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A RECENT DECISION UPON THE LAW OF LANDLORD AND TENANT.

Fitzgerald v. *Mandas* is reported in 21 O.L.R. 312. As the case will not go any further, the defendant not having appealed from the verdict in favour of the plaintiffs, it is proposed to say a few words upon some points of law involved in the decision.

The facts are very simple. The plaintiffs by indenture leased property to the defendant for ten years from the 5th March, 1910, at a rental of $3,000 per annum payable monthly in advance; the defendant covenanted to pay rent, taxes, etc. The defendant was offered, but refused to take possession, and, after some negotiation as to the value of shelving, etc., repudiated the lease and refused to act under it.

The action was brought on the 7th April, 1910, immediately after the defendant's repudiation of the lease, claiming $500 for two gales of rent and damages for breach of contract. On 22nd April, 1910, the plaintiffs leased the premises to one Neeley, for a term commencing on 30th April at a rental of $175 per month. At the trial on 30th May, 1910, counsel for the defendant stated that he appeared only on the question of damages, admitting that his client was liable for same amount.

In a written judgment on 4th June, 1910, the learned trial Judge, after pointing out that there could be no question as to two gales of rent due when action was brought, said, that the act of the landlord in leasing to Neeley could scarcely be called an eviction, as "to constitute an eviction at law the lessee must establesh that the lessor, without his consent and against his will, wrongly entered upon the demised premises, and evicted him and kept him so evicted," citing from Foa, 4th ed., at p. 166. The learned Judge went on to say: "Neither is this the case of the landlord taking advantage of the proviso for non-payment of

rent, which appears in the lease in the statutory form. Nor are we, in my judgment, embarrassed by considerations arising from the general relations of landlord and tenant. It is the case of two contracting parties, of whom the one expressly repudiates to the other the contract between them, and notifies him that he will not be bound by it. In such a case the law is well settled that the other party may thereupon treat the contract as at an end, except for the purpose of claiming damages for the breach of the same. *Hochster* v. *De la Tour,* 2 E. & B. 678, etc. . . The action then becomes a plain common law action for damages, the plaintiffs having elected to treat the contract as at an end except for the purposes of damages."

The learned Judge then proceeded to assess the damages on the basis of the difference in present value to the plaintiffs between the lease to the defendant and the lease to Neeley, and gave the plaintiffs a verdict for $10,982.87, including in that sum the rent due when the writ was issued.

One point in this judgment which seems to invite comment is the statement that the re-letting of the demised premises by the landlord could scarcely be called an eviction or a re-entry for breach of condition under the proviso in the lease. In the United States (except in New York) it appears to be well settled that if a tenant repudiates the lease, and abandons the demised premises, and the landlord re-enters and re-lets the property, crediting the tenant with the proceeds, such re-letting does not release the tenant from the covenants in his lease. Many cases in support of this doctrine may be found in "Cyc," vol. 24, p. 1165, to which may be added the recent case of *Higgins* v. *Street,* 92 Pac. Rep. 153, in which the rule is laid down, supported by a long list of authorities, that the lessee could not, by failure to perform the conditions of his lease, abrogate the contract, and thus secure the advantage of his own default and that the landlord had the right to take possession, and lease to another tenant, and that such action would not create a surrender by operation of law. That some such opinion was at one time entertained in England is shewn in the case of *Walls* v. *Atcheson,* 3 Bing. 462

(1826), in which the Court of Common Pleas is reported, very briefly, to have held that the plaintiff, having precluded the defendant from occupying his apartments by letting them to another, must be taken to have rescinded the agreement, and to have dispensed with the necessity for a surrender: that she ought to have given the defendant notice, if her intention was to let the apartments solely on his behalf.

But the writer has not been able to find any trace of this doctrine in any later English decisions.

In Foa, 4th ed., following the passage cited by the learned trial Judge from page 166 (supra) the author goes on to say: "But actual physical expulsion is not necessary: any act of a permanent nature done by the landlord with the intention of depriving the tenant of the enjoyment of the premises will be sufficient cause to constitute an eviction at law. Thus letting the demised premises, on their becoming empty during the term, to another person, unless the tenant has consented thereto, is a case in point." If the lease contains a proviso for re-entry upon the tenant's breach of covenant, then the landlord's action in re-letting after a breach has occurred would seem to be a re-entry under the proviso. And apart from any proviso for re-entry, the re-letting of abandoned premises by the landlord creates a surrender by operation of law.

But whether it be regarded as an eviction, a re-entry for breach of covenant, or a surrender by operation of law, it is submitted that, in England and in this Province, the re-letting of the demised premises, if vacant, by the landlord to a new tenant, determines the contract between the landlord and the first tenant and releases the latter from payment of subsequently accruing rent.

In *Nickells* v. *Atherstone*, 10 Q.B. 944 (1847), the facts were that defendant held premises as tenant to plaintiff under an agreement for three years; he left the premises in the first year, and being asked for payment of rent, authorized plaintiff to let the premises to anyone plaintiff then let them to another tenant and gave him possession; the second tenant became bankrupt. Held, in an action of debt on the original agreement that

these facts constituted a surrender by operation of law, and defendant had a verdict. In *Oastler* v. *Henderson*, 2 Q.B.D. 575 Cockburn, C.J., said in the Court of Appeal: "The plaintiffs by letting the premises to a new tenant, put an end to defendant's term from that date." The two last mentioned cases with many others are cited in *Mickleborough* v. *Strathy*, 2 O.W.N. 537, in which the question for decision was whether upon the facts the tenant's liability upon the lease had been determined, either by eviction or by operation of law.

A month before the trial of *Fitzgerald* v. *Mandas*, the plaintiffs, as we have seen, re-let the premises to Neeley, and, according to the authorities mentioned, it would seem that by such re-letting the lease from the plaintiffs to the defendant, and all liability of the defendant for rent thereafter accruing were determined. If this be so, then it may perhaps be open to question whether the plaintiffs at the trial should have recovered more than the rent due at the commencement of the action, which being payable in advance covered the period up to the commencement of the new lease.

But this leads to the more serious question whether the doctrine of anticipatory breach of contract to be found in *Hochster* v. *De la Tour* and other decisions quoted in the judgment under discussion is properly applied to a case between lessor and lessee. Authority may be found which seems to be unfavourable to the view taken by the learned trial Judge. "It is not necessary to decide the point," said Bowen, L.J., in *Johnstone* v. *Milling*, 16 Q.B.D., at p. 474, "but I very much doubt whether the doctrine of *Hochster* v. *De la Tour* is applicable to such a case as this between lessor and lessee."

To the same effect is the positive judgment of our Court of Appeal in *Conolly* v. *Coon*, 23 A.R. 37. In that case Coon was tenant of Conolly's house under a verbal lease for a year at a rent payable monthly: after occupying and paying rent for five months, Coon moved out and sent the key to Conolly who refused to accept it, and at once sued Coon for breach of contract. The house remained empty until the trial eight months afterwards,

when Conolly obtained a verdict for $200. On appeal, the verdict was set aside and the action dismissed. Chief Justice Hagarty held that there was no surrender of the term either under the Statute of Frauds or by operation of law, and that while the term continued the landlord could not make any claim except for rent from month to month: the defendant's expressly renouncing and repudiating the tenancy could not in itself be a surrender and the term remains. "I cannot see," said the learned Chief Justice, "that any sound argument deducible from such cases as *Hochster* v. *De la Tour* can govern the case before us." Burton, J.A., concurred. Osler, J.A., also thought that there was no surrender in law or otherwise, and went on to say: "He (Coon) remained tenant, and though not bound to remain in actual possession, might have resumed possession whenever he chose. It would be a most extraordinary extension of the doctrine of *Hochster* v. *De la Tour* and cognate cases, were it to be held that, because the tenant chose to say that he repudiated the lease and would pay no more rent, the landlord might forthwith bring his action, and recover damages measured by the amount of the future gales of rent, treating what had occurred as an immediate breach of the entire contract between his tenant and himself. It might as well be said that the announcement by the maker of a promissory note, or of a covenant to pay a sum of money at a future time, that he would never pay it, or would refuse to pay it when due, would give rise to an immediate cause of action . . . The case of *Green* v. *McVicker*, 8 Bissell 13, comes nearest to the present case in its circumstances. It seems well decided, but the vital distinction is that there the agreement was to accept a lease of certain premises in the future for a term of two weeks. The intended lessee never entered, and before the time arrived for taking the premises gave notice to the intending lessor that he would not take or occupy them according to the agreement. The agreement was strictly executory on both sides, and a claim by the intended lessor for damages before the time when the lease was commenced was entirely within the principle of the

English authorities cited." Maclennan, J.A., was also clear that the case was not governed by *Hochster* v. *De la Tour* but was quite different. Mere repudiation, he thought, was no breach and gave the plaintiff no cause of action.

Is it possible to distinguish *Fitzgerald* v. *Mandas* from *Conolly* v. *Coon* in that, in the latter case, the defendant entered and occupied the demised house for five months before he abandoned it, while, in the former case, Mandas, having become a party to an indenture of lease containing a demise of property for ten years, never entered under the lease, though he did not actually repudiate it until after the commencement of the term? Mandas had only an interesse termini, not a term in the demised property. Could he before entry get rid of his interest and determine his tenancy by a verbal repudiation? If he could not, then the principle so clearly laid down in *Conolly* v. *Coon* should apparently govern his case.

