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The subject of Trade Unions, with all that these combinations involve, has become one of great importance and interest in these latter days. An able discussion of one branch of the subject is given in this issue. We notice in the last number of the *Harvard Law Review* an article from the pen of Mr. A. V. Dicey on the combination laws as illustrating the relation between law and opinion in England during the nineteenth century. The aim of the writer is to trace out the close connection during the past century between the development of the law and the varying currents of public opinion affecting this subject. This article may be read with profit and interest in connection with the more practical treatment of just cause and excuse in labor disputes, by Mr. F. E. Hodgins, K.C.: post p. 410.

HON. MR. JUSTICE FERGUSON.

By the death of Mr. Justice Ferguson the High Court of Justice for Ontario has lost one of its best and most experienced judges. Appointed to the Bench in 1881 his judicial career extended over nearly a quarter of a century, and practically synchronised with the change wrought in the practice and procedure of the courts by the Judicature Act. He had naturally a judicial mind and was moreover a sound lawyer, and as he was well versed in both common law and equity he found no difficulty in conforming to the new ideas which the Judicature Act embodied. It would be untrue to describe him as a very alert or quick minded judge; on the contrary his physical and mental characteristics were essentially deliberate and ponderous, but, like the tortoise in the fable, although he was slow he was sure, and succeeded in inspiring general confidence in his judicial ability, both from the soundness of his understanding and the patient and laborious attention he was accustomed to bestow on every case that came before him. His slow and cautious way of arriving at conclusions was, perhaps, rather favorable to criminals tried before him, as they were sure to have nothing unduly preferred against them, and so fearful of doing injustice was he that in some noted cases verdicts of acquittal

were rendered when the exigencies of justice would seem to have been better served had a verdict of guilty been returned. How far this was due to the personality of the judge it is difficult to say, certainly in his view it were better that twenty guilty ones should escape punishment rather than that one innocent one should be condemned. His portly form will be missed at Osgoode Hall where his memory will be cherished for many years by those who knew him as an able lawyer and an honest man.

TRADE AND LABOR UNIONS.

JUST CAUSE AND EXCUSE IN LABOR DISPUTES.

I. *Introductory.*

England is a trading country, and it is not surprising to find that until 1825 combinations among workmen were illegal. But almost coincident with the gift of a vote came the right of association in labor. Advantage was taken of this, and what became known as Trade Unions were formally legalized in 1871.

The influence of these bodies in England was very marked, both in limiting the industrial output, and in securing complete control of the classification and pay of artisans. Their wealth did not attract attention until, through an alliance of several of them, a struggle occurred which lasted for almost a year and cost an enormous amount of money. Prominence has its drawbacks. Consequently an experiment was tried by capital in the *Taff Vale* case (1901) A.C. 426, and its conclusion startled the workmen of England. The outcome has been that in every case against a trade union the fight has been to a finish. And as a natural consequence we find old precedents, which had been supplied by minor and less far-reaching disputes, reviewed and reconsidered.

The interest awakened by the case of *Allen* v. *Flood* (1898) A.C. 1, and continued in the case of *Quinn* v. *Leatham* (1901) A.C. 495, has caused the true principle as to the rights of the contending parties in labor cases to be ascertained and applied. Prior to those cases a theory had been adopted as sufficient in all cases, which is not accepted at the present day. That was, that an intentional or malicious injury, if it caused damage, was actionable, whether done by one alone or by more than one in concert. This is the conclusion to be drawn from *Temperton* v. *Russell*, decided in 1893 (1 Q B. 435). In the light afforded by later decisions this view is now regarded as erroneous. The case of *Allen* v. *Flood* has demonstrated that malice or intent to injure (which is a state of mind) has no relation to and does not affect the existence or enforcement of a legal right. The *Mogul* case (1892) A.C 25, decided that, granting injury resulted from the action taken, yet liability is avoided if that action be in the assertion of a legal right, though done at the expense of another and intentionally so done.

Quinn v. *Leatham* has systematized the matter, and has pointed out why neither malicious intent nor resultant damage give a cause of action. It is because the possession of an equal right is "just cause or excuse" for acts done in asserting it, and so constitutes a defence. Just cause or excuse, therefore, if it is to be equivalent to reliance upon a legal right, must not depend upon intention or belief, it must be based upon some actuality. It may, of course, involve various elements, but it is only influenced by attitude of mind in fixing the relation of one or other of the parties to the particular dispute, and in ascertaining his true position in the quarrel.

It may be asserted generally and as a rule that the same considerations which will justify individual interference will be found applicable to associations of men, and that the connection between the men and their governing bodies and the officers thereof may be just as delicate and intricate as the relations between individuals, so far as this branch of law is concerned.

II. *Origin of just cause or excuse.*

In approaching the question as to what is "just cause or excuse" there is one statement which approximates to the funda-

mental. Such is the oft quoted dictum of Sir Wm. Erle, in his work on Trade Unions (1869, ed. p. 12). It is as follows:

"Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital, according to his own will. It follows that every other person is subject to the co-relative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, *not in the exercise of the actor's own right*, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

It will be observed that the learned writer limits the original right to the doing of such acts as either (1) do not conflict with the acts of others in possession of similar rights, or (2), if they do conflict, then to such acts as are an exercise of the actor's own individual right.

Hence collision thus anticipated is made lawful by just cause and excuse. This theory is important to a clear understanding of the subject. There are expressions in the cases which suggest another rule of decision. But when examined they are readily harmonized with it. For example, Lord Herschell, in *Allen* v. *Flood*, (1898) A.C. p. 138, discusses the underlying right of every man and asserts that everyone has a right to do any lawful act he pleases without molestation or obstruction, which wider right also embraces the right of free speech. He dissents from the view that this right is limited to damage to property or trade, and says that the *Mogul* case (ante) rests upon this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom and when, and under what circumstances and upon what conditions the parties pleased. And he adds (p. 139) that in his opinion, no one is called upon to justify either act or word merely because it interferes with another's trade, or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shewn to be in its nature wrongful, and thus to require justification. And in *Boots* v.

Grundy, 82 L.T. 769, Bigham, J., observes that no lawful act requires to be defended by any just cause or excuse—it carries its just cause or excuse with it.

At first sight these views appear to be inconsistent with Sir William Erle's theory. But they are not really so. An act may be lawful or unlawful, according to circumstances. For instance a trespasser may be ejected. The force necessary to do so may or may not constitute an assault, and this will depend on whether sufficient notice was given before it was applied. If done under proper conditions then the act is lawful. But its lawfulness involves the possession of an excuse sufficient in law. It is rightful because of the excuse and not per se. Hence, an act lawful in that sense needs no justification. And because, in that sense, it carries its own just cause or excuse with it, it is a lawful act; and so the words of Bigham, J., apply. But the justification which an act, lawful sub modo, carries with it must be capable of ascertainment and definition, and so the process of determining whether it is lawful requires an analysis of the right asserted.

It may safely be said that in order to adjudge an act to be a proper exercise of a legal right, evidence must be given which satisfies the Court that it is within the definition of Sir William Erle and is an exercise of the actor's own legal right and not merely an obstruction and so intended.

From this discussion may be gathered this axiom that the lawfulness of the acts done in the professed exercise of a legal right must in all cases be judged by the possession or absence of an actual legal right. In the one case interference causing injury gives no cause of action, and in the other it does.

Now lawfulness does not import absence or intention to injure, nor does it depend upon it. Hence malice or improper motive are not important, and when acts are scrutinized the purpose is, not to discover the underlying mental resolve, but rather the position of the actor so as to determine whether what he has done is consistent with and supports the position which he asserts to belong to him. To illustrate: The circumstances under which resolutions were passed by a sliding scale committee of the miners were considered, and the views of the executive committee were examined, in order to see whether what was done was really the executive committee's action, and not in fact that of the sliding

scale committee: *Glamorgan Coal Co.* v. *South Wales Miners Federation* (1903) 1 K.B. at pp. 126, 127.

III. *Earlier indications of the principle.*

Apart from what may be gathered from the *Mogul* case, there are indications in *Allen* v. *Flood* of the adoption of the principle of just cause or excuse. In that case Wills, J., who agreed with the majority of the House of Lords, thinks (p. 48) that neither the *Mogul* case nor any other says that the promotion of one's own interest will justify any and every means by which that end can be accomplished, and the utmost that can be said about self-interest as a justification for doing mischief to others, is that it is one of the circumstances to be taken into consideration in determining whether there is or is not just excuse for the wilful infliction of loss upon others.

Hawkins, J., who held with the minority (at p. 24), discusses the improbability of the defendant's action being dictated by a desire to protect trade interests, and is satisfied that they were not in any sense acting "in the exercise of any privilege, or in defence of any rights either of his own or the boiler makers."

In the House of Lords, where the case went off upon the weight to be attached to the presence or absence of malicious intent there is throughout the judgment an appreciation of the effect of lawful competition as an excuse for injury not limited to trade competition, but as extending to competition in labor. And Lord Herschell's already quoted remarks shew that the effect of the exercise of a competing right is fully recognized. Lord Macnaghten, in *Quinn* v. *Leatham*, may be said to have fully defined the law on this head when he said (p. 510) that the violation of a legal right committed knowingly is a cause of action . . . if there be no sufficient justification for the interference—which is equivalent to stating the proportion that the interference is wrongful if not supported by the possession of an existing legal right.

IV. *When acts require justification.*

The acts to be justified may be those of a single individual or they may be those of individuals similarly interested tending to the same end but without agreement. They may be the concerted acts of members of an association. The very agreement to do

them may be in itself the act to be excused, because the acts may be in themselves lawful. See *Mulcahy* v. *Reg.* L.R. 3 H.L.p. 317 and *Quinn* v. *Leatham*, ante.

