Canada Law Journal.

VOL. XLII. APRIL 1. NO. 7.

THE INTENT IN LIBEL.

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1. Intent of the publication in libel—Its threefold distinction.

One of the principal distinctions between civil and criminal liability for libel consists in the intention of the publication.

This intention, in reference to both kinds of liability, is said to be capable of a threehold distinction. The publisher may (1) be actuated by a malignant intention to effect the particular mischief to which the means which he uses tend; or, (2) his object may be benevolent and laudable; or, (3) he may be indifferent as to consequences, and act purely from some collateral motive. But mere intention in the abstract, and without reference to circumstances which supply a justification recognized by the law, cannot supply a test of exemption from criminal, any more

than from civil, liability. A man must, in respect of criminal as well as remedial consequences, be presumed to contemplate and intend the natural consequences of his own act. If, therefore, the act be calculated to produce evil consequences, he must be taken to have intended them.

2. When a question for the jury in civil cases.

In civil proceedings the question of intention should not be submitted to the jury, unless it appear that the publication was made on a justifiable occasion. And where it was left to the jury to say whether the defendant intended to inform the plaintiff, it was held that the direction was wrong, for the reason that if the tendency of the publication was injurious to the plaintiff, the defendant must be taken to have intended the consequences of his own act: *Haire* v. *Wilson* (1829) 9 B. & C. 643.

3. The maxim that every one intends the natural consequences of his act —Mens rea.

This common maxim, that a man must be held to intend the natural consequences of his act, sometimes stated as if it were a positive rule of law, is not really a rule of law further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequences of his conduct: 2 Steph. Hist. C.L. 111.

The wilful doing of any prohibited act, tending to public injury, is, in the absence of any lawful excuse, in itself criminal, legal malice being in all such cases a mere formal inference of law. It seems also to be clear in principle, that mere innocency of intention, so long as the act is voluntary and designed, in the absence of circumstances which amount to a legal excuse, cannot exempt the party even from criminal liability. As mens rea, or a guilty mind, is, with few exceptions, an essential element in constituting a breach of the criminal law, a statute, however comprehensive and unqualified it be in its language,

is usually understood as silently requiring that this element should be imported into it, unless a contrary intention be expressed or implied (Maxwell, Interp. of Stat. 4th ed. 136). Although mens rea is essential to crime (*Reg.* v. *Tolson* (1889) 23 Q.B.D. 168; *The Commonwealth* v. *Presly* (1859) 14 Mass. (Gray) 56), it may exist without any intention to do the criminal act which was done. "Take the case of libel, published when the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong; he could not be entitled to be acquitted because there was no mens rea. Why? Because the act of publishing written defamation is wrong where there is no lawful cause." (*Reg.* v. *Prince* (1875) L.R. 2 C.C.R. 154, per Bramwell, B.). Mens rea may be excluded by ignorance of fact (Anonymous (1745-63) Foster's Crown Law, 265), although such ignorance does not excuse if it be careless and unreasonable (*Reg.* v. *Jones* (1874) 12 Cox 628); but mens rea is not excluded by ignorance of law (*Rex* v. *Bailey* (1799) R. & R. 1). Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will make, and no man can tell how to confute him. (Selden.) All that is meant by the rule is, that no one is to be permitted to set up to an indictment, for an act on its face wrongful, the defence that he did not know that the act was wrongful: 4 Cr. L. Mag. 11.

4. Distinction between intention and motive.

Intention and motive are often confounded, but they are clearly distinguishable. "Intent" and "intention" have been defined as a design, a resolve, or purpose (Abbot's Law Dict.); and it has been declared that the phrases "with an intent" and "for a purpose" are almost absolutely identical in meaning: *Robertson* v. *Liddell* (1808) 9 East, 487; *Commonwealth* v. *Raymond* (1867) 97 Mass. 567.

Mr. Justice Stephen describes intention as the result of deliberation upon motives. It is, he says, the object aimed at by the action caused or accompanied by the act of volition. Though

this appears to be the accurate and proper meaning of the word, it is frequently used and understood as being synonymous with motive. It is very common to say that a man's intentions were good when it is meant that his motives were good, and to argue that his intention was not what it really was, because the motive which led him to act as he did was the prevailing feeling in his mind, at the time when he acted, rather than the desire to produce the particular result which his conduct was intended to produce. A puts a loaded pistol to B's temple and shoots B through the head deliberately, knowing that the pistol is loaded, and that the wound must certainly be mortal. It is obvious that, in every such case, the intention of A must be to kill B. On the other hand, the act in itself throws no light whatever on A's motives for killing B. They may have been infinitely various. They may have varied from day to day. They may have been mixed in all imaginable degrees. The motive may have been a desire for revenge, or a desire for plunder, or a wish on A's part to defend himself against an attack by B, or a desire to kill an enemy in battle, or to put a man already mortally wounded out of his agony. In all these cases the intention is the same, but the motives are different, and in all the intention may remain unchanged from first to last, whilst the motives may vary from moment to moment: 2 Steph. Hist. C.L. 110-11.

5. Motive and intention discussed.

Motive, therefore, is a very different thing from intention. It has been defined as an inducement, or that which leads or tempts the mind to indulge the criminal act: *People* v. *Bennett* (1872) App. Cas. 49 N.Y., 137, 148. Thus, if A intending to rob B, assaults him in order to accomplish the robbery, and B resists with such force that A is compelled to slay him in order to effect his purpose, here A's intention is to kill B, but his motive in so doing is to enable him to commit the robbery. A has in fact two intents—one to rob and another to kill, but only one motive, and that is to rob B. It was often argued that a prisoner ought to be acquitted of wounding a policeman with

intent to do him grievous bodily harm, because his intention was not to hurt the policeman, but only to escape from his pursuit; but, if the difference between motive and intention were properly understood, it would be seen that the wish to resist lawful apprehension was the motive, and the wounding of the policeman the intention. . . . It would be a mistake to suppose that, in order that any act may amount to a crime, the offender must intend to commit the crime to which his act amounts, but he must in all cases intend to do the act which constitutes the crime. There are cases in which a person may commit a murder without intending to commit a murder, but there is no case in which he can commit murder without intending to do the act which makes him a murderer. If a robber fire a pistol at the person robbed, intending only to wound him, and actually kills him, he is guilty of murder, though he had no intention to commit murder, but he cannot be guilty unless he intended to fire the pistol. (Ibid.) So, too, the concurrence of indifferent or good motives will not be a defence to an indictment for an intentional violation of the law. It is no defence to an indictment for larceny that the defendant intended to give the money to the poor; nor to an indictment for arson that the object was to remove a building that was a nuisance. Whatever a man's motives may have been, he is subject to indictment if he intended to commit an act made indictable by law, and then committed that act: 4 Cr. L. Mag. 7.

6. "Malice" and "malicious" as applied to libel.

In reference to libel the intention of the defendant has been usually expressed by the use of the word "malicious." Libel is a malicious defamation of any person: 2 Bl. Com. by B. & H. 173; 1 Hawk. P.C. 193.

There is little doubt that malice here originally meant a design to injure, which is still the meaning, in civil actions, of the statutory phrase "actual malice." But in the enormously increased opportunities for publication of modern times, it became obviously necessary that communications should sometimes be indictable, which were made bona fide, in the belief that it

was a duty to make them, and with no desire to injure at all: Markby's Elements of Law, s. 227, p. 111.

The indictment being necessarily for malicious defamation, the malice was presumed, unless—not the design to injure was disproved but—something else was proved, i.e., just cause for the publication. This presumption of malice being evidently often contrary to fact, the doing the act without just cause has itself been called malice in law, and we come at last to the general definition in *Bromage* v. *Prosser*, (1825) 4 B. & C. 255. (See also, 10 B. & C. 272) "malice, in its legal sense, denotes a wrongful act, done intentionally without just cause or excuse" (Clark on Criminal Liability, 92-3). The word "malicious" now means no more than the intentional publication of defamatory matter, not excused on certain definite grounds, as, e.g., by the truth of the matter published, or by an honest belief in its truth, or on the ground of privilege, etc.: Steph. Dig. C.L. 200 et seq.