The inchoate right which the grant of a lease confers before entry upon the lessee is not a mere right arising out of contract, but a right of property, which gives him a cause of action against any person through whose act his entry or the delivery of possession to him may have been prevented. It is a right in rem alienable at common law and one which passes to the executor. *Gillard* v. *Cheshire Lines Committee*, 32 W.R. 943—(a judgment of the Court of Appeal). It is not an estate, but a right to an estate (*Doe* v. *Walker*, 5 B. & C. 111), and a conveyance by the lessee to the lessor will operate as a release and not as a surrender. In the case of an interesse termini the common law rule which requires a re-entry to divest an estate for forfeiture does not apply (*Carnegie* v. *Philadelphia*, etc., 158 Penn. St. 317).

Perhaps the best definition of an interesse termini and its incidents may be found in Bacon's Abridgment under Leases (*M*), part of which is as follows: "The lessor having done all that was requisite on his part to divest himself of the possession and pass it over to the lessee thereby transferred such an interest to the lessee as he might at any time reduce into possession by actual

entry, as well before as after the death of the lessor, and such an interest as he might before entry grant over to another, or if he died before entry would go to his executors, or if the grant were made to two jointly, to the survivor and his executors, any one of whom might enter at their pleasure and so reduce the contract into an actual execution, for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power and left to his own discretion, to use when and as he saw fit."

Such then was the interest which the defendant Mandas had in the demised premises at the time of his repudiation of the lease, and there can not, it is submitted, be much doubt that it is an interest in lands within the meaning of the Statute of Frauds, R.S.O. 1897, c. 338, and which cannot be granted, assigned or surrendered except by deed or note in writing or by operation of law.

Thus it may be argued that the defendant's oral repudiation of the lease was ineffectual as an assignment or release of his interest in the demised premises, and that this interest continued until determined by the act of the landlords in leasing to Neeley. It would seem then that the relationship of landlord and tenant existed when the action was brought and continued to exist until the re-letting to Neeley, and it would follow that the claim of the landlords in that action would be limited necessarily to the rent in arrear when the writ was issued, for, in the words of Mr. Justice Maclennan, the attempted repudiation was no breach, and gave the plaintiff no additional cause of action.

It is submitted, therefore, with very much respect that the doctrine of anticipatory breach of contract was not applicable to the facts of *Fitzgerald* v. *Mandas* and that the plaintiff's verdict should not have been for more than $500 and interest. It must be borne in mind, however, that the defendant at the trial evidently did not raise the points discussed here, and apparently invited an assessment of damages in favour of the plaintiffs along the lines followed by the learned trial Judge. But as the case has found its way into the reports, it may not be amiss to point out that the soundness of the reasons given for the decision is perhaps not altogether free from doubt.

HON. MR. JUSTICE GIROUARD.

We exceedingly regret to record the death of Mr. Justice Girouard on the 22nd ult., at his residence in Ottawa from the effect of injuries resulting from an accident the week previously.

Mr. Girouard was born in the Province of Quebec on July 7, 1836. He was called to the Bar in 1860 and appointed to the Bench of the Supreme Court of Canada in October, 1895, taking the place of Mr. Justice Fournier. Mr. Girouard, who was one of the leader of the Bar in the Province of Quebec, was also a man of great industry, and contributed largely to literature, both legal and lay, in his own province; and in connection with these labours he published a work on the law of marriage, and was one of the editors of *La Revue Critique*, which contained many interesting articles on constitutional law. Mr. Girouard was also at that time a valued contributor to this journal. We referred more fully to his career at the time of his appointment to the Supreme Court Bench in 1895 (C.L.J., vol. 31, p. 526).

The high appreciation in which this learned judge was held was alluded to by Sir Charles Fitzpatrick, Chief Justice of the Supreme Court at the meeting of the court on the morning after his death. Hon. Wallace Nesbitt, K.C., who was recently a judge of the same Court, replied on behalf of the Bar.

Sir Charles Fitzpatrick said: "It is my painful duty to announce the death of Mr. Justice Girouard, which occurred this morning. By date of appointment our deceased colleague was the senior member of this court, and in him we lose one whose sound judgment and ripe experience were of inestimable value. Deep regret will be felt at his unexpected death, not only here and in the Province of Quebec, with the public and professional life of which he was so honourably connected, but throughout Canada, among all those who are interested in the work of this court. Those of us who come from Quebec felt with great pride that in him we had a fit representative of the best traditions of our Bar and Bench. His great knowledge of the civil law and his wide experience as a commercial lawyer made him a valued member of a tribunal in which appreciation of many diverse

forms of law is essential. His career has been one of varied and uninterrupted success. In Parliament he quickly made his mark as a fearless and independent representative of the people, and in this court he justified the great expectations of his friends. Proud of his French origin, and true to the best traditions of his race, he was blessed with a width of outlook not given to everyone, but which is one of the most valued attributes of a judge. It was his pride to maintain an affinity with literature and culture, and his name is connected with legal and historical works that will live after him."

CRIME AND THE PRESS.

The following abstract from one of our English exchanges, under the above heading tells its own story. We have frequently referred to this subject as being one of national interest and a growing evil. If things are as bad as stated in conservative England, they are necessarily worse in this country, where the press exercises greater license, and is not so subject to a wholesome public opinion. It will be noted that the opinion expressed as to this evil in England comes from an official who is dealing with an important subject from a Governmental point of view.

The article is as follows:—

"A recently-issued Blue Book (Part I. of the Judicial Statistics for England and Wales for 1909) is of unusual importance, by reason of the valuable introduction by Mr. Simpson, the Chief Clerk of the Home Office, one of our leading authorities, whose long experience qualifies him to deal ably with such figures as appear in the volume. His sad testimony is that, in the last decade, there has been a steady increase of crime, which he attributes largely to "the general relaxation in public sentiment with regard to crime," and the baneful influence of the Yellow Press in feeding the depraved taste *with shameless details of crime*, and *elaborate pictorial representations of criminals*, as well as by comments from which a moral tone is absent. Thus abused, the 'freedom of the press' becomes a national peril."

LAW SOCIETY OF UPPER CANADA.

The recent election of Benchers has resulted in the selection of the following members of the Bar. It will be seen that several excellent names not hitherto on the Bench now appear on the list.

F. W. Harcourt, K.C., Toronto; Hon. A. G. Mackay, K.C., M.P.P., Owen Sound; C. A. Moss, Toronto; Sir George C. Gibbons, K.C., London; T. C. Robinette, K.C., Toronto; E. Douglas Armour, K.C., Toronto; A. H. Clarke, K.C., M.P., Windsor; James Bicknell, K.C., Toronto; Geo. Lynch-Staunton, K.C., Hamilton; W. R. White, K.C., Pembroke; F. H. Chrysler, K.C. Ottawa; T. Herbert Lennox, K.C., M.P.P., Aurora; Hon. Wallace Nesbitt, K.C., Toronto; C. A. Masten, K.C., Toronto; J. M. Glenn, K.C., St. Thomas; E. F. B. Johnston, K.C., Toronto; A. E. H. Creswicke, K.C., Barrie; N. W. Rowell, K.C., Toronto; I. F. Hellmuth, K.C., Toronto; William Proudfoot, K.C., Goderich; J. E. Farewell. K.C., Whitby; W. A. Logie, K.C., Hamilton; W. S. Brewster, K.C., M.P.P., Brantford; F. E. Hodgins, K.C., Toronto; John Cowan, K.C., Sarnia; W. F. Kerr, Cobourg; W. D. McPherson, K.C., M.P.P., Toronto; H. H. Dewart, K.C., Toronto; W. B. Northrup, K.C., M.P., Belleville; W. H. McFadden, K.C., Brampton; A. C. McMaster, Toronto; Matthew Wilson, K.C., Chatham.

Messrs. Gibbons and Clarke having been elected at four quinquennial elections are by statute entitled to sit as ex officio Benchers.

WORKMEN'S COMPENSATION ACT.

Of the multifarious points to which at least fifteen sections of the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), and the voluminous schedules thereto are bound to give rise, the one that most frequently engages the attention of the Court of Appeal is whether an accident complained of as entitling a workman—or his dependents in the event of his death—to compensation arose "out of" as well as "in the course of" the employment of the workman. The reason for this is obvious enough. In every case the burden lies on the applicant for compensation

of proving—not necessarily by direct evidence, for it is well established that inferences of fact may be drawn by the court—that the personal injury to the workman was caused by an accident which arose in that manner. Mere surmise, conjecture, or guess does not suffice. Otherwise the claim for compensation must fail. Thus, among the batch of cases under the Act which came lately before the Court of Appeal, three of more than usual interest turning on that precise point were decided. In the first, that of *Hawkins* v. *Powell's Tillery Steam Coal Company,* noted ante, p. 439, the Court of Appeal had the difficulty of choosing between following the decision of the House of Lords in *Clover, Clayton and Co.* v. *Hughes,* 102 L.T. Rep. 340, (1910) A.C. 242, or in *Barnabas* v. *Bersham Colliery Company,* 103 L.T. Rep. 513. The workman in the former, suffering from an aneurism in so advanced a state that it might have burst at any time, ruptured the aneurism while doing his work in the ordinary way without any unusual exertion or strain. The requirements of the Act were, nevertheless, held to be fulfilled. On the other hand, a contrary conclusion was arrived at in *Barnabas's* case, where the workman, while performing his ordinary duties in the ordinary way, had an apoplectic seizure, from which he died shortly afterwards. In *Hawkins's* case the learned judges of the Court of Appeal preferred to take the decision in *Barnabas's* case as their guide. The dependents of the deceased workman there had not, their Lordships thought, succeeded in proving, by direct evidence or by necessary inference from the facts, that the death of the workman from angina pectoris was caused by an accident that arose "out of," as well as "in the course of," his employment. Whether or not there is any real distinction between the two lines of authority, or whether there has been merely a change of front, it is superfluous now to go into; but in all probability it will be seen that in this class of case in the future more importance will be attached to the later decision of the House of Lords than to the earlier one. The question to be determined in *Pierce* v. *Provident Clothing and Supply Company, Limited,* noted ante, p. 459, the second case to which we referred above, was based on circumstances of an entirely different nature. A workman,