And the results of the acts may be the breaking of a contractual relation, or the preventing of bargains necessary to the carrying on of business, or they may affect the health, comfort, peace of mind, business or profits of an individual or of a Company. Consequently the justification may have to be sought for in many different rights and from many and varied relationships. It is impossible to classify either the acts or the excuses in any useful way and examples will have to indicate a rough and ready rule.

The Courts have refrained from attempting to lay down any rule as to when justification exists. Both Stirling and Romer, L.JJ., think it well-nigh impossible: *Glamorgan* v. *South Wales*, ante at pp. 573, 577, and Lord Bowen's test in the *Mogul* case is the "good sense of the tribunal."

Both Bigham, J., in the Court below and Lord Justice Vaughan Williams, in his dissenting judgment in the Court of Appeal (*Glamorgan* case (1903) 1 K.B. 118, 2 K.B. 545) discuss the question of the right of an individual to counsel another, where in consequence of such advice a contract is to be broken or may be prevented. Bigham, J., cites the case of a brother advising a sister to break a contract of service which is injuring her health, and also cases where advice as to whether or not it is wise to break a contract is honestly asked and is honestly given by solicitors, parents or friends. He concludes that if from all the circumstances it appears that the interference was justified, a cause of action does not exist against the adviser. It is of course obvious that if the advice is taken and the contract broken an action lies against the person breaking the contract. Lord Justice Vaughan Williams in considering the cases referred to is of the opinion that the principle by which they are covered is that a community of interest or a duty arising from the relation of the parties affords a just cause or excuse. But self-interest is not in itself and apart from other considerations a complete justification. Wills, J., in *Allen* v. *Flood*, at p. 480 speaks of it as only one of the circumstances to be taken into consideration in determining whether there is or is not just cause or excuse. Lord Herschell in the same case (p. 129) alludes to furthering one's own interest as good cause if resort is not had to unlawful acts. And Bigham, J., in the *Glamorgan* case (1903)

1 K.B. 118 at p. 134 agrees in these words:—"If the real object were to enjoy what was one's own or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without illegal acts it would not, in my opinion properly be said that it was done without just cause or excuse, but not if done merely with the intention of causing temporal harm without reference to one's own lawful action or the lawful enjoyment of one's rights."

Romer, L.J., in the *Glamorgan* case (p. 574), points out that a community of interest is no answer to an action for procuring a breach of contract.

Stirling, L.J., admits (p. 577), the force of the argument that duty may protect, but is evidently of opinion that if the fulfilling of the duty to advise carried the adviser into active interference with an existing contract he would be liable.

It is obvious that community of interests as an excuse shifts the ground from the sole interest of the offending party in exercising his legal right. It either admits a right of outside interference with a matter in which another party is exercising his individual right or brings in the moral excuse of filial, fraternal or friendly duty instead of an existing and recognized right.

Until the House of Lords has spoken it is impossible to say to what extent and under what circumstances a defence will be established by the duty to advise or to actively interfere. In such cases as are illustrated by the one so forcibly cited by Stirling, L.J., (a father causing a child to break off a marriage engagement with a person of immoral character) a difficult problem is suggested. It may be that the right to physical health and the enjoyment of life to which every one is entitled (which in itself forms a valid excuse for breaking a contract) will enure to protect those who act to secure it. In the meantime, and speaking of cases in which only money interests are involved, it is extremely doubtful whether community of interest will be sufficient as a defence, though it may be a prime factor in determining the actual relationship of the parties.

The Divisional Court in *Read* v. *Friendly Society*, (1902) 2 K.B. 88, have laid down what seems to be a fairly comprehensive rule. They hold that the justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself,

and it will not be sufficient for him to show that he acted bona fide or without malice, or in the best interests of himself or others, or on a wrong understanding of his rights.

The case of the *Mogul Steamboat Co.* v. *McGregor Gow & Co.* (1892) A.C. 25, established, in a popular sense, competition in trade as a justification. But the learned judges are careful to point out that the case may be supported upon the ground that no legal right of the plaintiffs was infringed. It was really a case of competing rights of trading and the effect of it is that the defendants used their right to do business so as not to infringe the rights of the plaintiffs, though to their detriment. If the defendants had, under the guise of trade competition, used firearms to keep off those desiring to serve the plaintiffs they could not plead that as a justification. Yet those means were actually used in *Tarleton* v. *McGawley*, 1 Peake N.P.C. 270. The effect was precisely the same in both cases and the plaintiffs' right invaded, if any were infringed, was exactly identical. It is in the excuse that the difference lies. In one case trade was pushed by trade methods, in the other by practices not recognised as lawful, except where trading is superseded by war. They were, as Lord Holt pointed out in *Keeble* v. *Pickersgill*, 1 Mod. 74, 131, done in the way and under the guise of competition, yet were in themselves violent and unlawful.

V. *Cases where justification disallowed.*

Upon the complicated questions always arising out of combinations in which various interests become involved, three cases may be looked at. They present the same problem in different ways. They are: *Read* v. *The Friendly Society* (1902) 2 K.B. 88, 732; *Giblan* v. *National Amalgamated Labourers Union* (1903) 2 K.B. 600; *Glamorgan Coal Co.* v. *South Wales Miners Federation* (1903) 1 K.B. 118, 2 K.B. 545; to which may be added, *Lyons* v. *Wilkins* (1896) 1 Ch. 811.

These were all cases of procuring breaches of contract. The defendants in each were a federated body of workmen, and the disputes were actual ones carried on in what was believed to be the true interest of the working class and the federations.

In the *Read* case the federation compelled the employer to dismiss an apprentice, thereby procuring the breaking of a contract between the latter and his employer. The justification put for-

ward was the interest of the Union and the fact that the employer had agreed with the federation not to employ apprentices except in conformity with their rules. They claimed the right to compel him to perform his contract.

In the *Giblan* case the wrong done was both causing the plaintiff to be dismissed from his employment, and also in preventing him from obtaining further employment. The justification put forward was the fact that the plaintiff had embezzled funds of the union and that it was in its best interests that he should be prevented from obtaining employment until restitution was made.

In the *Glamorgan* case the injury was a breach of contract in that the miners stopped work on several days as ordered by their committee, and the justification alleged was that the stop days were ordered for the purpose of keeping up the price of coal and in that way benefitted the colliery owners (the plaintiffs), and that their action was not intended to injure the latter, but rather to benefit them, and only to interfere with the middlemen who were selling coal at too low a rate.

In the case of *Lyons* v. *Wilkins* the same absence of desire to injure the persons who actually suffered damage, and the same intention to injure a third party existed. The justification set up was that a trade dispute actually existed, which, although not involving the person injured, had to be dealt with in such a way as affected him, though there was no desire to injure him.

It will be observed that the interest of a combination or union as a justification runs through all of those cases. In the *Read* case the interests of the union were involved, because, unless they could control the employment of apprentices, a large portion of the power of their union would be gone. In the *Giblan* case the interest of the association was only collaterally involved, that is, the plaintiffs obtaining employment was no direct detriment to the union. Their action was intended as a punishment to him and it is evident that it was not taken simply for the purpose of protecting employers against a dishonest employee, or because the union men were refusing to work with him. If they could succeed in preventing the plaintiff from obtaining employment they would secure re-payment into the funds of the association of the amount which had been stolen, or at all events, they honestly expected so to do.

In the *Glamorgan* case and in *Lyons* v. *Wilkins* the intention

to injure existed, but not against the plaintiff, and in the latter case it was only intentional so far as it was the natural result of the action taken against the person whom it was desired to injure. It is interesting to notice how the doctrine of justification is applied under these varied circumstances.

In the first, honest belief that the action taken was in the best interests of the association was disallowed as a justification. Collins, M.R., says (*Read* v. *The Friendly Society*, p. 737) "Belief, however honest that in what they did, they were acting in the best interest of the society of masons, could be no excuse for trying to deprive the plaintiff of the advantage of his contract." "Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action: *Lumley* v. *Gye*, 2 E. B. 216, and strong belief on the part of the persuader that he is acting for his own interests does not seem to me to improve his position in any respect. Still less can it do so, when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiffs' expense by coercion."

In the *Giblan* case the difference between the direct and intimate interests of a union, and advantages merely collateral is emphasized. Walton, J., in his judgment (reported in 89 L.T. 386) points this out. Having regard to the *Mogul* case, he says: "I do not think this would be an actionable wrong if it were done for the purpose of protecting or advancing the interests of the members of the union, as, for instance, for the purpose of securing more work or better wages for themselves, even though a necessary consequence of such action would be to injure the plaintiff. In *Quinn* v. *Leatham* it would be an actionable wrong if it was done, not to advance the interests of the members of the union, except perhaps in some remote or indirect way, but directly and primarily for the purpose of injuring the plaintiffs, and as the jury have found that the object was to punish the plaintiff for not re-paying the moneys, the case falls within *Quinn* v. *Leatham* and not within the *Mogul* case."

In the Court of Appeal, Romer, L.J., says that this is not a case where the defendants, knowing of the plaintiff's defalcation thought it their duty to inform the employer, or where the plaintiff's fellow-workmen by reason of that act refused to work with

him. It was rather a case where the intention was to carry out some spite against the man, or had for its object to compel him to pay a debt, or any similar object, not directly connected with the case, against the man, and the defendants were liable to the man for the damage consequently suffered as being an inexcusable interference with the man's ordinary right of citizenship. The case is further noteworthy for holding that a union is liable where the acts done were by persons in the service of and for the benefit of the union, though not directly authorized by it to do as they did.

In the *Glamorgan* case and in *Lyons* v. *Wilkins* the point established is that even where the honest belief existed that the interests of the men required the objectionable course to be pursued, and although there was not only no intention to injure the plaintiffs, but a belief that the course taken was for their benefit as well, yet if injury ensued the union were liable. Romer, L.J., says (p 575) that what the defendants have to justify is their action, not as between them and the members of their union, but as between themselves and the plaintiffs the employers. And Stirling, L.J., (p. 578) holds that, although the men persuaded themselves that it was in their master's interest as well as their own that they should have power to take holidays at that period, this was a point on which the masters were entitled to have their own opinion.

