Canada Law Journal.

VOL. XLIV. JULY. NOS. 13 AND 14.

THE CRIME OF SUICIDE.

The number of cases of suicide occurring both in Canada and the United States is simply appalling. Not a day passes without mention of some instance of a person either having ended, or tried to end, a life which seemed to be no longer worth living. Neither sex, nor age, nor any condition of life, appears to be exempt from the temptation of thus seeking to cure the ills which all flesh is heir to. Family disputes, a disappointment in love, financial difficulties, depression of spirits, ill health, worry of any kind, are all given as reasons why men and women, and even boys and girls, choose rather to face the actualities, or what they may fancy to be the possibilities of a future state, than to struggle against the often very trifling difficulties sure to be met with in our present existence.

A man quarrels with his wife—he first shoots her and then, to save further trouble, he shoots himself. There is a grave humour about this method of settling matrimonial differences that seems to be a fascination—so many instances of it do we read about. A man speculates with other people's money—loses it, becomes a defaulter, and then, sooner than face the consequences of his own acts, seeks refuge in some method of suicide. Two lovers fall out, and the man kills the woman to punish her for her want of appreciation, and then kills himself by way of expiation. Men and women of all ages and conditions, suffering from ill health, or giving way to worry of any kind, or often from no conceivable motive whatever, take their own lives without any more apparent sense of wrong-doing than they would feel in committing the most venial of offences.

The existence of this state of things is a public calamity of the most serious character, for it shews, as to the mental condition of a large class of the population, a want of moral rectitude,

a cowardice of heart, a feebleness of spirit, not only contemptible, but destructive of all those qualities which go to the making of a great and self-respecting and, especially, a Christian people. We say nothing of the religious aspect of the question, for a truly religious person would no more commit the acts which lead to suicide than he would resort to suicide to avoid the consequences of the crime.

It is, however, remarkable that such a state of things should exist where the restraints of religion are very fully exercised, and very generally regarded. It is equally surprising that it should exist in a country which is peaceful and prosperous, where poverty in its extreme form is almost non-existent—where both civil and religious liberty prevail to the fullest extent, where public opinion is very tolerant, and where even the law is not extreme to mark what is done amiss—where, in fact, as compared with many other countries, no conditions prevail which would seem to give a plausible excuse for the commission of the crime, for crime it is, of self-destruction.

From a legal aspect, how should this question be regarded? Can the law in any way step in to put a check upon a practice so sinful and degrading? From the legal as well as the religious aspect felo de se is a crime, and as such, in olden times, it was regarded, and, as far as possible, punished. To reach the criminal personally after he had put himself out of all jurisdiction was of course not possible, but he was branded as an outcast, his body was refused Christian burial, and was interred at a cross-road with a stake driven through it. Modern sentiment is less severe. If a jury is called on to deal with the cause of death it decides, whatever the circumstances were, that the act of self-murder was committed under stress of temporary insanity. The same merciful view is taken by the church, and the crime is practically condoned at the grave. The law might deal with suicide as it does with treason by confiscation of the worldly effects of the guilty party, and to those who were leaving property behind them it might be a determent to know that such would be the case. In many cases, however, suicide is the

result of the loss of property, a dread of poverty, and in others such considerations would have no application. The law punishes, as a crime, the attempt to commit suicide, but beyond that it seems to be powerless. Religion, which teaches the sacredness of human life, is, apparently, the only influence that can avail to check this great and growing evil, and it can only do so by enforcing the truth that as murder is a crime, so is suicide a crime.

The fundamental cause of the prevalence of suicide is the negation of faith—a disposition of mind inherited now through some generations educated with scarcely any knowledge of God. In former days there was a general personal belief in God as a judge and punisher. However faulty and sinful the life, there was also a sense of One higher than the individual, a rock to the weak, a refuge even to the evil-doer, One able to deliver, One more merciful than man. With this belief, or superstition if you will, though dim and scarcely thought about, the human soul was afraid to rush into the presence of the misty but portentous and all-powerful Being that rules the universe. In Shakespeare's time God was, it may be said, a Factor in all men's lives, and the alternative of endurance of utmost evil, or of self-destruction, is well debated by his great character, Hamlet, who decides that it is nobler and better "to bear the ills we have, than fly to others that we know not of."

The statistics of suicide which have been carefully elaborated shew only one positive result. In other respects they only add perplexity to knowledge. The one ascertained fact is that in any country which advances in civilization the number of suicides in proportion to population increases also. In general also it may be stated that the rate of suicide is higher in towns than in the country, and among males than among females, though this is said not to be true of the thinly settled districts in the prairie tracts of Canada and the United States. But why these things are so, is a question which has not yet received any satisfactory answer.

Occupation does not per se throw any light upon the subject

for, strange to say, there are fewer suicides among miners whose life is difficult, depressing and dangerous, than among masons and carpenters. Another remarkable fact is that in Russia, where the conditions of life would seem to be harder than in most other countries, the rate is the lowest, being but 27 per million as against 105 in England, 223 in France, and 469 in Saxony. May not the intense religious faith, corrupt as his form of religion may be, of the Russian peasant account for this wonderful difference? May not the same reason account for tl fact that in Scotland the rate is 56 as compared with 223 in France? That in the United States as compared with England the proportion is as 10 to 7 and double that as compared with Scotland.

These figures would seem to bear out the theory that moral degeneracy, due to the want of religious training, has more to do with suicide than physical discomfort or mental disquiet. They do not, however, explain why Denmark should have a much higher rate than France, and more than double that of England, and why Saxony should have nearly twice as high a rate as Denmark.

Further investigation is required before we can form any definite conclusion as to the causes of suicide and by what means they may be dealt with. It may be that the subject is one to be dealt with by the psychologist rather than the theologian.

COMMON EMPLOYMENT.

It is rather remarkable that the doctrine of common employment has, in some recent cases, received a very wide application, though the number of cases in which the question can arise has enormously diminished since the Workmen's Compensation Act has been in operation, and must, necessarily, tend to decrease more and more. In *Coldrick* v. *Partridge, Jones & Co., Limited* (noted, *Law Times*, p. 130), Mr. Justice Bray gave an exhaustive judgment in which he reviewed the authorities and laid down the rule as to common employment in very wide terms,

following, in the main, the lines of the Master of the Rolls' judgment in *Burr* v. *Theatre Royal, Drury Lane* (96 L.T. Rep. 447; (1907) 1 K.B. 544). The judge there said that the basis underlying the doctrine appeared to be that under the circumstances the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself. The rule so laid down appears to meet the difficulty with which Mr. Justice Bray was much pressed in *Coldrick's Case*, viz., that the injured workman was not in the same grade of employment as the person by whose negligence the injury was caused, though they were both employed by the same employer. But His Lordship thought that, by looking at the ultimate object of the employment, both persons might be regarded as fellow-workmen, though not engaged in the same class of work. As Chief Baron Pollock said in *Morgan* v. *Vale of Neath Railway Company* (13 L.T. Rep. 564; L. Rep. 1 Q.B. 149), the common object of the employment of different classes of employees is but the furtherance of the business of the master. Yet it might be said with truth that no two had a common immediate object. This shews that we must not over-refine but look at the common object, and not at the common immediate object.—*Law Times*.

An interesting case recently came before the Maryland (U.S.) Court of Appeal justifying persons, under certain circumstances, in taking the law into their own hands. In the case in question as noted in the *American Law Review*, the right of a landlord to cut down a telephone pole erected on his premises without authority was sustained. The pole in question was erected on an alley adjoining defendant's lot after the company had asked permission of the defendant and the latter had refused to grant it. The landowner at first brought a bill in equity to require the company to remove the pole, but before the trial,

notified the company that he should abandon the suit, and, unless it removed the pole, should cut it down himself. The company had put a transformer on the pole after the bill in equity had been brought. In cutting down the pole the wires were cut by an expert, and secured so that no injury would be caused by them, but a crossarm was broken and the transformer damaged by the fall of the pole, no measures being taken to protect them. The decision proceeds on the ground that a person injured by a nuisance may abate it whether it is a public or private nuisance.

A point of interest in reference to criminal jurisdiction was referred to in a note of *Rex* v. *Warden of Dorchester Penitentiary*, ante, page 358. This note, however, did not fully, nor perhaps quite accurately, bring out the point decided. The judgment of Mr. Justice White, who spoke for the court, decides that a police magistrate acting under s. 777 of the Revised Criminal Code, (formerly s. 788) has the same territorial jurisdiction as the General Sessions in Ontario, and consequently a police magistrate of the city of Halifax has power to hear and decide cases for indictable offences of burglary committed in that part of the province of Nova Scotia. The judgment of the above case was decided on the ground that as s. 777 confers the same jurisdiction on police magistrates as that possessed by the General Sessions of the Peace in Ontario, which court by s. 577 (formerly 640) has jurisdiction over the entire province, then such magistrates have a like discretion.

