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BILLS OF LADING.

A condition of things exists in connection with railway traffic in this Dominion which is as extraordinary as it is objectionable. It is probably not known to the public, that, (1) since Oct. 17, 1904, the forms and conditions of four railway companies, then in use and produced to the Board of Railway Commissioners under the Railway Act, have been declared legal and binding upon the public by what amounts to statutory authority; whilst those in use by all other companies in Canada remain unaltered in that respect, and subject to dispute, and may be judicially declared to be illegal and valueless. (2) That the forms and conditions so declared to be legal and binding on the public have apparently been so declared without examination or consideration.

The four railway companies above referred to are the Grand Trunk Ry. Co., the Canadian Pacific Ry. Co., the Canadian Northern Ry. Co., and the Pere Marquette Ry. Co.

On the 17th of October, 1904, a far reaching order was made by the Board of Railway Commissioners. It recites "that the above named companies brought to the Board their forms of bills of lading and other traffic forms, in compliance with s. 275, sub-ss. 1, 2 of the Railway Act, 1903; that these companies are the only railway companies in Canada which have, up to the present moment, complied with the statute; that there is much diversity in the forms of the several railways; that the whole subject is of very great importance and will require that much circumspection should be exercised in examining into the contracts and forms which the Board hereafter has to approve, and also into the question of limitation and liability on the part of the carriers."

The order goes on to say: "The Board does not deem it

advisable to make any final or definite order upon the subject at present, but is of the opinion that an interim order might properly be made, permitting such railways as have made application therefor to continue the use of their present forms until the Board shall otherwise prescribe and order. It is therefore ordered that the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorized so to do until this Board shall hereafter otherwise order and determine."

By the Railway Act of 1903 the Board was authorized to determine the extent to which the liability of a company in respect to the carriage of traffic might be impaired, restricted or limited by any conditions or regulations made by the company, and the same statute provided that no such condition or regulation would relieve the company from their liability unless it had been first authorized or approved by the order of the Board.

Section 27 of the Railway Act of 1906 provides that all express tolls and tariffs shall also be subject to the regulation or disallowance of the Board.

It will be noticed that the four companies referred to in the order of Oct. 17, 1904, complied with the requirements of the statute in bringing to the Board of Railway Commissioners their traffic forms; and, as will be seen, the forms submitted by these four companies determine the extent of their liability. No order has been made as to the forms or conditions of any other railway company.

It is admitted in the preamble of the order that there is "much diversity in the forms submitted" by the four companies. Presumably there is also much diversity in the forms used by other companies. It is also admitted that the "subject is of very great importance" and that the "much circumspection which should be exercised in examining into the contracts and forms then submitted" has been omitted.

As a matter of public policy, the forms, conditions and liabilities of all railways in the country as to the carriage of

freight should be the same, and they should be subjected to the most careful scrutiny, and the great trade interests of the country should be notified, so that the public might be properly safeguarded, especially in view of the fact that the best legal talent, combined with long experience and clear conception of what is needed in the interests of the carriers, will be present on their behalf.

Whilst this matter should have been attended to long ago, the Board may, possibly with some reason, seek to excuse itself on the ground of the pressure of the work in relation to other matters of great importance in various parts of the Dominion. If this means that the Board as at present constituted is not equal to the strain of work laid upon it, the necessary changes must be made in its personnel, or more members must be added to the Board, for it may be safely said that it is almost the most important court of justice in the Dominion, as well as being a marked factor in its trade relations.

It must also be remembered that at least two members of the Board must be on circuit almost continuously, hearing and deciding railway matters from the Atlantic to the Pacific. Other work devolves upon the remaining Commissioner, usually the Deputy Chief Commissioner, the Hon. Mr. Bernier, who stays in Ottawa for that purpose. Cases of sudden emergency, as well as more routine matters, naturally come before him. Without disparagement important matters should not, and in fact do not, come before this single judge. Parties naturally desire the opinion of a majority, or the whole of the Board, and especially look to the Chief Commissioner whose legal and judicial training and experience in railway litigation, added to other qualifications, make him almost a necessity in the consideration and adjudication of important matters, such as for example the very questions above referred to.

DOMINION STATUTES, 1907.

The yearly volume of the Statutes of Canada (6-7 Edw. VII.) has been issued by the King's printer. It contains the first amendments which have been made to the Revised Statutes, as well as the repeal and re-enactment of many of those Acts.

Much new legislation also appears. Of this may be mentioned the Acts relating to Dominion Lands Surveys, Electricity and Fluid Exportation, Industrial Disputes Investigation (Lemieux Act) and the Treaty between Canada and Japan. Of Revised Statutes repealed and re-enacted, we find the Customs Tariff, Electricity Inspection Act and Geology and Mines Act (creating a Department of Mines).

We would call attention to the index to the Public General Acts. This now occupies some sixteen pages of analytical reference, and is in the same form as the index to the Revised Statutes. The latter we consider the best analytical index to be found in any volume of statutes, every possible subject matter being indexed, as well as each separate Act being alphabetically analysed. The references are in every case to the chapter, section and paragraph, instead of following the old style of reference to pages. That this index comprises some 420 pages is a partial indication of its extent and thoroughness.

Both of the indices mentioned were compiled by Mr. F. A. McCord, Parliamentary Counsel and Law Clerk of the House of Commons. We congratulate Mr. McCord on his valuable work, and gratefully acknowledge the service he has thereby rendered to the profession and the public.

An exceptionally good appointment to the Bench is the promotion of Mr. Nicholas D. Beck, K.C., of Edmonton, to the Supreme Court of the Province of Alberta. Mr. Beck was called to the Bar of Ontario in 1879, and was an LL.D. of the Toronto University. He practised his profession first at Peterboro' and subsequently at Winnipeg, Calgary and Edmon-

ton, going to the latter place in 1891, when appointed Crown prosecutor. He was given silk in 1893. A highly respected member of the Bar, and its acknowledged leader in the North-West Territories, he was chosen president of the Law Society where he did good service for the Bar. It is much to be deplored that other men in other parts of the Dominion, occupying the same high position in the profession as Mr. Beck, are not willing as he was to give up their large professional income for the good of the country. This difficulty, however, lies mainly at the door of the Government in not providing salaries commisurate with what ought to be the dignity of the position.

The Canada Gazette of August 31 and September 21 contain proclamations by the Governor-General in Council, whereby the statute, 6-7 Edw. VII. c. 45, in respect to the Provinces of Saskatchewan and Alberta came into force on September 16th last; and on that day the judges of the Supreme Court of the North-West Territories were assigned to the Supreme Court of their respective provinces as follows: Hon. E. L. Wetmore, to be Chief Justice of Saskatchewan, and Hon. J. E. P. Prendergast, Hon. H. W. Newlands, and Hon. T. C. Johnstone, to be Justices of the Supreme Court of that province. As to the Province of Alberta, Hon. A. L. Sifton becomes Chief Justice, and Hon. D. L. Scott, Hon. Horace Harvey and Hon. C. A. Stuart, Puisne Judges of the Supreme Court of Alberta.

PROVINCIAL POWER TO INCORPORATE COMPANIES.

In the recent argument before the Supreme Court in *Canadian Pacific Ry. Co.* v. *Ottawa Fire Insurance Co.* it was claimed for the provinces that they had power to incorporate all companies over whose operation they had legislative jurisdiction, and that such companies might be authorized to do business anywhere. In other words, that jurisdiction over the affairs of

the company determined the power to incorporate. One of the arguments urged against this view was that the application of it to our own constitution was impossible. If exclusive jurisdiction had been given to the Dominion over certain subjects and to the provinces over others, the theory would work; but in the early case of *Hodge* v. *The Queen*, the Privy Council declared that "subjects which in one aspect and for one purpose fall within section 92 may, in another aspect and for another purpose, fall within section 91." In order to illustrate the extent to which this view of the constitution had been established by the cases, a list of them, with an explanatory table, was prepared and referred to on the argument. These are now reproduced(*a*) as they may be useful for reference. An explanation of the table is given on the following page.

(*a*) The following is the list of cases; the table is on p. 640.

1. *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L.R. 6 P.C. 31. Legislature may pass an Act for the relief of a company in financial embarrassment to avert insolvency.

2. *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409. Parliament may declare judgment of Court of Appeal in matters of insolvency final and not subject to right of appeal given by provincial statute.

3. *Peek* v. *Shields* (1881), 6 Ont. App. Rep. Parliament may interfere with property and civil rights and civil procedure in passing Insolvent Act, 1875.

4. *Shoolbred* v. *Clarke* (1890), 17 S.C.R. 265. Parliament may pass Winding-Up Act affecting provincial companies.

