"IT IS ALL OVER, BUT I THINK I HAVE DONE MY DUTY."

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EDWARD, THE PEACEMAKER.

The Canada Gazette of May 9th contained the following announcement:—

"His Excellency the Governor-General has received with the deepest distress the news of the death of His Majesty King Edward VII., communicated to His Excellency in the following cable from the Right Honourable the Secretary of State for the Colonies:—

"LONDON, May 6th, 1910.

"Profoundly regret to inform you His Majesty The King passed away at 11.45 p.m. to-night.

"CREWE."

Into the many interesting details of the life and death of our late Sovereign, it is not our province to enter; suffice it for us to refer to some features of his character, and some events in his career, which shew how he gained that prominence among the great men of his day, and that influence over those who had the ruling of the nations in their hands, which, always exerted for good, gained him a title never before accorded to any earthly Sovereign. And that title was gained not by any ostentatious display of power, by the threat of the mailed fist, or the calling out of fleets or armies, nor by diplomatic manœuvering, nor even by the exercise of any extraordinary mental capacity. It came as the result of straightforward dealing, with no ulterior personal object, by a man who knew what he was talking about, whose gift of good common sense was aided by an experience in the public affairs, not only of Europe, but of the world at large, and a personal knowledge of the men by whom those affairs were conducted, such as no other man in public life possessed, or had the means of acquiring.

European statesmen knew that when advice was offered them it was given them for their own good, that no selfish scheme lay behind it, but they knew also that if they ventured to stray from the path of political rectitude there was a power supporting that kindly advice, and those words of wisdom, it would be not well for them to have to reckon with. They knew how stern that friendly visage could become, how quickly that open hand could close, and how hard that hand could strike if any attempt was made to presume upon its usual attitude of peace and goodwill. They knew that, however peaceful the inclination of the King might be, and however unwilling his people might be to engage in hostilities, the warlike instinct dormant there would brook no wrong, and suffer no injustice.

Thus it came about that on many occasions when the peace of Europe was threatened the well-timed and friendly mediation of the British Sovereign averted what might have led to terrible consequences.

But no monarch, however gifted, can be powerful abroad who is not loved and respected at home. And at home the King was both loved and respected. The great secret of his success lay in the mutual confidence which existed between him and his people. The King knew and trusted his people, and the people knew and trusted their King. They loved him as a man because he sympathized with them in their sorrows and rejoiced with them in their happiness. They respected him as a King for his wisdom and moderation. They felt that the affairs of state were safe in his hands, and that, however slight his actual power might be, it would always be exercised for the good of the people at large, and not for the benefit of any class, however influential.

One great element in the King's success was his versatility, and the tact which enabled him always to say and do the right thing. He never made the stupid mistakes that very clever people often do. Nor did he ever allow his kindly and affable demeanour to be taken as allowing any undue familiarity. Even as Prince of Wales his dignity was as carefully maintained as

when he ascended the throne. The following is an instance of the ready wit with which in gentle terms he rebuked an attempt to presume upon his good-nature. At a great gathering at Marlborough House a celebrated London tailor was one of the guests. Observing the nature of the assembly a certain person remarked to the Prince that his guests were not of a very exclusive character. "Well, Mr. P.," the Prince replied, "you know they could not all be tailors!"

At his country house at Sandringham, the King was a plain country gentleman, interested in his crops and his cattle, competing on even terms with other farmers at the shows, pleased when his sheep or his cattle were prize-winners, but ready to congratulate his fellow competitors when they were successful. He was there known as a good neighbour and a liberal landlord.

When staying abroad, or visiting, as he frequently did, those of his subjects with whom he was on terms of personal intimacy, he was a fine gentleman in the truest sense of the term—better qualified, indeed, to be called the "first gentleman in Europe" than was one of his predecessors to whom that title was given. Free from ostentation,—as a true gentleman is,—dignified, courteous, and self-respecting, he took an interest in whatever was going on, but never forgetting, in pursuing his own amusements, the claims which his subjects had upon his time, his sympathy and assistance.

Upon all state occasions he was "every inch a King." No personal inconvenience prevented him from upholding the dignity of the Crown, and representing in the fullest degree the grandeur of the state of which he was the titular head.

Not the least among his titles to respect was the decorum of his domestic life, and the care with which his children were so brought up as to fit them for the high positions to which they were born—a care for which the nation has now much reason to be thankful.

To his love for, and participation in racing, that form of sport so popular among all classes of Englishmen, to his reputa-

tion as a shot, to his prowess as a yachtsman, we need only refer as evidences of his many-sided character, and to which much of his personal popularity was owing.

Though never tried in war, albeit trained in both branches of the service, the King more than once gave evidence of that courage in the face of death which became his race and his lofty position, and at no time was his courage more nobly displayed than when in his last moments, knowing that his end was near, he calmly went on with his work till, when compelled at last to give up the struggle, he said with almost his latest breath, "It is all over, but I think I have done my duty."

The treaty with Japan, the friendly relations established with France, our hereditary foe, the good understanding brought about with Russia on many matters of common interest, and the constant endeavour to check the growing hostility to Germany, are among the events in the reign of the Peacemaker with which his name will be always associated. In the United States the King was always held in high esteem, and in no country has his death been more sincerely lamented, and his great qualities as a man and a ruler more truly appreciated.

Throughout the Empire, from the great dependencies in America, Asia, Africa, and Oceania, and from all the remote corners of the world, where one is constantly stumbling upon some unthought-of bit of British territory, has come a universal wail of grief at this sudden end of a glorious career, and the loss of one who was a personal friend of all his subjects.

At home, while for a moment the sounds of party strife have been hushed, it is keenly felt that when the contest is renewed how much will be missed that influence, always wisely employed, which might have done much to save from serious injury that constitution now so fiercely assailed; its value none more highly appreciated, its working by none better understood than by him who was its head. Nor did any one know better the temper of the British people nor discern more clearly the forces by which it would be governed. For guidance in these troublous times all

moderate men were looking with confidence to the King, and by them the loss of that guidance will be sorely lamented.

We cannot conclude this imperfect tribute of respect to our late most gracious Sovereign in words more fit than these we quote from a London journal: "The first of Englishmen has passed away—the monarch whose name is written among the highest in the roll of England's long line of Sovereigns, a patriot, a statesman, a governor, well fitted by the vigour of his intellect and the engaging charm of his temperament to be the actual as well as the ceremonial chief of the peoples he loved so well and of the Empire he ruled with such memorable success."

From the successor to the throne there is good reason to think that much may be hoped for. His education, his training, his surroundings, have been such as to fit him for his new responsibilities, and, though he may lack some of the qualities which endeared his father to the people, and has not the experience which only years can give, he has shewn a capacity for affairs which gives every prospect of successful attainment.

"THE KING IS DEAD—LONG LIVE THE KING."

DEFECTIVE SIDEWALKS AND ROADWAYS.

Actions against municipalities for injuries caused by defective sidewalks or roadways, are fairly frequent, and it is a class of actions which the legislature in its wisdom has thought fit should be tried without the assistance of a jury, possibly from the fear that the sympathies of a jury might prevent them from viewing the facts proved before them in a fair and reasonable way. By section 104 of the Judicature Act therefore it is expressly provided that "all actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets or sidewalks, shall be tried by a judge without a jury."

In a recent case of *Brown* v. *Toronto*, an attempt was made

very materially to limit the effect of this section by confining its operation to cases of simple non-feasance. In that case the plaintiff alleged that the defendants took up a sidewalk, and by not filling in, a hole was left, in consequence of which the plaintiff tripped and was thrown on to the roadway, sustaining injury thereby. No notice of the accident was alleged to have been given as required by s. 606 of the Municipal Act. Nor had the action been commenced within the time limited by that section.