while riding a bicycle in the course of his employment as a canvasser and collector, was knocked down by an electric tramway car and killed. Influenced by the principle of the recent decision of the Court of Appeal in *Warner* v. *Couchman*, 103 L.T. Rep. 693, the learned County Court judge took the view that the workman was not more exposed to the risk of an accident in the streets than any other member of the population; and that, therefore, the accident which occurred to him did not arise "out of" his employment. The Court of Appeal reversed the decision of the court below, and held that the dependent of the deceased had discharged the inevitable obligation of shewing that the accident had so arisen. The workman was, their Lordships considered, more exposed to accident than others because his occupation took him into the streets practically all day long. The fact that he rode a bicycle, which was a permitted way of doing his rounds, was rather more risky than travelling on foot, did not seem to the court to have any bearing on the point. The Scotch case of *McNeice* v. *Singer Sewing Machine Company, Limited,* 48 Sc. L. Rep. 15—an authority directly in point—was accepted as one that ought to be followed. A collector, forced to traverse the streets by his occupation, met with one of the ordinary dangers to which that employment exposed him. And although many members of the public are exposed to the same danger, it was held to be one arising "out of" the employment. The third case—*Astley* v. *R. Evans and Co., Limited,* Ct. of App., Feb. 28—gave the court the opportunity of very clearly enunciating the principles upon which it should act in dealing with the point which we have been discussing; and the case, when fully reported, will doubtless be regarded as an invaluable guide by the County Court judges.—*Law Times.*

PRISONERS TESTIFYING ON THEIR OWN BEHALF.

Two recent murder trials at the Old Bailey will no doubt serve to bring sharply before the mind of the public the wide change that has taken place in our criminal procedure during the past twelve years, and, although the profession is well aware of this radical alteration, we do not think that until the last six

months this change has been in general really appreciated. Although the Criminal Evidence Act, 1898, was cautiously drafted and every effort was made for the purpose of safeguarding prisoners, it cannot be denied that the forecasts made as to the effect of that measure when it was before Parliament have been amply proved accurate. It has always been our boast, so far as the administration of our criminal law is concerned, that a prisoner must be deemed to be innocent until he is proved guilty of the specific crime with which he charged, and that the onus is upon the prosecution to prove his guilt of such specific crime without a shadow of a doubt. The effect of the Act of 1898 has been imperceptibly and gradually to change that position, and to a large extent nowadays the onus of proving his innocence in many cases in fact falls upon the accused.

This has been brought about by the fact that juries are well aware that a prisoner can go into the witness-box, and, if he does not do so, are apt to draw unfavourable conclusions therefrom, although his omission to give evidence cannot be made the subject of comment. Further, where the prisoner does elect to give evidence on oath, he often does not make the best of witnesses when subjected to cross-examination. This is so whether he be innocent or guilty, for a person charged with a serious offence, who possibly has been confined to prison for weeks before his trial, cannot be supposed to be in the best mental condition for doing himself entire justice. An even more difficult position is created by the statute by the provision which allows cross-examination as to previous convictions and character where the accused "has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

In this way, if the prisoner's past does not bear investigation, the defence is undoubtedly placed in a very difficult position, which becomes more accentuated the more disreputable the witnesses for the prosecution may be.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—BILL OF LADING—INCORPORATION INTO BILL OF LADING OF CONDITIONS OF CHARTER-PARTY—ARBITRATION CLAUSE —STAYING ACTION.

The Portsmouth (1911) P. 54. In this case, the action was to recover for demurrage and was stayed on the ground that by the terms of the charter-party, which were incorporated in the bill of lading, in case of dispute the matter was to be referred to arbitration. The reference in the bill of lading was as follows: "he or they paying freight for the goods with other conditions as per charter-party," "Deck load at shippers' risk and all other terms and exceptions of charter to be as per charter-party, including negligence clause." The charter-party provided for payment of demurrage and "any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at the port where it occurs, and the same shall be settled by arbitration. A Divisional Court affirmed the order staying the action, (1910) P. 293, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) were of the opinion that the arbitration clause in the charter-party only applied to disputes arising under the charter-party and could not by inference be extended to apply to disputes arising under the bill of lading. The decision of the Divisional Court was therefore reversed.

FIXTURES—MANSION HOUSE — WOOD CARVINGS ATTACHED TO HOUSE—RIGHT OF REMOVAL OF WOOD CARVINGS ANNEXED TO FREEHOLD.

Re Chesterfield (1911) 1 Ch. 237. In this case a mansion house was by the will of a testator settled to certain uses in strict settlement. Attached to the walls of the mansion house, by nails or pegs as ornamental decorations, were certain wood carvings by Grinling Gibbons. The testator by his will bequeathed to the tenant for life all his books, pictures and other works of art or curiosity, and generally all goods and effects in or about the mansion house. The tenant for life sold the mansion house, reserving the wood carvings, which he removed and sold a portion of them, claiming to be absolutely entitled to the proceeds

thereof, but Joyce, J., held that the carvings did not pass by the bequest of chattels, but having been fixed to the inheritance so as to form part of the house, the proceeds of sale must be treated as capital money subject to the trusts of the settlement.

WILL—SETTLEMENT—POWER—ABSOLUTE INTEREST IN DEFAULT OF APPOINTMENT—EXERCISE OF POWER—"DEVISE, BEQUEATH AND APPOINT"—TRUSTS FOR PERSONS NOT OBJECTS OF POWER—CHILD EN VENTRE SA MERE—POSTHUMOUS CHILD—WILLS ACT, 1837 (1 VICT. C. 26) S. 33—(10 EDW. VII. C. 37, S. 37, (ONT.)).

In re Griffiths, Griffiths v. *Waghorne* (1911) 1 Ch. 246. Two points were decided. First, that where a testator has under a settlement a power of appointment in favour of his children, and in default of appointment the fund belongs absolutely to himself, and he devises and bequeaths and appoints the fund to trustees after payment of his debts and funeral expenses to divide the same equally between his children, the word "appoint" in such a case is not to be construed strictly as an exercise of the power, but as a dealing by the testator with the fund as his own property as he was entitled to do in default of appointment. And the second point was this: One of the testator's sons predeceased him leaving a child who was en ventre sa mère at the time of the testator's death, and Joyce, J., held that under s. 33 of the Wills Act, 1837 (see 10 Edw. VII. c. 37, s. 37 (Ont.)) the legacy to the deceased son did not lapse, but passed under his will, the posthumous child though not born, nevertheless being "living" at the time of his parent's death.

BILL OF SALE—REVERSIONARY INTEREST IN CHATTELS—ASSIGNMENT BY REVERSIONER OF HIS REVERSIONARY INTEREST IN CHATTELS—"CHOSES IN ACTION"—REGISTRATION.

In re Thynne, Thynne v. *Grey* (1911) 1 Ch. 282. This was a question between the assignee of a reversionary interest in chattels and the trustee in bankruptcy of the assignor the latter claiming that the assignment was void as against him for non-registration under the Bills of Sale Act. Neville, J., held that the interest assigned was a mere chose in action and therefore under s. 4 of the Bills of Sale Act, 1878, exempt from the operation of the Act.

TRUSTEE—BREACH OF TRUST—POWER TO EMPLOY AGENTS—CHEQUE PAYABLE TO SOLICITOR—MISAPPROPRIATION BY SOLICITOR OF TRUSTEE—LIABILITY OF TRUSTEE—"HONESTLY AND REASONABLY"—JUDICIAL TRUSTEES ACT, 1896 (59-60 VICT. C. 35) S. 3—(62 VICT. C. 15, S. 1 (ONT.)).

In re Mackay, Griesseman v. *Carr* (1911) 1 Ch. 300. In this case trustees under a will had express power to employ agents to act for them under the will. One of the trustees was a solicitor, and managed the estate, and on his death the survivor instructed another firm of solicitors to act for the estate; and at the new solicitor's request he signed cheques payable to him for considerable sums which were said to be wanting for death duties, and the solicitor misappropriated the proceeds of these cheques. The action was brought to compel the trustee to make good the loss, but Parker, J., held that the defendant was justified in believing that having regard to the terms of the will he might safely pay the money to the solicitor; and that in so doing he acted "honestly and reasonably" and ought to be excused under the Judicial Trustees Act, 1896, s. 3 (see 62 Vict. c. 15, s. 1 (Ont.)).

HUSBAND AND WIFE—GIFT OF INCOME DURING WIDOWHOOD—MARRIAGE WITH DECEASED'S SISTER'S HUSBAND—UNLAWFUL MARRIAGE SUBSEQUENTLY VALIDATED BY STATUTE—DECEASED WIFE'S SISTER'S MARRIAGE ACT, 1907 (7 EDW. VII. C. 47) SS. 1, 2.