The many friends of Chief Justice Falconbridge of the King's Bench Division of the High Court of Justice, Ontario, will be glad that the distinction of Knighthood has been conferred upon him, amongst the birthday honours of His Gracious Majesty. We note also that Chief Justice Taschereau of the King's Bench, Quebec, has also been made a Knight Bachelor. Sir Charles Fitzpatrick has been honoured with a seat at the Privy Council. The Canadian Bar will be glad to see him in the Judicial Committee.

REVIEW OF CURRENT ENGLISH CASES.

COLLISION—DAMAGE TO CARGO—ACTION AGAINST WRONGDOER BY OWNER OF GOODS—BUYERS NOT OWNERS AT TIME OF LOSS—PAYMENT BY BUYERS—SETTLEMENT OF LOSS OF BUYERS BY UNDERWRITER—SUBROGATION—RIGHT OF UNDERWRITERS TO RECOVER IN NAME OF SELLERS.

The Charlotte (1908) P. 206 was an action on behalf of underwriters to recover against wrongdoers the damage caused to cargo by reason of a collision, in which the difficulty arose of a technical character as to who was the legal owner of the goods at the time of the collision, and consequently in whose name the action should properly be brought. The goods were sold under a cost insurance, and freight contract, and at the time of the collision the buyers had not actually paid the price. But they did so three days after the collision and in ignorance of it having taken place. The carrying vessel put in to a port of distress and the goods were sold on behalf of the underwriters with whom the sellers had effected a policy for the benefit of whom it might concern. The action was brought on behalf of the underwriters in the name of the buyers and by leave of the judge at the trial the sellers were also added as co-plaintiffs, and the other vessel having been found alone to blame the amount of the damage was referred to the registrar who rejected the claim of the sellers suing on behalf of the underwriters, on the ground that as the sellers had been paid by the buyers the full price of the goods, they had sustained no loss. This report was confirmed by Deane, J., but the Court of Appeal (Lord Alverstone, C.J. and Farwell, and Kennedy, L.JJ.) were happily able to hold that this technicality could not prevail and that the payment of the price to the sellers did not disentitle the underwriters to recover the loss from the wrongdoer in the name of the sellers who were the legal owners of the goods at the time of the collision.

SHIP—ADVANCE OF PURCHASE MONEY—RESULTING TRUST—EVIDENCE—REGISTERED OWNER—EQUITABLE RIGHT.

The Venture (1908) P. 218 was an Admiralty action to determine the right to the proceeds of a yacht which had been

sold. The question of the claims upon the fund were referred to the registrar. He found that the yacht had been bought for £1,050 of which £550 had been advanced by one of the claimants, but he was not satisfied that the advance had been made on the terms of this claimant becoming part owner. This report was confirmed by Bucknill, J., and the whole of the proceeds were ordered to be paid to the registered owner: but on appeal this decision was reversed, the Court of Appeal (Lord Alverstone, C.J. and Farwell, and Kennedy, L.JJ.) holding that the fact that the claimant had advanced a part of the purchase money raised a presumption in his favour in accordance with the ordinary rule relating to resulting trusts, and as this had not been displaced by any counter evidence the claimant was entitled to 55-105 of the proceeds.

WATERWORKS—STATUTORY POWERS—ULTRA VIRES.

Attorney-General v. *Frimley & F. District Water Co.* (1908) 1 Ch. 727. This was an action to restrain a water company from exceeding its statutory powers. By a Special Act the defendants were empowered to construct in a specified place waterworks for the supply of water for certain localities. The company was also empowered to acquire by agreement land not exceeding ten acres for the purposes of its waterworks. The defendants had acquired the extra land at some distance from their authorized works and proposed to sink a well and erect a pumping station thereon for the purpose of tapping a new supply of water and pumping the water into an existing reservoir constructed under the provisions of the Act. This Eady, J., considered was in effect using the additional land for carrying on a new undertaking, whereas the statute in question only empowered the defendants to acquire the land for purposes ancillary to their statutory undertaking, and with this view the Court of Appeal (Cozens-Hardy, M.R. and Moulton, and Buckley, L.JJ.) concurred.

COMPANY—RECONSTRUCTION—SALE OF UNDERTAKING TO NEW COMPANY FOR PARTIALLY PAID SHARES—DISTRIBUTION OF CONSIDERATION—COMPANIES' ACT 1862 (25-26 VICT. C. 89) S. 161—(7 EDW. VII. C. 34, S. 188(O).)

Bisgood v. *Henderson's Transvaal Estates* (1908) 1 Ch. 743. This was an action by a shareholder to restrain the defendant company from carrying out a scheme for selling its

undertaking to a new company for partly paid shares in such new company. The shares in the defendant company were £1 shares and the scheme for the sale of its undertaking provided that the consideration for the sale was to be an equal number of £1 shares in the new company on which only 17s. 6d. was paid. These new shares it was proposed to allot to the shareholders in the defendant company in the proportion of one new share for every old share they held, and those who refused to accept such allotment were to be compensated for their shares in the defendant company by the price to be realized from the sale of such new shares as they refused to accept. This Eve, J., considered to be a legitimate arrangement, but the Court of Appeal (Cozens-Hardy, M.R. and Buckley, and Moulton, L.JJ.) regarded it as a scheme for levying an assessment on the shareholders of the defendant company, and imposing an increased liability in respect of their shares, with the alternative of being dispossessed of their status as shareholders in the defendant company and therefore ultra vires and in contravention of s. 161 of the Companies Act 1882 (see 7 Edw. VII. c. 34, s. 188 (O.)). The arrangement was attempted to be supported as being authorized by the original memorandum of association, but the Court of Appeal held that it was not competent to validly provide for any such arrangement in the memorandum of the association.

COMPANY—VOLUNTARY WINDING UP—CONTEMPORANEOUS RESOLUTION TO WIND UP, AND FOR RECONSTRUCTION—INVALIDITY OF SCHEME FOR RECONSTRUCTION.

In *Thomson* v. *Henderson's Transvaal's Estates* (1908) 1 Ch. 765 another question affecting the same company is discussed. Contemporaneously with the scheme for reconstruction referred to in the last case and which was held to be invalid, a resolution had been passed for the voluntary winding up of the defendant company, and the object of this action was to determine whether the resolution for winding up was valid, notwithstanding that the reconstruction arrangement was held to be invalid. Eve, J., held that it was, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) affirmed his decision, as Buckley, L.J., put it the passing of the resolution to wind up altered the status of the company from a going concern to one in liquidation, and though the object for which the resolution was passed may have failed, yet it was like a woman

marrying for some purpose which failed, the step was irrevocably taken, and could not be retraced.

ADMINISTRATION — BREACH OF TRUST — ACCOUNT — "WILFUL NEGLECT AND DEFAULT"—REMOVAL OF TRUSTEE.

In re Wrightson, Wrightson v. *Cooke* (1908) 2 Ch. 789 was an action against a trustee for an account alleging a breach of trust. Certain breaches were alleged in the pleadings but the plaintiff at the trial took a judgment in common form for an account. This according to the English practice would not entitle the plaintiff upon the reference to go into other breaches of trust than that alleged in the pleadings and he applied to the court at a subsequent stage of the proceedings for permission to set up and have an inquiry as to other breaches of trust, but Warrington, J., held that this could not be done, though it would seem that in Ontario under Ont. Rule 667, even without any specific direction, it would be competent for a master to go into any such matter. But there is another point in the case which should be noted, viz, that the learned judge also held that the court might at any stage of the proceedings if it should see fit, in the interest of the trust estate, or the beneficiaries, remove a trustee even though that relief had not been prayed for in the statement of claim.

WILL—LAND SUBJECT TO INCUMBRANCE—OPTION TO PURCHASE GIVEN BY WILL—INTEREST OF DONEE IN RIGHT OF PRE-EMPTION—DEVISEE—REAL ESTATES CHARGES ACT 1854 (17-18 VICT. C. 113) S. 1—(R.S.O. C. 128, S. 37.)

In re Wilson, Wilson v. *Wilson* (1908) 1 Ch. 839. A testator by his will gave one of his sons an option to purchase two houses from his trustees at the sum of £450. The two houses were subject to a mortgage of £300. The son elected to exercise the option, and claimed that he was entitled to a conveyance free from the incumbrance, and Warrington, J., held that he was, and that he was not in the position of an heir or devisee of the land, and therefore the Statute 17-18 Vict. c. 113, s. 1 (R.S.O. c. 128, s. 37) did not apply.

COMPA —ACTION TO RESCIND CONTRACT TO TAKE SHARES—INJUNCTION RESTRAINING FORFEITURE OF SHARES—PAYMENT INTO COURT.

Lamb v. *Sambas Rubber, etc., Co.* (1908) 1 Ch. 845 was an action to rescind a contract to take shares in a limited company.

The plaintiff had made a payment on the shares, and the company threatened to forfeit the shares pending the action for nonpayment of a call, the plaintiff therefore applied for an interim injunction to restrain the forfeiture pending the action, and it was granted by Neville, J., on the terms of the plaintiff giving the usual undertaking as to damages, and paying into court the amount of the call with interest.

ADMINISTRATION—STATUTE BARRED DEBT—RESIDUARY LEGATEE, ALSO RESIDUARY LEGATEE OF DEBTOR'S ESTATE.

