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UNJUST AND IMPOLITIC PROVINCIAL LEGISLATION AND ITS DISALLOWANCE BY THE GOVERNOR-GENERAL.

OPINION OF PROFESSOR DICEY.

All available light should be thrown upon a subject which is gradually becoming recognized as one of vast importance, namely, the constitutional position of Provincial Legislatures under the British North America Act in reference to their jurisdiction, and the exercise by the Governor-General of his power to disallow objectionable or improper legislation in the Provinces of the Dominion.

Unfortunately party politics bulk so large in this country, and so much attention is paid to the ephemeral clamour of popular prejudices, that a press, which ought to lead rather than to follow, refrains from discussing or even referring to the important matters above referred to. The truth unhappily is that the press on both sides of politics (speaking here especially of the Province of Ontario) devotes itself too much to the effort of catch votes, than to inform the public of the true condition of things, and the effect of reckless and unwise legislation.

An opinion on such important matters coming from a source, which is necessarily free from any possible prejudice or feeling, should be most welcome to those who have the interest of the country at heart; and we are glad, in this regard, to be the medium of publishing the views of this very eminent authority on a subject already discussed in these columns in reference to recent Acts of the Ontario legislation connected with the Florence Mining Case and the Hydro-Electric Commission (see ante pp. 137, 257, 297) and their disallowance by the Governor-General.

The lawyer who may be said to occupy the foremost place in Anglo-Saxon countries in the study of Constitutional Law

and to be a recognized authority therein is Professor A. V. Dicey, K.C., D.C.L. It is scarcely necessary to remind our readers that Mr. Dicey is also Vinerian Professor of English Law at the University of Oxford, Hon. LL.D. of Cambridge, Glasgow and Edinburgh Universities, and the author of various learned treatises, such as Dicey's Conflict of Laws, Private and International Law, The Constitution of England, Law and Public Opinion, The Privy Council, etc., etc.

The writer on the subject in the Toronto *Sun*, desiring the fullest information on the subjects above referred to from the best source, decided to secure the opinion of this learned jurist on a series of questions which bring up all the important issues which have come up in this connection. Having obtained this opinion, the editor of that journal has kindly sent us a copy of it, and permits us to publish it in full in our columns. This we gladly do.

The appeal for disallowance in the Mining Case was of no avail, although its objectionable character was commented upon; but, in the opinion of Professor Dicey, the Act so summarily disposing of all litigation in the other matter presents a much stronger case for interference. Certainly such a well-reasoned and unprejudiced utterance as that now given by this eminent authority would doubtless have weight in the consideration of any petition for the disallowance of the strange, unfair and un-British legislation of the Whitney Government known as the Hydro-Electric Commission Amendment Act of 1909.

En passant we would call attention to the fact that the power to disallow under the British North America Act is not given to the Governor-General in Council, but simply to the "Governor-General." It may be that the intention was that he, apart from the Cabinet of the Dominion, should, as representing the Crown, have the power to disallow objectionable legislation of his own motion, thus bringing the consideration of such matters into a sphere free from any possible pressure of party politics. This is a point which does not as yet seem to have been discussed.

It is unnecessary after all that has from time to time appeared in this journal to recapitulate the facts and circumstances connected with this legislation. It will be sufficient at present to quote two sections of the Act of 1909. They are as follows:—

"Section 4.—It is hereby further declared and enacted that the validity of the said contract, as so varied as aforesaid, shall not be open to question and shall not be called in question on any ground whatever in any court, but shall be held and adjudged to be valid and binding on all the corporations mentioned in section 3, and each and every of them according to the terms thereof, as so varied as aforesaid, and shall be given effect to accordingly.

"Section 8.—Every action which has been heretofore brought and is now pending wherein the validity of the said contract or any by-law passed, or purporting to have been passed, authorizing the execution by any of the corporations hereinbefore mentioned is attacked, or called in question, or calling into question the jurisdiction, power or authority of the commission or any municipal corporation or of the councils thereof, or of any of them or either of them, to exercise any power, or to do any of the acts which the said recited Acts authorize to be exercised or done by the commission or a municipal corporation or by the council thereof by whomsoever such action is brought, shall be and the same is hereby forever stayed."

The opinion of Professor Dicey reads as follows:—

PROFESSOR DICEY'S OPINION.

First question.—Does the B.N.A. Act, 1867, s. 92, sub-s. 13, confer upon a provincial legislature (in this instance the Legislature of Ontario) power to deprive individuals of substantive rights, and especially of property rights without compensation?

Answer.—The B.N.A. Act, 1867, s. 92, sub-s. 13, confers upon a provincial legislature power to make any law in relation to "property and civil rights in the province," and thus appears to confer upon such legislature power to deprive (if it sees fit) individuals of substantive rights, and, even though they be property rights, without compensation. There is nothing in the Act, as far as I can see, which provides that a law passed by a provincial legislature shall not be palpably unjust; nor is there anything in the Act, as there is in the constitution of the United

States, prohibiting the passing of a "law impairing the obligation of contracts" (Constitution of U.S. article I, s. X). The guarantee provided by the B.N.A. Act, 1867, against possible injustice resulting from the legislation of a provincial legislature is to be found, if anywhere, in the Governor-General's power under the B.N.A. Act, 1867, ss. 56, 90, to disallow any law passed by a provincial legislature.

Second question.—Does the B.N.A. Act, 1867, s. 92, sub-s. 13, give power to a provincial legislature to enact a law staying actions for the enforcement of the substantive and actually acquired rights of individuals?

Answer.—The Act does, in my opinion, confer such power. I do not think it possible to draw in principle a distinction between a law which without compensation deprives an individual of his property rights, and a law which deprives him of his right to enforce such rights by action. It is, of course, true that, unless the plainest language be used, any court would be unwilling to presume that a law was intended to have a retrospective operation which deprived an individual of his right to maintain an action, especially if it were already commenced, for interference with an actually acquired right.

Third question.—Does the B.N.A. Act, ss. 56 and 90, give to the Governor-General unlimited power of disallowing the Acts of a provincial legislature?

Answer.—The whole working of the constitution of the Dominion which is created under the B.N.A. Act, 1867, appears to depend upon the possession of, and the use by the Governor-General of this unlimited and general power of disallowance (see Lefroy, Legislative Power in Canada, proposn. 10, pp. 185-207). On this point I entirely agree with Mr. Goldwin Smith, that the enactment giving the power of disallowance plainly "refers to a power of political control to be exercised in the interest of the nation, not to a mere power of restraining illegal stretches of jurisdiction, a function which belongs, not to a government, but to a court of law." (Goldwin Smith, Canada, etc., p. 159.)

The power of disallowance is I am told, exercised by the Governor-General in Council, that is, I presume, in practice by the Ministry of the day. But the power is itself unlimited, and is surely intended to be exercised to prevent the enactment of unjust laws, especially where such injustice may, as in the cases submitted to me, work gross injury to the whole people of the Dominion. In any case no variation of the policy adopted by different Ministries can affect the fact that the power of disallowance is under the B.N.A. Act, 1867, quite general and unrestricted.

Fourth question.—Are the provincial Acts relied upon in the *Cobalt Case* (6 Edw. VII. c. 12, and 7 Edw. VII. c. 15) and in the Hydro Electric Power Commission Act, 1909, 9 Edw. VII. c. 19 valid?

Answer.—I answer this question with some hesitation. On the whole I am of opinion that they are valid, i.e., they are not beyond the power conferred by the B.N.A. Act, 1867, s. 92, sub-s. 13, on a provincial legislature; but it is right to add that these Acts taken as a whole, and particularly the Power Commission Act, 1909, ss. 2-8, seem to me practically to have an effect so strange and manifestly unjust that it is possible the court—say the Privy Council—might be inclined to hold them invalid.

Fifth question.—Generally, what remedy have individuals for injustice worked, or which may be worked, by the Ontario Acts in question?

Answer.—The injustice and impolicy of these Acts is almost patent. It is clear further that though they may directly affect only property and civil rights in a particular province, they must affect the credit and interest of the Dominion of Canada as a whole. The Power Commission Act, 1909, appears to be, if there be any difference, rather more opposed to the ordinary rules of just legislation than even the Acts relied upon in the *Cobalt Case.* But the obvious unfairness of a law can hardly affect its validity if the law falls within the terms of the B.N.A. Act, s. 92, sub-s. 13.

The idea indeed naturally suggests itself that a so-called law which, without compensation, confiscated the property of an individual, or of designated individuals, or imposed upon an individual, or such designated individuals, liability for a contract into which he or they had not in fact entered, might be held invalid as not being a law at all, i.e., as lacking that generality which some writers ascribe to a law (see e.g., Pollock, First Book of Jurisprudence, p. 35), and that, e.g., the Power Commission Act, 1909, ss. 2-8, might thus be treated by a court as falling outside s. 92 altogether, on the ground that it was not a law at all. But I doubt greatly whether this position could be maintained with success before the Privy Council.

Persons who suffer from unjust legislation of a provincial legislature have the following remedies.

