Canada Law Journal.

VOL. XL. MARCH 15, 1904 NO. 6.

Mr. Lyman P. Duff, K.C., of Victoria, of the firm of Bodwell & Duff, has been appointed to the Supreme Court of British Columbia in the room of Mr. Justice Walkem, retired. This appointment is one of the very best that has been made by the present Government. Mr. Duff is a learned lawyer, has a great reputation as a Counsel, is a man of wide views, is free from fads, and has a mind cast in a judicial mould. The appointment is none the less welcome and to be appreciated in that Mr. Duff never was a politician, but has attained his high positior at the Bar by force of character, brains, industry, and rectitude. He was born in Toronto, where his father, a retired Methodist Minister, still lives. Mr. Justice Duff is a graduate of Toronto University.

The care that is necessary in the drafting of statutes, as welf as the want of such care, occasionally evinced, was illustrated recently in connection with an amendment to the Municipal Act, in reference to the newly constituted Board of Control in the city of Toronto. This Board was first created in 1896. Special legislation in reference thereto, so far as the city of Toronto was concerned, was enacted in 1903. The question arose as to whether a County Judge had, under the provisions of the Municipal Act, jurisdiction to try in a summary way the validity of a Toronto controller's election, in the same manner as he would have had the right in the case of a mayor or alderman. The County Judge held that he had such jurisdiction; but Mr. Justice Teetzel, on appeal, came to the contrary conclusion, holding that the words used in the statute fail to bring a controller in the city of Toronto within the summary trial provisions. Both judges were agreed as to what was the intention of the legislature; but the appellate judge emphasized the correct legal proposition that this intention must be ascertained by the words used—and that it was not competent for the court to extend them; in other words, that the court must interpret and not legislate, and that in this case the words used were insufficient.

There is much common sense in some of the remarks contained in an address recently given to students of a law class in the Michigan University. What was there said is largely true here. The lecturer was of the opinion that it was a mistake for students to desire to go to large offices in cities for their legal training, in that there is much more practical and helpful education and experience to be gained in the office of a good reputable country practitioner than in the offices of the leaders of the Bar; and education, let it be remembered, is not merely book learning. Practitioners in large cities very commonly find that the most useful students are not town bred university men, but country boys who have commenced their studies in localities where it was a necessity to read up and find out the law and work out questions of practice for themselves, rather than to take the easy way, too common, for example, in Toronto, of asking others what they should do under certain circumstances. Theoretical knowledge and law schools are all right so far as they go; but they do not go all the way.

Although in some of the older commentaries on the common law as well as in some of the ancient reports (e.g. Y.B. 1 Edw. II. [Seld. Soc.] p. 33) the Latin term 'causa' is used to denote 'consideration,' it must not be confounded with the 'causa' of the civil law. In that system of jurisprudence while the term 'causa,' according to some writers (see Rogron "Code Civil," in *Codes Français Expliqués*, p. 209), means more than the mere motive which would induce a man to bind himself by an agreement, yet it is undoubtedly something less than 'consideration' in the common law. Under our system 'causa' invariably connotes a valuable inducement for a promise. The civilians, on the other hand, will enforce a promise without inquiring into the value of the inducement for it; and when we meet with the expression 'without cause' in their law it does not mean that there was no consideration for the promise, but that the consideration has failed,—for instance, to quote an example found in the books, if one gives a promise to pay 100 aurei, at the end of six months, in consideration of a sum intended to be lent, and the money is never lent, the promise cannot be enforced because the agreement is sine causa. In the case of *Thomas* v. *Thomas*, 2 Q.B. 851,

counsel for defendant contended that in the common law the cause or inducement for making a promise was a good consideration therefor. But Patteson, J., said: "It would be giving to 'causa' too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff." This statement of the English doctrine of consideration is regarded as correct and authoritative both by the courts and the commentators of our own day. However, it is worthy of note that Eustis, J., in *Mouton* v. *Noble*, 1 La. Ann. 192, undertook to say that "Civilians use the word 'causa,' in relation to obligations, in the same sense as the word 'consideration' is used in the jurisprudence of England and the United States." But an examination of the leading American writers on the subject shews clearly that there is no difference in principle between their law and ours; and the case of *Thomas* v. *Thomas*, above cited, is relied upon by Dr. Hare and others as conclusive of the distinction between 'causa' and 'consideration' as the terms are employed in the jurisprudence of the present day.

COMPULSORY RETIREMENT OF JUDGES.

By the Act of last session of the Dominion Parliament, 3 Edw. VIII., c. 29, s. 2, it seems to be assumed that every County Judge is unfit for his judicial work when he has attained the age of eighty years, for, when that period arrives, he is compulsorily retired. That most men are past their work at that age is undoubtedly true, but it is not true of all of them, and to the latter it may work injustice. There is in the present day a tendency to put young and inexperienced men in positions which might be filled with more advantage by men of mature age and ripened knowledge. Judicial experience is a most important factor in the usefulness of a judge, and when mental vigour goes hand in hand with experience, the best results are attained.

We are no advocates, however, for the appointment of worn out politicians, or for leniency in dealing with public servants occupying positions for which they are either incompetent, or have become unfit by reason of the infirmity of old age, or the decay by disease, or otherwise, of any of the faculties necessary for their service. When such incompetence, or unfitness, becomes apparent retirement should be insisted upon. The profession are perfectly familiar with instances where, owing to physical infirmity, the usefulness of judges has been almost destroyed, though still retaining their position and occupying places which should have been filled by others. But when there is compulsory retirement there shou go with it a generous regard to services rendered, and, in case of the judiciary, the recollection of the very inadequate remuneration that has been accorded. There is undoubtedly a practical difficulty in working out this compulsory retirement; and, probably, this is why the rough and ready method of an arbitrary age limit was adopted. Whilst, as we say, there are those considerably under the statutory age who should be retired, there are, on the other hand, those over it who are still quite equal to their work—both mentally and physically.

An example of the latter class is aptly given in the person of His Honour Judge Hughes, of St. Thomas, who, towards the end of last year, came under the provisions of the Dominion statute above referred to. At the time of his retirement he had been on the Bench for over fifty years, and this long service may, we think, be said to be unique in the judicial history of Great Britain and her colonies. During that long period he enjoyed the confidence of the profession and the public in the county where he presided, as a painstaking, conscientious judge, a sound lawyer, and a good citizen. That during that period he had no enemies, or encountered no difficulties, was not to be expected, for he was a man of strong convictions, independent in thought, intolerant of what he considered wrong or unfair, and very outspoken in the expression of his opinion, fearing no man, and regardless of any influence in doing what he considered right. His activity of mind and memory, and his physical vigour are almost undiminished and fully equal to the condition of most men twenty or thirty years younger than himself. The ex-judge was highly thought of by his brethren

of the High Court, and they had no hesitation in entrusting to him cases, which, for various reasons, could not be tried at the Assizes. His judgments, moreover, stood well the test of appeal. No County judge in Ontario, except, perhaps, his intimate friend, the veteran Chairman of the Board of County Judges, Hon. J. R. Gowan, C.M.G., now a Senator of the Dominion, was better versed in magisterial and municipal law, or better understood the spirit and scope and proper working out of the small debts Courts of Ontario. Both of these gentlemen were appointed, it will be remembered, by the government of which that eminent man Hon. Robert Baldwin was at the head. All the judicial appointments, made by that administration, were of good and fit men, as experience subsequently proved. It was especially true of those who are above referred to.

Looking out over the Dominion we notice the retirement of another excellent and highly respected judge in the Province of New Brunswick. His Honor James G. Stevens, to whom we allude, at the time of his retirement, had been on the Bench for over thirty-five years, in fact ever since the establishment of County Courts in that Province. His legal ability seems to have been inherited, his father having been a solicitor of repute in Scotland, where his son, the ex-judge, was born. He was called to the Bar in 1847, and was subsequently elected a member of the New Brunswick House of Assembly. An industrious worker, he contributed to the legal library "Steven's Digest of the New Brunswick Reports" covering the years from 1825 to 1897. As a judge he was highly esteemed both by the profession and the public, always upholding, by the gentlemanly courtesy characteristic of a past generation, the dignity of his position. Notwithstanding these long periods of service it cannot be said either of him or of Judge Hughes that they lagged superfluous on the stage and their life's work was well done. Happy for those who like them have resources and congenial employment to keep alive their activity and so enable them to enjoy their well earned rest and leisure.

Whilst we have this little quarrel with the recent act, it must be admitted, even by the most stalwart of what are called old men, that though their mental capacity remains unimpaired, their experi-

ence ripened and their store of knowledge so well filled, they cannot, we think, truly say that they are quite as able for the continued strain necessary for the conduct of a long trial as they once were; and we therefore the more applaud the enactment which gives to those who are thereby presumed to be failing (whether they think so or not) a pension equal to the salary previously enjoyed. That this provision should be made is a simple matter of justice; and is of right, and not of favour, especially in view of the small emoluments given to our judges. It may be hoped also that, to a limited extent, at least, it may be an inducement to the best men at the Bar to accept judicial appointments and so sustain the high character of our judiciary.

LIABILITY OF HUSBAND FOR HIS WIFE'S TORT.

Under the Married Women's Property Act, (R.S.O. c. 163) s. 17, a husband is liable for the wrongs committed by his wife before or after marriage "to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting any payments made by him or any sums for which judgment may have been bonâ fide recorded against him in any legal proceeding in respect of any such debts, contracts, or wages, for or in respect of which his wife is liable." But this section also provides that "nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the first day of July, 1884, for or in respect of any such debt or other liability of his wife aforesaid."

While, therefore, the liability of husbands married after the 1st July, 1884, in respect of debts committed by their wives before or after marriage is limited to the property of the wife received by the husband and remaining in his hands as above mentioned, the liability of husbands married before that date is governed by the law as it stood prior to 1st July, 1884.

The course of legislation in regard to married women has not been strictly logical or consistent in England, as Mr. Indermaur has pointed out in a paper published in a recent number of the English *Law Times*, neither has it been so in Ontario where we have followed more or less exactly in the wake of English legislation. It has been lacking in a broad and comprehensive view of the subject and has been characterized by timidity which has

resulted in the patchwork legislation with which we are only too familiar.