In re Bruce, Lawford v. *Bruce* (1908) 1 Ch. 850 was an application to determine whether a legatee of a share in a testator's estate, was obliged to bring into account a debt owed to the testator by an estate of which he was also residuary legatee, and which was barred by the Statute of Limitations. The testator A. died in 1882 leaving James Bruce a share of his residuary estate. In 1878 the testator had lent his sister Emily £200 at 5 per cent. interest, but no payment or acknowledgment had been made on account of either principal or interest since November, 1880. Emily died in 1903 and James Bruce was also her residuary legatee and as such received from her estate £5,000. Was he, or was he not, bound to give credit for the £200 and interest at 5 per cent. from November, 1880, in respect of his share in the residue of the estate of testator A.? Neville, J., on the authority of *Courtenay* v. *Williams* (1844) 2 Hare 539; (1846) 15 L.J. Ch. 204 held that he was bound, and that the other residuary legatees of that estate were entitled to say to him "to the extent of the debt and interest in your hands you must pay yourself on account of your share in the residue of the testator's estate."

JURISDICTION—PARTIES RESIDENT IN ENGLAND—LAND SUBJECT OF ACTION SITUATE IN FOREIGN COUNTRY.

Deschamps v. *Miller* (1908) 2 Ch. 856. The action was brought by the plaintiff as issue of a French marriage claiming title thereunder to lands in India. The father and mother were domiciled in France and were there married in 1831, and by the marriage contract it was provided that the marriage should be governed by the regime dotal. Under this the plaintiff claimed that his mother was entitled to one-half of the after-acquired property. The father and mother went to live in India and the father acquired property in Madras. In 1865

while the plaintiff's mother was living, his father went through the form of marriage with another woman, on whom he purported to settle certain property in Madras. The object of the action was to impeach this settlement and establish the plaintiff's rights under the regime dotal, but Parker, J., held that the lands being in a foreign country, and the relief sought not being merely in personam, the court had no jurisdiction and dismissed the action.

INFANT'S ESTATE—CONVERSION OF REALTY OF INFANT—PROCEEDS OF REALTY OF INFANT DYING INTESTATE.

In *Burgess* v. *Booth* (1908) 1 Ch. 880, Eve, J., holds that where the real estate of an infant has been sold by order of the court for the purpose of satisfying costs of an action, and a surplus of the proceeds remains in court and the infant owner afterwards attains majority and dies intestate, the surplus is to be regarded as realty, and descends to the heir at law and not to the next of kin of the deceased. See R.S.O. c. 168, s. 8.

CRIMINAL LAW—CRUELTY TO CHILDREN—PARENT LIVING APART FROM WIFE—CUSTODY OF CHILD—WILFUL NEGLECT OF CHILD—PREVENTION OF CRUELTY TO CHILDREN ACT, 1904 (4 EDW. VII. c. 15) s. 1—(CR. CODE, ss. 241, 242).

Rex v. *Connor* (1908) 2 K.B. 26. This was a prosecution under the Act for Prevention of Cruelty to Children, 4 Edw. VII. c. 15, s. 1 (see Cr. Code, ss. 241, 242). The defendant was the father of five children in question, who were in the care of their mother, from whom the defendant was living apart. He had contributed nothing to the support of his wife or children, though earning 25s. a week, and they were in a state of destitution. The jury found the prisoner guilty, and on a case stated the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Grantham, Lawrance, Ridley, and Pickford, JJ.) held that the defendant could not by living apart from his wife divest himself of the custody of his children so as to free himself from liability to conviction for neglecting to supply them with necessaries of life, and the mere omission to pay any part of his earnings for their support may constitute "wilful neglect" within the meaning of the statute.

AGREEMENT FOR LIEN FOR CURRENT ACCOUNT—BILL OF SALE—LICENSE TO TAKE POSSESSION—BANKRUPTCY OF DEBTOR—DAMAGE FOR TRESPASS, CAUSING BANKRUPTCY—CAUSE OF ACTION PASSING TO TRUSTEE IN BANKRUPTCY—SET-OFF.

In *Lord* v. *Great Eastern Ry.* (1908) 2 K.B. 54, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have reversed the judgment of Phillimore, J., (1908) 1 K.B. 195 (noted ante, p. 227), and have held that the agreement for a lien on the goods and license to take possession in default of payment was in effect a bill of sale, and as such void as against the trustee in bankruptcy for non-registration (Moulton, L.J., dissenting). The court, however, agreed with the view of Phillimore, J., on the question of set-off. The defendants at the time of the receiving order in bankruptcy had a claim for freight, and at that date the bankrupt's right was to have a return of the goods taken possession of by the defendants under the void agreement, and these claims were not the subject of set-off under the Bankruptcy Act, s. 38.

PRINCIPAL AND AGENT—STOCK BROKER—RIGHT OF BROKER TO INDEMNITY FROM CUSTOMER—PAYMENT MADE BY BROKER WITHOUT CUSTOMER'S AUTHORITY.

Johnson v. *Kearley* (1908) 2 K.B. 82. This was an action brought by a stock broker against his customer to recover moneys paid in the purchase of stocks pursuant to the defendant's instructions. The facts were that the plaintiffs were instructed by the defendant to buy ten shares of certain stocks, and the plaintiff employed a firm of London stock brokers to buy the shares in question. This firm purchased the shares at 98 7-16 from a jobber. The firm added to the purchase price their own commission and charged them to the plaintiff at "98½ net." The plaintiff then charged them to the defendant at 98½ and also charged as their own commission 7s. 6d. The defendant was not informed that the actual purchase price was 98 7-16, or that the London firm's commission was included in the 98½, and the word "net" was omitted. In these circumstances Bucknill, J., held that the plaintiff could recover nothing because in order to succeed he must prove that he had carried out the defendant's instructions; and his charging the defendant with more than was actually paid for the shares, and the omission to disclose the fact that part of the money represented to have been paid for them had been in fact paid as commission to the London

firm, were such a departure from his instructions as to disentitle him to recover even the money paid less the commission of the London firm. This judgment we fear would not commend itself to the average stock broker and, indeed, the learned judge himself expresses regret at the necessity for his deciding as he did, because the main defence on which the defendant relied had failed.

PRACTICE—CONDITIONAL ORDER—NON-FULFILMENT OF CONDITIONS —COMPELLING PERFORMANCE OF CONDITIONS—RULE 580—(ONT. RULE 638).

In *Talbot* v. *Blindell* (1908) 2 K.B. 114, an order had been granted giving the defendants as lessees relief from the forfeiture of the lease, upon certain conditions. Some of the conditions had been complied with, and the defendants then refused to comply with the other conditions, and consequently abandoned the relief given by the order. The plaintiff thereupon applied to the court for an order to compel the defendants to carry out the conditions, but Walton, J., held that he had no jurisdiction to compel the defendants to fulfil the conditions, and that they were within their rights in electing to abandon the benefit of the order; though it would, of course, have been otherwise if the order had been based on their undertaking to perform such conditions.

PUBLIC BODY—EXPROPRIATION OF LAND—STATUTORY POWER OF EXPROPRIATION—NOTICE TO TREAT—CREATION OF NEW INTEREST AFTER NOTICE TO TREAT—COMPENSATION.

In *Zick* v. *London United Tramways* (1908) 2 K.B. 126 the Court of Appeal (Barnes, P.P.D., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Jelf, J., (1908) 1 K.B. 611 (noted ante, p. 346), but on a somewhat different ground, the Court of Appeal being of the opinion that the original term was in fact still subsisting and had never been effectually surrendered, because after the service of notice to treat the lessors were debarred from creating a new term, and therefore the consideration for the surrender failed, and it never took effect.

PRACTICE—DISCOVERY—LIBEL—JUSTIFICATION — PARTICULARS OF JUSTIFICATION—ALLEGED MISCONDUCT OF BUSINESS—INSPECTION OF BOOKS.

Arnold v. *Bottomley* (1908) 2 K.B. 151 was an action for libel. The libel complained of was that the defendants carried

on their business in an improper and were fraudulent dealers in stocks and shares. The defendant pleaded justification, and gave particulars of the defence in which they alleged that the plaintiffs were concerned in running "a bucket shop" and did not carry on the ordinary and legitimate business of stock brokers, but were entirely dependent for their profits on the losses made by their customers, and gave the names of, and extracts from, certain pamphlets issued by the plaintiffs; but the defendants did not give any specific instance of the commission of any fraudulent or improper act, or the name of any person alleged to be defrauded. The defendants obtained from a Master an order for the inspection of the books of the plaintiffs for a certain period, which on appeal was reversed by Pickford, J., whose judgment was affirmed by the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) on the ground that no specific acts of fraud were alleged and the defendant's application was in the nature of a fishing proceeding to find out if they could find any support for their "defence of justification."

PRACTICE—WRIT OF SUMMONS—SERVICE OUT OF THE JURISDICTION—BREACH OF CONTRACT—CONTRACT FOR SALE OF GOODS C. I. F.—RULE 64(*e*)—(ONT. RULE 162(*c*).)