5 and 6. *Clarkson* v. *Ontario Bank*, *Edgar* v. *Central Bank* (1888), 15 Ont. App. Rep. 166; *Atty.-Gen. Ont.* v. *Atty.-Gen. Dom.* (1894), A. C. 189. Legislature may pass Assignments and Preferences Act, when there is no Dominion Act of Bankruptcy and Insolvency.

7. *Quirt* v. *Queen* (1891), 19 S.C.R. 510. Parliament may legislate respecting the property of an insolvent bank.

8. *Regina* v. *Boardman* (1871), 30 U.C.R. 553. Legislature may prescribe penalties in regulations for tavern and shop licenses.

9. *Hodge* v. *Queen* (1883), 9 App. Cas. 117. Legislature may make police regulations for taverns.

10. *Poulin* v. *Corporation of Quebec* (1884), 9 S.C.R. 185. Legislature may prohibit sale of liquor on Sunday.

11 and 12. *Atty.-Gen. Ont.* v. *Atty.-Gen. Dom.* (1896), A.C. 348; *Atty.-Gen. of Manitoba* v. *Man. License Holders' Assn.* (1902), A.C. 73. Legislature may prohibit liquor traffic within the Province.

13. *Brewers and Maltsters Assn. of Ont.* v. *Atty.-Gen. Ont.* (1897), A.C. 231. Legislature may issue licenses to brewers and distillers to sell wholesale within the Province.

14. *Russell* v. *Regina* (1882), 7 App. Cas. 829. Parliament may suppress liquor traffic throughout the Dominion.

By following the horizontal and vertical columns to the squares in which they meet, the cases will be found in which it has been held that the Dominion and Provincial jurisdictions

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15. *Citizens* v. *Parsons* (1881), 7 App. Cas. 96. Legislature may regulate contracts of fire insurance made by Dominion companies. Parliament may incorporate companies to do insurance business in more Provinces than one.

16. *Colonial Building & Investment Assn.* v. *Atty.-Gen. Que.*, 9 App. Cas 157. Dominion may incorporate companies to purchase and sell land in more Provinces than one.

17. *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575. Legislatures may tax banks and insurance companies carrying on business within the Province.

18 and 19. *Smith* v. *Merchants Bank* (1881), 28 Gr. 629; *Tennant* v. *Union Bank* (1894), A.C. 31. Parliament may legislate regarding transfer of warehouse receipts to banks.

20. *Fortier* v. *Lambe* (1894), 25 S.C.R. 422. Quebec Legislature may tax manufacturers and traders in the City of Montreal by imposing a license fee.

21. *Longueil Nav. Co.* v. *Montreal* (1888), 15 S.C.R. 566. Legislature may authorize municipalities to tax ferrymen and ferries.

22. *Dinner* v. *Humberstone* (1896), 26 S.C.R. 252. A Legislature can charter a ferry within its geographical limits.

23. *In re International and Interprovincial Ferries* (1905), 36 S.C.R. 206. Parliament can establish ferries between two Provinces or between a Province and any British or foreign country.

24. *C.P.R.* v. *Bonsecours* (1899), A.C. 367. Parliament has exclusive power to regulate the construction, repair and alteration of a Dominion railway. Legislature cannot interfere with the structure, but may prescribe for the cleaning of a railway ditch. But see *Madden* v. *Nelson*, *ibid.* p. 626. Legislature cannot impose liability for cattle killed on Dominion railway.

25. *G.T.R. Co.* v. *Atty.-Gen.* (1907), A.C. 65. Parliament may prohibit Dominion railways from "contracting out" of liability for injuries to employees.

26. *Canada Southern Ry. Co.* v. *Jackson* (1890), 17 S.C.R. 316. Workmen's Compensation Act (provincial) applies to Dominion railways.

27. *Cunningham and Atty.-Gen. B.C.* v. *Tomey Homma and Atty.-Gen. B.C.* (1903), A.C. 151. Parliament has exclusive jurisdiction as to naturalization, but Legislature can determine what privileges should be attached to it.

28. *Union Colliery Co.* v. *Bryden* (1899), A.C. 580. B.C. Legislature may not prohibit Chinamen (aliens or naturalized) from employment in mines.

29. *Regina* v. *Wason* (1890), 17 A.R. 221. Legislatures in passing Act providing against frauds in supplying milk to cheese and butter manufactories may prescribe penalties for its enforcement.

30. *Regina* v. *Bradshaw* (1876), 38 U.C.Q.B. 564. Parliament may provide for parties dispensing with a jury in appeals from summary convictions.

31. *Atty.-Gen.* v. *Atty.-Gen.* (1898), A.C. 700. Provinces own the fish, but fishing regulations may be made by the Dominion.

overlap and encroach one upon the other in respect of the subjects of legislation indicated in the horizontal and vertical headings respectively(*b*).

(*b*) Table of cases above cited, under their appropriate headings.

Provincial Jurisdiction Sec. 92.	Dominion Jurisdiction, Sec. 91.												
	2. Trade and Commerce.	2b. Temperance Legislation.	3. Taxation.	13. Ferries.	21. Bankruptcy and Insolvency.	25. Naturalization & Aliens.	27. Criminal Law.	Companies. (1) Dom. Rys. (s.s. 29).	Companies. (2) Banks (s.s. 15).	Companies. (3) Other Co's. Sec. 91.	Peace, Order and Good Govmt.	Fisheries.
1. Amendment of Constitution						27						
2. Direct Taxation	13, 17 20			21								
8. Municipal Institutions	9, 10	9, 10 11, 12						24				
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14. Administration of Justice, Civil Procedure, Provincial Courts							22					
5. Punishments to enforce Provincial Law	9, 29	9					8					
16. Matters of Local or Private Nature in the Province	9, 10 11, 12	9, 10 11, 12		22	1, 6 7		8	24			11, 12	
Sec. 109, Royalties				23								
Fisheries												31

"Ambulance chasers" having received judicial notice recently at Osgoode Hall, in a case, which, by the way, had nothing to do with that wart on the profession, reminds us of an anecdote worth repeating especially as another obnoxious character known as a "claims agent" also appears therein. The wife of a workman on a railway early one morning was called on by a claims agent, who suggested settling with her on behalf of the company for all damages for the loss of her late lamented spouse. She was somewhat mystified as this bread winner was upstairs sleeping off his booze of the night before; but, being offered $90 if she would sign a paper, she did not feel like refusing so welcome an addition to her uncertain livelihood. The claims agent had scarcely left the house when hot foot came a pettifogging solicitor who also wanted her signature to another paper. But there was no offer of money this time. This suggested a train of thought; if the first man was willing to give money for her signature why should not this man do the same? Negotiations being opened on that basis a smaller sum in cash was agreed to and paid, and No. 2 departed. Soon after another person of the same class appeared and wanted her name to another paper, with prospects of untold wealth dangled before her bewildered mind. She pulled herself together and seeing the tide apparently "leading on to fortune" again entered into negotiations and finally signed his paper, after a plucky and successful fight for an increased sum, which was also duly paid. Each of these solicitors then demanded compensation from the company. It is not related whether there were any further propositions of the same sort; but a few days after the solicitor of the railway company who apparently had begun to "smell a rat" enquired into the matter, and it turned out that the "late lamented" had sold his pass on the railway to another man for several drinks. This unfortunate went on a short trip on the strength of the pass; but the only name on his person when taken out of the wreck was the name on the pass.—Hence these tears!

Anarchy even though it is not always caused by a lax administration of the law is very commonly a result thereof. The tragedy at Wiarton is another illustration of the disastrous results of men taking the law into their own hands, which is a species of anarchy. Four men sought to do that which presumably should have been done by the local police authorities, with the result that one of them was shot dead by the woman whose house was being raided, and the other three have been promptly sentenced to eight months in the common jail for their participation in the attack. Chief Justice Mulock was perfectly right in the course he took. He would have been very lax in his administration of justice had he failed to pronounce a substantial sentence upon men who had thus been partakers in a very serious offence. As has been very frequently said of late, anarchy is in the air, and evidences of this are of daily occurrence. The well-being of the country depends upon the prompt repression of any exhibitions of this growing evil.

The State of New York has made a new departure by enacting that adultery is indictable as a criminal offence. The statute came into force on 1st September last. A contemporary does not think this a happy inspiration on the part of the legislature and prophesies that it will give rise to prosecution instituted not to vindicate the law and outraged morals, but to gratify private revenge. As the writer wisely says, "There are some wrongs which are best left to be dealt with by the healthy public sentiment of the people. If public morals are so debased as to excuse the wrong, it is not by legislation such as this that a reform can be effected." The statute, however, is an experiment, whose results will be watched with interest.