The common law on this point whatever may be thought of its ethical justice, was at least consistent. Under it marriage had the effect of vesting all the wife's chattel property, and also considerable rights in her real property in her husband. That being the case, during coverture the husband was in effect liable for the wife's torts committed by her before or after marriage. It is perhaps not technically correct to say that he was "liable," in the same sense as a wrong doer, but at all events he was a necessary party to an action against the wife for a tort whether committed before or after marriage. If judgment went against her, it went against him also; and was leviable out of his goods, and yet if he died pending the suit it did not abate, but might be continued against the surviving wife. On the other hand if the wife died, the action abated and the husband ceased to be liable.

But the statute law has been from time to time enroaching on and taking away the foundation of the common law rule by depriving the husband of his common law rights in both his wife's real and personal property, but at the same time has left him burthened with some of the obligations which the common law imposed as a consequence of the rights which it conferred. One can hardly suppose if the amendment of the law had been undertaken in a scientific manner that this anomaly would have been suffered to exist It is because of the want of the scientific method in making amendments in the law, that not only in this, but in other important particulars, (notably in respect of the devolution of estates in case of intestacy), that we find the law is thrown into confusion or into an anomalous condition by our legislators.

The course of amendment is generally as follows:—It strikes someone, for instance, that it is unreasonable that marriage should have the effect of vesting all of a wife's property in her husband; accordingly an act is duly drawn to amend the common law in this respect, but the legislator altogether neglects to take a comprehensive view of the subject by taking both the husband's rights on the one hand and his liabilities on the other into consideration, but fatuously, as we think, takes analtogether one-sided view of the matter, and while he cuts off the husband's rights, he leaves his liabilities, which were the consequence of these rights, untouched.

That this is the result as to persons married before 1st July, 1884, is shewn by the recent decision of a Divisional Court (Meredith, C.J.C.P., MacMahon and Teetzel, JJ.) in *Traviss* v. *Hales*, 6 O.L.R. 574. In this case the plaintiff sued husband and wife for a slander by the wife living coverture. The defendants were married in 1875, and the Court held that the husband was liable, and a judgment against him was affirmed—and yet for fifteen years before the marriage in this case took place the rights of a husband in his wife's property had been taken away and separate property rights conferred on wives. Osler, J., in *Amer* v. *Rogers* (1880) 31 C.P. 195, came to the conclusion that the effect of this legislation was inferentially to relieve the husband from liability for his wife's torts, but later decisions in England have led to the conclusion that though the legislature had taken away a husband's rights in his wife's property, it had nevertheless left him burthened with the common law liability for her torts, and a similar conclusion was arrived at by the late Mr. Justice Rose in *Lee* v. *Hopkins* (1890) 20 Ont. 666, which is now adopted and affirmed by the Divisional Court.

GEO. S. HOLMESTED.

LANDLORD AND TENANT AND THE STATUTE OF FRAUDS.

In the absence of a written agreement or of possession being acquired by a tenant, his rights as against his landlord, even where he may have paid rent in advance, will, it would appear, receive scant recognition in the courts.

In Agnew on the Statute of Frauds at p. 152 is found this proposition: "A contract for the taking or letting of furnished lodgings by the day or week or month is a contract for an interest in land, if specified rooms are let. But an agreement to take furnished lodgings in a boarding house, it not being intended to give the right to the exclusive occupation of any particular part of the house, is not within the statute." The authorities cited are: *Inman* v. *Stamp*, 1 Starkie, 12; *Edge* v. *Stafford*, 1 C. & J. 391. The same proposition is repeated in almost identical words in Addison on Contracts, 9th ed. at p. 24, and the same authorities are cited.

In *Inman* v. *Stamp*, the defendant agreed to take apartments in plaintiff's house to be entered upon at Christmas. On December

24th, defendant notified plaintiff that he receded from the bargain. It was held by Lord Ellenborough that this was a contract for an interest in land within the 4th section of the Statute of Frauds and, therefore, that the agreement was void, but that it would have been otherwise had the defendant entered on the premises.

In Dart on Vendors and Purchasers, 6th ed., p. 228, the point is dealt with as follows: "And although the actual demise by parol for any term not exceeding three years at a rent not less than two-thirds of the improved value is valid under the second section of the statute, an executory agreement for such a demise is void unless in writing. So a parol agreement by a lessee for an assignment for the residue of his term, being less than three years, is void."

Then what will be the effect of the payment of a part of the proposed rent? *Maddison* v. *Alderson* (1883) 8 App. Cas. 479, is authority for the proposition that a payment of part, or even the whole of the purchase money, will not be treated as part performance. There were earlier cases where individual judges expressed varying opinions (for instance, the cases cited in the Digest of English Case Law, vol. 13 at p. 1770, in which a distinction is attempted to be drawn between payment of earnest money and payment of a substantial sum on account), but the law is now apparently well settled. In *Maddison* v. *Alderson*, Selborne, L.C., says: "It may be taken as now settled that part payment of purchase money is not enough; and judges have said the same even of payment in full." All the other judges agree with Lord Selborne and there are no qualifying words.

The above case was discussed by Baggallay, L.J., and Brett, L.J., in *Humphries* v. *Greene*, 10 Q.B. 148. Adopting the language used by the Court of Appeal in *Maddison* v. *Alderson*, Baggallay, L.J., thought that the words of Lord Selborne ought to be qualified by the following words: "Unless it is shewn that the payment was made in respect of the particular land and the particular interest in the said land which is the subject of the parol agreement"; but Brett, L.J., differed directly from Baggallay, L.J., holding that the mere payment of part, or even of the whole, of the purchase money will not be sufficient, under any circumstances, to exclude the operation of the statute.

W. E. RANEY.

TRADE UNIONS AND BREACHES OF CONTRACT.

The learned editor of the *Law Quarterly Review* in the January number deduces some conclusions from the decisions in England on the subject of Trade Unions, and as to breaches of contract and conspiracy connected therewith, which may helpfully be reproduced. He says:

"*Glamorgan Coal Co.* v. *South Wales Miners' Federation* [1903] 2 K.B. 545, 72 L.J.K.B. 893, C.A. is the latest of the line of cases which begins just fifty years ago with *Lumley* v. *Gye* (1853) 2 E. & B. 216. From these cases we may now deduce, though with different degrees of certainty, the following conclusions:

(1) If X, knowing that N has entered into a contract with A, induces N to break that contract, X has prima facie committed a wrong for which A, if he suffers damage thereby, has a right of action: *Quinn* v. *Leathem* [1901] A.C. 495, 70 L.J.P.C. 76, and the principal case.

(2) Though X's conduct is prima facie actionable on the general principle that a violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere, without justification or excuse, with contractural relations recognized by law (*Quinn* v. *Leathem* [1901] A.C. p. 510, judgment of Lord Macnaghten, and see *Mogul Steamship Co.* v. *McGregor* (1889) 23 Q.B.D. 614, judgment of Bowen, L.J.), yet there may be just cause, or, what is the same thing, legal justification for X's interference.

(3) It is not yet possible to define the circumstances which may constitute a justification for procuring a breach of contract ([1903] 2 K.B. at p. 573, judgment of Romer L.J.) It must in each case be a question for the Court whether the circumstances found to exist are sufficient for that purpose. The mere fact that X holds N's contract with A to be a violation of a prior contract with X is not in itself a justification of X's nducing N (by threat at any rate) to violate N's contract with A: *Read* v. *Friendly Society of Co-op. Stonemasons* [1902] 2 K.B. 732, 71 L.J.K.B. 994, C.A.

(4) There seems to be a distinction between X inducing N to break a contract with A, by threats, by payment or otherwise, and X giving advice to N which leads him to break a contract with A (see [1903] 2 K.B. at p. 572, judgment of Vaughan Williams L.J.). The difference may be thus illustrated. N is under a contract

with A to go out to India and manage A's business there. X wishing to obtain N's services offers him a higher salary than that which is promised by A, and thereby induces N to break his contract with A and enter into X's service. Y is a doctor whom N consults as to the effect on his health of a residence in India. Y knowing of N's contract with A tells him that he will die within a month if he goes to India, and that he will be wise at all costs to break his contract with A. N in consequence declines to go out to India. X's conduct is clearly actionable. Y's conduct almost certainly is not. X induces N not to go out to India; Y, being bound by professional duty to do so, gives N his opinion as to the probable effect on N's health of performing his contract to go to India. Probably it is safe to say that in this class of cases disinterested advice, honestly given, is privileged.

(5) It is clear that malice, in any reasonable sense of that much abused term, is not material to the cause of action.

(6) If X and Y combine together to induce N, whether by threats or by payment, to break a contract with A, they are, unless there is something in their position which justifies their interference, liable to an action for conspiracy: *Quinn* v. *Leathem*, and the principal case."

ABSENCE OF FIRE ESCAPES.

The *Chicago Legal News* publishes in a recent issue an article written by Mr. Seymour D. Thompson on the risk of injury in consequence of the absence of fire escapes, referring therein to a case decided in the Province of Quebec. His observations are as follows:

"The decision of the Supreme Judicial Court of Massachusetts, in *Jones* v. *Granite Mills*, 126 Mass. 84, is one of the most cold and brutal decisions to be found in any American law book. It ought to be denounced from one end of our land to the other, until judges shall cease, from very shame, to quote it as authority. Certain truisms are known to the profession without massing cases in support of them. An employer is bound to exercise reasonable care, to the end of keeping his premises safe for the occupany and use of his employees. This duty of exercising this reasonable care is a primary and absolute duty, in the sense that he can not absolve himself from its performance by attempting to devolve it

upon another, whether an independent contractor, a superior servant, or a fellow-servant of the servant who is killed or injured by his failure to perform it. In this sense it is frequently called a non-assignable or unalienable duty. The most obvious conception of law, justice, and humanity, would assign to this class of duties, the duty which a master owes to his servants of keeping his premises provided with reasonable means of exit in case of fire; of providing reasonably efficient apparatus for the extinguishment of fire; and of keeping such apparatus in a reasonable state of repair. All these obligations on the part of the master are repudiated by the decision in question, and the risk is put upon the injured or murdered servant, and the failure of the master to perform this primary duty is put upon the shoulders of a fellow-servant, and the infamous conclusion reached that the catastrophe presumptively is due to the failure of some fellow-servant to do his duty, and that the master is therefore not liable.

