this requirement of s. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation.

Love v. *Webster*, 26 O.R. 453, distinguished.

Held, however, that as in this case the omission worked no injury to the plaintiffs who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and as the action was brought more than three years after the sale and more than two years after the deed, the defendants should have leave to plead in answer to it, ss. 208 and 209 of the Act, and thereupon the action should be dismissed.

J. E. Irving, for plaintiffs. *W. H. Hearst*, for defendants.

Falconbridge, C.J.K.B.] [March 20.

REX EX REL. ZIMMERMAN *v.* STEELE.

Municipal elections—County councillor—Disqualification—Membership in school board "for which rates are levied"—Resignation between nomination and polling—Relator's claim to seat—Notice to electors.

By 2 Edw. VII., c. 29, s. 5 (O), s. 80 of the Municipal Act, R.S.O. 1897, c. 223, is amended so as to provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation. The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organized, and paid over the rates levied on the section to the board of an adjoining section which provided accommodation for the school children living within the first-named section.

Held, a school board for which rates are levied, within the meaning of the amendment.

Held, also, following *Reg. ex rel. Rollo* v. *Beard*, 3 P.R. 357, and *Reg. ex rel. Adamson* v. *Boyd*, 4 P.R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling.

No objection to the respondent's qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths warning the electors not to vote for the respondent.

Held, not sufficient to entitle the relator to the seat.

German, K.C., for relator. *Raymond*, for respondent.

Falconbridge, C.J.K.B.] [March 21.

REX EX REL. MCLEOD *v.* BATHURST.

Municipal elections—Irregularity—Quo warranto application—Status of relator—Voting for respondent—Disclaimer.

The relator attacked the election of the respondents as county councillors for non-compliance with certain statutory formalities.

Held, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was nihil ad rem.

Hellmuth, K.C., for relator. *D. B. Maclennan*, K.C., for respondents.

Boyd, C.] [March 23.

ATTORNEY-GENERAL *v.* TORONTO GENERAL TRUSTS CORPORATION.

Succession Duties' Act—Litigation costs.

In litigation under the Succession Duties' Act express power is given to the High Court to deal with the costs thereof, and where therefore an estate had paid, or were ready to pay, all the duties which could properly be claimed against it, it is entitled to the costs of opposing a claim for higher duties; but only one set of costs was allowed.

Middleton, for plaintiff. *Knox*, for Trust Company. *Falconbridge*, for adult beneficiaries.

Britton, J.] [March 23.

BRADBURN *v.* EDINBURGH LIFE ASSURANCE CO.

Interest—Mortgage running over five years—Payment—Tender of amount to agents—Interest ceasing.

In an action to compel a mortgagee in Great Britain to accept the principal money and interest due on a ten year mortgage which had run for six and one-half years under the provision of R.S.C. (1886), c. 127, s. 7, in which it was contended that that section was ultra vires of the Dominion Parliament and that the tender was not made to the proper agents.

Held, 1. That section is intra vires of the Dominion Parliament and it is not restricted to its application to such mortgages as are mentioned in s. 3 of the Act and applies to every mortgage on real estate executed after July 1, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage."

2. The words of s. 25 of c. 205 R.S.O. 1897 are wide enough to apply to mortgages executed prior to the passing of that Act.

3. Defendants' Imperial Act of incorporation gives them the right to lend money in Canada the same as an individual could do, but gives them no higher or other rights.

4. The loan being made, the property situated, and the mortgage giving the option of payment in Canada, the law of Canada must govern in relation to the contract and its incidents.

5. The agency of the parties to whom the tender was made was established, and the tender was sufficient subject to the non-payment of the bank draft.

And judgment was given that no further interest should be chargeable, payable or recoverable.

Poussette, K.C., for plaintiff. *F. W. Kingstone* and *D. L. Symons*, for defendants. *Cartwright*, K.C., Dep. Atty.-Genl., for the Province of Ontario.

The Minister of Justice of Canada was notified, but was not represented

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Master in Chambers.] HALLIDAY *v.* RUTHERFORD. [March 27.

Costs—County Court—Order for, without right of set-off—Right to make—County Court—Equitable jurisdiction of.