The plaintiff filed a jury notice, and on a motion to strike it out as being contrary to the provisions of s. 104, it was contended that the wrong alleged on the part of the defendants was not mere non-feasance, but misfeasance in that the defendants removed the former sidewalk and actually created the bad state of repair. The Master in Chambers, however, came to the conclusion that the case was within the statute, and struck out the notice; on appeal to the Chancellor the notice was restored, because, as he thought, not only the method of trial, but also the question of whether the plaintiff could maintain the action at all, was incidentally involved by the determination of the question whether or not it was a case of misfeasance or non-feasance, and therefore, in his opinion it was better to leave the question open till a later stage.

From this decision an appeal was had, by leave, to the Divisional Court (Britton, Teetzel and Riddell, JJ.), and the order of the Chancellor was reversed and the order of the Master in Chambers was restored. Mr. Justice Riddell dealt very fully with the question, and came to the conclusion that s. 104 is not confined to cases of mere non-feasance, but in effect applies to every action for injuries sustained through "non-repair" of streets or sidewalks, however occasioned, where it is sought to make a municipality liable, and in his opinion "non-repair" means "a condition" quite irrespective of the question of how it has been brought about. At the same time the Divisional Court did not agree with the suggestion that the determination that the case was triable without a jury, necessarily involved the conclusion that the action was one within s. 606 of the Municipal Act.

This it may be observed settles a very important point of practice and virtually determines that all actions brought against municipal corporations for damages in respect of injuries sustained through defective streets or sidewalks, however the defect may have arisen, whether by non-feasance or misfeasance of the corporation or others are triable by a judge without a jury.

LEGAL PRESUMPTIONS.

The Sunday Chronicle, in a mildly sarcastic sketch depicting a frivolous scene at the Dieppe Motor Races, passes defamatory remarks on "Artemus Jones, a churchwarden, married, and residing at Peckham." Mr. Artemus Jones, a barrister, who is neither a churchwarden nor married nor a resident of Peckham, brings an action for libel and is awarded very heavy damages. (*Jones* v. *E. Hulton & Co.*, L.R. [1900] 2 K.B. 444 *et seq.*, and L.R. [1910] A.C. 20 *et seq.; Wing* v. *London General Omnibus Co.*, L.R. [1909] 2 K.B. 652.) The House of Lords, upholding the decision of the Court of Appeal which (Lord Justice Moulton dissenting) had affirmed the judgment of the King's Bench, decides unanimously in favour of the plaintiff.

It was stated in evidence and admitted that neither the writer of the article nor the publishers knew or had heard of the plaintiff, and that they could have had no intention to libel or injure Mr. Artemus Jones, the barrister. The latter proved that the article was considered by a number of people to refer to him and that it did him a great deal of damage.

There were altogether (in the Courts of First Instance, of Appeal, and the House of Lords) seven judges for the plaintiff, Moulton, L.J., being the only one against him. Yet when we read the learned Lord Justice's striking judgment with its precise reasoning and its searching analysis of authorities, to shew that there can be no libel in the absence of libellous intent (animus injuriandi), which must be directed against the plaintiff

and so consciously present in the defendant's mind, we are strongly inclined to be convinced. Is there a flaw in Lord Justice Moulton's exposition of the law, and if so, where does it lie? We do not, I submit, get a direct answer from the other judgments.

As the judges arrive at their convergent result on more or less divergent routes, we might briefly review their reasoning. The Lord Chief Justice (p. 452) says: "If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out. It is in my opinion clearly established by authorities that the question whether the article is a libel upon the plaintiff is a question of fact for the jury—and in my judgment this question of fact involves not only whether the language is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff."

His Lordship thus apparently takes the view that the bare fact of defamatory language being used which hits the plaintiff would be sufficient to render defendant liable.

Otherwise Lord Justice Farwell (p. 480*ff*): "So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt or ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff. . . Negligence is immaterial on the question of libel or no libel. The recklessness to which I have referred, founding myself on *Derry* v. *Peek*, is quite different from mere negligence."

We see that Lord Justice Farwell postulates that which the civilians would, I believe, term culpa lata on the part of the defendants, and that the mere act and its consequences would not satisfy him.

The judgments of the Lords of Appeal are brief. The Lord Chancellor lays down this proposition: "His (the plaintiff's) intention—is inferred from what he did," but modifies it afterwards by saying: "The jury was entitled to think—that some ingredient of recklessness or more than recklessness entered into the writing and the publication of this article."

Lord Atkinson concurs with the Lord Chancellor's judgment and also "substantially" with the judgment of Farwell, L.J.: "I think he has put the case on its true ground and I should be quite willing to adopt in the main the conclusions at which he has arrived."

Lord Gorell concurs with the Lord Chancellor's judgment and with the observations Lord Atkinson had made upon the judgment of Farwell, L.J.

Lord Shaw, of Dunfermline, concurs in the observations made by the Lord Chancellor and also with those made by the Lord Chief Justice.

Having regard to all these utterances I think we shall not err if we draw this conclusion, that in cases like the present an irrefutable inference is raised either of culpa lata or of dolus, and that thereby the conditions of the law of tort are satisfied. This inference (præsumptio juris et de jure, a fiction against which there is no defence) was left out of consideration by Lord Justice Moulton, and that, we must assume, was the flaw in his judgment.

But the question arises: Was, in these circumstances of the law, the verdict of the jury at all necessary, and, if so, was Mr. Justice Channell's summing up adequate? Should he not have directed them to say whether in their opinion the defendants published those statements recklessly or mala fide?

Another recent case implying or suggesting the question of a legal presumption, though of a different kind (præsumptio juris), is *Wing* v. *London General Omnibus Company*. A motor omnibus on a wet road skids, and a passenger incidentally gets injured. No negligence as regards the condition, management or control of the omnibus is alleged. Plaintiff's counsel ad-

vances the maxim res ipsa loquitur. Lord Justice Moulton discusses the latter in his judgment. He takes the view that the principle only applies "when the direct cause of the accident or so much of the surrounding circumstances as was essential to its occurrence were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a primâ facie responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road." I observe that Moulton, L.J., was the only judge who entered into this question. The other judges did not even refer to it, and with due respect I venture to say, rightly so. In my opinion that maxim is altogether inapplicable to the present case, though for some other reason than that the case related to traffic.

The maxim res ipsa loquitur, the origin of which I am unable to trace, and which I believe is absent from Continental jurisprudence, is apparently only an expedient which the sense of equity in our courts has created, as a relief against the rigid principle affirmanti non neganti incumbit probatio for cases in which, to use the language of Pollock, C.B., in *Byrne* v. *Bondle*, 2 H. & C. 722, "it would have been preposterous to put upon the plaintiff the obligation to prove the defendant's negligence." In other words, some fact or facts which under ordinary circumstances would have to be proved by the plaintiff, in order to complete the chain of his evidence, would in such cases have to be proved or disproved by the defendant.

Now in the present case there were no facts to be proved. All the essential facts were absolutely clear and beyond dispute, and no shifting of the onus probandi on the basis of that maxim was needed or indeed possible. The only question was: Does the user of a motor omnibus on a wet road constitute negligence (or a nuisance)? Such a question, however, is not in the nature of a fact but in that of an opinion formed on facts (for judge or jury, as the case may be, to pronounce). For

this reason I believe the maxim cannot apply and should not have been dragged in.

