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WORKMEN'S COMPENSATION.

A new measure is now before the Legislative Assembly of Ontario which aims at making the liability of employers to compensate their employees for injuries still more onerous.

Under the present law the liability is confined to employers of workmen engaged in manual labour, but not employers of domestic servants. The new bill includes all classes of employers of all kinds of working people. If it should become law, the best thing all small householders who employ domestic servants can do, would be to dismiss them and do their own work. If not, they may find themselves permanently crippled by having to maintain for the rest of her natural life some servant who happens to have sustained a serious injury whilst in their employ.

It may be said that employers can insure themselves against such contingencies, which is true enough, but that means adding so much more to the cost of living, which is already high and is gradually getting higher and higher, especially in the cities of Ontario, and notably so for professional men and those with fixed incomes.

If the Legislature thinks one class of the community should be specially insured against accidents, it should itself assume the burden, for to throw the expense of insuring one particular class of the community upon another class is class legislation of a most indefensible kind. If domestic and farm servants must be insured by their employers against all accidents, why should not every Government officer and clerk be similarly insured by the Government of the province? If servants are entitled to be insured at their employers' expense, why should not butchers and bakers and doctors and lawyers be insured by those who employ them? And as for clergymen it is well known that many of them have less of this world's goods than the women they are occasionally compelled to employ.

Then what a beautiful opportunity for all sorts of frauds on employers is opened up by such legislation. This method of pandering to one class of the community and giving it exceptional rights and privileges which no other class of the community enjoys, will before long work its own cure, in such a revulsion of feeling on the part of the community at large as will make any Government hesitate before it sanctions such a course.

If the Legislative Assembly thinks in its wisdom that workmen should be insured by employers, they should at least also provide that the employer should be at liberty to deduct the cost of such insurances from the wages of those for whose benefit they are effected.

There is neither reason nor justice in extending the principle of workmen's compensation any further than it at present exists, and the Government will, we think, make a great mistake if it lends itself to any such extension as is now proposed. The time has come to make a stand against the insane pandering to the unjust demands of so-called "labour" leaders, who for their own selfish purposes claim and obtain class legislation which disorganizes the social fabric and works injustice, and which in the end is hurtful to those whom they pretend to help.

DO JUDGES LEGISLATE?

Sir Henry Maine inclines to the view that judges do in fact legislate, though by a species of legal fiction they are supposed not to do so. Sir Frederick Pollock, on the other hand, in his able and very lucid note to the second chapter of Maine's History of Ancient Law maintains that they do not. But we are inclined to think, like many differences of opinion, this divergence is due to a want of agreement as to the premises; and the question here to be settled, at the outset is, what is meant by "legislating?"

We do not suppose that Sir Henry Maine intended for a moment to maintain that judges can, or do, exercise all the powers of a sovereign legislator, and yet their want of such

powers is the principal reason that Sir Frederick Pollock assigns in support of his position that they do not legislate, when he says: "A legislator is not bound to conform to the known existing rules or principles of law; statutes may not only amend, but reverse the rule or they may introduce absolutely novel principles and remedies like the Workmen's Compensation Act. Still less, if possible, is he bound to respect previous legislation." If no one could be a legislator who had not all these powers, then Sir F. Pollock might be said to have proved his point, but, as is well known, many bodies as a matter of fact have legislative powers and do legislate within a certain limited area without such powers. A familiar instance is to be found in our municipal corporations and other private and public bodies to whom a limited power of legislation is delegated, and who make laws which, so far as they are within the delegated power, are as binding upon all whom they may concern as though they had emanated from the legislature itself; since the Dominion Parliament itself is not a sovereign legislature, but exercises only delegated powers.

In a similar way judges have by the constitution, impliedly, a delegated power to legislate sub modo. As Sir F. Pollock says: "They are bound to find a decision for every case however novel it may be; and that decision will be authority for like cases in the future: therefore it is part of their duty to lay down new rules if required." But to lay down new rules of law, is, whatever may be said to the contrary, to make a new law; and to make a law is, we conceive, in fact to legislate—notwithstanding that the mode of legislating may be sui generis and not the ordinary way of making laws. And it does not appear to us to be any reason why such new rules made by judges can be said not to be legislation merely because in making such rules the judges have to proceed upon certain well defined principles in laying down such rules. In making by-laws corporations are similarly limited.