7. **The term "maliciously": (Per Russell, C.J.).**

Commenting on the use of the word "maliciously" in the phrase "maliciously publishes a defamatory libel," in s. 5 of the English Libel Act, 1843 (Lord Campbell's Act, 6-7 Vict. c. 96), Russell, C.J., says:—"The word 'maliciously' was introduced into the section in order to prevent the section working great injustice. Any one who publishes defamatory matter of another, tending to damage his reputation or expose him to contempt and ridicule, is guilty of publishing a defamatory libel; and the word "maliciously" was introduced in order to shew that, though the accused might be prima facie guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge. For example, upon the production of the alleged libel, it is for the judge to determine whether it is capable of being regarded as a libel by the jury; his function is then ended, and if the jury determine it to be a libel, then, in the absence of evidence of the motive of publication, the law attaches to the fact of publication the inference that the publication was malicious. B the

accused may be able to shew that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word "maliciously:" *Reg.* v. *Munslow* L.R. (1895) 1 Q.B. 758.

8. Objections to the term "malicious."

But, as is sometimes pointed out by the commentators, the word "malicious," although now well understood in law, is not apt for the purpose, because in its natural meaning it refers to the motives, and not to the intentions, of a man's conduct. There is undoubtedly the vague feeling, both in text writers, judges and juries, that malice, except when qualified by some term shewing that it does not mean malice, always signifies either spite against a definite individual, or the general desire to do injury to some one, which Austin styles malevolence. (Austin's Lectures 12 and 20.) This is the natural, i.e., the ordinary use of the word; and the legal use of a common word in a non-natural sense is, to say the least of it, undesirable. (Clarke on Criminal Liability, 94.) To make motive the test of criminality tends to harmonize law with popular feeling, but it is none the less objectionable. The mischief of the act depends upon the intention, not upon the motives, which are mixed and vary and cannot be precisely determined; while the effect of the legal fiction of dividing malice into malice in law and malice in fact is to impute bad motives where intentional misconduct, not prompted by bad motives, is proved.

9. The law as settled.

The law as it stands, on this point, has been settled by a sort of circuitous process. Malice in fact is personal spite, which, according to some jurists, is its original and proper meaning. (See Austin's Lectures 12, p. 355, and 20, p. 446.) Malice in law, as already stated, is a wrongful act done intentionally without just cause or excuse. (*Bromage* v. *Prosser*, supra.)

From the nature of the case the publication of a libel must be intentional; and as it has been held that to publish matter defaming another is, generally speaking, a wrongful act, the result is, that every such publication is a crime, impliedly malicious, unless there is some "just cause or excuse" for it.

10. Legal relations of malice and privilege.

What constitutes "just cause or excuse" has been decided in a multitude of cases, in which defamatory matter that was deemed lawful to publish was described as a "privileged communciation." This "privilege" has been regarded as rebutting the inference of malice arising from the fact of publication. It may be an absolute privilege, which will justify the publication, whatever may be the state of mind of the publisher. Or, it may be a qualified privilege, which will justify the publication only under particular circumstances, *e.g.*, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public benefit, etc. "The law thus falls," as Mr. Justice Stephen remarks, "into the singular condition of a see-saw between two legal fictions, implied malice on the one hand, and privilege, absolute or qualified, on the other." And he gives the following instance of the intricacy to which this leads. A writes of B to C, "B is a thief." Here the law implies malice from the words used. It appears that B was a servant, who had been employed by A, and was trying to get into C's employment, and that A's letter was in answer to an enquiry from C. Here the occasion of publication raises a qualified privilege in A, viz., the privilege of saying to C that B is a thief, qualified by the condition that A really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B, however, proves not only that he was not a thief, but that A must have known it when he said that he was. This raises a presumption of express malice, or malice in fact in A, and proof of the existence of express malice overturns the presumption against implied malice raised by the proof of the qualified privilege.

11. The rule of law and its exceptions.

The application of these distinctions in malice and privilege to libel is simply a roundabout way of saying, that, as a general rule, it is a crime to publish defamatory matter, but that there are certain exceptions which do not make it a crime. These are: (1) When the defamatory matter is true, and its publication, as to time and manner, is for the public benefit; (2) when the defamatory matter is false; but (*a*) the libeller in good faith believes it to be true, and publishes it for certain specified reasons; or, (*b*) although knowing it to be false, he publishes it in a particular character.

The learned author remarks that by working out this rule, and by simply declaring that the publication of a libel is always malicious, unless it falls within any of the exceptions, "the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient and proximately complete, the scaffold may be taken down:" Steph. Dig. Note 10, pp. 383-5.

12. Non-user of "malice" and "malicious" in libel sections of the Code.

The libel sections of the Code, it will be noticed, are in accord with these views. The authors of the English Draft Code, 1879-80, upon which our own Code is largely based, state in their report that they have avoided the use of the word "malice" throughout the Draft, because there is a considerable difference between its popular and its legal meaning. For example, the expression "malice aforethought," in reference to murder, has received judicial interpretation which makes its use positively misleading. And, for the same reasons, they have so defined the criminal law of libel as to dispense with the use of the word "maliciously." So also the term "malicious" is nowhere applied by the codifiers of the law of Canada to libel as a crime. The actual intention, or other culpable frame of mind, is set forth under its proper and intelligible name. In the definition of defamatory libel the special design of the defamatory matter —"designed to insult;" or, where that is not necessary, the

nature of the matter published—"likely to injure the reputation"—is clearly expressed. (s. 285.) The use of the word "likely" in the definition, instead of the word "calculated," which appears in the definition in the English Draft Code, seems to be more accurate and precise, as expressing the judicial idea of "tending to injure" which runs through the leading cases on the subject.

13. General rule applicable to indictable offences.

So long as an act rests in bare intention it is not punishable; but immediately an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable: *Per* Lord Mansfield, C.J., in *R.* v. *Scofield* (1784) Cald. 397; *R.* v. *Higgins* (1801) 2 East, 5; *R.* v. *Mulcahy* (1868) L.R. 3 H. of L. 317.

This is the general rule as to all indictable offences. The intention, however, is not capable of positive proof; it can only be implied from overt acts; and every man is supposed to intend the necessary and reasonable consequences of his own acts: *R.* v. *Dixon* (1814) 3 M. & Sel. 15; *R.* v. *Farrington* (1811) Russ. & Ry. 207.

When it cannot be implied from the facts and circumstances which, together with the intent, constitute the offence, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. See *R.* v. *Philipps* (1805) 6 East, 463.

14. Intent inferred from the nature of the publication.

The criminal intention of the defendant in a prosecution for libel will be matter of inference from the nature of the publication. In order to constitute a libel, the mind must be in fault, and shew a malicious intention to defame; for, if published inadvertently, it will not be a libel; but where a libellous publication appears, unexplained by any evidence, the jury should

judge from the overt act; and, where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. Per Lord Kenyon, C.J., in *R.* v. *Abingdon* (1794) 1 Esp. 228. See also *R.* v. *Topham* (1791) 4 T.R. 127, and *R.* v. *Woodfall* (1770) 5 Burr. 2667.

Previous and subsequent publications by the defendant of the same defamatory matter, or matter to the same effect, are also indicative of a criminal intent. In the case of an action for a libel contained in a newspaper, subsequent publications by the defendant, in the same newspaper, were tendered in evidence to shew quo animo the defendant published the paragraph in question. Lord Ellenborough said that no doubt they would be admissible in case of an indictment; and so they would here shew the intention of the party, if it were at all equivocal; but if they be not admitted for that purpose, they certainly are not admissible for the purpose of enhancing the damages: *Stuart* v. *Lowell* (1817) 2 Stark. R. 93.

Upon the same principle, on an indictment for sending a threatening letter, prior and subsequent letters from the accused to the party threatened may be given in evidence, as explanatory of the meaning and intent of the particular letter upon which the indictment is framed (*R.* v. *Robinson* (1796) 2 Leach 749). If the intent cannot be inferred from the letter itself: *R.* v. *Boucher* (1831) 4 C. & P. 562.

Where a person was charged with publishing a libel against magistrates, with intent to defame those magistrates, and also with intent to bring the administration of justice into contempt, it was held that proof of his having published it with either of these intentions would support the indictment: *R.* v. *Evans* (1821) 3 Stark. R. 35.

15. What is meant by the charge of malice—The legal presumption and its effect.

It is a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done malo animo towards the person injured; and this is all that is meant by a charge of malice in a complaint for libel, which is introduced rather to exclude the supposition that the

publication may have been made on some innocent occasion than for any other purpose: *Per* Tenterden, C.J., in *Duncan* v. *Thwaites* (1824) 3 B. & C. 584-5.

The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it; and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect: *R.* v. *Burdett* (1820) 4 B. & A. 95; *per* Littledale, J., in *R.* v. *Lovett* (1839) 9 C. & P. 462.