In this case it appeared that the plaintiff and other employees worked on the upper floor of a six-story factory building. There was no fire escape above the fifth floor, nor any exit from the sixth floor except by a winding stairway in a tower at the corner of the building. The fire occurred through the overheating of a spindle of a spinning-mule. The fire apparatus was out of order. Ignoring the obvious conclusion that it was a primary duty of the master to keep the fire apparatus in order, the court assumed, in the absence of evidence speaking upon the question, that it was out of order in consequence of the negligence of a fellow-servant of the plaintiff. It was a cold and brutal assumption, indulged in for the purpose of putting money and property above life and humanity. This has been called 'The Moloch decision.' It is not creditable to the head or to the heart of the court that rendered it, or to the judge who consented to be its mouthpiece. It is opposed to the settled principles of the common law. No reasoning could properly result in the conclusion that the failure to perform a duty primarily resting upon the master, that of taking reasonable measures to render his premises safe for his servants, could be shuffled off as the duty of some fellow-servant. This dreadful holocaust, in which a great many people, some of them women and children, were burned to death, and this miserable decision, exonerating the proprietors of the building where their negligence was absolutely plain, recall to mind that passage of Milton in which he describes:

'First Moloch, horrid king, besmear'd with blood
Of human sacrifice, and parents' tears,
Though for the noise of drums and timbrels loud
Their children's cries unheard, that passed through fire
To his grim idol. Him the Ammonite worshipped.'

The last sentence must have been a slip of the tongue of the great blind poet in dictating the famous passage. In view of the Massachusetts decision above quoted, it should read, 'Him the *Mammonite* worshipped.'

If the foregoing decision expresses the doctrine of the common law, then the servant necessarily assumes the risk of being burned to death through the negligence of the master in failing to provide suitable fire escapes or to keep his apparatus for extinguishing fire in proper order. If the master is not bound, under the principles of the common law, to afford his servants suitable means of egress from the building by means of fire escapes in case of a fire breaking out therein, the servant necessarily assumes the risk of the situation, however dangerous it may be. For example, there is a decision to the effect that negligence on the part of the proprietor of a factory can not be predicated of the fact that the windows leading to the fire escapes were screwed down, where such windows were light structures and could easily have been kicked out, with as little delay as would be occasioned by raising them if unfastened, and propping them up.* A servant can kick the window out if he happens to think of it and is not smothered by smoke, and if his faculties are not overwhelmed in the dreadful position in which he suddenly finds himself placed—a conclusion which might impress the minds of the judges could they be placed in such a position and be kept there for a brief period and then 'kicked out.'

But all the courts have not bowed to this doctrine, or at least have not applied it under all circumstances. One court has held that a boy of nineteen, employed in an upper story of a factory, the means of escape from which are insufficient in case of fire, is not presumed, as matter of law, to have assumed the risk, but that whether he has done so is a question of fact.†

* *Hulick* v. *American Glucose Co.*, 154 N.Y. 474; affirming s. c. 13 Misc. (N.Y.) 657; 34 N.Y. Sup. p. 931.

† *Schsandner* v. *Birge*, 33 Hur (N.Y.) 180.

A Canadian court, taking an enlightened and humane view of the subject, has dealt with it in the manner indicated by the abstract of its decision in the marginal note.‡ It should be kept in mind that the conclusion may be different where there is a statue requiring the building to be equipped with fire escapes and where the statute is violated by the proprietor of the building, whereby his servants are burned to death or injured. In such a case, to hold that the servants accept the risk of the statutory negligence of the master would be, in effect, to repeal the statute. Such, it has been held by an enlightened court, is not the law.* Even here a judicial tendency has been discovered to fritter away the protection of such a statute. Where such a state required 'factories' to be equipped with fire escapes, it was held that the existence of a chemical laboratory, the entire output of which was less than twenty per cent. of the business, which was that of a wholesale drug company, did not constitute the place a 'factory' within the meaning of the statute.† But it is suggested that statutes which are designed to conserve human life ought to be liberally construed, in the application of civil remedies, so as to promote the end intended. A building which is in part devoted to the manufacture of chemicals, and which, owing to the nature of the business, is more liable to take fire than if it were some other kind of 'factory,' is within the very policy and mischief of such a statute, and none the less so because the larger part of the building may be devoted to the storage and sale of such chemicals."

---

‡ A foreman on the top floor of a factory, who, knowing that a fire had commenced in one of the lower stories, directed the employees in his story to return to their work, assuring them that there was no danger, when they would easily have escaped if they had not been thus prevented, was guilty of such negligence, even though he acted in good faith, and in the belief that there was no danger, as will render the employer liable for the death of one of the employees who, when the fire subsequently reached such story, cast herself out of the window under the belief that she could not otherwise be saved, although she could readily have escaped by the stairway: *Macdonald* v. *Thibaudeau*, 8 Rep. Jud. Que. B. R. 449 (opinion and syllabus in French). Compare with this case *Hernischel* v. *Texas Drug Co.*, 26 Tex. Civ. App. 1 s. c. 61 S. W. Rep. 419 (where, on a somewhat similar state of facts, there being no contention that the fire was caused by the negligence of the defendant or that it could have been extinguished, it was held not error to direct a verdict for the defendant.)

* *Landgraf* v. *Kuh*, 188 Ill. 484; s. c. 59 N.E. Rep. 501.

† *Hernischel* v. *Texas Drug Co.*, 26 Tex. Civ. App. 1; s. c., 61 S. W. Rep. 419.

LIABILITY OF MUNICIPALITY FOR FAILURE OF ITS OFFICERS TO ENFORCE ORDINANCES.

"We have learned that, growing immediately out of the Iroquois theatre disaster, a large number of suits have been filed against the city of Chicago for the alleged failure of its officials to enforce the fire ordinances of the city. While it does not become us, at this stage of the proceedings, to express a personal opinion as to what the law ought to be, it certainly will not offend the proprieties of the case to give an intimation of the tendency of other courts on this question. Chief Justice Gray, in the case of *Hill* v. *City of Boston*, 122 Mass. 344, 23 Am. Rep. 332, held it to be a proposition well settled 'that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage.' The case from which this quotation is taken should be carefully studied by attorneys about to engage in litigation involving questions of the character we have before us at the present time. Indeed, in a concise and condensed opinion, Chief Justice Gray traces the history and progress of the law on the question from the earliest period of the common law to the present time. From a careful reading of Justice Gray's opinion, it would seem that the only remedy in such cases is by indictment of the city officials guilty of neglect of duty. Thus, in the case of *State* v. *Corporation of Shelbyville*, 36 Tenn. (4 Sneed) 176, it was held that the mayor and aldermen of a town, whose charter empowered them to abate nuisances, were properly indicted for permitting a slaughter-house to be kept upon the private property of a citizen within the town, to the detriment of the public health and comfort. To same effect: *Cochrane* v. *Frostburg*, 81 Md. 54. While we believe that these authorities go a little too far, nevertheless the rule appears to be well settled and sustained by reason and authority that where a positive duty is imposed by ordinance on any city official, he is liable to indictment for non-feasance or misfeasance in office for failing, negligently or wilfully, to enforce such ordinance. Coming now to the exact question before us, i.e., the liability of municipal corporations for negligence in the enforcement of municipal ordinances, we find the law to be settled, though not without some dissent, against the imposition of such liability.

The reason of the rule that a municipal corporation cannot be held liable for the non-action of its officers in this regard is stated to rest on the principle of ultra vires—the city not being held liable where the non-action of its officers is contrary to the will of the corporation, as expressed in its ordinances: *Peck* v. *City of Austin*, 22 Tex. 261, 73 Am. Dec. 261. Chief Justice Marshall in the case of *Fowle* v. *Alexandria*, 3 Pet. (U.S.) 398, gives expression to his opinion on this question as follows: 'That a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance—by an omission of the corporate body to observe a law of its own in which no penalty is provided—is a principle for which we can find no precedent.'

The cases on this subject now cover quite completely, as far as the principle of the thing is concerned, every phase of municipal life. Thus it is held that a city is not liable because of failure to enforce an ordinance requiring excavations to be fenced: *Moran* v. *Pullman Palace Car Company*, 134 Mo. 641, 56 Am. St. Rep. 543. So, also, where the city authorities temporarily suspended an ordinance forbidding cattle running at large in the streets, and by reason of this suspension, plaintiff was injured by being gored by a bull, it was held that the city was not liable: *Rivers* v. *Augusta*, 65 Ga. 376, 38 Am. Rep. 787. Neither is a city liable for injuries caused by a discharge of fireworks, in a case where the city officials granted a suspension for the day of the accident, of an ordinance forbidding the discharge of fireworks: *Hill* v. *Charlotte*, 72 N. Car. 55, 21 Am. Rep. 451; *Fifield* v. *City of Phœnix* (Ariz.), 36 Pac. Rep. 916; *Wheeler* v. *City of Plymouth* (Ind.), 18 N. E. Rep. 532; *Lincoln* v. *City of Boston* (Mass.), 20 N. E. Rep. 329. So, also, a city is not liable for damages sustained by a property owner because its officials failed to prevent the erection of a wooden building on an adjoining lot, in violation of an ordinance forbidding the erection of wooden buildings within certain limits: *Hines* v. *City of Charlotte*, 72 Mich. 278; *Forsyth* v. *Atlanta*, 45 Ga. 752; *Harman* v. *City of St. Louis*, 137 Mo. 494. In the last case cited, the court said: 'The idea that because the City of St. Louis has exercised the right of passing an ordinance prohibiting structures of a certain character to be built within certain districts therein defined, that therefore it must enforce the observance of said ordinance at the hazard of being subject to all

damages which may ensue from its violation, is certainly as novel as it is startling. While it is the duty of the city, as of all governments, to protect and preserve the rights of her citizens as far as possible, and to provide and pass all needful laws to that end, the government does not guarantee to its citizens freedom from injury by the non-observance or by the positive infraction of those laws or ordinances.' The decisions on this question, however, are not all uniform. Thus in the case of *Cohen* v. *Mayor*, 113 N.Y. 532, 21 N.E. Rep. 760, it was held that a city was liable for granting express permission to a grocery keeper to keep his wagon in front of his store in violation of an ordinance, whereby injury resulted to a third person. So also was a city held liable where the mayor, contrary to the ordinances, expressly permitted the shooting off of fireworks at the junction of two narrow streets. *Spier* v. *City of Brooklyn* (N.Y. App.) 34 N.E. Rep. 727. See, also, to same effect: *Cochrane* v. *Frostburg*, 81 Md. 54, 48 Am. St. Rep. 479; *Baltimore* v. *Marriott*, 9 Md. 174; *Taylor* v. *Cumberland*, 64 Md. 68, 54 Am. Rep. 759. In the last case cited which was a case in which a city failed to enforce an ordinance prohibiting "coasting" on the public streets the court said: "It is well settled that the corporation was under an obligation to exercise for the public good the power conferred upon it by its charter to prevent nuisance, and to protect persons and property, and that this duty is not discharged by merely passing ordinances. It is not relieved from responsibility unless there has been a vigorous effort to enforce them."—*Central Law Journal.*

