Canada Law Journal.

VOL. XXXVIII. DECEMBER 1, 1902. NO. 22.

The following appointments appear in the Canada Gazette of November 22nd: Hon. Charles Moss, one of the puisne judges of the Court of Appeal for Ontario, to be Chief Justice of the Court of Appeal, with the title of Chief Justice of Ontario, in the room of Hon. John Douglas Armour, appointed a puisne judge of the Supreme Court of Canada; and John James Maclaren, of the City of Toronto, K.C., to be Judge of the Supreme Court of Judicature for Ontario, and a puisne judge for the Court of Appeal, with the title of Justice of Appeal, in the room of the Hon. Charles Moss, appointed Chief Justice. The learned judges above referred to were duly sworn in on the 25th ult.

The new Chief Justice is an able and learned lawyer, an eminent judge and a man of high personal character. His fitness for the office goes without saying. The only thing tending to mar the general feeling of satisfaction at an appointment so good in itself is that it necessarily involves the passing over of Mr. Justice Osler, who, equally competent, and of the same high character, and one of the best of our judges, has for a much longer period faithfully and efficiently discharged his duties with credit to himself and to the benefit of the country at large.

The English bar numbers in its ranks men from all parts of the empire, and nowadays India contributes not a few. For instance, glancing through the lists of students who have recently passed the final examinations of the Inns of Court, we find the names of Messrs. Kaikobad Bhicaji Dastur, Harnath Sahai Gupta, Samuel J. De Jager, Govind Kashnath Gadgil, Nusserwanji B. Gazder, Apparanda B. Kariapa, Gullamhusein Khairaz, Sarat Sasi Mukerji, Devendra Kumar Mullick, Neoptolemus Paschalis, Gofrey Emil Reiss, George Hermann Rittner, Mohamed Abdul Samad, Bodh Raj Sawhny, Kanwar Maharaj Singh, Faiz Hassan B Tyabji, and Musa H. Visram. Out of these we should judge that fourteen are East Indians, one Greek and three Germans.

The presence of so many Easterners in the heart of the Empire for the purpose of learning at the fountain head the principles of English law is an impressive fact, and one which should, in the ordinary course of events, be fraught with much good, both to themselves and to the communities to which, in due course, they will return to practice their profession. The experience which they will have gained of western civilization at its best, ought, one would think, to have wide-reaching effects in many ways, and it is to be hoped that due care is taken by those in authority to enable these young men, during the time they are pursuing their studies, to see the best side of that civilization, and to guard and protect them from those perils to which, in our great modern cities, the young and inexperienced are so often exposed.

We have on more than one occasion in these columns advocated some effort being made on the part of the Provincial or Dominion authorities to give effect to s. 94 of the B.N.A. Act, by making provision for the uniformity at all events of some of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick. The section as it stands applies in terms only to these three of the provinces of the Dominion, but there seems really no good reason why it might not with the concurrence of the Provincial Legislatures be applied to the whole Dominion. It would probably be found impracticable to take any steps looking to the unification of all the laws relating to property and civil rights in all of the provinces, nor perhaps would it be desirable to do so even if it were practicable. But there are some laws relating to trade and commerce, as to which it is obviously most desirable that there should be uniformity throughout the Dominion. We have made one little step in the Bills of Exchange Act, the result of which legislation ought to encourage the taking of a further step in the same direction. Fortunately there are two subjects upon which the law has been already codified for us to a large extent by Imperial Statutes, which might be readily adapted to our needs. We refer particularly to the Sales of Goods Act, (56 & 57 Vict., c. 71) and the Partnership Act, (53 & 54 Vict., c. 39), both of which might be well adapted and made applicable throughout the Dominion. There is another branch of law closely akin to these which might also, with great advantage, be made uniform throughout the Dominion, and

that is the law relating to joint stock companies. A statute on this subject might be so framed which, without infringing any rights of revenue of the various provinces, would at the same time secure uniformity throughout the Dominion on this most important subject, including the winding-up of companies. We commend this matter to the serious consideration of the law officers of the Crown throughout the Dominion.

Our attention has recently been drawn to an occurrence in the United States with reference to the election of judges which is worthy of a brief reference. The *New York Evening Post* when speaking of the nominations for the elections recently held expressed the opinion that in making their nomination for a judge for the Court of Appeal for the State of New York, the Republican State Convention has taken a backward step in that it had nominated a candidate in opposition to Mr. Justice Gray, whose term was expiring, this judge being admittedly a man of ability, industry and unblemished character. The writer after referring to an unwritten law that demands "the re-nomination of a judge in actual service, regardless of his political attachment, if he has performed his duties satisfactorily to an enlightened bar and public," urges strongly that he should not have had any opposition. *The Albany Law Journal* in referring to the matter stated that this action constituted the first instance in the history of their highest court of a violation of the above practice; and further remarks: "Whatever evils may inhere in the principles of an elective judiciary, they have been and always will be much mitigated by the enforcement of the above rule." *The New York Times* in commenting on the action of the Bar Association in expressing regret that Judge Gray was not the nominee of the party for re-election, says that the "Republican 'boss' was guilty of a very grave violation of a wholesome precedent." We of the British Empire, are in the habit of decrying the system of electing judges; but, if the very proper practice above referred to were always carried out, it might prove in *some* respects a better system than our own, which is subject to the serious objection that a judge may turn out to be, or may become very useless or objectionable, but may not be a proper subject of impeachment. The fact is that the bar should have some share in the appointment of judges. If that were the rule

there would be (subject always however to other difficulties) the less objection to their being elective or having their term of office limited.

COMPANIES—DOMINION AND PROVINCIAL.

The passage of a new Companies Act by the Parliament of Canada should be a legal event of the first magnitude. Canada has been a little behind Great Britain and the States in taking the company fever, but she is making up well for lost time. Not only are companies being started for every conceivable domestic purpose, but many very large ones have recently been organized in Canada for enterprizes outside of Canada—notably a number of companies for the construction and operation of street railways and the supplying of electricity in different cities in the West Indies and South America.

One of the first problems with which the promoters of a company of any magnitude has to deal is the question of where and from what legislative authority they shall take the charter of incorporation. The practice varies considerably. Sometimes it is one of the provinces of the Dominion; sometimes the Dominion itself; sometimes one of the West Indian islands; occasionally Great Britain; and, in one instance at least in each case, Newfoundland and New Jersey. All these enterprizes were of Canadian origin, the promoters were Canadian, the capital in great part Canadian, and the general business management intended to be conducted in Canada. It seems strange that there should be such a diversity of practice, or that it should ever be thought necessary or even expedient to go outside of Canada for a charter of incorporation. Companies organized by citizens of Great Britain with British capital conduct all sorts of business all over the world under charters taken under the English Joint Stock Companies Acts. Why should Canadian citizens and Canadian capital ever find it expedient to take any charter except a Canadian?

The reason for this, in my judgment, is to be found in an entirely false theory respecting the origin of the power of a company, which finds expression in the Dominion Companies Act, and which by its expression in the B.N.A. Act imposes an altogether unnecessary and most mischievous limitation upon the

incorporation of companies by provincial charters. This theory finds no place in the English Acts, and their superiority is in no small part due to this cause.

It is not easy to understand why when a new Dominion Act was in contemplation, the English Companies Acts were not taken as the model, or better still, adopted in their entirety, in place of attempting to patch up the clumsy and antiquated Act already on the Canadian statute book. Even if there had been any comparison in point of merit between the two Acts, it would surely have been wise for many reasons to have followed the English statute. We should have had the direct benefit of the enormous accumulation of experience gained in working the English Acts as embodied in the English cases and text books. English investors and their legal advisers are familiar with their Act. Most of the other important colonies—all the Australian, New Zealand, Demerara, and the principal West Indian colonies, even Newfoundland—have verbatim copies of the English Acts. Two provinces of the Dominion, British Columbia and Nova Scotia, have adopted them. Even if our own Act had been a good one, it would have paid us to have abandoned it for the English.

No one who compares the two Acts but must be struck with the enormous superiority of the English Act. Compared with it, our own Act is most meagre, clumsy, and in every way inadequate. Not only is it radically faulty in its theory as to the nature of a company—as I hope to shew—but some of its details are extraordinary. It contains such sections as 30 and 31, which, contrary to the very essence and nature of a corporation, would enable a creditor of an insolvent company, the stock of which had not been fully paid up, to single out any one unfortunate shareholder and compel payment from him of the whole amount unpaid on his shares, and allow every other shareholder to go scot free. Sec. 52 apparently throws upon the directors the task of investigating the financial circumstances of every purchaser of a share not fully paid up. Sec. 34 is the famous sec. 38 of the English Act of 1867, which, after having been abused by every text book writer and by every Judge before whom it came, was finally repealed in 1900. It would be easy to make a lengthy article on the shortcomings in details of our Act. But all I

propose to do is to discuss what I conceive to be a radical and most mischievous error in its theory of the nature of a company.

The theory of the Dominion Act is that the company created under it is in every respect, both as a business enterprize and as a legal entity, the creature of the legislature, and owes to it all its powers, capacities and privileges. It is a survival apparently of the mediæval notion of companies being matters of special grace and royal favour, when associations of "merchant adventurers" were chartered with special and exclusive powers and privileges. The theory of the English Act draws a sharp distinction between the company as a business enterprize and the company as an artificial creature of the law. With the former the legislature has no necessary connection, any more than with the business of any individual or partnership. It is with the latter only that it concerns itself. It defines with precision and detail all the legal relations of the company and its shareholders as distinguished from an individual or a partnership. But as to the business in which the company proposes to engage it gives no sanction or authority: all that it requires is that it shall be lawful and shall be stated.