In *Crozier* v. *Auerbach* (1908) 2 K.B. 161, the defendant appealed from an order of Bigham, J., refusing to set aside an order allowing service of notice of the writ of summons on the defendant out of the jurisdiction. The action was brought for breach of a c. i. f. contract made in Germany by the defendant who was resident there, and where the goods were shipped for carriage to England. The plaintiff paid the price in exchange for the bill of lading. On arrival of the goods in England, they were found by plaintiff to be not according to contract. The action was brought to recover the price paid, or for damages. An order was made allowing notice of the writ to be served out of the jurisdiction. The defendant in his correspondence with his solicitor protested against the jurisdiction of the English Court, but his solicitor, under a mistake, and without instructions so to do, entered an appearance. The defendant then applied to Bigham, J., to set aside the appearance and the order allowing service out of the jurisdiction, who refused the application on the ground that the defendant's letters after service amounted to a waiver of his objection to the jurisdiction of the English court. The Court of Appeal (Wil-

liams and Farwell, L.JJ.) were of the opinion that it being clear that under a cost, insurance and freight contract the property in the goods passed to the plaintiff at the port of embarkation, the breach of the contract, if any, took place there, and the case was therefore not within the Rule 64(*e*) (Ont. Rule 162(*e*)). *Barrows* v. *Myers*, 4 Times L.R. 441, to the contrary was overruled and the order of Bigham, J., reversed.

POST NUPTIAL SETTLEMENT—PURCHASER FOR VALUE—CONSIDERATION—REFRAINING FROM TAKING DIVORCE PROCEEDINGS.

In re Pope (1908) 2 K.B. 169. A post nuptial settlement was attacked by a trustee in bankruptcy of the settlor as being voluntary and without consideration, but it appearing that the settlement had been made in consideration of the settlor's wife (one of the beneficiaries) refraining from taking divorce proceedings it was held by Cozens-Hardy, M.R., and Moulton, L.J., that this constituted a valuable consideration for the settlement, which was accordingly upheld, Buckley, L.J., however, dissented.

TRANSFER OF STOCK—PERSONATION OF HOLDER—IDENTIFICATION OF TRANSFEROR BY BROKER—FORGER—LIABILITY OF BROKER FOR ERRONEOUS REPRESENTATION.

Bank of England v. *Cutler* (1908) 2 K.B. 208. This is an important case as to the liability of a broker who procures a fraudulent transfer of stock to be made by reason of his having innocently but erroneously identified the transferor as the true holder of the stock. Lawrence, J., held that the broker was liable (1907) 1 K.B. 889 (noted ante, vol. 43, p. 500) and the majority of the Court of Appeal (Farwell and Kennedy, L.JJ.) have affirmed his decision, but Williams, L.J., dissented, being of the opinion, that on the evidence it could not be said that the defendant had done more than act as a witness, and that it failed to establish that he had in any way requested or directed the transfer to be made. A considerable sum is involved, and in view of the dissent in the Court of Appeal, it would not be surprising if the case were carried to the House of Lords, but it would be equally surprising if the appeal were successful, as there can hardly be any question that the representation was made with the intention and expectation that the plaintiffs should act upon it.

VETERINARY SURGEON—QUALIFIED PERSON—USE OF DESCRIPTION BY UNQUALIFIED PERSON—"CANINE SPECIALIST"—VETERINARY SURGEONS' ACT (44-45 VICT. C. 62) S. 17 (1)—(R.S.O. C. 184, S. 3).

In *Royal College of Veterinary Surgeons* v. *Collinson* (1908) 2 K.B. 248 it is held by a Divisional Court (Lord Alverstone, C.J. and Ridley and Darling, JJ.) that for a person who is not a registered veterinary surgeon to exhibit a notice board on his residence with the words "Canine Specialist—dogs and cats treated for all diseases," is an offence against the Veterinary Surgeons' Act (44-45 Vict. c. 62) s. 17; (see R S.O. c. 184, s. 3).

NEGLIGENCE—DANGEROUS PREMISES—BUILDING LET OUT IN FLATS—STAIRCASE IN POSSESSION OF LANDLORD—STAIRCASE NOT LIGHTED—LIABILITY OF LANDLORD TO PERSONS OTHER THAN TENANTS.

Huggett v. *Miers* (1908) 2 K.B. 278. This was an action to recover damages for injury sustained by the plaintiff by reason of the alleged negligence of the defendant in omitting to light a staircase in his building. The building in question was owned by the defendant and let out in flats. The agreements for letting contained no provision for keeping the staircase, which led to the flats, lighted. The tenants had gas lights on the landings outside their respective offices which were supplied with gas from their own meters, and their practice was to turn them off at night. The plaintiff while in the employ of one of the tenants, on coming down the staircase from his employer's offices, in the evening at 8.15, when all the lights had been put out, failed to find his way out to the street and on going down to the basement fell through a door opening into a flagged courtyard some distance below, and suffered injury for which the action was brought. Channell, J., who tried the action was of the opinion that there was no duty on the defendant to keep the staircase lighted, but left the case to the jury to avoid the necessity for a new trial, and the jury found a verdict for the defendant. The Court of Appeal (Barnes, P.P.D. and Moulton, and Farwell, L.JJ.) agreed with Channell, J., that the defendant was not liable, and dismissed the action.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] [May 29.

BONANZA CREEK HYDRAULIC CONCESSION *v.* THE KING.

Mining regulations—Hydraulic lease—Breach of conditions—Construction of deed—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.

Under a condition for defeasance in a lease of a mining location, made by the Crown in virtue of the hydraulic mining regulations of 3rd December, 1898, a provision that the Minister of the Interior is to be the "sole and final judge" of the fact of default by the lessee does not entitle the Crown to cancel the lease and re-enter until the fact of such default has been determined by the minister in the exercise of the functions vested in him after an inquiry made in a judicial manner and an opportunity has been afforded to all parties interested of knowing and being heard in respect to the matters alleged against them in such investigation. *Lapointe* v. *L'Association de Bienfaisance* (1906) A.C. 535, and *Edwards* v. *Aberayon Mutual Ship Insurance Society*, 1 Q.B.D. 563, referred to.

The lease provided a forfeiture for breach of conditions "other than that referred to" in the fourth clause.

Held, that, of several conditions in the clause in question, the exception applied only to that providing for forfeiture on failure by the lessee to make specified annual expenditures on the leased premises, of default in which the minister was to be the sole and final judge, and in respect of which his decision predetermined the rights of the lessee.

Quære, per IDINGTON, J., whether there was not sufficient evidence in the case to shew that there had been no such breach of the conditions as could work a forfeiture of the lease?

Appeals allowed with costs.

Chrysler, K.C., *Belcourt*, K.C., and *J. A. Ritchie*, for appellants. *Newcombe*, K.C., and *Shepley*, K.C., for respondent.

N.B.] FARRELL *v.* MANCHESTER. [June 16.

Company—Paid-up shares—Sale through broker—Prospectus—Misrepresentation — Liability of directors — Rescission — Delay.

F. in June, 1903, purchased paid-up shares of an industrial company's stock on the faith of statements in a prospectus prepared by a broker employed to sell them. In January, 1904, he attended a meeting of shareholders and from something he heard, suspected that some of the statements on which he had relied were untrue and after investigation he demanded his money back from the broker and also wrote to the president and secretary of the company repudiating his purchase and asking for cancellation and repayment. He repeated such demand at later meetings of the company and, in December, 1904, brought suit for rescission and repayment.

Held, that the delay in bringing suit from January to December did not operate as a bar to the suit and plaintiff was entitled to recover against the company. And also that he could not recover against the directors who had instructed the broker to sell the shares as they were not responsible for the misrepresentations in the prospectus prepared by the broker.

Judgment of the Supreme Court of New Brunswick (38 N.B. Rep. 364), affirming the decree of the judge in equity (3 N.B. Eq. 508), reversed. Appeal allowed with costs.

Ewart, K.C., and *J. M. Price*, for appellant. *Harrington*, K.C., and *Teed*, K.C., for respondents.

N.S.] GOULD *v.* GILLIS. [June 16.

Company—Sale of shares—Misrepresentation—Fraud—Action for deceit—Accord and satisfaction.

G., holder of 400 shares in an industrial company handed over 290 to the president to be sold. The president gave them with some of his own and some of the company's stock to an agent who canvassed, among others, J. A. G., representing to him, and believing, that it was all treasury stock. J. A. G. thereupon purchased 25 shares of the stock held by E. L. G., giving his note for the purchase money, which was endorsed over to the latter. Later on J.A.G. discovered that the stock did not belong

to the company and correspondence ensued between him and the secretary in which he complained of having been deceived by the agent, but finally agreed to give a renewal at four months of his note. Before the renewal fell due the company became insolvent and he refused to pay. In an action on the renewal note he filed a counterclaim for damages based on the misrepresentation and deceit. Judgment was given against him on the note and for him on his counterclaim.

Held, that G. was liable for the consequences of the fraud practised on the purchaser of his shares by his agent the president of the company.