A number of appointments have recently been made to county judgeships; some excellent, some otherwise—and some of them apparently for reasons purely political, and without reference to professional eminence. We are not, however, looking for the millennium in this dispensation, and so, as to those which will not meet with general approval, we are not exactly disappointed. Possibly the time may come, even before that happy period, when some government will arise which will be strong enough to select as judges the best available men at the Bar, without reference to party, or politics or creed.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—JURISDICTION—SERVICE OUT OF JURISDICTION—APPLICATION TO ENFORCE AWARD—ARBITRATION ACT, 1889, S. 12—(R.S.O. c. 62, s. 13)—(ONT. RULE, 162).

In *Rasch* v. *Wulfert* (1904) 1 K.B. 118, the plaintiffs and defendants who were foreigners resident abroad, had made an agreement to refer disputes between them to arbitration. The plaintiffs had under the agreement appointed an arbitrator and obtained an award in their favour, the defendants having refused to be parties; the plaintiffs now applied under the Arbitration Act of 1889, s. 12 (R.S.O. c. 62, s. 13) for leave to serve the defendants out of the jurisdiction with a summons for leave to enforce the award. The master to whom the application was first made granted leave, but on the return of the summons dismissed the application on the ground that there was no jurisdiction to give leave to serve the summons out of the jurisdiction. On appeal to Ridley, J., that learned judge held there was jurisdiction and reversed the Master's order, but on appeal to the Court of Appeal (Collins, M.R., and Mathew, L.J.) the order of Ridley, J., was reversed. On the appeal it was argued that the award having been made within the jurisdiction it must be presumed that the defendants had submitted to the jurisdiction; but the Master of the Rolls says "A mere contract to refer disputes does not seem to me to amount for this purpose to a submission in fact to the jurisdiction of the arbitration here. The person so submitting may be under a contractual obligation to submit, but I do not think that he therefore can be considered to have actually submitted to the arbitration here so as to give an English court jurisdiction over him," and, as the Court of Appeal held, there was no statute or rule authorizing the service of such a proceeding out of the jurisdiction.

STATUTE OF FRAUDS—INTEREST IN LAND—AGREEMENT TO PAY A SUM IF INTEREST IN LAND ACQUIRED—STATUTE OF FRAUDS (29 CAR. 2, C. 3)—S. —(R.S.O. c. 338, s. 5).

Boston v. *Boston* (1904) 1 K.B. 124, was a curious sort of case. A husband claimed to recover from his wife £1,400, under an agreement, whereby the wife agreed that if her husband would buy the residue of a lease of a particular house, she would pay him the amount expended in the purchase. The husband accordingly bought the lease; the wife set up as a defence that the contract was not in writing, and was therefore void under the Statute of Frauds, s. 4 (R.S.O. c. 338, s. 5). Wills, J., who tried the action, gave judgment in favour of the husband, and the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) affirmed his decision, holding that the contract was not within the Statute, because it created no obligation to acquire an interest in land, it was rather a contract of indemnity.

POST NUPTIAL SETTLEMENT—POWER OF REVOCATION WITH CONSENT OF TRUSTEES — PARTIAL REVOCATION CONSENTED TO SUBJECT TO OTHER PROPERTY BEING SETTLED—VOLUNTARY SETTLEMENT—"PURCHASERS FOR VALUE."

In re Parry (1904) 1 K.B. 129, although a bankruptcy case, seems to deserve attention. The bankrupt in 1899 by a post-nuptial deed settled property upon trust for himself for life and after his death upon trusts for his widow and children, with an ultimate trust, in default of issue, for his next of kin. The deed was subject to a power of revocation with the consent of the trustees. In 1902 the bankrupt applied to the trustees to consent to a partial revocation as to £1,600 of the trust property, which they consented to on the terms of the bankrupt settling other property, including his life interest under the deed of 1899, and also a reversionary interest to which he had since become entitled. The bankrupt agreed to this and assigned to the trustees his life interest under the deed of 1899 and the reversionary interest upon trusts which gave the trustees an absolute discretion to apply the income during his life for the benefit of the bankrupt or his wife or children, and subject thereto upon similar trusts as in the deed of 1899, with a like power of revocation. In September, 1903, the settlor was adjudicated bankrupt, and his assignee applied to set aside the deed of 1902, and the trustees resisted the

application on the ground that they were "purchasers for value" within s. 47 of the Bankruptcy Act, which avoids voluntary settlements made within two years before the bankruptcy, but Wright, J., held that they were not, and set aside the deed so far as necessary for the payment of the debts in the bankruptcy.

DEFAMATION—SLANDER—SPECIAL DAMAGE—DAMAGE TOO REMOTE.

Speake v. *Hughes* (1904) 1 K.B. 138, was an action of slander brought in respect of a statement made by the defendant to the plaintiff's employers to the effect that the plaintiff had removed from premises leaving rent due to his landlord, the plaintiff alleging that in consequence of such statement he had been dismissed from the service of his employers. The case was tried in the Liverpool Court of Passage and dismissed, and the Court of Appeal (Collins, M.R. and Mathew, and Cozens-Hardy, L.JJ.) affirmed the decision on the ground that the special damage alleged was too remote.

CRIMINAL LAW—FALSE PRETENCES—FRAUD—EVIDENCE OF PREVIOUS ACTS.

King v. *Wyatt* (1904) 1 K.B. 188, was a prosecution for obtaining goods by false pretences. The prisoner had gone to the prosecutrix's house and got her to receive him as a lodger and incurred a bill of 14 s. 6 d., which he was unable to pay. It was proposed to call witnesses to prove that the prisoner had been at an hotel and other lodging houses and in like manner incurred bills and left without paying. The evidence was admitted subject to an objection to its admissibility, and the prisoner was convicted. On a case stated the Court (Lord Alverstone, C.J., and Wright, Kennedy, Darling, and Phillimore, L.JJ.) held that the evidence was admissible as shewing a course of conduct on the part of the prisoner, and his conviction was affirmed.

WEIGHTS AND MEASURES—SCALES—WEIGHT INDICATED EXCEEDING TRUE WEIGHT—ACQUIESCENCE OF PURCHASER—"FALSE OR UNJUST"—WEIGHTS AND MEASURES ACT, 1878 (41 & 42 VICT., C. 49) S. 25—R.S.C. C. 104, S. 25.

In *London County Council* v. *Payne* (1904) 1 K.B. 194, the defendants, who were wholesale tea merchants, were summoned for having scales which were "false and unjust," contrary to s. 25

of the Weights and Measures Act, 1878 (R.S.C. c. 104, s. 25). The facts proved shewed that the defendants for the purpose of weighing tea to certain retail customers had affixed to one of the scales in question by a wire metal disc equal to the weight of a paper bag, for the purpose of weighing tea to be sold to such customers, the effect of which was to make the articles weighed in the scale appear to weigh more by the weight of the disc than the true weight. The disc was used with the knowledge of the customers who supplied the bags, and which bore a printed notice to the effect that the weight of the paper was included. The other scale instead of having a metal disc attached, had a paper bag placed under the scoop in which the tea was placed for weighing. The defendants had given directions to their servants not to use the scales with the disc or paper bag attached for any customers other than such retail dealers. The magistrate acquitted the defendants, but on a case stated the Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) held that the defendants had been guilty of using scales which were "false or unjust" within the meaning of the Weights and Measures Act, 1878, s. 25 (R.S.C. c. 104, s. 25) and ought to have been convicted.

LOTTERY—SWEEPSTAKE ON HORSE RACE—GAMING ACT, 1802 (42 GEO. 3, C. 119, S. 2)—(CR. CODE, S. 205).

In *Hardwick* v. *Lane* (1904) 1 K.B. 204, the Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) held that a sweepstake on a horse race is an illegal lottery within the Gaming Act, 1802 (42 Geo. 3, c. 119) s. 2. (See Cr. Code s. 205)

CLUB—"PRIVATE DWELLING PLACE"—NUISANCE.

In *McNair* v. *Baker* (1904) 1 K.B. 208, it was held by the Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) that a house used by a club of 750 members, which had previously been a private dwelling house, and which, besides the usual accommodation of a club, had five bedrooms for the use of members, was not "a private dwelling place" within the meaning of an Act of Parliament relating to nuisances caused by smoke.

MERCHANT SHIPPING ACT—LIMITATION OF LIABILITY—SHIP—WATER BALLAST TANK.

The Cordilleras (1904) P. 90, may be noted as deciding that in the measurement of the tonnage of a vessel for the purpose of

limiting the liability of the owners under the Merchant Shipping Act, s. 503, the space occupied by water ballast tanks which are not capable of being used for the carriage of stores, cargo or fuel, may properly be excluded.