1. They may, if a given Act, e.g., the Power Commission Act, 1909, is still liable (as I believe from the papers sent me it is), to disallowance by the Governor-General, petition for its disallowance. It is hardly possible, I may add, to conceive a stronger case in favour of disallowing an Act.

2. They may influence the public opinion of Canada so as to induce the Governor-General, or in effect the Ministry of the day, to disallow provincial Acts which do injustice to individuals and shake the credit of the whole Dominion.

3. They may obtain from the Imperial Parliament an amendment of the B.N.A. Act, limiting the power of provincial legislatures to interfere with acquired rights and with the validity of contracts. Such an amendment however would, as things now stand, hardly be obtained from the Imperial Parliament unless it were obviously desired by the people of Canada.

June 18, 1909. A. V. DICEY.

CAPITAL OFFENCES AND THE ROYAL PREROGATIVE.

The issue of the energetic movement looking to commutation of the death penalty which Mr. Justice Riddell of the Ontario Bench, passed upon the murderer, Blythe—a movement, critics not a few will think, born of delusion, and promoted by folly—has, in the writer's view, dealt a blow to the administration of justice in Canada from which it will not speedily recover.

It will be convenient, at the start, to review the circumstances of this unwonted expression of the criminal instinct in man from the bringing of the offender to trial until the present moment. Having been apprehended, he was committed for trial at the last winter assizes for the county of York, in Ontario, on a charge of having murdered his wife; achieving that unnatural object by recourse to an iron poker, his blows upon the lower part of her body only ceasing with the complete exhaustion of her vitality, and ultimate death. The prisoner was afforded what seemed to most onlookers in the court room and the vast majority of those deriving their knowledge at second-hand from the press, a thoroughly fair trial—the rules of evidence, apparently, being strained, in a good many respects, in his favour. The presiding judge, moreover, being a man of broad acquirements and keen preceptions and the defence being in the hands of a counsel exceptionally well versed in the department of law being treated, his interests, unmistakably, could have suffered little prejudice. After suitable deliberation by the jury, the prisoner was found guilty, and sentenced to be hanged on a day some six or seven weeks thereafter. The trial judge was asked, though after many weeks interval, to reserve a case for the Court of Appeal, which was however refused.

Representations having been made to the Minister of Justice that material evidence, going to shew mental deficiency, was obtainable, a respite was granted a day or so before the time fixed for the execution, to allow of a fuller and more thorough consideration of the case in Ottawa. Subsequently, the Governor-General, exercising his authority, in the manner prescribed by the constitution, declared that counsel had failed to make out sufficient reason to justify his interference.

Finally—some abortive petitions to the Acting Minister of Justice being, meanwhile, preferred—the prisoner obtained a further delay in carrying out the sentence from a judge of the High Coürt at Toronto in the form of a second respite, until October 1st, to permit of a motion for leave to appeal to the Court of Appeal from the refusal of the trial judge to reserve a case. This favour, it may be remarked, supplied, as to the manner and time of its concession, a meet anti-climax for a drama.

Two reprieves, associated with the death-penalty, distinctive in origin and nature, hold a venerated place in our well-ordered system of jurisprudence; the one, extended by the pleasure of the Crown, ex mandato regis; another, springing from the will of the court, ex arbitrio judicis. With the remaining types, the present controversy has nothing whatever to do. These are ex necessitate rei, where the law's course becomes interrupted on the discovery, between the dates of sentence and execution, that a female, who has been condemned, is pregnant; the other, leading to a stay and possible revocation of punishment from a convict's developing insanity. But, seeking light upon the first of these dual anchors of hope which one—shipwreck imminent—trusts, if let fall, peradventure, may hold. It cannot be without profit to learn how the expedient is described in that invaluable treatise, "Stephens' Commentaries, on the Laws of England." We find it spoken of there in this way, "the last resort is an act of grace, or the King's most gracious pardon, the granting of which is the most amiable prerogative of the Crown." Proceeding with his observations, the distinguished text-writer says: "the most personal, and most entirely his own;" imparting, besides, the knowledge that such attribute of the Sovereign —potent, sublime, as he conceives it to be—was, by the understanding of our Anglo-Saxon ancestors, enjoyed a lege suœ dignitatis. He declares, too, on the word of an earlier inquirer, what the writer himself will presently enforce, that "law cannot be framed on principles of compassion to guilt, yet justice is bound to be administered in mercy."

The comparative dulness of every legal dissertation may be relieved by some culling, here and there, from poetry. Let the

reader then weigh the estimate, as dignified as fitting, of the prerogative which the great dramatist offers by one of the characters in "Measure for Measure." A murderer's sister, it may be said, is interceding with the provisional head of the state for the condemned:

> "Well, believe this,
> No ceremony that to great ones 'longs,
> Not the King's crown, nor the deputed sword,
> The marshall's truncheon, nor the judge's robe
> Become them with one half so good a grace
> As mercy does."

Then occurs this highly attractive image:—

> "And mercy then will breathe within your lips
> Like man new-made."

The girl's touching appeal contains the well-known passage:—

> "O, it is excellent
> To have a giant's strength, but it is tyrannous
> To use it like a giant";

And that equally familiar,

> "Man, proud man,
> Drest in a little brief authority;
> Most ignorant of what he's most assured,
> His glassy essence, like an angry ape,
> Plays such fantastic tricks before high heaven,
> As make the angels weep."

It should not be overlooked that, by his answer, the ruler displays the other side of the shield!

> "I shew it, (pity) most of all when I shew justice,
> For then I pity those I do not know,
> Which a dismissed offence would after gall,
> And do him right that, answering one foul wrong,
> Live not to act another."

Thus far, little more than the worth and efficacy of the prerogative, as the lodging of mercy, has been emphasized. And

it may be of interest, before passing from that aspect of the inquiry, to recall a most noteworthy example, in recent times, of the exercise of the pardoning gift, being that of the disaffected Irishman, Colonel Lynch, who led, with much distinction, a regiment of Boer infantry during the South African Rebellion. But the Sovereign, while, as we perceive, traditionally commissioned, and, without doubt, always prepared, when seemly and right, to employ, in relief of the individual, the staff of benignity, must for the protection of society often wield the sword of retribution. Going back, at this point, for the ample unfolding of the chief argument, to a stricter line of reasoning, was it ever, one may ask, the belief of any jurist of repute in the wide circuit of our Empire—the home indubitably of impartial, unswerving justice—that, when the free avenue deemed by the voice of high authority "the last resort" had been tried by a prisoner awaiting execution, and the deliberately entered portal has closed behind him, a court of law might step in and defeat, or even oppose, the will of the King's representative? What but mischief—profound, far-reaching—could arise from playing off, as would seem to have resulted here, one of two such autinomic media of succor against the other! Is the amendment of the statute which counsel for the prisoner invoked in his extremity possible of being construed in such a way as to effect so grave a constitutional change as would thus be wrought?

Some, at any rate, fail to see where the judge who granted Blythe's extension of time found authority, consonantly with the Crown's prerogative, for his action.

What legislation, guardedly examined, confers the jurisdiction? If there be any, the position logically, brings us to, and leaves us, in a veritable cul-de-sac. Such, indeed, being the case, would not the arm, endowed for ages with might and energy, be palsied? Would there not, so viewing things, be exchanged for the instrument, popularly supposed to control, in the juridical scheme outlined the issues of life and death—for a being which had been gifted with purpose and volition—a string-pulled marionette?

J. B. MacKenzie.

RESPONSIBILITY OF CORPORATION FOR MALICIOUS ACTS OF EMPLOYEES.

The Supreme Court of North Carolina has lately considered the question of the liability of a railroad company for an employee shooting another under circumstances that appeared purely wanton and malicious and when no purpose in the interest of the company seemed to be subserved. These were the facts. Plaintiff attempted to climb upon the company's box car attached to a moving freight train so as to steal a ride. A flagman on top of the car told plaintiff to come up to him, but plaintiff started to run away and he had not gotten more than eight feet away when the flagman shot him twice. The jury found in answer to special interrogatory that the flagman was not acting within the scope of his employment, but their general verdict was for plaintiff. The majority of the court held that this issue was properly submitted to the court and judgment was ordered entered for defendant. *Jones* v. *Seaboard A. L. H. Co.*, 64 S.E. 266. The dissent by Clark, C.J., takes the position that the undisputed facts shew there was no basis for this finding by the jury. He says: "The flagman was in the discharge of his duty in discovering the plaintiff, and could not put off that character and without change of position assume another while the plaintiff was running eight feet, which a calculation shews was less than half a second. He could not be an employee of the railroad when he frightened the man and ceased to be an employee within the one hundred and twentieth part of a minute while the frightened man was running eight feet. As the flagman fired and struck the fleeing man twice before he could run eight feet, the pistol must have been drawn and presented before the plaintiff turned to fly." We do not know if this argumentation presents such a shewing of physical impossibility as to take the matter away from the jury upon the question as to whether the flagman was acting within the scope of his duty. The dissent is more nearly based, as we view the matter on the course of judicial decision, instanced and dis-

cussed. Thus one North Carolina case held a company liable for a station agent killing an ex-passenger in a difficulty over the delivery of a trunk; another for a conductor kissing a passenger and another for employee blowing a whistle so as to frighten plaintiff's horse.