But, as we have already intimated, the point necessary to be first settled is "What is meant by a legislator?" If you mean by a legislator, one who makes laws, then sub modo judges make

laws, therefore they are legislators; but if you mean by a legislator one who is endued with sovereign legislative power, then judges have not sovereign legislative power and therefore they are not legislators; but then we might also have to conclude that the Dominion Parliament does not legislate.

The socialistic craze for municipal ownership which of late years has been running its course in England, has been producing all sorts of extravagancies on the part of municipal authorities; with the result that enormous additions have been improvidently made to their debts without any corresponding advantage, money of ratepayers has been expended on all sorts of wild and useless enterprises, and wasted in the most reckless fashion. The long suffering taxpayers who have been thus exploited in the interests of these faddists, are, in London, beginning to squirm, and an immense demonstration recently took place in Trafalgar Square to protest against the methods of the London County Council and to arouse sufficient interest in the community to sweep from the council board those who have been responsible for the wasteful extravagance of the present regime. Since the foregoing was written the electorate has in fact made a pretty clean sweep of those who had abused its confidence; which goes to shew that if the body of the people will be only reasonably vigilant they need not be made the victims of such social parasites. This should be instructive reading for municipal ownership men in the Dominion, for now in England as well as in the United States it has been tried and has proved a failure.

There are many advantages no doubt in popular government, and it is well said that if people who live under it suffer, it is their own fault. But there can be no doubt that in spite of all its advantages, it often proves, as a matter of fact, a very dubious blessing. In the hands of the politician, and the necessity he finds for making himself "solid" with "the masses," it is too

frequently found that it is not the real interests of the community at large that are sought, and it is not the methods of wisdom and righteousness that prevail, but quite the reverse; so that it comes to pass that "popular government" becomes the synonym for all sorts of bad government, and those who really desire the welfare of the community long for "the benevolent despot" who would govern wisely and for the true interests of all.

A recent case in England is as interesting in its way as the Bee Case (ante, vol. 42, p. 723) or the Bull and Heifer Case (ante, infra, p. 66). A cyclist riding on one of the beautiful roads of England ran over a fowl (being a cyclist ourselves we deem him not to have been very skilful) belonging to the defendant, which ingeniously entangled itself in the spokes of his wheel and upset him, causing damage, for which he sued the owner of the biped. It did not appear whether the bird attacked the cyclist or simply after the manner of chickens, children and nervous women, ran across his path; nor was it shewn that this particular offender was in the habit of knocking down cyclists, or that its owner had a knowledge of any malicious propensity in that respect; nor was any evidence given that it was a matter of common knowledge that domestic fowls, presumably the ordinary barnyard variety, were accustomed either to lose their heads (except of course when they "got it in the neck" from the traditional axe) or of being subject to any form of berserker madness. The learned judge of the County Court, under these circumstances, was of the opinion that the defendant was not liable; but this proper pronouncement was coupled with the remark that he only so decided in the present state of knowledge as to chicken nature, and that if other cases occurred and it became well known that they were not the harmless animals they are generally supposed to be he would not feel bound to follow his present ruling. Nothing was said as to the right of domestic fowls to stray on the public highway, or as to any

feature of liability in that regard. At present therefore the warning to cyclists is: Keep out of the way of chickens.

Our legal exchanges discuss the criminal statistics for England and Wales in 1905, recently published. The aggregate of trials for all offences was 791,190, the convictions being 650,567. From this we gather that the millenium has not yet come. There has been an increase in some classes of crime, whilst in others there has been a slight decrease. It would seem that the crimes usually carried out by the habitual criminal, such as burglary and house-breaking, etc., have increased from 1,785 in 1900, to 2,870 in 1905. It also appears that offences against property without violence have steadily increased during the last ten years. Forgery and currency also shew a large increase. On the whole it may be said that though there has been a decrease of crime in 1905, there has been an increase in crimes which might be classed as "the work of the habitual criminal," or those which would come under the head of "educated crime."