The truth is, that the law of joint stock companies is simply an outgrowth and extension of the law of partnerships. Sir G. M. Giffard says (5 Ch. Ap. 377): "Just observe what the origin of this Act of Parliament [the Companies Act, 1862] was. When first joint stock companies were started they were found unwieldly associations, and it was found that they could not readily take proceedings, nor could proceedings readily be taken against them. In consequence of that several Acts were passed, more or less imperfect, but the object was really to clothe an ordinary partnership with something in the shape of a corporate capacity, in order on the one hand that they might sue, and on the other hand that they might be sued. This is the whole history of these Acts relating to joint stock companies, of which the Act of 1862 is the last."

In other words, the joint stock companies Acts are intended solely to regulate the legal relations of the members of a company between themselves, and of the company as a whole to the world at large, instead of the common law of partnership. They had absolutely nothing to do with the business in which the members of the association incorporated proposed to engage. That was

entirely a matter for the members of the association, and the only reason for stating it, whether in articles of partnership, or deed of settlement, or memorandum of association, is because when men associate together for definite objects it is necessary to state those objects for their mutual rights and protection. The members of the company carried with them into it the same freedom to engage in business of any kind that they had as individuals. The legislature had nothing to do with that.

Of course, if the newly formed company required anything special or peculiar or exclusive it would require legislative authority to that end. But that is a thing wholly apart from the charter of incorporation. Such privileges might be conferred on an individual or on a company already incorporated, or on a company incorporated abroad. It has been and often is the case that the grant of such special powers is contained in the Act incorporating the company requiring them. And very probably in this way arose a confusion of thought between the powers which required special authority and those which did not. But there should be no such confusion in connection with a general Act under which it is intended that all ordinary trading companies are to become incorporated, and no such idea finds expression in the English Act.

The difference in the two theories is exactly brought out in the language of the two statutes. Our Canadian Act requires in the application for letters patent a statement of "the purposes for which incorporation is sought." The English Act requires in the memorandum of association a statement of "the objects for which the proposed company is to be established." There is only one "purpose" for which incorporation is sought, namely, to secure the limitation of the shareholders' liability and the other legal advantages incident to corporate existence. That is the legal aspect of the matter, the only aspect with which the legislature should concern itself. The "objects" which the promoters have in view in establishing the company is the business side of the matter, with which the legislature has nothing to do. It is necessary to state them in the memorandum of association, but solely in the interests and for the protection of the shareholders, just as a deed of partnership requires a statement of the business in which the partners propose to engage. That statement expresses the compact and understanding upon which the shareholders subscribe

for their shares, and to which they can appeal for protection if the directors or servants of the company, or even the company itself, attempt to use their capital or pledge the corporate credit in any adventure beyond the scope of the objects so stated. The legal remedy for an attempted excess of authority under either Act is the same—by obtaining a declaration from a Court that the attempted excess of power is ultra vires, and so void. But the difference in respect to administration is marked. According to the Canadian view, the company derives all its powers from the legislature, and accordingly the legislature, or the officials appointed to work the machinery of the general Act, have a right to grant or withhold those powers according as they think them proper to be granted or withheld, or even according as they conceive them to be well or ill expressed. Consequently there is frequent complaint among those who obtain letters patent under the Canadian Act of difficulties raised by the officials of the department that this or that is not a legitimate purpose for which incorporation should be granted. Under the English Act there is no room for any such trouble. The incorporators are at perfect liberty to state whatever objects they please as those for which they propose to establish the company. That is entirely a matter for themselves, a matter between the company and the shareholders, and between one shareholder and another. The duties of the department are confined to seeing that they are stated.

The same confusion of ideas as to the legal and the business aspect of a company has been the cause of much trouble and uncertainty in relation to the incorporation of companies by provincial charters. At first sight one does not easily see why all charters in Canada should not be provincial, and why the Dominion should have anything to do with incorporating companies at all. Property and civil rights are purely provincial matters, and one would suppose that the law which limits the liability of the members of a company and regulates their rights among themselves was as much a matter of civil right as the law of partnership, of which it is an off-shoot and evolution. But the same vicious theory already discussed has entrenched itself in the B.N.A. Act and limited the powers of the Provincial Legislatures to the "incorporation of companies with provincial objects." What "provincial objects" means in this connection it is not easy to say, and has occasioned the widest diversity of opinion. On the one

hand, provincial acts incorporating marine insurance companies have been disallowed at Ottawa on the ground that the vessels insured might go beyond the limits of the province. On the other, under the advice of eminent counsel a company has been incorporated under the Ontario General Act, having for its chief object the construction and operation of a street railway and a light and power plant in a city in South America. In the latter case, it was held by the counsel referred to that the statement of the objects in general terms, such as "the construction and operation of railways," etc., without mentioning the locality outside of the province, was a sufficient compliance with the statute. The whole question of the nature, powers and limitations of these provincial companies bristles with difficulties, all of which are directly traceable to the incorrect theory as to the origin of the powers of a company and the confusion between its legal and its business aspects.

It is easy to see the idea which the framers of the B.N.A. Act had in mind. A provincial legislature has no power to deal with any matter beyond the territorial limits of the province. Therefore, if a company wishes to have a sphere of operation beyond the province—the whole of Canada, for instance—it should have a Canadian charter. Probably at the date of Confederation the idea of a company incorporated in one country for the purpose of doing business in another was not so prominently before the minds of Canadian public men as it would be to-day. Any company incorporated in Canada would, in their view, be either provincial or Canadian in its objects, and its charter should be provincial or federal accordingly.

But even this superficial appearance of soundness vanishes the moment one encounters a company whose objects are in whole or even in part outside of Canada. A provincial legislature has as much authority to deal with a company whose object is, we will suppose, the building and operation of a South American railway as the parliament of Canada or of Great Britain has—that is to say, so far as giving any right to build the road, none at all. Yet under the English Companies Act companies are being constantly incorporated for objects with which Great Britain has absolutely nothing to do. But for the language of the B.N.A. Act they might just as well and properly be incorporated by the legislature of any province of Canada.

The same confusion between the business in which it is proposed the company shall engage and the law which is to regulate its corporate existence is the cause of the difficulty. For the purpose of engaging in business outside of Canada or Great Britain, as the case may be, either no special law is required at all or a law of the foreign country in which it is proposed to carry on business. A citizen of Nova Scotia can engage in business in Cuba. He requires no special law to permit him to do so, unless he wishes something in the nature of a franchise or concession, and that he must obtain from Cuba. He can, if he pleases, associate with himself in partnership other persons in Nova Scotia. If he does so their relations to one another as partners are governed by Nova Scotian law. If he and his associates wish to go a step further and obtain the advantages of limited liability and a corporate existence, why is Nova Scotia law not still the proper one by which those legal relations are to be governed? They obtain no additional rights to carry on business by incorporation, and they can obtain none, whether they obtain their charter from the province or from the Dominion. The company carries on exactly the same business in Cuba that the partnership did. All that has happened is that the members of the association have turned their liability as respects the public from an unlimited to a limited one, and have altered their relations with one another from those of partners to those of shareholders. So far as the business rights in Cuba are concerned the change has been absolutely immaterial. So far as concerned transactions in Cuba Cuban law would prevail. In other respects the law of Nova Scotia has, up to the time of incorporation, governed. Why should the mere change from unlimited liability to limited compel a change from the law of the province to that of the Dominion?

Or to take another illustration from the class of business already referred to as having been the subject of federal disallowance—marine insurance. Suppose one of the old fashioned marine insurance associations modelled upon Lloyds, of which there were many in the maritime provinces in the palmy days of wooden ships. It would be an unincorporated association doing business by a secretary, and by the terms of its policy each member assumed a definite amount of risk. In the case of an action either one underwriter defended on behalf of all, or a consolidation rule was taken. Such associations formerly did a large business, effect-

ing insurances all over the world. No legislative authority was required. The members were merely exercising their right to conduct a legitimate branch of trade. Suppose such an association found that it would be more convenient—not necessarily for underwriting, but for such purposes for instance as legal proceedings, holding property, taking a premium note and endorsing it—to have a corporate existence, and a charter is obtained accordingly, under a provincial act. The members certainly have obtained no new power. They owe the legislature nothing in that respect. The business goes on exactly as before. The only "purpose" for which incorporation was sought was the convenience of a corporate existence. The federal legislature would have no more right to give them power to insure vessels in any part of the world than the provincial. Even if a federal charter were obtained, it would still be under provincial law, not federal, that all the business of the company, other than the corporate management, would be done. An action against the company to recover a loss, an action by the company for a premium or to cancel a policy, would be determined according to the law of the province. Yet according to the view at one time at any rate prevailing at Ottawa the law of the province was powerless to invest this association, which up to that time it had controlled entirely and still continued to control in every other respect, with a corporate existence.

