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PROXIMATE AND REMOTE CAUSE.

CAUSA PROXIMA ET NON REMOTA SPECTATUR.

It is a leading principle of the common law, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events. The wrong and the legal damage must be in sequence, like cause and effect; otherwise the damage is too remote to support a cause of action. The proximate cause has been defined by some as the causa causans; while the remote cause has been said to be the consequence of a consequence. If in consequence of an intervening agency, the damages does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined, as cause and effect to support an action. See judgment of Lord Chief Justice Campbell in *Gerhard* v. *Bates*, 2 Ell. & Bl., p. 490. But if the intervening agency is set in motion by the primary act of the defendant he is liable for the injury which results as a natural consequence of the original wrongful act. This rule finds apt illustration in the well-known *Squib case*. In this case all the intervening acts of throwing were considered by the Court as one single act. All the injury followed from the first act of the defendant, the intervening parties merely acting in self-defence. See *Scott* v. *Shepherd*, 2 W. Bl., p. 894. At first blush the rule seems plain enough; yet great difficulty arises in its application to the varying circumstances of each particular case. This is evidenced by the conflicting judgments found in the different law reports. So difficult is it to lay down a general rule of uniform application that it has been well said: Many cases illustrate, but none define what is a proximate or what is a remote cause. So indistinct is the dividing line between them as to leave a margin of doubtful and disputed territory.

The rule, however, is somewhat different in contracts from what it is in torts. In the case of contracts the general rule is,

the primary and immediate result is alone to be looked to. Complete compensation is not always awarded, even where damage flows in direct sequence. An instance of this is found in the case of the non-payment at maturity of a promissory note or bill of exchange. Default in payment might lead to the financial ruin of the holder, and yet such a result is never taken into consideration so as to entitle the party aggrieved to recover damages in respect of it. The only damages recoverable in such a case is interest on the principal sum from the date of the breach of contract.

Alderson, B., laid down the rule as to contracts in clear and distinct terms, in delivering the judgment of the Court in the great leading case of *Hadley* v. *Baxendale* (1854) 9 Ex., at p. 353, in these words: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The above exposition of this branch of the law has been followed with great regularity ever since. The following rules are held to be deducible from the decision in this case of *Hadley* v. *Baxendale*.

1. Damage is recoverable for the breach of a contract, when it arises naturally or in the usual course of things.

2. Damage is not recoverable where it does not arise naturally, but from special circumstances peculiar to the case.

3. Where the special circumstances are known to the one breaking the contract, he having contracted with such knowledge, and special damage flows from such breach, under such special circumstances, he is liable to the full extent of the damage consequent thereupon.

Since a concrete instance makes a far more vivid impression upon the mind than a mere abstract statement of a general rule, it may be well briefly to consider some of the leading cases upon this important branch of the law.

Lord Justice Brett, in the case of *McMahon* v. *Field* (1881) L.R. 7 Q.B.D., p. 595, in referring to the case of *Hadley* v. *Baxendale*, summarized its decision into three enquiries: First, whether the damages is the necessary consequence of the breach; secondly, whether it is the probable consequence; and thirdly, whether it was in the contemplation of the parties when the contract was made. In this connection two cases, one decided in 1875, and the other in 1881, may be referred to for the purpose of shewing how difficult it is to adapt a settled rule of law to the facts and circumstances of particular cases. In *Hobbs* v. *London and South Western Ry. Co.* (1875) L.R. 10 Q.B., p. 111, it was held, in an action for breach of contract of carriage, that damages were not recoverable, on the ground of remoteness, under the following facts.

The plaintiff and his wife bought tickets on the defendant's railway to Hampton Court. They were carried to Esher, where they were compelled to get out. It was late at night, and being unable to get other conveyance, they had to walk a distance of five miles in the rain to reach their home at Hampton Court. The wife caught cold on account of the exposure and was laid up for some time, being unable to assist her husband as before, and expenses were incurred for medical attendance. The Court held that the illness and its consequences were too remote from the breach of contract for damages to be given as naturally resulting from it. Chief Justice Cockburn, in delivering judgment, said: "You must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of."

The case of *McMahon* v. *Field* (1881) L.R. 7 Q.B.D., p. 591, would seem to be on all fours with the *Hobbs case* and yet the damage was not held to be too remote, under the following facts. The defendant, an innkeeper, contracted with the plaintiff, to stable a number of horses during a fair, but failed to make good his contract; in consequence of which the horses were exposed, in the defendant's yard, to the weather for some time until the plaintiff could find suitable stables elsewhere for them. In con-

sequence of this exposure some of them caught cold, which depreciated their value. It was held by the Court that damage in respect of such cold was recoverable, as it was the probable consequence of the defendant's breach of contract, and was not consequently too remote.

Brett, L.J., in delivering his judgment in the *McMahon case*, took occasion to express his dissatisfaction with the decision in the *Hobbs case*, in these terms: "The wife in consequence of the exposure caught a cold, and it was said that such damage was too remote to be recovered. Why was it too remote? There was no accommodation or conveyance to be obtained at Esher at that time of night, so that it was not only reasonable that they should walk, but they were obliged to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman, and then turned her out in the middle of the night with only her nightclothes on, would it not be a natural consequence that she would take a cold? Had Esher station been a large one, and there had been flys which might have been had, or accommodation at an inn, and the passengers had refused such and elected to walk home, I should have thought then that what happened arose from their own fault, but that was not so, yet, nevertheless, the judges who decided *Hobbs* v. *London and South Western Railway Company*, decided, as a matter of fact, that the cold was so improbable a consequence that it was not to be left to the jury whether it was occasioned by the breach of contract. It is not however, necessary for me to say more than that I am not contented with it." Brett sarcastically remarked, in distinguishing between this case of a horse catching cold on being turned out in the night time and that of the *Hobbs case*, where the lady caught cold, that people might possibly walk home on a wet night without catching cold, but horses turned out would be sure to do so.

Let us proceed to consider the question of remoteness, as a legal ground for the exclusion of damage, in actions of tort. The leading maxim, "a man is presumed to intend the natural consequences of his acts," is at best a vague one. Lord Bramwell compares it to something like having to draw a line between night and day, the great duration of twilight rendering it almost impossible to determine when the day ends and the night

begins. Grove, J., thinks the difficulty arises largely from the use of the word "natural." "Normal, or likely or probable occurrence in the ordinary course of things," he thinks would be the more correct expression. See *Smith* v. *Green*, 1 C.P.D., p. 96. Sir Frederick Pollock, in commenting upon the terms "natural" or "natural and probable," remarks: "There are consequences which no man could, with common sense and observation, help foreseeing. There are others which no human prudence could have foreseen. Between these extremes is a middle region of various probabilities divided by an ideal boundary, which will be differently fixed by different opinions; and as we approach this boundary the difficulties increase. There is a point where subsequent events are, according to common understanding, the consequence not of the first wrongful act at all, but of something else that has happened in the meanwhile, though, but for the first act, the event might or could not have been what it was. But that point cannot be defined by science or philosophy." By reference to cases for an illustration of the rule of "natural and probable consequence" it will be seen that on the whole the disposition of the Courts has been to extend, rather than to narrow, the range of the rule.

In 1902 in the case of *McDowall* v. *Great Western Ry. Co.* (1902) 1 K.B., p. 618, the defendants were held legally responsible for an occurrence which was immediately and directly due to the subsequent act of trespassers. It will be here noted, that in the *Squib case*, decided in 1773, the intervening acts were done in self-defence.

A decision reached by the Privy Council, in 1888, in a case brought on appeal from the Colony of Victoria—*Victorian Railway Commissioners* v. *Coultas*, L.R. 13 App. Cas. 222—has been subjected to much criticism, and is now not followed. The facts of the case were briefly these: The respondents brought a suit in the Supreme Court of Victoria to recover damages, sustained by the respondent, Mary Coultas, for mental and consequent physical injuries caused by a severe nervous shock and great fright at the imminent peril of being killed by a train, by reason of negligent acts of the defendants. Judgment was entered for plaintiffs below for the sum of £742 2s., the Court holding that damages were not too remote to be recovered; that impact was

not necessary to entitle plaintiffs to maintain the action; and that damages for mental injuries occasioned by a severe nervous shock caused by the negligent acts of the defendants were recoverable. Their Lordships of the Privy Council advised Her Majesty to reverse the judgment of the plaintiffs and to order judgment to be entered for the defendants with costs, holding the damages were too remote, without saying that "impact" was necessary. Sir Richard Couch, in delivering the judgment of their Lordships, said: "Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence has given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginery claims. It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent."

In *Pugh* v. *London, Brighton and South Coast Ry. Co.* (1896) 2 Q.B., p. 243, it was held a nervous shock constituted an injury to the assured by an "accident" within the meaning of the terms of an accident policy. Lord Esher, M.R. held it was not necessary in this case to consider whether the Court ought to act upon or according to the *Coultas case*, as that was an action for negligence.