The Speech from the Throne referring to legislation in Great Britain has some points of interest in this country. The profession there welcome a proposal to attempt an establishment of a Court of Criminal Appeal, and certainly recent incidents would seem to justify an effort in that direction. We shall wait with some interest any result of this, though it has not yet become a pressing need in this country. Other matters are: the amendment of patent laws; the giving women the right to sit as members of certain municipal bodies; the shortening of hours of labour in mines, etc. The House of Lords also receives attention owing to "the unfortunate differences between the two Houses."

REVIEW OF CURRENT ENGLISH CASES.

PAYMENT INTO COURT WITHOUT DENIAL OF LIABILITY—LIBEL—DEATH OF PLAINTIFF—ABATEMENT OF ACTION—RIGHT TO MONEY PAID AS SATISFACTION.

Maxwell v. *Wolseley* (1907) 1 K.B. 274 was an action of libel in which the defendant paid into Court fifty guineas in satisfaction and pleaded an apology. The plaintiff did not take the money out of Court, and died before trial. The defendant applied for repayment of the money to him and his application was opposed by the executor of the plaintiff who also claimed that the money should be paid to him. The reporter notes that no technical objection was taken to the application of the executor. Bray, J., decided that the executor of the plaintiff was entitled to the money and ordered it to be paid to him, and his order was affirmed by the Court of Appeal (Collins, M.R., and Farwell, L.J.). It would have been interesting as a matter of practice to know what would have been the decision of the Court if the defendant had taken the objection that the executor could not intervene without first reviving the action, and that it was not competent for him to revive and make himself a party because the cause of action was one which did not survive. It might probably have been deemed a good answer to say that quoad the money paid into Court the executor was entitled to revive.

RESTITUTION OF CONJUGAL RIGHTS—SEPARATION DEED—COVENANT NOT TO SUE FOR RESTITUTION—BREACH OF COVENANT FOR MAINTENANCE OF WIFE.

Kennedy v. *Kennedy* (1907) P. 49 was a petition by a wife for restitution of conjugal rights. A deed of separation had been made between the parties which contained a covenant on the part of the husband to pay a third part of his earnings, and a covenant on the wife's part not to sue for restitution of conjugal rights. The husband had broken his covenant, and the question Barnes, P.P.D., was asked to solve was whether the existence of the covenant not to sue on the wife's part was a bar to her application, and he held that it was not and that "the

Court should not allow its hands to be tied by the covenant not to sue in a case, such as the present, where the obligation to pay has been repudiated."

PROBATE—SEVERAL TESTAMENTARY DOCUMENTS—"LAST AND ONLY WILL"—INTENTION.

Simpson v. *Foxon* (1907) P. 54 was a probate suit in which the testator had left several testamentary papers and the question was whether all of these should be admitted to probate. The first was made in 1898 disposing of all his property and appointing his daughter executrix. The second was made in 1903, and was on a printed form commencing, "This is the last and only will of me," whereby he bequeathed the proceeds of an insurance policy and appointed an executor. The third was made in 1905 and described as "a codicil to the last will," whereby he made certain bequests and appointed other executors. The executors named in the last document applied for probate and it was held by Barnes, P.P.D., who tried the case, that all three documents must be admitted to probate and that the words "last and only" in the second did not have the effect of revoking the former will except so far as it was inconsistent with the second one.

RAILWAY COMPANY—OMNIBUS BUSINESS—INCIDENTAL POWERS—ULTRA VIRES.

Attorney-General v. *Mersey Ry. Co.* (1907) 1 Ch. 81 was an action to restrain a railway company from carrying on an omnibus service, as being ultra vires. The railway ran from Liverpool to Birkenhead, and, for the convenience of passengers, the company provided a service of motor omnibuses between their central station at Birkenhead and the residential part of the town. These omnibuses were run to and from their station in connection with their train service, but they picked up passengers and carried them for any distance they pleased on the route, for which fares were charged, Warrington, J., held that as the defendants had no power by their special Acts to run omnibuses their doing so was ultra vires and he granted an injunction (1906) 1 Ch. 811 (noted, ante, vol. 42, p. 561), and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), held that he was right, but on the defendants undertaking to run the omnibuses to or from the station on their line and in connection

with their trains and not to hold themselves out as doing a general omnibus business and (2) not to charge separate fares for intermediate journeys, and (3) as far as possible to confine their omnibus service to passengers by their trains, the Court discharged the injunction.