REVIEW OF CURRENT ENGLISH CASES.

BILL OF LADING—THROUGH FREIGHT—LOSS OF PART OF CONSIGNMENT IN TRANSIT—LIEN ON GOODS DELIVERED IN RESPECT OF FREIGHT CHARGES PAID ON GOODS LOST.

The Hibernian (1907) P. 277 was an action by consignees against ship owners to recover certain moneys alleged to have been overcharged by them. The circumstances were as follows: The plaintiffs were consignees of a quantity of bags of flour which had been consigned from Milwaukee partly by railway and partly by the defendants' ship to London for a through freight. In the course of transit part of the goods were damaged and were sold and not delivered. The ship owners paid the railway its charges on this part of the goods as well as on that part actually delivered to the consignees, and under the contract claimed to have a lien on the goods delivered for the railway charges on the undelivered goods. The Divisional Court (Barnes, P.P.D. and Dean, J.) was of the opinion that they were not entitled to any lien on the goods delivered for freight on the undelivered goods; but the Court of Appeal (Lord Alverstone, C.J. and Moulton, and Kennedy, L.JJ.) came to the conclusion that, on the proper construction of the contract, the ship owners had the lien which they claimed. The action therefore failed.

LUNATIC—COMMITTEE AND RECEIVER OF LUNATIC'S ESTATE—RECEIPTS BY RECEIVER AFTER HIS RIGHT TO ACT HAD CEASED—SURETY OF RECEIVER.

In re Walker (1907) 2 Ch. 120. In taking the accounts of a person who had been appointed receiver and committee of a lunatic's estate, it appeared that the receiver had a balance in his hands at the death of the lunatic, and that after the lunatic's death he had received further moneys which were also in his hands, and the question then arose whether a surety for the receiver could be made answerable for these subsequent receipts as well as for the balance in hand at the date of the lunatic's death. The Master held that the surety was liable, but the Court of Appeal (Cozens-Hardy, M.R. and Kennedy, L.J.) held that the receipts subsequent to the death of the lunatic could not

be attributed to him in his character of receiver or committee, and, therefore, his surety could not be made liable in respect thereof.

SOLICITOR—CHARGING ORDER FOR COSTS—PROPERTY PRESERVED—APPOINTMENT OF RECEIVER—RESULT OF ACTION NOT BENEFICIAL—(ONT. RULE 1129)—TRUSTEES—PRIORITY—COSTS.

In re Turner, Wood v. *Turner* (1907) 2 Ch. 126 was an application by the plaintiff's solicitors for a charging order. The action was for administration, and a compromise had been made whereby it was agreed that the costs of all parties were to be paid out of the estate. The plaintiff's solicitors claimed to be entitled to a charging order (Ont. Rule 1129), for their costs. A receiver had been appointed in the action, but in the result the appointment had not proved beneficial to the beneficiaries, nevertheless Kekewich, J., held that the property had been "preserved," and the solicitors were entitled to a charge. It was also held that the trustees of the estate who were defendants were entitled to payment of their costs, charges and expenses, in priority to the charge of the plaintiff's solicitors for their costs.

LANDLORD AND TENANT—DETERMINATION OF TENANCY—TENANCY AT WILL CREATED ON TERMS OF EXPIRED LEASE—INCORPORATION OF TERMS OF LEASE — ARBITRATION CLAUSE — ACTION FOR OCCUPATION RENT — STAYING PROCEEDINGS — ARBITRATION ACT, 1889 (52-53 VICT. C. 49), SS. 4, 27—(R.S.O. C. 62, S. 6).

Morgan v. *Harrison* (1907) 2 Ch. 137 was an action for use and occupation. The defendants had been tenants of the plaintiffs of a colliery under a written lease which had expired. The lease contained a clause providing that disputes should be referred to arbitration. On the expiration of the lease the defendants asked for an extension of the lease and the plaintiffs wrote in reply that they might consider themselves tenants at will of the demised premises pending further arrangements. The defendants contended that the result of this was to incorporate into the tenancy at will by implication, so far as applicable, all the provisions of the written lease, including the arbitration clause, and they applied to stay the proceedings under the Arbitration Act (see R.S.O. c. 63, s. 6). Neville, J., refused the

motion, but the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Buckley, L.J.) reversed his decision. Cozens-Hardy, M.R., lays it down that where an express tenancy at will is created after the termination of a written lease, the terms of such written lease, so far as applicable, apply to such tenancy at will. The other members of the Court however based their conclusion on the letters which had passed between the parties.

PRACTICE—APPEAL—INTERLOCUTORY OR FINAL ORDER.

In re Jerome (1907) 2 Ch. 145, the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Kennedy, L.J.) held that an order dismissing an application to review a taxation of a solicitor's bill between solicitor and client, is, for the purpose of appeal, an interlocutory and not a final order, and one from which an appeal can not be had without leave. The Court refused to lay down any general rule on the subject, and the reasoning of at least one of the judges turns upon the inconvenience, from the multiplicity of appeals, which might result if such an order were held to be final. Apart from decisions, one would rather incline to the view that any order which finally determines any matter of substance in the course of litigation should be regarded as a final order.

PRACTICE—COSTS—ADMINISTRATION OF REALTY — INCIDENCE OF COSTS—DIRECTION IN WILL TO PAY TESTAMENTARY EXPENSES OUT OF PERSONAL ESTATE.

In re Betts, Doughty v. *Walker* (1907) 2 Ch. 149 deals with a point of practice which we do not remember having ever seen applied in Ontario. The action was for the administration of a deceased person's estate who had died intestate as to her real estate, and by her will had directed her testamentary expenses to be paid out of her personal estate. In the course of the administration it became necessary to institute inquiries as to who was the testatrix's heir at law; and the question then arose whether the costs of such inquiry should be borne by the personalty, a question which is of course very material where the beneficiaries of the realty and personalty are not the same persons. Kekewich, J., held that though the effect of the English Land Transfer Act, 1897 (see Ont. Devolution of Estates Act, R.S.O. 127, s. 4), is to make the costs of administering real estate "testamentary expenses," yet that the ordinary practice

of the Chancery Division, that the cost of administration so far as they have been increased by the administration of realty are to be borne by the realty, is still applicable; and accordingly that the costs of the inquiry as to the heirs at law must be borne by the realty, notwithstanding the direction contained in the will as to the payment of the testamentary expenses out of the personalty.

FRAUDULENT CONVEYANCE — POST NUPTIAL SETTLEMENT — INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS — 13 ELIZ. C. 5—(R.S.O. C. 354, S. 1)—CHARGING ORDER—JUDGMENTS ACT, 1838 (1 & 2 VICT. C. 110), S. 14—(R.S.O. C. 324, S. 21) — RECEIVER — EQUITABLE EXECUTION — TRUSTEE — COSTS.

Ideal Bedding Co. v. *Holland* (1907) 2 Ch. 157. This was an action to set aside a post nuptial settlement of an equitable reversionary interest in personal estate made by a debtor as being a fraud on his creditors under 13 Eliz. c. 5, (R.S.O. c. 334, s. 1). The settlement was held by Kekewich, J., to be void under the statute because it prevented the creditor from obtaining a charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110, s. 14,—(R.S.O. c. 324, s. 21); or from obtaining the appointment of a receiver of the fund by way of equitable execution. The trustee of the settlement who had with knowledge of the settlor's destitution prepared the settlement in good faith, and appeared at the trial to defend it, was held entitled to his costs out of the settled property. It appearing that there might be a surplus after payment of creditors, it was held that the settlement ought not to be ordered to be delivered up to be cancelled, but that the trustee should be ordered to concur in all acts necessary to make the property included in the settlement available to satisfy the creditors' claims.

TRADE NAME—COMPANY—SIMILARITY OF NAME—RIGHT OF INDIVIDUAL TO USE HIS OWN NAME—TRANSFER TO COMPANY.

Fine Cotton Spinners v. *Harwood* (1907) 2 Ch. 184 was an action to restrain a defendant company from using the name of Cash as part of its trade name. The defendant company had been organized by a person named Harwood Cash, and the company was called "Harwood Cash Co." Harwood Cash was the son of a man named Cash who had carried on a busi-

ness under the name of "John Cash & Sons," which business has been bought, and was now owned by the plaintiffs. Harwood Cash had been an employee of John Cash & Sons, and on leaving that firm had promoted and registered the defendant company to carry on the same kind of business as that of John Cash & Sons. Joyce, J., held that although he had the right to carry on business in his own name, yet that the defendant company had no right to take a name which might have the effect of deceiving or misleading the public into the belief that there was some connection between the defendants' and the plaintiffs' business and that it was quite immaterial that John Harwood Cash was a promoter or member of the defendant company.