In *Wilkinson* v. *Downton* (1897) 2 Q.B., p. 57, the defendant indulging in a practical joke represented to the plaintiff that her husband had been injured by an accident, in which both of his legs had been broken, and urged her to go with all possible despatch to assist in bringing him home. The statement was false. It was meant by the defendant to be believed to be true.

The plaintiff so believed it. The effect of the false statement resulted in a violent shock to her nervous system, entailing much suffering and rendering her unfit, for some time, to discharge her domestic duties. On trial the jury found for the plaintiff and assessed the damages for the injury caused by the nervous shock at £100. Wright, J., held the effect was not too remote to be in law regarded as a consequence for which the defendant was answerable, thus disregarding the decision of the Privy Council in the *Coultas case*.

However great may be the respect entertained for the judgments of the Privy Council they are not binding upon the Court of King's Bench. It will be seen by reference to the case of *Dulieu* v. *White* (1901) 2 K.B., p. 669, the judgment in the *Coultas case* was not followed. In the *Dulieu case* it was held damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence, if physical injury has been caused to the plaintiff. Kennedy, J., in his judgment at page 675 says: "If impact be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact?" After deciding that physical injury sustained by a nervous shock through fear was not too remote to sustain an action, the learned judge added: "A judgment of the Privy Council ought, of course, to be treated by this Court as entitled to very great weight indeed; but it is not binding upon us, and, in venturing most respectfully not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher, M.R., in his judgment in *Pugh* v. *London, Brighton & South Coast Ry. Co.* as open to question; that it was disapproved by the Exchequer Division in Ireland in *Bell* v. *Great Northern Ry. Co.*, of Ireland, where, in the course of his judgment, Palles, C.B., gives a reasoned criticism of the Privy Council judgment, which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavourably reviewed by legal authors of recognized

weight such as Mr. Sedgwick, Sir Frederick Pollock, and Mr. Beven."

The question seems to have been carried to the extreme verge of the "ideal boundary" in the case of the *Toronto Ry. Co.* v. *Grinsted* (1895) S.C.R., p. 570, in which it was held by a majority of the Court that illness resulting from exposure to cold in consequence of ejectment from a street car, in the City of Toronto, was not too remote a cause of damages. It is true the night was a cold one; but there was no evidence that the plaintiff was inadequately clothed. He took cold which brought on an attack of rheumatism and bronchitis, and it was held the subsequent illness was the natural and probable result of the ejectment. It was alleged by the plaintiff that in consequence of the altercation with the conductor, when ejected from the car, he was in a state of perspiration and in a fit condition to take cold. Five hundred dollars damages were allowed for the ejectment and subsequent illness.

The following rules and dicta of the judges cannot be too firmly fixed in the mind of the practitioner.

1. The rule of English law as to the damages which are recoverable for negligence is that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act.—Brett, M.R., 9 P.D., p. 105.

2. To enable a plaintiff to recover damages for a wrong done, he must prove resulting damages to himself and a natural and continuous sequence uninterruptedly connecting the wrong or breach of duty with the damage as cause and effect.—Shermean and Redfield on Negligence.

3. Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural casual sequence—the inability to trace in regard to the damage the "propter hoc" in a necessary or natural descent from the wrongful act.—Kennedy, J., in *Dulieu* v. *White* (1901) 2 K.B., p. 678.

4. The decisions shew that no general rule can be laid down by reference to which the question, whether in any particular case the damage sought to be recovered is too remote, can be determined. Whether it is, or is not too remote, is a question of

fact depending on all the circumstances of the case, but although a question of fact it is one for the Court to determine.—Clerk and Lindsell on Torts, 2nd ed., p. 116.

5. I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B.—as by terrifying B.—and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind.—Phillimore, J., in *Dulieu* v. *White* (1901) 2 K.B., p. 682.

6. I cordially accept the decision of my brother Wright in *Wilkinson* v. *Downton*, that every one has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrong-doer was that of speech.—Phillimore, J., in *Dulieu* v. *White* (1901) 2 K.B., p. 683.

7. No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrong doer liable to an action.—Bovill, C.J., in *Sharp* v. *Powell*, L.R. 7 C.P., p. 258.

8. If one by his own act creates circumstances of danger and subjects the person or property of another to risk without exercising reasonable care to guard against injury or damage, he is responsible for such injury and damage to the person or property as arises as the direct or natural and probable consequence of the wrongful act.—King, J., in *Toronto Ry. Co.* v. *Grinsted*, 24 S.C.R., p. 570.

9. The line between proximate and remote damages is exceedingly shadowy; so much so, that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury, as to place them in contemplation of law in the relation of cause and effect.—Holt, J., in *Smith* v. *Western Union Tel. Co.*, 4 Am. St. Rep. 126.

10. Whether an original act was the proximate cause of an accident or injury where other agencies intervened, depends upon whether such original act was the antecedent, efficient and dominant cause which put the other causes in operation.—Joyce.

SILAS ALWARD.

ST. JOHN, N.B.

One of the best known and most respected members of the Canadian Bar was Mr. John Bell, K.C., of Belleville, Ont., who passed away on July 5th at the age of 82 years. Mr. Bell was born in Ireland, and came to the United States with his parents when a year old. After residing in the City of New York for a few years they moved to Toronto in 1833. Choosing the law as his profession, Mr. Bell, in 1841, entered the law office of George B. Lyon in Bytown, now the City of Ottawa. In the year following he removed to Toronto and was articled in the then well-known office of Crawford & Hagarty. In 1849 he was called to the Bar and admitted as an attorney, taking up his residence in Belleville, where he entered into partnership with the late Hon. John Ross. In October, 1852, Mr. Bell was appointed as the first solicitor of the then newly organized Grand Trunk Railway Company. This position he retained until Dec. 31, 1904, when, owing to declining health, he retired from active service in that great corporation, accepting the position of its Consulting General Counsel. On the formation of the Grand Trunk Pacific he was made one of its directors. This and other important positions of honour and trust he held up to the time of his death. Mr. Bell was closely identified with the profession as a Bencher of the Law Society of Upper Canada. When that position became elective he was one of those chosen and he was re-elected at each succeeding election. Mr. Bell never took any

part in politics, his profession being his great aim and pride. To it he devoted his great energy and legal attainments. A good all round lawyer he was on railway law one of the foremost authorities on the continent. He enjoyed the respect of all who knew him. High minded and honourable he was an ornament to the profession to which he devoted his life's work.

A resolution was passed at a meeting of the members of the judiciary and Bar of the City of Belleville and County of Hastings "expressing their tribute of respect and regard for the memory of the honoured veteran of the profession who, in the person of the late John Bell, one of His Majesty's Counsel and a Bencher of the Law Society of Upper Canada, has just passed from our midst, to the great Judge and Advocate above. Admiration for his long and successful career, appreciation of his genial and courteous personality, recognition of his half century's devotion to professional duty, mingle with the regret which is felt at his loss, and with the sincere and heartfelt expressions of sympathy and condolence, which we respectfully offer to the large circle of the bereaved family and relatives with whom we join on this day of mourning for one who during long life in Belleville bore worthily such large responsibilities, and was for so long personally identified with many of the chief factors in Canada's building and progress."

The long standing vacancy in the Supreme Court of Nova Scotia has been filled by the appointment of the late Attorney-General, Hon. J. W. Longley, K.C.

Mr. P. S. Lampman of the British Columbia Bar has been made County Court judge at Victoria, B.C. Mr Lampman was for several years reporter of the British Columbia Reports as well as reporter for this journal in that Province. He also occupied the position of secretary of the Law Society there.

The territory formerly part of that in the jurisdiction of Judge Henderson, of Vancouver, has been divided. The new judicial district has been set apart under the name of the District of Atlin. Mr. F. McB. Young, formerly practising at Nanaimo, B.C., has been appointed judge thereof.

The vacancy in the Thunder Bay District caused by the death of Judge Fitzgerald, has been filled by the appointment of Mr. Hugh O'Leary, K.C., of Lindsay.

REVIEW OF CURRENT ENGLISH CASES.

CRIMINAL LAW—FALSIFICATION OF ACCOUNTS—OMISSION OF ENTRIES—JURISDICTION—OFFENCE PARTLY COMMITTED ABROAD—38 & 39 VICT. C. 24, S 1—(CRIM. CODE S. 366).