VI. *Matters of Excuse.*

Lord Brampton in *Quinn* v. *Leatham*, dealt with this vexed question of just cause or excuse where a combination of men act in regard to what they consider their mutual interests. He indicates (p. 528) what might protect them, and suggests the following :— (1) Acts done in furtherance of any of the lawful objects of the association as set forth within registered rules; (2) in support of any lawful right of the association or any member of it; (3) to obtain or maintain fair hours of labor or fair wages; (4) to promote a good understanding between employers or employed, and workmen and workman; (5) or for the settlement of any dispute. Lord Lindley in the same case points (pp. 536, 537) to many acts for which no justification exists. They are:—(1) giving a black list; (2) dictating to the plaintiff and his customers and servants what they were to do; (3) disturbing them in their employment of

liberty of action and he refers (p. 541) to acts which are forbidden by law, such as picketing, besetting and threatening.

In *Boots* v. *Grundy*, 82 L.T. 769, Phillemore gives instances of what is or is not just cause or excuse. Political or religious hatred, a spirit of revenge for previous real or fancied injury are not accepted as valid, but to further one's own prosperity or if the act be constructive, or destructive only as a means of being constructive then sufficient excuse exists.

VII. *Conclusion*

In closing it may be interesting to note the view of Romer, L.J., in the *Glamorgan* case and what he thinks ought to be considered in determining whether just cause or excuse does or does not exist.

Those elements are:—(1) the nature of the contract broken; (2) the position of the parties to the contract; (3) the grounds for the breach; (4) the means employed to procure the breach; (5) the relation of the person procuring the breach to the person who breaks the contract, and (6) the object of the person in procuring the breach.

To this must be added that vitally important factor namely, the effect of combination as distinguished from the results of individual acts. A combination cannot act with as free a hand as an individual—as has been said, a baker can refuse to supply me with bread, but if all the bakers combine to refuse me bread their agreeing becomes a conspiracy to injure me. Hence in dealing with just cause and excuse, it is obvious that where two or more combine to do an act causing injury, their defence will be scrutinized more keenly and will always lack one advantage possessed by an individual, namely, the innocency of the means used.

Mr. Chalmers-Hunt, the great English authority upon this subject has propounded a view which, speaking generally appears to afford the best view point for considering just cause or excuse. It is that the right to attack persons for the sake or by way of competition is an indulgence conferred by the law, and, being in itself an evil, although a necessary one, its exercise is to be jealously limited and confined so as to exclude from protection acts of manifest tyranny and malice.

This puts the onus where it properly belongs, and if adopted

by the courts the doctrine of necessary evil will put at rest a much agitated branch of modern law. It bears an interesting resemblance to the use of privilege as a defence in actions for libel and slander.

The American view may be put side by side with that of Mr. Chalmers-Hunt. Mr. Eddy, in his recent work on Combinations, says (1901 ed. par. 470): "But when it clearly appears that there is an entire absence of legitimate motives, and that the damage is occasioned by acts which are the result of a deliberate intent to injure, then the law has, or should have, no difficulty in stamping the transaction, considered as an entirety, unlawful, and awarding the party injured whatever damages he has suffered. Such a conclusion does not involve the proposition that malice in and of itself is a cause of action, since a man may do many things not in themselves unlawful in the legitimate pursuit of his own lawful business, but at the same time with the malicious intent to injure others; but a man may not do wantonly and without any hope or expectation of profit or legitimate advantage to himself that which he knows must and which he intends shall inflict damage upon another. The practical question for court and jury is not so much whether or not malice exists, as it is whether or not the acts complained of were done in the legitimate pursuit of a legitimate business, or the legitimate exercise of some personal privilege: if so, then there is no redress for the party injured, since the law cannot undertake to distribute the damage according to the preponderance of the motives."

FRANK E. HODGINS.

JAPANESE LAW AND JURISPRUDENCE.

An article recently appeared on the above subject from the pen of Mr. A. H. Marsh, K.C., Toronto, in the *American Law Review*. His information was obtained from two lectures delivered in the United States by Dr. R. Masujima, of the Tokio Bar. We give the following extracts:

These lectures throw a flood of light for foreigners upon the present position of legal affairs in Japan, and it has occurred to me that possibly some persons might be interested in learning how some features of Japanese law and practice affect the mind of a foreign onlooker. The learned lecturer tells us that Japan possesses an excellent code of laws, and that, while in other countries codi-

fication has come after centuries of growth, in Japan it has been formulated rather as an introduction to an era of progress.

The learned lecturer also informs us that under the old system in Japan (during the feudal days, which continued until recent years) litigation was almost unknown, as disputes were generally settled without recourse to the law, and public sentiment and official influence tended to discourage all forms of litigation, and that, even when recourse was had to the law, "So great was the rigidity of the rule which was laid upon the people, and so submissive was their temper that a case at law generally meant nothing more than a bare statement of the case on either side, resulting in an award rather than the decision of the judge." Again, he informs us that: "Prior to the introduction of modern institutions the habits and affairs of the people were simple; their occupations were primitive, their disputes were regulated by custom and immemorial usage. The conception of making and fulfilling contracts had scarcely any place in their life. Country people almost always settled their disputes themselves; townspeople, perhaps a little more frequently, but very seldom, invoked the aid of the law. The forum for the settlement was the family hearth, a family council, or the arbitration board of villagers or 'fellow-townsmen.'" Nothing could be more diametrically opposed to the traditions, customs and habits of the English people than this account of the Japanese people.

It is curious to note what the learned lecturer tells us about the law of ancient Japan relative to banking and commercial law generally. The lex mercatoria appears to have originated, grown and developed among the various nations of the earth throughout the course of centuries, so as to produce various domestic systems of the law merchant, which, in their broad lines, have a remarkable similiarity one to another. Japan appears not to have been singular in this respect, for she, too, had her system of mercantile law running on lines parallel to the lex mercatoria of Europe.

The learned lecturer tells us that the adoption by Japan of her present system of codes was hastened by the desire of the Japanese people to rid their country of the exterritorial jurisdiction exercised in Japan by the courts of foreign nations, and it could not be expected that the foreign nations would concede this point unless Japan first furnished herself with a recognized and uniform system of laws. This, we are told, led to the adoption per saltum of a

ready-made code, instead of allowing the indigenous law to grow and develop and formulate and broaden down from precedent to precedent until this native product should form a complete and systematized body of laws springing from and fitted to the tastes, the customs, and the requirements of the people.

When a model was sought whereon to base her new system of laws, Japan had to choose between the civil laws of the continental nations of Europe (founded upon the Roman law) and the dual system of England consisting of common law and equity, now practically fused into one system under the English Judicature Act.

Whether wisely or otherwise, she chose the continental system as her model, and, accordingly, the law in its entirety is statute-made law, and we learn from these lectures that the Japanese are already experiencing the defects which are likely to arise whenever the law is reduced to a written code. We are told that the courts committed the error of adhering too closely to the letter of the law instead of expounding it in such a manner as to make it work out justice in accordance with the true intent and spirit of the law. The only remedy for such a state of affairs is to place upon the bench judges who are lawyers of wide experience, and who are not only learned in the law, but who have acquired their learning by profound study of jurisprudence, and the principles of law upon which codes are founded, and not merely by memorising the codes themselves. If such men are broad-minded men of courage, they will bear in mind that written codes are the mere framework of the law, and that the judges, by their interpretation of the codes, may make their system of law a living and growing system, expanding and modifying to meet the just requirements of the people. Lord Coke tells us that "He who considers merely the letter of the law goes but skin deep into its meaning." A written code may be so treated as to make it a living and growing organism. To treat it in the latter way requires a strong man, conscious of his own strength, based upon knowledge.

It is astounding to learn from these lectures that the judges of Japan are not generally drawn from the bar, but are appointed directly from the graduates of law schools and colleges, and that the appointments are based upon examination; that pre-eminence at the bar is not a necessary qualification for the bench, and that the bench is not a post of honor and emolument to which men

look forward with ambition. The appointment of judges by examination surely must have been borrowed from China. So long as such a system prevails, foreign nations will have reason to regret that they ever surrendered their exterritorial jurisdiction.

We learn from these lectures that people in Japan very rarely think of the lawyer as a professional guide, but that they generally do their own legal business, and rarely consult a lawyer until after a suit is actually pending, and that, if they do seek his assistance, it is generally in the last stages of the suit.

This is, indeed, a rough, raw, and democratic way of doing business, and it will doubtless work its own cure in the course of time when corporations, manufacturers, merchants, employers of labor, landlords, and others discover that a skilled lawyer is as necessary for the successful conduct of litigation as a skilled general is for the successful conduct of a war, or skilled artisans are for the successful conduct of a factory.

As soon as it becomes the custom for one of the litigants to employ a lawyer, it will not be long before both parties begin to employ one, for experience will soon teach them that skill and success go hand in hand, and that, if one side employs a skilled advocate and the other side does not, the latter will be badly handicapped. The saying in England is that he who acts as his own lawyer has a fool for a client.

One is surprised to learn from these lectures that in the Japanese courts they have no system of pleading by which the issues to be tried between the parties are defined, and that neither party knows with any degree of accuracy what his opponent's case or defence is until trial, when the judge, by oral questions, elicits what are the real points in controversy. There is no such thing as a preliminary examination of the parties for discovery, or a preliminary production of documents in the possession of the parties, and finally the examination of witnesses is conducted by the judge and not counsel for the parties. To one who is familiar with the procedure of English courts, this system would appear to be fairly described as disorganization striving with chaos in topsy-turvydom. English and American lawyers are thoroughly convinced that truthful evidence is obtainable from witnesses only through the medium of skilful cross-examination. It may be that parties and their witnesses in Japan are so thoroughly imbued with the spirit of truth, and are so possessed of the love of justice, integrity, and

righteousness that none of the machinery of the law, which is found necessary in other countries to prevent surprise and the giving of false evidence and generally to promote the due administration of justice, is there deemed needful.