Under 59 Vict. c. 19, s. 3 (O), the equitable jurisdiction of the County Court, which had been taken away by the Law Reform Act of 1868, was restored to that Court, so that it has equitable jurisdiction where the subject matter involved does not exceed $200.

Where, therefore, an action, to set aside an alleged fraudulent conveyance of certain lands to the defendant, and where a lis pendens had been registered, which by a consent order was vacated on payment of $300 into Court; the creditors to file their claims, whereupon claims were filed to over $200, adjudicated upon by the Master, and fixed at $189.47, the amount found to be due to the plaintiff being $96.20, for which judgment was given with costs on the lower scale, the Master subsequently giving a certificate that his ruling was that the plaintiff was entitled to costs on the County Court scale, without any right of set-off,

Held, that the Master's order as to costs should not be interfered with.

John Macgregor, for defendant. *F. C. Cooke*, for plaintiff.

Master in Chambers.] [March 28.

BANK OF COMMERCE *v.* TENNANT.

Writ of summons—Renewal of—Grounds for—Sufficiency of.

An ex parte order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence will not be set aside on its being shewn on a motion to set aside such order that the defendant had never changed his place of residence, and that it could readily be ascertained from the directory, the local master, who made the ex parte

order, having been satisfied as to the efforts made to effect such service, and nothing having been withheld from him.

Howland v. *Dominion Bank* (1892), 15 P.R. 56, and *Mair* v. *Cameron* (1899), 18 P.R. 484, distinguished.

D. L. McCarthy, for plaintiffs. *Tennant*, for defendant.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [March 28.

CROMPTON & KNOWLES LOOM WORKS *v.* HOFFMAN.

Warranty — Manufacture of machine—Defects—Making good—Loss of profits—Allowance on price.

Plaintiff agreed to manufacture a goring loom fit for certain special work required by the defendants and deliver it by a certain time. The machine was not delivered until after the time fixed, and when delivered did not have certain fittings which were necessary for its proper working, and there were certain defects in it which the defendants after applying to the company to make good had to rectify themselves. In an action for the price of the loom,

Held, that the defendants should be allowed the sum paid in supplying the missing portions of the machine and for the services of an expert to put it in working order; that, notwithstanding that the property in the machine remained in the plaintiff company until paid for, the company never had supplied a loom properly constructed to do the work required of it and to do which the company well knew the machine had been ordered; that there was a warranty that it should be fit for that purpose; that the defendants were prevented from earning the profit they would have earned if the loom had been complete, and that under the circumstances in this case the company was liable to make such profit good.

Judgment of MACMAHON, J., reserved in part.

G. G. McPherson, K.C., for the appeal. *E. Sydney Smith*, K.C., contra.

Master in Chambers.] [April 6.

REX EX REL. O'DONNELL *v.* BROOMFIELD.

Quo warranto—County councillor—School trustee on board for which rates levied—Seat claimed—Objection before election—Resignation before taking office—Disqualification—New election.

In a quo warranto proceeding in which it was sought to unseat the respondent as a county councillor because he was a member of a school board for which rates were levied and in which the seat was claimed for the relator. It was,

Held, 1. The relator was not entitled to the seat as he had not objected to the disqualification of the respondent at the nomination or given any

notice on the election day to the electors that they were throwing away their votes on account of the respondent's disqualification.

2. Sec. 76 of The Municipal Act does not apply to county councillosr.

3. At the time of the respondent's election he was a member of a school board for which rates were levied and if he were then disqualified, his resignation after his election and before taking his seat would not remove his disqualification. *Regina ex rel. Roilo* v. *Beard* (1865), 3 P.R. 357, followed.

4. The words "for which rates are levied" used in 2 Edw. 7th, c. 29, sec. 5 (O.) disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates are levied whether levied by the municipal corporation for which he was elected or by any other.

5. The saving clause in s. 5 refers to the election of the member of the council of any municipal corporation and not to the election of a school trustee.

6. At the time of his election as county councillor the respondent was disqualified and a new election was ordered.

McGillvray, K.C., for relator. *Farewell*, K.C., for respondent.