The King v. *Oliphant* (1905) 2 K.B. 67 was a prosecution against a clerk for falsifying the accounts of his employer under 38 & 39 Vict. c. 24, s. 1 (see Crim. Code s. 366). The defendant was employed by an English firm to manage their branch establishment in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers and transmit these slips to them in England in order that the amounts might be entered in their cash book there. On a certain date the defendant received three sums in Paris which he fraudulently appropriated to his own use and omitted to enter on the slips forwarded by him to England, knowing and intending that, in consequence, the amounts so received would be omitted from the cash book as they in fact were. Upon the trial the question was raised, whether in view of the fact that part of the alleged offence had been committed in France, there was any jurisdiction in the English Court to try the case. The defendant was convicted and a case was reserved. The Court for Crown Cases Reserved (Lord Alverstone, C.J., and Lawrance, Kennedy, Ridley and Channell, JJ.,) affirmed the conviction. The majority of the Court thought that the fact that the prisoner knew and intended that the effect of his omission from the slips of sums received by him would lead to a falsification of his employers' books was sufficient to warrant his conviction, and that on the authority of *Rex* v. *Manton*, 1 Esp. 62; 8 R.R. 556, the fact that part of the offence was committed abroad did not oust the jurisdiction of the English Court. Kennedy and Channell, JJ., though not dissenting from the result, intimate a doubt whether the mere causing another clerk to make a false entry was sufficient to justify a conviction for falsifying accounts, but in this case there was evidence that the defendant knew and intended that his action should have that effect.

ADULTERATION—SAMPLE—PURCHASE FOR ANALYSIS—MODE OF DIVIDING SAMPLE—SALE OF FOOD AND DRUGS ACT 1875 (38 & 39 VICT. C. 63) S. 14—(R.S.C. C. 107, S. 9).

Smith v. *Savage* (1905) 2 K.B. 88 was a prosecution under the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63):

(see R.S.C. c. 107). On the hearing of the information it appeared that the purchaser asked the seller, a grocer, if he sold cream of tartar, and the seller produced a box containing penny packets labelled cream of tartar. The purchaser asked for and was supplied with four packets from the box, all of which were similar in size and outward appearance, for which he paid four pence. He then emptied the contents of each packet into a heap and divided it into three parts and sealed them up, handing one part to the seller, another to the public analyst and retaining the third himself. It was contended by the defendant that this was an improper way of dealing with the packets, and that each of them ought to have been dealt with as a separate purchase and divided into three parts. The justices dismissed the summons, but the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, L.JJ.,) held that each packet was not a separate article for the purposes of the Act, and that the mode in which the packets had been dealt with was a sufficient compliance with the requirements of the Act (see R.S.C. c. 107, s. 9).

SOLICITOR—UNQUALIFIED PERSON ACTING AS A SOLICITOR—CARRYING ON PROCEEDING IN AN ACTION—NOTICE OF APPEARANCE TO WRIT—SOLICITORS ACT 1843 (6 & 7 VICT. C. 73) S. 2—SOLICITORS ACT 1860 (23 & 24 VICT. C. 27) S. 26—(R.S.O. C. 174, S. 2).

In *Re Ainsworth* (1905) 2 K.B. 103 an application for an attachment was made against an unqualified person for action as a solicitor. The act complained of consisted in his having sent by post a letter stating that he had entered an appearance for a defendant in an action, and that the defendant required the delivery of a statement of claim. This was held to be "acting as a solicitor," because it was a formal "notice of appearance" required by the Rules to be given. If the respondent had contented himself with simply taking the appearance to the office as the defendant's messenger, that, it was conceded, would not have been an acting as a solicitor, but the giving notice of appearance was a step in the action, and could only be properly given by the defendant himself, or by his solicitor. The Court on the respondent's apology and promise not to offend again, let him off with payment of costs.

DISTRESS—EXCESSIVE CHARGES FOR TAKING, KEEPING AND SELLING DISTRESS—ACTION TO RECOVER EXCESS—DISTRESS ACT 1817—57 GEO. III. C. 93, SS. 2, 4—(R.S.O. C. 75, SS. 2, 13).

The King v. *Philbrick* (1905) 2 K.B. 108 was an application for a rule to compel a judge of a County Court to hear and de-

termine an action. The action was brought to recover unreasonable and excessive charges alleged to have been made by the defendant in levying a distress for poor rates. The judge declined to hear the case on the ground that the plaintiff's remedy was by application under the Distress Act, 57 Geo. III. c. 93, s. 2 (see R.S.O. c. 75), but the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.,) held that the statute expressly saved a right of action (s. 4), (R.S.O. c. 75, s. 13), and granted the mandatory rule as asked.

RAILWAY COMPANY—CARRIAGE OF GOODS—TOLLS—EVADING PAYMENT OF TOLLS—FALSE SHIPPING BILLS—RAILWAY ACT 1845 (8 & 9 VICT. c. 20) ss. 98, 99—(3 EDW. VII. c. 58, s. 279 (3) D.).

In *Barr* v. *London & North Western Ry.* (1905) 2 K.B. 113 the appellants were charged under ss. 98, 90 of the Railway Act 1845 (see 3 Edw. VII. c. 58, s. 279 (3) D.) with giving a false account of goods shipped by them with the respondents in order to evade the payment of the proper tolls therefor. The evidence shewed that they had brought to the respondents' goods station three cases of goods for carriage, and at the same time delivered to the respondents' servants consignment notes, in which the goods had been misdescribed by the appellants with the object of procuring the carriage of the goods at a lower rate than would have been charged had they been correctly described. No express demand was made by the respondents' servants for an account of the goods, but by the course of business known to the appellants the goods would not have been received by the respondents without consignment notes. The Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.,) held that the defendants were rightly convicted, and that no demand of an account of the nature of the goods was necessary, where, as in this case, one was voluntarily tendered. Whatever doubt might exist under the peculiar wording of the English Act, there seems to be none under the Dominion Railway Act.

WILL — BENEFICIARIES — COMPROMISE—FAMILY ARRANGEMENT—MISTAKE OF LAW OR FACT.

In re Roberts, Roberts v. *Roberts* (1905) 1 Ch. 704, disputes having arisen among numbers of a family, the beneficiaries under a will, a meeting was held in the presence of the family solicitor, and a compromise agreed to. One of the parties, however, agreed to the compromise in consequence of the solicitor's erroneous view of the law as to her legal rights, and it was held that she was entitled to have the compromise set aside. (Lord Halsbury, L.C., and Williams and Stirling, L.JJ., overruling Kekewich, J.)

REPORTS AND NOTES OF CASES.

Dominion of Canada.

BOARD OF RAILWAY COMMISSIONERS.

Killam, C.C.] [July 4.

IN RE TOWNS OF PORT ARTHUR AND FORT WILLIAM AND THE BELL TELEPHONE CO. AND CANADIAN PACIFIC RY. CO.

Exclusive agreement between a railway company and a telephone company—Municipal telephone system—Competition—Validity of agreement—Rescission by subsequent legislation—Lex loci contractus—Compensation.

In May, 1902, an agreement was made, for valuable consideraction, between the Canadian Pacific Railway Co. and the Bell Telephone Co. giving the latter the exclusive right to install telephones in the stations of the former for the period of ten years. Municipal telephone systems were established and are in operation at Port Arthur and Fort William.

The application of the municipality of Port Arthur for an order directing the railway company to allow the installation of telephone instruments in its station there, and for leave to connect same with the municipal telephone system came before the Board when the Hon. A. G. Blair was Chief Commissioner. The then Chief Commissioner held that the agreement was valid; but that nevertheless there should be an order made, under section 193 of the Railway Act, 1903, allowing the municipality to connect their system with the railway station, and ordering compensation for damages resulting therefrom. Mr. Commissioner Mills dissented on the ground that the agreement was in restraint of trade and public policy and therefore void, and that as to compensation it should be limited to the use of the premises occupied by the applicant's telephones and the expense of operating them. (See *Port Arthur* v. *Bell Telephone Co.*, 3 Can. Ry. Cas. 205.)

No order was made on this application; and the same questions came up for further discussion on a subsequent application by the two municipalities before the newly constituted Board. After argument by the counsel for the various parties interested judgment was delivered by

KILLAM, C.C.—It does not appear to me that anything has been done which amounts to a binding decision; but there seems to be no reason for reconsidering the question upon which the members of the Board expressed their opinions; and I feel bound to follow the conclusions of the majority of the Board. Therefore, without discussing the main questions any further, we should, in my opinion, proceed upon the view that the contract giving the Bell Telephone Company an exclusive right to telephone connection with the stations and premises of the Canadian Pacific Railway Company, was, and is valid and binding between the parties to it; but that, notwithstanding this, the Board has power, under section 193 of the Act, to order the railway company to provide for the telephone connection or communication asked for, and that the Board, in its discretion, will do so upon such terms as to compensation and otherwise as it may think proper to impose. It is clear, I think, that compensation should be made to the railway company for the use of its railway stations by the towns for the purposes of their telephone system and the interference with the property of the railway company incident to establishing the instruments and connection therein. I think it is also clear that compensation should be made to the Bell Telephone Company for the loss of the exclusive privilege of telephone connection with the stations of the railway company in the two towns respectively. If the municipal system of one of these towns be installed under the authority of the statute and the order of this Board, it will, I think, be lawfully established, and the Canadian Pacific Railway Company will not be liable for violation of the provision of the contract granting the exclusive privilege. For the loss of that right of action, the telephone company should certainly be compensated.