The dissent also goes upon another theory, which distinguishes railroad corporations from other employers, which may be thought interesting, if not in fact sound. The judge says: "The liability of a farmer, merchant or other citizen in the performance of his inherent right to do business, for the conduct of his agents is necessarily not so broad as that of these great corporations, which are given artificial existence and great special privileges, on the ground not only that they shall be used for the public benefit, but on the implied agreement that they shall not be used to the public detriment. Using both physical and pecuniary power, they must be liable for its misuse, and employing great numbers of men they alone can control them and are responsible for their discipline." That sort of language sounds more populistic than scientific, and if we get into that sort of atmosphere for the ascertainment of a legal principle we will not be apt to aid in that harmonious application of settled principles to new conditions that we so much need.—*Central Law Journal.*

THE SOCIAL STATUS OF A HANGMAN.

An American paper puts the question, What should be, in a civilized country, the social status of a hangman? This has been asked before now, but is surely a somewhat idle query. Nevertheless, the position of the executioner has undoubtedly varied at different periods and in different countries. In France, "Monsieur de Paris," as the representative of la haute justice was called, seems usually to have been held in some esteem, and students of French history are familiar with the tradition that the executioner Tristan was one of the favourite gossips of that powerful, eccentric Sovereign, Louis XI. At a very recent execution in France, the manipulator of the guillotine, Deibler,

was cheered both on entering and on leaving the town. In Russia at the present day an executioner would scarcely be received on these terms, but the minion of the law ought not to be blamed for the law's unrighteousness. Dr. Mercier discusses the subject in the chapter entitled Wrongdoing, in his treatise on Criminal Responsibility. The hangman does not merit execration as such if he fulfils his ugly duty in a proper and seemly manner. It was rightly held to be misbecoming when an executioner, some years ago, pretending to lecture on his business, exhibited his ropes, straps, and white cap, and attempted to shew how a victim was "worked off"; but this was an abuse of the hangman's office and position. Dr. Mercier says:—

"No doubt a hangman derives a certain satisfaction from turning off his victims in a workmanlike manner—the satisfaction that we all derive from dexterity and success in whatever undertaking—but, though we look askance upon his occupation, we do not regard him as a wrongdoer, so long as his primary motive is to earn his wages, to carry out the contract he has made, or to perform a public duty. But the man who should hang another merely to gratify his own desires, merely to obtain gratification by so doing . . . or to obtain his victim's clothes, or in any way to obtain satisfaction to himself would do wrong." The case of the hangman is, of course, an especial one. We should not, as Dr. Mercier says, care to eat with him, drink with him, or shake hands with him; but, though we may and do look askance upon his calling, we cannot fairly class him with the bravo who stabs in the dark to satisfy the private vengeance of the person who has hired him. We feel, or should feel, that the hangman, though he works for hire, does not work solely for hire. He undertakes to kill for a certain wage some person whom society, as personated by the law, has decided must be slain for the welfare of the community. The hangman who acts thus is merely giving effect to the wish expressed by society —is, in fact, and to this extent, co-operating with society.—*Law Times.*

The profession in Ontario will regret that Mr. James F. Smith, K.C., has resigned his position as Editor-in-Chief of the Ontario Law Reports. He brought to the duties of his office, a most thankless and difficult one in many ways, ceaseless attention and great intelligence. It will be difficult to properly fill his place. Mr. Smith was a worthy successor to the first Editor-in-Chief, Mr. Christopher Robinson, one of his most intimate friends. It is fitting that those who occupy prominent positions in professional matters should be of the character of these two men; high-minded, reliable and courteous; realizing the responsibility of being, in a measure, representatives of an honourable profession, and seeking to sustain its highest standard and traditions.

The Dominion Government has done well in the appointment of Mr. Thomas Mulvey, B.A., K.C., formerly Assistant Provincial Secretary for Ontario, as Under Secretary of State and Deputy Registrar-General of Canada. Mr. Mulvey, having shewn great ability and untiring industry in his provincial office, will we doubt not be also most efficient in his more extended field of usefulness at Ottawa. Mr. Joseph Pope the former Under Secretary of State now becomes Under Secretary of State for External Affairs. Mr. S. A. Armstrong, Barrister-at-law, takes Mr. Mulvey's place at Toronto.

REVIEW OF CURRENT ENGLISH CASES.

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CRIMINAL LAW—ABORTIVE HEARING—RE-HEARING—EVIDENCE.

Ex p. Bottomley (1909) 2 K.B. 14. This was an application by certain persons accused of conspiracy for a mandamus to compel magistrates to take the evidence in the case de novo. The trial was originally commenced before Sir G. Smallman, a magistrate, and after a hundred witnesses had been examined the magistrate fell ill and was unable to continue the hearing, thereupon another magistrate took his place, before whom the counsel for the prosecution proposed to recall some of the witnesses previously examined, re-swear them and read over to them their previous depositions directing them to correct the evidence, if and where it was inaccurate; to ask them any additional questions that might be thought advisable; and then to tender them for cross-examination with right to the counsel for the prosecution to re-examine if necessary; and then to proceed with the oral examination of other witnesses not previously called. The magistrate assented to this course, but the accused objected to this proposed procedure, and contended that the witnesses must be called and examined entirely de novo. Phillimore and Walton, JJ., before whom the motion was heard, were unanimous in thinking the proposed procedure was unobjectionable, and in refusing the application.

EMPLOYERS' LIABILITY—WORKMAN—ACCIDENT CAUSING DEATH—SURGICAL OPERATION—REMOTENESS.

Shirt v. Calico Printers Assocn. (1909) 2 K.B. 51 was an action brought under the Workmen's Compensation Act, 1906. The workman, whose death was the occasion of the action, was injured in the course of his employment, by a severe laceration of his hand. A competent surgeon proposed, instead of amputating the hand, by means of a double operation, to graft skin upon it which would completely preserve the hand. An anæsthetic was properly administered at each stage of the operation, but on the second occasion death unexpectedly ensued. In these circumstances the judge of the County Court held that the death was caused not by the accident, but by the administration of the anæsthetic, for which the employers were not liable; but the

Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) held that the learned judge was wrong, and had misdirected himself, and that the plaintiff was entitled to succeed.

EMPLOYERS' LIABILITY — WORKMAN — ACCIDENT — REFUSAL OF WORKMAN TO SUBMIT TO SURGICAL OPERATION—WORKMAN'S COMPENSATION.

In *Tutton* v. *SS. Majestic* (1909) 2 K.B. 54 the Court of Appeal (Cozens-Hardy, M.R., and Moulton, L.J.) held that a workman claiming compensation for injury received in the course of his employment, is not barred by reason of his refusing to submit to a surgical operation of a serious character for the relief of the injury, if he acts on the advice of his own doctor, whose honesty and competency is not impeached; even though on the balance of medical testimony it appears that the operation was one which might reasonably and properly have been performed.

EMPLOYEE AND WORKMAN—COMPENSATION—ACCIDENT HAPPENING ABROAD—JURISDICTION—SCOPE OF WORKMEN'S COMPENSATION ACT, 1906.

Tomalin v. *Pearson* (1909) 2 K.B. 61. This was also an action by the representative of a deceased workman to recover compensation for his death occasioned by an accident in the course of his employment. The deceased was in the employment of the defendants, a firm of contractors, and was by them sent out to Malta to work for them there and where he came to his death. The County Court judge held that the plaintiff was entitled to recover, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) came to the conclusion that the action must be dismissed, on the ground that the Act had no operation out of the territorial limits of the United Kingdom.

CRIMINAL LAW—INSANITY—PERSON TOTALLY DEAF—INCAPACITY TO UNDERSTAND PROCEEDINGS—DETENTION DURING PLEASURE OF CROWN—(CR. CODE, S. 967).

The King v. *Governor of Stafford Prison* (1909) 2 K.B. 81. The defendant was indicted for felony. Upon his arraignment he stood mute and a jury impanelled and sworn for the purpose found that he was mute by the visitation of God. The jury were

sworn again to try whether he was capable of pleading to the indictment, and they found that he was incapable of pleading to and taking his trial by reason of his inability to communicate with or be communicated with by others. Upon this finding the judge ordered him to be detained under the Criminal Lunatics Act, 1800 (39-40 Geo. III. c. 94), s. 2 (see Cr. Code, s. 967). On a motion to discharge the prisoner on habeas corpus, the Divisional Court (Lord Alverstone, C.J., and Darling and Jelf, JJ.) held that the finding of the jury was in effect a finding that the prisoner was insane within the meaning of the Act, and that the order for his detention was properly made.

LOTTERY — OFFENCE — CORPORATION — PERSON—LOTTERIES ACT, 1823 (4 GEO. IV. c. 60)—INTERPRETATION ACT, 1889 (52-53 VICT. c. 63), s. 2(1)—(R.S.C. c. 1, s. 34(20)—7 EDW. VII. c. 2, s. 7(13) ONT.).