In re Whitefield, Hill v. *Mathie* (1911) 1 Ch. 310. This is an instance of a curious legal complication which has arisen from the passage of the Act authorizing and validating marriages with a deceased wife's sister, and which is productive of a somewhat paradoxical result. The facts were that a testator died in 1902 leaving property to trustees on trust to pay the income to his widow while she remained unmarried. The widow subsequently went through a form of marriage with her deceased sister's husband, but the trustees continued to pay her the income on the ground that such marriage being unlawful she was still "unmarried," but when the Act in question was passed validating the marriage, they ceased to pay her, because she had by virtue of the Act become married; but the Act provides, that no right, title, estate or interest whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to or in respect of any pro-

perty, and no act or thing lawfully done or omitted before the passing of the Act shall be prejudicially affected by reason of any marriage heretofore contracted as aforesaid being made valid by the Act; and Parker, J., held that the effect of this proviso was to preserve the lady's right to the income; so that although she is now lawfully married she is still entitled to the income as if she were not married.

SETTLEMENT—POWER OF APPOINTMENT—CESSER OF INTEREST OF HUSBAND—ABSENCE OF DIRECTION AS TO INCOME DURING HUSBAND'S LIFE AFTER CESSER OF HIS INTEREST—CHILDREN OF MARRIAGE ENTITLED PENDING APPOINTMENT.

In re Master, Master v. *Master* (1911) 1 Ch. 321. In this case under a marriage settlement the husband was in the events which had happened entitled to the income of the trust fund for life or until he became bankrupt, and subject thereto the trustees were to hold the income upon trust for the children or other issue of the marriage as the spouse or the survivor of them should by deed or will direct. The wife was dead, the husband had become bankrupt and gone off to Australia and so far as known no appointment had been made. There were three children of the marriage all of whom were of age and one of them was married and had three children. On an application by the trustees for advice as to how they should deal with the income during the life of the husband, and pending the exercise of the power of appointment, Eve, J., held that it was distributable in equal shares amongst the children of the marriage until and unless that disposition should be superseded by the exercise of the power.

CONTRACT—FRAUD—SALE OF GOODS—VOIDABLE CONTRACT—GOODS OBTAINED BY FRAUD—SALE TO INNOCENT PURCHASER—ONUS OF PROOF—POWER GIVEN TO PASS PROPERTY IN GOODS.

Whitchorn v. *Davison* (1911) 1 K.B. 463 was an action of detinue to recover goods in the following circumstances. The goods in question consisted of a pearl necklace, which the plaintiffs entrusted to one Bruford, on the representation that he had a customer in view who would purchase it. The necklace was in the first place handed to him on this representation, which was false, on the terms that he was to return it, or pay the agreed price. Instead of selling it he pledged it with the defendant for an advance of money, and he subsequently made

a bargain with the plaintiffs that he was himself to be the purchaser and they accepted from Bruford his bills of exchange for the price, on the representation that the necklace had been actually sold to a customer, and that Bruford could not approach him, to ask for cash, without insinuating a doubt as to his bona fides. Bruford then obtained a further advance from the defendants and absconded, and the bills he had given were, of course, dishonoured. The plaintiffs demanded the necklace from the defendants, but they refused to give it up. The jury found as a fact that Bruford obtained the necklace by fraud, with the intention of stealing it, and that it was one of the terms on which he got possession that the property in it should not pass until the plaintiffs were paid cash, and that the defendants did not advance the moneys in good faith and without notice of the fraud, Bray, J., at the trial having charged the jury that the onus was on the defendants to shew that they had made the advances in good faith and without notice of the fraud of Bruford. On these findings Bray, J., gave judgment for the plaintiffs, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) unanimously reversed his decision, and gave judgment for the defendants, being of opinion that, though the goods may have been obtained in the first place by a trick which would constitute larceny, yet the subsequent sale to Bruford amounted to a contract authorizing him to pass the property, and this gave him a right which fed the defendant's title, notwithstanding the contract was voidable for fraud; it being held that after this contract the goods could not be deemed to have been stolen, but to have been obtained by fraud or false pretences. Such being the case, the Court of Appeal held that the onus was on the plaintiffs to shew that the advances had not been made by the defendants bonâ fide and of that there being no evidence, the findings of the jury were set aside and the action dismissed. There is an interesting discussion in the judgment of Buckley, L.J., as to the difference betwen larceny by trick, and obtaining goods by fraud or false pretences, as affecting the question of the right of property in goods.

CONTRACT—FRAUD—SIGNATURE TO CONTRACT OBTAINED BY FRAUD —DOCUMENT SIGNED ON MISREPRESENTATION AS TO ITS CONTENTS — GUARANTEE — NON EST FACTUM — NEGLIGENCE — ESTOPPEL—PROXIMATE CAUSE OF LOSS.

Carlisle & Cumberland Banking Co. v. *Bragg* (1911) 1 K.B. 489. This was an action on a guarantee and the defence set up

was non est factum. It appeared by the evidence that one Rigg, on the representation that the document in question was an insurance paper, had got the defendant to sign a paper purporting to be a continuing guarantee to the plaintiff for any debt due by Rigg to the plaintiff up to £150; the defendant signed the paper without reading it, and Rigg subsequently forged the name of another person as an attesting witness to it and handed it to the plaintiffs. The jury found that the defendant did not know the paper was a guarantee, but was guilty of negligence in signing the paper, and that Rigg was not the agent of the bank. On these findings, Pickford, J., gave judgment for the defendant, which was affirmed by the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.), that court holding that the defendant was not estopped from denying that he had contracted to guarantee the debt of Rigg, as he owed no duty to the plaintiff in the matter, and that the proximate cause of the plaintiffs' loss was the fraud of Rigg, and not the negligence of the defendant.

BAILMENT—BAILEE—CLAIM BY THIRD PARTY TO GOODS BAILED—DUTY OF BAILEE—NOTICE OF CLAIM OF BAILOR—NOTICE TO BAILOR OF CLAIM OF THIRD PARTY—ORDER OF MAGISTRATE FOR DELIVERY OF GOODS.

Ranson v. *Platt* (1911) 2 K.B. 499. The plaintiff in this case was a married woman and she had delivered to the defendant, a warehouseman, certain goods for safe keeping. Subsequently the husband of the plaintiff went to the defendant and demanded the goods, claiming that they were his property. The defendant refused to give them without a magistrate's order and he attended before a magistrate with the husband and informed the magistrate that he had received the goods from the wife. A summons was then taken out under the Metropolitan Police Courts Act, and served on the defendant, but he gave no notice of it to the plaintiff; on its return the husband deposed that the goods were his and were worth £10 and the magistrate made an order for their delivery to him, and they were delivered accordingly. The County Court judge gave judgment for the plaintiff, but the Divisional Court (Darling, Phillimore and Bucknill, JJ.) reversed his decision, Darling, J., dubitante, who thought the defendant ought to have given notice of the husband's claim to the plaintiff. The majority of the court, however, thought that he had sufficiently discharged his duty by informing the magistrate that he had received the goods from the plaintiff. Probably the magistrate failed to realize that husband and wife are no longer one.

LANDLORD AND TENANT—HOUSE LET FOR IMMORAL PURPOSE—RIGHT TO RECOVER RENT.

Upfill v. *Wright* (1911) 1 K.B. 506. This was an action to recover rent for a flat. The premises had been let by the plaintiff's agent to the defendant for a term of three years. The agent knew that the defendant was the mistress of a certain man, from whom the rent would probably come and who, he knew, was a constant visitor at the flat; after the expiration of the term, the defendant continued as tenant from year to year. In these circumstances the judge of the County Court gave judgment for the plaintiff; but the Divisional Court (Darling and Bucknill, JJ.) overruled it, holding that the premises had been let to the plaintiff's knowledge for the purposes of prostitution.

RENT CHARGE—TERRE-TENANT—MORTGAGEE IN FEE NOT IN POSSESSION—LIABILITY OF MORTGAGEE FOR RENT CHARGE.

In *Cundiff* v. *Fitzsimmons* (1911) 1 K.B. 513, a Divisional Court (Darling, and Bucknill, JJ.) affirmed the judgment of a judge of a County Court, holding that where a mortgage in fee subject to a rent charge is made, the mortgagee thereby becomes as terre-tenant personally liable to pay the rent charge, notwithstanding he has not entered into possession.

POISON—SALE BY UNLICENSED ASSISTANT — LIABILITY OF UNLICENSED SALESMAN TO PENALTY.

Pharmaceutical Society v. *Nash* (1911) 1 K.B. 520. By the English Pharmacy Act, 1908, "so much of the Pharmacy Act, 1868, as makes it an offence for any person to sell . . . poison unless he is a duly registered pharmaceutical chemist, shall not apply in the case of "certain specified" poisonous substances to be used exclusively in agriculture or horticulture . . . if the person so selling . . . is duly licensed for the purpose" under that section. In this case, a shopman of a person duly licensed had sold poisonous matter for horticultural purposes, not being himself duly licensed, and the question was, whether he was liable to the penalty imposed by the Act, and Phillimore and Harridge, JJ., held that he was.