Held, also, GIROUARD and DAVIES, JJ., dissenting, that the renewal of the note given for the price of the shares and extension of time for payment thereby secured did not operate as a release of J.A.G.'s action for deceit, though it might have been a defence in an action for rescission. Appeal dismissed with costs.

Matthew Wilson, K.C., and *W. B. A. Ritchie*, K.C., for appellant. *W. F. O'Connor*, for respondent.

Ont.] IREDALE *v.* LOUDON. [June 16.

Title to land—Upper room in building—Adverse possession—Statute of Limitations—Incidental rights—Implied grant—License or easement.

Possession of an upper room in a building supported entirely by portions of the story beneath may ripen into title thereto under the provisions of the Statute of Limitations. I., one of several owners of land with a building thereon sold his interest to a co-owner and afterwards occupied a room therein as tenant for carrying on his business. Inside the door by which he entered from the street was a landing leading to a staircase by which his room could be reached. He had the only key provided for this door and always locked it when leaving for his home at night. It remained open during the day. His payment of rent ceased after a time and he continued to occupy the room for twelve years thereafter, the owners of the premises paying all the taxes thereon, he sending them the tax bills left in his room. In an action to enjoin the owners from disturbing him in possession of said room,

Held, reversing the judgment of the Court of Appeal (15 Ont. A.R. 286) by which the judgment for I. at the trial (14 Ont.

L.R. 17) was reversed, IDINGTON and MACLENNAN, JJ., dissenting, that I.'s possession had ripened into title under the Statute of Limitations of the room and the landing inside the door.

Held, per DAVIES, J.—The possession of the room for the statutory period carried with it a proprietary right to the supports thereof and to the landing and staircase which provided access thereto.

Per FITZPATRICK, C.J., and DUFF, J.—The Statute of Limitations does not annex to a title acquired by possession incidents resting on the implication of a grant. I. had, therefore, acquired no rights in the supports of the room which he occupied or in the staircase leading thereto, but had in the landing inside the door which rested directly on the soil.

Per IDINGTON and MACLENNAN, JJ.—I. acquired a statutory title to nothing but the room itself; he had no "natural right" to the supports as incidental to his possession of the room; and his user of the landing and stairway was, at the most, an easement which must continue for twenty years to confer title.

Appeal allowed with costs.

W. N. Tilley, for appellant. *W. D. McPherson,* K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* YALDON. [June 19.

Criminal law—Perjury—Indictment—Lord's Day Act, C.S.U.C., c. 104 *still in force—Record of trial—Police magistrate.*

This was a case reserved by the chairman of the general sessions of the peace for Wentworth. The defendant was found guilty of perjury on an indictment which charged him with having committed perjury in reference to a charge of gambling on the Lord's Day by swearing that he did not see any such offence committed. The jury found the accused guilty, but the chairman deferred sentence, reserving certain questions for the opinion of the court.

Held, 1. That an indictment which contains in substance a statement that the accused committed perjury in a judicial proceeding is not bad because it does not allege that the person committed the crime with intent to deceive or mislead, so long as it complies with the requirements prescribed by s. 852 of the Criminal Code and form 64.

2. The Act to prevent the profanation of the Lord's Day, C.S.U.C., c. 104, s. 3, is still in force in Ontario. See *Attorney-General* v. *Hamilton Street Ry. Co.* (1903) A.C. 524. The result of the determination of that case being that the provisions of 40 Vict. c. 6, s. 6(O.) were not effective to repeal C.S.U.C., c. 104, although the latter appears in schedule A. to R.S.O. 1877, as one of the repealed Acts.

3. The prisoner could not escape conviction merely because the Crown did not produce any record of the trial or the result thereof in the police court, where the perjury was alleged to have been committed, following *Reg.* v. *Hughes*, 4 Q.B.D. 614; *Reg.* v. *Shaw*, 10 Cox C.C. 66.

Cartwright, K.C., and *Washington*, K.C., for Crown. *Lynch-Staunton*, K.C., and *O'Reilly*, K.C., for prisoner.

Full Court.] [June 19.

CROWN BANK *v.* LONDON GUARANTEE & ACCIDENT CO.

Fidelity bond for bank clerks—Theft by one clerk and negligence of another preventing discovery of theft—Expenses incurred in following thief.

One Banwell, being a clerk in plaintiffs' bank, absconded, taking with him a large sum of plaintiffs' money. It was the duty of one Maunsell to check Banwell's cash. The bank followed Banwell and recovered a large portion of the sum stolen, but in doing so expended some $8,000.

Held, 1. Confirming the trial judge that Maunsell was negligent in not discovering the discrepency in Banwell's cash. This negligence consisted in the failure to observe and carry into efficient practice the duties which were imposed upon him for the purpose of discovering and frustrating any attempt to commit such a theft as was committed by Banwell. The court drew a distinction between this case and that of *Baxendale* v. *Bennett*, 3 Q.B.D. 52, where the negligence complained of consisted in rendering it possible for such a crime to be committed.

2. The plaintiffs were justified in claiming from the defendants the amount expended by the bank in recovering the balance of the money stolen.

Arnoldi, K.C., and *Hellmuth*, K.C., for plaintiffs. *Shepley*, K.C., and *Swabey*, for defendants.

Moss, C.J.O., Osler, Garrow,] [June 19.
McLaren, JJ.A., Riddell, J.]

TINSLEY *v.* TORONTO RY. CO.

Street Ry. Co.—Contributory negligence—Person crossing track.

The plaintiff being on the other side of the street saw a car coming close to where it usually stopped to take on passengers. He also saw a man signal for the car to stop. He assumed that the car would stop accordingly and crossed the track in front of car, but was knocked down and injured.

Held, that plaintiff was not guilty of contributory negligence and that the defendants were liable.

J. H. Denton, for plaintiff. *D. L. McCarthy*, K.C., for defendant.

Full Court.] [June 19.

IN RE TOWNSHIPS OF SANDWICH AND WINDSOR, AND TECUMSETH ELECTRIC RY. CO.

Street railways—By-law of municipality—Passenger fares—School children.

A by-law relative to the defendants railway, a street railway, for an ordinary cash fare of five cents, children under five years of age, not occupying a seat and accompanied by its parent to be carried free; and that, "for every child under 12 years of age, except as aforesaid, the fare shall not exceed three cents." Provision was then made for the issue of tickets, it being provided that tickets should be issued to "children and school children," namely, 10 for 25 cents, each ticket to be taken for a 3 cent fare as above provided.

Held, reversing the order of the Ontario Railway and Municipal Board, that the school children entitled to such tickets were those under the age of twelve years, the provisions not ex-

tending to all those under twenty-one years of age actually attending school.

A. H. Clarke, K.C., for railway company. *J. H. Rodd*, for township of Sandwich.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.C., Teetzel, J., Riddell, J.] [April 23.

IN RE HASSARD AND CITY OF TORONTO.

Intoxicating liquors—Liquor License Act—Municipal corporations—By-law to reduce number of licenses—Construction of statutes and by-laws—Unauthorized limitation—Ultra vires—Meaning of "year."

By sub-s. 1 of s. 20 of the Liquor License Act, R.S.O. 1897, c. 245, the council of every city is authorized by by-law passed before March 1 in any year to limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning May 1, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by the Act. Under the authority of this sub-section, the council of the city of Toronto, on Feb. 22, 1904, passed a by-law, the second section of which provided that "the number of tavern licenses to be issued shall not exceed the number of one hundred and fifty in any one year." On Jan. 27, 1908, the council passed a by-law entituled, "A by-law to reduce the number of tavern licenses to 110," the effect of which was to amend the second section of the first by-law, so that it would read: "The number of tavern licenses to be issued shall not exceed the number of one hundred and ten in any one year." The number of licenses issued by the License Commissioners for the license year commencing May 1, 1907, was 144, but under s. 8, sub-s. 3, of the Act, they had authority, if special grounds were shewn, to issue the six unissued licenses at any time before May 1, 1908.

Held, Riddell, J., dissenting, that the council by the by-law of Jan. 27, 1908, assumed to limit the number of licenses which the License Commissioners had authority to issue for the license

year beginning May 1, 1907, and that the by-law was therefore ultra vires and should be quashed.

Fullerton, K.C., and *Muckelcan*, for appellants, the city of Toronto. *W. T. J. O'Connor*, for respondent.

Riddell, J.—Trial.] [June 8.

BALLENTINE *v.* ONTARIO PIPE LINE CO.

Negligence—Injury to property by gas explosion—Independent contractor—Statutory powers.