COPYRIGHT—LETTER—RIGHT TO PREVENT PUBLICATION OF LETTER —COPYRIGHT ACT, 1842 (5 & 6 VICT. C. 45), S. 3.

In *Macmillan* v. *Dent* (1907) 1 Ch. 107 the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), have affirmed the judgment of Kekewich, J. (1906), 1 Ch. 101 (noted ante, vol. 42, p. 262). It may be remembered that the action concerned the publication of letters of Charles Lamb and the question as to the ownership of the copyright was in question. The owners of the letters had assigned all copyright in them to the plaintiffs, Smith, Elder & Co., in 1895, and that firm had published an edition in 1898 and returned the originals to the owners. The defendant subsequently purchased the originals and took from the legal personal representative of Charles Lamb an assignment of the copyright and of all other his rights therein, but with notice of the prior assignment to Smith, Elder & Co., and was proceeding to republish the letters when the plaintiffs, Macmillan, who had become licensees of Smith, Elder & Co., brought this action to restrain publication by the defendants. Kekewich, J., granted an injunction and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), affirmed his decision. The material part of s. 3, of the Copyright Act, 1842, is as follows: "Copyright in every book which shall be published after the death of its author shall endure for the term of 42 years from the first publication thereof and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns." The principal difficulty in the case arose from the fact that by the terms of the agreement with Smith, Elder & Co., they were to return the letters after having published them. But the Court of Appeal held that the assignment was in its legal effect an assignment of the right to obtain copyright by first publication notwithstanding the publishers were not to become owners of the letters by means of which the copyright was to be obtained. And as Moulton, L.J., points out if in fact the copyright on publication by Smith, Elder & Co. vested in the owners of the letters, the agreement which they had made was sufficient to transfer it instantaneously it arose

to Smith, Elder & Co. The contention on the part of the defendants, that the personal representative of Charles Lamb was entitled to copyright in the letters was overruled.

TENANT FOR LIFE AND REMAINDERMAN—REAL ESTATE—TRUST FOR CONVERSION—PAYMENTS IN NATURE OF ROYALTIES—CAPITAL OR INCOME.

In re Darnley, Clifton v. *Darnley* (1907) 1 Ch. 159. This was an administration action in which a question arose between tenant for life and remainderman as to whether certain payments received by the trustee of the estate were to be deemed income or capital. The estate was that of a testator who by his will gave his residuary real and personal estate to a trustee upon trust for conversian, and to pay the proceeds to his wife for life and after her death to his children. There was no power to postpone conversion, nor any express gift of the income before conversion. Part of the testator's real estate was under lease which empowered the lessee to dig chalk on certain portion of the demised land, and to take additional chalk land on paying therefor £900 an acre. A sale of the real estate had been directed, but had not taken place. The question was whether moneys thus received or to be received for chalk was to be deemed capital or income and Kekewich, J., decided that it must be treated as income.

LEGACY TO SCHOOL—DISCONTINUANCE OF WEEK-DAY SCHOOL—CONTINUED USER AS SUNDAY SCHOOL—LAPSE.

In re Waring, Hayward v. *Attorney-General* (1907) 1 Ch. 166, a testatrix by her will bequeathed a legacy to "St. Andrew's School, Heybridge," for the benefit thereof. A school of that name had been founded by a brother of the testatrix for the education of the poorer classes. For some years previous to the testatrix's death, but after the date of her will, the use of the school as a week-day school had been discontinued, and at the time of her death it was only used as a Sunday school. The question was whether the legacy had lapsed on the ground that the purpose for which the school had been founded had to a great extent failed. Kekewich, J., held that it had not inasmuch as there had not been a total failure of the institution inasmuch as it still survived in the Sunday school and served the purpose for which it was founded one day in the week.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Nov. 30, 1906.

SCHWOOB *v.* MICHIGAN CENTRAL RY. CO.

Master and servant—Negligence—Defect in machinery—Defective system of inspection—Workmen's Compensation Act.