VENDOR AND PURCHASER—TITLE—DEFECT IN TITLE—AGREEMENT BY VENDOR NOT TO INTERFERE WITH LIGHT TO ADJOINING PREMISES—DRAIN.

Pemsel v. *Tucker* (1907) 2 Ch. 191 was an application in the nature of an appeal from the certificate of a master on a reference as to title. The premises in question were sold under an open contract, and on a reference as to title the vendor produced an agreement made with an adjoining proprietor by which, in effect, the vendor had agreed not to interfere with the lights of the adjoining premises, and it also appeared that beneath the premises a drain ran which served two adjoining houses. Warrington, J., held that both these facts constituted objections to the title: the agreement operating as a restriction on the enjoyment of the premises sold, and the common drain being by statute vested in a municipal authority, so as to prevent the vendor from conveying all that he had contracted to sell.

STAYING ACTION—CAUSE OF ACTION ARISING OUT OF THE JURISDICTION—DEFENDANT TEMPORARILY WITHIN JURISDICTION—ABUSE OF PROCESS OF COURT.

In *Egbert* v. *Short* (1907) 2 Ch. 205 the defendant applied to stay, or dismiss, the action as being an abuse of the process of the Court. The defendant was a solicitor practising in Madras, and was trustee of a deed of separation made between the plaintiff and her husband who was an American domiciled in India. The action was brought for negligence on the part

of the defendant in not collecting the moneys payable under the deed. In October, 1906, the defendant was in England temporarily on a holiday, and, on the eve of his return to India, was served with the writ. The plaintiff was then in England but had since gone to America. In these circumstances as the liability of the defendant would have to be determined according to the law of India, and upon the evidence of witnesses in India, Warrington, J., was of the opinion that the action was not brought bona fide in England, and the injustice in bringing the action in England was so great, that the action ought not to be allowed to proceed, and he accordingly dismissed it with costs.

SOLICITOR—BILL OF COSTS—AGREEMENT AS TO COSTS—SIGNATURE—ATTORNEYS AND SOLICITORS ACT 1870 (33-34 VICT. C. 28), S. 4 (R. S. O. C. 174, S. 54).

Bake v. *French* (1907) 2 Ch. 215. The plaintiff, a solicitor, claimed in an account which was being taken before the Master a sum of £635 for costs under an agreement. The agreement in question was signed by the clients and enclosed in a letter to the plaintiffs. The agreement was dated 30th May, 1904, and was not signed by the plaintiffs. It waived the delivery of a detailed bill and agreed to the payment of £635 as costs with interest from 25th March, 1904. The agreement in blank had, however, been enclosed by the plaintiff in a letter to the defendant for signature. Warrington, J., thought that the agreement was so connected with the correspondence that it must be taken to have been signed by both parties, but even if it were in fact only signed by the defendant that was sufficient under the statute 33-34 Vict. c. 28, s. 4 (R.S.O. c. 174, s. 54), notwithstanding some conflicting decisions on that point. He, however, sent the agreement to the taxing officer for examination as to its reasonableness.

DEED—MISREPRESENTATION AS TO CHARACTER OF DEED—NON EST FACTUM.

Bagot v. *Chapman* (1907) 2 Ch. 222 was an action against a husband and wife on a mortgage, for foreclosure and judgment on the covenants for payment of the mortgage debt. The wife pleaded a plea of non est factum. The facts proved were to

the effect that the mortgage in question was made of a reversionary interest of the wife in a fund of £20,000. The mortgage was brought to her by her husband for execution, and he represented it to be a power to enable him at some future time to raise money on her reversionary interest, but he said he was not going to use it, and she should not suffer, and she was not told, nor did she know, that she was then parting with her interest, or incurring any personal liability by covenant or otherwise. The mortgage money, £12,000, was paid to her husband, and she never received any part of it. Eady, J., held that the deed was void as a conveyance of the reversionary interest, and was also void as a covenant by the wife for payment of the motrgage debt. The action was accordingly dismissed as against the wife.

LANDLORD AND TENANT—LICENCE TO ASSIGN LEASE—UNREASONABLY WITHHOLDING CONSENT—FINE—DECLARATORY JUDGMENT—COSTS.

In *Jenkins* v. *Price* (1907) 2 Ch. 229 the plaintiff, a lessee, claimed a declaratory judgment to the effect that he was entitled to assign his lease without the consent of the lessor, on the ground that the lessor's consent had been unreasonably withheld. The demised premises consisted of a public house, and the lease contained the usual covenant by the lessee not to assign without the consent of the lessor, but such consent was not to be unreasonably withheld. By the effect of a statutory provision in that behalf, no "fine" could be exacted by the lessor as a condition of giving his consent. The lessee proposed to assign the lease to a brewery company, whereby the house would become "a tied house," and the effect of this, as the landlord proved, would be to depreciate the value of the property by about £500, and in order to recoup this loss, therefore, he gave an unconditional consent to an assignment of the lease to any private person, but stipulated that if the assignment were made to a brewery the rent must be increased by £25 a year, and the time extended from twelve to twenty-one years. Eady, J., held that the terms imposed as a condition of consent to an assignment to a brewery was in the nature of a fine which the lessor was precluded from demanding, and, therefore, that his consent had been unreasonably withheld, and that the lessee might assign without his consent, but he held that that gave

the lessee no cause of action against the lessor for withholding his consent, and, therefore, the lessor could not be ordered to pay the costs of the action.

EXECUTOR — DEVASTAVIT — CLAIM ON GUARANTY — STATUTE OF LIMITATIONS—TRUSTEE ACT 1888 (51-52 VICT. C. 59), S. 8, SUB-S. 1.—(R.S.O. C. 129, S. 32(1).)

Lacons v. *Warmoll* (1907) 2 K.B. 350 was an action against one of two executors upon a guaranty given by their testator. The action was commenced in 1905 in respect of claims accruing due in 1903 and 1904. The plaintiff alleged that the defendant had been guilty of a devastavit in wrongfully handing over assets to a beneficiary under the will in 1898, without making provision for the liability under the guaranty now sued on. The County Court judge who tried the action held that the defendant was liable for the devastavit and gave a judgment against him de bonis testatoris et si non de bonis propriis for the amount of the plaintiff's claim, which judgment was affirmed by the Divisional Court (Kennedy and Lawrence, J.J.); but the Court of Appeal (Lord Alverstone, C.J., and Moulton and Buckley, L.JJ.) reversed the decision. The case was carried on without pleadings. The plaintiff's original plaint was to recover the amount payable under the guaranty, but he gave notice that he would claim that defendant had committed a devastavit; and the defendant gave notice that he would plead the Statute of Limitations as a bar to the alleged claim for devastavit. In the Courts below it was considered that as the claim on the guaranty did not become payable until 1903, the Statute of Limitations afforded the defendant no defence, because prior to that date the plaintiff could not have brought any action in respect of the devastavit. But the Court of Appeal hold that where an executor is sued in respect of a devastavit he is sued in respect of an alleged personal wrong and that, altogether apart from the Trustee Act, 1888, (see R.S.O. c. 129, s. 32), he is entitled to set up the Statute of Limitations as a bar, and that the statute begins to run, not from the date of the accrual of the plaintiff's right to sue the testator's representatives, but from the date the devastavit on which the plaintiff relies was actually committed. The judgment in so far as it was de bonis propriis was therefore held to be erroneous.

The judgment of Buckley, L.J., deserves careful attention

where he points out that while an executor sued for a devastavit may set up the Statute of Limitations as a bar, yet in an administration action it is not competent for a personal representative to discharge himself by setting up a devastavit more than six years prior to the action.

SOLICITOR AND CLIENT—AGREEMENT AS TO COSTS—ATTORNEYS' AND SOLICITORS' ACT, 1870 (33-34 VICT. C. 28), S. 4—(R.S.O. C. 174, S. 54).

In *Clare* v. *Joseph* (1907) 2 K.B. 369 the Court of Appeal (Lord Alverstone, C.J., and Moulton and Buckley, L.JJ.) have reversed a judgment of a Divisional Court (Darling and Ridley, JJ.). The action was by a client against solicitor to recover a sum of money had and received by the defendant while acting as the plaintiff's solicitor. The plaintiff alleged that by an oral agreement between himself and the defendant, the latter agreed to carry on an action against a third party on the terms that if successful he was to make no charge against the plaintiff for costs, but in case it was unsuccessful he was to be entitled to receive from the plaintiff the same amount of costs he would have recovered from the defendant if the action had been successful. The action had proved successful, but the defendant had retained a sum of money as costs out of the money recovered in the action. The jury found the agreement as a fact. The defendant contended it was invalid because not in writing, under the Solicitors Act, 1870, 33-34 Vict. c. 28, s. 4, (see R.S.O. c. 174, s. 54), and the Divisional Court gave effect to that contention, but the Court of Appeal held that the Act in question though providing that agreements under it shall be in writing, did not override the law as it previously existed enabling agreements as to costs to be made orally. See *Re Solicitor* 14 O.L.R. 464.