The mere publication of matter, which on the face of it is libellous, is presumptive evidence of the malice which is necessary to constitute a crime, and, therefore, the proof of innocence of intention lies on the defendant. And so it has been held, that the publisher of slanderous matter, which is calculated to defame another, must be presumed to have intended to do that which its publication is calculated to bring about, unless he can shew to the contrary; and it is for him so to shew. (*R.* v. *Harvey* (1823) 2 B. & C. 257, 266.) But if the printed or written matter is prima facie innocent, malice may be proved from special circumstances which may be laid before the jury: *R.* v. *Yates* (1872) 12 Cox's C.C. 233.

16. The presumption against newspaper proprietors and how it may be met.

Under the Code every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter published therein (s. 297 sub-s. (1)), and so is presumed to have published it with a criminal intention. This presumption extends to the acts of his servant in the publication of a libel, the proprietor of a newspaper, or other principal, being answerable criminally as well as civilly for such acts. The publication by the servant is presumed to be with the assent of the master, and so to have been equivalent to publication by him: Bac. Abr. Libel (B. 2); *R.* v. *Almon* (1770) 5 Burr. 2686; 20 How. St. Tr. 38, 803, 842; *R.* v. *Cuthell* (1799) 27 How. St. Tr. 641; *R.* v. *Lovett* (1839) 9 C. & P. 462.

In the *Almon case,* in which this law is laid down, the defendant, a bookseller, was convicted of publishing a libel, on proof of the sale of the book containing the libel by a servant of the defendant in his shop. It was said by the Court, that this was prima facie evidence sufficient to ground a verdict upon; that if the defendant had had a sufficient excuse, he might have shewn and proved it; and that any circumstances of exculpation or extenuation ought to have been established by the defendant. It would, it is said, be exceedingly dangerous to hold otherwise; for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether: Per Tenterden, C.J., in *R.* v. *Gutch* (1829) Moo. & M. 433. And in England prior to Lord Campbell's Act 6-7 Vict. c. 96, s. 7 (Imp)), and, in this country, prior to the enactment founded on Lord Campbell's Act, (13-14 Vict. c. 60, s. 8, reproduced in C.S.U.C. 1859, c. 103, s. 13), this was the law, although it was proved that the proprietor, or other principal, was not privy to the libellous publication. The proprietor of the *London Times* retired to live in the country, leaving the entire management of the paper to his son, with whom he never interfered; yet he was held criminally liable for a libel which appeared in the paper in his absence and without his knowledge.

And though now, since Lord Campbell's Act, the proprietor, in such a case, would probably be acquitted in any criminal proceeding, he would certainly be held liable for damages in a civil action (*R.* v. *Walter* (1799) 3 Esp. 21; *R.* v. *Gutch* (1829) Moo. & M. 433; *Atty.-Gen.* v. *Siddon,* 1 Cr. & J. 220; *R.* v. *Dodd,* 2 Sess. Cas. 33). Legal criminality, however, is merely legal responsibility, and may exist where there is no moral criminality whatever. (Holt on Libel, p. 53.) The presumption, therefore, of criminality against a newspaper proprietor may, under the Code, be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part: Sec. 297 (1).

JOHN KING.

TECHNICALITIES IN CRIMINAL PROCEDURE.

We note a growing laxity in judicial utterances as to the administration of justice in this country. Whilst it is not well that criminals should go unwhipt of justice it is most desirable that the traditions of British law as to the sacredness of the person and the liberty of the subject should be preserved. If amendments in the direction of preventing technicalities are desirable they should be made by statute. Judge made law in that direction is contrary to the spirit of the constitution.

In a recent case in British Columbia (see ante p. 201) a learned judge laid down the proposition that in extradition cases the ordinary technicalities of criminal procedure were only applicable to a limited extent, and that the non-compliance with some formality or technicality in criminal procedure should not be allowed to stand in the way of extradition. Again, in Ontario, a learned judge recently characterized some objections to the procedure in an extradition case as "frivolous." Another learned judge in another extradition case said that "the Court would fail in its duty and the whole purpose of the extradition comity would be frustrated, if a man duly charged with an extradition crime could escape by technicalities and subtleties that are discreditable enough in ordinary criminal law without being imported into extradition proceedings."

With great deference we would suggest that in reference to informalities and technicalities in criminal procedure where they really exist such expressions as "frivolous" and "discreditable" are scarcely appropriate. We would not venture to criticize the language used if we were not justified in so doing by the highest authorities in England. It cannot be forgotten, moreover, that in these matters we touch upon the liberty of the subject, the rights of personal liberty and possibly on the right of asylum, which by the law of England are most jealously guarded.

Mr. Dicey, at p. 321 of his work on the Law of the Constitution, says: "Every technical plea the prisoner can raise obtains full consideration, and if, on any ground whatever, it can be

shewn that the terms of the Extradition Act have not been complied with, or that they do not justify his arrest and surrender, he is, as a matter of course, at once set at liberty."

Mr. Justice Cave in the case of *In re Bellencontre,* 2 Q.B. (1891), at p. 137, says: "It seems to me that this is a very proper mode of expressing the result of the inquiry, and that there is no ground for saying that there is any technical informality in any of these warrants which would justify us in discharging the prisoner."

Lord Chelmsford, one of the greatest of English judges, in his judgment in the case of *In re Coppin,* L.R. 2 Chy. App., at 55, lays down the rule that "no part of the argument for the prisoner may be disregarded"; and he concludes with these words: "I have not, at any period of the argument, entertained the slightest doubt as to the invalidity of all the objections, but I was anxious that the subject should be fully discussed, in order that it might be publicly known that the delivery up of the prisoner to France was *in strict accordance with law* and the correct interpretation of the Treaty and of the Acts for giving effect of it. The question has been fully argued, and I am of the opinion that no case has been made out, and the prisoner must be remanded."

The rule in this regard which has been observed in England has also obtained favour amongst some of the best of our judges in this Province. In the cause celebre of *The Queen* v. *Reno and Anderson,* 4 P.R. 281, Draper C.J., lays it down that it is the duty of the Court or a judge on a habeas corpus in extradition cases to determine on the legal sufficiency of the commitment and to review the magistrate's decision as to there being sufficient evidence of criminality. In the extradition case of *In re Lewis,* 6 P.R. 236, Mr. Justice Gwynne says: "It is the right of the accused which impartial justice and the letter and spirit of the law award to him, that the minutest forms and technicalities with which the legislature has surrounded the production of this species of ex parte testimony shall be strictly complied with." We are aware that the objection here related to a question of

evidence, but the strict rule in that particular seems to call also for extreme formality in other respects.

Mr. Justice Osler, in another extradition case, *In re Parker*, 9 P.R. 332, evidently takes the same view as to the right of a prisoner to insist upon all formalities being observed, for he concludes his judgment as follows: "For myself I shall be glad to see the day when 'free trade' in criminals shall exist; but so long as there is an extradition law, under which a criminal whose extradition is sought, has rights to be observed here, he is entitled to have those rights administered by our Courts."

These authorities might easily be multiplied, but they would seem to be sufficient to warrant attention being called to this subject.

In these days of "speaking smooth things" and "calling pet names," etc., it is interesting to note a euphonism for the vulgar crime of larceny. The alleged effort of a reporter said to be on the staff of a certain daily journal, in his desire to give to its readers a sweet morsel of news has therein added to our nomenclature a substitute for "stealing" in the words "newspaper enterprise." It is perhaps a little lengthy, but on the other hand it is highly suggestive.

The recent decision of the judges of New Brunswick Supreme Court refusing Miss Mabel French admission as an attorney, on the ground that a woman was not a "person" within the meaning of the Act, has led to unforeseen issues. A certain "lady inebriate" threw consternation into the St. John Police Court recently by claiming exemption from the by-law applying to such "persons," on the plea that excluded Miss French. The ingenuity of the prisoner so appealed to the judge, that he dismissed the case, and the modern Portia left the court in triumph.—*Ex.*

REVIEW OF CURRENT ENGLISH CASES.

LEASE—COVENANT TO BUILD—SPECIFIC PERFORMANCE.