Whether Lord Justice Moulton's obiter dictum, in so far as on principle it would exclude all cases of traffic from the operation of that rule of evidence, will be adopted, remains to be seen.—*Law Magazine and Review.*

The origin of a well-known "dog Latin" phrase may not be very well known, and for the information of those who do not know it, and to recall it to those who do, we give the following extract from a book entitled "Authentic Letters from Upper Canada," by T. W. Magrath, published in Dublin, 1833. The scene is laid in York, now Toronto. Mr. Magrath writes as follows:—

"A writ against a debtor liable to the law of arrest, was put into the hands of one of our sheriffs—a fat and unwieldy person—to whom the debtor was pointed out, and finding himself hard pressed by the sheriff (who was well mounted) made off for a morass, into which he dashed, laughing heartily at his pursuer. Now the puzzle to the sheriff was how to make a proper return on the writ—he could not return "non est inventus," for he had found his prey; he could not return "cœpi," as he had not succeeded in the capture. So after much deliberation, he made out the return "non est comeatibus in swampo."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COMPANY—SHARES—EXECUTORS—PROBATE—TRANSFER BY EXECUTORS TO ONE OF THEMSELVES—NOMINAL CONSIDERATION—BREACH OF TRUST—NOTICE—REVOCATION BY ONE TRANSFEROR—REFUSAL TO REGISTER TRANSFER—DIRECTOR'S QUALIFICATION.

Grundy v. *Briggs* (1910) 1 Chy. 444 was an action against three directors of a limited company to restrain the defendants from preventing the plaintiff from acting as a director, and to rectify the register of shareholders by registering him as the owner of fifteen shares in the following circumstances. One James Grundy died entitled to 112 shares of the stock of the defendant company, he made a will appointing the plaintiff and four other persons his executors. The probate of the will was produced to the company and the executors were registered as the owners of the shares. Subsequently the plaintiff was elected director, and with the object of qualifying him the executors executed a transfer to the plaintiff of fifteen shares for a nominal consideration. Before this transfer was registered one of the executors notified the company that he withdrew his signature, and that the transfer was a breach of trust and requested the company not to register it. The directors of the company thereupon refused to register the transfer, and subsequently informed the plaintiff that he had ceased to be a director by reason of his not having acquired the necessary qualification, and thenceforward excluded him from the directors' meetings. Eve, J., who tried the action, held that the plaintiff was entitled to succeed, and that the refusal to register the transfer was not justifiable, because the company were not warranted in gratuitously assuming that the transfer necessarily involved a breach of trust, or, in the absence of any specific reason being given for the withdrawal of the signature, in refusing to register the transfer. He held that the proper course for the directors to take would have been to notify the objecting executor that they would register the transfer unless within a specified time he obtained the order of the court prohibiting its registration. He therefore held that the plaintiff was entitled to have the transfer registered. But in

his opinion, this point was immaterial to the plaintiff's right to act as director, because he also held that as a joint holder of the testator's shares the plaintiff was sufficiently qualified.

LESSOR AND LESSEE—COVENANT NOT TO ASSIGN WITHOUT LEAVE—LEAVE "NOT TO BE UNREASONABLY OR ARBITRARILY WITHHELD" — UNREASONABLE CONDITION — DECLARATORY JUDGMENT — COSTS.

Evans v. *Levy* (1910) 1 Ch. 452. In this case the plaintiff was assignee of a lease which contained a covenant not to assign without leave of the lessors, but such leave was not to be unreasonably or arbitrarily withheld. The plaintiff desired to assign the term to his wife. The defendants, the lessors, refused to consent unless the plaintiff entered into a covenant to pay the rent during the residue of the term and perform all the covenants of the lease on the part of the lessee as if he had been a party thereto. Eve, J., held that this was an unreasonable condition to impose, and made a declaratory order that the plaintiff was entitled to assign the lease without the license of the lessors and free from conditions, but as no relief was sought against the lessors he made the order without costs. The learned judge expresses the opinion that having regard to the fact that the proposed transferee was a married woman it would not have been unreasonable to have made it a condition that the husband should give a covenant as surety for the payment of the rent by his wife during her tenancy.

LIFE ASSURANCE COMPANY—LIQUIDATION—TRANSFER OF BUSINESS TO ANOTHER COMPANY—DEPOSIT WITH GOVERNMENT—RIGHTS OF POLICY-HOLDERS—(R.S.C. c. 34, s. 12).

In re Life & Health Assurance Association (1910) 1 Ch. 458. In this matter a life insurance company having made the usual deposit with government for the security of policy-holders, went into voluntary liquidation, and in the course of the liquidation proceedings its current business was agreed to be transferred to another company, which, under the agreement, assumed all liability to the current policy-holders. An application was then made to Eve, J., by the liquidators for the return to them of the government deposit, but he held that unless all the policy-holders of the company released and abandoned their claims against the

company and the deposit, and accepted the liability of the purchasing company, the deposit ought not to be ordered to be returned to the company. The application was therefore ordered to stand over with leave to amend.

PARTNERSHIP—NOTICE OF DISSOLUTION—PARTNERSHIP TERMINABLE BY MUTUAL AGREEMENT—PARTNERSHIP ACT, 1890 (53-54 VICT. C. 39), SS. 26, 32.

In *Moss* v. *Elphick* (1910) 1 K.B. 465, a Divisional Court (Darling and Pickford, JJ.), determined that when by the terms of a partnership it is to be terminable by mutual agreement, it is not open to either partner to put an end to it by notice, notwithstanding that s. 26 of the Partnership Act, 1890, provides that a partnership for "no fixed time" may be dissolved by notice, and s. 32 provides that "subject to any agreement" a partnership for "an undefined time" may also be dissolved by notice. Here the agreement of the parties was held to control the construction of both sections.

RAILWAY COMPANY—CARRIER—UNPACKED GOODS—OWNER'S RISK—REASONABLE CONDITION.

Sutcliffe v. *Great Western Ry.* (1910) 1 K.B. 478. In this case the plaintiffs had for many years consigned wooden cisterns, lined with lead and fitted with a cross bar, and lever, which projected above the edge of the cistern, for carriage by the defendants unpacked, and at the defendants' risk. Many of the cross bars and levers having been broken in transit, in 1907 the defendants notified the plaintiffs that thereafter the defendants would only accept them unpacked at the plaintiffs' risk, except on proof that damage, if any, arose from the wilful acts of the defendants' servants. The plaintiffs claimed that the requirement of packing, and the refusal to accept the cisterns unpacked except at the plaintiffs' risk, were unreasonable conditions, and the County Court judge so held, and his decision was affirmed by the Divisional Court (Darling and Jelf, JJ.), but the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) came to the conclusion that, in the circumstances, the conditions were reasonable and just, and the orders of the courts below were therefore reversed.

been dismissed with costs, and the respondent claimed to be allowed, as part of his costs of appeal, copies of documents which had been used in the appeal, but which had been prepared for and been used on a prior appeal to a Divisional Court. The taxing Master disallowed these items and, on appeal, Lawrence, J., held that the Master was right, and the Court of Appeal (Williams and Farwell, L.JJ.) affirmed the decision of Lawrence, J.

WORKMEN'S COMPENSATION — WORKMAN EARNING MONEY IN ANOTHER CHARACTER—COMPENSATION.

In *Simmons* v. *Heath Laundry Co.* (1910) 1 K.B. 543 the plaintiff was employed in a laundry, and in the course of her employment she sustained an injury. She earned 7s. a week in the laundry and also gave music lessons, by which she earned 3s. a week, and in fixing compensation the question arose whether her earnings in the latter capacity could be taken into account, the amount of compensation being regulated by the earnings of the injured person. The County Court judge held that only the earnings in the laundry could be taken into account, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) affirmed his decision.

DEFAMATION—SLANDER—WORDS ACTIONABLE PER SE—INNUENDO —CHARGE OF CRIMINAL OFFENCE—PUNISHMENT—LIABILITY TO ARREST.

Hellwig v. *Mitchell* (1910) 1 K.B. 609 was an action of slander. The statement of claim alleged that the defendant, who was proprietor of a hotel, had said to the plaintiff, "I cannot have you in here; you were on the premises last night with a crowd, and you behaved yourself in a disorderly manner and you had to be turned out," and upon the plaintiff protesting that the defendant had made a mistake, the defendant said, "Oh, no, I have not made any mistake, and there are plenty of people here now who saw you and the disorderly way in which you behaved; you have to go out at once; and if you don't go I shall call in the police and have you turned out." The innuendo charged was that the plaintiff had committeed a breach of the peace and refused to quit licensed premises, and as thereby having committed criminal offences. No special damage was alleged. On a motion

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by way of demurrer to the statement of claim, Bray, J., held that the words charged imputed that the plaintiff had been guilty of an offence punishable by fine only, which, though it involved a liability to summary arrest, nevertheless afforded no cause of action in the absence of any special damage, and the action therefore was dismissed.