The contract shews that it was made in the City of Montreal, in the Province of Quebec, and it described each company as having its principal office in that city. I proceed upon the view that the effect of installing the municipal system under the order of the Board must be determined by reference to the law of the Province of Quebec. By the Civil Code of that Province, Art. 1065, 'Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which omit it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside, subject to the special provisions contained in this code, and without prejudice in either case, to his claim for damages.' The language is 'that the creditor *may* demand that the contract be set aside.' The Article of itself does not avoid

the contract; it merely places it within the power of the injured party to require this. So far, then, as the Bell Telephone Company is concerned, it will be its own fault if the contract is determined upon or after the installation of a municipal system in one of these stations.

In my opinion no compensation should be given to the Bell Telephone Company, except for the damages which it will sustain through the loss of the exclusive privilege for the Towns of Port Arthur and Fort William respectively. The position of the railway company is different. Nothing has yet occurred producing a rescission of the contract. The railway company insists upon its performance. If the installation of the municipal system in one of the railway stations should result in the loss to the railway company of this contract, it should receive compensation therefor.

The learned Chief Commissioner did not consider that the evidence furnished satisfactory basis for fixing the sums to be allowed for compensation, but he made some suggestions in reference thereto, but did not fix the amounts. This it was thought should be determined thereafter either by the Board or by arbitration.

It was also ordered that the amount of the compensation to the Bell Telephone Company should be a condition precedent to the installation of the municipal systems in each town, but that this might be done by giving a bond of the towns in the sum of $85,000 by way of security, if so desired.

Lighthall, K.C., for the municipalities. *Lafleur*, K.C., and *Stewart*, for Telephone Co. *Creelman*, K.C., for C.P. Ry. Co.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [June 29.

FORSYTHE *v.* CANADIAN PACIFIC RY. CO.

Master and servant—Nuisance—Course of employment—Piling ties on highway.

A number of worn out railway ties were taken from the line of a railway during ordinary working hours by section men employed by the defendant company and were piled on a highway at a railway crossing, the foreman of the section men

intending to take them to his house for firewood. It was the custom of the section men to get rid of the worn out ties either by burning them beside the track or by taking them home for firewood. The plaintiff's horse while being driven along the highway shied at the ties and the plaintiff was injured.

Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men, and that the defendants were therefore primâ facie responsible, but that there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses generally, this being an essential element of liability, a new trial was necessary. Judgment of a Divisional Court reversed.

Charles Millar, for appellant. *Hellmuth*, K.C., and *Curle*, for respondents.

Full Court.] [June 29.

ATTORNEY-GENERAL FOR ONTARIO *v.* LEE.

Revenue—Succession duty—"Aggregate value" of property—Incumbrances.

An appeal from the judgment of FALCONBRIDGE, C.J.K.B., ante p. 264; 9 O.L.R. 9, was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 2nd of June, 1905, and on the 29th of June, 1905, was dismissed with costs, the Court agreeing with the construction of the Act adopted in the judgment appealed from. See now 5 Edw. VII. c. 6.

W. R. Riddell, K.C., for appellants. *Frank Ford*, for respondent.

Full Court.] [June 29.

REX *v.* MAHER.

Municipal corporations — By-law respecting cab stands — Cab waiting for hire.

A livery stable keeper made an agreement with the proprietors of a hotel to keep at all times three carriages in attendance at the hotel ready for immediate use by guests, each carriage to be deemed as hired by the proprietors, from the time of attendance until dismissed or engaged for use by a guest, at the rate of one cent an hour, and the proprietors made themselves responsible for the payment by guests of the fares properly chargeable.

Held, that in keeping carriages in attendance pursuant to this agreement the livery stable keeper was not guilty of a breach of a municipal by-law providing that no cab should stand upon any street while waiting for hire or engagement. Conviction quashed.

G. T. Blackstock, for defendant. *Wm. Johnston*, for prosecutor.

Full Court.] [June 29.

REX *v.* CRUTTENDEN.

Trade mark—Criminal law—Forgery of trade mark—Descriptive words—"Glyco-thymoline."

A person prosecuted under s. 477 of the Criminal Code for forging a trade mark or for falsely applying to goods a mark so nearly resembling a trade mark as to be calculated to deceive is entitled to shew in his defence (just as under *Partlo* v. *Todd* (1888) 17 S.C.R. 196, and *Provident Chemical Works* v. *Chemical Manufacturing Co.* (1902) 4 O.L.R. 546, he might do in answer to an action for infringement) that the trade mark in question is invalid, its registration not being conclusive.

The section of the Criminal Code in question does not apply to a case of "passing off" goods as those of another.

The words "glyco-thymoline" as applied to a compound of glycerine and thymol are descriptive merely and are not properly the subject of a trade mark. Conviction quashed.

John MacGregor, and *J. B. Mackenzie*, for appellant. *Curry*, K.C., for prosecutors.

Full Court.] THE KING *v.* MANNIX. [June 29.

Criminal law—Common bawdy house—Woman living alone.

Held, that s. 195 of the Criminal Code has not changed the law as to what constitutes the offence of keeping a common bawdy house. Such a house is there defined as a house, room, set of rooms, or place of any kind kept for purposes of prostitution—which is in substance the same as the common law definition; and a woman living by herself in a house cannot be convicted of keeping it as a common bawdy house unless other women than herself resort to it for the purpose of acts of prostitution.

Nesbitt, K.C., for defendant. *Cartwright*, K.C., for Crown.

HIGH COURT OF JUSTICE.

McMahon, J.] SHAW *v.* COULTER. [Feb. 17.

Mortgage—Statute of Limitations—Service of notice of sale.

After the Statute of Limitations has run against the mortgagor of lands, service of a notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem, the mortgagee's statutory title being in no way affected thereby, such service being a mere nullity.

Hislop, for plaintiff. *D. C. Ross*, for defendant.

Master in Chambers.] MUIR *v.* GUINANE. [Feb. 26.

Practice—Solicitors to the record—Service on—Rule 533.

Solicitors on the record continue as such for service of papers, etc., thereon until a change is made under Rule 335.

Where, therefore, by reason of a change in the plaintiff's firm of solicitors an order for security for costs was not complied with and the action was dismissed, but on this coming to the solicitor's knowledge, they gave notice of motion under Rule 358 to be allowed to put in security and proceed with the action, which was served on the defendants' solicitors to the record, but who since the dismissal of the action had had no communication with defendant, he having left the Province without giving his address, such service was held to be good.

Clute, for plaintiffs. *Woods*, for defendants and solicitors.

Anglin, J.] LA BOMBARDE *v.* CHATHAM GAS CO. [March 31.

Negligence—Accident—Allowing guy wire to hang loose—Contact with live wire.

The defendants' workmen while straightening a pole to which a guy wire was attached, cut the wire, allowing it to hang loose, and, either by those workmen, or some third party, it was thrown across a power wire so as to become a live wire, whereby the plaintiff coming in contact therewith was injured.

Held, that the defendants were liable therefore.

Sayer, for plaintiff. *Houston* and *Stone*, for the Gas Co. *Gundy* and *Pike*, for the City of Chatham.

MacMahon, J.] WESTON *v.* SMYTHE. [April 1.

Deed—Description—House—Northerly face of wall—Deviation in.

In the description of a house, immediately adjoining another house to the north, one of the metes and bounds was from the intersection of the production easterly to the street line of the northern face of the wall of the said house to the street line and running westerly along the said production and limit between the house and the adjoining one, to the westerly limit of the lot. Where the said wall extended beyond the rear wall of the adjoining house, it was cased with brick, nine inches thick, so as to cause it to project that distance beyond what would otherwise have been the division line between the two houses.

Held, that the northerly face of the wall must be followed no matter how devious its course might be, so as to extend it to the northerly face of the said brick casing.

Sinclair and *W. A. McMaster*, for plaintiff. *Smythe* and *Tytler*, for defendants.

Teetzel, J.] [April 20.

WIARTON BEET SUGAR MANUFACTURING CO. MCNEIL'S CASE.

Winding-up proceedings—Stock issued as fully paid up—Partly paid for—Liability for—Contributory—Set-off by shareholder—Mutuality—R.S.O. 1897, c. 191, s. 37.

A certificate of 238 shares of stock was issued to one McNeil (described as fully paid up) pursuant to an understanding between him and the directors. He paid for 171 shares, accepted the certificate knowing that 67 shares were not paid for, but believing that there was no further liability on him in respect to them. There was no evidence of any application for them by him or any allotment to him. He transferred one share, surrendered his certificate and got a new one for 237 shares and acted as a director of the company. His name was in the stock ledger and stock register as a holder of 237 shares.

Held, in a winding-up proceeding that he was a shareholder with all the rights and liabilities of a shareholder, and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares.