Molyneux v. *Richard* (1906) 1 Ch. 34 was a somewhat curious case. The defendant was a lessee of certain premises and by the lease he covenanted to erect seven cottages on the demised premises similar to certain others specified. The lease contained an exception of the minerals and reserved to the owner thereof the full right of working them, including power to destroy the surface. The lessee had himself at the date of the lease acquired these mineral rights. The action was brought for specific performance of the covenant to erect the seven cottages, and the defendant contended that the power to work the minerals and destroy the surface reserved by the lease in effect extinguished the covenant, because if he were to erect the cottages he might immediately proceed to pull them down again for the purpose of working the minerals. Kekewich, J., however, declined to give effect to that contention, and held, that as it was evident that pecuniary damages would not be an adequate compensation, and as the nature of the buildings to be erected was sufficiently specified, the Court on its discretion, and on the principles laid down by the Court of Appeal in *Wolverhampton* v. *Emmons* (1901) 1 K.B. 515, ought to decree specific performance which he accordingly did.

SETTLEMENT BY DEED — CONSTRUCTION — "SURVIVORS" READ "OTHERS."

In re Friend, Cole v. *Allcot* (1906) 1 Ch. 47. Two points are decided by Farwell, J., (1) that in construing a deed the same principles are to be applied as in construing a will; and, (2), that where a settlement limited property to the settlor's one son and six daughters for life, as tenants in common with remainder as to the share of each tenant for life to his or her child or children who being a son should attain 21, or being a daughter should attain that age or marry, and if more than one as tenants in common in fee, provided that if any one or more of the seven tenants for life should die without issue, or having issue who being a son should not attain 21, or being a daughter

should not attain that age or marry, the original, as well as the accrued, share of such tenant for life should go to be divided equally between the "survivors and survivor" of them the said tenants for life in such shares and proportions in all respects as the original shares of the seven tenants for life were directed to be divided; that the words "survivors and survivor" must be read "others and other." The effect of this construction being that the shares of children who attained 21 or married in the gift over, were vested, whether or not they survived a tenant for life who should die without issue capable of taking in remainder.

ADMINISTRATION—PERSONAL ESTATE—INTESTACY—ADVANCES OUT OF LUNATIC'S ESTATE ON CONDITION OF THEIR BEING BROUGHT INTO HOTCHPOT—STATUTE OF DISTRIBUTION (22 & 23 CAR. 2, c. 10), ss. 6, 7—(R.S.O. c. 235, s. 2).

In re Gist, Gist v. *Timbrill* (1906) 1 Ch. 58. In the course of certain proceedings in lunacy advances were made to the brother and sisters of the lunatic out of the lunatic's estate under order of the Court, subject to a provision that such advances should be taken as part of any share to which the brother or sisters might become entitled in the lunatic's estate at the time of his decease, in case of such brother and sisters surviving him. One of the sisters, so advanced, predeceased the lunatic, leaving children, who, with the surviving brother and sister of the lunatic, were his sole next of kin. The question Eady, J., had to decide was whether the children of the deceased sister were bound to bring into hotchpot the advances made to their mother, notwithstanding that she did not survive the lunatic. For the brother and other sister it was claimed that under the Statute of Distribution the children only took as representing their deceased mother and not in their own right and, therefore, were bound by the order. For the nieces it was claimed that the obligation to bring the advances into hotchpot was contractural on the part of the mother, and they were not bound by it, and though taking per stirpes under the statute they took independently and not subject to any contractual obligation of the mother. Eady, J., decided that the advances not being made by parent to child, there was no obligation under the Statute of Distribution (see R.S.O. c. 335, s. 2) to bring them into hotchpot; and that the provision of the order under which the advances were made did not bind the children of the deceased sister to bring such advances into hotchpot, which was somewhat hard on the surviving brother and sister.

MONEY LENDER—LOAN TRANSACTION—EXCESSIVE INTEREST—RISK—MONEY LENDERS ACT, 1900 (63 & 64 VICT. C. 51), S. 1 (1).

Carringtons v. *Smith* (1906) 1 K.B. 79 is a decision under the Money Lenders Act of 1900, which may be of some interest here in view of recent prosecutions for taking excessive interest on loans. In this case, the defendant, a director of a company, and having an income of £1,000 a year, and a well-appointed house, applied to the plaintiffs for a loan of £150 to pay off some debts, and gave the plaintiffs promissory notes for £222 payable in eighteen monthly instalments, the rate of interest being 75 per cent. per annum. The plaintiffs obtained no security for the loan, but at the time of advancing the money were informed by the defendant of his financial position. The defendant paid seven instalments, and having then made default the present action was brought and the defendant then claimed the benefit of the Money Lenders' Act on the ground that the interest charged was "excessive" and "harsh and unconscionable." Channell, J., who tried the action came to the conclusion that looking at all the circumstances of the transaction, the rate was not excessive, nor harsh and unconscionable, and he gave judgment in favour of the plaintiffs for the full amount claimed. The learned judge bases his judgment on the fact that the defendant was a man of business, that the loan was without security, that there was no pressure of any kind, that the lenders were asked their terms which the defendant at once accepted without demur. That having gone into the matter with his eyes open, he could not, after getting the benefit of the loan, fall back on the Money Lenders Act to relieve him of the obligation he had voluntarily incurred without any fraud or deception of any kind.

PRINCIPAL AND AGENT—BORROWING BY AGENT—APPLICATION OF LOAN TO AGENT IN PAYING PRINCIPAL'S DEBTS—AGENT EXCEEDING AUTHORITY—EQUITABLE RIGHT OF LENDER TO RECOVER.

Bannatyne v. *MacIver* (1906) 1 K.B. 103 is an illustration of the application of equitable principles in relief of an injustice, which a rigid adherence to the common law would occasion. The defendants, a country firm, opened a branch of their business

in London, the management of which they entrusted to an agent. The defendants had a banking account with the plaintiff upon which the defendant agent was entitled to draw, but he had no authority to borrow money. The banking account, however, being low, the agent borrowed a sum of money from the plaintiff which was placed to the credit of the defendants' account, and out of this money debts due by the defendants were paid by the agent. Subsequently the defendants supplied money which would have been sufficient to meet their obligations, but for the agent drawing on his own account sums to which he was not entitled. The agent borrowed further sums of the plaintiff, part of which were also applied in payment of debts of the defendants. The action was brought to recover the amounts so borrowed, and the defendants set up their agent's want of authority to borrow, as a defence to the action, and Grantham, J., at the trial gave effect to it, and dismissed the action; but the Court of Appeal (Collins, M.R., and Romer, and Mathew, L.JJ.,) reversed his decision, holding that, to the extent to which the moneys borrowed had been applied in discharge of debts due by the defendants, the plaintiff was entitled to recover.

COMPANY—FLOATING SECURITY—RECEIVER—JUDGMENT CREDITOR —ATTACHING ORDER—PRIORITY.

Norton v. *Yates* (1905) 1 K.B. 112 was an interpleader issue to determine the rights to certain moneys. The parties to the issue were (1) the judgment creditor of a company who had obtained an order nisi attaching a debt due to the company; which debt had been paid into Court by the garnishee; and (2) the receiver of the company's assets, who had been appointed at the instance of debenture holders, whose debentures were a floating security upon all the property and assets of the company. These debentures were prior in date to the attaching order, but the appointment of the receiver was not made until after the issue of the attaching order. Warrington, J., who tried the issue held that the receiver was entitled to the money because the service of the attaching order did not operate as an assignment of the debt to the garnishor either absolutely, or by way of security, but only prevented its payment by the garnishee to the judgment debtor, and a dictum of James, L.J., in *Ex p. Joselyn*, 8 Ch. D. 327, to the contrary is not to be fol-

lowed;—and though the effect of the attaching order is to prevent the payment of the debt to the judgment debtor, it does not impair the rights of those to whom the debtor may have given a prior charge on the fund: That the appointment of the receiver operated on all property of the company still in its control, and the property in the debt in question not having been transferred by the attaching order, the learned judge held that the receiver was entitled to the money as against the attaching creditors. The case is distinguished from *Robson* v. *Smith* (1895) 1 Ch. 118, because there the debentures had merely given a notice to the debtor to pay his debt to them, but have not obtained the appointment of a receiver so as to make their dormant charge under the debentures into an active charge.

COMPANY — LIQUIDATION — STAYING PROCEEDINGS IN ACTION AGAINST COMPANY IN LIQUIDATION (WINDING-UP ACT, R.S.C., c. 129, s. 16).

In *Currie* v. *Consolidated Kent Collieries* (1906) 1 K.B. 134 the plaintiff sued the defendant company for services rendered by him to the company. The company had gone into voluntary liquidation, and the liquidator disputed the plaintiffs' claim. The liquidator applied to stay the action (see R.S.C. c. 129, s. 16). Phillimore, J., affirmed the Master's order refusing the application, but without prejudice to the liquidator applying to stay execution. The Court of Appeal (Collins, M.A., and Romer, L.J.,) held that the order of Phillimore, J., was right and that prima facie the plaintiff, as his claim was disputed, was entitled to have it determined in the ordinary way by an action, and no special ground being made out for a stay of proceedings the application should, in the exercise of the discretion of the Court, be refused.