Master in Chambers.] [April 6.

REX EX REL. ROBINSON *v.* MCCARTY.

Municipal elections—Township councillor—Disqualification—Membership in school board "for which rates are levied"—Resignation—Non-acceptance—Designation of board—Relator's claim to seat—Notice to electors—Costs—Status of relator—Discretion.

Held, that the respondent being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been accepted by his co-trustees, was by 2 Edw. VII., c. 29, s. 5 O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a "a board of public school trustees of union section," etc., or a "public school board." The respondent's qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat.

Rex ex rel. Steele v. *Zimmerman* (not reported) followed.

It appearing to be the fact, though there was no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while the election was set aside and a new election was ordered, no costs were given to either party.

Mabee, K.C., for relator. *Aylesworth*, K.C., for respondent.

Master in Chambers.] SMITH *v.* MCDERMOTT. [April 9.

Judgment—Action for equitable execution—Right to attack judgment—Absence of fraud or collusion.

In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances, under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon.

A motion that a witness, who, on examination for discovery, had refused to answer questions relating to such circumstances should be compelled to attend and be examined at his own expense, was therefore refused.

Gwynne, for defendant Lee. *W. N. Ferguson*, for plaintiffs.

MacMahon, J.] BANK OF MONTREAL *v.* LINGHAM. [April 14.

Statute of Limitations—Simple contract debt—Conversion into specialty debt—Evidence of.

Default having been made in the payment of two promissory notes payable to a bank, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank, as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank, and also to his father, and that the father had certain lands as security therefor, the father thereby conveyed the same to the trustee as security in the first place for his indebtedness, then for that of the bank, power being given to the trustee to sell the said lands on one month's default in payment, and on notice in writing by the trustee of his intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay same. In 1893 written notice having been given by the trustee of his intention to sell, a deed of release, of all his interest in the said lands was given by the defendant to the bank, the deed reciting that it was made to save expense of a sale.

Held, that neither the trust deed, nor the deed of release, converted the debt into a specialty debt, so that the defendant could validly set up the statute of limitations as a bar to an action brought in 1902.

W. Cassels, K.C., and *A. W. Anglin*, for plaintiffs. *Ritchie*, K.C., and *Northrup*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Ritchie, J.] REX *v.* BOWERS. [Feb. 14.

Criminal law—Theft—Plea of not guilty—Jurisdiction of magistrate to try and convict—Order in nature of habeas corpus—Motion for discharge under, refused.

Defendant was arrested and brought before the Stipendiary Magistrate for the City of Halifax for the purpose of preliminary examination on a charge of stealing one coat, the property of M., valued under $20, and also on a further charge of stealing two books, the property of D., valued under $20.

After committal for trial on both charges, but before the actual signing of the warrant of commitment defendant elected to be tried summarily on the charge of stealing the coat, and, on pleading "not guilty," was tried and convicted, and sentenced to be imprisoned in the county jail for nine months with hard labour. On the charge of stealing the books he elected to be tried before a jury and was committed to jail to await trial. On the return of an order in the nature of a habeas corpus the discharge of defendant from custody was moved for on the ground that under secs. 789, 790 of the Criminal Code of 1892 the magistrate could impose the sentence for the offence of which the prisoner was convicted only in the event of the prisoner pleading "guilty," and not after trial on a plea of "not guilty."

Held, 1. Refusing the motion, that the Stipendiary Magistrate had not exceeded his jurisdiction in trying the prisoner for the theft of property over $10 in value, with his consent, when he pleaded "not guilty."

2. The fact that the prisoner was detained in jail awaiting trial at the next term of the Supreme Court for the theft of the books, in relation to which he declined to be tried summarily, would alone prevent his discharge.

Cluney, for Attorney-General. *O'Hearn*, for prisoner.

Townshend, J.] FAWSETT *v.* FAULKNER. [April 15.

Bill of sale—Assignment within 60 days—Presumption of insolvency—Evidence to rebut presumption—Application to adduce further evidence refused—Costs.