On the trial of the action herein, which was against a railway company to recover damages for the death of the deceased through his being called by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working, the injury, in answer to questions submitted to them, set out in the report, found that the death was caused through a defect in the condition of the locomotive, though the defendants not supplying proper inspection, the defect itself not being specified; but from a discussion which the trial judge had with a jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the way the tubes were fixed in the boiler, i.e., in not being, as it was said, properly belled; and that J., who did the work was a person entrusted by the defendants to perform the same.

Held, MEREDITH, J.A., dissenting, that there was no evidence to support a liability at common law, but that it was sufficiently established what the defect was and that such defect would have been discovered had there been a proper inspection and that J. was a person entrusted with the work so that there was a liability under the Workmen's Compensation Act in respect of which the deceased's widow and administratrix could maintain the action and was entitled to recover the damages assessed by the jury under the above Act.

Hellmuth, K.C., and *D. W. Saunders*, for appellants, defendants. *Crothers*, for respondent.

Full Court.] [Jan. 21.

NATIONAL MALLEABLE CASTINGS CO. *v.* SMITH'S FALLS MALLEABLE CASTINGS CO.

Company—Executory contract—Corporate seal—Authority of general manager.

Appeal from judgment of FALCONBRIDGE, C.J.K.B., at the trial. By letter addressed to the plaintiffs signed by the defendants by their general manager the defendants agreed to furnish malleable iron coupler parts to the plaintiffs in certain quantities as might be ordered between certain dates. The letter had at its foot the word "accepted" subscribed with the plaintiffs' name by H. F. Pope, assistant treasurer. The defendants were what is known as a one man company, the president and general manager above referred to, holding 1240 shares out of 1375. No by-law had ever been passed defining the general powers of the board of directors or of the managing director of the above company except as to the power of borrowing money for the purpose of carrying on the business. The managing director did not consult the board before signing the letter referred to and there was no formal subsequent approval by the board of what had been done, nor on the other hand any formal or other dissent. At the time the letter was written the general manager knew that to carry out the proposed contract, an extension of the defendants' plant and premises would be necessary at an additional expenditure of probably $40,000, and the plaintiffs also knew that the full performance of the contract would require a substantial increase of the defendants' plant. But there was no evidence that they knew anything about the defendants' capital or commercial circumstances, or their ability to furnish the additional plant.

Held, 1. In the absence of bad faith or notice the plaintiffs were entitled to assume that the general manager had been clothed with the real authority which he was ostensibly exercising in entering into the contract in question, which was after after all, only one to manufacture and supply articles of the kind for the manufacture and sale of which the defendants were expressly organized, and the agreement therefore, was certainly one to which the board of directors would have had power to bind the company by entering into it.

2. The circumstance that the contract required for its full

or maximum performance an increased plant was not in itself sufficient to render the whole ultra vires; it would have been otherwise if such increased plant had been required to carry on a new or different business from that then being carried on by the defendant company. As it was, the supplying such additional plant would fall under the head of "management" and would therefore be within the general scope of the defendants' authority.

3. There was no need here of the corporate seal although the contract was an executory contract; and the plaintiffs were entitled to recover so far as they had given orders for the couplers under the contract.

W. Cassels, K.C., and *W. D. McPherson*, K.C., for the defendants, appellants. *J. H. Moss* and *C. A. Moss*, for plaintiffs.

Full Court.] [Jan. 28.

HANLY *v.* MICHIGAN CENTRAL RY. CO.

Railway—Injury at highway crossing—Negligence—Findings of jury—Train "behind time."

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being "behind time"; but they did not answer a question put to them as to whether the bell was ringing.

Held, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.

Sec. 215 of the Dominion Railway Act, 1903, did not aid the plaintiffs.

Judgment of BOYD, C., reversed.

Hellmuth, K.C., and *Cattanach*, for defendants, appellants. *S. White* and *E. Meek*, for plaintiffs.

HIGH COURT OF JUSTICE.

Divisional Court.] [Dec. 4, 1906.

CLARKE *v.* UNION STOCK UNDERWRITING CO.

Bills of exchange and promissory notes—Absence of consideration—Evidence, admissibility of—New trial.