PRACTICE—STAYING ACTION—CAUSE OF ACTION ARISING OUT OF JURISDICTION—ACTION BROUGHT OPPRESSIVELY.

Logan v. *Bank of Scotland* (1906) 1 K.B. 141 was an action brought in England in respect of a cause of action which arose in Scotland, and could be as conveniently prosecuted by the plaintiff in a Scotch Court as in an English Court, but the de-

fendants would be subject to inconvenience amounting to vexation and oppression in having to defend the action in England. The defendants applied to stay the proceedings on the ground that it was vexatious and oppressive, and the Master granted the application, but Phillimore, J., reversed his order; the Court of Appeal (Collins, M.R., and Barnes, P.P.D., and Romer, L.J.,) however came to the conclusion that the Master was right, and reversed the order of Phillimore, J.

LANDLORD AND TENANT—LEASE—COVENANT FOR QUIET ENJOYMENT—ASSIGNMENT OF REVERSION—EXTENT OF LIABILITY OF LESSOR FOR ACT OF HIS ASSIGNEE.

In *Williams* v. *Gabriel* (1906) 1 K.B. 155 an important point in the law of landlord and tenant is discussed. In 1886 a lease was made by the defendant to the plaintiff of certain rooms on the ground and first floors of a block of buildings owned by the lessor for a term of twenty-one years. The lease contained a covenant for quiet enjoyment "without any interruption" by the lessor "or any person claiming under him." In 1891 the lessor assigned his reversion in the whole of the buildings. In 1904 the buildings, other than the part occupied by the plaintiff, became so dilapidated, that an order was made under the London Building Acts for their demolition. The assignees of the reversion in carrying out the work of demolition caused an interruption to the enjoyment of the plaintiff's premises. The lessor being dead the plaintiff sued his representatives to recover damages for breach of the covenant for quiet enjoyment, but Bray, J., held that the plaintiff could not recover. In his judgment the covenant in question merely bound the lessor to answer for any interruption by himself or by any person whom he might expressly or impliedly authorize to do the acts; but as the assignment of the reversion conferred no right or authority on the assignees to do the acts complained of, therefore he held the lessor or his representatives could not be made answerable therefor.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] BEACH *v.* THE KING. [Feb. 21.

Lease—Water power from canal — Temporary stoppage—Compensation—Total stoppage—Measure of damages—Loss of profits.

A mill was operated by water power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage of the supply caused by repairs or alterations in the canal the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent.

Held, IDINGTON J., dubitante, that a stoppage of the supply for two whole seasons, necessarily and bona fide caused by alterations in the canal, was a temporary stoppage under this provision.

The lease also provided that in case the flow of surplus water should at any time be required for the use of the canal, or for any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee would be entitled to be paid the value of all the buildings and fixtures thereon belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement contemplating at the time only a temporary stoppage of the supply of water to the lessee, but afterwards changes were made in the proposed work which caused a total stoppage and the lessee, by Petition of Right, claimed damages.

Held, GIROUARD, J., dissenting, that as the Crown had not given notice of an intention to cancel the lease the lessee was not entitled to the damages provided for in case of cancellation.

Held, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal.

Appeal dismissed with costs.

Shepley, K.C., and *Hilliard*, for appellant. *Chrysler*, K.C., for respondent.

Ont.] CITY OF TORONTO *v.* GRAND TRUNK RY. CO. [Feb. 21.

Constitutional law—Parliament—Power to legislate—Railway Act, 1888, ss. 187, 188—Protection of crossings—Party interested—Railway committee.

Sections 187 and 188 of the Railway Act, 1888, empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates, or otherwise, are intra vires of the Parliament of Canada. IDINGTON J., dissented.

Sections 186 and 187 of the Railway Act, 1903, confer similar powers on the Board of Railway Commissioners.

Sec. 188 also authorizes the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested."

Held, IDINGTON, J., dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under said section.

Appeal dismissed with costs.

Fullerton, K.C., and *W. Johnston*, for appellants. *H. S. Osler*, K.C., for respondents. *Shepley*, K.C., for Dominion of Canada.

Ont.] [Feb. 21.

CITY OF TORONTO *v.* GRAND TRUNK RY. CO.

Highway—Dedication—Acceptance by public—User.

An action was brought by the city against the company to determine whether or not a street crossed by the railway was a public highway prior to 1857 when the company obtained its right of way. It appeared on the hearing that in 1850 the trustees of the General Hospital conveyed land adjoining the street, describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot being the street in question. Subsequent conveyances of the same land prior to 1857 also recognized the allowance for a road.

Held, IDINGTON, J., dissenting, that the said conveyances were acts of dedication of the street as a public highway.

The first deed executed by the hospital trustees and a plan produced at the hearing shewed that the street extended across the railway track and down to the river Don, but at the time the portion between the track and the river was a marsh. Evi-

dence was given of use by the public of the street down to the edge of the marsh.

Held, IDINGTON, J., dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway.

Appeal dismissed with costs.

W. Cassels, K.C., for appellants. *Fullerton*, K.C., and *W. Johnston*, for respondents.

Province of Ontario.

COURT OF APPEAL.

From Anglin, J.] [Nov. 15, 1905.

WOODS *v.* TORONTO BOLT AND FORGING CO.

DUNSFORD *v.* TORONTO BOLT AND FORGING CO.

Master and servant—Injury to servant—Negligence—Explosion of boiler—Defective appliances—Reasonable care in selection—Incompetence of fellow servant—Knowledge of officers of company—Selection of competent officers—Liability at common law—Workmen's Compensation for Injuries Act—Damages.

The plaintiffs were employed by the defendants, an incorporated company, in a rolling mill, and while so employed were injured by the explosion of a boiler. The immediate cause of the explosion was that the water in the boiler had been allowed to become too low owing to the valve which regulated the supply having been closed. It was the duty of the "water tender," who was killed by the explosion, to attend to the valve and see that a sufficient supply of water was maintained. The boiler was built by reputable makers, and there was nothing to shew that it was not originally built of good material or that it had become defective or worn out, except as to the "pet-cock" at the foot of the glass gauge.

In actions against the defendants at common law and under the Workmen's Compensation for Injuries Act to recover damages for the plaintiffs' injuries, four allegations of negligence were made: (1) That the water tender was negligent and incompetent; (2) that the boiler was insufficient and dangerous by

reason of the valve which regulated the water supply having been placed upon the vertical pipe or column, instead of being lower down by itself upon a horizontal pipe through which the water passed on its way to the boiler; (3) that the boiler was also out of repair in that a brass pet-cock at the bottom of or connected with the glass indicator had become broken, and its place imperfectly supplied by a wooden plug; and (4) that the defendants failed in their duty to see that the boiler was kept supplied with water.

The actions were tried by a jury, who answered a number of questions mainly in favour of the plaintiffs.

Held, 1. There was no evidence of negligence proper for the jury upon the question of the valve. The real question was, whether the defendants, in buying and using the boiler with the valve as it was, fell short of discharging the duty of exercising reasonable care, which was the limit of their obligation; and the undisputed evidence disclosed that such boilers with valves so arranged were in common use, and that the boiler in question was built by makers of good reputation and large experience.

2. There was evidence proper for the jury that the water tender was incompetent when employed and remained incompetent and negligent in the discharge of his duty, and that the defendants' officials had been amply warned thereof, and were negligent in retaining him. But, there being no finding and no evidence that these officials were themselves incompetent, their negligence in carrying on operations could not be imputed to the defendants. And this also applied to any right of action as at common law for failure to repair the pet-cock.

The law laid down in *Wilson* v. *Merry* (1868) L.R. 1 Sc. App. 326, 332, is the law by which the Court is bound; although the rule laid down by the Supreme Court of the United States, that where the master only acts in the management of his business through vice-principals he will be liable for their negligence as for his own, is a more reasonable rule.

3. The failure to repair the pet-cock was negligence for which the defendants were answerable under the Workmen's Compensation for Injuries Act: it was a fair and reasonable inference from the evidence that with a pet-cock in proper order the real difficulty might have been at once discovered by its use, in time to avert the disaster; and the defect was well known to two of the defendants' officials for several weeks before the accident.

The plaintiffs were, therefore, confined to such damages as were recoverable under the statute.