McNeil had paid $1,500.00 on a guarantee given for the company and claimed to set-off that amount against his liability (if any) on the shares.

Held, that s. 37 of R.S.O. 1897, c. 191, only has reference to an action against a shareholder in the nature of a sci. fa. by a creditor of the company: that its provisions do not extend the right of set-off to proceedings against shareholders under that Act: that to allow set-off by a shareholder who is also a creditor would violate the spirit and intention of the Winding-up Act, the ruling object of which is the distribution of assets of an insolvent company amongst its creditors pari passu: that mutuality between cross debts or demands had always been the underlying essential of set-off, and that the right of set-off did not exist on the broad ground of absence of mutuality between the claim of the liquidator against McNeil and McNeil's claim as a creditor against the company. *Maritime Bank* v. *Troop* (1889) 16 S.C.R. 456 followed, and the judgment of King, J. in the Court below referred to with approval.

Watson, K.C., for contributory. *W. H. Blake,* K.C., for the liquidator.

Teetzel, J.] WALSH *v.* FLEMING. [May 3.

Will — Devise — Divesting — Executory devise — Failure of — Residuary devise.

A testator died in 1880 having by his will devised to his wife "all my real estate consisting of (the lots in question and other lots) and also all the other real estate and personal estate which I may die seized and possessed of" (1) To hold the same for the benefit of my said wife (for life). (2) After the death . . . of my said wife as aforesaid to hold the same for my daughter . . . during her life . . . allowing her full free use of my said personal estate and all the rents and profits, etc. (3) From and after the death of my said daughter . . . to divide the said real estate and personal estate between her children in such manner, as she shall by her last will and testament direct and appoint, and in default of such appointment to divide the same equally between the said children, etc. (4) Notwithstanding the directions hereinbefore contained I desire that if my son . . . returns to Toronto within five years from the date of my death my said executors shall hold in trust for him from the time of his return . . . (the lots in question) during the term of his natural life and shall pay over to him all rents, issues and profits thereof, and after his death shall divide the same between his children. . . . The son returned within the five years. The widow died in 1902, not having married again. The son entered

into the receipt of the rents and profits of the lots devised to him and died in 1904 intestate and unmarried.

Held, 1. The expression "also all other real estate and the personal estate of which I may die seized or possessed" clearly manifested the testator's intention that there should not be a partial intestacy, and there was nothing in the will shewing a contrary intention.

2. The contention that at most the prior interest had only been divested to the extent of the executory devise to the son for life and on his death without children, the purpose of the devise was satisfied and estate revested in the first devisees could not prevail as the gift over was of the entire interest in the lots named and the contingency upon which the gift over was to take effect was the son's return, and the failure of the executory devise to his children resulted only in a lapse of that devise.

3. The will contained a residuary devise, and no contrary intention appearing, it was sufficiently comprehensive to "sweep up" the lapsed devise and pass it to the daughter.

J. E. Jones, for plaintiff. *C. Robinson*, K.C., *J. T. Richardson*, *A Hoskin*, K.C., *Coatsworth*, *Harcourt* and *B. M. Jones*, for the other parties interested.

Street, J.] PLENDERLEITH *v.* SMITH. [May 12.

Practice—Parties—Mortgages—Joint interest—Trustees—Foreclosure—Devolution of Estates Act.

Under s. 29 of 60 Vict. c. 14 (O.), s. 1 of 54 Vict. c. 18 (O.) is interpreted as applying only to the estates of persons dying after May 1, 1801, which made retrospective, save as to estates of persons dying before May 4, 1891.

A husband, who with his wife had jointly mortgaged certain lands, died in 1890, having appointed his wife his executrix and devised to her all his estate. The wife died in the same year, having appointed two named persons her executors, and devised all her estate to the plaintiff. Default having been made in the payment of the mortgage money, the surviving assignee of the mortgage—the mortgage having been assigned to him and another, who took as trustees, though no trust appeared on the face of the assignment—brought a foreclosure action against the wife's executors and procured judgment of foreclosure and the assignee entered into possession. He subsequently sold the said lands to one of the defendants, who also entered into possession and mortgaged to the other defendant. In a redemption

action brought by the daughter against the said defendants.

Held, that the husband and wife having died before May 4, 1891, the equity of redemption at the time of the foreclosure action and judgment was vested in the wife's said executors, so that the judgment recovered against them was effected, the said daughter not being a necessary or proper party.

Held, also, that the personal representatives of the deceased assignee were not necessary parties, for (1) under s. 13 of the R.S.O. 1897, c. 12 the mortgage was vested in the two assignees jointly, so that the survivor was entitled to receive the money and enforce payment, and (2) the assignees being trustees, the right to receive the money both at law and equity vested in the surviving trustee, although, had the defendants objected the personal representatives would have had to have been parties so as to have them bound by the judgment.

Hislop, for plaintiff. *J. B. O'Brian*, for defendants.

Meredith, C.J.C.P., Teetzel, J., Clute, J.] [May 15.

SHEPPARD PUBLISHING CO. *v.* PRESS PUBLISHING CO.

Misrepresentation — Sale of goods — Customers of former employer—Slander—Scope of employment—Damages where no profit—Liability of corporation—Judgment against joint tort feasors—Judgment instead of new trial.

The plaintiff company were the publishers of a Christmas annual and had for years been selling it at a considerable profit, the defendant T. being in their employ as a salesman or agent, and as such visited and sold the annual to their customers. T. left their employment and entered the employment of the defendant company, who decided to issue a similar annual, and sent T. out as a salesman. He went to some of the plaintiffs' customers, and by untrue representations such as that the defendant had taken over that part of plaintiffs' business, they going out, sold annuals to those customers to the detriment of the plaintiffs' business, and to the profit of the defendant company, who accepted and filled orders and collected the price. In the answers to questions put to the jury (set out in the judgment) the trial judge, following *Perkins* v. *Dangerfield* (1897) 51 L.T. Rep. N.S. 535, gave judgment against T. for the damages found by the jury, and granted an injunction against him and dismissed the action as against the defendant company. On appeal to a Divisional Court,

Held, 1. T. was acting within the scope of his employment in seeking to procure orders, that the representations were made within the scope of his employment, and that the defendant company had availed itself of his acts and was liable.

2. The action was not one of slander, but an action on the case for false and malicious statements made in reference to the plaintiffs' business and resulting in loss to the plaintiff, and that the defendant company, although a corporation, was liable.

3. The true measure of a master's liability is the same as if the act had been committed by himself, and the fact that the defendant company had made no profit out of the transaction made no difference as to the amount of the damage against them. Although in acts of joint tort if one of the joint tort feasors be sued, and judgment recovered against him, that is a bar to further action against the two joint tort feasors, here the action was brought against both and judgment obtained against one and motion for judgment made against the other.

4. Both the company and the agent T. were liable.

5. No finding such as is found in answer to question 6 could be sustained and there being no reason to think new light could be thrown on the case by a new trial, and the Court having before it all the materials necessary for determining the question in dispute, a judgment was directed to be entered against both the defendants with costs.

Johnston, K.C., and *W. J. Elliott*, for plaintiffs. *Riddell*, K.C., and *W. T. J. Lee*, for the company. *D. O. Cameron*, for defendant Tobbs.

Teetzel, J.] [May 23.

BURSON *v.* GERMAN UNION INS. CO.

Insurance—Foreign company—Delivery of policy to insured—Through mail from broker—Cause of action enforceable in Ontario—Place of payment—Home office—No agent in Ontario—Non-registration—Not licensed—Lex loci contractus—R.S.O. 1897, c. 203, s. 143.

The insured residing in Ontario applied through an insurance broker in Montreal for an insurance policy in the defendant company which was incorporated under the laws of the State of Delaware in the United States and had its home office in that State, and whose president and secretary resided in Chicago in the State of Illinois. The evidence of the insured was that he received the policy through the mail from the insurance broker

—and the evidence of the president of the company was that it was delivered to the assured's agent (the broker) and that the latter was not an agent of the company, ar . that the company had no agent or officer in Ontario. No place of payment was named in the policy. In an action (on the happening of a fire) by the assignee for the benefit of creditors of the assured, the assured and the bank to whom the moneys under the policy were payable,

Held, that the plaintiffs had not proved a cause of action upon which they were entitled to sue the company in Ontario: and that the words "to be delivered or handed over to the assured, his assign or agent in Ontario" in s. 143 of c. 203 R.S.O. 1897, contemplates a committing to the post office of the policy by the insurer addressed to the insured, his assign or agent in Ontario, and the provision therein that in such event the moneys should be payable at the office . . . in Ontario shews that the section was intended to apply to companies having an office or agent in Ontario and not to a company which has in no way brought itself or its business within the limits of Ontario and that that section did not effect this action.

Held, also, that as the company had not complied with the Insurance Act R.S.O. 1897, c. 203, in regard to license or registration it was precluded by section 85 of that Act from entering into any contract with any one in Ontario.