In an action upon two promissory notes for $3,000 and $4,000 respectively, the defendants set up that the defendants had never received any value for the notes, and that the plaintiff was not a bona fide holder for value. At the trial the defendants tendered evidence, which was refused, to shew that the notes were given merely as receipts for stock which had been delivered to the defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff was merely a clerk in the office of his solicitor, and had given no value therefor; also that a written agreement for the transfer of the stock made between the payee of the stock and another one of the defendants' firm had never been acted upon, or had been abandoned.

Held, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this, having been denied them, a new trial was directed.

Watson, K.C., and *Medd,* for plaintiff. *Rose,* for defendants.

Meredith, C.J.C.P.] [Dec. 4, 1906.

MONTGOMERY *v.* RYAN.

Venue—Trial in Toronto—Investigation of accounts — Proper case for trial without a jury—Striking out jury notice.

The practice where the venue in an action is laid out of Toronto is, except in rare cases, to leave the matter to be dealt with by the trial judge; but in Toronto, where there are separate sittings for jury and non-jury cases, the latter being practically a continuous sitting throughout the year, the practice has been adopted, in order to prevent the jury list from being unduly encumbered, to strike out the jury notice in cases which properly ought to be tried without a jury.

Where, therefore, in an action on a promissory note, which involved an investigation of accounts, and was therefore properly triable without a jury, an order was made in chambers directing such notice to be struck out.

W. N. Ferguson, for plaintiff. *W. M. Hall,* for defendant.

Meredith, C.J.C.P.] RE GAMBLE [Dec. 8, 1906.

Will—Devise to two devisees—Death of one before testator—Lands and personalty—Tenants in common—Joint tenants—Survivorship.

A testator, by his will, amongst other devises, devised certain land to two sisters naming them, to whom he also gave his residuary estate. One of the sisters predeceased the testator.

Held, that as regards lands the sisters would take as tenants in common, and therefore as to the deceased sister's share therein there would be a lapse, but as to the personalty they would take as joint tenants, and the surviving sister took the whole by survivorship.

H. Morrison, Malcolmson and *Harcourt,* for various parties.

Boyd, C.] RE CRICHTON. [Dec. 15, 1906.

Medical practitioner—Infamous and disgraceful conduct in a professional sense—Erasing name from register—Advertising secret remedy—Deceitful and fraudulent advertising—Mistrial—Appeal to Divisional Court.

The charge laid under s. 33 of the Ontario Medical Act, R. S.O. 1897, c. 176, against a medical practitioner, was, that he was guilty of "infamous and disgraceful conduct in a professional respect," in advertising a secret remedy, called "Grippura," which the advertisement claimed would cure grippe or influenza, and would assist in curing a number of other diseases, while the finding against him was, that he was guilty of deceitful and fraudulent advertising, for which his name was ordered to be struck off the register.

Held, on appeal to a Divisional Court, under s. 36 of the Act,

that the order could not be supported, and must be set aside; and his name, if struck off, restored to the register.

What constitutes "infamous or disgraceful conduct in a professional respect," considered and commented on, as well as the evidence submitted with reference thereto, and the course pursued by the prosecution on the hearing of the charge.

W. F. Kerr, for appellant. *Curry*, K.C., for Discipline Committee. *H. S. Osler*, K.C., for Medical Council.

[Dec. 15, 1906.

Falconbridge, C.J.K.B., Britton, J., Clute, J.]

BURTCH *v.* CANADIAN PACIFIC RY. CO.

Railways—Crossing in town—Hand-car—Warning—Finding of jury—Railway committee jurisdiction—Infant plaintiff—Contributory negligence—By-law—Invoking for another purpose.

A child of ten years of age was coasting down an incline on a street in a town crossed by a railway and was run down and injured by a hand-car proceeding along the railway. At the trial the jury found in answer to questions amongst other answers that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car and that it was their duty apart from the provisions of the Railway Act to have given warning.

Held, 1. The jury in finding that the railway should have given such warning were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should be given, that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission.

2. Even if a hand-car is not a train a warning was necessary apart from the Railway Act.

3. Although there was a municipal by-law to prohibit coasting, the plaintiff had not been "warned," which was necessary under its provisions to make coasting an offence and the onus is on the defendants to prove criminal capacity at common law and under the Code of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose.

4. Although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he was as of right and had not been "warned" under the provisions of the by-law, or his capacity for crime shewn, the trial judge was right in submitting the whole case to the jury, and the jury having found in favour of the plaintiff the verdict should not be disturbed.