Every consideration of legal logic seems to point to the province and not to the Dominion as the appropriate source from which to derive corporate rights. In respect to a company formed for the operation of a business enterprise outside of Canada it is not of much practical consequence whether a federal or a provincial charter be taken, assuming that the one Act is as good as the other. Even in these cases it would I believe be found more generally convenient for the promoters to take the charter in a provincial capital rather than at Ottawa. But in the case of the great majority of companies the limitation upon provincial power is an anomaly and a nuisance. A company is started mainly for some business confined to a particular province. But its promoters see the possibility of engaging in business outside of the province, and the uncertainty of what the effect would be compels the adoption of a federal charter when a provincial one would be more convenient. Or a concern which is doing a thriving business turns itself into a

limited company under the provincial Act. Subsequently it sees an opening to extend its business into an adjoining province. What is the effect of doing so? Is it ultra vires for instance for a New Brunswick laundry company to open a branch in Nova Scotia? Could it enforce a contract made by the manager of that branch? Such questions as these should not be. In every case there could be no question of the right of an individual or a partnership, and there should be none in the case of a provincial company. There is an almost complete absence of authority on the subject. The point apparently came up in the recent British Columbia case of *Boyle* v. *Victoria-Yukon Trading Co.*, reported ante p. 694, in which the Supreme Court of that province decided that a provincial company could legally undertake extra-territorial contracts of carriage.

What in this connection is a "provincial object?" It is not easy to say. The expression is one of those loose and general ones which in practical application are as elusive as mercury. If, for instance, I am conducting a business in Nova Scotia with the West Indies—selling fish at one end and sugar at the other—has my business a "provincial object?" Its only object is to make money for a Nova Scotian, to be spent in Nova Scotia or elsewhere. Suppose instead of selling fish in the West Indies I make my living in Nova Scotia by operating a gold mine in Venezuela, the "object" is still the same. If the management of a business is conducted within the province by citizens of that province for their own benefit, are these not sufficiently "provincial objects" to entitle the conductors of the business to a charter of incorporation under the laws of their province? Are geographical considerations only, to the exclusion of every other, to be the test of the provinciality of the business objects of the company?

The whole subject is involved in difficulties and obscurities, all arising from the untenable theory on which our company legislation is founded. All these would disappear at once if it were once clearly recognized and admitted that the business in which a company proposes to engage (apart from anything in the nature of franchise) is something with which the legislature has no more to do than it has with the business of an individual or a partnership, and neither grants any rights nor withholds them. The law of joint stock companies would then manifestly take its appropriate place as part of the ordinary law governing civil rights, and as such as

purely a provincial matter as the law of partnership. The necessity for any charter, other than a provincial one, would at once disappear, and all ordinary business companies would be organized under provincial charters, to the great convenience of their promoters and the gain of the provincial treasuries. The one obstacle is the meaningless limitation in the B.N.A. Act, but there should be no trouble in having this repealed if the provinces would take combined action, as it is manifestly their interest to do.

F. H. BELL.

Halifax, N.S.

THE SIFTON MURDER TRIAL.

The acquittal by the jury of Gerald Sifton upon his second trial for murder unfolds a decidedly novel situation Herbert, it will be remembered, declared himself to have been the prisoner's accomplice, and was the only witness against him. On enquiries into offences of a grade less than capital, juries, with us, have not infrequently rejected the criminatory evidence of a self-proclaimed accessory, but there has been, I think, no instance, in recent days at all events, of a person accused of murder obtaining a verdict in his favour, while the abettor sustains, through his own act, the burden of guilt.

There can be no question, of course, that the previous conviction of a principal, is not, under our system, essential to that of the accessory. The doctrine, however, would scarcely be applicable where there has been a joint arraignment. It would, manifestly, be excluded, where, as in the present case, the crime is alleged to have been consummated in a particular way by one, with the presence upon the scene and the active participation of another. Immunity from punishment may, and in all probability was, made a condition of its acceptance by the Crown of Herbert's testimony. But, apart from any such understanding, or if he should only have been promised a lighter sentence as consideration therefor, is it possible now to impose any punishment upon him? Would it be a legitimate proceeding even to sentence him, a course that is reported to be in contemplation? The jury, in pronouncing his conjectural associate not guilty, determine, in effect, that no principal

offender existed.* And if no principal offender how may an accessory be deduced?

If the result of the trial accomplishes nothing more, it will persuade the Crown of the futility of looking for the conviction of a prisoner obliged to answer to a charge, the issue of which is so momentous as that of murder, by admissions procured from a person who avows that the felony was concerted with him.

J. B. MACKENZIE.

* This deduction is, perhaps, not strictly accurate. All the jury did was to find Gerald Sifton not guilty of the crime alleged on the evidence then adduced.

ED. C. L. J.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

FRAUDULENT CONVEYANCE—POST-NUPTIAL SETTLEMENT—RECITAL OF ANTE-NUPTIAL AGREEMENT FOR SETTLEMENT—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 4—(R.S.O. c. 338, s. 5) 13 ELIZ. C. 5—(R.S.O. c. 334, s. 1).

In re Holland, Gregg v. *Holland* (1902) 2 Ch. 360. The judgment of Farwell, J. (1901), 2 Ch. 145, (noted ante vol. 37, p. 745), to the effect that a post-nuptial settlement made in pursuance of an ante-nuptial agreement is void against creditors under 13 Eliz. c. 5 (R.S.O. c. 334, s. 1), unless the ante-nuptial agreement is in writing, has been overruled by the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.,) on the ground that there was no evidence of intent to defraud creditors, and no such intent ought to be inferred, and also because the settlement was not voluntary, and taken as a whole constituted such a note or memorandum in writing of the recited parol ante-nuptial contract as satisfied the Statute of Frauds, s. 4, and such recital was admissible in evidence against the trustee setting up the Statute. In arriving at this decision the Court of Appeal overruled *In re Pearson* (1876) 3 Ch. D. 807, which it was admitted bound Farwell, J.; and the decision of Kindersley, V.-C., in *Barkworth* v. *Young*, 4 Drew. 1, to the effect that a post-nuptial writing may be a sufficient memorandum under the Statute of Frauds of an ante-nuptial agreement, which Farwell, J., thought to be unsound, the Court of Appeal upheld as good law.

CHARITY—MORTMAIN — DEVISE OF LAND ON TRUST FOR SALE FOR CHARITY — BEQUEST OF PROCEEDS OF SALE OF LAND FOR CHARITY - SALE—MORTMAIN AND CHARITABLE USES ACT, 1891 (54 & 55 VICT. C. 73), SS. 3, 5 (R.S.O. C. 112, S. 5).

In re Sidebottom, Beeley v. *Waterhouse* (1902) 2 Ch. 389, was an appeal from the decision of Farwell, J. (1901), 2 Ch. 1, in which he held that a devise of land in trust for sale, and to hand over the proceeds to a charity, was a devise of land within the Mortmain and Charitable Uses Act, 1891, s. 5 (R.S.O. c. 112, s. 5), and therefore that the trustees must sell the land within a year unless the time was extended by the Court. The Court of Appeal (Williams, Romer and Stirling, L.JJ.,) held that such a devise is not a devise of "land," but is money arising from or connected with land, and therefore not within the Act so far as it limits a time within which land devised for charity must be sold. We think it is to be regretted that, as this decision shews, no legislative restriction is placed on such bequests. It is obvious that one of the mischiefs the Act was intended to prevent may be defeated by such gifts. And if instead of making a devise of the land a gift of the proceeds of lands ordered to be sold is made, the land may nevertheless be practically tied up for an indefinite period in mortmain, an evil which is constantly recurring, and which successive generations of legislators have from time to time to deal with.

DONATIO MORTIS CAUSA — POST OFFICE SAVINGS BANK — DEPOSIT BOOK — GOVERNMENT STOCK INVESTMENT CERTIFICATE.

In re Andrews, Andrews v. *Andrews* (1902) 2 Ch. 394, is a decision of Kekewich, J., on the law of donatio mortis causa, a subject which has received a good deal of elucidation of late. In this case the subject of the alleged donatio was a Post Office Savings Bank deposit book and a Government certificate that the deposit had been invested in Government stock. After the money was so invested it was written off the deposit account, and dividends on the stock were payable at the Bank of England and not at the Post Office, and before the fund could be again under the Post Office it was necessary to go through the form of a sale of the stock and a re-transfer of the amount to the deposit account. Kekewich, J., held that a gift of the deposit book and investment certificate was not a valid donatio of the moneys so invested.

VENDOR AND PURCHASER – EQUITABLE MORTGAGE — NOTICE — FRAUD OF VENDOR'S SOLICITOR—LEGAL ESTATE—POSSESSION OF TITLE DEEDS—FORGED RECEIPT.

Jared v. *Clements* (1902) 2 Ch. 399, is a case which shews that the legal estate, possession of title deeds and bona fides may all be unavailing to protect a purchaser from the consequences of fraud. In this case a purchaser agreed to buy land, he had notice that there was an equitable mortgage outstanding on the property, and he called for its discharge. The vendor's solicitor thereupon produced a forged receipt purporting to be signed by the mortgagee. The legal estate was transferred and the title deeds handed over; but it was nevertheless held by Byrne, J., that as the purchaser had actual notice of the equitable mortgage, the legal estate and possession of the deeds were unavailing to protect him from the claim of the equitable mortgagee.

PARTNERSHIP — LIABILITY OF PARTNER FOR FRAUD OF CO-PARTNER — CONTRACT WITH INDIVIDUAL—NOVATION– ELECTION TO ABIDE BY CONTRACT MADE WITH INDIVIDUAL AFTER NOTICE OF PARTNERSHIP.