LANDLORD AND TENANT—LEASE TERMINABLE ON CONTINGENCY—NOTICE OF INTENTION TO SURRENDER—ACCEPTANCE OF SURRENDER UNDER MISTAKE OF FACT—LIABILITY OF TENANT FOR RENT NOTWITHSTANDING SURRENDER.

Gray v. *Owen* (1910) 1 K.B. 622 was an action by a landlord to recover rent in the following circumstances. The plaintiff let a house to the defendant, who was a naval officer, subject to a proviso "that should the tenant be ordered away from Portsmouth by the Admiralty he may determine this agreement by giving the landlord one quarter's notice in writing." The Admiralty in February, 1908, did order the defendant away, but subsequently at his request cancelled the order. On 25th March, 1908, he gave notice of his intention to quit, and the plaintiff under the belief that the defendant was under orders of the Admiralty to leave Portsmouth accepted the notice, and in June, 1908, received possession and advertised the house for sale. Subsequently the plaintiff discovered the true facts and brought the action to recover the rent from June to December, 1908. The County Court judge who tried the action thought that as the defendant had been ordered to leave Portsmouth he was entitled to give the notice notwithstanding the subsequent cancellation of the order, and that the plaintiffs' acceptance of possession effected a surrender in law of the term, he therefore dismissed the action, but the Divisional Court (Bucknill and Phillimore, JJ.) reversed his decision, being of the opinion that the defendant in giving the notice after the Admiralty order had been cancelled, was guilty of a breach of contract, and though the acceptance of possession by the plaintiff had worked a surrender of the term, and relieved the defendant from liability for rent; yet that fact did not preclude the plaintiff from recovering for the breach of contract, and the measure of damages therefor was the amount of rent which he had lost. The appeal was therefore allowed and judgment given for the plaintiff for the amount claimed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] [March 11.

SAINT MARY'S YOUNG MEN'S TOTAL ABSTINENCE SOC. *v.* ABLEC.

Lease—Construction of covenant—Taxes—Partial exemption.

A society owned a building worth about $20,000 which, by the statute law of the province, was exempt from municipal taxation so long as it was used exclusively for the purposes of the society. A portion of the building having been used at intervals for other purposes, it was assessed at a valuation of $1,000, and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of the society, and the valuation for assessment was increased to $10,000. The lease contained this covenant: "The said lessees . . . shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)." The society was obliged to pay the taxes on such increased valuation and brought action to recover the amount so paid from the lessees.

Held, FITZPATRICK, C.J., and ANGLIN, J., dissenting, that the taxes so paid were "regular and ordinary taxes" which the lessors had agreed to pay as theretofore and the lessees were not liable therefor on their covenant. Appeal dismissed with costs.

O'Connor, for appellants. *Newcombe,* K.C., for respondent.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] [March 11.

SAINT MARY'S YOUNG MEN'S TOTAL ABSTINENCE SOC. *v.* ABLEC.

Lease—Construction of covenant—Taxes—Partial exemption.

A society owned a building worth about $20,000 which, by the statute law of the province, was exempt from municipal taxation so long as it was used exclusively for the purposes of the society. A portion of the building having been used at intervals for other purposes, it was assessed at a valuation of $1,000, and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of t. society, and the valuation for assessment was increased to $10,000. The lease contained this covenant: "The said lessees . . . shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property b. longing to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)." The society was obliged to pay the taxes on such increased valuation and brought action to recover the amount so paid from the lessees.

Held, FITZPATRICK, C.J., and ANGLIN, J., dissenting, that the taxes so paid were "regular and ordinary taxes" which the lessors had agreed to pay as theretofore and the lessees were not liable therefor on their covenant. Appeal dismissed with costs.

O'Connor, for appellants. *Newcombe,* K.C., for respondent.

B.C.] BURRARD POWER CO. *v.* THE KING. [Feb. 15.

Constitutional law — Legislative jurisdiction — Crown lands — Terms of union of British Columbia, art. 11*—Railway aid—Provincial grant to Dominion—Intrusion—Provincial legislation—Water-records within railway belt—B.N.A.* 1867, *ss.* 91, 109, 117, 146*—Imperial order in council, May* 16, 1871*—Water Clauses Consolidation Act, B.C.*

While lands within the "Railway Belt" of British Columbia remain vested in the Government of Canada in virtue of the grant made to it by the Government of British Columbia pursuant to the eleventh article of the "Terms of Union" of that province with the Dominion, the Water Commissioners of the Province of British Columbia are not competent to make grants of water-records, under the provisions of the Water Clauses Consolidation Act, 1897, R.S.B.C., c. 190, which would in the operation of the powers thereby conferred interfere with the proprietary rights of the Dominion of Canada therein. Cf. *The Queen* v. *Farwell*, 14 Can. S.C.R. 392.

Judgment appealed from, 12 Ex C.R. 295, affirmed. Appeal dismissed with costs.

Lafleur, K.C., for appellants. *Newcombe*, K.C., for respondent.

B.C.] [Feb. 15.

BRITISH COLUMBIA ELECTRIC RY. CO. *v.* CROMPTON.

Construction of statute—Limitations of actions—Contract for supply of electric light—Negligence—Injury to person not privy to contract.

The appellant company, having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of the Consolidated Railway Company's Act, 1896, 59 Vict. ch. 55 (B.C.), is entitled to the benefit of the limitation of actions provided by s. 60 of that statute, IDINGTON, J., dissenting.

The limitation so provided applies to the case of an infant injured while residing in his mother's house by contact with an electric wire in use there under a contract between the company and his mother.

Judgment appeal from, 14 B.C. Rep 224, reversed, DAVIES and IDINGTON, JJ, dissenting. Appeal allowed with costs.

McPhillips, K.C., for appellants. *Travers Lewis*, K.C., for respondent.

Ex. C.] BOULAY *v.* THE KING. [Feb. 15.

Contract—Delivery of goods—Conditions as to quality, weight, etc.—Inspection—Rejection—Conversion—Sale by Crown officials—Liability of Crown—Deductions for short weight.

The Minister of Agriculture of Canada entered into a contract with the suppliants for the supply of a quantity of pressed hay for the use of the British army engaged in the operations during the late South African war, the quality of the hay and the size, weight and shape of the bales being specified. Shipments were to be made f.o.b. cars at various points in the Province of Quebec to the port of Saint John, N.B., and were to be subject to inspection and rejection at the ship's side there by government officials. Some of the hay was refused by the inspector, as deficient in quality, and some for short weight in the bales. In weighing, at Saint John, fractions of pounds were disregarded, both in respect to the hay refused and what was accepted; there was also a shrinkage in weight and in number of bales as compared with the way-bills. The hay so refused was sold by the Crown officials without notice to the suppliants, for less than the prices payable under the contract and the amount received upon such sales was paid by the government to the suppliants. In making payment for hay accepted, deductions were made for shortage in weights shewn on the way-bills and invoices, and credit was not given for the discarded fractions.

Held, the CHIEF JUSTICE and DAVIES, J., dissenting, that the appellants were entitled to recover for so much of the amount claimed on the appeal as was deducted for shrinkage or shortage in the weight of the hay delivered on account of the government weighers disregarding fractions of pounds in the weight of the hay actually accepted and discharged from the cars at Saint John.

Per GIROUARD, IDINGTON and DUFF, JJ., CHIEF JUSTICE and DAVIES and ANGLIN, JJ., dissenting, that the manner in which the government officials disposed of the hay so refused amounted

to an acceptance thereof which would render the Crown responsible for payment at the contract prices.