EXERCISE OF STATUTORY POWERS—DAMAGE TO LAND—OFFER BY PROMOTERS—CONDITIONAL OFFER—LAND CLAUSES CONSOLIDATION ACT, 1845 (8-9 VICT. C. 18) S. 34—COSTS OF ARBITRATION.

Fisher v. *Great Western Ry. Co.* (1911) 1 K.B. 551. This was an action to recover a sum awarded by arbitrators for dam-

age occasioned by expropriation of land for a railway, together with the costs of the arbitration, and the only point in question was whether the costs ought to have been awarded. The defendant company under statutory powers diverted a public foot-path The plaintiff claimed compensation for injury to his land. Prior to arbitration, the defendants sent a letter to the plaintiff's solicitor to this effect: "The company have made arrangements for the construction of a forty-foot road, which will put your client's property in direct connection with the new bridge and will more than counterbalance any injurious affection of that property by reason of the closing of the old foot-path. The road will be made as soon as practicable, and on the understanding that it will be made, we will make your client the offer of £50 in settlement of his claim." This offer was refused and the parties proceeded to arbitration, in which £50 was awarded to the plaintiff as compensation. Sometime before the hearing of the arbitration the forty-foot road was constructed. Phillimore J., held that the offer was not a good offer under the Land Clauses Act, 1845, s. 34, and that the plaintiff was entitled to recover his costs of the arbitration and the Court of Appeal (Lord Alverstone, C.J., and Buckley, and Kennedy, L.JJ.) affirmed his decision, being of the opinion that the offer was embarrassing.

MANDAMUS—INTEREST OF PROSECUTOR—STATUTORY DUTY IMPOSED AT INSTANCE OF THIRD PARTIES—RIGHT OF THIRD PARTIES TO ENFORCE STATUTORY DUTY IMPOSED AT THEIR INSTANCE.

The King v. *Manchester Corporation* (1911) 1 K.B. 560. This was an application for a peremptory mandamus commending the defendant to make a by-law in accordance with the terms of a statute. In the year 1900, the defendants had applied to Parliament for power to construct additional tramways, and an insurance company opposed the bill and at its instance a clause was inserted providing for the making of by-laws by the corporation prescribing the distances at which carriages using the tramways shall be allowed to follow each other. The corporation purporting to act under this power, passed a by-law providing that, in the central area, "the distance at which a carriage shall follow a preceding carriage shall be such as may be directed by the police." The police gave no direction as to the distance at which carriages may follow one another, but the constables on duty regulated the traffic in the usual way. Owing to the lack of prescription of distance, the central area

became congested and collisions frequently occurred and the insurance company was frequently obliged to pay damage claims in consequence. The insurance company thereupon applied for a mandamus to compel the corporation to make a proper by-law as contemplated by the statute and the question was raised by the defendants whether the insurance company had a sufficient interest to entitle them to invoke the aid of the Court in the way asked. A Divisional Court (Lord Alverstone, C.J., and Pickford, J., and Avory, JJ.) held that they had, but Avory, J., doubted as to whether the applicant had sufficient interest; all the members of the court were agreed that the by-laws made by the corporation do not prescribe the distance at which tramcars should be allowed to follow one another.

SHIPPING — SEAMAN — NEGLECT OF DUTY — OMISSION TO DO ACT NECESSARY FOR PRESERVATION OF SHIP—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 220.

Deacon v. *Evans* (1911) 1 K.B. 571. This was a proceeding before a magistrate, under the Merchants Shipping Act, 1894, s. 220. By that section, "If a master, seaman, or apprentice, belonging to a British ship . . . by neglect of duty . . . omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction or damage," he shall be guilty of a misdemeanour. The evidence shewed that the ship on which the defendant was engaged as master had come into collision with another vessel and suffered damage owing to the defendant placing the look-out man in such a position on deck, that his view ahead was partially obstructed. On a case stated by the magistrate, it was held by a Divisional Court (Lord Alverstone, C.J., and Hamilton and Avory, JJ.), that this was not an offence of the kind contemplated by the Act, neither was the omission of the master to keep a proper look-out himself.

DAMAGES—CONTRACT—SALE OF GOODS—ACT DONE BY PLAINTIFF IN MITIGATION OF DAMAGES—PROFIT ACCRUING THEREFROM TO THE PLAINTIFF.

British Westinghouse Co. v. *Underground Ry. Co.* (1911) 1 K.B. 575. This was a case stated by an arbitrator. The defendants had contracted to buy from the plaintiffs certain electrical machines for the purpose of operating an electric railway. The machines were to be according to a certain specified standard. The machines delivered were not up to the required standard,

and were defective in design and efficiency and did not comply with the contract and specifications. The defendants nevertheless accepted the machines and used them, reserving their right to damages for breach of the contract. The plaintiffs endeavoured to make one of the machines efficient and up to the required standard, intending, if successful, to make corresponding improvements in the rest of the machines, but their efforts proved unsuccessful, and the defendants thereupon replaced the machines with those of one Parsons, which proved greatly superior to those furnished by the plaintiffs and moreover effected a great saving of expense to the defendants. The question was, on what principle the damages for the breach of contract should be assessed in these circumstances? The plaintiffs contended that the commercial life of the machines furnished by them ought to be deemed to have expired when the Parsons machines were purchased and that the cost of the Parsons machines was not recoverable as part of the damages. The defendants on their part claimed that the commercial life of the machines furnished by the plaintiffs was not at an end when the Parsons machines were bought, but that the effect of the defendants purchasing the Parsons' machines was to diminish the loss the defendants would have sustained had they continued to use the machines furnished by the plaintiffs for the term of their commercial life, and that, therefore, the plaintiffs were liable to defendants' damages for breach of the contract were considerpay the cost of the Parsons machines, as including such cost the ably less than they would otherwise have been. The Divisional Court (Lord Alverstone, C.J., and Hamilton, and Avory, JJ.), were of the opinion that inasmuch as the procuring of the new machines had the effect of diminishing the loss the defendants would have sustained had they continued to use those furnished by the plaintiffs, it was a reasonable expense for them to have incurred in discharge of their duty, to minimize the loss; and therefore, the arbitrator was entitled to take the cost of such new machines into account, when fixing the damages, notwithstanding that such machines were also a pecuniary advantage to the defendants, and even if those furnished by the plaintiff had been in accordance with the contract, it would still have been in the plaintiffs' interest to have discarded them in favour of the Parsons machines, though it was conceded that if the putting in the Parsons machines had increased the damages, the cost ought not to be recovered. It was because the substitution was in relief of the plaintiffs that the cost was recoverable. Cf. *Sharpe* v. *White*, 20 O.W.N. 849.

COMPANY—LIST OF MEMBERS—GOVERNMENT RETURN—DEFAULT IN MAKING RETURN—OMISSION TO HOLD ANNUAL MEETING—COMPANIES ACT, 1908 (8 EDW. VII. c. 69) ss. 26, 64 (7 EDW. VII. c. 34, s. 131 (ONT.))—(R.S.C. c. 79, s. 106).

Park v. *Lawson* (1911) 1 K.B. 338. A prosecution for not making a return of the members of a joint stock company, as required by statute 8 Edw. VII. c. 69. (see 7 Edw. VII. c. 34, s. 131 (O.)). The defendants, the directors of the company, set up as an excuse, that no general annual meeting of the company had been held, but a Divisional Court (Lord Alverstone, C.J., and Hamilton and Avory, JJ.), on a case stated by the justices, held that this was no defence.

SEAMAN—DESERTION IN AUSTRALIAN PORT—PROHIBITED IMMIGRANT—FINE IMPOSED ON MASTER—EXPENSE CAUSED BY ABSENCE DUE TO DESERTION—DEDUCTION OF FINE FROM SEAMAN'S WAGES—MERCHANT SHIPPING ACT, 1906, (6 EDW. VII. c. 48) s. 28.

Halliday v. *Taffs* (1911) 1 K.B. 594 is incidentally an instance of the paternal care exercised over a British seaman. The defendant was the superintendent of the mercantile marine office, who had refused to allow a deduction from a seaman's wages in the following circumstances. The seaman in question was a Chinaman on board a ship of which the plaintiff was master. The ship touched at an Australian port, where the Chinaman deserted, and the master was thereupon fined £100 under an Australian Act prohibiting the immigration of Chinese. The plaintiff claimed to deduct the fine and also the expense of a cable message to the owners, from the wages due to the Chinaman, as being an expense caused to the master by the absence of the seaman, due to desertion, within s. 28 of the Merchants Shipping Act, 1906, but a Divisional Court (Lord Alverstone, C.J., Hamilton, and Avory JJ.) held that neither the fine nor the expense of the cable message were expenses within the meaning of the section, and were therefore not deductible from the wages.

JUSTICES—SUMMARY JURISDICTION—ELECTION TO BE TRIED SUMMARILY—EVIDENCE GIVEN BY DEFENDANT — COMMITTAL FOR TRIAL.

The King v. *Justices of Hertfordshire* (1911) 1 K.B. 612. In this case a person accused of larceny elected to be tried sum-

marily before justices. The hearing was proceeded with, and defendant gave evidence in his own behalf, the justices omitting to caution him, and his witnesses also were heard; whereupon the justices came to the conclusion that the case ought not to be summarily dealt with, and committed the accused for trial at the sessions. The Court of Quarter Sessions considered that their jurisdiction was ousted by what had taken place before the justices; but a Divisional Court (Lord Alverstone, C.J., and Pickford and Avory, JJ.) held that it was not, and granted a mandamus, as asked.