In *British Homes Assnce. Corp.* v. *Paterson* (1902) 2 Ch. 404, the plaintiffs sought to make a partner liable for the fraud of his co-partner. The plaintiffs retained a solicitor in a particular transaction, and whilst it was pending he notified them of the formation of the partnership, but the plaintiffs took no notice of the fact and continued to correspond with the solicitor originally retained individually, and ultimately remitted him a sum of money by cheque payable to his own order, and accepted his receipt in his own name therefor He paid the money into his own account and afterwards misappropriated it. The partner was in no way participant in the fraud, and Farwell, J., held that he was not liable therefor, as the plaintiffs had elected to employ the fraudulent solicitor alone.

STOCKBROKER—GENERAL LIEN OF BROKER ON SECURITIES OF CUSTOMER.

In re London & Globe Finance Corporation (1902) 2 Ch. 416, Buckley, J., determines that where securities are deposited with a stockbroker by a customer as specific security for a certain sum, and, after payment thereof, are left in his hands, he has a general lien on them for any balance due to him from his customer on subsequent stock transactions.

COMPANY — DIRECTORS — FIDUCIARY POSITION OF DIRECTORS—PURCHASE OF SHARES BY DIRECTORS—NEGOTIATIONS FOR SALE OF UNDERTAKING—DUTY TO DIRECTORS.

In *Percival* v. *Wright* (1902) 2 Ch. 421, it was held by Eady, J., that the directors of a company, pending negotiations which they have entered into for the sale of the company's undertaking, may buy up shares of the company without disclosing to the sellers of such shares the pendency of the negotiations.

RIGHT OF WAY—GRANT—"EXECUTORS, ADMINISTRATORS AND ASSIGNS, UNDER TENANTS AND SERVANTS."

Baxendale v. *North Lambeth Liberal Club* (1902) 2 Ch. 427, was a case concerning a right of way in favour of the defendants' predecessor in title, "his executors, administrators and assigns, under tenants and servants." The premises were used by the defendants for the purposes of their club, which had many members, and the object of the action was to restrain the members, honorary members, guests, visitors, officers and tradespeople of the club from using the way, on the ground that they did not come within the terms of the grant. Eady, J., however, held that the grant extended to all persons lawfully going to and from the premises, though not expressly named, and the action was dismissed.

PROBATE—REVOCATION OF—WORDS OR CLAUSES OMITTED FROM PROBATE—COURT—JURISDICTION—GIVING RELIEF NOT ASKED.

Karunaratne v. *Ferdinandus* (1902) A.C. 405, was an appeal from Ceylon. The suit was brought to revoke the probate of a will, and for a declaration that the deceased died intestate. The court of first instance had granted a decree of revocation on the express findings of the court that the will was not the act of a free and capable testator and was executed under undue influence and coercion. On appeal from this decision the Appellate Court made an order declaring that the testator died intestate as to his immovable property, and expunging from the will all references to his real and immovable property. From this judgment an appeal was had to the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley) the appellant claiming that the order should be varied and probate issued of the will in its entirety. The respondents accepted the view that the probate should be confined to the personalty and did not cross appeal.

The committee was of opinion that the course taken by the court appealed from was objectionable, because the issues raised in the court of first instance went to the validity of the whole will and not of a part of it, and that under the circumstances the court ought to have pronounced for or against the will in its entirety, unless the parties otherwise agreed,—but although their Lordships came to the conclusion that the finding of the judge of first instance was correct, and that the will was in fact void in toto, yet as the respondents did not object to the variation which had been made they simply dismissed the appeal.

PRACTICE—NEW TRIAL—DISCOVERY OF NEW EVIDENCE.

Turnbull v. *Duval* (1902) A.C. 429, was an appeal from Jamaica. The action was brought to enforce a charge on the respondent's share in her father's estate. It appeared that the plaintiffs had obtained the charge through their agent, who was also executor and trustee of the father's estate, that the charge had been obtained by pressure through the respondent's husband, whose debts were thereby to be secured, concealment of material facts, and without independent advice; the court below held that the charge could not under these circumstances be enforced. The appellants applied for a new trial on the ground of the discovery of new evidence consisting of an important document, but it appeared that they had not, before trial, made any application for discovery of documents and that the document was accessible at the trial if it had been called for. The Judicial Committee (Lords Macnaghten, Davey, Robertson and Lindley) held that the action was rightly dismissed, and that a new trial was properly refused.

LIQUOR LICENSE—SALE OF LIQUOR WITHOUT LICENSE.

In *Pasquier* v. *Neale* (1902) 2 K.B. 287, a case was stated by magistrates. The defendant was the keeper of a restaurant carrying on business in premises not licensed for the sale of liquor. He was also the partner in a wine dealer's business carried on in duly licensed premises near the restaurant. A customer at the restaurant ordered wine, and the waiter went to the licensed premises and bought a bottle of wine which was brought to the restaurant and consumed by the customer there. The question was whether the defendant could be convicted for selling it at the restaurant without a license. The Divisional Court (Lord Alverstone, C.J., and

Darling and Channell, JJ.) held that the magistrates were justified in drawing the inference that the sale took place at the restaurant to the customer and was not compelled, in the absence of positive evidence that the waiter was acting purely as the agent of the customer, to infer that that was the case.

EMPLOYER AND WORKMAN—DEATH RESULTING FROM INJURY — NATURAL OR PROBABLE CONSEQUENCE.

Dunham v. *Clare* (1902) 2 K.B. 292 is a case under the Workmen's Compensation Act 1898, but it deals with a question which may possibly have a bearing in other cases. On Sept. 2 a deceased workman received in the course of his work a wound on the toe. He attended hospital as an out patient until Sept. 17, when erysipelas set in and on Sept. 27 he died. The medical evidence was to the effect that erysipelas was a very unusual consequence of a wound of the kind, that according to modern theory it was due to the introduction of a germ and developed in six days after its introduction, and that as erysipelas did not develop until 15 days after the accident the wound had probably been re-opened by deceased walking to and from the hospital. The Court of Appeal (Collins, M.R., and Matthew and Cozens-Hardy, L.JJ.) came to the conclusion that the death of the deceased was the result of the injury to the toe within the meaning of the Act, and that his widow was entitled to compensation. A similar question might arise under Lord Campbell's Act (R.S.O. c. 166).

STATUTE OF LIMITATIONS—TRESPASSER ON LEASEHOLD—POSSESSORY TITLE ACQUIRED AGAINST LESSEE—SURRENDER OF LESSEE - LESSOR'S RIGHT AGAINST TRESPASSER—REAL PROPERTY LIMITATION ACT 1833 (3 & 4 WM. 4, C. 27) S. 34—(R.S.O. C. 133, SS. 5 (12), 6, 15)—"FUTURE ESTATE."

Walter v. *Yalden* (1902) 2 K.B. 304, is an interesting decision under the Real Property Limitation Act. The facts were as follows: Under a lease dated February 7, 1837, the land in question was demised for 99 years, if three named persons should so long live, at a nominal rent of 1s., by the plaintiff's predecessors in title to one Pothecary. In 1885 Pothecary's representatives surrendered the lease to the plaintiffs. The defendants had then acquired a title by possession as against Pothecary, commencing in 1854. The last of the three lives for which the lease had been granted dropped on January 2, 1895. The defendants claimed to

have acquired title to the fee by reason of their possession since 1854 without paying rent. It will thus be seen some nice questions presented themselves for decision. For instance, what was the effect of the defendants' possession against the lessor, what was the right of the lessor by virtue of his surrender as against a person who had acquired a title by possession as against the lessee? It was contended by the defendants that their possession was sufficient to bar not only the lessee but also the lessor, and that in any case the statue began to run as against the lessor on the 2nd January, 1895, and that under the Real Property Limitation Act 1874, s. 2 (R.S.O. c. 133, s. 6 (1)) the lessor had only six years (in Ontario five years) within which to bring the action because the term was "a particular estate," and the reversion must be regarded as "a future estate" within the meaning of that section; moreover, that by the surrender of the lease in 1885 the lease merged in the fee and that the defendants' possession, at all events from that time, was sufficient to bar the lessor. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.), however, came to the conclusion that the reversion was not a "future estate" within the meaning of s. 2, and that that expression was intended to apply to future estates expectant on the term created by the reversioner, but did not include the reversion itself, consequently that the lessor had twelve (in Ontario ten) years to bring his action. The surrender was also held not to have the effect of affording a point for the commencement of the statute because it had no operation as against persons who had acquired title as against the lessee: in other words, a lessee cannot put an end to a possessory title as against himself by a surrender of the term; consequently the statute did not begin to run against the lessor till the expiration of the lease by effluxion of time in January, 1895, and therefore that the plaintiff was not barred by the statute.

STATUTE OF LIMITATIONS—LEASEHOLDS—SETTLEMENT BY LESSEE—POSSESSION BY CESTUI QUE TRUST—ENCROACHMENT BY CESTUI QUE TRUST—ACCRETION TO HOLDING FOR BENEFIT OF LESSOR—PERSON CLAIMING THROUGH TRUSTEE—REAL PROPERTY LIMITATION ACT 1833 (3 & 4 WM. 4, C. 27) SS. 7, 25—(R.S.O. C. 133, SS. 5 (7), 30.)