JUSTICES—JURISDICTION—BREACH OF PEACE—NO FORMAL CHARGE—POWER TO BIND OVER BOTH COMPLAINANT AND DEFENDANT TO KEEP THE PEACE—NO AVERMENT AS TO THREATENED BODILY HARM.

The King v. *Wilkins* (1907) 2 K.B. 380 was an application by a complainant to quash an order of justices of the peace,

binding the complainant to keep the peace towards the defendant, whom he had summoned for an alleged threatened breach of the peace. On the hearing of the complaint the defendant testified that the complainant had used threatening language toward him and the justices found as a fact that there was a real danger of a breach of the peace on the part of both parties, and accordingly bound them both over to be of good behaviour. No formal complaint was made by the defendant against the complainant who appealed. The Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held that there was jurisdiction in the circumstances to make the order.

FATAL ACCIDENT—WIDOW—POSTHUMOUS CHILD—DEPENDENT ON DECEASED.

Williams v. *Ocean Coal Co.* (1907) 2 K.B. 422 although a case under the English Workmen's Compensation Act, 1897, may nevertheless be found useful in the construction of our Fatal Accidents Act, R.S.O. c. 166. In this case the deceased had been killed in course of his work in circumstances entitling those dependent on him to compensation, and the question was whether his widow and posthumous child were in fact dependent on him. The facts being, that the deceased had been married in 1903 and for about nine months after lived with his wife's parents. He then lived with his wife in apartments for about six weeks. The wife then returned to her parents and the deceased went off to seek work. The wife had not seen him since December, 1905, and in April, 1906, he was killed. A posthumous child of which deceased was the father was born in April, 1906. The County Court judge had held that the widow and child were not actually dependent on the deceased and were, therefore, not entitled to compensation, but the Court of Appeal (Cozens-Hardy, M.R. and Barnes P.P.D. and Kennedy, L.J.) held that he had overlooked the legal presumption of dependency in the case of the wife, and that on that presumption there was a total dependency of the wife. Also that under the recent case of *Villar* v. *Gilbey* (1907) A.C. 139, the posthumous child was also a dependent, and entitled to compensation.

Correspondence.

BARGAINS BETWEEN SOLICITORS AND CLIENTS AS TO COSTS.

To the Editor of the Law Journal:

Dear Sir,—In a recent number of the *Law Journal* (p. 554), you make brief reference to *Re Solicitor*, reported on p. 575. Permit me to offer a few observations.

The facts in this case were briefly as follows: A sailor named Ellis, sailing on a sailing vessel coming into Port Hope one night in rough weather, jumped on to the dock to make fast a cable, and in the dark ran into some barbed wire and lost an eye. Like most sailors, he was a poor man, and what little he had saved went to pay doctor's bills. He sought help from the Standard Ideal Co., by whom the wire had been placed on the dock; but no attention was paid to him. Then he consulted a solicitor living in Picton near his home. The solicitor went to the trouble of making enquiries which confirmed Ellis' story, and concluded that Ellis had good cause of action against the company. The solicitor wrote to the latter on Ellis' behalf, asking for reasonable compensation for his expenses and loss of eye; but no attention was paid to the letter. Thereupon the bargain reviewed by the learned Chancellor was entered into and an action for damages launched. I venture to think that the language used by him, if correctly reported in 10 O.W.R. 226, is unnecessarily harsh, so far as this particular case is concerned.

One feature of the case should not be overlooked. Every solicitor knows that in undertaking an action for a man of no means like Ellis he runs the risk of a settlement by his client behind his back. Indeed, a client of the Ellis class, too frequently, in fact usually, thinks it exceedingly clever to "beat" his lawyer. He is worthless; he pockets what the solicitor obtains for him by the stress of a writ, and laughs at him. If the solicitor attempts to get his costs out of the defendant, he has formidable difficulties to encounter; and usually may be thankful if he is not mulcted in costs: See *De Santis* v. *C. P. Ry. Co.*, not reported. Meantime, he has had to pay out considerable in disbursements, such as for examination for discovery without which he could hardly with safety go down to trial. In this case the company offered $1,000 and costs just before the trial came on. This sum Ellis was quite willing to accept, but the solicitor refused to take it as insufficient. The trial went on, and the jury brought in a verdict for $2,600 which was confirmed by a Divis-

ional Court. Ellis was quite willing to accept $1,000, but through the exertions of his solicitor he actually got nearly double that sum after deducting the amount in dispute; yet he proceeded to rend his solicitor.

The Chancellor, however, suggests that the solicitor "might well have undertaken the case as a matter of professional benefaction!" A kind suggestion truly. He "might have done" so, but should he? He has to live by his profession, and his client has nothing to complain of.

The report does not set forth "the true method of dealing with impoverished clients laid down by Lord Russell of Killowen." He seems to have forgotten that the Osgoode Hall library is not readily available to most country practitioners.

The learned Chancellor invokes the ancient law regarding champerty, and he may have been justified in so doing, although some in the profession think that the recent legislation as to costs has abrogated it, at least to a considerable extent. But a law suit, especially for a pauper client, involves no slight risk. The Court of Appeal recently overruled the trial Judge and a Divisional Court, and unanimously held that a father instead of recovering from the C. P. Ry. Co. for the death of his son was really under a deep obligation to defendants for releasing him from a bargain the Court considered to be improvident by killing the son. See *Moir* v. *C.P. Ry. Co.*, not reported.

A solicitor should either not listen to an "impoverished" client at all, or take the case "as a matter of professional benefaction," run all risks of success or failure, time, labor and money spent, of a settlement behind his back, and of being cast aside and some other solicitor employed in his stead by a client who has nothing to lose. If he wins out, he should then go to his client and say: "I'm in your power; what are you going to do with me?' Otherwise, he is in for a scathing from a judge and probably an investigation by the Law Society by his Lordship's direction.

Let it be noted, too, that the cost of living has of late greatly increased; even judicial salaries have, very properly too, been raised; but for solicitors there is the same old tariff of half a century ago, and they are under the invocation of the ancient champerty statutes passed upwards of 600 years ago. Moreover, it is a common remark amongst the profession that when a solicitor becomes a judge he seems to lose all remembrance of the difficulties under which his late brethren labor; and if he has to order costs, he faithfully reduces them to the lowest notch.

A SOLICITOR.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] MORTON *v.* FULTON. [June 24.

Constitutional law—Construction of statute—Duty of responsible Ministers of the Crown—Refusal to submit petition of right—Right of action—Damages — Pleading—Practice—Withdrawal of case from jury—New trial—Costs.

Under the provisions of the "Crown Procedure Act," R.S. B.C. ch. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant-Governor within a reasonable time after presentation, and failure to do so gives a right of action to recover damages.

After a decisive refusal to submit the petition has been made, the right of action vests at once, and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim.

In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper and a new trial should be had.

The Supreme Court of Canada reversed the judgment appealed from, which had affirmed the judgment at the trial dismissing the action with a variation allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the courts and a new trial ordered. DAVIES and MACLENNAN, JJ., dissented, and taking the view that the refusal, though illegal, had not been made maliciously or wrongfully, considered that on that issue the plaintiff was entitled to nominal damages, that, in other respects, the judgment appealed from should be affirmed and that there should be no costs allowed on the appeal to the Supreme Court of Canada.

Deacon, for appellant. *Nesbitt*, K.C., for respondent.

Ont.] SCOTT *v.* SWANSON. [June 24.

Assignments and Preferences Act, s. 11—*Assignment by mortgagor — Foreclosure — Payment by assignee of judgment —Redemption.*

After judgment for foreclosure of mortgage or redemption judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the master's office and proved their claims. The master reported that they were the only incumbrances and fixed a date for payment by them of the amount due the mortgagees. After confirmation of this report S. obtained assignments of the judgments and was added as a party. He then paid the amount due the mortgagees and the master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgments as well as the mortgage. This report was confirmed, and the mortgagor having made an assignment for the benefit of creditors before the day fixed for redemption an order was made by a judge in Chambers adding the assignee as a party, extending the time for redemption and referring the case back to the master to take a new account and appoint a new day.