SHIPPING—DEVIATION—PUTTING INTO PORT OF REFUGE—UNSEAWORTHINESS—LIEN FOR DEAD FREIGHT—DAMAGES.

In *Kish* v. *Taylor* (1911) 1 K.B. 625, the Court of Appeal (Cozens-Hardy M.R., and Moulton and Farwell, L.JJ.) have been unable to agree with the decision of Walton, J. (1910) 2 K.B. 309 (noted ante, vol. 46, p. 612). The action was brought by shipowners to recover for dead freight and to enforce a lien therefor on the cargo. The vessel, through the plaintiff's default, put to sea in an unseaworthy condition, and by reason thereof had to put into a port of refuge. Walton, J., held this did not constitute a deviation and that the defendants and cargo were accordingly liable but the Court of Appeal was of the opinion that the putting into the port of refuge having been necessitated by the plaintiff's negligence in sending the vessel to sea in an unseaworthy condition, it amounted to a deviation and debarred the plaintiffs of their right under the bill of lading to a lien for dead freight, and the plaintiff's action was accordingly dismissed.

EXECUTION—INTERPLEADER—SHERIFF'S COSTS OF INTERPLEADER.

In re Rogers (1911) 1 K.B. 641. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that the sheriff's costs of interpleader proceedings are not "costs of the execution" and have therefore reversed the decision of Phillimore, J., (1911) 1 K.B. 104 (noted ante, p. 138).

CRIMINAL LAW—INCEST—EVIDENCE.

The King v. *Hall* (1911) A.C. 47. The defendants in this case were brother and sister, and were indicted for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution that they had been seen

together at night in the same house, which had only one bedroom, and that in the bedroom was a double bed which bore signs of having been occupied by two persons. The witnesses were not cross-examined. The prosecutor then tendered evidence of the previous relations existing between the accused, which was objected to but admitted. This evidence was to the effect that the male defendant took a house in 1907, to which he brought the female defendant as his wife; that they lived there as husband and wife for about sixteen months; that at the end of March, 1908, the female defendant gave birth to a child, and that she registered the birth declaring herself to be the mother and the male defendant the father. The defendants having been convicted the Court of Criminal Appeal quashed the conviction on the ground that the evidence objected to was not admissible in chief, and that nothing had occurred in the conduct of the defence to render it admissible in rebuttal. The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Alverstone and Gorrell) reversed this decision, and held that the evidence objected to was properly admitted for the purpose of shewing that the accused had a guilty passion towards each other, and to rebut the defence of innocent association as brother and sister. Their Lordships besides confirming the conviction, also ordered the issue of a warrant to arrest the female defendant, who had been discharged from custody pending the appeal.

4 EDW. VII. c. 34 (Q.)—CONSTRUCTION—EXTRA PROVINCIAL CORPORATION—"CARRYING ON BUSINESS IN QUEBEC"—CANADIAN TRADE MARK & DESIGN ACT, 1879—DESCRIPTIVE WORDS—"STANDARD."

Standard Ideal Co. v. *Standard Sanitary Manufacturing Co.* (1911) A.C. 78. This was an appeal from the King's Bench of Quebec. Two points were involved. The Provincial Act, 4 Edw. VII. c. 34, provides that no extra provincial corporation shall carry on business in Quebec unless a license is obtained under the Act. The plaintiffs in the action were an extra provincial corporation, its headquarters being in Pittsburg; it employed an agent as traveller to take orders in the Province of Quebec and then consigned goods direct to the customers, who paid direct to the plaintiffs. The action was brought to restrain the defendants from infringing an alleged trade mark of the plaintiff, and the defendants set up that the plaintiffs were not entitled to the protection of Canadian laws because they were carrying on business in Quebec without a license. The judge at the trial held that

whatever effect the absence of a license might have on the plaintiffs' right to recover for sales made in the province without license, it did not take away the plaintiffs' civil rights, and the plaintiffs were entitled to prevent the violation of those rights. The King's Bench held that the Act did not prevent the plaintiffs from selling outside of the province to persons in the province or from having agents to take orders for the sale and shipment of their wares from the United States into the Province of Quebec, and that they were not evading the Act. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey) were also of the opinion that the plaintiffs were not carrying on business in contravention of the Act. On the main point, however, their Lordships disagreed with the courts below, who had held that the word "standard" had acquired a secondary meeting as applied to the plaintiffs' goods, and that it was the proper subject of a trade mark; whereas their Lordships held that the word being a common English word having reference to the character and quality of the goods in connection with which it is used, and having no reference to anything else, is not an apt or proper word to distinguish the goods of one trader from those of another, and therefore cannot be a valid trade mark. The appeal was therefore allowed and the action dismissed.

BRITISH COLUMBIA LEGISLATURE—JURISDICTION—LANDS IN RAILWAY BELT VESTED IN DOMINION.

Burrard Power Co. v. *The King* (1911) A.C. 87. In this case certain lands in what is called the Railway Belt were vested by the Provincial Legislature in the Dominion for railway purposes; and thereafter the Provincial Legislature had by statute appointed Water Commissioners, who by virtue of the statute had made a grant to the appellants of certain water privileges which the appellants claimed extended to lands in the Railway Belt. The Supreme Court of Canada held that the grant was invalid and conveyed no interest, and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey) affirmed the decision on the ground that the Dominion Government had control of the lands in the Railway Belt, and that the grant under which the appellants claimed properly construed did not, and did not purport to, affect such lands.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] GOODISON THRESHER CO. v. MCNAB. [Dec. 23, 1910.

Ontario Municipal Act—Construction—Bridges—Crossing by engines—Condition precedent.

R.S.O. (1897) 242 as amended by 3 Edw. VII. c. 7, s. 43 and 4 Edw. VII. c. 10, s. 60, provides as follows:—

10. (1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.

(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R.S.O. 1887, c. 200, s. 10.

(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge or culvert as aforesaid. 3 Edw. VII. c. 7, s. 43; 4 Edw. VII. c. 10, s. 60.

Held, affirming the judgment of the Court of Appeal (19 O.L.R. 188), FITZPATRICK, C.J., and GIROUARD, J., dissenting, that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.

Held, also, FITZPATRICK, C.J., and GIROUARD, J., dissenting, that planks required by sub-sec. 3 over a bridge or culvert were not intended merely to protect the surface from injury by reason of inequalities in the wheels of the engine or machinery passing over it, but was also to guard against the danger of the flooring giving way. Appeal dismissed with costs.

Robinette, K.C., and *J. M. Codfrey*, for appellant. *W. White*, K.C., and *Douglas*, K.C., for respondent.

(Owing to the illness of a judge this case could not be reported earlier.)

Ont.] GARLAND *v.* O'REILLY. [Feb. 21.

Donatio inter vivos—Ante-nuptial contract—Gift to wife—Payment at death of husband—Institution contractuelle—Onerous gift.

An ante-nuptial contract provided that "in the future view of the said intended marriage he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting thereof . . . the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him the said Edward O'Reilly." The parties were married and on the death of the said O'Reilly his wife claimed the right to rank on his estate as a creditor for the said sum of $25,000 which claim was contested by the general body of creditors who had all become such after said contract was made.

Held, affirming the judgment of the Court of Appeal (21 O.L.R. 201), that this clause in the contract must be construed as a donatio inter vivos creating a present debt in favour of the future wife, payment of which was deferred; that such a contract could not be attacked by subsequent creditors; and that the wife was entitled to rank on the estate for the amount of said gift.

Held, per GIROUARD, J., that the donation was one à titre onereux. Appeal dismissed with costs.

Casgrain, K.C., for appellants. *Lafleur*, K.C., and *Chrysler*, K.C., for respondents.

Railway Board.] [March 24.

HALIFAX BOARD OF TRADE *v.* GRAND TRUNK RLY. CO.

Appeal—Leave—Jurisdiction of Railway Board—Doubt as to decision of Board.

A judge of the Supreme Court of Canada will not grant leave to appeal from the decision of the Board of Railway Commissioners on a question of jurisdiction if he has no doubt that such decision was correct. Leave refused.

Code, K.C., for motion. *Biggar*, K.C., contra.

N.S.] REDDY *v.* STROPPLE. [April 3.

Deed—Description—Ambiguity—Admissions.

In an action for trespass to land both parties claimed title from the same and the dispute was as to which title included the locus. The deed under which S. claimed contained the following as part of the description: "then running in an eastwardly direction along the said highway until it comes to a crossway in the public highway and running in a southerly direction until it comes to the waters of Broad Cove." There were two crossways in the highway and S. contended that the first one reached on the course was indicated and R. that it was the second lying a little farther south.

Held, reversing the judgment of the Supreme Court of Nova Scotia, 44 N.S. Rep. 332, ante, vol. 46, 343, IDINGTON and DUFF, JJ., dissenting, that to run the course to the first crossway would take it over land not owned by the grantor; that there were other difficulties in the way of taking that course; that S. apparently for many years treated the second crossway as the boundary; and what evidence there was favoured that view; the construction should be that the crossway mentioned in the description was the second of the two. Appeal allowed with costs.

Newcombe, K.C., for appellant. *Gregory*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] [March 16.

BOYD *v.* CITY OF TORONTO.

Easement—Lateral support—Withdrawal by operations in street adjoining plaintiff's land—Subsidence—Injury to buildings—Right to support independent of prescription—Compensation—Appreciable disturbance—Absence of negligence.