R. was indebted to the plaintiff F. for an overdue draft which fell due in May, 1901. On August 15, 1901, F. went to R.'s place of business and bought from him a quantity of stoves. A memorandum of the sale was drawn up showing the number of stoves purchased, the prices and the

terms of sale. R. agreed to give F. credit for the amount of the purchase, on contra account, and to hold the stoves subject to the order of F. and to deliver them either at Dartmouth or Halifax free of charge. In September following R. made an assignment under the Assignments Act to the defendant F., the official assignee, for the general benefit of creditors, under which defendant took possession of and sold the stock of R., including a portion of the goods sold to plaintiff.

To an action by F. for the conversion of the goods defendant pleaded (1) that the inventory and receipt given by R. to F. were a bill of sale, and within the provisions of the Bills of Sale Act, R.S. 1900, c. 142, and not having been filed in accordance with the provisions of the Act were void. (2) That R. at the time of the transfer to F. was insolvent and that the transfer was void under the terms of the Assignments Act, R.S. 1900, c. 145.

Held, 1. The inventory and receipt operated as an absolute bill of sale; that they were not intended to operate as a security for the debt but as an absolute transfer of the title.

2. As the inventory and receipt enumerated the articles sold and the prices and the terms of sale, they did away with any objection under the Statute of Frauds in respect to absence of part delivery.

3. In the absence of evidence of knowledge on the part of F. that R. was insolvent or unable to meet his liabilities; and in the absence of evidence that R. was as a matter of fact insolvent at the time of the transaction, apart from the fact that the assignment to defendant was made within a month afterwards, the transaction was not one that offended against the terms of the Assignments Act, R.S., c. 145.

4. The provisions of the Act (c. 145, s. 4), which made an assignment for the benefit of creditors within 60 days presumptively given with intent unjustly to prefer, must be read in connection with previous sections requiring insolvency at the date of the transaction to be established, and moreover only raised a presumption which could be rebutted.

5. The conduct of F. in endeavouring at the time to sell other goods to R. and in permitting the goods to remain in his possession was inconsistent with any suspicion on his part that there was a general inability on the part of R. to meet his debts.

6. The word "insolvent" in the Nova Scotia Act was not to be read differently from the word "debtor" in the corresponding section of the Ontario Act.

7. An application on the part of defendant made after the conclusion of the trial for permission to reopen the evidence for the purpose of giving evidence of insolvency should be refused with costs, it being inexpedient to grant such application and there being authority given to the Court on appeal to take further evidence.

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

Weatherbe, J.] IN RE SARAH SMITH. [May 1.

Bail—Motion to estreat refused—Code, secs. 958, 959.

The condition of a recognizance to keep the peace taken by the Stipendiary Magistrate of the City of Halifax was that the above named S. S. should keep the peace and be of good behaviour, etc., for two years from the date first above written.

On motion on notice by the Attorney-General to estreat the recognizance for breach of the condition thereof.

Held, that to sustain the recognizance under s. 958 of the Criminal Code, no form being prescribed (following *Bridge* v. *Ford*, 4 Mass. 642), it should have shewn on its face by recital or otherwise that the magistrate proceeded under that section.

Held, that as the magistrate followed form XXX. of the code, it must be assumed that he was proceeding not under s. 958 but under s. 959, which alone authorized the form used, and that as the security required was for a period of two years, the order was in excess of the powers conferred upon the magistrate by s. 959 of the Code, and the recognizance founded upon such order was null and void, and the motion to estreat the recognizance must be refused.

J. J. Power, for the bail and sureties. *Cluney*, for Attorney-General.

Province of New Brunswick.

SUPREME COURT.

En Banc.] WHITE *v.* HAMM. [April 24.

False imprisonment—Policeman arresting without warrant—Notice of action—Belief in plaintiff's guilt.

In an action for false imprisonment for arresting plaintiff without warrant on a charge of theft, the jury found that defendant was acting as a policeman in making the arrest, but that the circumstances afforded no justification for an arrest without warrant. On motion for a non-suit on the ground that defendant was entitled to notice of action,

Held, that for the purpose of determining this question it should have been left to the jury to find whether or not defendant honestly believed that plaintiff was committing a theft. If he did he was entitled to notice and the reasonableness of such belief was of no importance.

New trial ordered.