Held, affirming the judgment of the Court of Appeal, 13 O.L.R. 127 (sub nom. *Federal Life Ass. Co.* v. *Stinson*), that under the provisions of s. 11 Assignments and Preferences Act, the assignee of the mortgagor could only redeem on payment of the total sum due to S. under the mortgage and the judgments assigned to him.

D. L. McCarthy, for appellant. *H. Cassels*, K.C., and *R. S. Cassels*, for respondent.

Ont.] [June 24.

CANADIAN PACIFIC RY. CO. *v.* GRAND TRUNK RY. CO.

Specific performance—Tender for land—Agreement for tender —One party to acquire and divide—Division by plan— Reservation of portion of land from grant.

By agreement through correspondence the G.T.R. Co. was to tender for a triangular piece of land containing 19 acres offered for sale by the Ontario Government and convey half to the C.P.R. Co. which would not tender. Division was to be

made according to a plan of the block with a line drawn through the centre from east to west, the C.P.R. Co. to have the northern half. The G.T.R. Co. acquired the land but the Government reserved from the grant two acres in the northern part. In an action by the C.P.R. Co. for specific performance of the agreement,

Held, affirming the judgment of the Court of Appeal (14 O.L.R. 41), MACLENNAN and DUFF, JJ., dissenting, that the C.P.R. Co. was entitled to one-half of the land actually acquired by the G.T.R. Co. and not merely to the balance of the northern half as marked on the plan. The Court of Appeal directed a reference to the Master in case the parties could not agree on the mode of division.

Held, that such reference was unnecessary and that the judgment appealed against should be varied in this respect.

W. Cassels, K.C., and *Cowan*, K.C., for defendants, appellants. *Armour*, K.C., and *MacMurchy*, for respondents.

Ont.] ROBINSON *v.* MCGILLIVRAY. [June 24.

Insolvency—Preferential transfer of cheque—Deposit in private bank—Application of funds to debt due banker—Sinister intention—Payment to creditor.

McG., a merchant in insolvent circumstances, although not aware of that fact, sold his stock-in-trade and deposited the cheque received for the price to the credit of his account with a private banker to whom he was indebted, at the time, upon a overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit McG. gave the banker his cheque to cover the amount of the note. In an action to have the transfer of the cheque, so deposited, set aside as preferential and void,

Held, affirming the judgment appealed from, 13 O.L.R. 232, that the transaction was a payment to a creditor within the meaning of R.S.O. (1897), c. 147, s. 3, sub-s. 1, which was not, under the circumstances, void as against creditors.

G. C. Gibbons, K.C., for appellants. *Meredith*, K.C., and *Brewster*, for respondents.

Ont.] SINCLAIR *v.* TOWN OF OWEN SOUND. [June 24.

Municipal Act—Vote on by-law—Local option—Division into wards—Single or multiple voting.

Sec. 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law" does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act (R.S.O. 1897, c. 245).

Judgment of the Court of Appeal, 13 Ont. L.R. 447, affirming that of the Divisional Court, 12 Ont. L.R. 488, affirmed.

W. Nesbitt, K.C., and *Wright*, for plaintiff, appellant. *F. E. Hodgins*, K.C., and *Frost*, for respondents.

Ont.] KIRSTEIN *v.* COHEN BROS., LTD. [June 24.

Trade-mark—Infringement—Inventive term—Coined word—Exclusive use—Colourable imitation—Common idea—Description of goods—Deceit and fraud.

The hyphenated coined words "shur-on" and "staz-on" are not purely inventive terms but are merely corruptions of words descriptive of the goods (in this case, eye-glass frames) to which they were applied, intending them to be so described, and, therefore, they cannot properly be the subject of exclusive use as trade-marks. A trader using the term "staz-on" as descriptive of such goods, is not guilty of infringement of any rights in the use of the term "shur-on" by another trader as his trade-mark, nor of fraudulently counterfeiting similar goods described by the latter term; nor is such a use of the former term a colourable imitation of the latter term calculated to deceive purchasers, as the terms are neither phonetically or visually alike. The judgment appealed from, 13 Ont. L.R. 144, affirmed.

Cassels, K.C., and *McIntosh*, for appellants. *J. H. Moss*, and *C. A. Moss*, for respondents.

N.B.] FLEMING *v.* MCLEOD. [June 24.

Promissory note—Protest in England—Notice of dishonour to indorser in Canada — Address — First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety—Appropriation of payments—Evidence.

Notes made in St. John, N.B., were protested in London, England, where they were payable. The indorser lived at Richibucto, N.B. Notice of dishonour of the first note was mailed to the indorser at Richibucto, and, at the same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing him to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of the dishonour to the indorser at Richibucto. As the other notes fell due, the holders sent them and the protests, by the first packet from London to Canada, to the same agent at Halifax, by whom the notices of dishonour were forwarded to the indorser at Richibucto.

Held, IDINGTON and DUFF, JJ., dissenting, that the sending of the notices of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent was an indication that the holders were not aware of the correct address of the indorser and the fact that they used the proper address was not conclusive of their knowledge or sufficient to compel an inference imputing such knowledge to them. Therefore, the notices in respect to the other notes sent through the agent were sufficient.

Per IDINGTON and DUFF, JJ., dissenting, that the holders had failed to shew that they had adopted the most expeditious mode of having the notices of dishonour given to the indorser.

The maker of the note gave evidence of an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note, and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the indorser.

Held, that the evidence did not shew that there was any agreement by the holders to give time to the maker and the indorser was not discharged. If the existence of an agreement could be gathered from the evidence it was without consideration, and the creditor's rights against the sureties were reserved.

Per IDINGTON and DUFF, JJ., that a demand note given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the indorser is discharged.

Judgment of the Supreme Court of New Brunswick, 37 N.B. Rep. 630, reversed.

Teed, K.C., for plaintiff, appellant. *W. D. Carter*, for respondent.

Man.] CARRUTHERS *v.* CANADIAN PACIFIC RY. CO. [June 24.

Negligence—Railway — Animals at large — Meaning of "At large upon the highway or otherwise"—Fencing—Trespass from lands not belonging to owner.

C.'s horses strayed from his enclosed pasture situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.

Held, affirming the judgment appealed from, 16 Man. R. 323, that under the provisions of the Railway Act, 1903, s. 237, sub-s. 4, the company was liable to damages for the loss sustained notwithstanding that the animals had got upon the track while at large in a place other than a highway intersected by the railway.

Blackstock, K.C., for defendants, appellants. *J. E. O'Connor*, for respondent.

Man.] DAY *v.* CROWN GRAIN COMPANY. [June 24.

Mechanics' lien — Completion of contract — Time for filing claim—Right of appeal.

The time limited for the registration of claims for liens by sec. 20 of "The Mechanics' and Wage Earners' Lien Act," R.S.M. 1902, c. 110, does not commence to run until there has been such performance of the contract as would entitle the con-

tractor to maintain an action for the whole amount due thereunder.

The judgment appealed from, 16 Man. R. 366, was reversed. DAVIES and MACLENNAN, JJ., dissented on the ground that the evidence was too unsatisfactory to justify an extension of the time. The court refused to quash the appeal on the ground that the right of appeal had been taken away by s. 36 of the statute above referred to.

C. P. Wilson, and *A. E. Hoskin*, for plaintiff, appellant. *Alex. C. Galt*, for respondents.

Man.] MCNICHOL v. MALCOLM. [June 24.

Landlord and tenant—Negligence—Master and servant—Acts in course of employment—Alterations—Damage by steam —Responsibility of contractors—Control of premises — Cross-appeal between respondents—Practice.

In the lease of a shop the landlord agreed to supply steam heating, and, in order to improve the system, engaged a firm of plumbers to make alterations. Before this work was completed and during the absence of the tenant, the plumbers' men who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again, which, passing through unfinished pipes connected with the shop escaped through an open valve in a radiator and injured the tenant's goods.

Held, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm was also responsible for the negligence of their employees in turning on the steam, under such circumstances, as they were acting in the course of their employment in what they did although requested to do so by the caretaker. The judgment appealed from, 16 Man. R. 411, was affirmed with a variation declaring the plumbers jointly liable with the landlord. The action was against the two defendants jointly, and the plaintiffs obtained a verdict at the trial against both. The Court of Appeal confirmed the verdict as to McN., and dismissed the action as to

the other defendants. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal.

Held, that the plaintiff, respondent, was entitled to cross-appeal against the said defendants, respondents, to have the verdict against them at the trial restored.

Appeal dismissed with costs, and cross-appeal allowed with costs.