Appeal by the defendants from the judgment of RIDDELL, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $600 damages and costs. The action was for damages for the injury caused to the plaintiff's land and house by the operations of the defendants, the city corporation, in digging a trunk sewer in Wyatt avenue, without taking proper precautions for shoring up the sides, whereby a subsidence of the plaintiff's land fronting on Wyatt avenue resulted and the walls of his house were cracked, etc.

BOYD, C.:—For the law in this case (in view of the doubt raised by *Smith* v. *Thackerah* (1866), L.R. 1 C.P. 564), I would be content to rest on the authority of Page Wood, V.-C., in *Hunt* v. *Peake* (1860), Johns. 705. He holds that a land-owner has a right, independent of prescription, to the lateral support of the neighbouring land owned by another so far as that is necessary to uphold the soil in its natural state as its normal level, and also to compensation for damage caused either to the land or to buildings upon the land by the withdrawal of support. . . .

The unsatisfactory character of the case of *Smith* v. *Thackerah*, as reported, is incisively discussed in Banks, pp. 36-38, and the view of Bowen, L.J., in *Mitchell* v. *Darley Main Colliery Co.*, 14 Q.B.D., at p. 137, is quoted. Bowen, L.J., is evidently of the opinion that the true view is, that, if a substantial or appreciable subsidence can be proved, the plaintiff is entitled to nominal damages, quite apart from the amount of actual damages; and that, I think, is the correct result, as manifested by the general trend of the cases, with the sole exception of *Smith* v. *Thackerah*.

Here the plaintiff's scheme was disturbed and changed to a visible, appreciable, and substantial extent by cracks and subsi-

dence by the withdrawal of lateral support resulting from the trenching operations in the street. It does not matter as to the sort of soil which was found below, the removal of which caused the disturbance in the plaintiff's land. It was not necessary to prove negligence in the methods of work adopted by the defendants; the work must be done so as not to disturb the soil of the frontagers. No objection was made to the Judge's charge or as to the questions submitted to the jury. It would be a proper course in cases if this kind to ask the jury whether buildings added to the weight of the land requiring lateral support, and whether the same subsidence would have occurred if the land had been without the buildings.

D. C. Ross, for the defendants. *A. C. McMaster,* for the plaintiff.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Feb. 17.

LES SOEURS DE LA CHARITE *v.* FORREST.

Costs—Taxation of—Action—Counterclaim—King's Bench Act.

For the purpose of the taxation of costs, a counterclaim was, before the amendment of sub-sec. (*c*) of s. 2 of King's Bench Act, by s. 17 of c. 12 of 7 & 8 Edw. VII. providing that the word "action" should include suit, set-off and counterclaim, always treated as a cross-action: *Emerson* v. *Guerin,* 12 P.R. 799, and that amendment has made no change in this respect, but was passed to make it clear that the new rule limiting the amount of costs that might be taxed, introduced by s. 1 of the same statute, should apply to set-offs and counterclaims as well as to actions. The plaintiffs, therefore, who became entitled to the costs of their action and of the defendant's counterclaim, were not limited to $300 (outside of disbursements) on both bills, but only on each separately.

Blackwood and *A. Bernier,* for plaintiffs. *Deacon,* for defendant.

Prendergast, J.] [Feb. 20.

WINNIPEG ELECTRIC RY. CO. *v.* WINNIPEG.

Municipality—By-law—Winnipeg charter—Regulations as to poles and wires in the streets claimed to be ultra vires, unreasonable and oppressive—Remedy when by-law conflicts with charter powers of incorporated company.

As the city of Winnipeg, by ss. 714, 720, 721 and 722 of its charter, has possession and control of its streets and lanes and the responsibility of keeping them in proper repair and free from obstructions that might be dangerous and, by sub-s. 123 of s. 703, is authorized to pass by-laws for regulating the erection and maintenance within the city of telegraph or telephone poles or wires and electric light and power poles and wires and to order such poles to be removed and such wires to be placed underground or otherwise, a by-law of the city providing that no person, firm or corporation shall erect or maintain any electric pole or wire without first making an application (in a form prescribed) for a permit and until such permit shall be granted; that every such permit shall be subject to revocation by the city at any time in the absence of an agreement to the contrary ratified by by-law; that there shall be no claim for compensation of any kind by any person, firm or corporation with respect to any rights or privileges alleged to have been acquired under such permit; that any right, leave or license given by such permit shall cease and determine upon such revocation; that upon the revocation of any such permit, the person, firm or corporation to whom it has been issued shall remove all poles and wires erected or maintained under its authority within fourteen days after notice, and authorizing and directing the proper officers of the city to cut down and remove any such poles or wires in the event of such person, firm or corporation refusing or neglecting to remove same after having been duly notified of the revocation of the permit covering the same, not being expressly made retroactive in any way, is neither ultra vires, unreasonable nor oppressive.

2. A provision in the by-law that the acceptance of the permit shall constitute an agreement to be bound by the conditions upon which it was issued, and by the terms of all present and future by-laws of the city relating thereto, does not place any company in a worse position than it would otherwise be, for all such by-laws would have to be ultra vires of the city and the company would be bound by them in any event.

3. The remedy of the plaintiffs, if they could establish that the by-law conflicts with special privileges conferred on them by certain legislation and the agreements authorized thereby, would be to resist the invasion of their rights by injunction or otherwise, but not by motion to quash the by-law in question which must stand, if it is authorized by the charter of the city.

Anderson, K.C., for plaintiffs. *Hunt*, for defendants.

Metcalfe, J.] CUPERMAN v. ASHDOWN. [Feb. 26.

Practice—Particulars—Action against owner of a motor vehicle for killing a person—Negligence—Motor Vehicle Act.

Plaintiff sued as administrator of S. The statement of claim set out that the defendant's servants, while driving a motor vehicle belonging to him along a public highway, operated the motor vehicle so negligently that S., who was then riding a bicycle on said street, was struck by the motor vehicle and instantly killed. The defendant's application for an order for particulars was dismissed by the referee. The plaintiff swore that he had no personal knowledge of the manner in which S. came to his death, and that he had no means of obtaining the knowledge necessary to give the particulars asked for.

Held, on appeal from the referee, that, taking into consideration the nature of the action, that some particulars were given in the statement of claim, and in view of the effect of s. 38 of 7 & 8 Edw. VII. c. 34, particulars should not be ordered.

Miller v. *Westbourne*, 13 M.R. 199; and *Brown* v. *Great Western Ry. Co.*, 26 L.T. 398, followed.

Cohen, for plaintiff. *Montague*, for defendant.

Mathers, C.J.] IN RE MONTGOMERY. [March 3.

Administration—Corroboration of evidence of claimant against estate of deceased—Voluntary payments by husband for wife—Liability of husband for wife's funeral expenses.

Held, 1. Although there is no rule of law that requires the evidence of a claimant upon the estate of a deceased person to be corroborated, yet it is a rule of prudence for the protection of the estate from unfounded claims; and when the Master, in taking the accounts of the husband as administrator of the

estate of his deceased wife, disallowed the husband's claim to certain lands that stood in her name for want of corroboration, his finding should not be disturbed. *Finch* v. *Finch*, 23 Ch. D. 271, and *In re Hodgson*, 31 Ch. D. at p. 183, followed.

2. Payments for taxes, registration fees and other expenses connected with the wife's lands made in her lifetime by the husband of his own accord, and without the knowledge of the wife were properly disallowed.

3. A husband cannot recover from his wife's estate money disbursed for the expenses of her funeral unless she has charged them by will upon the estate, or unless there is some statute making such expenses a charge upon her separate estate. *In re Lea*, 1 W.L.R. 460, followed. *In re McMyn*, 33 Ch. D. 575, not followed.

Ferguson, K.C., for plaintiff. *Coyne* and *A. C. Campbell*, for defendants.

Macdonald, J.] [March 7.

SCHULTZ *v.* LYALL MITCHELL CO.

Jury—Workmen's Compensation for Injuries Act—Joinder of another cause of action.

Under s. 59 of the King's Bench Act, a plaintiff suing under the Workmen's Compensation for Injuries Act, has a right to have the action tried by a jury without an order to that effect, and he does not lose that right by adding a claim for damages at common law independently of the Act, though the latter cause of action is one of those in which an order of a Judge for a trial by jury must be obtained.

Macalpine, for plaintiff. *Anderson*, K.C., for defendants.

Mathers, C.J.] LARENCE *v.* LARENCE. [March 21.

Crown patent—Law of descent of land in Manitoba prior to creation of province—Dominion Lands Act—Meaning of word "province" in Dominion legislation—Construction of statutes—Error or oversight in.

By an amendment to the Dominion Lands Act, 60 & 61 Vict. c. 29, it is enacted as follows: "Where patents for any lands have been or are hereafter issued to a person who died or who hereafter dies before the date of such patent, the patent in such case shall not therefore be void, but the title to the land designated therein and granted or intended to be granted thereby shall become

vested in the heirs, assigns, devisees or other legal representatives of such deceased person according to the laws of the province in which the land is situate, as if the patent had issued to the deceased person during life." The plaintiff claimed title to the lots in question, now part of the city of St. Boniface, under a patent from the Crown issued in 1906 in the name of Charles Larence, his grandfather, who died in February, 1870, before the creation of the Province of Manitoba. The patent recited the above Act and also contained the following recitals: "And whereas the legal representatives (within the meaning of the above enactment) of the late Charles Larence etc., are entitled to a grant of said lands, and application has been made by or on behalf of them or some of them for such patent." "And whereas, having in view the provisions of the above enactment, we deem it expedient for good and sufficient reasons to issue such grant to or in the name of the said late Charles Larence," and the habendum was "To have and to hold the same unto the said Charles Larence his heirs and assigns forever."