It may be that this state of procedure and practice accounts for the non-employment of lawyers above referred to, and also that the non-employment of lawyers accounts for the toleration of the said state of procedure and practice, so that each phase reacts upon the other and produces motion in a circle, instead of progress.

The lack of confidence felt by English courts in sworn testimony when the witness has not been subjected to cross-examination is exemplified by the saying of one judge that "the truth will sometimes leak out, even in an affidavit."

Perhaps the most interesting portion of Japanse law is that part of the civil code which deals with family relations. While the remaining portion of Japanese law has in great part been formulated in accordance with the ideas of modern Europe, this portion of Japanese law has been in great part formulated in accordance with ancient Japanese law. This being the case, it is interesting to note the similarity between the Japanese law of family relations and the Roman law touching the same subject. The learned lecturer tells us that "There is no other department of law which enters so closely into the heart and foundations of society as the law of 'family relations.'" This doubtless accounts for the fact that, while Japan was ready to adopt the general body of the law of modern Europe, she was not willing to revolutionize the indigenous law which circles around the hearth-stone. Society in Japan has gone through the stages of family groups, village community, and feudal system, which latter system lasted until the Revolution of 1868. This is the order of progress which has been recognized elsewhere throughout the world, and, speaking in a general way, Japan has now brought her jurisprudence into line with the latest phase of modern European advancement. In one respect, however, there is still room for growth along the line recognized throughout the world as the line of progress, and that is with respect to the law of family relations. Dr. Masujima tells us that it has been generally stated that in Japan the family is still the unit of society and not the individual, and he proceeds to argue that this is not strictly accurate, because the law of Japan

does, to a considerable extent, recognize the position of the individual, but he makes it clear that the saying, which he combats, has in it a considerable deal of truth. If we examine what Sir Henry Maine says about the progress of primitive society, we shall find why Dr. Masujima, loyal to his country and jealous of her reputation for progressiveness, is unwilling to admit that the family, and not the individual, is there the unit of society. Maine tells us that society in primitive times was not, what it is assumed to be at present, a collection of individuals. In fact and in view of men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the family, of a modern society the individual.

In certain winding up proceedings at Osgoode Hall, Toronto, recently, the certificate of the incorporation of a Company was put in which showed the formation of a Company of a multiform and hydra-headed character not often seen. Certain enterprising Canadians obtained the charter in the State of West Virginia. The concern was called a mining development company. The powers given were (using a redundancy of words) to lease, purchase, own, operate, etc. mining properties or options, and to sell and to dispose of the same; to operate mills, etc.; to buy and sell all kinds of merchandise; to erect and operate boarding houses and dwelling houses; to buy, build on, and mortgage real estate; to borrow money in every conceivable way; to construct, acquire, and develop water powers; to construct and operate necessary machinery for steam, electrical power and light and sell the same; to transact a general warehousing and forwarding business; to buy and sell shares of other mining companies or corporation; to organize, incorporate and to promote the organization of other companies; to construct, own and operate tramways and roadways, by engines and all other kinds of machinery vehicles and vessels, and in general to do everything else. Finally, to carry on the Company's business in any province of this Dominion, its head being in the City of Toronto. For the purpose of forming the said corporation the handsome sum of $125 was subscribed and paid in, five persons taking twenty-five one dollar shares each. It was sad that so magnificent a scheme should, whilst yet in its infancy, have its funeral obsequies under the supervision of the Master in Ordinary. Who the chief mourners were did not appear. Probably not so many as there would have been had the infant come to maturity.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

TRADE NAME—"CALEDONIA WATERS"—WORD DESIGNATING LOCAL SOURCE OF GOODS.

Grand Hotel Co. v. *Wilson* (1904) A.C. 103, was an appeal by the plaintiff from the Court of Appeal of Ontario reversing a judgment of the Chancellor and dismissing the action. The action was brought to restrain the use by the defendants of the word 'Caledonia' as applied to mineral waters sold by them. The plaintiffs derived mineral waters from various springs in the Township of Caledonia, where they carried on business, and it was known in the market by that name. The defendants had discovered other springs in the same township and sold the product thereof as water "from new springs in Caledonia." The plaintiffs claimed that the word Caledonia in reference to the water sold by them, the word had lost its geographical sense and had acquired a secondary meaning by which the waters from the plaintiffs' springs were designated, and that therefore the defendants could not now use that name as a designation of mineral water sold by them. The Judicial Committee of the Privy Council (Lords Davey and Robertson, and Sir Arthur Wilson) while conceding that the defendants could not use the word "Caledonia" in such a manner as to pass off their goods for those of the plaintiffs', were nevertheless of the opinion that the plaintiffs had not an exclusive right to the use of the word; and they thought that the defendants by describing their water as from "the new springs at Caledonia" sufficiently distinguished their water from that of the plaintiffs, and that the use of the word "Caledonia" by the defendants as a designation of the locality from which the water came could not be interfered with. The appeal was therefore dismissed.

MARTIAL LAW—JURISDICTION.

Attorney General v. *Van Reenen* (1904) A.C. 114. This was an appeal by the Attorney General of the Cape of Good Hope from a decision of the Supreme Court of that colony purporting

to quash two convictions made for contraventions of martial law. The magistrate had used printed forms of his magistrate's court with printed headings appropriate thereto, but it was clear on the evidence that the convictions had been made in the administration of martial law. Under these circumstances the Judicial Committee of the Privy Council (The Lord Chancellor, Lords Davey, Macnaghten and Lindley, and Sir Arthur Wilson) held that the Supreme Court had no jurisdiction and their order purporting to quash the convictions was reversed.

CONTRACT—ON BEHALF OF COMPANY BEFORE ITS INCORPORATION—RIGHTS OF COMPANY.

Natal Land Co. v. *Pauline Colliery* (1904) A. C. 120. This was an appeal from the Supreme Court of Natal. The action was brought by the Pauline Colliery for the specific performance of a contract alleged to have been made in its behalf before its incorporation. The Court below had given judgment for the plaintiffs, but the Judicial Committee of the Privy Council (Lords Macnaghten, Davey and Lindley, and Sir Arthur Wilson and Sir John Bonser) reversed the judgment, holding that a company cannot by adoption or ratification obtain the benefit of any contract purporting to have been made on its behalf before it was in fact in existence. In such a case a new contract must be made with the company after its incorporation.

PRACTICE—DISCOVERY—SHIP'S PAPERS—ACTION BY INSURERS FOR MONEY OVERPAID—FRAUD.

Boulton v. *Houlder* (1904) 1 K.B. 784, was an action by insurers to recover money overpaid on marine policies of insurance owing to alleged fraudulent misrepresentations by the insured; and on an application by the plaintiffs for further discovery it was held by Bucknill, J., that the plaintiffs were only entitled to discovery of other policies in possession or control of the defendants, but not policies in the hands of the liquidator of a company into which the owners of some of the ships insured had been merged, neither the company nor its liquidator being parties to the action. On appeal, however, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) decided (Romer, L.J., dubitante) that the defendants were bound to state on oath the steps they had taken to enable them to produce the policies, and, failing to produce them, they were bound to give such information as to their contents as they could obtain by reasonable exertion.

Correspondence.

PROFESSIONAL ADVERTISING.

Editor Canada Law Journal:

DEAR SIR,—Would you kindly inform me, either directly or through the columns of your next issue, whether or not it would be unprofessional for a barrister and solicitor to engage in and advertise himself as engaging in the business of loaning, real estate business and fire and life insurance, in connection with or as a side issue to his regular practice and business as a lawyer. This of course, specially applies to country practitioners, to meet the serious competition of the so-called unlicensed conveyancers, who by judicious advertising and the active prosecution of such a general office business, are thus enabled to secure a very liberal share of the conveyancing and collection business which should be done and could be retained by the local practitioners if they were not so handicapped by the restrictions of a professional "etiquette" of past decades. With this handicap removed it would then be a question of ability and of business push, and perhaps also of personal character and standing. I venture to think there would then be no need of legislation against "unlicensed" conveyancing.

Yours,

B.

[The above letter brings up a matter of interest to many in the profession and more especially country practitioners. We should be glad to have the views of some of our readers on the subject. We have great sympathy with those in the profession who are handicapped in the way that our correspondent speaks of.—Ed. C.L.J.]

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Ferguson, J., Meredith, J.] [Feb. 9.

JOHNSTON *v.* RYCKMAN.

Costs—Taxation between party and party—Counsel fees paid to partner of litigant—Affidavit of payment made by counsel—Brief—Correspondence.

Where counsel fees were paid by a member of a firm of barristers and solicitors to his partner for the latter's services as counsel in an action in which the former was defendant under a prior agreement to pay such fees as would be payable to counsel outside the firm;

Held, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs. *Henderson* v. *Comer*, 3 U.C.L.J. 29, followed.

Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross examined.

Held, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit.

Held, also, per BRITTON, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties should not be interfered with on appeal, although the correspondence was not used at the trial.

W. R. Smyth, for plaintiff. *W. E. Middleton*, for defendant.

Boyd, C., Ferguson, J., Teetzel, J.] [Feb. 11.

REX *v.* NURSE.

Liquor License Act—Conviction—Third offence—Evidence of previous convictions—Improper reception—Subsequent deletion.

A conviction of the defendant for a third offence against the Liquor License Act, R.S.O. 1897, c. 245, was quashed on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act.

Held, also that the jurisdiction of the magistrate was gone when he admitted the improper evidence, and his competence was not restored by its deletion.