In *East Stonehouse U.D. Council* v. *Willoughby* (1902) 2 K.B. 318, the facts of the case are somewhat complicated, and a full statement of them here would occupy more space than can well be

afforded. It must suffice to say that from the decision of Channell, J., the following propositions appear to be deducible, viz.: Where the cestui que trust of a leasehold estate encroaches on property adjoining the trust estate he does so primâ facie for the benefit of the lessor who will be entitled thereto on the termination of the demise; and, secondly, that a cestui que trust of a leasehold cannot acquire a title by possession as against his trustee to property encroached upon as being ostensibly, though not in fact, part of the trust estate; and that upon a surrender of the lease by the trustee the part encroached upon will vest in the lessor.

CRIMINAL LAW—CONSPIRACY—INDICTMENT AGAINST TWO OR MORE FOR CONSPIRING TOGETHER—PLEA OF GUILTY BY ONE—ACQUITTAL OF ALLEGED CO-CONSPIRATORS—WITHDRAWAL OF PLEA OF GUILTY BEFORE SENTENCE.

The King v. *Plummer* (1902) 2 K.B. 339, was a prosecution for conspiracy. Three persons were indicted, one of them pleaded guilty, the other two were tried and acquitted. The problem then arose, what was to be done with the defendant who had pleaded guilty, conspiracy being a crime which one man alone cannot be guilty of. The Court of Crown Cases Reserved (Lord Alverstone C.J., and Wright, Bruce, Darling, and Jelf, JJ.) unanimously came to the conclusion that the defendant who had pleaded guilty should have been allowed to withdraw his plea of guilty, and a conviction on such plea was therefore set aside.

LANDLORD AND TENANT—AGREEMENT TO LET—IMPLIED CONTRACT FOR QUIET ENJOYMENT BY LESSEE—BREACH.

In *Budd-Scott* v. *Daniell* (1902) 2 K.B. 351, the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) held that upon the letting of a house from year to year an implied undertaking by the lessor for quiet enjoyment arises from the mere relation of landlord and tenant; and whether or not there has been a breach of that undertaking is a question of fact in each case. The Court dissented from the view of Kay, L.J., that the word "demise" was necessary to create a contract for quiet enjoyment

CHOSE IN ACTION—EXECUTORY CONTRACT—ASSIGNMENT—RIGHT OF ASSIGNEE OF CONTRACT FOR SALE OF REVERSIONARY INTEREST TO SUE VENDOR—"LEGAL CHOSE IN ACTION"—JUD. ACT 1873 (36 & 37 VICT. C. 66) S. 25, SUB-S. 6—(ONT. JUD. ACT, S. 58 (6).)

In *Torkington* v. *Magee* (1902) 2 K.B. 427, the plaintiff sued for breach of a contract for the sale of a reversionary interest, of

which contract he was assignee, having duly notified the defendant of the assignment. It was contended by the defendant that the interest in such a contract was not "a legal chose in action" and therefore that the plaintiff as assignee had not the right to sue for damages for breach in his own name. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.), however, declined to accede to that contention and gave judgment in favour of the plaintiff, being of opinion that all choses in action assignable in equity came within the Jud. Act, s. 25 (Ont. Jud. Act, s. 58 (6)).

PRACTICE—THIRD PARTY PROCEDURE—COUNTER CLAIM—RIGHT OF PLAINTIFF WHEN MADE DEFENDANT BY COUNTER CLAIM TO ISSUE THIRD PARTY NOTICE —RULE 170—(ONT. RULE, 209).

In *Levi* v. *Anglo Continental* (1902) 2 K.B. 481, the Court of Appeal (Mathew and Cozens-Hardy, L.JJ.) have settled a point of practice, holding that when a plaintiff in an action is made a defendant by counter claim, he may issue a third party notice against a person from whom he claims relief over in respect to the matter of the counter claim.

EVIDENCE—PEDIGREE.

Wigley v. *The Solicitor to the Treasurer* (1902) P. 233. This was a suit in the Probate Division for a grant of administration to the estate of a deceased person. The only point at issue was the marriage of the parents of the intestate, and of this fact Jeune, P.P.D., accepted as evidence, in the absence of any official record, a Scotch marriage register of the year 1868 of the marriage of the intestate's brother in which, under the heading "Name, surname and rank and profession of father," appeared the names and descriptions of both parents of the bridegroom.

PROBATE—WILL—MISTAKE OF SOLICITOR IN DRAWING—WANT OF KNOWLEDGE AND APPROVAL BY TESTATOR—WORDS ELIMINATED FROM PROBATE.

Brisco v. *Baillie Hamilton* (1902) P. 234, is a case in which the Probate Court has gone a long way in correcting a mistake in a will. It appeared that the solicitor who drew the will was mistaken as to the extent of the testatrix's interest in certain land devised, and drew the will divising only "an undivided moiety of and in" the land. The draft was sent to the testatrix and returned by her with certain alterations in other parts and was then engrossed and duly executed. Jeune, P.P.D., however, came to the

conclusion that she did not really know and approve of the clause as drawn, and directed the words in question to be omitted from the probate.

PROBATE—WILL REFERRING TO FUTURE DOCUMENT—RE-PUBLICATION OF WILL BY CODICIL, EFFECT OF, AS REGARDS DOCUMENT REFERRED TO AS FUTURE IN WILL, BUT THEN EXISTENT.

In the goods of Smart (1902) P. 238. An attempt was here made to include in a probate of a will a memorandum referred to therein as containing a list of persons she might designate to whom she desired certain articles to be given. This book or memorandum was not in existence when the will was made, but was so when the will was subsequently re-published by a codicil. Barnes, J., held that the memorandum could not be included in the probate, though it would have been otherwise if the codicil, or the will as re-executed, had referred to the document as then existing.

PROBATE—WILL—DESTRUCTION OF PARTS OF WILL AFTER EXECUTION AND SUBSTITUTION OF OTHERS—EXECUTION—REVOCATION.

Leonard v. *Leonard* (1902) P. 243, is an instance, as Barnes, J., remarked, of the danger of a testator meddling with his will after he has once properly executed it. In this case the testator duly executed a will written on five sheets of paper. After its execution, he from time to time changed it by taking out pages and having them re-engrossed. These substituted pages he signed, as did also the witnesses. On his death his will was found to consist of five pages; the 3rd, 4th and 5th pages were part of the will as originally executed, but the 1st and 2nd pages, the judge found, had been substituted for the original pages. These two pages bore the signatures of the testator and witnesses. The destruction of the first two pages, the learned judge held, amounted to a revocation of the whole will, and the signature of the two substituted pages did not constitute an execution of those pages as a will, but was, as the judge held, merely intended for identification of those pages as part of the will which the testator intended should include the other three pages which were attached, but which for lack of re-execution of the whole document failed to take effect; and the testator after all his trouble was held to have died intestate.

VENDOR AND PURCHASER—VOIDABLE CONTRACT—ASSIGNMENT OF CONTRACT FOR SALE—PURITY OF CONTRACT—MONEY HAD AND RECEIVED.

In *Fleming* v. *Loe* (1902) 2 Ch. 359, a contract for the sale of lands having been entered into the vendor assigned the contract to the plaintiff and thereafter payments were made under the contract to the assignee. Subsequently the purchaser refused to carry out the contract on the ground of misrepresentation by the vendor, and the plaintiff then brought the present action for specific performance. Cozens-Hardy, J., found in the defendant's favour and dismissed the action. The defendant counter claimed to recover the money paid by him to the plaintiff. Cozens-Hardy, J., allowed this claim (1902) 2 Ch. 594 (noted ante p. 70), but the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) have reversed his decision on the ground that the payments made to the plaintiff had been appropriated by the plaintiff to the purposes for which under the contract they were paid and intended by the defendant, and therefore could not now be recovered by the plaintiff. The effect of the judgment in the case is, therefore, to rescind the contract for misrepresentation and leave part of the consideration therefor still in the vendor's pocket. This may be law, but it does not appear to be altogether justice, so far as one can judge from the facts disclosed by the report.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] RENAUD *v.* LAMOTHE. [May 15.

Will—Condition of legacy—Religious liberty—Public policy—Restrictions as to marriage—Education—Exclusion from succession.

In the Province of Quebec the English law rules on the subject of testamentary dispositions, and, therefore, in that province, a testatrix may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rites

of any church recognized by the laws of the province, and that the grandchildren should be educated according to the teachings of such church and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages or who may not have been educated as directed. Appeal dismissed with costs.

Lafleur, K.C., and *White*, K.C., for appellant. *Belcourt*, K.C., and *Lamothe*, K.C., for respondents.

Que.] C.P.R. Co. *v.* BOISSEAU. [May 16.

Negligence—Findings of jury—Operation of railway—Lights on train—Evidence.

A conductor in defendant's employ, while engaged in the performance of the duty for which he was engaged at the Windsor Station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train nor was there any person stationed there to give warning of the movement of the train.

Held, that by omitting to have a light on the rear end of the train the railway company failed in its duty and this constituted prima facie evidence of negligence. Appeal dismissed with costs.

Chase-Casgrain, K.C., and *Fred. Meredith*, K.C., for appellants. *Beaudin*, K.C., and *Mignault*, K.C., for respondents.

EXCHEQUER COURT.

Burbidge, J.] LUXFER PRISM COMPANY *v.* WEBSTER. [July 14.

Patent for invention—Prisms for deflecting light—Anticipation—Novelty.

A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses and shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements.

Semble, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass it would fail for want of novelty.

Robinson, K.C., and *Britton Osler*, for plaintiffs. *Oughtred*, for defendants.