The plaintiff was a grocer in the city of Hamilton and the owner of the premises, the southerly portion of which he occupied, the northerly portion being occupied by one Gordon. The defendants were an incorporated company and had obtained from the city the right by by-law to enter upon the streets, to dig trenches and lay and operate pipes for the supply of natural gas. The defendants made a contract with one Byrnes, a competent, independent contractor, for the necessary service connected with the main lines for the purpose of supplying customers with natural gas. Whilst this contract was in force and a short time prior to the accident the plaintiff's tenant, Gordon, requested the defendants to make the necessary connection between him and the main line of pipes, which were laid in front of the premises for the purpose of supplying Gordon with natural gas to his premises. The defendants notified Brynes to have the service made in accordance with the contract existing between them. It was admitted on the statement of facts as agreed to that the employees of Byrnes negligently allowed gas to escape while constructing the trenches and thus finding its way into the cellar occupied by Gordon became ignited with the light therein, causing an explosion and injury to plaintiff's property. The plaintiff contended that the defendants are liable, (1) because they were exercising statutory powers under R.S.O. 1897, c. 191, ss. 22 and 27; (2) because they committed a nuisance in allowing the gas to escape. The defendants claimed that they were not liable as they employed a competent, independent contractor to do the work, and that he, if anybody, was liable.

Held, that this was not the case of a nuisance nor was the negligence collateral. It was the duty of the defendants in dig-

ging up the street to see that gas was not negligently allowed to escape, and this was a duty of which they could not rid themselves by delegating it to another, and it made no difference that the pipes to be opened up were those of the defendants themselves, and the defendants were not relieved by getting a contractor to perform their work for them: and were therefore liable for the damages sustained.

Lynch-Staunton, K.C., for plaintiffs. *Gauld*, K.C., for defendants.

Teetzel, J.] McNEILL *v.* LEWIS BROTHERS, LTD. [June 12.

Discovery—Examination of officer—Foreign company—Attorney with limited powers and duties.

The defendants were a foreign corporation and their power of attorney appointed a person in Toronto as their attorney to act as such and to sue and be sued to plead and be impleaded in any court in Ontario, and, on behalf of the company, to accept service in Ontario of process and receive all lawful notices, and for the purpose of the company to do all acts and execute all deeds within the scope of the power of attorney.

Held, that their attorney was an officer of the corporation liable to be examined for discovery.

C. D. Scott, for plaintiff. *Middleton*, K.C., for defendants.

MacMahon, J.—Trial.] [June 13.

DARRANT *v.* CANADIAN PACIFIC RAILWAY.

Railway—Breach of statutory duty—Injury to employee—Common law liability—Damages.

The plaintiff was a brakesman on a freight train between Ottawa and Prescott. Whilst coupling the tender and an oil tank, his left arm was caught and taken off above the wrist. He was left handed. The defendants admitted their liability and paid into court $1,000, as being sufficient to satisfy the claim. The plaintiff had, prior to 1891, been in defendant company's employment as brakesman for eight years at $1.25 per day. After that he was in partnership with his father in the pump making business until April, 1907, when he was again

employed by the defendant company as senior brakeman, which put him in line for promotion for a freight conductorship. He was 38 years old. The average wages of senior brakesman are $75 a month, which is what the plaintiff earned. The Railway Act, R.S.C. 1906, c. 37, s. 264, provides that "every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars." In this case the cars which caused the accident could not be automatically coupled.

Held, 1. There was a breach of statutory duty, and as the plaintiff was injured as a result of that breach, he was entitled to recover at common law.

2. Being so entitled the damages might reasonably be fixed, under the circumstances, at $4,500, for which judgment was entered.

G. F. Henderson, K.C., and *H. A. Lavell*, for plaintiff. *D'Arcy Scott*, for defendants.

Riddell, J., Trial] [June 15.

FLORENCE MINING CO. *v.* COBALT LAKE MINING CO.

Constitutional law—Powers of provincial legislature.

Action for a declaration that the Crown patent for part of the bed of Cobalt Lake was erroneously issued to the defendants and should be set aside. The learned judge made findings of fact, that the applicant went to the proper office "and procured such information as satisfied him that Cobalt Lake was open for prospecting"—"no reason for doubting the good faith," etc., and that "all legitimate means were used by the plaintiffs and generally that the evidence of the plaintiffs' engineer "should be given full credence throughout." Also that against the protest of the plaintiffs the Crown sold in fee simple the bed of the lake for a large sum to defendants without any discovery made by or for them, and a grant was made accordingly in January, 1907. The defendants had knowledge of the claim of the plaintiffs.

The learned judge, however, stated that Acts of the legis-

lature were "intended to bar the claim of the plaintiffs," and that he could not read the Act of 1907 as meaning anything less than that plaintiffs are not to have any rights in the property and remarked that, "In short, the legislature within its jurisdiction, can do everything that is not naturally impossible, and is restrained by no rule, human or divine. If it be that the plaintiffs acquired any rights—which I am far from finding—the legislature has the power to take them away. The prohibition 'Thou shalt not steal', has no legal force upon this sovereign body, and there would be no necessity for compensation to be given—we have no such restriction upon the power of the legislature as is found in some states."

J. M. Clark, K.C., and *Bradford*, K.C., for plaintiffs. *Armour*, K.C., *G. F. Henderson*, K.C., and *Britton Osler*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] RE BANK OF LIVERPOOL [June 9.

Judgment recorded—Effect—Execution.

Application by the assignee of a judgment against H. for leave to issue execution against lands held subject to the judgment by B. to whom the lands were conveyed by the executors of the deceased judgment debtor.

Held, under the provisions of the Registry Act the recording of the judgment gives it the effect of a mortgage and the judgment creditor can release whatever part of his security he sees fit upon whatever consideration he chooses.

If the party holding the land has any equities they are not equities against the creditor and leave granted to sell the land as prayed for will not affect them.

If the conveyances of other lands were voluntary he may have a right to transfer the whole burden of the charge to those lands, or, whether voluntary or otherwise, he may have a right to contribution from the grantees of those lands.

But this does not affect the rights of the judgment creditor

who, until he receives payment, has recourse against all the securities available to him.

W. F. O'Connor and *H. O. Savary*, for applicant. *Roscoe*, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] CAMPBELL *v.* IMPERIAL LOAN CO. [June 8.

Mortgagee—Redemption—Real Property Limitation Act, R.S.M. 1902, *c.* 100, *s.* 20—*Constructive possession by mortgagee of vacant lands—Acknowledgment to prevent statutory bar—Acquiescence and laches—Condition in power of sale protecting purchasers—Exercise of power of sale by giving agreement.*

Appeal from judgment of MATHERS, J., noted vol. 43, p. 707, dismissed with costs, but not on the ground taken by the court below.

The action was for redemption of a mortgage in fee covering several parcels of land given by plaintiff's predecessor in title. The mortgage became in default, 1st January, 1892. The land was vacant and, by the terms of the mortgage, the mortgagor's right to possession ceased upon default, but the mortgagees had not taken actual possession. Under the power of sale in the mortgage, the company had, between 1899 and 1903 made sales of the different parcels to the several persons who had been made co-defendants in the action. The purchasers had only entered into agreements to purchase, but had paid portions of their purchase money, entered into possession and made improvements on the lands. The sales had been made without notice to the plaintiff, replying on the provision in the mortgage that "in default of payment for one month and ten days the said mortgagees may without any notice enter upon the said land and proceed under and exercise the power of sale or lease *hereinafter* conferred." There was no such power referred to *after* that provision, but the statutory power of sale under the Short Forms Act was contained in an *earlier* portion of the mortgage. The plaintiff allowed over ten years to elapse without making any payment

on the mortgage or for taxes on the land. She knew of the making of two of the sales two years at least before commencing this action; but made no objection to any of them, although the company had sought her co-operation in endeavouring to realize on the lands. By the time the action was commenced, the lands had so increased in value that it became worth while to redeem them, if possible.

Held, 1, reversing the decision of MATHERS, J., that the "possession" referred to in s. 20 of "The Real Property Limitation Act," R.S.M. 1902, c. 100, means actual adverse possession and not a mere constructive possession of vacant lands by reason of the mortgagor being in default, and the plaintiff was, therefore, not barred by the statute. *Smith* v. *Lloyd*, 9 Ex. 562; *Agency Co.* v. *Short*, 13 A.C. 799, and *Bucknam* v. *Stewart*, 11 M.R. 625, followed.

2. The plaintiff had, by her laches and acquiescence in the sales made by the mortgagees, lost her right to redeem. *Archbold* v. *Scully*, 9 H.L. Cas. 388, and *Nutt* v. *Easton* (1899) 1 Ch. 873, followed.

3. The word "hereinafter" in the power of sale quoted should be construed to mean "herein" or "hereinbefore" and, so construed, the power of sale was sufficient and had been validly exercised. The court will correct such an obvious mistake. *Wilson* v. *Wilson*, 5 H.L. Cas. 66, and *Bengough* v. *Edridge*, 1 Sim. 269, followed.

4. The defendant purchasers were in any case protected by the following clause in the mortgage: "No purchaser under said power shall be bound to inquire into the legality or regularity of any sale under the said power or to see to the application of the purchase money." *Dicker* v. *Angerstein*, 3 Ch. D. 600, followed. If an irregular or improper sale is made by the mortgagee, the mortgagor has his remedy by way of an action for damages. *Hoole* v. *Smith*, 17 Ch. D. 434.

5. The agreements of sale entered into between the company and the purchasers were valid exercises of the power of sale, and conveyances were not necessary. *Thurlow* v. *Mackeson*, L.R. 4 Q.B. 97, followed.