R. McKay, for plaintiffs. *D. L. McCarthy* and *Frank Ford*, for defendants.

Meredith, J.] PLANT *v.* TOWNSHIP OF NORMANBY. [May 27.

Municipal corporations — Elevated highway — Repair — Guard rails—Accident—Defective harness—Negligence of driver—Want of knowledge on part of plaintiff—Damages.

The female plaintiff was being driven by her mother over a highway at a point where a hill had been partly cut down and the valley filled up, making a good level road, but from 7 to 10 feet above the natural level of the ground. The horses and conveyance belonged to the mother. The neck yoke and harness were defective to the knowledge of the mother, but there was no evidence that the daughter was aware of it. The neck yoke broke, the control of the horses was lost and the conveyance went over the bank and the daughter was injured. In an action by the daughter and her husband against two municipalities,

Held, that the defendants should keep such highways in such a condition of repair as the reasonable demands of the traffic over them from time to time requires, having regard to their means of performing such duty; that some danger lurked in the place in question which could have been removed by the use of guard rails, that the failure of the defendant to place guard rails or a protection along the embankment was a breach of that duty; that they were at fault and that that fault was the proximate cause of the female plaintiff's injury.

It was also shewn that the driver was driving carelessly and that the defective harness and her carelessness largely contributed to the accident.

Held, that although her contributory negligence would be an answer to any claim by herself it could not be said that her negligence was the proximate cause of the daughter's injury, as notwithstanding it, the accident would not have happened and the injury been sustained, if the road had been protected with guard rails; that the mother's negligence should not be attributed to the daughter, and although the daughter should have some care in regard to the conveyance and driver, it was not her duty to make such inspection of the horses' harness and conveyance that she must have observed the insecure neck yoke and refused to go, it would have been negligent of her to have gone if she had known, but as there was no evidence of such knowledge the defence of her contributory negligence failed.

Kingston, K.C., for plaintiffs. *Mabee*, K.C., for defendants.

Meredith, C.J.C.P., Britton, J., Anglin, J.] [June 10.

PHILLIPS *v.* CITY OF BELLEVILLE.

Appeal to Divisional Court—Motion to quash—Acceptance and adoption of judgment—Payment of money as directed—Changed attitude of co-litigant.

In an action by a ratepayer for an injunction against a municipal corporation to restrain a sale of lands to one C. and to compel it to sell and convey them to the plaintiff on the ground that his was the highest tender therefor, and both had paid deposits, the trial judge held that the plaintiff was entitled to an injunction restraining the sale to C., but could not compel the corporation to sell to him, and directed both the deposits to be returned.

The corporation having returned the deposits appealed to a Divisional Court and the plaintiff moved to quash the appeal on the ground that the corporation had accepted and acted on the

judgment and that C. would now carry out the purchase.

Held, that the mere payment of money as directed by a judgment is not a bar to an appeal from that judgment by the party making such payment, and mere obedience to a judgment, not such as to signify conclusive acceptance of its terms, does not destroy the right of appeal, and the repayments of the deposits involve nothing inconsistent with the relief which the corporation seeks upon its pending appeal and in no wise signify a conclusive submission to the judgment appealed from.

Held, also, that no change in attitude upon C.'s part at this stage of the case could debar his co-defendants (the corporation) from taking steps by appeal to relieve themselves from an onerous judgment which they allege to have been pronounced in error. The motion was dismissed.

Armour, K.C., for the appeal. *W. C. Mikel*, contra.

Magee, J.] WILSON *v.* MCGINNIS. [June 21.

Division Courts—Service of summons.

Except in the few special cases provided for by the Division Courts Act the bailiffs of the Courts have the right to serve summonses, and a plaintiff is not entitled as of right to effect service himself.

Mandamus to a Division Court clerk to compel him to give a summons to the applicants for service refused.

W. H. Blake, K.C., for the application. No one contra.

Britton, J.] IN RE CHARLES TUCK. [June 21.

Will—Construction—Gift of personal property—"Before receiving"—Rule in Shelley's case.

A testator left to his wife his lands for her life together with "all my household furniture, personal property, to be for her use and behoof during her natural life in lieu of dower. . . . All the personal property . . . that may be in possession of my said beloved wife at her decease and not otherwise disposed of, shall be sold by my executors . . . and the proceeds . . . equally divided among my daughters as being part of my estate."

Held, that the widow took absolutely all the personal property which she appropriated to her own use and used up dur-

ing her life, and that there was a gift over of only so much of the personal property as was in the possession of the widow at the time of her death.

The testator also directed that certain lands should at the decease of his wife be sold, and the proceeds divided among his daughters, and that if any one or more of the daughters should "be deceased before receiving her or their interest or share" her or their heirs should inherit the same; and if she have left no legal heir then over. One of the daughters survived her mother, and became entitled to a share, but had not at her own death, actually received the whole of her share. She died unmarried.

Held, that the share had become vested at the time of her her death, and must be paid to her estate.

The testator, also, devised to one of his sons for his life "and his lawful heirs after him," certain lands, "to have and to hold the same during his natural life, and subject to this express condition, that he shall have no power to sell . . . the above real estate, but shall transmit to his lawful heirs unimpaired if he shall have any . . . and should he fail to have any lawful heirs, the said lands shall at his decease be sold, and the proceeds equally divided among the other legatees."

Held, that the son took the fee under the rule in *Shelley's case*: and the restraint an alienation was invalid.

Cleaver, for executors. *Washington*, K.C., *F. Ford*, *W. T. Evans*, *J. W. Bicknell*, K.C., *F. W. Harcourt*, for other parties interested.

Trial—Street, J.] [June 26.

CUMMINGS *v.* TOWN OF DUNDAS.

Municipal corporations—Non-repair of highway—Street carried away by natural stream—Liability.

Without any fault on the part of the defendants a rapid, natural stream running through the town changed its course, and in so doing carried away part of the street upon which certain lands belonging to the plaintiff were situated.

Held, 1. The defendants were not bound to replace it under their statutory duty to repair highways. What would be required would be the building of an entirely new road bed, not the repair of an existing one, and this would be impossible until the stream was first diverted from its course and restored to its old course.

2. The defendants were not liable for any depreciation in the value of the plaintiff's property resulting from the destruction by the stream of the road in front of it.

O'Reilly, for plaintiff. *Nesbitt* and *Gwyn*, for defendants.

ELECTION CASES.

Boyd, C., Teetzel, J.] [May 16.

SAULT STE. MARIE ELECTION PETITIONS.
COYNE AND GALVIN CASES.

Corrupt practices—American citizens—Tort committed within the Province—Service out of jurisdiction.

Where American citizens had intervened in the conduct of Provincial elections and committed illegal and corrupt acts in connection therewith,

Held, that their foreign nationality or residence did not exempt them from penal consequences of their violations of the Election Act, R.S.O. 1897, c. 9. They had attorned to the jurisdiction of the Ontario Court by permitting and committing unlawful acts, which were consummated within the territorial boundary of the Province.

Held, also, that they had been properly served outside the jurisdiction under Con. Rule 162 (2) which permits service out of Ontario where the action is founded on a tort committed within the Province, which rule is made applicable to proceedings in election Courts by Rule LXIV., passed December 23rd, 1903, by the judges of the Court of Appeal for Ontario, under the authority conferred by R.S.O. 1897, c. 11, ss. 112, 113.

DuVernet, for the prosecution. *R. McKay* and *W. M. McKay*, for the accused.

Boyd, C., Teetzel, J.] [May 16.

SAULT STE. MARIE ELECTION PETITION.
LAMONT CASE.

Corrupt practices—Incriminating evidence—Certificate of judge.

Where upon a summons calling on the defendant to shew cause why he should not be found guilty of certain alleged corrupt practices under the Ontario Election Act, R.S.O. 1897, c. 9, the only evidence taken was his own, and was given by him under the general objection raised by his counsel that he should not be called on to criminate himself.

Held, that by virtue of s. 189 (*a*) (*b*) of the Election Act, R.S.O. 1897, c. 9 (1), the defendant having answered truly all the questions put to him, was entitled to be indemnified against any penal results which might otherwise follow from the disclosures made by him, and could not be convicted on his own testimony.

The new section of the Evidence Act, 4 Edw. VII. c. 10, s. 21, applies only where but for this section the witness would have been excused from answering, and therefore had no application in the present case inasmuch as under the Election Act the evidence was compellable.

DuVernet, for the prosecution. *R. McKay* and *W. M. McKay*, for the accused.

Province of Manitoba.

KING'S BENCH.

Full Court.] McLENAGHEN *v.* HOOD. [June 9.

New trial—Surprise—Negligence.