Burbidge, J.] [Nov. 10.

CALGARY AND EDMONTON R.W. CO. AND THE CALGARY AND EDMONTON LAND CO. *v.* THE KING.

Railway—Land subsidy in the N. W. Territories—Mines and reservation in grant—53 Vict. c. 4, s. 2—Dominion Lands Act, s. 47.

Petition of right. By 53 Vict. c. 4, the suppliant railway company, among others, were authorized to receive a grant of Dominion lands of 6400 acres for each mile of its railway, when constructed. Under the provisions of section 2 the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees respectively of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th of May, 1890. On that date there were certain regulations in force, made the 17th September, 1889, under the provisions of the Dominion Lands Act, which provided that all patents for lands in Manitoba and the North-West Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with full power to work the same. Orders-in-council, authorizing the issue of patents for the lands in question to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in those orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889.

Held, that the regulation reserving mines and minerals applied to all grants of lands made under the provisions of the Act 53 Vict. c. 54, and that the omission of reference to such regulations in the orders-in-council authorizing patents to be issued did not alter the position of the suppliant railway company under the law.

Semble, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands.

Heilmuth and *Saunders*, for suppliant. *The Attorney-General of Canada*, and *Newcombe*, K.C., for the Crown.

Burbidge, J.] HARGRAVE *v.* THE KING. [Nov. 10.

Postmaster's salary—Claim for difference between amount authorized and that paid—Interest—Extra allowances.

Petition of right. By the Civil Service Act (R.S.C. c. 17, Sched. B.) a city's postmaster's salary, where the postage collections in his office

amount to $2c.ooo and over per annum, is fixed at a definite sum according to a scale therein provided, no discretion is vested in the Governor-in-Council or in the Postmaster-General to make the salary more or less than the amount provided. Notwithstanding the statute it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute. Upon his petition to recover the difference between the said amounts.

Held, 1. That he was entitled to recover.

2. That the provision in the 6th section of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by vote of Parliament for that purpose" was no bar to the suppliant's claim, even if it could be shewn that if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the Treasury who are entrusted with the safe keeping and payment of the public money, and not to the Courts of law. *Collins* v. *The United States*, 15 Ct. of Clms. 35, referred to.

3. That the supplian. was not entitled to interest on his claim.

4. That the provision in section 12 of the Civil Service Amendment Act, 1888, to the effect that "No extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy-head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration, and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back.

Travers Lewis, for suppliant. *Chrysler*, K.C., for respondent.

Burbidge, J.] [Nov. 17.

THE CORPORATION OF PILOTS *v.* GRANDEE.

Shipping—Pilotage dues—Liability of barge for same—R.S.C. c. 80, s. 58 —"Every ship which navigates."

This was an appeal from Quebec Admiralty District.

Held (affirming the judgment of the Local Judge for the Quebec Admiralty District) that the expression "every ship which navigates," found in section 58 of The Pilotage Act, R.S.C. c. 80, means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means and which must be moved or propelled or navigated by another vessel.

Chase-Casgrain, K.C., for appellants. *Pentland*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Osler, Maclennan, Moss and Garrow, JJ.A.] [Sept. 19.

SMITH *v.* HUNT.

Mortgage—Pretended sale under power—Fraud—Purchasers for value without notice—Knowledge of agent—Redemption—Acts of parties to fraud—Damage by.

On an appeal from the judgment of MEREDITH, C.J.C.P., 37 C.L.J., 694,

Held, that the defendant D. was not personally liable as he committed no wrong in taking the assignment of the mortgage, and in exercising the power of sale wrought no change in the plaintiff's rights, as the property in the hands of H., the purchaser who became trustee for R., was redeemable and unaffected by the sale: but

Held, also, that the defendant H. was personally liable as he was possessed of the legal title and had the legal power and control, and it was his sale and his act that prejudiced the plaintiff.

Judgment of MEREDITH, C.J.C.P., varied.

J. L. Murphy, for the appeal. *Riddell*, K.C., and *Redd*, contra.

HIGH COURT OF JUSTICE.

Britton, J.] ELLIOTT *v.* HAMILTON. [Oct. 30.

Bankruptcy and insolvency—Assignments and preferences—Judgment—Execution—Sheriff—Sale of land.

Under a writ of fieri facias a sheriff seized the interest of a judgment debtor in certain lands and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R.S.O. 1897, c. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the lands to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent.

Held, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void and the sheriff's vendee entitled to possession of the land.

Simpson, K.C., for plaintiff. *R. D. Gunn*, for defendant.

MacMahon, J.] STANDARD TRADING CO. *v.* SEYBOLD. [NOV. 10.

Costs—Security for—Præcipe order—Increase in amount.

Under rule 1208, the fact of the defendant having obtained a præcipe order for security for costs by which a definite amount of security is provided for, binds him to no greater extent than if he had in the first instance made a special application for security; in either case the defendant must shew facts disclosing a proper case for increased security; and no reservation in the first order of leave to apply again is necessary.

Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, $200 paid into Court in compliance with a præcipe order, was ordered to be increased by a bond for $600 or payment into Court of an additional sum of $300.

Bethune, for defendants. *Kidd*, for plaintiffs.

Divisional Court.] IN RE THOMPSON *v.* STONE. [NOV. 11.

County Court — Jurisdiction — Equitable relief — Setting aside chattel mortgage.

An appeal by the defendants from the judgment of MEREDITH, C.J.C.P., ante p. 596; O.L.R. 333, refusing an order for prohibition, was argued before a Divisional Court (FALCONBRIDGE, C.J.K.B., and STREET, J.) on Nov. 3rd, and at the conclusion of the argument was dismissed with costs.

John MacGregor, for defendants. *Swayzie*, for plaintiff.

Winchester, M.C.] [NOV. 11.

PARRAMORE *v.* BOSTON MANUFACTURING CO.

Evidence—Discovery—Production—Patent for invention.

In an action for damages for the infringement of a patent of invention the defendants pleaded among other defences that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced and

after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent.

Held, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented invention was manufactured in Canada under the patent, and the plaintiff having refused upon his examination for discovery to answer questions relating to these matters was ordered to attend for reexamination at his own expense.

The plaintiff was also ordered to make and file another affidavit of production and to produce for inspection statements received by him from such agents.

Kilmer, for defendants. *Bicknell*, K.C., for plaintiff. *Tilley*, for Kleinert Rubber Company.

Province of Nova Scotia.

SUPREME COURT.

In Chambers, Graham, J.] [Nov. 6.

MACDONALD *v.* ROBERTSON.

Common informer—Recovery of penalties.

This was a qui tam action brought by plaintiff as a common informer to recover from defendant, the Mayor of the town of Westvilie, the sum of $2300.00 penalties for acting as Mayor of said town under the provisions of the Towns Incorporation Act, R.S. (N.S., c. 71, s. 56), which provides a penalty of $20.00 for each time a person disqualified acts or sits as Mayor or Councillor.

The action was brought in the Supreme Court and after appearance defendant moved to dismiss or stay the action.

Held. 1. That the action should be stayed with costs.

2. That s. 23, s-s. 45 of the Interpretation Act, R.S.N.S., which provides that if no other mode is proscribed for the recovery of a pecuniary penalty or forfeiture imposed for the contravention of any enactment and the same cannot be recovered upon summary conviction, such penalty or forfeiture shall be recoverable with costs by civil action or procedure, did not apply to this case, and that "another mode is proscribed for the

recovery thereof" by s. 236 and the following sections of the Act which creates the penalty and that the proceedings should have been taken within the six months fixed in that act by information in the Stipendiary Magistrates Court of the town.

3. That the fact that the six months' limitation to a recovery by summary conviction had run did not enable the penalty to be recovered in this form of action, if this form of action could not be maintained before the six months had expired. The provision has reference to cases where there is no statutory provisions for summary procedure.

4. That as the policy of the Act is to have the penalties go into the revenue of the town, there is an onus cast upon a common informer to shew that he has the right to the penalty he claims.

5. That this application was the proper mode of taking advantage of the irregularity.

E. M. MacDonald, for defendant. *Mellish* and *Power*, for plaintiff.

ROACH *v.* SHEDIAC.

Malicious prosecution—Reasonable and probable cause—Particulars.

Action for malicious prosecution for theft. Par. 5 of the defence alleged "reasonable and probable cause." Application to the County Judge of the District (having authority under Order LIX. B.) to compel the defendant inter alia to give particulars of the "reasonable and probable cause." Plaintiff in his affidavit swore that he knew of none, as did another person, jointly arrested with the plaintiff on the same charge.

Held, that defendant ought not be required to furnish particulars of "reasonable and probable cause" when pleaded in an action for malicious prosecution. To do so would be to make a statement of his evidence.

(YARMOUTH, N.S., Nov. 18—SAVARY, Co. J.

The facts sufficiently appear in the judgment.

Bingay, K.C., for plaintiff. *E. H. Armstrong*, for defendant.