In *Hawke* v. *Hulton* (1909) 2 K.B. 93 a limited company was charged under the Lotteries Act with advertising a lottery. The Act provides that if a person shall advertise a lottery he shall be deemed "a rogue and vagabond," and shall be punished as thereinafter directed. By a subsequent section the punishment is imprisonment and for a second offence imprisonment and whipping. By s. 4 of the Summary Jurisdiction Act a magistrate is empowered in any case to impose a fine instead of imprisonment. On a case stated by the magistrate the Divisional Court (Darling and Jelf, JJ.) held the Lotteries Act did not apply to limited companies, and that the Interpretation Act, which provides that "person" shall include "corporations" did not help the matter, as a company could neither be whipped nor imprisoned, which punishments indicated as far as this Act is concerned "a contrary intention" that the word "persons" should include corporations; they also held that the Summary Jurisdiction Act did not make any difference, because the magistrate is not bound under that Act to impose a fine, nor does that Act provide that in a particular class of offence a fine shall be imposed, and that in another imprisonment shall be inflicted.

STATUTORY DUTY—NEGLIGENCE—MASTER AND SERVANT—BREACH OF STATUTORY DUTY—COMMON EMPLOYMENT.

David v. *Britannic Merthyr Coal Co.* (1909) 2 K.B. 146 was an action by the representatives of a deceased workman against his employers to recover damages for his death which was occasioned

by the neglect of certain statutory duties imposed on the defendants by the Coal Mines Regulation Act. This neglect was due to the default of the defendants' employees. Channel, J., who tried the action charged th ary that the defendants were under the statute bound to publish the statutory regulations and to enforce them to the best of their power, and if they did enforce them to the best of their power they were not responsible if one of the servants committed a breach of the regulations which occasioned the death of one of their workmen. He also charged them that the onus was on the plaintiff to shew that the defendants had neglected their duty. The jury found that the accident in question was occasioned by a breach of the regulations by two of the defendants' servants but that such breach was not brought about by defendants not taking reasonable grounds to prevent such contravention of the statutory regulations. But the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that the jury had been misdirected, and that the statutory duty imposed on the defendants was absolute, and could not be shifted from their shoulders, and that they were civilly liable for the consequences resulting from a breach of the statutory rules, without any proof of negligence on their part, and the employers being liable for the breach of the statutory duty, the defence of common employment was no answer, a new trial was therefore ordered. It may be noted that the decision follows in effect the previous decision of the Court of Appeal in *Groves* v. *Wimbourne* (1898) 2 Q.B. 402 in regard to the Factory Act.

DAMAGES—SALE OF FOOD—BREACH OF IMPLIED WARRANTY THAT ARTICLE SOLD IS FIT FOR CONSUMPTION—DEATH OF PLAINTIFF'S WIFE THROUGH EATING FOOD SOLD TO HIM—LOSS OF WIFE'S SERVICES—DEATH NO PART OF CAUSE OF ACTION.

Jackson v. *Watson* (1909) 2 K.B. 193 was an action brought by the plaintiff to recover damages for breach of an implied warranty that tinned salmon purchased by him from the defendants was fit to eat. The plaintiff and his wife partook of it, the plaintiff became ill, and his wife died from the effects of it. The plaintiff claimed to recover doctor's expenses, funeral expenses of his wife, and also for the loss of her services. The jury found a verdict for £233 16s. of which £4 3s. was for doctor's bill, £29 13s. for funeral expenses, and the residue for loss of wife's services. The defendants contested their liability for the loss of laid down that no action wo lie at common law for the death

of a human being. This case has been the subject of much discussion and the result of the present decision by the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) appears to be this, that where the death occasions injury to a third person such third person may recover damages therefor. There is of course a difficulty in estimating damages for loss of services in such a case as the present owing to the fact that widowers may and sometimes do very shortly marry again. The case seems to be a departure from the previous decision of the Court of Appeal in *Clark* v. *London General Omnibus Co.* (1906) 2 K.B. 648 (noted ante, vol. 43, p. 11), which the court distinguishes on the ground that it was an action of tort, whereas this case was on contract.

PRACTICE—DIVORCE—CO-RESPONDENT — ORDER AGAINST CO-RESPONDENT TO PAY DAMAGES INTO COURT—DEATH OF CO-RESPONDENT—ABATEMENT—REVIVOR—JURISDICTION.

Brydges v. *Brydges* (1909) P. 187, although a divorce action deserves attention in connection with the case of *C.* v. *D.*, 10 O.L.R. 641. The facts were that a decree nisi for divorce was pronounced on March 4, 1908, and damages assessed against the co-respondent at £1,500, and an order was subsequently made that the co-respondent do within one month from its service pay the said sum into court. Before the month was up the co-respondent committed suicide. On the 30th November, 1908, the decree was made absolute. An application was then made against the executor of the co-respondent to compel him to pay the £1,500 into court. The president made the order, but on appeal to the Court of Appeal (Cozens-Hardy, M.R. and Farwell, L.JJ.) it was held that there was no jurisdiction to make the order, because the executor was not a party to the proceedings, and could not be made a party, the rules as to continuing proceedings on the death of parties not applying to divorce actions. The court say: "Whatever remedy (if any) a petitioner may have against the estate of a deceased co-respondent under the circumstances of this case, it is not to be obtained in the Divorce Division."

BILL OF LADING — CHARTER-PARTY—NEGLIGENCE CLAUSE—DUTY OF MASTER ON SHIP.

The Draupner (1909) P. 219 was an action by the holders of a bill of lading against the ship owners to recover damages for short delivery; the goods in question having been lost owing to the negligence of the master of the ship. The plaintiffs in England had contracted for the purchase of timber to be de-

livered at a foreign port, and had stipulated with the vendor for "tonnage to be engaged on the conditions of the charter-party attached." The form of charter-party attached contained a clause exonerating the ship owners from liability for negligence of their servants, and the defendants' ship was chartered accordingly, but in the bill of lading signed by the master of the ship the negligence clause was omitted by mistake—and without express authority from the ship owners. The defendants contended that in these circumstances they were not liable for the loss notwithstanding the omission of the negligence clause from the bill of lading. Deane, J., however, who tried the action, held that the plaintiffs were entitled to recover, and his judgment was affirmed by the Court of Appeal (Bigham, P.P.D. and Kennedy, L.J. and Joyce, J.). The Court of Appeal considered that the mere fact that the plaintiffs had authorized a vessel to be chartered subject to a negligence clause in the charter-party, was no evidence that they knew that the defendants' vessel had been so chartered, or that in signing the bill of lading the master was exceeding his authority.

COMPANY — SHAREHOLDERS' ADDRESS BOOK — RIGHT OF SHAREHOLDER TO INSPECT AND COPY BOOK—ACTION TO ENFORCE RIGHT OF SHAREHOLDER—COMPANIES ACT, 1845, (8-9 VICT, c. 16) s. 10— (7 EDW. VII. c. 34, s. 117 (ONT.)—(*R.S.C.* c. 97, ss. 89, 91.)

Davies v. *Gas, Light & Coke Co.* (1909) 1 Ch. 708 In this case which was brought by the shareholder of a limited company against the company, to compel the defendants to permit the plaintiff to inspect and copy the shareholders' address book. Warrington, J., gave judgment in favour of the plaintiff (1909) 1 Ch. 248 (noted ante, p. 198). The Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.) have affirmed his decision, holding that the right may be enforced either by a negative or mandatory injunction, the main contention on the appeal being that the plaintiff's only remedy, if any, was by mandamus.

STATUTE OF LIMITATIONS—RECOVERY OF LAND—ACTION FOR ASSIGNMENT OF DOWER—TIME FOR ASCERTAINING VALUE—REAL PROPERTY LIMITATION ACT, 1833 (3-4 WM. IV. c. 27) s. 2—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. c. 57) s. 1—(R.S.O. c. 133, ss. 25, 26.)

Williams v. *Thomas* (1909) 1 Ch. 713 was an action by a widow for an assignment of her dower. For twenty years after

the death of her husband she had received one-third of the rents and profits of the land, but in 1905 it was about to be made available for building purposes and the heiresses of the testator disputed her right to any more than one-third of the rental actually produced at the death of the testator. The defendants resisted the action and contended that the plaintiff's right to dower was now barred under the Statute of Limitations, 3-4 Wm. IV. c. 27, s. 2, as amended by 37-38 Vict. c. 57, s. 1, but Eve, J., who tried the action held that as the plaintiff was in possession or part possession within the statutory period the statute did not afford any defence. He also thought that the plaintiff was entitled to an assignment of dower according to the present value of the property at the time of the assignment and with this conclusion the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Buckley, L.JJ.) agreed. It may be noted that this decision agrees with that of Proudfoot, V.-C. in *Fraser* v. *Green*, 27 Gr. 68, and in *Laidlaw* v. *Jackes*, ib. 101, where he dissented from Spragge, C. and Blake, V.-C. The view of Proudfoot, V.-C., in the latter case was afterwards made law by statute 43 Vict. c. 14, now R.S.O. c. 133, s. 26.