Judgment appealed from, 12 Ex. C.R. 198, reversed in part, the CHIEF JUSTICE and DAVIES, J., dissenting. Appeal allowed in part with costs.

J. A. MacInnes, for appellants. *Newcombe*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O.] [April 25.

MCCARTHY & SONS CO. *v.* W. C. MCCARTHY.

Appeal—Court of Appeal—Security for costs—Dispensing with security—Property of appellant in hands of respondents.

Motion by the defendant for an order dispensing with the giving of security for costs of an appeal to the Court of Appeal from the order of a Divisional Court, or reducing the amount of the security to be given.

Featherston Aylesworth, for defendant. *Grayson Smith*, for plaintiffs.

MOSS, C.J.O.:—An appellant applying for an order dispensing with the giving of security for costs under Rule 826, or reducing the amount of the security to be given, must make out a case beyond reasonable doubt. The onus is upon him, and the matter should not be left in uncertainty. The ground presented in this case is that the plaintiffs have in their hands or under their control, by means of a receiving order, property or means of the defendant sufficient to answer their costs of the appeal, and which would, in the event of the appeal failing, be available for that purpose. But I am not satisfied as to this upon the material before me. There is a conflict as to the value of the 63 shares and as to the extent of the charges against them and the policies of life assurance, as well as to the full amount of the claims against the defendant in respect of which they may be made exigible. The matter is left in too much uncertainty to justify

of ballot used in voting upon the by-laws was not that prescribed by the statute of 1908.

Held, that the expressed wish of the voters ought not to be defeated by the clerk's mistake in departing from the words of the statutory form, where it is not shewn that the departure confused any one and so prevented the will of the voters from being manifested; that the circumstances brought the case within the gauge of the Interpretation Act, 7 Edw. VII. c. 2, s. 7(35); and, while it is a matter of regret that a municipal officer should depart from the plain directions of a statute, the by-law should not be quashed. Motion dismissed without costs.

Haverson, K.C., for applicant. *Raney*, K.C., and *J. Hales*, for respondents.

Meredith, C.J.C.P.] [April 22.

RE GREEN *v.* CRAWFORD.

Division Courts—Jurisdiction—Promissory note for more than $100—Item in larger account—Merger in mortgage—Matters of defence.

Motion by the plaintiff for a mandamus to the junior judge of the County Court of Elgin, commanding him to try this action, which was brought in the 3rd Division Court in the county of Elgin, upon a promissory note made by the defendant for $140, to recover the amount of it with interest, amounting in all to $154.60. At the trial the plaintiff produced and proved the making of the promissory note. On his cross-examination it appeared that he had other dealings with the defendant and a Mrs. James, that he had an account in his books with them, that the amount of the note formed one of the items of this account, and that he had taken a mortgage from Mrs. James covering the amount of the account. Upon this appearing, the County Court judge stopped the case, holding that the Division Court had no jurisdiction; and the plaintiff then moved for the mandamus.

Held, that the plaintiff's claim came within the provisions of clause (*d*) of sub-s. 1, of s. 72, of the Division Courts Act, R.S.O. 1897, c. 60, as amended by 4 Edw. VII. c. 12, s. 1. He sued on the promissory note only, and to make out his case all that was necessary was the production of the note and proof of the signature of the defendant. The question whether the claim on it had become merged in the mortgage, if that question could or did

arise, was matter of defence, and the fact that the amount of the note formed one of the items of the account kept by the plaintiff with the defendant and Mrs. James, if of any importance at all, did not affect the question of jurisdiction. These were matters of defence, which the judge, having jurisdiction to try the action, had jurisdiction to pass upon.

J. M. Ferguson, for plaintiff. *Shirley Denison,* for defendant.

Meredith, C.J.C.P., Britton, J., Clute, J.] [April 28.

McMURRAY *v.* EAST MISSOURI SCHOOL SEC. No. 3.

Public schools—Teacher's salary—Written agreement.

Appeal by defendant from the judgment of the County Court of Oxford in favour of the plaintiff, the jury having found a general verdict for the plaintiff, assessing the damages at $50, for which sum judgment was entered. It was not disputed that the plaintiff was engaged as a teacher for 1908, but the agreement was not reduced to writing. The defendants contended that this being so it was not binding on them. Sec. 81, sub-s. 1, of the Public Schools Act, 1 Edw. VII. c. 39, provides that: "All agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation."

Held, that the case of *Birmingham* v. *Hungerford,* 19 C.P. 411, settles this question in favour of the defendants. That case was decided under 23 Vict. c. 49, s. 12. The present statute, 1 Edw. VII. c. 39, s. 81, sub-s. 1, is the same, with the exception that the words, "to be valid and binding," which were used in s. 12 have been dropped in subsequent consolidations, but the dropping of these words has not altered the effect of the provision. See *Young* v. *Corporation of Leamington,* 8 Q.B.D. 579, 8 App. Cas. 517. The conduct of the defendants having been unmeritorious the appeal was allowed without costs and the action dismissed without costs.

C. A. Moss, for defendants. *J. L. Ross,* for plaintiff.

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J. M. Ferguson, for plaintiff. *Shirley Denison*, for defendant.

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C. A. Moss, for defendants. *J. L. Ross*, for plaintiff.

Divisional Court, K.B.] [April 30.

NEWMAN *v.* GRAND TRUNK RY. CO.

Railway—Carriage of goods—Condition of contract—Misprint.

Appeal by plaintiff from the judgment of TEETZEL, J. (20 O.L.R. 25), dismissing the action without costs. Owing to an obvious mistake the word "or" appears instead of "are" in a clause of the terms and conditions printed on the back of the defendants' shipping bill. In this form it received the approval of the Board of Railway Commissioners for Canada, and the mistake was perpetuated in the forms used by the defendants. The action was for a declaration that the whole clause was thereby rendered insensible and meaningless.

Held, that the appeal must be dismissed as under the authorities the provision could not be reduced to a nullity by an obvious mistake.

H. D. Smith, for plaintiff. *W. E. Foster*, for defendants.

Boyd, C.] PIGGOTT *v.* FRENCH. [May 2.

Defamation—License inspector—Notice not to supply intoxicating liquor to plaintiff—Information by person not within the statute—Notice of action—Public officer exceeding jurisdiction.

Action by plaintiff, a grocer in the town of Wallaceburgh, against the license inspector of the county of Kent to recover damages for the issue of a notice to the hotelkeepers of the county not to supply the plaintiff with intoxicating liquor. 6 Edw. VII. s. 33, provides as to what persons who may give the notice, or require the inspector to give the notice to vendors of liquor not to deliver liquor to the person having an inebriate habit. One McKnight, who did not come within the list of persons referred to in the above section, although a connection of the plaintiff's by marriage, required the defendant as inspector to give the notice. The inspector believing that McKnight came within the statute gave the notice.

Held, 1. Following *Connors* v. *Darling*, 23 U.C.R. 541, that the defendant was liable inasmuch as the statute afforded no protection, McKnight, who initiated the proceedings not coming within its terms, and who had no more authority to intervene than a stranger.

2. The inspector although a public officer was not entitled to notice of action under R.S.O. c. 88, ss. 1, 13-14. He was not acting in respect of the matter within his jurisdiction and was therefore acting "unlawfully." Good faith and honest intention cannot create an authority to act where the officer is outside the jurisdiction. See *Houlden* v. *Smith*, 14 Q.B. 841, *Sinden* v. *Brown*, 17 A.R. 187, *Roberts* v. *Climie*, 46 U.C.R. 264.

G. S. Fraser, K.C., for plaintiff. *Wilson*, K.C., and *Pike*, K.C., for defendant.

Mulock, C.J. Ex.D.] [May 5.

RE DALE AND TOWNSHIP OF BLANCHARD.