Judgment of ANGLIN, J., varied.

J. Bicknell, K.C., and *J. W. Bain*, for defendants, appellants. *Gamble*, for plaintiff.

Full Court.] [Jan. 22.

CITY OF TORONTO *v.* TORONTO ELECTRIC LIGHT CO. AND INCANDESCENT LIGHT CO.

Appeal to Privy Council—Motion to allow security—Matter in controversy exceeding $4,000—Leave to prove value.

On a motion by the plaintiffs for the allowance of the security on an appeal from the Court of Appeal to the Privy Council in an action brought by the City against two electric light companies to have it declared that they had forfeited their rights under certain agreements with the City under which they held certain underground franchises in that they had amalgamated contrary to the terms of such agreements, which action had been dismissed.

Held (MEREDITH, J.A., dissenting) that the whole matter in controversy at the trial (being the destruction not the acquisition of the defendants' franchise) was whether the companies had forfeited their right by amalgamation, and this clearly did not come within the last branch of s. 1 of R.S.C. 1897, c. 48, and that there was nothing before the Court to shew that such matter was of value to the plaintiffs of more than $4,000; or of any sum or value capable of being ascertained or defined.

Per MEREDITH, J.A.—The matter in controversy much exceeded $4,000, and if controverted leave should be given to the appellants to prove the value.

Fullerton, K.C., for plaintiffs. *Johnson*, K.C., for Toronto Electric Light Co. *Lundy*, for Incandescent Light Co.

HIGH COURT OF JUSTICE.

Divisional Court.] CRATE *v.* MCCALLUM. [Nov. 9, 1905.

Defamation—Privileged occasion—Excessive privilege—Malice—Proof of special damage—Judge's charge.

In 1892 by an error of a town assessor the amount deducted by the Court of Revision from the defendant's assessment was entered on the roll as the assessment itself, so that he was assessed for $48 or $49 less than he should have been. Subsequently the

question of arrears of taxes came up in the council, of which the defendant was a member, and the cases of alleged arrears, including the undercharge of the defendant's for 1892 was referred to a committee, of which the defendant was also a member. The committee, by a majority report, reported that the defendant was liable for the $48 or $49, a minority report being presented by the defendant. On the report being considered, statements were made by those presenting it. The defendant in answer thereto, while contending that he was not liable, accused the plaintiff, who was not then the assessor, and not an applicant for the office, of having violated his oath of office, and of having threatened to tax defendant out of town, the defendant contending that he could have prosecuted him before a judge, and was sorry he had not done so; and similar statements were made by him on other occasions.

Held, 1. The fact of the plaintiff not being then the assessor did not prevent the action from being maintained without proof of special damages.

2. Malice could be inferred from the language of the defamatory words themselves. *MacIntyre* v. *McBean,* 13 U.C.R. 534, dissented from. *Laughton* v. *Bishop of Sodor and Man.* (1872) L.R. 4 P.C. followed.

3. Although the occasion was a privileged one, the words used, being foreign to the subject matter in hand, created an excess of the privilege, and the statement then made, as well as on the other occasions, were evidence of malice, which could not be withdrawn from the jury.

The learned judge in charging the jury left it to them to say whether the defendant had established that he had acted bonâ fide and without malice; but on the jury being recalled he pointed out that the onus in this respect was on the plaintiff. An objection, therefore, on this ground of the charge was overruled.

A further objection was taken to the charge. The learned judge also in his charge, after first stating in substance, that if as a matter of fact the defendant believed the charges to be true, the fact that he had no reasonable ground for such belief need not enter into their consideration in the question of malice, that such belief was not sufficient, if he took advantage of a privileged occasion when this particular matter was not under discussion and was not revelant thereto; but to gratify some indirect motive of his own brought that in—proceeded, "the fact that it is true—that he believed it to be true," is immaterial. If he did

not believe it to be true that, in itself, was abundant evidence of malice; but if he believed it to be true that is not conclusive evidence of want of malice."

Held, that the use of the words, "the fact that it is true," etc., which were the words objected to, were immediately corrected by the words which followed; and this was what was understood by defendant's counsel at the trial as appeared by his objections to the charge; and, therefore, the charge in this respect was also unobjectionable.

Watson, K.C., for appellant. *C. A. Moss*, for respondent.

Street, J.] [Dec. 12, 1905.

CITY OF TORONTO *v.* TORONTO RAILWAY COMPANY.

Street railways—Street in newly annexed territory—By-law—Passing of before date of Act—Annexing territory—Recommendation of engineer—adoption by resolution—Necessity of by-law—Specific performance—Option to others to lay down rails—Effect of—Engineer—Authority of—Stopping places—Right to fix—Determination of engineer.

By s. 14 of an agreement entered into between the plaintiffs and defendants, set out in 53 Vict. c. 90 (O.), the defendants are required to establish new lines and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council within such period as may be fixed by by-law to be passed by a vote of two-thirds of all the members of the said council; and all such extensions and new lines shall be regulated by the same terms and conditions and relate to the existing system, etc. A recommendation was made by the city engineer to the city council that a double line of tracks should be laid down and the car service extended on the continuation of one of the streets in the city, and a by-law was passed duly approving thereof and fixing the date for such service, of which the defendants were duly notified. The said continuation of said street was in territory brought into the city subsequently to the passing of the agreement.

Held, that the agreement applied as well to streets brought within the city subsequently to the passing of the said agreement, as to those then within its limits. *City of Toronto* v. *Toronto Ry. Co.* (1904) 9 O.L.R. 333; 42 C.L.J. 325, and ante, p. 36, followed.

Held, also, that it was not essential that the city should pass a by-law as required by 2 Ed. VII., c. 27 (O.), s. 16, which provides that prior to the passing a by-law authorizing any electric railway company to lay out or construct its railway on, upon or along any public highway, road, street or lane, notice must be given similar to that required by sec. 632 of the Municipal Act, for that section only applied to those electric railways which come within R.S.O. 1897, c. 209, and had no application to the defendants.

The by-law for the laying out and construction of the said extension was passed April 10, 1905, while the statute for the annexation of the territory in question was not passed until May 25, 1905; but the Lieutenant-Governor's proclamation annexing the territory was issued March 3, to take effect on March 10, 1905, to which no objection was over suggested.

Held, that the by-law was valid.

By 63 Vict. c. 102 (O.), s. 5, it is provided that if the railway company neglected or failed to perform any of their obligations under the Act and the agreement, and an action were brought to compel performance the Court before whom the action was tried should, notwithstanding any rule of law or practice to the contrary, enquire into the alleged breach, and in case a breach was found to have been committed, should make an order specifying what things should be done by the defendants as a substantial compliance with the said Act and agreement; which should be enforcible in the same manner, etc., as a mandamus.

Held, that an order could be made specifying what was necessary to be done to constitute a substantial compliance with the agreement. *Corporation of Kingston* v. *Kingston & Cataraqui St. Ry. Co.* (1903) 25 A.R. 462, referred to.

Held, also, that the corporation could enforce the laying out of such extension notwithstanding the option given by sec. 17 of the agreement to grant to another person or company the right of laying down lines on streets, after failure of the defendants, though duly notified, to do so.

Held, also, that the engineer for the time being and not the engineer who held office when the agreement was entered into is the one referred to therein, and that he acts in a judicial capacity as the executive officer of the corporation, to whom he must make his recommendation, which the council may approve or reject as they see fit.

By s. 26 of the agreement it is provided that the speed and service necessary on any main line, part of same or branch is to be

determined by the city engineer and approved of by the council; and by s. 39 it is provided that the cars shall only be stopped clear of cross streets, and midway between streets, where the distance exceeds 600 feet.

Held, that the regulation of the places at which cars are to stop to take on and let off passengers is part of the service within s. 26, and, therefore, subject to the limitations of s. 39, the defendants may be required to stop wherever the city engineer and city council may agree in requiring them so to do.

The engineer reported to the council recommending that the cars should be required to stop at certain specified points, and his report was adopted by resolution of the council.

Held, that this was a determination and not merely a recommendation of the engineer, for it must be assumed that before making his recommendation he had to determine the matter so far as he could; and that it was not essential that the adoption of such recommendation should be by by-law.

Fullerton, K.C., *Montgomery* and *Wm. Johnston*, for plaintiffs. *Laidway*, K.C., and *Wallace Nesbitt*, K.C., for defendants.

Trial—Street, J.] [Dec. 28, 1905.

NORTHERN NAVIGATION CO. *v.* LONG.