BUILDING ESTATE—RESTRICTIVE COVENANTS—"OFFENSIVE" TRADE OR BUSINESS—BILL POSTING—ADVERTISEMENT—HOARDING—"BUILDING"—MANDATORY INJUNCTION.

In *Nussey* v. *Provincial Bill Posting Co.* (1909) 1 Ch. 734 two points are decided, one, that a hoarding for posting bills on is a "building," and second, that bill posting is an offensive trade within the meaning of a restrictive covenant against carrying on an offensive trade. The covenant in question was against erecting any "building for manufacturing purposes, or for the carrying on of any noisy, noisome, offensive or dangerous trade or calling." Moulton, L.J., who dissented from the majority of the court (Cozens-Hardy, M.R. and Buckley, L.J.) considered that the word offensive must be construed ejusdem generis with the words "noisy, noisome and dangerous" and therefore bill posting was not an "offensive" trade within the meaning of the covenant.

COMPANY—BOND—CONSTRUCTION—BONUS PAYABLE OUT OF PROFITS—ISSUE OF PAID-UP SHARES IN SATISFACTION OF BONUS—DIVIDENDS OUT OF CAPITAL—ISSUE OF SHARES WITHOUT CONSIDERATION—WANT OF CONSIDERATION—ULTRA VIRES.

In *Bury* v. *Famatina Development Corporation* (1909) 1 Ch. 754, the plaintiff claimed to restrain the defendant company from

issuing paid-up shares in the following circumstances. In 1904 the company issued bonds for £50,000 repayable in seven years with a bonus of £25 exclusively out of the net profits of the company. These bonds were exchangeable for first mortgage debentures, but this was not to affect the bonus. In 1909 most of the bonds had been converted into debentures leaving only the £25 bonus payable. No profits had been earned and it was proposed to issue paid-up shares in order to extinguish the liability for the £25 bonus. The present action was brought to test the validity of that arrangement. Parker, J., who tried the action held that it was intra vires of the company, but the Court of Appeal (Cozens-Hardy, M.R. and Farwell, L.J.) overruled his decision and decided that there was nothing in the bonds authorizing the company to turn a contingent liability on income into a present liability on capital, and that the proposed arrangement was equivalent to paying dividends out of capital, and was an attempt to issue paid-up shares without consideration, and was ultra vires of the company.

RESTRAINT OF TRADE—PUBLIC POLICY—REASONABLE PROTECTION OF COVENANTEE—NEWSPAPER REPORTER—UNUSUAL STIPULATION—INFANT.

Leng v. *Andrews* (1909) 1 Ch. 763, was an action to enforce an agreement in restraint of trade. The plaintiffs were publishers of a newspaper in a provincial town, and the defendant, while an infant, had entered their employment as a junior reporter, and had signed an agreement that he would not after leaving the plaintiffs' service "either on his own account or in partnership with any other person be connected with as proprietor, employee or otherwise with any other newspaper business carried on," in the same town as plaintiffs' or within twenty miles radius thereof. The defendant had left the plaintiffs' service and had entered the employment of a rival newspaper business carried on in the same town as the plaintiffs'. Eve, J., who tried the action had come to the conclusion that the agreement in question was not unreasonable and as it would be binding on an adult it was also binding on the defendant although he was an infant at the time of its execution and he granted an injunction. The Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.) however reversed his decision being of the opinion that the restriction was wider than was necessary for the reasonable protection of the plaintiffs and could not be enforced

in any case. Cozens-Hardy, M.R., expresses the opinion that even if the agreement were enforceable against an adult, it would not have been binding on the defendant owing to his infancy at the time the agreement was entered into.

WILL—CONSTRUCTION—SPECIFIC DEVISE—"HOUSE AND EFFECTS KNOWN AS CROSS VILLA"—ALTERATIONS OF PREMISES DEVISED, AFTER EXECUTION OF WILL—WILLS ACT, 1837 (1 VICT. c. 26) s. 24—(R.S.O. c. 128, s. 26(1))—CONTRARY INTENTION.

In re Evans, Evans v. *Powell* (1909) 1 Ch. 784. In this case the clause of the Wills Act which provides that a will is to speak from the testator's death unless a contrary intention appears in the will itself, was invoked. By his will made in 1901 the testator specifically devised to his daughter his "house and effects known as Cross Villa situated in Templeton." At the time of the will there was one house upon the premises known as Cross Villa, subsequently in 1906 the testator, upon part of the ground which he separated from the rest by a hedge, erected two other houses which he named Ashgrove Villas. He died in 1908. It was contended under the section above referred to that the will must be construed to apply to Cross Villa as it existed at the death of the testator and not at the date of the will, but Joyce, J., quotes with approval the dictum of Lindly, L.J., *In re Portal & Lamb*, 30 Ch.D. 65. "This section does not say that we are to construe whatever a man says in his will, as if it were made on the day of his death," and in construing a will he considers it is necessary to take into consideration the condition of things in reference to which it was made, and being clearly of the opinion that at the date of the will the whole of the premises was intended to be devised, he held that the subsequent alteration and additions in the way of buildings made no difference and that the whole of the property passed to the devisee.

WILL—MORTGAGE DEBT ON WHITEACRE CHARGED ON BLACKACRE —INSUFFICIENCY OF BLACKACRE—REAL ESTATE CHARGES ACT (17-18 VICT. c. 113) s. 1—(R.S.O. c. 128, s. 371)— GENERAL ESTATE.

In re Birch, Hunt v. *Thorn* (1909) 1 Ch. 787. Eady, J., held that where a testator by his will directs that a mortgage debt on Whiteacre shall be paid out of Blackacre which proves insufficient, that does not give the devisee of Whiteacre any right to have the residue of the mortgage debt paid out of the general

personal estate, and that the charge of the debt on Blackacre is not any indication of "any general, contrary or other intention" within the meaning of the Act 17 & 18 Vict. c. 113, s. 1 (R.S.O. c. 128, s. 37(1)).

WILL—MIXED FUND—IMPLIED CHARGE OF LEGACIES — EXPRESS CHARGE OF DEBTS—LIMITATION ACT, 1623 (21 JAC. I. c. 16) s. 2—(R.S.O. c. 324, s. 38)—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. c. 57) s. 8—(R.S.O. c. 133, s. 23.)

In re Balls, Trewby v. *Balls* (1909) 1 Ch. 791. By the will in question in this case, the testator devised and bequeathed "all the real and personal estate to which at my death I shall be entitled" to his trustees, upon trust to pay "my debts and funeral and testamentary expenses" and to hold the residue thereof in trust for certain residuary legatees. He then bequeathed certain pecuniary legacies. The testator died in 1901 and his only asset was a reversionary share of real estate which fell into possession in 1905 and was sold in 1908, the debts and legacies being still unpaid. It will be observed that the will contained no express charge of the legacies on the real estate. Eady, J., was called on to decide two questions: (1) were the debts barred by the statute 21 Jac. I. c. 16 (R.S.O. c. 123, s. 23), or, being charged on the real estate, did the Real Property Limitation Act apply? (2) were the legacies impliedly charged on the realty? As to the first question he held that the debts being charged on the realty the Real Property Limitation Act applied and the limitation therein mentioned not having expired they were recoverable out of the land, notwithstanding 21 Jac. I. c. 16. And as to the second point he held that the gift of "all the real and personal estate" though not expressed to be "the rest and residue," was obviously intended to be the residue and that therefore the legacies were impliedly charged on the estate which constituted a mixed fund.

WILL—ILLEGITIMATE CHILDREN—CLASS GIFT—MOTHER OF ILLEGITIMATE CHILDREN PAST CHILD BEARING.

In re Eve, Edwards v. *Burns* (1909) 1 Ch. 796. Notwithstanding the law's unwillingness to recognize the status of children born out of lawful wedlock, cases do arise where it is found necessary to admit, that persons though not lawful children, are nevertheless entitled to take under a devise to children. The present case is an illustration. Priscilla Eve, by her will

dated in 1907 gave her residuary estate to trustees "in trust for and to be equally divided between and among the children of my sisters Mary Ann Burns, Clara Davenport and Sarah Pugh, and of my brother William Sales." At the date of the will Mary Ann Burns was a widow nearly sixty-eight years of age: she had married in 1869, having had two children by her husband before marriage, and no other children. She was living with the testatrix at the date of her will and of her death. The testatrix knew all the facts, and was on affectionate terms with the children. The other sisters and brother all had legitimate children living. Eady, J., held that the two illegitimate children of Mary Ann Burns took shares, on the ground that there were not and never could be any legitimate children to answer the description.

TRUSTEE—BREACH OF TRUST—BANKRUPTCY OF TRUSTEE—ACCEPTANCE OF COMPOSITION FROM DEFAULTING TRUSTEE—RETAINER OF SHARE OF DEFAULTING TRUSTEE OF TRUST FUND.