LETTERS OF ADMINISTRATION—COLONIAL PROBATES ACT, 1892 (55 & 56 VICT., C. 6)—LIMITED GRANT—RESEALING GRANT.

In the goods of Smith (1904) P. 114, an application was made to reseal colonial letters of administration under the Colonial Probates Act, 1892 (55 and 56 Vict., c. 6). The deceased, William Smith, was at the time of his death administrator of one George Smith, and the letters of administration to the estate of William Smith were limited to the property of George Smith in the hands of William Smith. The next of kin of William Smith consented to the application. The officers of the Probate Division declined to reseal the grant, but on application to Bucknill, J., he ordered the grant to be resealed notwithstanding its being limited in its terms.

CONVEYANCING—ASSIGNMENT OF MORTGAGE OF LEASEHOLD—"BENEFIT OF SAID MORTGAGE"—OPERATIVE WORDS—LEGAL ESTATE—TECHNICAL WORDS—INTENTION.

In re Beachey, Heaton v. *Beachey* (1904), 1 Ch. 67. The Court of Appeal (Lord Alverstone, C.J., and Williams and Romer, L.JJ.) decided that there was still some importance left in technical words and that an assignment of a mortgage of leaseholds whereby the assignor purported "to convey and transfer all the benefit of the said mortgage" to the transferee, was not sufficient to convey the legal estate in the mortgaged property.

WILL—CONSTRUCTION—"CHATTELS REAL"—RENT CHARGE ON LEASEHOLDS—UNPAID PURCHASE MONEY—INTESTACY NEXT OF KIN—REAL ESTATE CHARGES ACTS 1854 (17 & 18 VICT. C. 113), S. 1, AND 1877 (40 & 41 VICT. C. 34, S. 1)—(R.S.O. C. 128, S. 37.)

In re Fraser, Lowther v. *Fraser* (1904), 1 Ch. 111, two points were determined by Byrne, J. First, that a rent charge issuing out of leaseholds is a "chattel real"; and secondly, that where a testator dies intestate as to a chattel real which is subject to a lien for unpaid purchase money under the Real Estate Charges Act 1877 (40 & 41 Vict. c. 34), s. 1, (R.S.O. c. 128, s. 37) the next of

kin take it cum onere and are not entitled to have the lien discharged out of the general estate.

COMPANY—SALE OF ASSETS—DISSOLUTION OF COMPANY—LEGAL TITLE—VESTING ORDER—TRUSTEE ACT 1893, (56 & 57 c. 53), ss. 26, 35, 36 - (R.S.O. c. 336, s. 5, ii. (c), s. 15, ii. (c).

In re General Accident Assurance Corporation (1904) 1 Chy. 147. A company having gone into voluntary liquidation for the sale of its property, and having received the full purchase consideration therefor, before making any legal transfer of the property became automatically dissolved, and the problem then arose as to how the legal title of the property was to be vested in the purchaser. Farwell, J., held that it was a case of property vested in a trustee who "could not be found" within the Trustee Act 1893, (see R.S.O. c. 336, s. 5, ii. (c); s. 15 ii. (c)) and that under the Act a vesting order could be made vesting all the estate of the company therein at the date of its dissolution, and he made the order accordingly.

WILL—LIFE INTEREST—FORFEITURE ON ALIENATION—CHARGE—CANCELLATION OF CHARGE, BEFORE SHARE CHARGED BECOMES PAYABLE.

In re Baker, Baker v. *Baker* (1904), 1 Ch. 157, the question Buckley, J., was called on to decide was whether a forfeiture had taken place under the terms of a will. By the will in question a life interest in a share of the testator's residue had been bequeathed to his son Henry subject to a proviso that he should not have power to dispose of his interest by way of anticipation, and that in the event of his becoming bankrupt or doing anything whereby his share would become payable to, or vested in, some other person it should go over to his children. The testator died in 1896 and an order for the administration of his estate was made in 1899. In 1903 Henry borrowed two sums of money and charged his share of the residue in favor of the lenders. Both charges were cancelled and given up to him before any order had been made in the action for payment of anything to him in respect of his life interest. Under these circumstances Buckley, J., held that there having been an act done which gave a right to the mortgagees to receive part of Henry's share, the forfeiture then took effect, and it was immaterial that the mortgagees had subsequently cancelled or released the charge.

PARTNERSHIP—RECEIVER—INTERFERENCE WITH RECEIVER.

In *Dixon* v. *Dixon* (1904), 1 Ch. 161, the action was brought to wind up a partnership, and a receiver and manager of the business had been appointed with a view to its sale as a going concern. The defendant had, pending the suit, joined a rival business and had informed some of the old employees of the old firm that the business was to be sold and had invited them to give notice to terminate their employment and join the new business in which he was engaged. Three of the most important employees in consequence left the old and joined the new business after giving the requisite notice. The defendant had also endeavoured to secure for himself a lease of a field which had been in the occupation of the old firm. The plaintiff moved for an injunction to restrain the defendant from interfering with the receiver's management of the old business. Eady, J., held that the acts complained of were an interference with the receiver and granted an injunction, which looks like shutting the stable door after the horse is stolen. One would have thought the plaintiff's proper remedy would have been a motion to commit the defendant for contempt of court.

PATENT — INFRINGEMENT — COMBINATION — COMPONENT PART OF PATENTED ARTICLE—SALE—INTENTION.

Dunlop Pneumatic Tyre Co. v. *Moseley* (1904), 1 Ch. 164, was an action to restrain an alleged infringement of a patent. The patent was for a combination and the defendants were manufacturers of one article which constituted one of the component parts of the patented combination. The plaintiff claimed that the defendants sold them to persons who used them for the purpose of combining them with other parts so as to infringe the plaintiff's patent, and that the defendant intended that they should be so used, and they claimed an injunction. Eady, J., dismissed the action on the ground that the manufacture and sale of the part in question was no infringement of the patent, and the fact that purchasers might possibly use them for the purpose of infringing the patent gave the plaintiffs no ground of action against the defendants.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] ALEXANDER *v.* MILES. [Jan. 25.

Master and servant—Employer's liability—Workmen's Compensation for Injuries Act—Usual action by fellow employee.

Action under Workmen's Compensation for Injuries Act by a widow to recover damages for the death of her husband, caused by an accident when in the defendant's employ. The deceased was working on the first floor of the defendant's door and sash factory. There was an opening in the floor through which boards were passed from the lower to the first floor when required. The usual method before and at the time of the accident was, that when a number of boards had to be put up stairs a workman was sent up to stand by the hole and receive each board as it was handed up by a man on the ground floor. When only a few boards were to be put up at a time, the man below would push a board up a little way and rattle it about until some one on the first floor came forward and took it. On the occasion of the accident an employee of the defendant's engaged on the ground floor, finding three boards standing with the upper ends in the opening above and in the way of his work, pushed one up a little way and rattled it. No attention being taken, he violently shoved a board up so that it shot through the hole and landed on the first floor. He repeated this with the second and third, and the last one struck the deceased while walking past the hole and caused his death.

Held, that the defendant was not responsible inasmuch as the act of the employee which caused the accident was wholly unauthorized and opposed to the usual course, and the defendant or foreman could not be blamed for not assuming that any workman would resort to such unlikely and extraordinary measures for removing boards from the lower floor.

Riddell, K.C., for defendant, appellant. *McBrady*, K.C., for plaintiff, respondent.

HIGH COURT OF JUSTICE.

Street, J.] FORBES *v.* GRIMSBY PUBLIC SCHOOL BOARD. [Dec. 26, 1903.

Public schools—Requisition for funds—Requisites of meetings of board and council—Notice—Adjourned meeting of council—Scope of power at—By-law—Recital of amount of debt—Municipal Act, 1903, s. 386, s.-s. 1 and s. 384, s.-s. 5.

A public school board having called upon the Municipal Council of a village to raise $12,500 for the purpose of building a school house, the council passed a by-law for the purpose of issuing debentures to the amount required. A ratepayer obtained an interim injunction restraining proceeding thereunder which injunction was dissolved on motion to continue. The school board subsequently passed a new resolution asking the council "to pass a by-law for the issuing of debentures to the amount of $12,500 for the purpose of a school site and towards the erection of a school house thereon" which was presented to the council on the same day and the council repealed their by-law and passed a new one for the purpose. The plaintiff (the same ratepayer) then brought an action to have the latter by-law declared invalid (1) on the ground that the meeting of the school board at which the last resolution was passed was irregular because no notice was given to the members of the board of the object of the meeting, and (2) because the council had no power to pass the by-law as no notice had been given of the object of its meeting, and as it was an adjourned meeting, it had no power to transact any business which could not have been brought before it at the meeting of which it was an adjournment.

Held, that in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it is unnecessary that the notice calling any meeting of any school board or municipal corporation should specify the business to be transacted. *The King* v. *Pulsford* (1828) 8 B. & C. 350 and *La Compagnie de Mayville* v. *Whitley* (1896), 1 c. 788, referred to and distinguished from *Marsh* v. *Huron College* (1880) 27 Chy. 605 and *Cannon* v. *Toronto Corn Exchange* (1880) 5 A.R. 268.

2. It was the duty of every member of the Council to be present at the adjourned meeting, and it was competent to the members present to transact any business which might have been transacted at the original meeting.

3. As the latter by-law was only passed to overcome certain defects in the earlier one, it might well have been passed without any new requisition from the school board.

4. The by-law sufficiently recited the amount of the debt intended to be created as it recited that application had been made by the school board to the council to raise the sum of $12,500 by the issue of debentures, and it authorized the issue of debentures to that amount.

5. Sub-s. 1 of s. 386 of the Municipal Act of 1903 authorized the issue of debentures providing for the payment of principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of sub-s. 5 of s. 384 of that Act.

Marsh, K.C., and *Pettit*, for plaintiff. *Lynch-Staunton*, K.C., for School board, Vandyke and Lipset. *D'Arcy Martin*, for Corporation of Grimsby.

Meredith, C.J., MacMahon, J., Teetzel, J.] [Jan. 22.