SAVARY, Co. J.—The plaintiff requires particulars under par. 5. In other words, he wants the defendant to be compelled to furnish him with the facts on which he intends to rely as evidence that he acted with "reasonable and probable cause." The only case cited on behalf of the application is *Roberts* v. *Owen*, 6 Times Law Reports 172, quoted in Annual Practice, and in Odger on Pleading, 4th ed., p. 181. The defendant denied that he had prosecuted without reasonable and probable cause; the plaintiff applied for particulars of the defendant's reasonable and probable cause, but this application was refused. The Court did not see its way to order particulars of a traverse of something, without the help of an affidavit. The text writer adds, "If the allegation in the defence had been drafted affirmatively, e.g., 'the defendant had reasonable and probable cause for prosecuting the plaintiff' an order for

particulars would perhaps have been made." See *Mure* v. *Kaye*, 4 Taunt. 34," which was a case where a private person had arrested the plaintiff on suspicion of felony, and it was held that the circumstances should be pleaded, and that using the term "suspicious" was not sufficient. I can see no analogy between that case and this; nor apparently did KILLAM, C.J., in the Manitoba case of *Rogers* v. *Clark*, 36 C.L.J., p. 646, where he defined how a defence of "reasonable and probable cause" should now be pleaded. Here the defendant does plead affirmatively, but the "perhaps" of the text writer can have no weight with a judge. To express the defence affirmatively or negatively seems to me to involve no change in its meaning or effect, and I will refer to the plaintiff's affidavits later on. The defendant's solicitor here in drafting affirmatively goes further in form than was laid down as necessary and sufficient by the learned Chief Justice Killam in *Rogers* v. *Clark*. Regarding the reasons given for setting aside the defence in that case in connection with what we are reminded of in the judgment of our Supreme Court in *Seary* v. *Sexton*, 28 N.S.R., p. 282, that there are cases where the prosecutor has to depend upon inferences from suspicious circumstances and information derived second hand, I see some reason for refusing this application.

The defendant might perhaps be excluded from the benefit of these inferences and information by having to give particulars of facts, or else give away his whole case by disclosing to the plaintiff long before the trial all the evidence on which it rests. In *Briton Medical Life Association* v. *Britannia Fire Association*, Weekly Notes, 1898, p. 245, Kay, J., said that he had to draw the line between requiring the plaintiffs to make a statement which would prevent the defendants being taken by surprise at the trial, and requiring them to make a statement of the evidence on which they rely. He had great difficulty in drawing that line, and he could not find any case to guide him. In *Spedding* v. *Fitzpatrick*, 38 Ch. Div., p. 410, the Court of Appeal modified an order made by Kay, J., Lopes, J., however declaring that he would not have made the order at all, because he considered it obliged the defendants to set forth their evidence.

Here I find myself quite unable to draw the line referred to by Lord Justice Kay, and there is admittedly no case to guide me. Can any such line be drawn in such a case as this? Certain facts and circumstances are evidence of "reasonable and probable cause."

I am asked for an order compelling the defendant to make a statement of those facts or circumstances, for nothing else can be meant by "better particulars" under par. 5; is not that to make a statement of the evidence on which he relies? It is certainly a very different thing from specifying acts of a dedication of a highway pleaded generally, or whether an alleged instigation by a corporate body to an official to do certain acts were verbal or in writing, with names of persons and dates, as in *Spedding* v. *Fitzpatrick*, and *Briton Medical Association* v. *Britannia Fire Association* respectively. The affidavit of the plaintiff is just what might have been expected from

anyone in his position. If innocent, as he must be presumed to be, circumstances well known to him would not seem to him to afford "reasonable and probable cause" for a criminal prosecution against him, although they might so appear to the defendant or to a judge. If the prosecutor relied on information derived from another, to compel him to disclose the name of the informant would be inexpedient for various reasons.

I think the practice of ordering particulars under Order XIX. has gone far enough, consistently with a fair administration of our system of jurisprudence, and should not be extended to such cases as the one before me. The application is therefore refused.

NOTE.—The rule against pleading the evidence is substantially the same in Nova Scotia and Manitoba.—REPORTER.

Province of British Columbia.

SUPREME COURT.

Full Court]. [June 14.

DUNSMUIR *v.* COLONIST PRINTING AND PUBLISHING CO.

Company—Memorandum incorporating agreement by reference—Preference shares—Meaning of—Special voting powers—Companies Act, 1890.

The provisions in the Companies Act of 1890 that the members and stockholders of a company incorporated under it shall be subject to the conditions and liabilities in the Act imposed and to none others, and that in the election of trustees each stockholder shall be entitled to as many votes as he owns shares of stock, do not render it ultra vires of a company to validly stipulate in its memorandum of association that a certain limited class of stockholders shall have the privilege of electing a majority of the trustees, and such stipulation may be contained in a document incorporated merely by reference in the memorandum of association.

Per DRAKE and MARTIN, JJ.: Preference stock means stock that has any advantage over other stock and is not confined to stock having a preference in regard to the payment of dividends, but

Per HUNTER, C.J., and MARTIN, J.: The preference stock mentioned in section 1 of the Companies Act Amendment Act, 1891, means stock having a preference in regard to the payment of dividends and not merely superior voting powers.

Gregory and *Luxton*, for appellants. *Peters*, K.C., and *Griffin*, for respondents.

Full Court]. PITHER *v.* MANLY. [June 30.

Debtor and creditor—Accord and satisfaction—Agreement to accept land in payment of debt—Solicitor's authority—Agent's authority.

One C., a commercial traveller in plaintiffs' employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C. in company with defendant inspected the land. C. wrote plaintiff submitting the proposition and giving a specific description of certain land. Plaintiffs wrote a solicitor instructing him to prepare a conveyance thereof. The solicitor finding that there had been a misdescription in the letter to plaintiffs accepted a conveyance of the land actually shewn by defendant to C.

Held, in an action on the note that plaintiffs were bound as by an accord and satisfaction and could not recover.

Judgment of IRVING, J., reversed.

Duff, K.C., for appellant. *Higgins*, for respondent.

Hunter, C.J.] HAYES *v.* THOMPSON. [July 10.

Municipal law—Saloons—Bar-rooms—Sunday closing by-law—Validity of—R.S.B.C. 1897, c. 144, s. 50, sub-s. 109, 110.

Appeal by way of case stated from a conviction by the police magistrate of Nanaimo, whereby the appellant was convicted under the Sunday Observance by-law, the offence being that of being found in the bar-room of the Crescent Hotel between 10 and 12 p.m. on Sunday contrary to the provisions of the by-law. By the Liquor Traffic Regulation Act, liquor is prohibited from being sold between 11 p.m. Saturday and 1 a.m. of the Monday following, and also during any other days or hours during which the place is to be kept closed by order of municipal by-law.

Held, setting aside the conviction.

1. A municipality has no power under section 50, sub-sections 109 and 110 of the Municipal Clauses Act, to pass a by-law closing any kind of licensed premises except saloons.

2. A municipality is not empowered by section 7 of the Liquor Traffic Regulation Act to pass any closing by-law, the intention of the section being to prohibit the sale during inter alia such hours as may be prescribed by the municipality under the authority of some other statute.

3. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad.

Duff, K.C., and *F. McB. Young*, for appellant. *C. H. Barker*, contra.

Full Court.] FRY *v.* BOTSFORD AND MACQUILLAN. [July 29.
MACQUILLAN *v.* FRY.

Adverse action—Certificate of improvements—Co-owner—Estoppel—Notice—Res judicata—Judgment in rem—Mineral Act, secs. 36-7 and amendments.

Appeal from a judgment of IRVING, J., on a point of law in which the question, "Does the decision of the adverse action of *Callahan* v. *Coplen* (1899) 6 B.C. 523, prevent these actions being maintained?" was answered by him in the negative.

Held, that a judgment in an adverse action under section 37 of the Municipal Act is not a judgment in rem.

One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements.

Per MARTIN, J., Section 37 does not apply to co-owners of the same claim, but to owners of conflicting claims.

Decision of IRVING, J., affirmed.

Bentley et al v. *Botsford and Macquillan* (1901) 8 B.C. 128, followed.

Peters, K.C., and *H. J. Duncan*, for appellants. *Martin*, K.C., for respondents.

Martin, J.] WARD *v.* DOMINION STEAMBOAT LINE CO. [Oct. 10.

Practice—Order XIV.—Cross-examination of plaintiff—Discretion to refuse—Rule 401.

On the return of a summons for judgment under order XIV. an application was made on behalf of defendant for leave to cross-examine plaintiff on his affidavit filed in support of the summons. No affidavit of merits had been filed on behalf of defendant.

Held, refusing the application that it is only in exceptional cases that defendant will be permitted to cross-examine plaintiff on his affidavit, and then only after defendant has filed an affidavit of merits.

J. H. Lawson, Jr., for plaintiff. *Higgins*, for defendant.

Martin, J.] ROBERTS *v.* FRASER. [Nov. 3.

County Court—Practice—Discovery—Oral examination.

Summons on behalf of defendant for an order for the oral examination of the plaintiff for discovery.

Held, dismissing the summons, that a County Court Judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories as provided in s. 126 of the County Courts Act.

Higgins, for the summons. *Powell*, contra.

Book Reviews.

Chronological Table of the Public General Statutes of the Parliament of Canada, from the Revised Statutes, 1887, to the Acts passed in the session of 1902, 2nd Edward VII., both inclusive, shewing which of them, or what parts of them, are in force on July 1, 1902, and by what legislation each of them, since being passed, has been affected. Prepared by J. G. A. Creighton, Law Clerk of the Senate of Canada. Ottawa: Printed by S. E. Dawson, Printer to the King's Most Excellent Majesty, 1902.