Haverson, K.C., for defendant. *Cartwright*, K.C., for Attorney-General and magistrate. *Dewart*, K.C., for prosecutor.

Teetzel, J.] FRASER *v.* HAM. [April 18.

Prohibition—Division Court—Trial by jury—Claim under $20—Counter claim over $20.

Plaintiff sued in a Division Court for $14 for rent; and defendant besides filing a dispute notice counter claimed for $60 damages and asked for a jury but the County Judge refused to place the case on the list for trial by jury. On an application for prohibition,

Held, that the filing of the counter claim did not entitle the defendant to have the plaintiff's claim tried by a jury, but that section 160 of the Division Court Act R.S.O. 1897, c. 157 did entitle him to that right in respect to his counter claim: and prohibition as to the latter was directed to issue subject to the right of the judge to order that the counter claim be the subject of an independant action under Division Court Rule 108.

John Greer, for the motion. *Frost*, contra.

Idington, J.] BANK OF HAMILTON *v.* SCOTT. [May 4.

Judgment creditor—Examination of judgment debtor—Assignment for benefit of creditor.

The fact that the judgment debtor made before judgment obtained assignment for the benefit of his creditors, and was examined under such assignment under the provisions of R.S.O. 1897, c. 147, does not deprive a judgment creditor, after obtaining his judgment, of the right to examine him under Con. Rule 900.

Rose, for plaintiff. *Kilmer*, for judgment debtor.

COUNTY COURT—LEEDS AND GRENVILLE.

REX *v.* WENDLING.

Liquor License Act—Resolutions of License Commissioners—Unreasonableness—Ultra vires.

Held, that a resolution of License Commissioners against erecting or allowing to remain erected screens, blinds or other obstructions preventing a view of the bar room from the public street, and imposing a penalty of from $10 to $50 for every day which it was allowed to remain is ultra vires of the License Board, inasmuch as the penalty was in excess of the powers of the License Board, and because it was unreasonable.

[Brockville, July 28, 1903. MCDONALD, CO. J.

Appeal from a conviction made by Joseph Deacon, Police Magistrate, for the town of Brockville, on June 30, 1903. The defendant was tried for a breach of a resolution of the License Commissioners, providing that "there shall be no screen, blind, unnecessary partition, or other obstruc-

tion erected, or allowed to remain erected upon any licensed premises which does or shall in any way prevent the bar room from being open to view from the nearest public street, and any person who shall erect or allow to remain erected any such obstruction, or curtain, and infringe upon this regulation shall be liable to a penalty of not less than $10, and not exceeding $50 for every day during which such obstruction or curtain shall remain erected or placed." It appeared from the evidence at the trial that the defendant, a license holder, allowed the blinds of his bar room to remain on his windows, the license inspector having observed them on several days. Several witnesses testified that the exposure of the bar room to the light and heat of the sun was injurious to the liquors—and that at least four bar rooms in Brockville were so arranged as not to be seen from any public street. The defendant was convicted and fined $10 and costs. The defendant appealed to the county Judge in Chambers.

Haverson, K.C., for the appellant. The resolution is ultra vires of the License Board. Sec. 4 of the License Act authorizes the passing of resolutions, and the imposition of penalties for their infraction. Under s. 100, "such penalties may be recovered and enforced in the manner and to the extent that by-laws of municipal councils may be enforced under the authority of the Municipal Act under s. 702 of that Act. By-laws may be passed by municipal councils for inflicting reasonable penalties not exceeding $50, exclusive of costs, for any breach of any of the by-laws of the corporation." The offence under the resolution is erecting or allowing to remain erected. It is one act, and no matter how many days it is allowed to remain it is one offence, if for six days the penalty in such case would be from $60 to $300, a sum beyond the power conferred by ss. 100 and 702 respectively. Paley on Conviction, 207. *Reg.* v. *Scott*, 4 B. & S. 368; *Collins* v. *Hopwood*, 15 M. & W. 459; *Attorney-General* v. *McLean*, 1 H. & C. 750; *McCutcheon* v. *Toronto*, 22 U.C.R. 613.

For the distinction between separate penalties and those of a cumulative character many instances can be cited in the License Act. For separate penalties see ss. 57, 59, 68, 75, 78, 85, 124 and 125; for those of a cumulative character see ss. 47, 71 and 77.

The resolution is unreasonable in that it requires the license holder, a tenant, to interfere with permanent partitions in a house not his own. Its operations are confined to houses with their bars facing a public street and not to those not so placed.

M. M. Brown, contra, cited *Reg.* v. *Martin*, 21 A.R. 145; *Queen* v. *Hodge*, 9 Ap. Cases 117; *Reg.* v. *Waterhouse*, L.R. 7 Q.B. 545; *Wentworth* v. *Mathieu*, 3 Can. Crim. Cases 429.

MacDONALD, Co. J.—In my judgment the resolution of the License Commissioners cannot be upheld.

In the first place it is ultra vires. I have come to this conclusion with some hesitation, and content myself with referring to the Liquor License Act, ss. 4, 5, 100; the Municipal Act, 702; the sections of the Liquor Li-

cense Act and the authorities cited by counsel. To these may be added *Reay* v. *Gateshead Corporation*, 55 L.T. 92.

In the second place the resolution cannot be upheld, owing to its unreasonableness. In addition to cases cited by counsel, I have been able to examine many others bearing upon this branch of the case.

In *Burnett* v. *Berry*, L.R. 1 Q.B.D. 643 (1896), Lord Russell, of Killowen, says:—"Authorities cited on the construction of other by-laws are of very little use in assisting the Court to decide whether the particular by-law before them is, or is not, good. Each must be judged by its own language, and having regard to the circumstances to which it is addressed." And from a consideration of reported cases in which the validity of by-laws is the question concerned one sees that Lord Russell is not alone in his opinion.

In Comyn's Dig. vol. 2, p. 309, it is said C. 6, "A by-law not reasonable in any respect will be void," and C. 7, "A by-law being entire, if it be unreasonable in any particular, shall be void for the whole; or if the penalty be unreasonable." The dictum of Lord Kenyon, in *The King* v. *Company of Fishermen*, 8 Durnford & East, T.R. 356 is "a by-law may be good in part, and bad in part, yet it can be so only when the parts are entire and distinct from each other." In American and English Encyclopædia o Law, 2nd ed., p. 97, "A by-law must be reasonable." It is a governing rule, with regard to corporations, that their by-laws must be reasonable, and such as are vexatious, oppressive, unreasonable and opposed to common right are inoperative and void." At p. 100: "By-laws to be valid must be certain, must be directed against all within the sphere of their operation, and must operate equally."

In *Kruse* v. *Johnston*, L.R. 2 Q.B.D. (1898), 91, which was heard before a specially constituted court, Lord Russell, at p. 99, drew a distinction between by-laws of bodies of a public representative character entrusted by Parliament with delegated authority and those of railway companies, dock companies, or other light companies which carry on business for their own profit although incidently for the advantage of the public, and speaking of the latter class, he says: "In this class of case it is right that the courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public representative bodies, clothed with the ample authority which I have described, and exercising the authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported, if possible. They ought to be as has been said, benevolently interpreted, and credit ought to be given to those who have to administer them, that they will be reasonably administered. This involves the introduction of no new canon of constitution. . . . I do not mean to say that there may not be cases in which it would be the duty of the Court

to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say "Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires," but it is in this sense, and this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent, or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. And in this connection see *Strickland* v. *Hayes*, L.R. 1 Q.B. (1896) 290; *Gentel* v. *Rapps*, L.R. 1 K.B. (1902) 160, and *Thomas* v. *Sutter*, 1 Ch. Div. (1900) 10.

The legislature of Ontario has in respect to the enactment of resolutions or the regulation of many matters connected with the liquor traffic virtually clothed the License Commissioners with legislative powers, within certain limitations, and the remarks of Lord Russell in *Kruse* v. *Johnston* above quoted, seem to be applicable in considering resolutions passed by them. Considered from that point of view is the resolution now in question a reasonable one? It seems to me it is not.

I am not much impressed with the evidence offered by the appellant in support of his theory as to the injury caused to his liquor by exposure to sunlight, and as to his inability, owing to the narrowness of his bar room to remedy the difficulty. Nor can the resolution be considered unreasonable because the publicity given to a bar room by virtue of it would prevent people who wish to drink quietly and away from the public eye from frequenting it. But when owing to the resolution being "partial in operation" these people find licensed houses not affected by it as is that of the appellant and hence give him the go by he may not unfairly put it forward as a ground in favor of his appeal.

It has been clearly shewn, and is not disputed, that the resolution now under consideration is not applicable to and does not affect four out of the ten licensed houses in the town of Brockville. Thus it is not directed against "all within the sphere" of its operations, and does not "operate equally." The other six licensed houses are saddled with requirements and restrictions from which the four above-mentioned are free.

Surely this is unreasonable. Had the resolution been so framed as to cover all the licensed houses it would, subject to the question of validity as to the penalty enacted for the breach of it, have been valid. And there is not any reason given why it could not have been so framed. For instance had it provided that in every licensed house the bar room must face upon and open into a public street, and that no screen blind, etc.,

should be erected, etc., it would have been impartial in application. For such an enactment or resolution a precedent may be found in an Act of the legislature of Prince Edward Island, passed in 1892, enacting police regulations concerning the drink traffic in Charlottetown, some of which were that the places in which liquor was sold must be a front room with large windows, facing the street; that such place must have but one door, and that to open on the public street; that there should be no screen or curtain at the window, and no stalls or other partitions within the place. This enactment was made for a city in which there was neither prohibition nor license: Had the resolution now under consideration been framed similarly it would have affected all equally and been impartial in operation.