ST. LAWRENCE STEEL AND WIRE CO. *v.* LEYS.

Principal and surety—Guarantee—Construction of—Future indebtedness.

An appeal by the defendant from the judgment of STREET, J., reported 6 O.L.R. 235, was argued before a Divisional Court on Jan. 20 and dismissed with costs.

Gibbons, K.C., for appellant. *Watson*, K.C., contra.

Meredith, C.J., Maclaren, J.A., MacMahon, J.] [Mar. 3.

BURDETT *v.* FADER.

Injunction—Debtor disposing of his property—Status of creditor—Verdict for damages—Fraud.

An appeal by the plaintiff from the judgment of BOYD, C., reported ante p. 32, was argued on the 3rd March, 1904, before a Divisional Court, composed as above.

The Court dismissed the appeal with costs.

Gunn, K.C., for appellant. *O'Connell*, contra.

Boyd, C., Ferguson, J., Meredith, J.] [Feb. 1.

RE L'ABBE AND CORPORATION OF BLIND RIVER.

Municipal corporation—By-law—Reduction of number of liquor licenses—Casting vote of Reeve—Pecuniary interest in licensed premises in municipality.

Appeal from an order of the senior judge of the District Court of Algoma dismissing an application to quash a by-law of the municipal council, reducing the number of liquor licenses on the ground that the Reeve, upon whose casting vote the by-law was passed, had a pecuniary interest in the result of the reduction of the number of licenses.

The municipality contained a population of 583 people. There had been passed in a former year a by-law allowing three liquor licenses for

taverns to be issued for the locality, which remained in force in 1903. As a matter of fact only two licenses had ever been granted at any time, and in 1903 these licenses were held, one for a tavern owned by the brother of the Reeve, and the other for a tavern which was held under mortgage by the Reeve. The by-law objected to purported to repeal the by-law allowing three licenses and limit the number to two. The members divided equally and the matter was carried in favour of the new by-law by the casting vote of the Reeve.

Held, that the effect of the by-law in question would be to prevent the license commissioners granting more than two licenses, and it was fairly to be inferred that the licenses would go in continuation of the existing licenses and to the exclusion of the present applicant, who had completed the building of a large boarding house with the view of obtaining a liquor license. The vote of the Reeve in effect secured the renewal of the license to the tavern held by him under mortgage and cut out any chance of a competitor who might share the profits of the mortgaged tavern, and otherwise impair the value of his security, and therefore it could not be said that there was an absence of direct pecuniary or proprietary interest in the Reeve in the matter of his casting vote, and his vote should not be allowed to bring about a result so likely to be favourable to himself.

It appears to be a question of fact in administration of public trusts whether the person voting in the exercise of the trust has such a disqualifying interest as should estop him from taking part and as should nullify his vote.

Appeal allowed and impeached by-law quashed.

Middleton, for appellant. *Grayson Smith*, for corporation.

Boyd, C.] IN RE MCCRAE AND VILLAGE OF BRUSSELS. [Feb. 13.

Municipal corporation—Local improvement by-law—Absence of personal notice—Actual notice—Motion to quash.

Held, that the provision in s. 669 (i.a.) of Municipal Act, 3 Edw. VII., c. 19, as to giving personal notice of a projected local improvement to the parties whose property is to be included is directory only; and in this case in which it appears that the applicants were well aware all the while from the outset as to what was intended, a motion to quash a municipal by-law providing for a local improvement on the ground of the absence of such personal service was refused.

Held, also, that the objection that the members of the Court of Revision were not sworn, could not be entertained on such motion, because the members of that court had not been called upon to uphold their action, and because the applicants went before the court on appeal and were unsuccessful.

Proudfoot, K.C. for plaintiff. *Sinclair*, K.C., for defendants.

GENERAL SESSIONS OF THE PEACE—COUNTY OF YORK.

Winchester, Co. J., Chairman.] [Feb. 23.

REX *v.* GOODING.

Conviction under by-law—Appeal—Drainage and water system of buildings—Construction, reconstruction or alteration, in respect of same—Repairs—Meaning of terms.

The defendant had been convicted by R. E. Kingsford, one of the Police Magistrates for the City of Toronto, of having, contrary to a by-law of the municipality directing that "before proceeding to construct, reconstruct, or alter any portion of the drainage, ventilation, or water system of any hotel, warehouse, dwelling-house, or other building, the owner, or his agent, desiring to construct the same, shall file in the office of the Medical Health Officer an application for a permit therefor." The by-law further obliged any master plumber, or workmen, engaged by the owner to discharge work of such description to satisfy himself before commencing it that the permit had been so filed. Penalties were enacted for violation of the by-law.

The offence sought to be established by the prosecution was that of "reconstructing or altering" the drain leading from water-closet by removing 8 feet or so of pipe and replacing this by two new lengths, the sides being afterwards filled in with earth. Besides this operation the old hopper, which had become impaired by use, was taken out and a fresh one inserted.

Held, quashing the conviction, that the work performed should not be viewed as "construction, reconstruction, or alteration," but consisted of "repairs," for which a permit was not requisite. *Hoddinott* v. *Newton Chambers Co.* (1901) A.C. 49, considered and approved.

B. N. Davis, for appellant. *W. C. Chisholm*, for respondent.

Winchester, Co. J., Chairman.] [Feb. 23

REX *v.* SABINE.

Summary conviction—Appeal—Lord's Day Act, R.S.O. c. 246,—Eating house license—Sale of "Ice-cream soda."

The defendant was convicted by R. E. Kingsford, one of the Police Magistrates for the City of Toronto, "for that he, being a tradesmen," etc. (following here the words of s. 1 of the Act) by, among other things, selling and exposing and offering for sale, or authorizing clerks and salesmen to sell, etc., certain glasses of a beverage known as "Ice-Cream Soda." It appeared from the facts that the appellant held a victualling house license, for the year ending December 31, 1903, applying to 168 Queen St. west.

He said there were tables of different capacities for guests, at which meals, such as ham and eggs, meat, etc., were served, if called for, but admitted that the front part of the store was used for trade in candies, and that such was the main business carried on; though he kept plates, saucers and knives on hand, and sold oysters when they were in season. He swore that he confined his dealings on Sundays to ice-cream and eatables. He did not put table cloths, nor knives and forks on the tables, but said they were available. Witnesses stated that they had often looked in at the place, when passing, but never saw anything but candies and ice-cream or ice-cream soda there. One declared that he was not able, on request, to get a meal at one time.

The ice-cream soda was made up of cream, sugar, flavor, and soda, carbonated.

The offence was not committed by the appellant personally, but he confessed to having girls employed in the store to wait upon customers.

Held, 1. On the authority of *Sieman* v. *Commonwealth*, 21 Am. Law Reg. 245, which refers to *Reg.* v. *Bleasdale*, 2 C. & K. 764, that appellant was liable for the wrong of his servant acting in the course of his employment.

2. The business of the appellant not being exclusively that of a victualler, the sale of the article in question was illegal.

Robinette, K.C., for the appellant. *W. C. Chisholm*, for the respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] REX *v.* BURKE. [Jan. 13.

Canada Temperance Act—Informations for similar offences pending at same time—Conviction quashed.

Defendant was summoned to appear before the stipendiary magistrate of Sydney, C.B., to answer to two informations for selling intoxicating liquor in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases and both cases were then adjourned until a subsequent day when judgment was given convicting defendant under one information and dismissing the other.

Held, that the conviction must be quashed, the magistrate having heard evidence in both cases and had them pending before him when he

made the conviction, and the evidence in the one case, although dismissed, being calculated, under the circumstances disclosed, to influence the magistrate in the case in which defendant was convicted.

R. v. *McBerny*, 26 N.S.R. 327 followed.

Weatherbe, J.] HENNIGAR, ASSIGNEE *v.* BRINE. [Feb. 5

Collection Act—Fraudulent disposition of property—Appeal from order of examiner dismissed with costs—Refusal to execute assignment—Imprisonment ordered for.

A judgment was recovered against one of the defendants, G.B., on Jan. 31, 1901, for $37.91, debt and costs, and remained unsatisfied, which at the date of the commencement of the examination hereinafter mentioned, amounted to $50.32. On Dec. 29, 1903, the defendant, G.B., entered into a recognizance for $45 as surety for his brother J.T.B. in the Police Court at Halifax on appeal from a summary conviction, and justified on oath as being worth "$45 over and above all his debts" in personal property, which consisted of household furniture, including the above judgment and another judgment had against him by L. & T. for $65.19, and which two judgments were specifically brought to his notice at the time he was justifying as bail under oath. An execution was issued on the first mentioned judgment on the following day, and the sheriff acting under it, on Jan. 3, 1904, demanded from the defendant the personal property on which he justified, to which G.B. replied that he had sold it to his brother N.B. who took possession of it two days before for $60, which he gave to his wife for the purpose of buying household supplies, etc. The defendant was shortly afterwards examined under the Collection Act in respect of this judgment. The above facts were proved on the examination, but the disposition of the $60, the proceeds of the sale of G.B.'s personal property to his brother N.B., was not satisfactorily accounted for to the examiner; it further appeared that shortly after the recovery of this judgment against the said G.B., but before it was recorded, he mortgaged his realty to a building society for $400, and subsequently conveyed by absolute deed the equity of redemption for another alleged loan of $400 to his father in-law, whose heirs without any consideration conveyed said equity to defendant, G. B.'s wife. The defendant G. B. remained in possession of the realty which was assessed in his name, paid the taxes on it, and did not know whether the alleged loan from his father-in-law was paid off by his wife or not. He afterwards himself paid off the mortgage to the building society.

The examiner made an order under the Collection Act, s. 27 (e) against the defendant G. B. committing him to jail for two months for a fraudulent disposition of his property, or until he should pay $61.42, the amount due on the judgment. On appeal to Weatherbe, J., at Chambers,

Held, 1. The examiner was fully justified in making the order for imprisonment and the appeal should be dismissed with costs.

2. Where the debtor refused to execute the assignment mentioned in s. 28 of The Collection Act, and the judge or examiner determines to commit him under s. 27 of the Act, the warrant or order of committal cannot then direct an assignment to be executed, but such refusal of the debtor to execute it can be only taken into consideration by the officer or judge in fixing the term of imprisonment.