6. The posting up on the land, after the making of the sales, of a notice of sale prepared by the company's solicitors did not give the plaintiff a right to redeem. It was not the act of the purchasers and their rights could not be prejudiced by it.

A. J. Andrews and *Burbidge*, for plaintiff. *Aikins*, K.C., *Haggart*, K.C., *Taylor* and *Kilgour*, for the several defendants.

Full Court.] MEY *v.* SIMPSON. [June 8.

Misrepresentation as to quality of land sold—Action of deceit—Representations not amounting to warranty.

The plaintiff complained that he had been induced by false representations made by the defendant as to the quality of a number of parcels of wild land to accept them as cash at $9 per acre as part payment of property sold and conveyed by him to the defendant. The defendant had never seen any of the lands and did not state that he had; but he had stated to the plaintiff's agent that they were a fairly good lot of lands. There was some evidence that he had said they were all good farming lands, but the majority of the Court of Appeal considered that this was not sufficiently established.

Held, affirming the judgment of CAMERON, J., that the defendant had not been guilty of any fraudulent misrepresentation as to the quality of the lands, but had at most given an exaggerated opinion as to their quality, and, although it turned out that a large portion of them was not good enough land for farming purposes, the plaintiff could not recover. *De Lassalle* v. *Guildford* (1901) 2 K.B. 221 followed.

Phillips and *Whitla*, for plaintiff. *Burbidge*, for defendant.

Full Court.] LOCATORS *v.* CLOUGH. [June 8.

Commission on sale of land—Sale by principal to purchaser who conceals part taken by agent.

The defendant listed the property in question with the plaintiffs, real estate agents, and agreed to pay a commission on any sale effected directly or indirectly by the plaintiffs and approved by him, and he also agreed to notify them immediately if he made a sale himself. Shortly thereafter the plaintiffs suggested to one Forrest, the purchase of the property. Forrest then opened negotiations with the defendant for its purchase. Forrest concealed from the defendant the fact that the plaintiffs had suggested the purchase to him and, as an inducement to the defendant to modify his terms, represented that a sale to him would not involve the payment of any commission. Believing this, the defendant closed the sale to Forrest on terms less favourable to himself than those stated in his contract with the

plaintiffs. The circumstances were not such as to put the defendant upon inquiry as to whether or not the plaintiffs had sent Forrest to him.

Held, that the plaintiffs were not entitled to recover any commission on the sale, either under their contract or for services rendered by way of quantum meruit.

Cathcart v. *Bacon*, 49 N.W. Rep. 331: *Quist* v. *Goodfellow*, 110 N.W. Rep. 65, followed; *Mansell* v. *Clements*, L.R. 9 C.P. 139, and *Green* v. *Bartlett*, 14 C.B.N.S. 681, distinguished.

Hull and *McAllister*, for plaintiffs. *Metcalfe* and *Stacpoole*, for defendant.

NOTE:—If the facts are correctly stated, and we are assured they are, we doubt whether the above decision states the law as it stands at present. With due deference we would suggest that the plaintiff would seem to have done all that he was required to do to earn his commission, and, if so, why should he not have it? Surely, at least, he should be paid for his services on a quantum meruit. We publish the note, however, as the case will doubtless be followed in Manitoba, and has, we understand, since its delivery been referred to and distinguished, but not dissented from, in a case subsequently decided.—ED. C.L.J.

Full Court.] TURNER *v.* TYMCHORAK. [June 8.

Interpleader—Evidence—Proof of judgment at trial of interpleader issue—Attaching order.

When a third person claims goods seized by the sheriff under an attaching order and the sheriff applies for an interpleader order, any objection by the claimant as to the want or insufficiency of the material on which the attaching order was obtained should be raised in answer to the sheriff's application, and it will be too late to raise such objection at the trial of the interpleader issue.

It is not necessary at the trial of such an interpleader issue for the plaintiff, although he is plaintiff in the issue, to prove the defendant's indebtedness, at least in the absence of evidence on the part of the claimant to shew that it did not exist. *Holden* v. *Langley*, 11 U.C.C.P. 407, and *Ripstein* v. *British Canadian*, 7 M.R. 119, followed.

The attaching order having been set aside by the referee after the making of the interpleader order, and the sheriff having relinquished possession of the goods, the claimant contended that the latter order then lapsed; but the attaching order had been re-instated on appeal to a judge, when the sheriff again took possession of such of the goods formerly seized as he found to be still in the claimant's possession.

Held, that the plaintiff had a right to have the interpleader issue disposed of and that, as the merits were in his favour, the verdict for him should stand, but limited in its effect to the goods seized by the sheriff after the attaching order was restored. *Howe* v. *Martin*, 6 M.R. 616, followed.

Appeal from CAMERON, J., dismissed with costs.

Galt and *J. H. Leech*, for plaintiff. *Coyne* and *Forrester*, for defendant.

Full Court.] WHITMAN FISH CO. v. WINNIPEG FISH CO. [June 8.

Sale of goods—When property passes—Retention of goods without notice of rejection to seller within reasonable time—Right of buyer to damages for breach of warranty as to quality of goods.

The defendants disputed liability for the price of a carload of finnan haddie purchased from the plaintiffs and received by defendants on February 4. The sale was by sample and the defendants discovered by the 9th of February that some of the cases were not up to sample. Thereafter they made complaints by letter of the quality of the goods, but, instead of definitely rejecting them, they sold a large number of the cases out of the carload, and it was not until March 18 following that the defendants wrote to the plaintiffs positively refusing to accept the goods.

Held, reversing the judgment of Cameron J., that under ss. 35 and 36 of R.S.M. 1902, c. 152, the defendants had retained the goods without rejecting them within a reasonable time and were liable for the price agreed on subject to their right, under s. 52 of the Act, to whatever deduction from the price they could establish or claim for by reason of any breach of warranty as to the quality of the fish or for damages by counterclaim. *Couston* v. *Chapman*, L.R. 2 H.L. Sc. 250 and *Grimolby* v. *Wells*, L.R. 10 C.P. 393, followed.

On the evidence the court also held that it was proved that the fish were in good condition when shipped by the plaintiffs; that under s. 33, the defendants took the risk of any deterioration necessarily incident to the transit from Nova Scotia to Winnipeg by freight; that the defendants had been so careless in handling the goods after their arrival in Winnipeg that the damages subsequently resulting should be attributed to their own negligence, and that, therefore, there should be no deduction from the purchase price.

Held, also, following Benjamin on Sales, 5th ed., at pp. 355, 639, and *Badische* v. *Basle* (1898) A.C. at p. 207, that, although delivery to a carrier is prima facie an appropriation of the goods, yet the seller may contract to deliver them to the buyer at their destination, in which case the property does not pass till such delivery.

Appeal allowed with costs, and judgment ordered to be entered for plaintiffs for the amount of their claim and costs of suit.

Galt, for plaintiffs. *Fullerton* and *Foley*, for defendants.

Full Court.] EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF. [June 8.

Jurisdiction—Service of statement of claim out of jurisdiction —Substitutional service within the jurisdiction—Non-resident foreigner—Writ of attachment against goods of.

Appeals from decisions of MATHERS, J., noted ante, pages 359 and 362, heard separately but disposed of by judgments covering both appeals.

On the hearing of the appeals, powers of attorney, executed at Chicago, U.S., 14 days before the filing of the statement of claim, in which the defendants described themselves as of Winnipeg, Canada, were for the first time put in. These instruments authorized one Popoff of Winnipeg to take charge of and deal with the defendant's property there.

HOWELL, C.J.A., and PERDUE, J.A., affirmed, but RICHARDS and PHIPPEN, JJ.A., dissented from, both decisions of MATHERS, J., and consequently both appeals were dismissed without costs.

O'Connor and *Blackwood*, for plaintiff. *Hudson* and *Levinson*, for defendants.

Full Court.] STEWART *v.* HALL. [June 8.

Solicitor and client—Collusive settlement of suit without the knowledge of his solicitor—Liability of defendant for costs of plaintiff's solicitor.

In this case the Court of Appeal, reversing the judgment of CAMERON, J., applied the principles laid down in *Brumsdon* v. *Allard*, 2 E & E. 19; *Price* v. *Crouch*, 60 L.J.Q.B. 767, and *Re Margetson & Jones* (1897), 2 Ch. 314, and

Held, that, as the defendants had collusively settled the suit with the plaintiff behind the back of his solicitor and for the purpose of depriving the plaintiff's solicitor of his costs, well knowing that such would be the result of the settlement, they should be ordered to pay to the plaintiff's solicitor his costs up to the time he received notice of the settlement, together with the costs of the application to CAMERON, J., and of the appeal, forthwith after taxation.

Deacon, for plaintiff. *Crichton*, for defendant.

KING'S BENCH.

Mathers, J.] HOLMES *v.* BROWN. [June 5.

Mandamus—Compelling mayor of city to sign cheque for payment approved by council—Existence of other adequate remedy.