Fraud and misrepresentation—President of company—False statement of earnings to directors—Payment of dividends—Damages—Evidence—Credibility of witness—Statutory declaration.

In an action by an incorporated company to recover from the executors of the deceased president of the company damages alleged to have been suffered by the company by reason of false and fraudulent representations made by the deceased.

Held, upon the evidence, that the statement of approximate earnings laid before the directors of the company by the deceased on Dec. 15, 1902, and the annual statement presented by him to the directors on Jan. 27, 1903, and afterwards to the shareholders, were untrue to his knowledge, and that the earnings for 1902 were wilfully misrepresented by him in order that the directors might be induced to declare dividends which they would not have declared had they been made aware of the true earnings, and that the directors acted upon the misrepresentations made to them in declaring five per cent. half-yearly dividends in January and July, 1903.

Held, also, that the plaintiffs, the company, had suffered damages by reason of the payment of the dividends, notwithstanding that the payment was not made out of the actual fixed capital and was not ultra vires of the company, and notwithstanding that it was made to the persons who were then the shareholders of the company; the company having parted with sums of money which, but for the misrepresentations, would still have been at the company's credit.

Damages were assessed against the estate of the deceased in the sum of $34,500, made up by taking the amount of the misrepresentation at the end of December, 1902, to have been roundly $30,000, and adding three years' interest at five per cent.

It was urged by the defendants against the credibility of the principal witness for the plaintiffs, that having, at the instance of the plaintiffs, though before this action was brought or contemplated, and while the president was still alive, made a statutory declaration as to the truth of the facts which he afterwards deposed to at the trial, he was in vincula, and was not free to vary from it except at the risk of a prosecution for perjury.

Held, that the taking of unnecessary statutory declarations is a practice which should be avoided, and in this case a simple signed statement would have been as effectual; but the witness was entitled to credit, against this objection, his testimony being given with fairness and candour, and no motive for falsehood being apparent.

H. J. Scott, K.C., *Hellmuth,* K.C., and *J. H. Moss,* for plaintiffs. *Walter Cassels,* K.C., *Wallace Nesbitt,* K.C., and *Frank Ford,* for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] DOUCETTE *v.* THERIO. [Dec. 8, 1905.

Person trespassing—Liability for excessive force in removing.

Plaintiff, who was trespasing upon defendant's premises, was removed therefrom by defendant, who used more force than was necessary in so doing.

Held, that while defendant was justified in using such force as was necessary for plaintiff's removal, as on his own admission

he did more than this he was liable for the excess, and the verdict of the jury in defendant's favour must be set aside and a new trial ordered.

J. J. Ritchie, K.C., for plaintiff, appellant. *R. G. Munroe* and *T. R. Robertson*, for defendant, respondent.

Full Court.] THEREAU *v.* SABINE. [Jan. 6.

Husband and wife—Purchase and sale of goods by wife personally—Gift—Requisites of.

Plaintiff's wife obtained money from H. to pay for an organ which she had purchased. There was no evidence that she professed to be acting for plaintiff in the matter or that she had his authority to make the purchase, it being shewn on the other hand that the agent from whom the purchase was made dealt with the wife alone and that he received from her the money paid for the organ. It appeared further that the wife was the owner in her own right of the house in which she lived and that plaintiff had disclaimed liability for other articles purchased by her.

Held, 1. Affirming the judgment of the trial judge that the organ was the property of the wife and could not be claimed by plaintiff as against defendant to whom she sold it.

2. Evidence that plaintiff subsequently repaid to H. the money advanced by him to his wife, even if true, was not sufficient to divest the interest of the wife in the property. There must not only be an intention to give, but there must be an intention to accept before there can be a complete gift, and while this intention may be presumed in case of the retention or the property by the donee it cannot be presumed where a different intention has been proved.

T. R. Robertson and *Grierson*, for appellant. *Roscoe*, K.C., for respondent.

Full Court.] BETCHER *v.* HAGELL. [Jan. 6.

Landlord and tenant—Repairs to roof—Damage caused by failure to make repairs.

Plaintiff was tenant under defendant of the "dwelling portion" of a building the remainder of which was occupied by defendant as a shop. During a storm a skylight was blown from a neighbouring building and struck the roof of defendant's

building and injured it. Plaintiff notified defendant, who gave an order on a builder for the repair of the roof, but before this could be done the weather conditions became such that the repairs could not be effected and later on water from rain and from the melting of a heavy accumulation of snow on the roof came through and damaged plaintiff's property.

Held, reversing the judgment of the trial judge, that defendant was under no obligation to repair the roof which would make him responsible in damages and that his promise to have the injuries made good was without consideration to support it and was not binding.

Fullerton, for appellant. *Rowlings*, for respondent.

Full Court.] PEPPETT *v.* MCDONALD. [Jan. 6.

Assignment with preferences—Laches in taking proceedings to set aside—Evidence of assignor discredited.

A deed of assignment made by the defendant M. for the general benefit of creditors with preferences in favour of the assignee was attached as fraudulent and void against creditors under the statute of Elizabeth. The deed was made the 30th October, 1890, and the action was not commenced until the 13th May, 1898, and was not brought to trial until the 21st October, 1900. In the meantime the assignee had died and the only evidence offered in support of the alleged fraud was that of the assignor.

Held, 1. Affirming the judgment of the trial judge that the long delay in the commencement of the action and in bringing it to trial, in the absence of clear and reasonable explanation would prevent the Court from lending its assistance to the plaintiff.

2. The evidence of the assignor in contradiction of his affidavit made at the time the assignment was given must be disregarded.

Kenny, for appellant. *Rowlings*, for respondent.

Full Court.] WEIR *v.* TOWN OF AMHERST. [Jan. 6.

Municipal corporation—Excavation in street—Failure to properly guard—Finding of contributory negligence.

Plaintiffs sought to recover damages from the defendant town for injuries sustained in falling into a ditch or trench

which had been dug across one of the streets of the town by a contractor under the town authorities in connection with the construction of a system of drainage. The evidence shewed that plaintiffs drove out of town in the morning before the trench was dug and were returning after dark when they were thrown into the trench which in the meantime had been dug across the greater part of the street and had been left unguarded and insufficiently lighted.

The jury found in answer to questions submitted to them that the town was guilty of negligence in not properly guarding the excavation, but that the driver of the carriage could have avoided the accident by the exercise of reasonable care.

Held, on an equal division of the Court, that the judgment entered on the findings in defendant's favour must be affirmed.

H. Mellish, K.C., for appellant. *Rogers* and *Jenks*, for respondents.

Full Court.] COMEAU *v.* WHITE. [Jan. 6.

Judgment by confession—Action to set aside—Burden of shewing absence of consideration.

In an action to set aside a confession of judgment given by a father to his son as being a preference within the meaning of the Assignment Act (R.S. 1900, c. 145) and also on the ground that it was given to defeat and delay creditors the evidence shewed that at the time the confession of judgment was given the father was possessed of property not including personal property and a piece of land the value of which was not fixed, variously estimated as being worth from $1,300 to $1,800 while his liabilities outside of the amount secured by the judgment were only a disputed claim amounting to $200 and a note for $75 not then matured.

Held, 1. There was no evidence from which insolvenc could be inferred.

2. Absence of consideration was not to be inferred from the fact that the judgment attacked was a judgment by confession, but that the burden was on plaintiff to shew affirmatively that there was no debt due.

3. Assuming that absence of consideration must be presumed, plaintiff must still shew that by the giving of the judgment the debtor was subtracting from his assets so much that there was not sufficient left to pay the claims of creditors.

T. R. Robertson and *F. W. Nicholls*, for appellant. *Roscoe*, K.C., and *Dennison*, for respondent.

Province of Manitoba.

KING'S BENCH.

Dubuc, C.J.] MEIGHEN *v.* ARMSTRONG. [Jan. 12.

Chattel mortgage—Seed grain—Affidavit of bonâ fides—Landlord and tenant—Distress.

The plaintiff had taken a chattel mortgage from defendant Todd covering the crops to be grown on certain land by Todd as tenant to the def· ıdant Armstrong under a lease for a year dated 1st April, 1904, reserving as rent one-third of the crops, and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor, but no time was fixed when that was to be done.

The landlord in the following November distrained for rent, and the plaintiff was thereby prevented from realizing more than a small portion of the amount secured by his mortgage.

The plaintiff had purchased the seed grain from a dealer who delivered it to Todd. The price of it was $300.75, but the chattel mortgage was taken for $360 to cover the solicitor's costs in addition.