In re Sewell, White v. *Sewell* (1909) 1 Ch. 806. In this case a trustee who had also a beneficial interest in a share of the trust estate, misappropriated part of the trust fund. He was subsequently declared a bankrupt, new trustees were appointed and they, with other creditors of the bankrupt, accepted a composition approved by the court, in full discharge of their debts. Subsequently the trust estate became divisible and the trustees claimed the right to retain the bankrupt trustee's share to answer the loss he had occasioned to the trust fund, but Parker, J., held that the acceptance of the composition extinguished the debt, and that the bankrupt was consequently entitled to have his share paid to him.

WILL—GIFT TO CLASS—INQUIRY AS TO PERSONS ENTITLED TO LEGACY—COSTS OUT OF WHAT FUND PAYABLE.

In re Vincent, Rohde v. *Palin* (1909) 1 Ch. 810. By a rule of the court "costs of inquiries to ascertain the person entitled to any legacy, money or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money or share, unless the judge shall otherwise direct." In this case a testator devised and bequeathed his residuary real and personal estate to trustees for sale and conversion and to invest the proceeds after payment thereout of his funeral and testamentary expenses, debts and legacies, and pay the income to his wife and after her death to raise certain legacies and also a sum of £6,000 which he be-

queathed to a class of persons, and to pay the ultimate residue to his brother and sisters in equal shares. The testator died in 1891 and his widow in 1905. In November, 1905, an order was made directing an inquiry to ascertain the persons entitled to share in the £6,000. The inquiry was completed and the trustees asked that the costs down to November, 1905, should be paid out of the ultimate residue and the subsequent costs out of the £6,000, but Parker, J., in the exercise of his discretion held that all the costs of ascertaining the members of the class, except so far as they had been increased by incumbrances on the shares, must be paid out of the residue and not out of the £6,000, because testamentary expenses were expressly charged on the estate and these costs were part of the testamentary expenses.

SETTLED ESTATE—SURRENDER OF LEASE—CONSIDERATION FOR ACCEPTING SURRENDER—TENANT FOR LIFE AND REMAINDERMAN—CASUAL PROFIT.

In re Rodes, Sanders v. *Hobson* (1909) 1 Ch. 815. Parker, J., decided that where an equitable tenant for life is paid money by the lessee of the settled estate as a consideration for accepting a surrender of his lease, which had been granted under the Settled Estates Act, such money does not belong to the tenant for life as a casual profit, but must be paid by instalments to him and other persons entitled to the rent.

SPECIFIC LEGACY—COST OF UPKEEP AND PRESERVATION OF PROPERTY BEQUEATHED, UNTIL ASSENT OF EXECUTOR.

In re Pearce, Crutchley v. *Wells* (1909) 1 Ch. 819. A testator bequeathed to his wife his furniture, horses, carriages, motors, yacht, etc., and the question arose in the course of administering his estate, as to the incidence of the expense attending the preservation and upkeep of such property for the period between the death of the testator and the executor's assent to the legacy. Eve, J., held that it must be borne by the property bequeathed and not by the general estate of the testator.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] CANADIAN PACIFIC RY. CO. *v.* LACHANCE. [May 28.

Negligence—Operation of railway—Damages—Solatium doloris —Verdict—New trial.

The court refused to order a new trial or reduction of damages under the provisions of articles 502, 503 C.P.Q. where it did not appear that, under the circumstances, the amount of damages awarded by the verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. Davies, J., dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed.

Quære. In an action under article 1056 C.C. can a jury award damages in solatium doloris? *Robinson* v. *Canadian Pacific Ry. Co.* (1892) A.C. 481 referred to.

Appeal dismissed with costs.

Lafleur, K.C., and *Wells,* for appellants. *Panneton,* K.C., for respondents.

Que.] CITY OF MONTREAL *v.* BEAUVAIS. [May 28.

Constitutional law—Legislative powers—Early closing by-law—Unreasonable or unjust provisions.

The Act of the Quebec legislature (57 Vict. c. 50) authorizing any municipality to pass a by-law compelling all shops with certain exceptions to remain closed during specified hours is not an Act for the regulation of trade and commerce within the meaning of s. 91 of sub-s. 2 of the B.N.A. Act, 1867, and is otherwise within the competence of the legislature.

A by-law passed under the authority of said Act will not be set aside unless its provisions are shewn to be unreasonable, unjust or oppressive. Appeal allowed with costs.

Atwater, K.C., and *J. L. Archambault,* K.C., for appellants. *Bisaillon,* K.C., and *H. F. Bisaillon,* for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

BANNERMAN *v.* LAWYER.

Liquor License Act—Transfer of license—Right of electors to withdraw their signatures from certificate.

Electors have no power to withdraw their names from a certificate filed with the License Board in support of an application for the removal of a license from licensed premises to premises not licensed at the time of the application.*

[MEREDITH, C.J.—April 20, 1900.

Action by a ratepayer of the city of Toronto against the holder of a shop license and the License Commissioners of Toronto, to prevent the removal of the license to unlicensed premises on the ground that a number of the electors signing the certificate had withdrawn their names previous to any action by the License Board, and on the grounds set out in the judgment.

DuVernet, for plaintiff, for motion. *Ritchie,* K.C., for defendant Lawyer. *J. R. Roaf,* for other defendants.

The following oral judgment was delivered by the learned Chief Justice at the conclusion of the argument.

MEREDITH, C.J.:—I think the case entirely fails. The first objection, which Mr. DuVernet has ably supported by a well considered argument, depends upon the proposition that the persons who signed the certificate mentioned in sub-sec 14 of sec. 11 are entitled before the license commissioners have acted upon that certificate to withdraw their names and having withdrawn that the certificate is to be treated as if it never had had their signatures. I think that is not the correct view. I am unable to distinguish the *Kent Case,* under the Canada Temperance Act, which has been referred to. It seems to me that if that decision was a proper one under that Act, it is an a fortiori case that there is no right on the part of a person who signs such a certificate as that in question here to withdraw.

What the legislature says is that if it be desired to obtain a license or a transfer under this section, the applicant as a con-

*This case is referred to in a foot note to *East v. O'Connor,* 2 O.L.R. 355; but as it is an important judgment and a leading case on the subject it is now published in full.—ED. C.L.J.

dition of obtaining it must produce a certificate which has been signed by the stated proportion of the ratepayers and which embodies a statement or declaration that the applicant for the license is a fit and proper person to be licensed and to keep whatever class of house it is, and that the premises in which he proposes to carry on business and for which he seeks the license are in their opinion suitable therefor, and that the same are situate in a place where the carrying on of the business will not be an annoyance to the public generally.

What right have the license commissioners or anybody else to say, where the applicant has obtained the certificate which the legislature has said shall be a condition precedent to the license commissioners acting upon the application of the person desiring to transfer, that the persons signing shall be allowed to withdraw. It is like a condition that one shall not sub-let leasehold premises without the consent of the landlord. If the landlord consents there is no right to withdraw his consent.

That is the main ground upon which the action is based, and the only one which I have at present considered but without expressing a decided opinion upon the point, it seems to me that a reasonable argument could be made that there is no jurisdiction in the court to interfere with the action of the commissioners, though if there be an absence of the certificate which the statute requires there probably would be no foundation for the action by the license commissioners, and it may be that there would be then authority for the Court to interfere.

With regard to the second ground, it seems to me that it is less tenable than the first, and to give effect to it would require the court to put a highly technical and in my judgment an unreasonable construction upon the statute. The argument in substance is, that, although the defendant Lawyer made his application and supported it by the proper certificate and although the license commissioners, in the exercise of the discretion which the legislators has vested in them determined to permit the transfer, yet, inasmuch as the premises to which the transfer was to be made were not occupied on the 29th March, I think it is, on the day upon which Lawyer made his application for a license for the coming year, which he had to make before the 1st of April in order that it might be considered by the license commissioners, it was necessary to go again through the procedure laid down in sub-section 14 and to procure a new certificate. That argument is based upon the provisions of sec. 16, which seems to me to have no application to the case in hand. The

purpose of sub-sec. 16 manifestly was to make it clear that a man could not get a license and put somebody else into the license premises and permit him to carry on the business. It was a license personal to the man to whom it was granted, and for the very premises and no other than those for which the license was issued, and what the legislature desired to accomplish by that provision was to prevent a man, after getting a license in that way withdrawing from the control of the business and putting somebody else in who would operate under his license. To extend the section to such a case as this would make the Act unworkable, and is something which I think was not at all in contemplation of the legislature.

Then it is to be observed that the provision is "so long as such person continues to be the occupant of the premises" so that, taking it even in the most technical sense, this man was never the occupant of the premises, and if technically is to be resorted to upon the one side it may fairly be resorted to upon the other, and there was in this case no ceasing to continue because he never had occupied the premises.

In my opinion the moment the license commissioners granted the transfer or the permission to transfer, or whatever the formal document was, the premises became licensed premises within the meaning of the statute, and therefore upon the application for a license for the incoming year there was no necessity for a new certificate.