H. Mellish and *J. L. Barnhill*, for appellant. *J. J. Power*, for respondent.

Townshend, J.] HENNIGAR *v.* BRINE. [Feb. 16.

Collection Act—Bond to appear on hearing of appeal—Action for penalty under—Damages to be assessed—O. 3, rr. 5 and 6.

One of the defendants, G.B., appealed to a Supreme Court judge in Chambers from the examiners' adjudication referred to in *Hennigar, Assignee*, v. *Brine*, supra, and gave a bond in the sum of $61.42, required by s. 32, of the Collection Act, conditioned personally to appear before the judge on the hearing of the appeal, and to surrender himself to prison in case of an adjudication of imprisonment. The appeal was heard and dismissed, and the adjudication below confirmed, and, for an alleged breach of the condition of the bond by the defendant in not surrendering himself to prison, an action was commenced on the bond against the defendant, G.B., and his sureties for the penalty of $61.42, by the issue of a general writ of summons. The defendants, before appearing, moved to set the writ and service aside on the grounds (a) that, being for a debt or liquidated demand, the writ should have been specially endorsed under order 3, rule 5, and (b) that the writ, in any event, should have been endorsed with the usual claim for costs under order 3, rule 6, citing *Murray* v. *Kaye*, 32 N.S.R. 206.

Held, dismissing the motion with costs, that the claim was not a debt or liquidated demand for money, but was one in respect to which damages must be assessed. *Sloman* v. *Walter*, 2 W. & T., Leading Equity Cases (Blackstone ed.) page 1267; Leake on Contracts, 3rd ed., page 122; and *Tuther* v. *Caralampi*, 21 Q.B.D. 414, referred to.

J. M. Davison, for motion. *J. J. Power*, contra.

Weatherbe, J.] IN RE GEORGE BRINE. [Feb. 19.

Habeas corpus—Arrest of witness while returning from giving evidence—Detention under order of punitive and quasi criminal character—Motion for discharge refused—Remedy.

The applicant, G.B., was arrested at the City of Halifax, at which place he resided, by the sheriff of the County of Halifax, under the order of Weatherbe, J., referred to in *Hennigar, Assignee* v. *Brine*, supra, on

Feb. 11, 1904, while he was going to his place of business and returning to his home, about three-quarters of an hour after he had left the police court at Halifax where he had attended to prosecute and give evidence as a necessary and material witness for the Crown, in a prosecution instituted by himself the previous day, for an aggravated assault committed on him on Feb. 6, 1904. On a motion to discharge the prisoner from custody the sheriff, to an order made by Graham, E.J., in the nature of a writ of habeas corpus, under R.S., c. 181, "of securing the liberty of the subject," returned the above order of Weatherbe, J., as the cause of the prisoner's detention. The grounds of the motion were (a) the prisoner's privilege from arrest while returning from giving evidence in Court, and (b) alleged excessive fees indicated in the margin of the judge's order.

Held, 1. Dismissing the application, that, under all the circumstances, and as the judge's order was of punitive and quasi-criminal character, the defendant as a witness was not privileged from arrest under it. Sec. 242 of the Criminal Code, *Gibbs* v. *Phillipson*, 1 R. & M. 19, and *Re Gent*, 40 Ch. D. 190, referred to.

2. The order was one that could not be impeached under habeas corpus proceedings. *MacKay* v. *Campbell*, 39 C.L.J. 486; *Re Sproule*, 12 S.C.R. 140; *R. v. Beamish*, 5 C.C.C. 388, referred to.

3. In view of s. 37 of the Collection Act, which makes the judgment of the judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due, or to sue for the penalty for taking excessive fees provided by R. S. c. 185, s. 2, but that in any event, under s. 40 of the Collection Act, even if the present application lay, as the evidence taken upon the examination shewed there was ground for making this order, the application should be refused. *R.* v. *Doherty*, 3 C.C.C. 505; 32 N.S.R. 235; *R.* v. *Murdock*, 4 C.C.C. 82; 27 A.R. 443; *R.* v. *Spooner*, 4 C.C.C. 207; 32 O. R. 451, referred to.

J. M. Davidson, for applicant. *J. J. Power*, contra.

COUNTY COURT DISTRICT No. 6.

MacGillivray Co., J.] RE ARCHIBALD. [Sept. 21, 1903.

Partition—Dower—Merger—R.S.N.S. 1900, c. 140, ss. 3, 4 (1) and 16.

Samuel Archibald died intestate, leaving two sons and one daughter to whom his real property descended as tenants in common. Before partition one of the sons died intestate, leaving a widow but no issue. The Act as to descent of real property provides: Sec. 3. "If the intestate leaves no issue one-half of his real property shall go to his father and the other half to his widow in lieu of dower, and if there be no widow the whole shall go to the father."

Sec. 4 (1). "If the intestate leaves no issue nor father, one-half of his real property shall go to his widow and the other half in equal shares to

his mother, brothers and sisters, and the children of any deceased brother or sister by right of representation."

Sec. 16. "Nothing in this chapter contained shall affect the title of husband as tenant by the curtesy, nor that of a widow as tenant in dower."

On proceedings under the Probate Act for partition of the real property the widow of the deceased son claimed, in addition to one-half of her late husband's share in fee one-third of the other half as tenant in dower, contending that as the words "in lieu of dower" were not repeated in sec. 4 (1) that under s. 16 dower in her case is not affected. On a special case stated,

Held, that the widow had no right of dower in the half assigned to the brother and sister. "The law casts the freehold on the heirs immediately on the death of the ancestor." "Until assignment of dower the widow has no estate and only a right of dower." (Smith on R. & Per. Pr., 3rd ed. p. 193). On the death of S. Archibald his children took the whole estate as tenants in common. The share of one of his sons (who died after his father) is set apart in the partition. This share goes one-half to the widow the other to the brother and sister in equal shares; and they all held those shares before partition by unity of possession. The inferior life estate of the widow—inchoate life estate—is therefore absorbed in the higher life estate and entirely disappears. Following the doctrine laid down in Freeman on Co-Ten. & Part. s. 108, it was held that the widow was tenant in common with the brother and sister; and on partition between them she takes one-half in fee and they take the other half in fee. Hence there is no right of dower remaining which the widow can claim.

The reason of expressly saving dower under s. 16 is declaratory only of the widow's common law right in case the lands descended to an intestate's children; or it may be intended to save her dower in case the real estate of an intestate were sold by license to pay his debts.

H. T. Harding, for the widow. *W. Chisholm*, for brother and sister.

Province of Manitoba.

KING'S BENCH

Full Court.] CAMERON *v.* DAUPHIN. [Feb. 1.

Public Health Act, R.S.M. 1902, c. 138, ss. 32, 67, 95, 101, 102—Liability of municipality for services of physician and nurse employed by health inspector to take care of a smallpox patient.

Appeal from verdict of a County Court Judge in favor of plaintiff who sued the defendant municipality for payment for his services as physician and nurse in attending, by direction of the district health inspector, upon a

smallpox patient in quarantine. On the breaking out of the disease in the town the district health inspector, appointed under "The Public Health Act," R.S.M. 1902, c. 138, visited the town and decided to remove the family affected with the disease, and the patient was isolated and quarantined in a house selected by the local health officer and mayor. The inspector then requested the plaintiff to take charge of the quarantine as medical attendant and nurse, and told him the amount of remuneration he would be entitled to, viz., $15 per day. He remained in charge for eleven days. The town paid the other expenses but declined to pay the plaintiff, although the inspector gave him a certificate of the services having been performed and of the amount earned.

By s. 67 the health officer of the municipality may make effective provision, in the manner which to him may seem best, for the public safety, by removing such person to a separate house or by otherwise isolating him if it can be done without danger to his health, and by providing nurses and other assistance and necessities for him at his own cost and charge, or the cost of his parents or other person or persons liable for his support if able to pay for the same, otherwise at the cost and charge of the municipality. By s. 32 the health inspector shall have in his district, and in every municipality therein, all the powers conferred by the Act upon health officers, and may, when he deems it necessary, suspend, supersede or act in the place of the health officer and other local officials and give such orders or directions as he deems necessary. By s. 33 the orders, directions or certificates of the inspector have the like force and effect as those of the local health officer and mayor or reeve, and he is given power to annul the orders of the local officials, who shall have no power to make any order inconsistent with that of the inspector.

By s. 95, when any person is unable through poverty to comply with the provisions of the Act, he may so notify the health officer and the latter may then give a certificate which shall be a bar to all proceedings against such person for six months.

In view of the above provisions and also of ss. 101 and 102 of the Act, the municipality in such a case is primarily liable for the expenses incurred in caring for such patients in quarantine, and it was not necessary for plaintiff to prove that he could not recover from the patient or from his parents or other person or persons liable for his support.

2. It was unnecessary to decide whether the plaintiff could recover as a physician for he had acted as nurse, and the amount certified for his services as such was not unreasonable under the circumstances.

3. It was competent for the inspector to engage the plaintiff without having first suspended or superseded the local health officer.

The matters dealt with in the portions of the Act referred to are of pressing necessity and require prompt action in the interest of the persons affected and of the public health, and if the municipality were not obliged to pay the expenses incurred under the Act until proceedings had

been taken against the individuals liable and until it was shewn that such proceedings would be unsuccessful, thus involving a delay of perhaps many months, it would be difficult, if not impossible, to secure the prompt services of nurses or physicians or to procure necessary food, medicines and supplies, and such could not have been the intention of the Legislature in passing the Act.

Appeal dismissed with costs.

Wilson, for plaintiff. *Aikins*, K.C., for defendant.

Full Court.] SPEIGHT WAGGON CO. *v.* CURRIE. [Feb. 1.

Executions Act, R.S.M. 1902, c. 58, ss. 24-27—Extension of time for creditor to get judgment in order to share in distribution by sheriff—Power of judge to alter, vary, or add to his own order—Power to rescind his own order—King's Bench Act, R.S.M. 1902, c. 40, s. 58, R. 438, 638.