It is not out of place to observe that owing to four of the licensed houses being free from possibility of compliance with the resolution, the community does not as to those obtain what the learned police magistrate appears to have considered would be the beneficent effects of the resolution, viz., opportunity for readily observing "from the street whether the licensee is, or is not, selling contrary to law."

See *London & Brighton R. Co.* v. *Watson*, L.R. 4 C.P.D. (1879) 118; *Dyson* v. *London & N.W.R. Co.*, L.R. 7 Q.B. (1881) 32; *Saunders* v. *South Eastern R. Co.* L.R. 5 Q.B.D., 463; *Alty* v. *Farrell*, L.R. 1 Q.B.D. (1896) 636; *Hanks* v. *Bridgman*, ib. 253; *Lowe* v. *Volp*, ib. 256; *Simmons* v. *Malting Rural District Council*, L.R. 2 Q.B. (1897) 433; *Kennaird* v. *Corry & Son*, L.R. 2 Q.B. (1898) 586. *Elwood* v. *Bullock*, 6 Q.B. 383; Ad. & El. N.S., 383. *Jonas* v. *Gilbert*, 5 S.C.R. 356.

The appeal is allowed and the conviction quashed.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] KING *v.* KING. [March 8.

Court of divorce and matrimonial causes—Jurisdiction of Judge Ordinary—Restitution of conjugal rights—Alimony pendente lite—Constitution of Appeal Court—Act of 1886, c. 49, s. 3, held intra vires, provincial legislature.

The jurisdiction of the Court for Divorce and Matrimonial Causes extends to all matters relating to prohibited marriages and divorces and includes the same powers in respect of, or incidental to divorce or matrimonial causes, as are possessed by the Court in England, except as enlarged, abridged, altered, or modified, by the laws of this province. The Judge in Ordinary has power to hear and decide a suit for restitution of conjugal rights, and has also jurisdiction, if necessary, to grant alimony pendente lite. An appeal from the order of the Judge in Ordinary, granting alimony pendente lite, was heard before four Judges of the Supreme Court, not including the Judge in Ordinary.

Held, dismissing the appeal with costs, that the Court was properly constituted, and that s. 3 of c. 49 of the Acts of 1886, repealing the words of s. 10, c. 126 R.S. App. (a) "of whom three, at least, in addition to the Judge Ordinary shall form a quorum" was within the jurisdiction of the local legislature of Nova Scotia.

B. Russell, K.C., and *S. E. Gourley*, for appeal. *F. A. Lawrence*, K.C., and *H. Mellish*, K,C., contra.

Full Court.] McDONALD *v.* MILLER. [March 8.

Partnerships—Dissolution—Contract for exclusive right to use firm name —Injunction to restrain violation—Colorable imitation calculated to deceive.

Plaintiff and defendant dissolved a co-partnership which had been carried on by them for some years as dealers in pianos, organs and sewing machines under the name and style of M. Bros. & M. In consideration of the sum of $9,000 paid by plaintiff to defendant the latter assigned to plaintiff all his right, etc., in said business and the right to use the firm name, and covenanted that plaintiff alone or with others should have the right to carry on business under the name of M. Bros. & M., and that defendant would not in any way interfere with the use of such name by plaintiff. Defendant subsequently commenced business under the name of M. Bros. & Co. and published an advertisement soliciting old customers of the firm of M. Bros. & M. in such a way as to lead such customers and the public to believe that in dealing with him they were dealing with the old firm.

Held, 1. Affirming the judgment of the trial judge that the name adopted by defendant was calculated to deceive persons into the belief that they were dealing with plaintiff; that it was a colorable imitation of the name under which plaintiff was doing business, and that it was a violation of the contract that defendant would not in any way interfere with the use of such name by plaintiff.

2. The advertisement published by defendant addressed to his "old customers" as well as to any new ones who may favor me with their patronage," in which he stated that he had merely sold his interest in the retail store in H. and that he would still continue to wholesale pianos, etc., from his warehouse there, contained misrepresentations and concealments and was calculated to deceive the public into the belief that he represented the business of the old firm.

3. Plaintiff was entitled to an order restraining defendant from using the name adopted by him and from soliciting the old customers of the firm.

R. E. Harris, K.C., for appeal. *W. B. A. Ritchie*, K.C., and *J. L. Mackinnon*, contra.

Full Court.] MORTON *v.* JUDGE. [March 8.

Contract—Part performance—Accord and satisfaction.

On the trial of an action brought by plaintiff for balance of price of goods sold and delivered defendant proved an agreement between plaintiff and defendant subsequent to the date of sale whereby defendant, in consideration of the goods sold and delivered by plaintiff, agreed to prepare and deliver to plaintiff a monument or headstone of the value of $20, and to prepare and deliver to plaintiff a second monument or headstone of the same value at any time when plaintiff required the same. The agreement was carried out in part by the delivery to plaintiff of the first mentioned stone, but the second stone was not delivered in consequence of some difference between the parties as to the size of the stone required.

It was contended for defendant that the agreement was in accord and satisfaction of the plaintiff's claim for goods sold and delivered, and that the plaintiff could only claim under the agreement for damages for breach of contract, and also that as the agreement set out as the consideration for the goods supplied the promise of delivery of the headstones was in writing it could not be varied by parol evidence of any sale, and that the contract was one of barter, not sale. It was contended for plaintiff that the performance of the agreement alone could constitute accord and satisfaction, and that until performance there was no consideration for the agreement, and that the plaintiff could claim under the original cause of action for goods sold and delivered.

Held, reversing the judgment of the county court judge and dismissing the action with costs, that the agreement entered into and partly executed was a complete accord and satisfaction of plaintiff's original cause of action, and that the plaintiff's only remedy was for breach of contract, if defendant had not carried out terms of the agreement.

T. R. Robertson, for appeal. *J. J. Ritchie*, K.C., contra.

Townshend, J.] REX *v.* SWAN. [May 4.

Canada Temperance Act—Third offence—Failure to shew commision of offence after information for first offence—Affidavit shewing compliance with statutes properly received—Conviction in Form VI., Dominion Acts, 1888, c. 34, s. 14, sufficient—Omission to state that second and third convictions were for separate offences.

Defendant was convicted by the Stipendiary Magistrate of the town of Springhill, on the 7th April, 1904, for unlawfully selling intoxicating liquor within said town between the 15th day of March, 1904, and the 5th April, 1904, contrary to the provisions of the second part of the Canada Temperance Act then in force in and throughout the said county of Cumberland, the said conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act. On application

for a writ of certiorari the chief point argued was that it did not appear from the conviction that the offence for which defendant was convicted was committed after an information laid for the first offence as required by R.S.C. c. 106, s. 115, sub-s. (d). Affidavits were read in reply, shewing, that although it was not so stated in the conviction, such, in fact, was the case.

Held, 1. The affidavits were receivable.

2. The provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in Form V., provided by Dom. Act, 1888, c. 34, s. 14, was sufficient. *The Queen* v. *Brine*, 33 N.S.R. 43, and *The Queen* v. *Ettinger*, 32 N.S.R. 181 referred to.

3. It did not invalidate the conviction that it did not therein appear that the second and third convictions were for separate offences. Motion dismissed with costs.

J. B. Kenny, for prisoner. *J. J. Power*, for Inspector.

Townshend, J.] REX *v.* BOUTILIER. [May 6.

Liquor License Act—Warrant and information—Foilure to shew offence within six months.

To an order in the nature of a habeas corpus for the discharge of defendant, a prisoner confined in the common jail at H., the jailer returned a warrant signed by the Stipendiary Magistrate for the county of H. reciting a conviction under the Liquor License Act, made against defendant "for that he the said L. B. within the space of six months, *last past*, and previous to the information hereon, which information is dated and laid on April 22, 1904 . . . did sell liquor by retail without the license therefore by law required, etc."

Held, that defendant was entitled to his discharge, it not appearing from the warrant that the offence charged was committed within six months before the laying of the information.

J. J. Power, for prisoner. *T. Notting*, for Inspector.

Province of British Columbia.

SUPREME COURT.

Irving, J.] MILTON *v.* DISTRICT OF SURREY. [Feb. 17.

Costs—Appeal—Costs of negotiations.

Appeal from taxation of costs. After an appeal was opened it stood over at the suggestion of the Court in order to give the parties an opportunity to settle: the negotiations for settlement were unsuccessful and the appeal was ultimately dismissed with costs.

Held, that the successful party was entitled (1) to a counsel fee (under

item 224 of the tariff of costs) on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 224 of Schedule No. 4.

R. L. Reid, for appellant. *W. J. Whiteside*, for respondent.

Full Court] LOVE *v.* FAIRVIEW. [April 18.

Fire escape Act—Neglect of statutory duty—Injury to guest while rescuing fellow-guest from fire—Contributory negligence—Volenti non fit injuria—Misdirection—New trial.

Appeal from judgment of HUNTER, C.J., dismissing plaintiff's action for damages for injuries sustained in a fire in defendant's hotel while he was a guest in it.

Held, where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor notwithstanding that a penalty is imposed for breach of the statutory duty.

The defence arising from the maxim volenti non fit injuria (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty.

The fact that the guest delayed his exit in order to rescue a fellow guest, and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence:" whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident was for the jury to decide.

Judgment of HUNTER, C.J., set aside and new trial ordered, IRVING, J., dissenting.

Davis, K.C., for plaintiff, appellant. *Bodwell*, K.C., for defendant, respondent.

Book Reviews.

The Law and Practice Relating to the Formation of Companies. With forms and precedents. By VALE NICOLAS, Barrister-at-law. Second edition. London: Butterworth & Co., Temple Bar; 1904.

This is one of the many books on Company law, but is confined to the formation of companies. Whilst the difference between our statute law on this subject and that of England renders much of the information given of but little service in this country, there are some chapters which will be as useful for reference here as there, such as the promotion of

companies, misrepresentation in prospectuses, the fiduciary position of directors, etc.