Municipal corporations—Money by-law—Voting on—Voters' list—Assessment roll—Court of Revision—Proceedings out of time—Basis of list—Certificate of County Court judge—Finality of list—Qualifications of voters—Conduct of voting—Irregularities—Motion to quash—Costs.

Application to quash a money by-law of the township granting aid to St. Mary's and Western Ontario Railway Company.

MULOCK, C.J.:— . . . The voting on the by-law took place on the 19th November, 1909, 244 votes being given in its favour and 240 against it, thus resulting in a majority of 4 for the by-law.

The list used for the purposes of such voting was that certified by the County Court judge on the 6th November, 1909. The applicant contends that such was not the proper list, but that the voters' list of 1908 was the last revised and certified list, and therefore should have been used. . . .

The assessment roll for 1909 was returned to the clerk of the municipality on Saturday, the 29th April. Within the 14 days allowed by s. 65 of the Assessment Act, 4 Edw. VII. c. 23, in which to appeal, a considerable number of appeals against the roll were duly filed with the clerk. On the 18th May the Court of Revision met and tried the appeals, and the roll was purported to be finally revised and corrected in accordance with the decisions of the Court of Revision. The court, however, was not entitled to try these appeals until 10 days after the last day for appealing: s 61 of the Assessment Act. Thus its action in disposing of the appeals in question on the 18th May was a nullity: *Re Dale and Township of Blanchard*, ante 65.

The clerk then prepared, on the basis of such revised and corrected roll, the alphabetical list of voters required by s. 6 of the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, and adopted the various steps called for by that Act, with a view to the list being finally revised and certified to by the judge. No appeals were made against the list of voters thus prepared by the clerk, and the same was duly certified to by the judge on the 6th November, 1909. On these facts the applicant contends that, inasmuch as the Court of Revision had no legal right to sit on the 18th May and adjudicate in respect of the appeals from the assessment roll, it was not competent to the judge to revise and to certify to the voters' list.

It was the duty of the Court of Revision to try each of the appeals in question (s. 62 of the Assessment Act), and that before the 1st July, 1909 (sub-s. 20 of s. 65 of the Assessment Act). By sub-s. 1 of s. 68, an appeal to the County Court judge shall be at the instance of the municipal corporation, or at the instance of the assessor or assessment commissioner, or at the instance of any ratepayer of the municipality, not only against a decision of the Court of Revision on an appeal to the said court, but also against omission, neglect, or refusal of the said court to hear or decide an appeal. The court not having before the 1st July tried the appeals, it was competent, under this section, for any ratepayer to have appealed to the judge against such omission of duty. Whether the court omits to hold a legal meeting, or, holding a legal meeting, omits to try all complaints, as required by s. 62 of the Assessment Act, in either case an appeal lies to the judge; and, if no appeal is taken, sub-s. 16 of s. 6 of the Voters' Lists Act applies.

In this case no appeal having been taken because of the omission of the Court of Revision to sit within the time prescribed by the Assessment Act to dispose of appeals made to that body, or for any other reason, the assessment roll in question, because of the absence of any appeal, therefrom, became "deemed to be finally revised and corrected," and constituted a legal basis for the preparation of the voters' list of 1909, and, on its being certified to by the judge on the 6th November, 1909, it became the proper list to be used for the purpose of the voting on the by-law.

I am of opinion that the objection because of the list of 1909 having been used fails.

Another objection is, that "several persons voted upon the by-law who were not entitled so to vote." The persons in this objection referred to are those whose names appear on the last revised and certified voters' list, as entitled to vote, but who, the applicant contends, did not possess the qualification entitling them to have their names placed on the list.

It is not open to this court to deal with this class of objection. By s. 24 of the Voters' Lists Act, "the certified list shall . . . be final . . ." See *In re Mitchell and Campbellford*, 16 O.L.R. 578. I therefore am of opinion that it is not competent to the applicant to call in question the findings of the County Court judge as to the qualifications of the persons whose names he has placed upon the voters' list. This objection, therefore, fails.

C. C. Robinson, for the applicant. *Fullerton*, K.C., for the township corporation.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [April 9.

McISAAC v. FRASER MACHINE AND MOTOR CO.

Sale by agent—Contract in excess of authority—Ratification.

Defendant company, builders of gasoline engines, employed an agent L., to solicit orders for them and furnished him with contract blanks to be filled up where sales were effected, containing a description of the engine ordered, the terms of payment, etc., and a guaranty on the part of the company that the engine was built of first-class material, of full rated horse power, thoroughly tested, etc., and agreeing to repair or replace defective parts within one year from date of invoice. It appeared from the evidence that the company, while not builders of boats, occasionally contracted to deliver boats as well as engines, and that in such cases they arranged for the construction of the boat required with builders in other places. L. took an order from plaintiff for the delivery of one of defendant company's 11 horse power engines and (at an additional cost) a boat suitable for the carriage of a specified number of passengers, and trans-

mitted the same to defendant who wrote plaintiff saying: "We have your order for an 11 horse power (engine) and boat to our Mr. Paul J. Lidbach. We will take up the matter of the boat at once and trust we may be able to serve you in a satisfactory manner and thanking you for your order, etc."

Held, that there was no holding out by the company of L. as their agent to take such orders as that given by plaintiff and that the letter acknowledging receipt of the order was not such a ratification as to make it binding upon defendant.

Per DRYSDALE, J., dissenting:—It was the duty of defendant, as soon as the sale was reported, to have promptly repudiated their agent's authority, and that their action after receipt of notice of the contract amounted to a ratification.

R. G. MacKay, in support of appeal. *O'Connor*, K.C., contra.

Full Court.] [April 9.

GASS *v.* ALFRED DICKIE LUMBER CO.

Statute of Frauds—Defence to action claiming specific performance—Findings of trial judge—Acts insufficient to take case out of statute.

Plaintiff being indebted to defendants in a large sum of money secured by a judgment and in other ways arranged a compromise by which defendants agreed to release their judgment and other securities on payment of a much smaller sum, for which plaintiff gave his promissory note, payable in three months. On maturity of the note plaintiff was unable to meet it and claimed that a further agreement was made by which defendants agreed to advance a further sum of money to pay off certain encumbrances, and to surrender plaintiff's note on receiving a transfer of certain properties enumerated. In an action claiming specific performance plaintiff alleged that a part payment was made by defendants on account of the further advance agreed to be made by them, and that plaintiff prepared the deeds necessary to carry out the agreement on his part and that one of such deeds was delivered to and accepted by defendants. The trial judge found in favour of the making of the agreement as alleged by plaintiff, but that the deed referred to was delivered and accepted for another purpose.

Held, that the payment of a portion of the sum agreed to be advanced by defendants could not be treated as a part per-

formance to take the case out of the Statute of Frauds, and that the delivery of the deed under the circumstances found could not be accepted as fulfilling the requirements of the statute.

Christie, K.C., in support of appeal. *O'Connor,* K.C., contra.

Full Court.] IN RE SYDNEY G. PIERS. [April 9.

Collection Act—Consent order made in absence of debtor—Jurisdiction of Commissioner—Estoppel.

Where a debtor in order to avoid an examination before a Commissioner, under the Collection Act, touching his ability to pay a debt for which judgment had been recovered against him, gave his consent in writing to the making of an order against him for the payment of the debt by instalments and admitting possession of means to pay the instalments agreed upon.

Held, that he would not be permitted subsequently to take advantage of the fact that he was not present personally or by counsel when the order so assented to was made by the Commissioner.

GRAHAM, E.J., dissented, on the ground that the written consent, in the absence of the debtor personally or by counsel, was not sufficient to give jurisdiction.

Terrell, support of appeal. *King,* K.C., contra.

Full Court.] REDDY *v.* STROPLE. [April 9.

Trespass to land—Construction of deeds—Equivocal statement—Latent ambiguity—Admission—Word "crossway."