H. S. Osler, K.C., for the appeal. *W. J. L. McKay*, contra.

Mulock, C.J. Ex.D., Teetzel, J., Anglin, J.] [Jan. 17.

CANADIAN OIL FIELDS CO. *v.* VILLAGE OF OIL SPRINGS.

Assessment—Mining lands—Value as agricultural lands—Buildings—Plant—Illegal assessment—Jurisdiction.

An assessor assessed mining lands at their value as agricultural lands under sub-s. 3 of s. 36 of the Assessment Act of 1904, but further assessed the buildings and mining plant as such and adding the two latter together entered them as the assessed value of the buildings.

Held, that that method was an attempt to evade the fair meaning of the Act; that the assessment of the exempted property, the plant, was illegal and it was not for the assessor in the exercise of his judgment to assess it for taxation at any amount and the illegality being established, the Court had jurisdiction to deal with the matter outside of the machinery provided by the Assessment Act for dealing with such a complaint.

Judgment of BOYD, C., reversed.

A. Weir, for the appeal. *Towers*, contra.

Mulock, C.J. Ex.D., Teetzel, J., Anglin, J.] [Jan. 25.

RE PORTER.

Restraint on alienation—Will—Devise—"During lifetime"—"Mortgage or sell."

A testator by his will devised land to his "son H. P. his heirs and assigns to have and to hold to said H. P. his heirs and

assigns for his and their sole and only use forever subject to the condition that the said H. P. shall not during his lifetime either mortgage or sell (the land) thus devised to him."

Held, that the restraint on alienation being limited was good.

Judgment of BRITTON, J., affirmed.

J. H. Spence, for the applicant. *Harcourt*, official guardian, for infants.

Divisional Court.] [Feb. 11.

LIVINGSTON *v.* LIVINGSTON.

Reference—Solicitor—Master—Acceptance by Master of retainer from one of the parties—Setting aside reference.

Appeal from ANGLIN, J., on motion by plaintiffs to set aside the reference to the Master at Berlin and all proceedings thereupon had before him on the ground that the firm of solicitors in which the said Master is a partner had accepted a retainer from the defendant pending the reference for some non-contentious business in the Surrogate Court of the County of Waterloo, by which judgment the learned judge set aside the reference and proceedings accordingly.

Held, that the judgment appealed from must be affirmed. Without suggesting that there had been or would be any bias, the Master as the solicitor even in a small matter for the defendant, who is a man of large business interest, might reasonably be suspected of bias.

S. H. Blake, K.C., and *J. H. Moss*, for defendant, appellant. *J. W. Nesbitt*, K.C., and *Britton Osler*, for respondent.

Cartwright, Master.] BOYD *v.* MARCHMENT. [Feb. 12.

Production—Discovery—Accident—"Recklessly and negligently" driving.

In an action for injuries to the plaintiff and his carriage, caused by the defendant's servants driving "recklessly and negligently" on an examination of the defendant for discovery he gave the names of his men who were with his waggon at the time of the accident but could not give the weight of the load without

his books which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solicitors wrote a letter (*without prejudice) that the defendant's team was coming from a house in a certain street and that the weight of the load and waggon together was not less than three tons. This the plaintiff declined to accept as official.

Held, that as the plaintiff's case rested on "recklessly and negligently driving horses and a conveyance," which the defendant contended was impossible on account of the weight of the load, and as it might assist the plaintiff to find out what house the team was coming from and the weight of the load the books must be produced.

J. D. Montgomery, for the motion. *J. E. Jones*, contra.

*Waived on the argument.—Rep.

Cartwright, Master.] [Feb. 12.

BURNS *v.* TORONTO RAILWAY CO.

Discovery—Medical examination—Time when to be ordered.

An examination under Con. Rule 462 is an examination for discovery and that rule must be applied the same as Con. Rule 442: and an order for the medical examination of a plaintiff in an action where the liability is disputed will not be made if opposed before the delivery of the statement of defence where opposed.

Frank McCarthy, for the motion. *H. C. Macdonald*, contra.

Falconbridge, C.J.K.B.] RE HART ESTATE. [Feb. 14.