Wallace, K.C., and *G. H. V. Belyea*, for plaintiff. *Skinner*, K.C., for defendant.

En Banc.] KING *v.* MARSH. [April 24.

Canada Temperance Act, sec. 115, sub-s. (d)—Third offence—Committed prior to conviction for second offence.

Sub-s. (d) of 115 of Canada Temperance Act does not alter the common law to the extent of making valid a conviction for a third offence, committed "after information laid for a first offence," but prior to conviction for the second offence, MCLEOD, J., dissenting.

Conviction quashed.

R. W. McLellan, in support of rule. *Phinney*, K.C., contra.

En Banc.] KING *v.* WEDDERBURN. [April 24.

Appeal from summary conviction—Crim. Code, s. 880—"Personally" omitted from recognition—Costs.

The omission of the word "personally" from the condition of the recognizance required by Crim. Code, s. 880 with respect to appeals from summary convictions is fatal to its validity.

The County Court judge, though having no jurisdiction to try such a case, would have power to award costs on the dismissal of the appeal.

Rule discharged to quash County Court Judge's order dismissing appeal.

Hazen, K.C., in support of rule. *Tedd*, K.C., contra.

Province of British Columbia.

SUPREME COURT.

Full Court.] ROBITAILLE *v.* MASON AND YOUNG. [Jan. 27.

Malicious prosecution—County Courts Act, s. 23, 31—Waiver of objection to jurisdiction—False imprisonment.

Plaintiff took possession of Mason's float which he found adrift on a lake. Mason, although aware that plaintiff claimed a lien for salvage, made no move towards recovering the float until after three weeks when he in company with a constable demanded it, and on plaintiff refusing to give it up without compensation he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under s. 338 of Crim. Code for taking and holding timber found adrift, was dismissed. Mason provided the tug which got the float and carried plaintiff to gaol and accompanied the constable with the plaintiff to the gaol.

Held, on the facts, affirming FORIN, Co. J., that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment.

Action for malicious prosecution tried in the County Court which has no jurisdiction to try such an action unless a signed agreement consenting thereto is entered into by the parties. No signed agreement was made, but the action was tried without objection by either party and judgment given in favour of plaintiff.

Held, by the Full Court that the question of the jurisdiction of the County Court could not be raised on appeal.

W. A. Macdonald, K.C., for appellant. *S. S. Taylor*, K.C., for respondent.

Hunter, C.J.] ALASKA PACKERS' ASSOCIATION *v.* SPENCER. [June 4.

Practice—Particulars—Of matters in opposite party's knowledge.

Summons for particulars in an action for damages for the negligence of defendant, his servant and agents, who were hauling a tug which attempted to tow the plaintiff's ship from a dangerous position at Trial Island near Victoria. The plaintiffs alleged that the equipment and machinery of the tug were insufficient for the purposes for which they were attempted to be used with the result that the ship was allowed to drift on the rocks. The defendant applied for particulars of the insufficiency and want of equipment.

Held, 1. Particulars are ordered for the purpose of forwarding the applicant's case and not to hamper the party ordered to give them.

2. When a plaintiff is ordered to give particulars which are essentially within defendant's knowledge, the order may provide that the plaintiff should not be confined at the trial to the particulars given.

Plaintiff ordered to give particulars, but not to be confined at the trial to the particulars given.

W. M. Griffin, for defendant. *J. H. Lawson, Jr.*, for plaintiff.

UNITED STATES DECISIONS.

NEGLIGENCE:—Negligence in leaving a car load of high explosives an unreasonable time in the vicinity of a dwelling is held, in *Fort Worth & D. C. R. Co.* v. *Beauchamp* (Tex.) 58 L. R. A. 716, to be the proximate cause of injury to the dwelling by an explosion of a car through fire communicated from other cars near by.

DELIVERY:—A telegraph company is held, in *Western U. Teleg. Co.* v. *Cobb* (Tex.) 58 L. R. A. 695, not to comply with its duty to deliver promptly a telegram by delivering it to the clerk of the hotel where the addressee boards, where the clerk had no other authority to receive it than that which arises from the relation of hotel-keeper and boarder.