Action for mandamus to compel mayor of city to sign cheque for payment of plaintiff's claim pursuant to resolution of council. The mayor had vetoed the resolution, but the council assumed to pass it again over his veto.

Held, 1. As the plaintiff had another adequate remedy for enforcing his claim, namely, by action against the city, he could not have the mandamus asked for. *The Queen* v. *Hull & Selby Ry. Co.*, 6 Q.B. 70; *In re Napier*, 18 Q.B. 70; *The Queen* v. *Registrar of Joint Stock Companies*, 21 Q.B.D. 131, followed.

2. It makes no difference that the other remedy would not lie against the defendant but against the city: *Queen* v. *Commissioners of Inland Revenue*, 12 Q.B.D. 461.

Meighen, for plaintiff. *Wilson* and *McPherson*, for defendant.

Mathers, J.] COTTER *v.* OSBORNE. [June 5.

Trades unions—Strikes—Combined action—Conspiracy to injure plaintiffs—Picketting and besetting—Injunction—Damages.

The members of a labour union, in order to compel the plaintiffs, employers of both union and non-union men, to give them higher wages and other advantages, went on strike and took steps to induce the men who remained at work to come out, and to prevent others from entering into the plaintiffs' employment although they had contracted to do so. They had pickets watching the plaintiffs' shops and places where they had work to do, others to meet trains coming into Winnipeg from the East and persuade men coming to work for the plaintiffs to break their contracts, others to attend for a like purpose on the arrival of the trains, and others to talk to the men working on different jobs with the like object. All this was done pursuant to a determined conspiracy among the defendants for that purpose, and it had proved effectual until the issue of an interim injunction in this action forbidding it. There was no evidence of threats or intimidation by any of the defendants, except that in one instance a workman who continued to work was threatened with violence by one of the defendants if he did not quit working.

Held, 1. Whilst workmen have a right to strike, and to combine together for that purpose in order to improve their own position, provided the means resorted to be not in themselves unlawful, yet the defendants had no right to induce other workmen, who were not members of the union and who desired to continue working, to leave their employment, or to endeavour to prevent the plaintiffs from getting other men to work for them, and for that purpose to watch and beset the places where the men happened to be, or to induce the plaintiffs' men to break their contracts with the plaintiffs, as these are actionable wrongs, and picketting and besetting are expressly made unlawful by s. 501 of the Criminal Code. *Lyons* v. *Wilkins* (1899), 1 Ch. 255, and *Charnock* v. *Court* (1899), 2 Ch. 35, followed.

2. The defendants who had participated in or counselled or procured the acts condemned were each individually liable for the whole amount of the damages suffered by the several plaintiffs in consequence of those acts: *Krug Furniture Co* v. *Berlin Union*, 5 O.L.R. at p. 469, but not for any damages caused by

themselves quitting work. Damages assessed against all the defendants found guilty at $2,000, divided amongst the several plaintiffs, in proportions fixed by the judgment.

The property and assets of the union were also declared to be liable for the amount of the judgment and costs and the interim injunction made perpetual restraining the defendants from persuading, procuring or inducing workmen to leave the employ of the plaintiffs and from conspiring or combining to induce workmen not to enter plaintiffs' employ, also from besetting or watching places where the plaintiffs or any of their workmen or those seeking to enter their employ reside or carry on business or happen to be with a view to compel the plaintiffs or said workmen to abstain from doing anything they or any of them have a lawful right to do, or from persistently following them or any of them.

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

Cameron, J.] ANDERSON *v.* DOUGLAS. [June 13.

Contract—Evidence to vary written contract—Evidence proving terms of contract intentionally omitted from the writing—Statute of Frauds—Specific performance—Rectification.

Action for specific performance of an agreement in writing dated Feb. 14, 1898, by which the defendant agreed to purchase from the plaintiff certain lands containing 650 acres more or less excepting thereout certain rights of way for $19,500.

Evidence was admitted on behalf of the defendant on the authority of *Alley* v. *Fisher*, 34 Ch.D. 367, to shew that the actual bargain verbally made between the parties contained: (1) Terms different from some of those in the writing; (2) A number of terms relating to matters not referred to in the writing.

There was no evidence of fraud, accident or mistake or of an intention, common or unilateral to embody the whole of the contract in writing, and parts of it were apparently left designedly in parol.

Held, that the Statute of Frauds in no way prevents either party from shewing that the writing on which the other insists is not the real agreement that was made between them, that there was, therefore, before the court a parol contract of which some only of the terms were evidenced in accordance with the require-

ments of the Statute of Frauds, and that the writing could not be enforced because it was shewn not to be the real agreement, and the real agreement could not be enforced because it was not in writing. Pollock on Contracts, 7th ed. 511; *Price* v. *Ley* (1863) 4 Giff. 235, and *Green* v. *Stevenson*, 9 O.L.R. 671, followed.

Plaintiff contended that, if the evidence disclosing terms not inserted in the writing was admissible, he could now amend his pleading and ask for a rectification of the agreement in accordance with the evidence and for specific performance of the agreement thus rectified, relying on *Martin* v. *Pycroft*, 2 De.G. M. & G. 785, and *Olley* v. *Fisher*, supra.

Held, distinguishing those cases, and following Fry on Specific Performance, p. 352; Pollock on Contracts, p. 510, 575; Attorney-General v. *Sitwell*, 1 Y. & C. Ex. at p. 593, *Davies* v. *Fitton*, 2 Dr. & Mar. 232; *May* v. *Platt* (1900), Ch. 616, and *Woolman* v. *Hearn*, 7 Ves. 211, that, before there can be rectification of an instrument, there must be clear evidence of a common intention that the instrument to be rectified should contain the whole contract and that the omitted terms were left out owing to fraud, accident or mistake. In other words, if the writing purports to contain all the terms of the bargain but omits some material part thereof and there was no common intention to put the whole bargain into writing, the document cannot be rectified. Specific performance refused.

Robson, for plaintiff. *Hoskin*, for defendant.

Macdonald, J.] BATES *v.* CANNON. [June 22.

Fraudulent preference—Assignments Act, R.S.M. 1902, *c.* 8, *s.* 41 *—Chattel mortgage—Exemptions.*

Action to set aside as fraudulent and void against creditors a chattel mortgage given by one James Speed to the defendant, for a past due indebtedness, less than sixty days before Speed made an assignment to the plaintiff for the benefit of his creditors. At the time of the giving of the chattel mortgage Speed was in insolvent circumstances to the knowledge of the defendant, and there was no doubt that the mortgage was void as against the plaintiff under s. 41 of R.S.M. 1902, c. 8. Some of the chattels covered by the mortgage, however, were such as would be

exempt under s. 29 of the Executions Act, from seizure under execution.

Held, following *Field* v. *Hare*, 22 A.R. 449, that the defendant was entitled to hold his mortgage as regards all goods mentioned in it which would be so exempt, and that the plaintiff was entitled to have the mortgage set aside as to the remaining goods.

Hudson and *Noble*, for plaintiff. *McKay*, for defendant.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] PARROT *v.* CHEALES. [May 28.

Practice—County Court action transferred to Supreme Court.

The order transferring an action from the County Court to the Supreme Court takes effect as soon as pronounced.

W. N. Bole, K.C., for the application. *Kennedy*, contra.

Hunter, C.J.] REX *v.* LABOURDETTE. [May 28.

Criminal law—Concealing with intent to escape from prison—Attempt and intent—Plea of guilty, striking out.

Where the accused was indicted for "concealing himself with intent to escape from the penitentiary,"

Held, that as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt.

Where the accused pleads guilty to a charge and it is disclosed that the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of guilty will be struck out.

McQuarrie, for the Crown. Prisoner undefended.

Wilson, Local J.] [June 8.

IN RE RELIANCE GOLD MINING & MILLING CO.

Land Registry Act, s. 89—Surface rights of mineral claim—Registration.

The grant from the Crown to the surface rights of a mineral

claim, being given in conjunction with the right to win the minerals thereunder, is not an interest which can be separately transferred by the grantee so as to secure registration under the Land Registry Act.

Lennie, for the applicant. District Registrar of Titles in person.

COUNTY COURT.

Howay, Co.J.] RE NILS NILSON. [June 11.

County Court—Official Administrator's Act—R.S.B.C. 1897, *c.* 146—*Amendment Act*, 1900, *c.* 27—*Intestate Estates Act*, *R.S.B.C.* 1897, *c.* 106.

The amendment of 1900, c. 27, to the Official Administrator's Act, was intended to obviate the necessity of applying under the Intestate Estates Act, for an order to administer the real estate of the deceased.

I. R. Grant, for the application.

Flotsam and Jetsam.

The omnipotence of Parliament has been often dilated upon by constitutional lawyers, but it has probably escaped their notice that when Her late Majesty, Queen Victoria, conferred the honour of Knighthood on the late Mr. Justice Day, she turned Day into Knight.

TRIOLET IN CURIA.

The judge was wide awake;
The counsel's speech was long,
His reasoning opaque.
—The judge was wide awake—
(A little nap to take
Would do no plaintiff wrong).
The judge was wide awake;
The counsel's speech was long.