The sheriff, having realized certain moneys under executions against the defendants, gave, on Nov. 8, 1902, the notice required by R.S.M. 1902, c. 58, s. 25, which requires him to delay the distribution of the money for three months, to enable other creditors to get judgment, and place their executions in his hands, and then to distribute the funds in his hands among all persons having unsatisfied executions in force in his hands at the date of distribution. Sec. 27 provides that, in case any person, to whom the same debtor is justly liable for any debt or liquidated demand, or such a demand as would have been the subject of a former action upon the common or money counts, is unable, for any reason which he cannot by due diligence overcome, to obtain judgment against the said defendant, a Judge of the Court of King's Bench may order the distribution by the sheriff to be wholly or partially delayed, as may seem just for a further period. Under this provision the plaintiffs, on Feb. 7, 1903, on notice of motion which was served only on the sheriff, obtained an order in chambers from Mr. Justice Richards that the sheriff should delay the distribution of the money until March 30; but the order provided that any interested party might move to vary, or rescind it, within two weeks after the service thereof on the sheriff. This service was made on Feb. 9. On March 13, following, Merrick Anderson & Co., on whose writs of execution the sheriff had realized the moneys referred to, on notice of motion given by special leave of the same judge, obtained from him an order that the one made by him, on Feb. 7, delaying the distribution, should be set aside, with costs to be paid by the plaintiffs, on the ground that they had not used due diligence in obtaining judgment. On April 20, following, Merrick Anderson & Co. obtained a further order from the same judge, directing that his order of March 13, should be amended, nunc pro tunc, by adding a clause thereto that the sheriff should have no regard to the

writ of execution issued by the plaintiff on Feb. 8, and that he should distribute the moneys among those entitled to share in them on Feb. 8 without paying the plaintiffs any part thereof. The plaintiffs appealed against the two last mentioned orders.

Held, 1. Since the passage of s. 58 of The King's Bench Act, R.S.M. c. 58, an order of a single judge cannot be set aside, varied, amended, or discharged, except on appeal to the Court in banc, unless the case comes within the provision of Rule 638, that clerical mistakes in judgments and orders, or errors arising therein from any accidental slip, or omission, may, at any time, be corrected by the Court, or judge, on motion without an appeal; and, therefore, the order of April 20, barring the plaintiff from the distribution was made without jurisdiction, and should be set aside. *In re Suffield and Watts*, 20 Q.B.D. 693, and *Preston Banking Co.* v. *Allsup* (1894) A.C. 141, followed.

2. Under Rule 438, which provides that any party affected by an ex parte order, except the party issuing the same, may move to vary, or rescind the order within four days, from the time of its coming to his notice, or within such further time as the judge may allow, it was competent for the judge to make the order of March 13, rescinding his order of Feb. 7, as that order, having been obtained without notice to Merrick Anderson & Co., should, as regards them, be considered as an ex parte order, and, although Merrick Anderson & Co. had not applied within two weeks, or within four days, from acquiring a knowledge of it, the judge had allowed further time, as provided for by that Rule; that there was no sufficient reason for interfering with the discretion exercised by the judge in making the order appealed against: and that it should stand.

3. A creditor having no other cause of action than one based on a debt not yet due and payable, has no right to apply, under s. 27 of the Executions Act, for an order delaying the distribution by the sheriff. No costs to either party.

Wilson and *McPherson*, for plaintiff. *Mulock*, K.C., for Merrick Anderson & Co.

Full Court.] BRYDGES *v.* CLEMENTS. [Feb. 1.

Principal and agent—Commission on sale of land—Right to commission when sale falls through—Amount payable in that case.

After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in question, on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the building, on the property, was out of plumb, and slightly overhung the adjoining lot, and called on the defendant to make good the title to the building, which formed part of the property bought. Being unable, or unwilling, to make good the defect in title, or to make satisfactory terms

with the owner of the adjoining lot, defendant proposed to the purchaser that the agreement of sale should be cancelled, and it was cancelled accordingly.

Held, following *McKenzie* v. *Champion*, 4 M.R. 158; *Wolf* v. *Tait*, 4 M.R. 59; *Brickett* v. *Badger*, 1 C.B.N.S. 296; *Roberts* v. *Barnard*, 1 C. & ... 336, and *Fuller* v. *Eames*, 8 T.L.R. 278, that plaintiffs had earned and were entitled to be paid a compensation for the services in finding a purchaser, not necessarily the amount agreed upon as commission, but a compensation as a quantum meruit, or by way of damages, and that, under the circumstances, it was competent for the trial judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through.

Held, also, following *McKenzie* v. *Champion*, that plaintiffs were entitled to be paid, notwithstanding the fact that the plaintiffs had not procured the purchaser to execute a binding agreement of purchase.

Munson, K.C., and *Laird*, for plaintiffs. *Aikins*, K.C., and *Monkman*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] HARRY *v.* PACKERS' STEAMSHIP CO. [Jan. 25.

New trial—Misdirection—Judge's comments on evidence.

It is not misdirection for the judge to tell the jury his own opinion on the evidence before them. In his charge to the jury the judge stated that he himself would pay very little attention to certain corroborative evidence adduced by defendants, but he also told them that the matter was entirely for them to decide.

Held, not misdirection. Appeal from judgment of IRVING, J., dismissed.

Wilson, K.C., Atty.-Gen., for appellant. *D. G. Macdonnell*, and *L. B. McLellan*, for respondents.

Hunter, C.J.] WILES *v.* TIMES PRINTING AND PUBLISHING CO. [Jan. 29.

Practice—Notice of trial—Rule 340.

Summons to dismiss action for want of prosecution. On Jan. 13 plaintiff's solicitors gave notice of trial at the July sittings to be held in Victoria, where, according to statute, sittings are also held in February, March, May, October and December. This was a libel action and the

plaintiff was in Pennsylvania engaged in organizing theatrical entertainments and had so arranged her engagements that for her to leave there before June would entail great loss.

Held, that to give a notice of trial for the 4th sitting after the date of the notice is an abuse of the process of the court and the plaintiff was ordered to go to trial in March, otherwise the action to stand dismissed.

J. H. Lawson, Jr., for the summons. *Cassidy*, K.C., contra.

Book Reviews.

Principles of the Common Law, by John Indermaur, Solicitor, 10th ed., by the author and Charles Thwaites, Solicitor. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1904. Pages, 598. Price, $.

The first edition of this well-known book was written mainly with a view to the examinations of the Incorporated Law Society, as to which the author had large experience in reading with students. That was in 1876. The 9th edition went out of print in a little more than two years, rendering necessary the present 10th edition. We may well believe that "no pains have been spared to bring the work thoroughly and completely up to date." We need say no more about such a well-known book.

Imperatoris Justiniani Institutionum Libri Quatuor, with introductions, commentary, and excursus, by J. B. Moyle, D.C.L., of Lincoln's Inn, Barrister-at law: Oxford, at the Clarendon Press, London; Henry Frowde, Amen Corner, and Stevens & Sons, Limited, 119 & 120 Chancery Lane, 1903.

For purposes of beginners Sandar's edition of the Institutes may be more suitable than Dr. Moyle's, but in point of learning all competent critics agree that Dr. Moyle's Institutes is facile princeps of all editions by English annotators. It is not too much to say that it is an honor to Oxford University that one of its sons should have produced such an edition of the Institutes in a country in which the Civil Law does not prevail. Sohm's Institutes of Roman Law, admirably translated as they have been by Mr. Ledlie, can never supersede Dr. Moyle's work.

The historical introduction and the excursus upon such subjects as Servitude, Possession, Agency, and the early history of Roman Civil Procedure, with the frequent and apt citations from the Digest contained in the notes, are especially valuable features of this book; and the introduction, excursus, and notes have been carefully revised.

We observe that in his note to this edition Dr. Moyle specially refers to Professor Girard's Manual Elementaire de Droit Romain, and cites that work from time to time in his notes. Dr. Moyle says of it, that it is "A

masterly treatise which it is much to be desired should have been translated into English." We are glad to be informed that a member of our own bar, Mr. Lefroy, Professor of Roman Law in the University of Toronto, having obtained special permission from Professor Girard to translate his manual in whole or in part, has completed his translation of the Historial Introduction, comprising the first Book of Professor Girard's work, and it will shortly be published.

Courts and Practice.

EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions contained in the 55th section of "The Exchequer Court Act," as amended by 52 Vict., c. 38, s. 2, it is hereby ordered that the following Rule in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada :

1. An application to have any entry in any register of copyrights, trade marks or industrial designs, expunged, varied or rectified, may be joined with or made in an action for infringement.

(1) By the plaintiff in his statement of claim, where such entry has been made at the instance of the defendant, or some one through whom he claims, and the plaintiff is aggrieved thereby ; or

(2) By the defendant by counter-claim, where such entry has been made at the instance of the plaintiff, or some one through whom he claims. and the defendant is aggrieved by such entry.

Dated at Ottawa, this 7th day of March A.D., 1904.

Signed, GEO. W. BURBIDGE,
J.E.C.

The Recognition of Panama.—Theodore S. Woolsey LL.D. Professor of International Law in the Yale Law School discusses the action of the Government of the United States in reference to the recognition of Panama and its results, in the January number of the *Green Bag*, and comes to the following conclusions:—(1) The hasty recognition of a new State in Panama was not in accordance with the law of nations. (2) To justify it by the Treaty of 1846 requires a new and forced construction of that instrument. (3) To prevent Columbia's coercion of Panama is an act of war. (4) The "man in the street's" verdict that smart politics served Columbia right, disregards law, sets a dangerous precedent, detracts from the national dignity, and may injure our influence and trade amongst the Latin-American States. (5) Our duty was and is to let Columbia recover Panama if she can ; our policy, to use her troubles to get favourable canal action from the rightful sovereign. (6) Our recognition, if persisted in, makes of Panama a treaty making agent, but for ourselves only. (7) The canal treaty, negotiated and ratified by the Junta, with no constitutional authority or other authorization, is of doubtful validity and the defect will need to be subsequently cured.