The title page above very fairly indicates the nature of this publication, prepared, as the compiler states, with a view to faciliate a revision and consolidation of the Statutes of Canada. We trust that it will be found useful for this purpose by the revisers, who have now been appointed. The form of the tables and the type used indicates clearly which Acts are now in force, and shews all their amendments to date, and which Acts have since been repealed and the dates of the repealing Acts.

As it will be several years before the revision is likely to be completed, this table will be found to be very useful for reference to those having occasion to ascertain the present state of the public Acts of Canada, most of which have been considerably amended or repealed during the sixteen years that have elapsed since the revision.

Canadian Railway Cases. By ANGUS MACMURCHY and SHIRLEY DENISON, of Osgoode Hall, Barristers at Law. Volume 1, Toronto: Canada Law Book Company, 32 Toronto Street. 1902.

This publication contains a collection of cases affecting railways recently decided by the Judicial Committee of the Privy Council, the Supreme Court and Exchequer Court of Canada and the courts of the provinces of Canada, with notes and comments.

The issuance of this volume marks an era in the line of specialization which is becoming so frequent. Railway law, moreover, is becoming more important in recent years, and this collection of decisions will be welcomed by those interested in this branch of the law. The design of the editors is to select typical cases upon questions frequently arising in relation to railways, arranging them under appropriate headings and adding occasional notes.

The present volume will be followed by others at intervals taking up the various branches of this important subject. A number of cases of importance hitherto unreported will be found, together with English translations of decisions given in the official report in the Province of Quebec. The notes, which are carefully written and evidently by one familiar with

the subject, group together decisions from England, the United States and Canada, and will be very helpful in giving an outline of the law as it stands on the various subjects discussed, and this matter cannot be found in the same convenient shape in any other work.

The experience which Mr. MacMurchy has had as one of the solicitors for some twenty years of one of our great railway companies, and his reputation as a railway lawyer, will give the profession confidence in his compilation. He has been fortunate in choosing as joint editor one who has not only had experience in railway law but is known to be careful and thorough. The publishers' part of the work is as usual well done.

Obituary.

On the 24th ult., one of the best known practitioners in the Province of Ontario as well as the oldest solicitor in the Dominion, died at the advanced age of 94 years. Joseph Clarke Gamble, K.C., was born in Kingston in 1807, being the youngest son of the late Dr. John Gamble, Surgeon to the Queen's Rangers, and a U. E. Loyalist. He received his early education under the late Dr. Strachan, afterwards Bishop of Toronto. He was called to the bar in 1832; elected a Bencher of the Law Society in 1840; and made a Q.C. in 1867.

Like most of the professional men of 1837 he was active in the loyalist cause and took part in the suppression of the rebellion of that date. It is a coincidence that Mr. Charles Durand, one of the few lawyers of the other way of thinking at that time, is now the oldest living member of the profession in Ontario. Mr. Gamble took a prominent position in the organization and as the legal adviser of a number of large public concerns. He was one of the promoters of and solicitor for the British America Insurance Co.; the Bank of Upper Canada; the Northern Railway Co.; the Toronto General Hospital, and other institutions. Mr. Gamble was a strong Tory of the olden type; a warm friend and ally of Bishop Strachan, Sir John Beverley Robinson and all the leading men of that day, and a well-known and highly respected citizen ever since. His eldest son was a captain in H. M.'s 17th Regiment and died in the Afghan campaign in 1878. Another son carries on the law business commenced by his father. His daughter is now the wife of I. F. Hellmuth, K.C., with whom he resided at the time of his death.

A warm hearted friend, a man of no mean intellectual attainment, and with a bright cheery manner, he will be missed by all who had the privilege of his acquaintance. He retained the use of his faculties unimpaired to the end.

Flotsam and Jetsam.

An energetic and youthful solicitor has just opened shop in an eligible and quarrelsome town of Sussex. Socially he is progressing, and his success socially is probably a precursor to his professional popularity. The name on his office reads "A. Swindler," Solicitor. A friend called and remarked, "Man alive, look at that sign! Put your name in full—Alexander, or whatever it is. Don't you see how it reads now?" "Oh, yes, I know; but I don't exactly like to do it." "Why not?" said the stranger; "it looks very bad as it is. What is your Christian name?" "Adam."

"You see" said the client to the lawyer, "a year ago we lived together, my son Bill and I. Across the way lived widow Foster and her daughter Mary. Well, sir, I married Mary because she was good-looking. My son Bill married the widow because she had heaps of money. Now, perhaps you can tell me whether the old lady is my mother-in-law or my daughter-in-law." But the lawyer couldn't—at least not just then. The problem had struck him all in a heap. He looked wild-eyed, his brain was reeling and he was speechless. "By the way," said the client, disappointedly, as he took up his hat and prepared to go, "since the double wedding a child has been born to each couple. Can you tell me what relation the two children are to each other?" But the lawyer couldn't.

UNITED STATES DECISIONS.

EMBEZZLEMENT BY ATTORNEY HAVING LIEN.—A peculiar question was raised in behalf of an attorney charged with embezzlement by a contention that, as the funds which he was charged with embezzling were subject to a lien for compensation, he could not be prosecuted for embezzlement of the funds so long as his compensation remained unpaid. The case was one in which an attorney received by check the sum of $20,500, which it was claimed by the prosecuting witness he was to use first for the payment of about $12,000 of the client's debts, and the balance was to belong to the attorney upon his conveyance of certain mining interests. The prosecution was for embezzlement of these funds by converting them to his own use without complying with the conditions on which the funds were received. There was a claim on the part of the defence that the attorney was entitled to the sum of $2,000 for services as attorney, and that he had a lien on these funds therefor, which must be satisfied before he could be charged with embezzling the funds. This raised an unusual question, but

the court did not discuss or refer to it, but by implication held that it was not well taken, as the conviction was affirmed. The case is that of *State* v. *Hoshor* (Wash.) 67 Pac. 386.—*Case and Comment.*

NEGLIGENCE.—A judgment for plaintiff in an action for injury to his vehicle through negligent obstruction of a highway is held, in *Reilly* v. *Sicilian Asphalt Pav. Co.* (N.Y.) 57 L.R.A. 176, to be no bar to another action for injury to his person, arising out of the same accident.

A carrier is held, in *Homans* v. *Boston Elev. R. Co.* (Mass.) 57 L.R.A. 297, to be liable for nervous shock to a passenger, resulting from a jar to the nervous system, which accompanies a blow to the person, caused by being thrown from the seat through the carrier's negligence; and it is held not to be necessary to shew that the shock is the consequence of the blow.

The negligent act of a foreman with general control and authority to employ and discharge workmen, in ordering a subworkman upon an elevator, and himself operating the elevator with negligence to the workman's injury, is held in *Swift & Co.* v. *Bleise* (Neb.) 57 L.R.A. 147, not to be the act of a fellow servant, but of a vice-principal.

Injury received by a young man seventeen years old while helping brakemen, at their request, to load a piano, is held, in *Cincinnati, N. O. & T.P.R. Co.* v. *Finnell* (Ky.) 57 L.R.A. 266, to be within the rule which exempts the master from liability to one who is injured while helping his servants at their request, by reason of their negligence.

ELECTRICAL USES.—An employee of a telephone company, who attempts to string wires over those of an electric light company, is held in *Mitchell* v. *Raleigh Electric Company* (N.C.) 55 L.R.A. 398, to have a right to presume that the latter company has complied with an ordinance requiring its wires to be insulated, and to be bound to look for patent defects only.

NEGLIGENCE.—A boy twelve years old who is injured by collision with a slowly moving team in a public street is held, in *Gleason* v. *Smith* (Mass.) 55 L.R.A. 622, to have no right to recover, where, without care or precau-

tion to avoid collision with vehicles, he is using the street as a playground, and comes in contact with the team in attempting to catch another boy, although the driver is negligent in having his attention diverted from his horses to a vehicle behind him.

DAMAGES FOR MENTAL SUFFERING.—Damages for mere mental suffering caused by failure to promptly deliver a telegram are held, in *Connelly* v. *Western Union Teleg. Co.* (Va.), 56 L. R. A. 663, not to be recoverable either at common law or under statutes imposing penalties for failure to promptly transmit and deliver telegrams, authorizing the recovery of damages sustained by reason of the violation of the statute, and making telegraph companies liable for special damages occasioned in transmitting or delivering despatches, in determining the quantum of which grief and mental anguish may be considered.

DYING DECLARATIONS.—Dying declarations of a woman whom defendant is charged with killing by means of an abortion are held, in *Worthington* v. *State* (Md.), 56 L. R. A. 353, to be admissible in evidence where they were accompanied by constant affirmation of expectancy of death, and begging the doctor to save her, as she was dying, although he held out hope of recovery. An instrument prepared by an injured person in full possession of his mental faculities and in confident hope of recovery, to be signed as a dying declaration in the event of subsequent conviction of fatal termination of the injury, is held, in *Harper* v. *State* (Miss.), 56 L. R. A. 372, not to be admissible in evidence as a dying declaration, although executed under conviction of death. An extensive note to these cases reviews all the other authorities on dying declarations as evidence.

MUNICIPAL LAW.—The death of a city employee from smallpox contracted in tearing down a smallpox hospital, of the danger from which he receives no warning, is held, in *Nicholson* v. *Detroit* (Mich.), 56 L. R. A. 601, not to render the city liable, where the work is done through a board the duties of which are statutory, and which is required to provide smallpox hospitals in case of emergency, since the city's act is a governmental function.

ANALYTICAL INDEX

Of the Contents of this Volume.