The plaintiff's claim was for loss of 29 young cattle out of 47 which the defendant had agreed to feed, salt and winter for the plaintiff at $4.50 per head, and to be responsible for the loss of any of the cattle "through getting lost or killed or any other way except dying from ordinary disease." The statement of claim charged that defendant had failed to carry out the provisions of the said agreement and that, by reason thereof, 29 of the cattle had died while under the care of the defendant and were lost to the plaintiff and the remainder of the said cattle were improperly provided with food and shelter and otherwise improperly cared for. The evidence satisfied the trial judge that the stable provided by defendant had been too small and low for so many cattle, that they had not sufficient ventilation. and that they had in consequence contracted colds resulting in catarrh, which increased in severity, and caused the deaths of the 29, and plaintiff had a verdict for their value.

Defendant applied to the Full Court for a new trial on the ground of surprise in the evidence produced by the plaintiff as to the size of the stable.

PERDUE, J.:—The statement of claim contains no direct allegation of negligence on the part of the defendant nor anything that can be construed as a charge of negligence except as to the 18 cattle which survived. The defendant's solicitor states upon affidavit that it was impossible to ascertain from the statement of claim upon what grounds the plaintiff relied, that he was examined for discovery, and that the defendant was unable to

ascertain from such examination the grounds upon which the plaintiff held him liable. The evidence as to the size of the stable, which the defendant had taken down before the commencement of the action, was contradictory and very unsatisfactory, none of the witnesses having made an actual measurement of it. Several affidavits have been filed on the motion for a new trial, and from these it would appear that the space covered by the building is well marked and ascertainable, and that the actual measurements made on the site shew that the stable was much larger than the plaintiff's witnesses declared it to have been. The affidavits also state that a stable of the dimensions shewn by the measurement of the site would be large enough to accommodate the 47 cattle. If the evidence contained in these affidavits had been adduced at the trial, there is good reason to believe that it would have met and outweighed the evidence produced by the plaintiff. We think there should be a new trial on the grounds of surprise to the defendant, the costs of the former trial and of this appeal to abide the event of the new trial.

Meighen and *McClure*, for plaintiff. *Howell*, K.C., for defendant.

Full Court.] CASS *v.* MCCUTCHEON. [June 9.

Practice—Amendment—Parties to action—Trustee and beneficiary—Contract.

By the original statement of claim, the plaintiff asked for an injunction to restrain the defendant from committing a breach of a contract made between them for the supply of all the bricks to be made by defendant during the season of 1903, for specific performance of the contract and for damages for alleged breach of it.

An interim injunction was granted, but it was afterwards dissolved by the Full Court (see note of decision, vol. 39, p. 529). The plaintiff then obtained an order from the referee giving leave to amend the statement of claim by adding the Manitoba Construction Company, being the company referred to in the contract as about to be incorporated, as co-plaintiff; but this order was set aside on appeal to a judge who held that, whatever the company's rights might be as between it and the plaintiff, there was no contract of any kind between the company and the defendant, and that the company's interest, if any, in the contract could not in any way affect the defendant.

The plaintiff then applied for and obtained an order allowing amendments to the statement of claim, the effect of which

was practically to allow the plaintiff to claim damages for breach of contract for himself as trustee and for the Manitoba Construction Company as cestui que trust. Defendant appealed from this order. It had previously been determined by the Full Court that the company did not appear to have acquired any interest, or incurred any liability, in respect of the contract sued on.

Held, that, even if the plaintiff could be treated as a trustee for the after formed company, it could not come in as beneficiary and claim damages against the defendant for breach of the contract.

Plaintiff contended that the case was analogous to those in which a trustee may enter into a valid contract for a cestui que trust not in existence at the time, such, for instance, as a trust created in favour of an unborn child which may afterwards be enforced by it.

Held, that, as the contract in question was not a unilateral contract on the part of the defendant, merely beneficial to the company without any obligation on its part, as are most of the contracts made in favour of an unborn child or other non-existing cestui que trust, this contention failed.

Appeal allowed and order allowing the amendments referred to set aside with costs.

Phippen and *Minty*, for plaintiff. *Aikins*, K.C., for defendant.

Full Court.] [June 9.

BELL *v.* WINNIPEG STREET RY. CO.

Negligence—Contributory negligence.

This was a judgment dismissing an appeal from the judgment of PERDUE, J., delivered Feb. 24, 1904, which was as follows:—

Action for damages for an injury caused to plaintiff by alleged negligence on the part of the defendants' servants. Plaintiff was a passenger on a street car of the defendants proceeding westwards on Portage Avenue in the city of Winnipeg. He had a seat near the front entrance of the car, which was crowded at the time, there being a number of passengers standing in the passage and others in the vestibule with the motorman. When the car stopped at Young Street, the plaintiff proceeded to get out by the front entrance, having to work his way through the crowd and past another passenger who was stand-

ing on the step. As soon as he alighted he started southwards to cross the other street railway track situated parallel to the one on which he had been travelling and quite near it, when he was knocked down by another car of the defendants, which was going eastwards on the southern track, and was severely injured.

The door by which the plaintiff left the car was on the side next the car by which he was struck, the step from which he alighted was at a height of 15½ inches from the ground, and the space between the sides of the cars as they passed on the parallel tracks was only 44 inches. There was no rule of the defendant company forbidding passengers to alight from the front entrance.

The trial judge found that the plaintiff was not aware of the approaching car until it struck him, and that the motorman on that car had not rung his gong or noticeably slackened speed as he came near the standing car, although there was a great conflict of testimony on these two latter points. It was proved to be a rule of the company that motormen while passing a car on that street must slacken speed and ring the gong continuously until the car has been passed.

Held, that, upon the findings of fact, there was such negligence on the part of the servants of the company as to entitle the plaintiff to recover in the absence of proof of contributory negligence on plaintiff's part.

Defendants' counsel strongly urged that plaintiff was guilty of contributory negligence by (1) alighting from the front instead of the rear door which was on the other side of the car, (2) not looking before he alighted to see if there was another car coming, and (3) not looking at the moment he alighted to see that the track he wished to cross was clear.

Held, 1. As the company permitted passengers to get off the car at the front, the plaintiff was not in fault in so doing.

2. Owing to the crowded condition of the car at the time, the plaintiff could not be expected to ascertain before alighting whether another car was approaching or not.

3. Under the circumstances, it was not contributory negligence for the plaintiff to start immediately to cross the other track without looking out for another car, for he had not the same time or opportunity to look out for danger as an ordinary pedestrian crossing the street would have. Verdict for plaintiff for $750 with costs.

Hudson and *Ormond,* for plaintiff. *Munson,* K.C., and *Laird,* for defendants.

Full Court.] [June 9.

PRIMEAU *v.* MOUCHELIN.

PRIMEAU *v.* PANTEL.

Promissory notes—Consideration—Rescission of contract—Will.

Appeals from verdicts for defendants rendered in a County Court in action on promissory notes given by defendants for some cattle purchased from plaintiff.

Plaintiff's title to the cattle was under the will of her deceased husband, which gave her only a life estate in all his property. Defendant Mouchelin was a son and defendant Pantel a son-in-law of the plaintiff and of the deceased. When selling the cattle, the plaintiff claimed and apparently believed that they were hers absolutely. Defendants apparently thought that the deceased had died intestate, and supposed that that gave plaintiff an absolute title to the cattle. After purchasing and giving the notes, defendants learned of the will. Thereafter they paid a year's interest on the notes. They did not return, or offer to return, the cattle. Until sued they apparently did not dispute the plaintiff's right to sell. The defence was on the ground that plaintiff had misrepresented her title and that there was a failure of consideration.

Held, that there was no fraud and that, as the plaintiff was able to give at least a title to the cattle for her life, there was not a total failure of consideration, that the defendants were bound, on learning the contents of the will, to repudiate the transactions at once, that, having failed to do so, and having kept the cattle and paid interest on the notes with knowledge of the facts, they had elected to affirm their purchases. No fraud was shewn, and defendants had not been disturbed in either title or possession.

Appeals allowed with costs, and judgments ordered to be entered in the County Court for the amounts claimed and costs.

Howell, K.C., for plaintiff. *Wilson* and *Dubuc,* for defendants.

Full Court.] PENNER *v.* WINKLER. [June 9.

Ejectment—Right of action by owner who has leased the land to another—Agreement for lease.

Defendant Winkler had a lease of the land in question from the plaintiff for one year from 1st October, 1902, and the other defendants were in occupation of the land under Winkler's lease. Before the expiration of the year, plaintiff made a verbal agreement with one Nichol by which the latter was to have the

land for one year from 1st October, 1903, and to pay, in lieu of fixed rent, one-third of the crop to be grown on the land. There was a clause in Winkler's lease allowing an incoming tenant to enter and plough in the autumn, and Nichol commenced ploughing in September. After 1st October he continued the ploughing until he had ploughed about 40 acres.

The other defendants remained on the land and refused to give up possession.

Plaintiff then brought ejectment on 23rd October, 1903. The only defence was that the plaintiff had lost his right of action by leasing the land to Nichol and that Nichol was the only person who could sue.