Even if that were not so, there is, I think, another complete answer to the application, so far as it rested upon the argument upon which this branch of the case is supported, and that is that there is nothing in the case to shew that the license commissioners have acted yet or that they intend to act contrary to their duty in the premises, and even if the court has jurisdiction to intervene in the matter I ought not to assume that they are going to do so; and that, as I say, seems to me to be a complete answer to this branch of the case.

Then with regard to the absence of the report of the inspector, I am very much inclined to think that that is a matter with which the court has nothing to do. The absence of the report I cannot think would, where the license is issued, make the license void. Surely that is part of the internal machinery. The license commissioners probably would be derelict if without such a report they acted; but the statute seems to have laid down a course of procedure with regard to the removal of licenses

which indicates that the time has not yet come for the procuring of that report. The inspector is, after the resolution is passed, to give a permit to the license holder to remove from the licensed premises, and he is not to give the permission until the person applying has filed with the license commissioners a report to the inspector containing the information required by law in the case of the application for a license.

In this case no doubt the reason why that has not been furnished is that the transfer was granted conditionally as it were, upon the premises which were not then fitted for the purpose of the business being made so, and I have no reason and no right to doubt that the license commissioners, if that report be necessary, will require it to be procured before they proceed to act finally by permitting the business to be carried on in the new premises.

Then there is sub-s. 4 of s. 37, which is still another answer to this objection. It provides that where an application is made for the transfer of a license issued to a tavern or shop situate in a remote part of the license district, or where for any other reason the license commissioners see fit, they may dispense with the report of the inspector, and act upon such information as may satisfy them in the premises. I think that if they have acted, if that is the proper conclusion of fact to be arrived at, without the report, they have acted under the powers of sub-s. 4 of s. 37, and acted within their statutory rights.

It seems to me, as I said during the course of the argument that it would be a most unfortunate state of things if upon all these questions of the granting or withholding of transfers there should be the right of the parties to resort to the court and bring an action which might tie up the question for a year or two or perhaps more, when the term of the license which is the subject matter of the controversy is but one year at the most. I think there is reasonable ground for the argument that there is no jurisdiction in the court to interfere in matters of this kind.

Sub-s. 18 of s. 11 gives the license commissioners the power to examine witnesses upon oath for the purpose of satisfying themselves as to whether the application ought to be granted. I have no doubt that would enable them to go into any question as to a certificate having been obtained by fraud or as to whether the petition was really signed by the persons by whom it purported to be signed, or to the conclusion which the license commissioners have to come to before granting the license or transfer, that in the public interest it is reasonable that the application

should be granted. The section further provides that their proceedings are to be as nearly as may be in the manner directed by any Act now or hereafter to be in force relating to the duties of justices of the peace in relation to summary convictions and orders.

If ss. 91 and 92 do not, as one learned judge at all events seems to have thought, apply to the action of the license commissioners in granting a permission to transfer and there be no appeal given by s. 91 to the county judge and I think there is reasonable ground for the argument that there is no appeal at all. If the legislature has expressly given, with regard to some of the matters which the license commissioners are called upon to deal with, a right of appeal, and has not so given it in regard to others, it seems to me that on well understood principles, the proper construction to be placed upon the statute is that no right of appeal was intended to be given in the latter cases, but that these matters were left to the absolute discretion of the license commissioners. However, as I have said, I do not rest my judgment upon the question of jurisdiction. I determine it upon the other grounds.

The action failing must be dismissed, and I see no reason why it should not be dismissed with costs.

This judgment was affirmed by a Divisional Court (Armour, C.J., Falconbridge and Street, JJ.), on June 5, 1900. Leave to appeal was refused by the Court of Appeal on June 29, 1900.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] THE KING *v.* JORDAN. [June 14.

Canada Temperance Act—Conviction for second offence—Failure to allege prior conviction.

The informant who is proceeding as for a second offence against the Canada Temperance Act, must in his information allege a previous conviction and not merely a previous offence or a previous information for an offence. A conviction made in the absence of such allegation is bad and the discharge of the person convicted will be ordered.

Jenks, Deputy Attorney-General, for the Crown. *Power*, K.C., for defendant.

Graham, E.J.] [June 16.

OVERSEERS OF THE POOR *v.* MCGILLIVRAY.

Bastardy proceedings—Evidence of mother—Circumstances corroborating.

While the legislature of Nova Scotia has never adopted statutory provisions applicable to bastardy cases similar to 7 & 8 Vict. c. 101, s. 3, and 35 & 36 Vict. c. 65, s. 4, requiring the evidence of the mother in such cases to be corroborated in some material particular the reasons which induced the passage of the statutes referred to prevail and will be regarded by the court where there is a conflict of testimony.

Although there is no rule of law about it it is a matter of practical expediency and good sense that the uncorroborated evidence of the mother making such an accusation should be received guardedly.

Where there was no evidence to suggest that any other person than the defendant was the father of the child and it appeared that at the time when the child, in the ordinary course of events, was begotten the defendant was living in a country district and the mother of the child was frequently employed by him at work about his house of a character that required her to be often alone with him it was considered that this afforded the necessary corroboration and the defendant's appeal from the order of affiliation granted by the justice was dismissed with costs.

Cole v. *Manning*, 2 Q.B.D. 614, referred to.

Overseers v. *McLellan*, 9 N.S.R. 95, distinguished.

Griffin, for plaintiffs. *Girroir*, for defendant.

Graham, E.J.] CARRIGAN *v.* LAWRIE. [June 16.

Trespass—Conventional line.

There being a dispute as to the location of a line between the plaintiff's and defendant's properties a surveyor was employed to run the line and in doing so measuring from the agreed starting point, found a discrepancy of 30 feet between the point from which the line would be required to proceed as shewn by the measurements and the line as previously recognized and fenced. The dispute as to the location of the line was then compromised by dividing the difference of 30 feet between the two parties in the proportion of two-thirds to plaintiffs and one-third to defendant. A stake was driven at the point so fixed and the line

run accordingly, one of the plaintiffs assisting and the other assenting.

Held, following *Woodbury* v. *Gates,* 2 Thom. 255; *Davison* v. *Kinsman,* James R. 1, and *Reed* v. *Smith,* 1 N.S.D. 262, that the line so run possessed all the requisites of a conventional line and settled the dispute as to trespasses complained of by plaintiffs.

Chisholm and *A. McDonald,* for plaintiffs. *Gregory,* K.C., for defendant.

Russell, J.] THE KING *v.* LORRIMER. [June 22.

Canada Temperance Act—Proceedings prior to issue of warrant —Justice—Grounds of disqualification—Proof that Act is in force necessary to jurisdiction.

Where an information is laid charging a sale of intoxicating liquors in violation of the second part of the Canada Temperance Act the justice must hear the allegations of the informant and pass upon their sufficiency before issuing his warrant.

In the absence of a compliance with such requirement the magistrate has no jurisdiction of the person of the defendant and the conviction is void. *Ex parte Bryce,* 24 N.B.R. 347, and *Ex parte Grundy,* 10 C.C.C., followed.

Where however it is not affirmatively shewn that the statute was not complied with.

Quære, whether the court may not properly assume that the magistrate satisfied himself, before issuing his warrant, that there were sufficient grounds.

Defendant was brought before the stipendiary magistrate of the town of Westville on the 5th of May, 1909, and convicted of a violation of the Act. A difference arose as to the amount of fees properly chargeable against him and a tender was made of the amount claimed by defendant's counsel to be the maximum and refused. Defendant went to jail and afterwards paid the amount under protest. The following day another information was laid against him before the same magistrate, and while it was pending notice of action at the suit of defendant was served upon the magistrate for causes of action arising out of the previous conviction and imprisonment, the action being brought in good faith and in the genuine belief on the part of defendant that he had a good cause for action. Without deciding the point whether the relations between defendant and the magistrate constituted a ground for disqualification,

Held, that such relations rendered it highly inexpedient that the magistrate should try a case against a party standing in such relations to him.

Held, also, following the judgment of Laurence, J., in *R.* v. *Wallace*, that in order to a conviction under the Canada Temperance Act it must be shewn that the Act is in force and in order to shew this it must be shewn that there were no licenses in force in the county at the date of the proclamation.

J. J. Power, K.C., for defendant. *H. S. McKay*, for prosecutor.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] WILLIAMS *v.* BOX. [May 25.

Mortgagor and mortgagee—Foreclosure—Real Property Act, R.S.M. 1902, *c.* 148, *ss.* 71, 113, 114, 126—*Certificate of title.*

After a mortgagee of land under the Real Property Act has regularly obtained a final order of foreclosure from the district registrar under sec. 113 of the Act, and has had the same entered in the register as mentioned in sec. 114 and has obtained a certificate of title for the property, the court had no power to open the foreclosure and allow the mortgagor in to redeem, although the circumstances are such that a final order of foreclosure made by the court itself would be set aside and the mortgagor let in to redeem.

Effect of sec. 71 of the Act as to certificates of title discussed.

Bank of New South Wales v. *Campbell*, 11 A.C. 192, and *Assets Company* v. *Mere Roiho* (1905), A.C. at p. 202, followed, *Barnes* v. *Baird*, 15 M.R. 162, not followed.