Mozley and Whiteley's Law Dictionary. Second edition. By West and Neave. London: Butterworth & Co., Toronto: Canada Law Book Co., 1904.

A compact and excellent dictionary, especially useful to students and beginners. It contains also a catalogue of all the English law reports which have appeared up to the present time, giving the periods over which they extend and the abbreviations by which they are usually referred to. This alone is worth the price of the book.

Courts and Practice.

JUDICIAL APPOINTMENTS.

Nova Scotia.

Mr. Justice J. Norman Ritchie, of the Supreme Court of Nova Scotia, died on the 5th inst. after a short illness, at the age of 70 years. His father, Hon. Thomas Ritchie, and his half-brother, Hon. J. William Ritchie, were also judges. He was looked upon as one of the ablest members of the Nova Scotia Bench. Chief Justice McDonald having resigned there are now two vacancies in the Supreme Court to fill. It is understood that Mr. Benjamin Russell, K.C., M.P., will take the Chief Justiceship. A better appointment could not be made.

Ontario.

Mr. Adam Johnstone, of the town of Morrisburg, Barrister-at-law, to be Junior Judge of the United Counties of Prescott and Russell.

RULES OF COURT—ONTARIO.

It will be a great convenience to many readers to publish for easy reference a complete copy of the various Rules of the Supreme Court of Judicature for Ontario passed since the Consolidation of the Rules in 1897. They are as follows:—

1225. Rule 401 is repealed and the following substituted therefor:

The time allowed to a party served out of Ontario to apply to discharge the order shall be that limited by the order allowing the service to be effected.

56. (2) From and after the 1st day of October, 1898, interest shall not be credited in any action or matter in respect of moneys paid into Court (1) with a defence; (2) as security for costs of an action, or appeal; (3) as security for debt or costs, to stay execution; (4) as a deposit for sale in mortgage actions; (5) as a condition imposed by any injunction order: (6) as proceeds of sale in, or to abide the result of, interpleader proceed-

ings; or (7) for any other merely temporary purpose unless or until after the same shall have been in Court six months, and then only at the rate of 2 per cent. per annum, not compounded in any case; but the President, or in his absence the next Senior Judge of the High Court, may, for special reasons, order that in any particular case, interest shall be allowed on such moneys at any higher rate not exceeding 3½ per cent. per annum.

56. (3) From and after 1st day of October, 1898, the interest to be credited on the Assurance Fund shall be at the rate of 2½ per cent. per annum, compounded as provided by Rule 57.

56. (4) The interest to be credited to suitors' accounts, on all moneys paid into Court after the said 1st October, 1898 (other than for the purposes above mentioned), shall until further or other order be at the rate of 3½ per cent. per annum from the date, as provided by Con. Rule 57.

58. (2) All balances which are or shall hereafter be standing to the credit of any action or matter which have not been, or which hereafter shall not be claimed, before the lapse of ten years from the time when the same became, or shall hereafter become payable out of Court, shall be transferred to the Suspense Account; and the account in such actions or matters, in respect of all moneys so transferred shall be closed, and no further interest shall thereafter be credited thereto in respect of the moneys so transferred; but such transfer is not to prejudice the claim of any person to the payment of any moneys so transferred. Interest shall not hereafter be credited to the Suspense Account in respect of moneys standing at its credit or authorized to be transferred thereto.

66. (2) Mortgages and other securities made to, or invested in the accountant, in any action or matter, are to be held by him subject to the order of the Court or a Judge; but no duty or liability (save as custodian of the instrument) is by reason of such mortgage or other security being made, given to or vested in him, imposed on the accountant in respect of such mortgage or security or any property thereby vested in the accountant.

1226. Rule 9 of the Consolidated Rules is hereby amended by inserting the words "and Ottawa" after "Toronto" in the 4th line.

1227. Rule 782 is repealed and the following to be substituted.

Where there has been a trial with a jury an application for a new trial, whether made for that relief alone or combined with or as an alternative of a motion under Rule 783, may be made to a Divisional Court, or to the Court of Appeal.

1228. The following is to be added to Rule 783:

3. The foregoing provision of Rule 782 and of this Rule are not to restrict or affect the power of the Court of Appeal to direct a new trial in any appeal where such relief appears just and proper.

1229. Rule 412 is repealed and the following substituted therefor:

Money shall be paid out of Court upon the cheque of the Accountant, countersigned by the Registrar of the Court of Appeal, or in the case of his absence, by the Junior Registrar of the High Court of Justice, this Rule to take effect forthwith without being published in *The Gazette*.

1230. Clause 4 of Sub-Section B of Rule 26 is amended by adding: thereto:

When the same shall be transmitted to the central office, to be dealt with under Rule 340.

1231. Rule 341 is hereby amended by striking out the word "Toronto" and the words "or in a Divisional Court" in the second line thereof.

1232. Sub-section 2 of Rule 792 is repealed and the following substituted:

(2) The party making the motion shall not be entitled, unless by

leave of a Judge or of the Court, to set it down until the record and exhibits have been, and it shall be his duty to cause them to be transmitted to the central office.

1233. Consolidated Rules 95 and 96 are hereby repealed.

1234. That Rule 347 be repealed and the following substituted:

347. The time for delivering, amending or filing any pleading, answer or other document may be enlarged by consent without application to the Court or a Judge.

1235. That all proceedings under the Mechanics Lien Act, R.S.O., c. 153, shall be legibly endorsed as follows: "In the matter of the Mechanics Lien Act, between A. B., plaintiff, and C. D., defendant."

1236. Rule 56 is hereby further amended by adding thereto following:

5. (5) From and after the 1st day of April, 1902, the interest to be paid on any suitor's account which has been heretofore allowed at four per cent per annum, is to be three and one-half per cent. per annum, but this rule is not to affect any payments of interest at four per cent. already made on such accounts.

1237. The Finance Committee may, subject to the approval of the Attorney-General of Ontario being first obtained, arrange for the investment of any moneys in Court in first mortgages on lands in the Province of Manitoba.

1238. The costs of and incidental to the proceedings in the Court of Appeal for Ontario, and in the High Court of Justice for Ontario, and in any Divisional Court thereof, for or in relation to the quashing of convictions or orders shall be in the discretion of the Court, and the Court shall have power to determine and direct by whom and to what extent the same shall be paid, whether the conviction or order is affirmed or quashed in whole or in part.

1239. Consolidated Rule 117 is amended by adding to the proceedings and matters which it is thereby provided shall be heard and determined by the Divisional Courts the following: Proceedings for or in relation to the quashing of convictions or orders.

1240. Consolidated Rules 355 and 356 shall not extend or apply to proceedings for or in relation to the quashing of convictions or orders.

1241. Consolidated Rule 1130 shall apply to the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders, whether the conviction or order is affirmed or quashed in whole or in part.

1242. (47) Rule 47 is hereby repealed and the following substituted:

47. (1) A local Judge of the High Court shall in actions brought and proceedings taken in his county, possess the like powers of a Judge in the High Court, in Court or Chambers, for hearing, determining and disposing of the following proceedings and matters, that is to say:

(*a*) Motions for judgment in undefended actions;

(*b*) Motions for the appointment of receivers after judgment by way of equitable execution;

(*c*) Application for leave to serve short notice of motion to be made before a Judge sitting in Court or in Chambers;

(*d*) Motions for judgment and all other motions, matters and applications (except: (i) trials of actions; (ii) applications for taxed or increased costs under Rule 1146; and (iii) motions for injunction other than those provided for by Rule 46) where all parties agree that the same shall be heard, determined or disposed of before such local Judge, or where the solicitors for all parties reside in his county.

Provided always that where an infant or lunatic or person of unsound

mind is concerned in any such proceedings or matters, the powers conferred by this Rule shall not be exercised in case of an infant without the consent of the Official Guardian, and in the case of a lunatic or person of unsound mind without the consent of his committee or guardian, and provided also the like consent shall be requisite in the case of applications for payment of money out of Court and for dispensing with the payment of money into Court where an infant, lunatic, or person of unsound mind is concerned.

(2) No order for the payment of money out of Court, or for dispensing with the payment of money into Court, shall be acted upon unless a Judge of the High Court has manifested his approval thereof in the manner provided by Rule 414.

(3) The judgment or order of the local Judge in any of the proceedings or matters in this Rule referred to shall be entered, signed, sealed and issued by the Deputy Clerk of the Crown, Deputy or Local Registrar of the County, as the case may require, and shall be and have the same force and effect, and be enforceable in the same manner as a judgment or order of the High Court in the like case.

1243. (48) Rule 48 is hereby amended by substituting the letter (*d*) for the letter (*c*) in the second line.

1244. (139) Rule 139 is repealed and the following substituted therefor:

139. Where a plaintiff's claim is for or includes a debt or liquidated demand, the endorsement, besides stating the nature of the claim, shall state the amount claimed in respect of such debt or demand, and for costs respectively, and shall further state that upon payment thereof within the time allowed for appearance further proceedings will be stayed. Such statement may be according to Form No. 6. The defendant, notwithstanding that he makes such payment, may have the costs taxed, and if more than one-sixth be disallowed the plaintiff's solicitor shall pay the costs of taxation.

1245. Form No. 6 (Section 3 of the Appendix) is amended by striking out the figure 8 and leaving a blank space between the words "within" and "days" in the third line, and omitting the words between brackets.

1246. (162) Clause (*c*) of Rule 162 is hereby repealed and the following substituted therefor:

(*c*) The action is founded on a judgment or on a breach within Ontario of a contract wherever made which is to be performed within Ontario, or on a tort committed therein.

1247. (300) Rule 300 is hereby repealed and the following substituted:

300. A plaintiff may, without leave, amend his statement of claim, whether endorsed on the writ or not, once, either before the statement of defence has been delivered, or after it has been delivered, and before the expiration of the time limited for reply, and before replying.