Nichol had taken no steps to secure possession and relied on the plaintiff to secure quiet possession for him.

Held, that plaintiff had a right to bring the action.

The agreement between Nichol and the plaintiff was a very indefinite one, as there was nothing said as to how many acres he was to cultivate, or as to where the one-third of the crop was to be delivered, or whether it was to be before or after threshing, and such agreement could hardly be said to be more than an agreement for a lease. He who lets agrees to give possession, and not merely a right to bring a lawsuit: *Coe* v. *Clay*, 5 Bing. 440; *Jenks* v. *Edwards*, 11 Ex. 774, and therefore he must have a right to secure that possession to give. Although a lessee, even before entry, can maintain ejectment against any one wrongfully in possession, it does not follow that, in every instance, he has the right to the exclusion of the lessor.

Campbell, K.C., A.G., for plaintiff. *Wilson*, for defendant.

Perdue, J.] [June 15.

CLEMENT v. THE FAIRCHILD CO.

Contract—Cancellation by new verbal agreement—Statute of Frauds.

Plaintiff entered into a written contract with defendants for the purchase of an engine to be delivered at a named date or as soon thereafter as possible. Before breach of this written agreement the plaintiff entered into negotiations with the defendants for the substitution of a more powerful engine than the one first ordered and, in addition, a wind stacker and a set of trucks, the price to be $500 more than that in the first order, and a verbal agreement was arrived at for the supplying of the new machinery in place of the old. Defendants then took over an old engine from the plaintiff and agreed to credit $1,000 for it on the price of the new machinery. They sold the old engine

shortly afterwards to a third party. This new machinery, having been shipped to fill the order as named, was wrecked in a railway accident while in transit. Plaintiff then served defendants with a notice calling for delivery in four days of the machine ordered under the first agreement, and informing them that, if it was not delivered by that time, the contract would be rescinded. Delivery was not made by the date specified and the plaintiff purchased an engine from another company.

Held, 1. The new agreement entered into between the parties, though, by reason of the Statute of Frauds it was one that could not be enforced, had the effect of discharging the written one, and the plaintiff could neither enforce the new agreement nor recover damages as for a breach of the written one. *Goss* v. *Lord Nugent*, 5 B. & Ad. pp. 55 and 56; *Morgan* v. *Bain*, L.R. 10 C.P. 15, and *Ogle* v. *Lord Vane*, L.R. 3 Q.B. 272 followed.

2. The plaintiff was entitled to recover from the defendants the actual value of the old engine which they had taken and sold, but not necessarily the amount at which it had been taken over, as that appeared to have been a high valuation allowed in order to put through a sale of new machinery.

Verdict for plaintiff for $900 and interest and costs of suit.

Haggart, K.C., for plaintiff. *Howell*, K.C., and *Metcalfe*, for defendants.

Perdue, J.] JOHANNISON *v.* GALBRAITH. [June 15.

Arbitration and award—Setting aside award—Pleading—Allegation that award relied on is invalid—King's Bench Act, Rules 773-775—9 & 10 Wm. III. c. 15.

The plaintiffs sued for the balance due on a contract for the erection of a house. The defendant pleaded a submission to arbitration of all matters in difference, an award made thereunder, and payment in accordance with the award. Plaintiffs then amended the statement of claim setting up that the award was invalid because the arbitration made it without giving the plaintiffs an opportunity of adducing evidence or of being heard in respect of the matters in dispute. Defendant demurred to this amendment. The pleadings did not shew whether or not the submission to arbitration contained a clause providing that it might be made a rule of Court so as to bring it under the operation of 9 & 10 Wm. III. c. 15, under which proceedings to set an award aside have to be taken before the last day of the next term after the publication of the award.

Held, that, upon the pleadings as they stood, judgment on the demurrer must be for the defendant, but that the plaintiffs

should be allowed to amend by adding a prayer that the award should be set aside and declared void, the costs of the demurrer to be costs to the defendant in any event of the cause.

Under the former practice the plaintiffs could not reply matter attacking or impeaching the award where it was pleaded. They would have first to move against and get the award set aside before suing on the original cause of action.

Rules 773-775 of the King's Bench Act, by a strange oversight, provide no procedure for setting aside an award at the instance of a party dissatisfied with it. Such party may attack the award if it is sought to be enforced against him, but it is not open to him, under Rule 773, to make a substantive motion to have it declared invalid.

In respect to cases not within the statute of William III., a bill in equity always lay to set aside an award for fraud or misconduct on the part of the arbitrator, and the Court of King's Bench has the same jurisdiction over awards as the Court of Chancery in England formerly had: King's Bench Act, s. 26, s.-s. (*b*).

Even if the case is within the statute of Wm. III. the effect of Rule 774 of the King's Bench Act, forbidding a resort to the old procedure relating to awards without leave of the Court or a judge, should be held to be such that a party may attack the award directly in an action, although the time has expired within which it could be moved against under that statute, since there is no procedure provided in the Rules for such an attack.

Wilson and *Johnson*, for plaintiffs. *Potts*, for defendant.

Dubuc, C.J.] [June 20.

FISHER *v.* VILLAGE OF CARMAN.

Constitutional law—Ultra vires—By-law requiring pool rooms to be closed on Sundays—Powers of Provincial Legislatures.

Application to quash By-law No. 87 of the Village of Carman requiring all pool rooms and billiard rooms to be closed from 8.30 p.m. of every Saturday until 7 a.m. of the following Monday, and from 10 p.m. of every other day until 6 a.m. of the next day, and that all screens or other devices for obscuring the view from the outside into such pool room or billiard room should be removed during such prohibited hours. The by-law was passed under the powers conferred by s. 640 (*a*) of the Municipal Act, R.S.M. 1902, c. 116, enabling the council of every municipality to pass by-laws: "For licensing, regulating and governing all persons who, for hire or gain, directly or indirectly, keep or have in their possession or on their premises any billiard,

pool or bagatelle table." The principal contention on behalf of the applicant was that the by-law was ultra vires because it relates to Sabbath observance, and was evidently passed in order to secure the observance of Sunday, and the case of *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (1903) A.C. 524 was relied on.

Held, that the provision of the by-law objected to was not ultra vires either of the municipal council or of the legislature.

Neither the by-law nor the provision of the Municipal Act makes any reference to Lord's Day observance.

To the power of licensing pool rooms is added the form of regulating and governing them and, therefore, the power of determining the manner in which the license is to be enjoyed, and this includes the conditions as to time and otherwise under which the licensee is to have the benefit of the license.

It is not necessary to investigate and consider what reasons may have induced the council to impose upon the licensee the condition that his pool or billiard room shall not be opened during a certain day of the week any more than during certain hours of of the day. The reasons may be surmised, but that is not a ground for declaring the by-law to be bad when there is nothing on its face indicating what such reasons may be.

Butcher, for applicant. *Phippen,* for Village of Carman.

Province of British Columbia.

SUPREME COURT.

Full Court.] LEE *v.* CROW'S NEST PASS COAL CO. [June 7.

Workmen's Compensation Act, B.C. Stat. 1902, c. 74, sched. 2 and 4—Arbitrator appointed by Supreme Court judge—Appeal.

Appeal by the employers from the award of an arbitrator appointed by a judge of the Supreme Court under Clause 2 of the second schedule to the Workmen's Compensation Act. 1902. The arbitrator heard the case and made an award of $1,500 in favour of the applicant.

Held, that no appeal lay.

E. P. Davis, K.C., for appellants. *J. A. Macdonald, K.C.* contra.

Full Court.] MARTIN *v.* BROWN. [June 21.

Appeal—County Court—Judgment—Entry of—What constitutes —Extension of time.

Appeal from a judgment in the County Court. On Nov. 3, 1904, the judge gave written reasons stating that his judgment was for defendant with costs and on the same day the registrar entered in his record book "Judgment for defendant with costs." Notice of appeal was not served until 16th March. The short point for decision was as to when the judgment was perfected and whether it was necessary to take out a formal judgment.

Held, that the appeal was not brought in time as the judgment was perfected when a note of it was made by the registrar in his book, and that no special form of judgment is necessary except in special cases where the judgment is in the nature of a decree.

Held, also, that the Court will no longer entertain motions for the extension of time for appealing where the time limited has expired.

L. G. McPhillips, K.C., for appeal. *J. H. Senkler,* K.C., and *F. W. Tiffin,* contra.

Full Court.] [July 3.

ALASKA PACKERS ASSOCIATION *v.* SPENCER.

Practice—Order for special jury—New trial—Whether order is exhausted after first trial.

Decision of Martin, J., reported p. 299, ante, affirmed, Hunter, C.J. dissenting.

An order for trial with a jury may be provisional in its nature, but it is only so when there has been a change in circumstances such as an amendment of the pleadings.

Bodwell, K.C., for the appeal. *Peters,* K.C., contra.