Sec. 126 of the Act as amended in 1906, c. 75, preserving to the court jurisdiction over "mortgages," cannot be construed so as to destroy the effect of the plain language of ss. 71 and 114.

Robson, K.C., and *Foley*, for plaintiff. *Wilson*, K.C., and *G. W. Baker*, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] REX *v.* SUNG CHONG. [July 10.

Municipal law — By-law regulating hawkers — Construction — Validity—Regulation and prohibition — Vancouver Incorporation Act, 1900, *c.* 54, *s.* 125, *s.-s.* 110.

Where a municipal by-law was passed prohibiting hawkers and peddlers of vegetables and similar products from pursuing their calling throughout the municipality on market days,

Held, that a statutory power to pass by-laws regulating a trade does not authorize the prohibition of such trade or the making it unlawful to carry on a lawful trade in a lawful manner.

Farris, for defendant, appellant. *J. K. Kennedy,* for plaintiff, respondent.

Full Court.] [July 10.

IN RE BANK OF MONTREAL ASSESSMENT.

Assessment—Bank, income of—Deductions for losses—Date of ascertainment of such losses—"Transaction," meaning of.

Form 1 of the schedule of forms to the Assessment Act, as enacted by c. 50 of the Statutes of 1905, provides among the deductions permitted in making returns of incomes earned by banks: Losses written off during the year, such losses being written off within six months of the time they were ascertained and not covering transactions antedating that date more than 18 months.

Held, on appeal, reversing the decision of the Court of Revision, that, the enactment being doubtful as to whether the inception or completion of the transaction was meant, the doubt must be resolved in favour of the taxpayer.

Senkler, K.C., for the bank, appellant. *Maclean,* K.C. (D.A.G.) for the assessment.

Full Court.] [July 10.

DISOURDI *v.* SULLIVAN GROUP MINING COMPANY.

Practice—Workmen's Compensation Act, 1902—Procedure to set aside award—Costs where procedure uncertain—Discretion.

Proceedings to set aside an award under the Workmen's Compensation Act, 1902, registered in the County Court, may be taken by way of motion, and it is not necessary to apply for a writ of prohibition.

Where there is a doubt as to what is the procedure to be followed, the court in its discretion will not order costs to the successful party: *Murphy* v. *Star Mining Co.* (1901), 8 B.C. 422.

L. G. McPhillips, K.C., for appellant. *S. S. Taylor*, K.C., for respondent.

Full Court.] [July 10.

JONES *v.* NORTH VANCOUVER LAND AND IMPROVEMENT CO.

Company law—Forfeiture of shares—Abandonment by acquiescence in forfeiture.

The plaintiff, H. A. Jones, one of the original shareholders of the company, organized in 1891, transferred 240 shares to his wife, co-plaintiff, Clara B. Jones, on September 26, 1893, and on same day took an assignment of the same shares from her to himself. The assignment was never registered. The par value of the shares was $100 on which 80% had been paid up. In May, 1895, a call of 2½% was made, payable June 14, following, with the usual penalty of forfeiture in case of default. Default was made, and the shares were declared delinquent, were offered for sale, but there being no bid were withdrawn. In March, 1896 (new by-laws having been adopted in the meantime) a call of 6% was made on all shares, including those of the plaintiff, Clara B. Jones. Default was made, and in due course the shares were declared delinquent. In April, 1897, a further call of 9% was made. On May 21, 1898, a resolution was passed by the directors that Mrs. Jones be served with a notice requiring her to pay the call of 2½% by the 24th of June, and that in the event of default the shares would be forfeited. At a meeting of the directors on June 25, a resolution of forfeiture, reciting the facts was put, when Mrs. Jones's husband and co-plaintiff who was present and a director, offered to pay $100 on account if the shares were not forfeited for six months. This offer was

refused and the resolution was passed. In May, 1907, Mrs. Jones's solicitors inquired of the company whether the shares had been forfeited, and offering to pay up the arrears, but were informed that the shares had been forfeited. She then brought action.

Held, on appeal, affirming the judgment of CLEMENT, J., at the trial (HUNTER, C.J., dissenting) that the plaintiff, Clara B. Jones, had elected to abandon the undertaking by acquiescence in the forfeiture at a time when the company's prospects were doubtful, and such abandonment could not be recalled when it was found that the company was prosperous.

Martin, K.C. and *Craig,* for plaintiffs. *Davis,* K.C. and *Pugh,* for the defendant company.

SUPREME COURT.

Full Court.] REX *v.* GARVIN. [June 10.

Constitutional law—Dominion and Provincial legislation—Sale and quality of milk—Adulteration, R.S.C. c. 133, *ss.* 23, 26 *—R.S.B.C.* 1897, *c.* 91.

Sec. 20 of the Provincial Board of Health Regulations governing the sale of milk, not being clear as to whether the offence aimed at is the possession of milk below a certain standard, intended for sale, or whether such intention is to be implemented by actual sale, the court should not, following *Barton* v. *Muir* (1874), L.R. 6 P.C. 139, at p. 144, be called upon to construe it, it being dangerous in the construction of a statute to proceed upon conjecture.

Maclean, K.C., (D.A.-G.) for the Crown, appellant. *Craig* and *Hay,* for defendant, respondent.

Full Court.] [June 10.

DISOONDI *v.* MARYLAND CASUALTY CO.

Workmen's Compensation Act, 1902*—Order directing insurers to pay amount into court before award—Liability to third party.*

There must be an admission of liability on the part of the insurer, or a finding of liability by a competent tribunal, before the provisions of sec. 6 of the Workmen's Compensation Act, 1902, as to payment into court, can be invoked.

L. G. McPhillips, K.C., for appellant company. *S. S. Taylor,* K.C., for respondent.

Clement, J.] LAITNEN *v.* TYNJALD. [June 15.

Practice—Notary public taking affidavits in Supreme Court—R.S.B.C. c. 3—R.S.B.C. 1897, c. 1, s. 10, s.-s. 50.

A notary public within the Province of British Columbia has not authority to take an affidavit in an action in the Supreme Court.

McLellan, for plaintiff. No one contra.

Irving, J.] IN RE YING FOY. [June 21.

Mandamus—Adjournment of preliminary examination—Discretion of the magistrate—Limitations of control exercised by Supreme Court.

Accused was one of sixteen Chinamen charged with the same offence on similar evidence. Fourteen, including accused, were remanded pending decision of the other two as test cases. Upon resumption of proceedings, evidence similar to that on which the two first cases were committed for trial was put in, whereupon a remand of a week was granted to permit the procuring of further evidence. At the end of that time a second remand was granted. Upon application for a mandamus requiring the magistrate forthwith to commit the accused for trial,

Held, that a writ of mandamus will not issue directing a magistrate to commit prior to his adjudication of the case. It is the duty of the magistrate to take the evidence of all concerned, and that the court must not interfere with the discretion of the magistrate as to remands when that discretion is being exercised legally and in good faith.

Aikman, for the rule. *H. W. R. Moore,* for the magistrate.

Book Reviews.

The Measure of damages in actions of maritime collisions. By E. S. ROSCOE, Barrister-at-law, Admiralty Registrar of the High Court of Justice. London: Butterworth & Co., 11-12 Bell Yard. 1909.

The writer gives also notes of cases, an epitome of the law on the above subject in Scotland, France and Germany, by writers in these countries, also some unreported judgments, etc.

It will be a great convenience to the profession to have the law on this subject collected for ready reference, especially in view of the constantly growing volume of decisions, owing to the increase of shipping and consequently of collisions.

Every English lawyer must, as the author remarks, regard with satisfaction the fact that the first maritime nation of the world possesses the most complete body of law on this particular subject. Canada, as part of the British Empire, is daily growing in importance on the maritime side; this volume will therefore be of use in this country as well as elsewhere.

Death duties, particularly the Finance Acts, 1894 *to* 1907, With notes, rules, cases and table of forms. By W. G. DOBSON, Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1909.

The Succession Act brings up many important points of law and this book will be helpful in discussing them. The subject is intricate and complicated. The tax being an inquisitorial one, and therefore repulsive to the public, the efforts to evade it are as numerous as the scheme of governments to add to their surplus by this new source of revenue. The severity of the tax, and the vigorous and sometimes offensive and annoying way in which it is collected may begin a campaign for its amelioration.

A Treatise on guaranty insurance and compensated insurance. By THOMAS GOLD FROST, PH.D., LL.D., of the New York Bar. 2nd edition. Boston: Little, Brown & Co. 1909.

This edition discusses all forms of compensated suretyship, such as office and private fidelity bonds, building bonds, probate bonds, credit bonds, credit and title insurances. There has been a marvellous growth in the direction of guaranty insurance during the past few years and numberless are the ways in which this new commercial enterprise shews itself, and seeks fields of usefulness, or at least profit to the insurers. The extent of this is illustrated by the fact that more than 250 pages have been added to Mr. Frost's work, and recent decisions, numbering over 500, have been digested and commented upon in this revision. In the United States this form of insurance covers a very large field. Title insurance companies are not so popular here and as yet are but "feeble folk," but may grow.