The description in defendant's deed purported to run along the public highway until it came to a "crossway" and thence in a southerly direction, etc. It appeared that a "crossway" was a kind of wooden culvert or bridge and that at or near the point in question there were two crossways, and that if the line of departure was taken from the first one it would cross property of a third person.

Held, that the word "crossway" as used being an equivocal statement, the one should be taken that would suit the other parts of the description.

In cases of latent ambiguity, it is possible to look at the evidence as to the state of things.

The description in the earlier deed having been departed from, apparently deliberately, there was no authority for going back to it.

In construing the deed, where there was nothing to indicate a mistake of any kind, there was no authority for striking out a monument like a crossway and substituting another object.

A line fence which had existed for a period of 23 years on one side of a brook where the second crossway was situated could be regarded as an admission of the correctness of that place as the point of departure.

TOWNSHEND, C.J., and DRYSDALE, J., dissented as to the application of the descriptions.

Gregory, K.C., and *Floyd*, in support of appeal. *J. A. Fulton*, contra.

Drysdale, J.] REX *v.* MORRIS. [May 9.

Canada Temperance Act—R.S.N.S. c. 71, s. 115(2), construction —Deputy stipendiary magistrate—Jurisdiction—Excessive costs—Habeas corpus—Criminal Code, 1120.

The defendant was convicted by a deputy stipendiary magistrate of the town of Westville in the county of Pictou, acting at the request of the stipendiary magistrate of an offence against Part II. of the Canada Temperance Act and fined $50 and costs, and in default of payment imprisonment for one month unless fine and costs were sooner paid. On motion to discharge him on the return to a habeas corpus on the grounds (1) that two hearings of $1 each were taxed against the prisoner in contravention of s. 770 of Crim. Code, and (2) that the deputy of the stipendiary magistrate could only act in the event of the temporary absence or incapacity through illness, etc., of the stipendiary.

Held, 1. Assuming that excessive costs were included in the conviction as there was a good sentence, the prisoner should not be discharged on that ground, but that a new conviction and commitment could be directed to be drawn up or the present one amended by reducing the costs so as to conform to the law.

2. S. 115 of the Towns' Incorporation Act, R.S.N.S. c. 71, s. 115(2), is one conferring jurisdiction, the latter part of it does not enlarge the obvious and apparent limitation in the first part, which very plainly indicates that a deputy stipendiary magistrate is given power only to perform the duties of the stipendiary in

the event of his temporary absence or incapacity, etc., and as the former officer acted in this case in fact and as appeared by the proceedings on their face, on the mere request of the latter and permanent official, the conviction was without jurisdiction and the prisoner must be discharged.

3. Sec. 1120 of Crim. Code only applies to indictable offences and where the acting officer has jurisdiction.

Power, K.C., for the prisoner. *O'Connor*, K.C., for the prosecutor.

Graham, E.J., Trial.] [May 12.

DE HART *v.* MCDIARMID.

Vendor and purchaser—Terms of purchase—Discharge of incumbrance—Interest—Word "due"—Admission—Costs.

Plaintiff purchased a property from defendant subject to a mortgage held by the Yarmouth Building Society. By the terms of purchase, the purchase money was to be paid in instalments to the agent of the Society, C. (who was joined as a defendant), and was to be applied by him, in part, in payment of the mortgage. It was provided: "The rate of interest chargeable by the parties concerned on the balance of this purchase price, which may from time to time be due, shall be 7% per annum." It was contended by defendant that there was to be an ordinary interest account on the purchase price adding interest and deducting instalments as they were paid, and plaintiff at the end of the second year signed a statement with the interest made up on its face according to defendant's contention.

Held, that the word "due" was used in the sense of "owing" or "unpaid"; and that the paper signed by plaintiff was in the nature of an admission, and that he must pay the charge which he had to pay the Society in order to secure the release of the mortgage, without recourse against either defendant.

F. McDonald, for plaintiff. *H. Ross*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] COLWELL *v.* NEUFELD. [April 11.

Vendor and purchaser—Agreement of sale of land—Bond to secure payment of purchase money with additional stipulation for payment even though obligees should be unable to make title to the land.

Defendants with others had entered into an agreement with the plaintiffs that they would respectively purchase certain lands at a price agreed on, $2 per acre of which was to be paid on 1st Nov., 1905. Defendants afterwards executed the bond sued on in this action. This bond stated that it was given expressly to secure the said payment of $2 per acre, but it contained an additional stipulation for the payment to the plaintiffs of $2,500, part of the instalment of $2 per acre to and for their own use and benefit, as liquidated damages for their services rendered and to be rendered in using every possible endeavour to have the lands surveyed and located as soon as possible, and that such services should be a sufficient performance of the agreement on their part. In the opinion of the court, the plaintiffs failed to shew at the hearing that they had ever acquired title to the lands or any legal or enforceable right to purchase them.

Held, that, as the plaintiffs could not recover under the agreement, neither could they on the bond, which should be construed as one merely given, as it said, to secure the instalment of purchase money, disregarding the stipulation above referred to as being fraudulent as against the defendants.

Dennistoun, K.C., and *Robson*, K.C., for plaintiffs. *Wilson*, K.C., and *McLeod*, for defendants.

Full Court.] RENTON *v.* GALLAGHER. [April 11.

Malicious prosecution—Want of reasonable and probable cause—Burden of proof—Honest belief—Province of judge and jury—Questions to jury—Malice—Reasonable care in ascertaining facts—Search warrant.

Held, 1. Although a prosecutor, before commencing the prosecution of a person whom he suspects to be guilty of a crime, must,

to protect himself from a subsequent action for damages for malicious prosecution, take reasonable care to acquaint himself with the facts, such reasonable care does not necessarily include making inquiries of the suspected person himself or asking him for an explanation especially when the prosecutor's solicitor advises him to refrain from doing so. *Archibald* v. *McLaren*, 21 S.C.R., per PATTERSON, J., at p. 603, and *Malcolm* v. *Perth*, 21 O.R. 406, followed.

2. The question of reasonable and probable cause being for the judge, and not for the jury, to decide, after obtaining the opinion of the jury, when necessary, upon any facts in dispute upon which such question depends, it is not a safe or proper course to submit to the jury the question: "Did the defendants take reasonable care to inform themselves of the true facts of this case" as this is practically equivalent to asking the jury if the defendants had reasonable and probable cause for laying the information, which is a question solely for the judge and really involves a conclusion of law. Opinion of CAVE, J., in *Brown* v. *Hawkes* (1891), 2 Q.B. 718, followed.

3. Malice cannot be inferred from the fact that the defendant, in giving evidence at the trial, stated that he still believed in the guilt of the plaintiff.

4. The absence of reasonable and probable cause for the prosecution is not of itself evidence of malice, but only in cases where the conduct of the prosecutor, in instituting the prosecution, is shewn to have been so unreasonable as to lead to the inference that the prosecution could only have been the result of malice. *Brown* v. *Hawkes*, supra, followed.

5. A finding of the jury that the defendants had been actuated by some motive other than an honest desire to bring a guilty man to justice, if unsupported by the evidence, will be disregarded.

6. If the prosecutor has had a search warrant issued and executed in order to obtain evidence in support of his charge, the plaintiff, in a subsequent action for malicious prosecution, would have a right to have that considered in aggravation of damages in the event of his getting a verdict in the action; but, if he fails, he can have no separate cause of action based on the issue or execution of the search warrant.

7. If the jury does not answer the question as to the defendant's honest belief in the case which they laid before the magistrate, and the plaintiff in the opinion of the court has failed to

satisfy the onus upon him of proving want of reasonable and probable cause and malice, a verdict entered for him at the trial should be set aside, notwithstanding the findings of the jury, unsupported by the evidence, that the defendants had not taken reasonable care to inform themselves of the true facts of the case and had been actuated by some improper motive, and a nonsuit should be entered, pursuant to rule 651 of the K.B. Act as re-enacted by 10 Edw. VII. c. 17, s .7, in the absence of any mention of fresh evidence to warrant the ordering of a new trial.