W. Nesbitt, K.C., *Atkins*, K.C., and *Coyne*, for plaintiff, appellant. *Chrysler*, K.C., and *Ormond* and *C. P. Wilson*, for respondents.

Man.] FAIRCHILD COMPANY *v.* RUSTIN. [June 24.

Contract—Sale of machinery—Agreement for lien—Delivery.

The company sold R. an entire outfit of second-hand threshing machinery for $1,400, taking from him three so-called promissory notes for the entire price. Two days before giving the notes R. had signed an agreement setting out the bargain, in which the following provisions appeared:—"And for the purpose of further securing payment of the price of the said machinery and interest . . . the purchaser agrees to deliver to the vendor, at the time of the delivery of the said machinery as herein provided, or upon demand, a mortgage on the said lands (i.e., lands described at the foot of the agreement) . . the statutory form containing also the special covenants and provisions in the mortgage usually taken by the vendors. And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized, etc., should the vendors take and resell the said machinery . . . and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages and expenses, and any and all notes or renewals thereof shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes and all renewals thereof, and interest, and all costs, charges, damages and expenses as herein provided, and, for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands. . . . And, on default, all

moneys hereby secured shall at once become due and all powers and other remedies hereby given shall be enforceable." In an action to recover the amount of the notes past due and to have a decree for a lien and charge upon the lands therefor under the agreement,

Held, reversing the judgment appealed from, that the right of the company to enforce the lien depended upon the interpretation of the whole contract; that the provision as to the lien only become operative in the case of a complete delivery pursuant to the contract, and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery.

W. R. Mulock, K.C., for defendant, appellant. *C. P. Wilson,* and *A. E. Hoskin,* for respondents.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] GOSCOMBE *v.* LAIRD. [Aug. 21

Indigent debtor—Arrest — Wilful and malicious tort — Liquidated amount—Appeal from commissioners.

The Indigent Debtors Act, R.S. 1900, c. 183, s. 15, empowers the Court or judge, where it appears upon the examination of the debtor . . . "(f) in cases of tort that such tort was wilful and malicious" to "remand the debtor to be confined without the privileges of jail limits for such term not exceeding one year as is deemed proper under the circumstances."

Defendant was in prison under an order for arrest (capias) in an action claiming damages for crim. con., and on application to commissioners under the Indigent Debtors Act an order was made for his discharge.

Plaintiff appealed on the ground that the tort of which defendant had been guilty was wilful and malicious.

Held, dismissing the appeal, that the order for arrest simply establishes a sum which, in the opinion of the judge who allows

it, would be sufficient security for the plaintiff, but it was not to be intended that the defendant should be imprisoned under the section except in consequence of circumstances connected with a claim for an ascertained and liquidated amount, which he could pay at any time after his imprisonment and thereby secure his discharge.

J. R. Johnstone, for appellant. *W. J. O'Hearn*, for respondent.

Russell, J.] THE KING *v.* REID. [Sept. 2.

Criminal law—Summary trial before magistrate—Jurisdiction—Irregularity in trying second case before deciding first.

Defendant was tried before the stipendiary magistrate at Halifax on two charges, one for assault and the other for pointing firearms at the complainant. Both cases were tried before any decision was given in either of them. The magistrate then proceeded to convict defendant for the assault and acquitted him on the other charge.

It was conceded that the case should be dealt with as if an affidavit had been made by the magistrate to the effect that he had not been influenced in deciding the first case by any evidence taken in the second.

It was also conceded that all the evidence applicable to both cases had been taken on the trial of the first charge and that nothing was added on the second trial that could influence the magistrate in deciding the case first tried.

On motion for a habeas corpus, the offence being clearly proved and no evidence being offered in exculpation,

Held, that the irregularity in trying both cases together was not ground for holding the conviction void. The magistrate asked the prisoner whether he consented that the charge should be tried by him or should be sent for trial by jury at the next sittings of the Supreme Court of Criminal Jurisdiction at Halifax, there being nothing in the statute requiring the date of the sittings to be named.

Held, that the objection that the requisite question was not put to defendant in order to give the magistrate power to deal summarily with the case must fail.

O'Hearn, in support of application. *Knight*, contra.

Full Court.] GOULD *v.* GILLIES. [Sept. 2.

Company—Promissory note given in payment for shares—False representation by agent—Liability of principal—Damages.

Defendant was induced to sign an application for shares in a company on the representation that the shares subscribed for were treasury stock, and that the money paid was to go into the treasury and was to be used for certain specified purposes. The shares were, as a matter of fact, the property of plaintiff, and the promissory note given by defendant in payment was indorsed to plaintiff. In an action on the note,

Held, 1. It was not necessary for defendant to shew that the false statement was the sole inducement which led him to apply for the shares or to explain upon which particular false statement he relied.

2. Defendant had not lost the right to assert his claim for damages through delay in repudiating the contract.

3. It was not open to plaintiff to say that he did not authorize anyone to sell his shares as "treasury stock" when, as a matter of fact they were sold as such, and that he was liable for the fraudulent acts of his agent even if he was innocent himself.

W. B. A. Ritchie, K.C., and *Robertson*, for appellant. *Mellish*, K.C., *O'Mullin* and *O'Connor*, for respondent.

Full Court.] THE KING *v.* BARNES. [Sept. 2.

Crown case reserved—Question of fact.

The prisoner was tried and convicted before GRAHAM, E.J., with a jury for rape committed upon the person of a girl of the age of 14 years.

On a case reserved by the trial judge there were contradictory affidavits as to a communication alleged to have been made by the sheriff to the jury while they were considering their verdict, two of the jurymen swearing in answer to a question put by them to the sheriff that the latter said they would be obliged to report the prisoner guilty of rape, but if they did so and recommended the prisoner to mercy the judge would give him a light sentence. The sheriff in his affidavit denied this and said: "Whatever your verdict, bring it into Court."

Held, that the Court had no jurisdiction to decide a question of fact on a case reserved.

Per GRAHAM, E.J., and RUSSELL, J., that the conviction should be quashed.

Roscoe, K.C., for the prisoner. *Clancy*, for the Crown.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] THEO NOEL CO. *v.* VITÆ OZÆ CO. [Aug. 15.

Discovery—Injunction against use of trade name—Questions tending to shew misrepresentation by plaintiffs as to their goods.

Motion to compel the plaintiffs' manager to answer certain questions which he had refused to answer when cross-examined on his affidavit filed in support of the plaintiff's motion for an injunction to restrain the defendants from advertising, etc., any medicinal preparation under the name of Vitæ Ozæ or V. O. or any names resembling the same or calculated to mislead the public.

The questions were directed to the point whether, as contended by the defendants, the advertisements of the plaintiffs' preparation contained misrepresentations as to their curative value and ingredients.

Held, that the truth or falsity of the advertising matter put forth by the plaintiffs was relevant to the motion for an injunction and that the questions must be answered.

Minty, for plaintiffs. *O'Connor* and *Blackwood*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] NEVILLE *v.* KELLY. [June 7.

Master and servant—Injury arising out of and in the course of employment.

While engaged in chipping the burrs from a steel plate with

a cold chisel, the plaintiff was injured by a piece of the steel so chipped off, striking him in the eye and destroying its sight.

Held, on appeal, affirming the decision of MORRISON, J., that the injury was an accident within the meaning of the Workmen's Compensation Act, 1902.

W. S. Deacon, for the appellants (respondents in the court below). *McCrasson* and *Harper*, for respondent (appellant below).

Full Court.] MARKS *v.* MARKS. [July 18.

Will, construction of—Description of legatee—"To my wife"—Bigamous marriage, presumption of—Evidence taken on commission—Discretion of trial judge to dispense with reading in full, or to accept a statement of its effect.

In December, 1873, the plaintiff, Annie J. Marks, then aged 21, was returning from a visit to Detroit. Whilst waiting at the Windsor depot she made the acquaintance of the deceased, A. J. Marks, then a widower. After an acquaintance of an hour or so, she decided to go with him by train to Stratford, during which time the couple became engaged. She did not return to her home in Kincardine, but waited for a few weeks when she received and accepted a request from him to meet her at Brantford. They then went to Buffalo, where she contends they were married. After a short absence they returned to Kincardine, where they kept house as man and wife until the spring of 1876, when he sold the furniture, kept the proceeds and left her, but returned in the fall of 1877. During his absence he did not provide for her support. He lived with her until the spring of 1878, when he left for Winnipeg. They apparently parted on friendly terms; she did not request to be taken with him; they did not correspond with each other; she made no demand for support from him and he gave her none. In 1895 he returned to Kincardine, but did not visit her, although he visited her mother and sister, and made enquiries concerning her. He died in October, 1904, but commencing in January of that year he opened a correspondence with her. These letters were produced at the trial by her. In all of these communications he addressed her as "Dear Friend" and she replied in the same way. In 1888, she lived with a man named Frankboner in Michigan, assumed his name and went as his wife.