1248. (302) Rule 302 is hereby repealed and the following substituted:

302. Where a plaintiff has amended his statement of claim under Rule 300 the opposite party shall plead thereto or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, which ever shall last expire, and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

1249. (414) Rule 414 is hereby amended by adding thereto:

(2) An order dispensing with the payment of money into Court unless it is made by a Judge of the Supreme Court shall not be acted on unless or until a judge of the High Court has manifested his approval thereof in manner provided by sub-s. 1.

1250. (439) Rule 439 is hereby repealed and the following substituted:

439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner and upon the some terms and subject to the same rules of examination as a witness, except as hereinafter provided.

439 (*a*) In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial.

(2) After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.

439 (*b*) An examination shall not take place during the long vacation without an order of the Court or a Judge.

1251. (461) Sub-sections 2 and 3 of Rule 461 are hereby repealed.

1252. (881) Rule 881 is hereby repealed and the following substituted:

881. Before the sale of lands under a writ of fieri facias, the sheriff shall publish once, not less than three months and not more than four months preceding the sale, an advertisement of sale in *The Ontario Gazette*, specifying:

(*a*) The particular property to be sold;

(*b*) The name of the plaintiff and defendant;

(*c*) The time and place of the intended sale;

(*d*) The name of the debtor whose interest is to be sold;

and he shall in each week, for four weeks next preceding the sale, also publish such advertisement in a public newspaper of the county or district in which the lands lie; and he shall also, for three months preceding the sale, put up and continue a notice of such sale in the office of the Clerk of the Peace, and on the door of the Court House or place in which the General Sessions of the Peace of the county or district is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day.

1253. (1146) Rule 1146 is hereby amended by adding thereto:

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements, in accordance with sub-s. 1, unless it is otherwise expressly provided by the order or judgment, or unless the Court or a Judge of the High Court otherwise directs.

1254. (406) (2) When money is required to be paid into Court to the credit of the Assurance Fund, established under the Land Titles Act, the direction to receive the money, if the same is payable into a bank in Toronto, shall be obtained from the Master of Titles, and if payable into a bank outside of Toronto the direction shall be obtained from the proper Local Master of Titles.

1255. 818 (*a*) Upon the filing of the order of His Majesty in his Privy Council, made upon an appeal to His Majesty in Council, with the officer of the High Court, with whom the judgment or order appealed from was entered, he shall thereupon cause the same to be entered in the proper book, and all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below.

818 (*b*) When the judgment of the Supreme Court of Canada in appeal has been certified by the Registrar of the Court to the proper officer of the High Court he shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the High Court. See R.S.O. c. 135, s. 67.

1256. 1157 (*a*) When the costs incurred in Canada of an appeal to His Majesty in his Privy Council have been awarded, and the same have not been taxed by the Registrar of the Privy Council, the same may be taxed by the senior Taxing Officer, and the taxation shall be according to the scale of the Privy Council.

1257. Rule 413 is hereby repealed and the following substituted :

413. Cheques shall not be issued during the long vacation unless the præcipe therefor is lodged in the accountant's office on or before the 20th day of July, unless otherwise ordered by a judge.

1258. 972 (*a*) Costs payable out of the proceeds of lands sold under the Devolution of Estates Act, with the approval of the Official Guardian, shall be taxed by the senior Taxing Officer.

972 (*b*) The Official Guardian shall deposit in the Accountant's office a statement, certified by the proper officer, showing the distribution of the proceeds of lands sold or mortgaged with his approval, and proof of the dates of births of the infants interested.

972 (*c*) All moneys received by the Official Guardian on behalf of infants, lunatics, absentees or other persons for whom he acts, shall, unless otherwise ordered by a Judge of the High Court in Chambers, be paid into Court.

972 (*d*) Moneys paid into Court under the next preceding rule to the credit of infants, shall be paid out to them when they attain their majority, or sooner if so ordered by a Judge of the High Court in Chambers.

1259. Rule 99 is repealed and the following is substituted :

99. The business of the Weekly Sittings shall be as follows: Tuesday and Friday, Chambers. Monday, Wednesday, and Thursday, Court.

1260. Rule 1245 is repealed, and the following is substituted for Form No. 6, s. 3 of the Appendix :

(*Add to the above forms for money claims in No's. 4 and 5*), and the plaintiff claims $ for costs; and if the amount claimed be paid to the plaintiff or his solicitor within the time allowed for appearance, further proceedings will be stayed.

1261. 348 (*a*) Unless the Court or a Judge gives leave to the contrary there shall be at least six (6) clear days, computed as mentioned in Rule 348, between the service of notice of an application for a declaration of lunacy and the day for hearing.

UNITED STATES DECISIONS

INNKEEPERS—DUTY TO GUESTS—TORT OF SERVANT.—The defendant was the proprietor of a hotel at which the plaintiff and his family were guests. The plaintiff's infant son was injured by the discharge of a revolver, fired by the defendant's servant. It did not appear whether the discharge was accidental or intentional. The plaintiff sued the defendant for breach of contract.

Held, that the defendant was liable for breach of an implied contract to protect his guest: *Clancy* v. *Barker*, 98 N. W. Rep. 440 (Neb.).

As the act of the servant was clearly outside the scope of his duty, the master would not be liable from the point of view of the law of agency. *Morier* v. *St. Paul, etc., Ry. Co.*, 31 Minn. 351. But although no decision upon the exact point decided has been found, the result seems to be in accord with the trend of recent cases. Modern decisions tend to hold a carrier liable for all torts of its servants committed against a passenger during the carriage, on the ground that the contract imposes upon the carrier a duty of protection: *Chicago, etc., Ry. Co.* v. *Flexman*, 9 Ill. App. 250. As an innkeeper bears a somewhat similar relation toward his guests, it would seem that, by analogy, his contract imposes a like duty to protect them. He has been held liable for injuries to his guests caused by third persons, which he might have prevented: *Rommell* v. *Schambacher*, 120 Pa. St. 579. And the principal case is not without support in imposing upon him an absolute liability for injuries to guests caused by his servants. See *Overstreet* v. *Moser*, 88 Mo. App. 72.—*Harvard Law Review.*

NEW TRIAL—EXCESSIVE DAMAGES.—The plaintiff obtained a verdict for twelve thousand dollars in an action against the defendant for negligence. At that time the plaintiff had not yet recovered from the accident, and the extent of her injuries depended largely on the result of an operation which could not be determined until a few weeks after the trial. The defendant asked for a new trial on the ground of excessive damages.

Held, that the new trial should be granted: *Searles* v. *Elizabeth, etc., Ry. Co.*, 57 Atl. Rep. 134 (N.J., Sup. Ct.).

The power of granting new trials, first exercised to prevent injustice, was originally limited by judicial discretion only. Although rules have been developed in practice which, whether embodied in statutes or not, compel the granting of new trials in certain defined cases, the original discretionary power of the courts as to all other cases has not been affected: See *Fine* v. *Rogers*, 15 Mo. 315. The present decision, in view of its peculiar facts, seems fairly to fall within the latter class. The damages given were not excessive if the plaintiff's injuries were permanent, but to conclude that they were permanent required the assumption of the failure of an operation the result of which was at the time of the trial undetermined. In granting a new trial the court could rely upon no established rule, but it thought that injustice might be done in depriving the defendant of the possible benefit which the ascertainment of the result of the operation might give him, thus resting the case upon the primary reason for granting new trials.—*Harvard Law Review.*

ACCIDENT.—A workman employed in a wool-combing factory, who contracts the disease of anthrax by contact with anthrax bacillus which is present in the wool, is held in *Higgins* v. *Campbell* [1904] 1 K.B. 328, to

have sustained an "injury by accident" arising out of and in the course of his employment, within the meaning of the workman's compensation act of 1897.

RAILWAYS.—A stipulation in a railway pass that the company shall not be liable to the user "under any circumstances, whether of negligence of agents or otherwise, for any injury to the person," is held in *Northern P. R. Co.* v. *Adams*, Advance Sheets U. S. 1903, p. 408, to violate no rule of public policy, and to relieve the company from liability for personal njuries resulting from the ordinary negligence of its employees to one riding on the pass with knowledge of its conditions. A stipulation in a free railway pass requiring the user to assume the risk of injury due to the carrier's negligence, is held in *Boering* v. *Chesapeake Beach R. Co.*, Advance Sheets U. S. 1903, p. 515, to be binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

EVIDENCE OF HANDWRITING.—The right to cross-examine handwriting experts in order to prove their ability is sustained in *Hoag* v. *Wright* (N.Y.) 63 L.R.A. 163, and it is held to be error to strike out an admission by such an expert that he had been mistaken as to signatures which he had pronounced genuine, although the trial judge might, in his discretion, have excluded an effort to secure such admission in the first instance. The other authorities on examination of witnesses to handwriting by comparison are collated and reviewed in a note to this case.

Flotsam and Jetsam.

Law of Master and Servant. The *American Law Review* in its review of Mr. Labatt's treatise on the law of Master and Servant says: "No other work with which the writer is acquainted, on the subject of Master and Servant, and Employers' Liability is entitled to be mentioned in comparison with this. The work is somewhat prosaic, at times prolix, and the style of the author is sometimes involved and even obscure. But the book is not a mere digest of points extracted from cases. It abounds in thought and suggestion. It will have an important effect upon the development of the jurisprudence of our country. Its author is a philosopher, a thinker, a reasoner, a commentator. His great work is well called 'Commentaries. But it is not a commentary merely. He has collected and presented all the adjudged cases upon the topics of which he treats, down to a comparatively recent period, between 7,000 and 8,000 in number. Each of these cases has evidently been studied, and many of them have been restudied by him. His work will take and hold the field against all competitors, and will lead from this time on."