Trueman, for plaintiff. *Phillips* and *Chandler*, for defendant.

Full Court.] [April 14.

BANK OF NOVA SCOTIA v. BOOTH.

Private International law—County—Assets of foreign insolvent —Receiver by foreign court—Service of statement of claim outside jurisdiction.

Appeal from judgment of MACDONALD, J., noted vol. 45, p. 251, dismissed with costs.

Full Court.] KERFOOT v. YEO. [April 25.

Security for costs—Jurisdiction of judge of the King's Bench to order security for costs of appeal to Court of Appeal—Order for security for costs already taxed and for which judgment entered.

Held, 1. Neither a judge of the King's Bench nor a judge of a County Court has jurisdiction to order a non-resident plaintiff to give security to the defendant for the costs of an appeal to the Court of Appeal, or to stay proceedings in the Court of Appeal after the action has got into that court, but the Court of Appeal will itself in a proper case order security for the costs of the appeal on the application of the defendant. *Bentsen* v. *Taylor* (1892), 2 Q.B. 193, not followed.

2. When the plaintiff's action has been dismissed and the defendant has entered judgment for his taxed costs, no order will be made requiring the plaintiff prosecuting an appeal to give security for them, although he is a non-resident and the security he has already given under an order made by the court of first instance is insufficient to cover the taxed costs.

Fullerton, for plaintiff. *Bergman*, for defendants.

KING'S BENCH.

Metcalfe, J.] SHAW *v.* CITY OF WINNIPEG. [May 3.

Practice—Discovery—Officer of corporation—King's Bench Act, Rule 387.

In an action against a city corporation for damages occasioned by the negligence of an employee of the water works department of the city in discharging his duty of examining a water meter in the plaintiff's premises, the plaintiff has a right, under Rule 387 of the King's Bench Act, to examine for discovery a water meter inspector of the city as an officer of the corporation. *Dixon* v. *Winnipeg Electric Railway Co.*, 10 M.R. 660, followed.

Dennistoun, K.C., and *Young*, for plaintiff. *T. A. Hunt*, for defendants.

Richards, J.A.] [April 7.

WHITE *v.* CANADIAN NORTHERN RY. CO.

Negligence—Common employment—Liability of employer for injury to workman caused by negligence of foreman—Workmen's Compensation for Injuries Act—Duty of persons who cause others to handle specially dangerous things.

The death of the deceased was caused by carelessness and ignorance in the handling of dynamite by the deceased and a fellow workman named Anderson employed by the road-master of defendants to look after the work. According to the answers of the jury, Anderson was not a competent person to be so employed, and the road-master was aware that he was not and there was, in the opinion of the judge, evidence sufficient to warrant the findings of the jury.

Held, 1. The plaintiffs could not recover under Lord Campbell's Act because the road-master was a fellow workman with the deceased.

2. The plaintiffs were entitled to recover $1,500 in all under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, because, by the jury's findings, the death was caused by reason of the negligence of a person in the service of the employer who had superintendence entrusted to him whilst in the exercise of such superintendence: par. (b) of s. 3.

Dominion Natural Gas Co. v. *Collins*, 79 L.J.P.C., p. 16, followed, as to the duty of those who cause others to handle specially dangerous things.

Deacon and *Kemp*, for plaintiffs. *Clark*, K.C., for defendants.

Proclamations.

(*Canada Gazette*, May 9, 1910.)

GREY.

CANADA.

By His Excellency the Right Honourable SIR ALBERT HENRY GEORGE, EARL GREY, Viscount Howick, Baron Grey of Howick, in the County of Northumberland in the Peerage of the United Kingdom, and a Baronet; Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, etc., etc., Governor-General of Canada.

To all to whom these presents shall come,—GREETING:

WHEREAS it hath pleased Almighty God to call to His Mercy Our late Sovereign Lord King Edward the Seventh of blessed and glorious memory by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland and all other His late Majesty's Dominions is solely and rightfully come to the High and Mighty Prince George Frederick Ernest Albert, Now Know Ye that I, the said Sir Albert Henry George, Earl Grey, Governor-General of Canada as aforesaid, assisted by His Majesty's Privy Council for Canada, do now hereby with one full voice and consent of tongue and heart publish and proclaim that the High and Mighty Prince George Frederick Ernest Albert is now by the death of our late Sovereign of happy and glorious memory become our only lawful and rightful Liege Lord George the Fifth by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, Supreme Lord in and over the Dominion of Canada, to whom we acknowledge all faith and constant obedience with all hearty and humble affection, beseeching God by whom all Kings and Queens do reign to bless the Royal Prince George the Fifth with long and happy years to reign over us.

Given under my Hand and Seal at Arms at Ottawa this ninth day of May, in the year of Our Lord one thousand nine hundred and ten, and in the first year of His Majesty's reign.

By Command, CHARLES MURPHY,
Secretary of State.

GOD SAVE THE KING.

CANADA.

GEORGE THE FIFTH, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To all to whom these presents shall come,—GREETING:

CHARLES MURPHY, Acting Attorney-General Canada.

WHEREAS by chapter one hundred and one of the Revised Statutes of Canada, 1906, intituled "An Act respecting the Demise of the Crown," it is, amongst other things, in effect enacted, that upon the demise of the Crown, it shall not be necessary to renew any commission by virtue whereof any officer of Canada, or any functionary in Canada or any Judge of the Dominion or Provincial Courts in Canada, held his office or profession during the previous reign; but that a proclamation shall be issued by the Governor-General authorizing all persons in office as officers of Canada who held commissions under the late Sovereign, and all functionaries who exercised any profession by virtue of any such commissions and all Judges of Dominion and Provincial Courts to continue in the due exercise of their respective duties, functions and professions; and that such proclamation shall suffice and that the incumbents shall, as soon thereafter as possible, take the usual and customary oath of allegiance before the proper officer or officers thereunto appointed,—

Now, therefore, by and with the advice of Our Privy Council for Canada, We do, by this Our Proclamation, authorize all persons in office as officers of Canada and all functionaries in Canada, and all Judges of the Dominion and Provincial Courts in Canada, who, at the time of the demise of Our late Royal Father of glorious memory, were duly and lawfully holding or were duly and lawfully possessed of or invested in any office, place or employment, civil or military, within Our Dominion of Canada, or who held commissions under the late Sovereign, or all functionaries who exercised any profession by virtue of any such commissions, to severally continue in the due exercise of their respective duties, functions and professions, for which this Our Proclamation shall be sufficient warrant.

And We do ordain that all incumbents of such offices and functions and all persons holding commissions as aforesaid shall,

as soon hereafter as possible, take the usual and customary oath of allegiance to Us before the proper officer or officers hereunto appointed.

And We do hereby require and command all Our loving subjects to be aiding, helping and assisting all such officers of Canada and other functionaries in the performance of their respective offices and places.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent, and the Great Seal of Canada to be hereunto affixed. WITNESS Our Right Trusty and Right Well-Beloved Cousin the Right Honourable SIR ALBERT HENRY GEORGE, EARL GREY, Viscount Howick, Baron Grey of Howick, in the County of Northumberland, in the Peerage of the United Kingdom, and a Baronet; Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, etc., etc., etc., Governor-General of Canada.

At Our Government House, in Our City of Ottawa, this ninth day of May, in the year of Our Lord one thousand nine hundred and ten, and in the first year of Our Reign.

By Command,

CHARLES MURPHY,
Secretary of State.

GOD SAVE THE KING.

A subsequent proclamation announces that Friday, May 20th, has been fixed "for the obsequies of His late Majesty, our Royal Father of blessed and glorious memory," and it appoints and sets apart that day as a day of general mourning to be observed by all persons throughout the Dominion of Canada.