For the purposes of this action she had visited Buffalo, but was unable to discover any record of her marriage. She gave evidence to the effect that no public records of marriages in Buffalo were kept before 1878. She could not trace the witnesses, the hotel where she was married having been destroyed, and the minister being dead. She also gave evidence that deceased had taken possession of her marriage certificate in 1878, but his son swore that he had searched through all his father's papers in vain for the certificate, or any evidence that the plaintiff had ever been the wife of A. J. Marks.

In November, 1903, nearly two years after his marriage to the defendant Susan Elizabeth Marks, deceased wrote to plaintiff Annie, stating that he had obtained her address from her sister. He then addresses her as "Dear Friend," and this correspondence continued until August, 1904, she sending in one of her letters her photograph, with "A. Frankboner" written on the back. In a letter from the deceased to her he spoke of the time "you and I were one" at Tift House in Buffalo. This is the only reference to their former relations. At the trial plaintiff's sister and cousin swore to having seen the paper supposed to be the marriage certificate, but neither witness remembered the contents of the document.

Deceased married Susan in March, 1902, at Nelson, B.C., prior to his opening up correspondence with Annie and during this period he also, when absent, wrote to Susan, but always addressed her as "my dear wife" and signed himself "your loving husband." He made his will at Nelson on the 6th of May, 1904, leaving to "my wife" $50 per month during her lifetime payable out of his estate.

It is on this clause in the will that action was brought, it being contended that the marriage to Susan was a bigamous union and that the legacy ought, therefore, to go to Annie, who set up her alleged marriage in 1873.

Held, on appeal, affirming the decision of HUNTER, C.J. (MARTIN, J., dissenting), that there was nothing in the evidence to displace the presumption that the deceased had not committed bigamy in marrying Susan in 1902, and that she was the person designated in the will as "my wife" and "my said wife."

Whether all the evidence taken upon commission in an action shall be read at length, or read in part and stated in

part, or stated by counsel at the trial is a matter in the discretion of the trial judge.

Cassidy, K.C., for plaintiff, appellant. *S. S. Taylor*, K.C., for respondent. *Lindley Crease*, for trustees.

Full Court.] STEPHENSON *v.* STEPHENSON. [July 18.

Mining law—Hydraulic lease—Dispute note—Special defence—Free miner's certificate—Recorded interest—New defence on appeal.

A defence setting up failure to comply with the provisions of the Placer Mining Act must be specifically pleaded, *e.g.*, lack of a free miner's certificate and failure to record interest.

Unless exception be taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal.

Gelinas v. *Clark* (1901), 8 B.C. 42, 1 M.M.C. 428, followed.

Wilson, K.C. and *Bloomfield*, for defendants, appellants. *Martin*, K.C., for respondent.

Irving, J.] [July 19.

DUDGEON *v.* DUDGEON & PARSONS.

Husband and wife—Property purchased by wife with husband's money—Resulting trust—Sale by wife—Notice to purchaser.

A husband from time to time gave his wife money to pay for certain property which constituted their home. While they were living apart through a disagreement, the wife entered into negotiations with defendant Parsons for the sale of the property and received a payment on account of the purchase price. Plaintiff thereupon notified the purchaser of his claim, but the purchaser anticipated the due date of final payment and completed the purchase.

Held, that there was a resulting trust in favour of the husband, and that he was entitled to recover from the purchaser, but that as there was a dispute between the husband and wife as to a proportion of the money being her own when the property was purchased by them, the amount recovered from defendant Parsons be paid into Court pending a reference.

Helmcken, K.C., and *Peters*, K.C., for plaintiff. *A. E. McPhillips*, K.C., for defendant Dudgeon. *Wootton*, for defendant Parsons.

Clement, J.] [July 30.

BROHM *v.* B. C. MILLS, TIMBER AND TRADING CO.

Crown grant issued of lands covered by timber lease—Renewal of timber lease subsequent to issue of Crown grant.

Plaintiff obtained a Crown grant to certain lands, to the timber on which a lease for 21 years had been previously given. The grant from the Crown was silent as to the timber lease. At a date subsequent to the said grant, the timber lease had to be surrendered for renewal under the provisions of the Land Act.

Held, that the rights given the grantee under his Crown grant were subject to the existing timber lease; and that the lessees did not lose their priority by taking a renewal under the Act.

G. C. Duncan, for plaintiff. *C. B. Macneill*, K.C., for defendants.

Book Reviews.

Burge's Commentaries on Colonial and Foreign Laws generally and in conflict with each other and the law of England. New edition, under the editorship of A. W. RENTON, Judge of the Supreme Court of Ceylon, and G. G. PHILLIMORE, B. C.L., Barrister-at-law. Vol. 1., London, Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119-120 Chancery Lane, 1907.

We are told that this work is to be completed in five volumes, and that among the assistant editors are, as to the law of Canada, Professor Walters of McGill College, Montreal; Professor A. H. Lafroy, and Professor McGregor Young, of Toronto University. There are eight other assistant editors in connection with the systems of law in other countries.

Mr. Burge, after some twenty years spent in Jamaica, part

of the time as Attorney-General, returned to England where he was concerned in most of the important cases coming before the Judicial Committee of the Privy Council in reference to constitutional questions. In 1838 he published his Commentaries on Colonial and Foreign Laws. His learning as well as his experience gained as an advocate in connection with appeals from various parts of the British Empire gave him great familiarity with the different systems of law expounded in his book. Since it appeared, changes of the most far-reaching character have passed over the British Empire and the world. This has made necessary a re-casting of his work, and the editors in the volume before us describe generally the character of the different systems that underlie the jurisprudence of the legal world, and their relations to the present laws of the British dominions, and trace the outlines of the existing juridical constitutions of these dominions, exclusive of the United Kingdom, and discuss the position of tribunals which have been established in lands not forming an integral part of His Majesty's dominions. Appended to this volume is a tabulated statement shewing the conditions regarding appeals to the Judicial Committee of the Privy Council from British Courts of justice outside the United Kingdom. This is an interesting table and gives a bird's eye view of the jurisdiction of the highest court of appeal for the outlying British possessions. It would have been convenient if there had been a table of contents, and some information a little more easily obtainable as to what its contents consist of.

This volume is introductory to the more detailed and expanded treatment of colonial and foreign laws and their conflicts with each other and with the law of England to be given in succeeding volumes. The aim of the editors is an ambitious one and the result of their labours in the volumes to follow will be looked for with great interest.

Bench and Bar.

Mr. T. C. Patteson.

Scarcely known to the profession of this day as having been one of their number, Mr. Thomas Charles Patteson, whose death

occurred on the 21rt ult., was a well-known figure in legal circles a generation ago, as a member of the then firm of Ross, Lauder & Patteson. His inclination did not run in the direction of law as a continuous pursuit, and so, when the *Mail* newspaper was founded he became its editor, in which position he remained until appointed Post-Master of Toronto. As a journalist he wrote with great facility, bringing to the subject under discussion a keen intellect and large knowledge of men and affairs. His language and his writings were not only scholarly but trenchant. The duties which devolved upon him in the position which he occupied in later years were discharged with great satisfaction and with careful attention to and mastery of all details. A large circle of friends will mourn his loss.

MR. J. E. HALLIWELL.

The following resolution was passed at a meeting of the County of Hastings Law Association, held at Belleville on 16th ult., W. N. Ponton, President, in the chair.

Moved by Mr. John Parker Thomas, seconded by Mr. John J. B. Flint:

"That the members of the County of Hastings Law Association tender their sincere and heartfelt sympathy to Mrs. Halliwell and to her little ones in this hour of deep bereavement. And they further desire to record their own personal sense of loss through the decease of their late friend and brother barrister, Lieutenant-Colonel John Earl Halliwell, whose sad and sudden death has deprived the Bar of an earnest and able advocate, Canada of a loyal and public-spirited citizen, and friends of a genial and true-hearted comrade."

CANADA GAZETTE.

Nicholas Du Bois Dominic Beck, K.C., of Edmonton, to be a judge of the Supreme Court of Alberta. (Sept. 23, 1907.)

Hon. John Henderson Lamont, K.C., of Prince Albert, to be a judge of the Supreme Court of Saskatchewan. (Sept. 23, 1907.)

Hon. William Pugsley, K.C., to be Minister of Public Works, in the room of Hon. Charles Hyman, resigned. (Aug. 30, 1907.)