Held, 1. The distress was illegal, as there was no rent due at the time, Todd having until 31st March, 1905, to pay it, and also because there was no one in possession of the land at the time. Bell on Landlord and Tenant, p. 271.

2. The chattel mortgage was not void because the affidavit of bonâ fides stated that the agent had "a knowledge of all the facts connected with the said mortgage," instead of saying that he was "aware of all the circumstances" as required by Bills of Sale and Chattel Mortgages Act," R.S.M. 1902, c. 11, s. 12. *Emerson* v. *Bannerman*, 19 S.C.R. 1, and *Rogers* v. *Carroll*, 30 O.R. 328, followed.

3. It was no objection that the seed grain had not been sold to Todd by the plaintiff himself, but purchased for him from a third party. *Kirchhoffer* v. *Clement*, 11 M.R. 460.

4. Under s. 39 of the Act the objection that the mortgage had been taken for a greater amount than the price of the seed grain and interest was fatal to it, as that section provides that every mortgage, bill of sale, etc.," shall, so far as it assumes to bind, comprise, apply to or affect any growing crop, or crop to be grown in the fi ure, in whole or in part, be absolutely void

except the same be made as a security for the purchase price, and interest thereon, of seed grain. Maxwell on Statutes, p. 661; *Ex parte Charing Cross, etc., Bank*, 16 Ch. D. 35; *In re Rolfe*, 19 Ch. D. 98; and *Hamilton* v. *Chaiur*, 7 Q.B.D. 319, followed.

Judgment for plaintiff against Todd on the covenant in the mortgage for payment of the money, with costs, and dismissing the action as against Armstrong, but without costs.

Daly, K.C., and *Meighen*, for plaintiff. *Aikins*, K.C., and *Taylor*, for defendant Armstrong.

Dubuc, J.] McARTHUR *v.* MARTINSON. [Feb. 2.

Mechanic's lien—Reserve of percentage of contract price—Payments to material men and wage earners out of the reserve—Liability of owner for full amount of reserve.

The defendant Martinson entered into a contract with the owners to erect for them a building for the sum of $17,164. Before the building was quite completed Martinson abandoned the contract, but the owners had kept back fifteen per cent. of the amounts called for by the progress estimates made from time to time. They, however, made payments, both before and after Martinson abandoned the contract, to wage earners and other parties entitled to file liens, and they claimed in this suit, which was brought to enforce the plaintiff's lien for lumber supplied to Martinson for use in the building, that they were entitled to deduct such payments from the fifteen per cent. required by s. 9 of the Mechanics' and Wage Earners' Liens Act, R.S.M. 1902, c. 110, to be held back and were only liable to account to the plaintiff and other lien holders for the balance, relying on s. 10 of the Act.

Sec. 10 in effect provides that if an owner chooses to make any such payments he may do so on giving three days' notice of such payments to the contractor, and that such payments shall be deemed to be payments to the contractor on his contract generally, "but not so as to affect the percentage to be retained by the owner, as provided for in s. 9."

Held, that this clearly means that no such payments can be made out of the percentage required to be resumed under s. 9, and that the defendants, the owners, were liable in this action for the full fifteen per cent. of the value of the work done up to the time Martinson abandoned the work.

C. P. Wilson and *Frank Fisher*, for plaintiff. *Daly*, K.C., and *Crichton*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Nov. 8, 1905.

GINACA *v.* MCKEE CONSOLIDATED HYDRAULIC.

Lease holders and placer miners—Respective rights of, to water —Lease and placer claim—Difference between.

It was the intention of the Legislature by s. 29 of the Water Clauses Consolidation Act, as enacted by s. 2 of c. 56, 1903-4, to secure to free miners, occupants of placer ground, whether they hold as original locators or as lease holders, that continuous flow of water which the section specifies.

A free miner having obtained certain rights on one creek under s. 29, does not forfeit them because he obtained additional rights on another creek under another section.

The enactment contained in c. 56 of 1903-4, shews a clear intention to cut down the rights of holders of water records, and to increase the benefits accruing to the individual free miner under the Placer Mining Act.

Per IRVING, J. (dissentiente) :—A leasehold, being held under a lease granted pursuant to the recommendation of the Gold Commissioner, on the representation by the applicant that the ground is abandoned as placer ground, the term "location" would not be properly applied to it.

Decision of HENDERSON Co. J. (Mining Jurisdiction), affirmed.

A. D. Taylor, for appellants. *Kappele,* for respondents.

Full Court.] MCADAM *v.* KICKBUSH. [Nov. 22, 1905.

Nonsuit—Evidence in rebuttal, rejection of—Burden of proof —Damages.

In an action of replevin, plaintiff proved ownership and rested his case. Defendant then moved for a nonsuit, the decision on which was reserved until he had presented his case. Plaintiff offered evidence in rebuttal to meet the case made by defendant, which was rejected on the ground that evidence to prove the non-existence of the tenancy alleged would be merely

confirmatory of the plaintiff's case, and the action was disposed of by allowing defendant's application for a nonsuit.

Held, that the rejection of the evidence tendered by the plaintiff in rebuttal could be sustained only on the ground that the onus of proof on the issues to which it related was at the outset of the case on the plaintiff; and that the course adopted by the learned trial judge admitted the evidence for the defendant to and excluded the evidence for the plaintiff from review by the Court of Appeal.

Decision of BOLE, Co. J., reversed.

Macdonell, for plaintiff. *Bowes*, for defendant.

Hunter, C.J.] MORTON *v.* NICHOLS. [Feb. 26.

Contract—Specific performance—Option to purchase mineral claim—Time of the essence—Tender of instalment of purchase money.

Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time shall be of the essence of the contract, yet by the very nature of the property dealt with, it is clear that time shall be of the essence.

Where the transaction is an option, or unilateral contract, for that reason time is to be taken as intended to be of the essence.

Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to seek out and find the payee if he is within the jurisdiction.

R. T. Elliott, for plaintiffs. *W. J. Taylor*, K.C., and *Twigg*, for defendant.

Full Court.] HOPPER *v.* DUNSMUIR. [Jan. 25.

Costs—"Event," what constitutes.

By s. 100 of the Supreme Court Act, 1904, the Legislature expressly intended to provide an automatic code for the disposition of the costs of all trials, hearings and appeals in the Supreme Court, and to sweep away all discretion save in relation to the specific exceptions set out in the said s. 100.

Bodwell, K.C., for plaintiff. *E. P. Davis*, K.C., and *Luxton*, K.C., for defendants. *Sir C. H. Tupper*, K.C., for intervenant.

Full Court.] [March 6.

WEST KOOTENAY POWER AND LIGHT CO. *v.* CITY OF NELSON.

Water Clauses Con. Act—Grant to municipality for power purposes.

Appeal from judgment of IRVING J. See 41 C.L.J. p. 726.

Held, having regard to Lord Blackburn's examination of *Rickett* v. *Morris*, L.R. 1 H.L. (Sc.) 47, in *Orr-Ewing* v. *Colquhoun* (1877) 2 App. Cas. at p. 852 et seq., and the remarks of Fitzgibbon and Barry, L.JJ., in *The Belfast Ropeworks Co.* v. *Boyd*, 21 L.R. Ir. 560, the law is not that any sensible interference is per se actionable, but that there must be either actual damage or a reasonable possibility of damages to give a good cause of action, and that in determining whether the defendant has discharged the onus regard must be had to the circumstances of the case.

Held, further, that in this particular case the defendants had discharged the onus, having regard to the evidence taken since the trial by leave of the Full Court.

MacNeill, K.C., and *Lennie*, for plaintiffs, respondents. *Bodwell*, K.C., and *W. A. Macdonald* K.C., for defendants, appellants.

Bench and Bar.

At a recent meeting of the County of Hastings Law Association a resolution was passed expressing a deep sense of the loss sustained by the members of the Bar of the above County through the death of His Honour Judge Lazier, who had held office for over thirty years. The resolution spoke of the courtesy, integrity, impartiality and devotion to duty which characterized him in his judicial career; and expressed the assurance that his example would be deemed the standard for, and his life's work and memory held dear by the members of the legal profession in the County in which he had lived for nearly four score years.

The appointment of Mr. Hugh McMillan, of Guelph, as junior judge of the County of Victoria has been well received in the County that knows him best. It is refreshing to record that the organ of the political party to which he does *not* belong applauds the appointment, saying: "His long experience in and knowledge of the law, his mature judgment, his fairness and his practical common sense, well fit him for the discharge of the duties which he has been called upon to perform." We concur.