Held, that, as the lands in question were not in any province at the date of the death of Charles Larence, the above statute did not cover the case, or avail to validate a patent issued in the name of a deceased person which, without the support of some statute was a nullity and that, as the plaintiff was unable to establish a title to the lands independently of the patent, his action must be dismissed.

Although satisfied that there must have been some error or oversight in drafting a statute, the Court cannot correct the error or supply the omission, for that would be to legislate and not to interpret the Act. *Commissioners of Income Tax* v. *Pemsel* (1891), A.C., per Halsbury, L.C., at p. 543, and *In re Sepulchre's*, 33 L.J. Chy. p. 375 followed.

Coyne and *A. C. Campbell*, for plaintiff. *Laird*, *Jameson* and *Nason*, for defendants.

Mathers, C.J.] [March 21.

IN RE BYERLEY AND CITY OF WINNIPEG.

Expropriation of land by municipality—Assessment by arbitrators of value of land taken—Value at time of making award or at date of by-law to expropriate—Winnipeg Charter, ss. 823-823.

Under s. 825 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, when the city has passed a by-law for the expropriation of

land for any purpose of the city, but the land has not been entered upon or used by the city, it is not bound by any award the arbitrators may make as to the value of the land proposed to be taken unless the award is, within three months thereafter, adopted by another by-law; but, if the city exercises its power of entering upon or using the land before the making of the award, it would be bound to carry out the purchase.

Held, that, in the former case, the arbitrators should assess the value of the land as at the time of making the award and not as at the date of the by-law, if values have changed in the meantime. *Pretty* v. *Toronto*, 19 A.R. 503, distinguished.

Order referring the matter back to the arbitrators to assess the value as at the date of their previous award.

Wilson, K.C., and *A. M. S. Ross*, for applicant. *T. A. Hunt*, for City of Winnipeg.

Macdonald, *J.*] [March 21.

NEWTON *v.* FOLEY BROS., LARSON CO.

Assignment f.b.o.c.—Money paid to sheriff by assignor before assignment—Priority as between assignee and execution creditor—Assignments Act.

Held, 1. Moneys paid to the sheriff by an execution debtor whose goods have been seized under the execution, but have not been sold thereunder, are the property of the execution creditor, and the sheriff is not required by s. 9 of the Assignments Act R.S.M. 1902, c. 8, to pay them over to the assignee under an assignment by the execution debtor for the benefit of his creditors, unless such moneys are the proceeds of an actual sale by the sheriff.

2. The words "completely executed by payment" in s. 8 of the Act, giving precedence to an assignment for the general benefit of creditors over all executions not completely executed by payment, mean executed by payment to the sheriff, not to the execution creditor, so that the assignee has no right, under that section, to any moneys collected by sheriff under an execution against the assignor.

Clarkson v. *Severs*, 17 O.R. 592, followed.

Richards and *Kemp*, for plaintiff. *F. M. Burbidge*, for defendants.

Robson, J.] [Feb. 21.

SAWYER & MASSEY CO. *v.* FERGUSON.

Contract—Implied warranty—Fitness of machinery—Waiver —Sale of Goods Act—Notice.

The defendant by agreement in writing dated 21st August, 1909, agreed to buy from the plaintiffs a threshing machine and other articles for $1,065 and to pay for same in two instalments, $535 on 1st November, 1909, and $530 and interest on 1st November, 1910. Shortly after the date of the contract, certain threshing machinery was delivered to defendant in presumed compliance with the contract. Defendant paid the first instalment and gave his note for the other instalment, but claimed at the trial that he had done so under protest, because the machinery was not satisfactory; and he defended this action for the amount of the note alleging breach of the warranty or condition that the machine would do as good work as any of the same size sold in Canada and that he had given the notices required by the terms of the agreement. The agreement contained the same provisions as are set out fully in the head note to *Sawyer & Massey Co.* v. *Ritchie*, 43 S.C.R. 614. The defendant sought at the trial, though not pleaded, to invoke the aid of section 16 of the Sale of Goods Act, R.S.M. 1902, c. 152, on the subject of implied conditions or warranties.

Held, following *Sawyer & Massey Co.* v. *Ritchie*, that the clauses of the agreement excluded the provisions of the Sale of Goods Act as to implied conditions, and that the purchasers' remedies for breach of warranty as to the working capacity of the machinery entirely depended on his having observed the terms of the warranty, so that if the defendant neglected to observe them, both his defence to the claim on the note and his counterclaim for damages for breach of the warranty would fail.

The notices relied on by defendant were as follows: He complained over the telephone to the plaintiffs' local agent, Menzies, who sent to plaintiffs at Winnipeg a telegram reading thus, "Send Badgley, J. M. Ferguson separator laid up." Badgley was an expert in such machinery employed by plaintiffs.

Held, that, as the alleged notice contained no information as to wherein the machinery failed to satisfy the warranty, it was not a sufficient notice to comply with the contract and that there was nothing from which to infer a waiver as in *American Abell* v. *Scott*, 6 W.L.R. 550.

Held, also, that the provision in the contract excluding a waiver would apply in this case.

Fullerton, for plaintiffs. *E. B. Fisher* and *Eakins*, for defendants.

Robson, J.] BANK OF MONTREAL *v.* TUDHOPE. [March 3.

Bank Act, R.S.C. 1906—*Sale of goods by pledgor in ordinary course of business—Assignment of chose in action—Set-off.*

Held, 1. Goods purchased from the wholesale manufacturer thereof in the ordinary course of business without notice that he has given security thereon to a bank under ss. 86 to 88 of the Bank Act, R.S.C. 1906, c. 29, will become the property of the purchaser free from any claim of the bank under such security. *National Mercantile Bank* v. *Hampson*, 5 Q.B.D. 177, followed.

2. The defendants were entitled to set off their claim for goods sold to the Sylvester Company as against the claim of the plaintiffs upon an assignment to them by the Sylvester Company of their claim for goods sold to the defendants to the extent of such set-off as it stood at the time of receiving notice of the assignment, since there was clear evidence of an agreement that there should be such a set-off.

Sifton v. *Coldwell*, 11 M.R. 653, *Story*, ss. 1434, 1435, and *Lundy* v. *McCulla*, 11 Gr. 368, followed. *Watson* v. *Midwales Ry. Co.*, 36 L.J.C.P. 285, distinguished.

Kilgour, for plaintiff. *Dennistoun*, K.C., and *Stacpoole*, for defendants.

Prendergast, J.] [March 22.

IN RE WOOD AND CITY OF WINNIPEG.

Municipal law—By-law—Motion to quash for unreasonableness and discrimination—Prohibition as to erection of buildings within fixed distance from street line in residential locality—Removal of prohibition in favour of individual owner—Status of applicant—Acquiescence—Winnipeg charter.

Under par. 29 of s. 703 of the Winnipeg charter, the city passed a by-law prohibiting the erection of buildings on River Avenue, a residential street, within 15 feet of the street line. Subsequently a by-law was passed in amendment of the former law and permitting one Millman to erect a building on the

corner of River Avenue and an intersecting business street within six feet of the street line on condition that he would convey the six feet and a small triangle at the corner to the city. On motion to quash the amending by-law,

Held, that it was not justified by any considerations of public interest or benefit and was unreasonable and discriminatory and should have been quashed if moved against at the proper time by an applicant whose status was unobjectionable. *In re Pellot and Township of Dover*, 10 W.R. 792; *Hamilton Distillery Co.* v. *City of Hamilton*, 12 O.L.R. 75, *and Attorney-General of Canada* v. *City of Toronto*, 25 S.C.R. 514, followed. *In re Inglis and City of Toronto*, 9 O.L.R. 562, distinguished.

Held, however, that the motion must be denied, because it had not been made until about ten months after the date of the by-law attacked, during which time Millman had erected and completed his building at a cost of $80,000.00, and the applicant had been fully cognizant of the work from its inception. *In re Tabor and Township of Scarborough*, 20 U.C.R. 549; *In re Grant and Township of Puslinch*, 27 U.C.R. 154, and *In Re Platt and City of Toronto*, 33 U.C.R. 53, followed.

Whitla and *Chandler*, for applicant. *T. A. Hunt* and *Auld*, for City of Winnipeg.

RULES OF COURT.

Appeals to Privy Council.

The following announcement respecting appeal books has been sent to us for publication:—

As a result of correspondence between the Registrar of the Privy Council and the Registrar of the Court of Appeal the latter has been advised by the former that he is "prepared to accept appeal books printed in the form suggested, without marginal notes, but with headlines."

The form suggested by the Registrar of the Court of Appeal was "with headlines" instead of with marginal notes. The practice in Ontario has been to insert appropriate headlines, though the rules are silent as to such. Hereafter the practice should be observed in all cases. The Registrar of the Supreme Court having already stated appeal books printed in accordance with Rule 1305 will be accepted by him, and now the Registrar of the Privy Council having expressed a like readiness, provided "headlines" are inserted, all differences are practically removed, and the one set of appeal books, therefore, will suffice, and a substantial saving in the cost of printing be assured.