Devolution of Estates Act—Administrator only adult interested in real estate—Registration of caution.

An intestate owning real estate died leaving her surviving her husband and two infant children. Letters of administration were issued to the husband who registered a caution under sub-s. 5, s. 14, of the Devolution of Estates Act, R.S.O., 1897, c. 127,

and with the consent of the official guardian sold the real estate. On an application under Con. Rule 972,

Held, that he, being the only adult interested in the real estate although he was administrator, had the right so to do.

W. A. Baird, for applicant. *Harcourt*, official guardian, for infants.

Divisional Court.] [Feb. 18.

McCORMICK *v.* TORONTO RAILWAY CO.

Damages—Assignment of claim for—Chose in action—Assignability of—O. J. A. c. 58, *sub-s.* 5.

The plaintiff brought this action for personal injuries sustained by his being run down by a car of the defendant company, and for the killing of his master's horse which he was riding, in respect of which latter he claimed under assignment from his master. Anglin, J., at the trial entered judgment for the plaintiff for the damages found by the jury in respect to the personal injury, but dismissed the action as to the claim for damages to the horse, upon the ground that such a claim was not an assignable chose in action.

Held, that the judgment must be affirmed and the appeal dismissed with costs.

Godfrey and *Phelan*, for plaintiff. *H. S. Osler*, K.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] ADAMS *v.* ADAMS. [Jan. 2.

Trustee—Breach of trust—Damages.

Plaintiff conveyed a property owned by him to defendant to secure the payment of certain amounts owing by him to defendant and took from defendant an acknowledgment in writing that the property was to be retransferred to plaintiff or his heirs on payment of the full amount due to defendant at the

time the retransfer was asked for. Plaintiff failed to record the declaration of trust and defendant gave a deed of the property to a third party.

Held, that in the absence of evidence to justify a finding that the third party knew of the trust a reconveyance could not be decreed but that plaintiff was entitled to recover damages for the breach of trust, and also for the value of articles left upon the property by plaintiff and sold by defendant and not accounted for.

W. B. A. Ritchie, K.C., and *T. R. Robertson*, for plaintiff. *A. Drysdale*, K.C. (A. G.), and *H. McInnes*, for defendant.

Russell, J.] TOWNSEND *v.* COLEMAN. [Jan. 2.

Canada Temperance Act—Action to recover money paid to constable—Remedy by injunction—O. 50 r. 1—Costs.

In an action for money had and received plaintiff sought to recover a sum of money paid by plaintiff to defendant, a constable, to secure plaintiff's release from imprisonment under a warrant of commitment for a violation of the Canada Temperance Act.

Held, 1. Dissolving with costs the interim injunction obtained by plaintiff to restrain the paying over of the money by defendant on the ground that the warrant was illegal, that it is against the policy of the law in relation to injunctions to interfere by that procedure in a case where the only thing at stake is the right to recover a small sum of money.

2. R. 1 of O. 50, if applicable to the case of an implied or quasi contract, such as the plaintiff was proceeding upon, required a prima facie case of liability on the part of the defendant to be made out, while in the present case the prima facies were the other way, the Court having decided that the warrant of commitment was made by a competent magistrate. The fact that defendant was indemnified was not a sufficient reason for refusing costs.

W. E. Roscoe, K.C., for motion. *J. J. Power*, contra.

Longley, J.] SMITH *v.* WAMBOLD. [Jan. 7.

Husband and wife—Deed by husband to wife—Claim by wife to surplus proceeds as against subsequent creditors.

In the year 1894 defendant conveyed certain real estate to his wife by a deed which was duly recorded. In 1906 defendant got into financial difficulties and a mortgage on the property was foreclosed, the amount realized at the sale being larger than the amount due on the mortgage. The surplus proceeds were claimed by defendant's wife under the deed to her as against judgment creditors and assignees of her husband.

The evidence shewing that at the time the deed was made and for ten years or more afterwards defendant was perfectly solvent,

Held, that the deed made by defendant to his wife was effective and that she was entitled to the surplus proceeds as against the other claimants.

Whitman and *R. H. Murray*, for judgment creditors and assignees. *Tobin*, for grantee under deed.

Full Court.] THE KING *v.* MACK. [Jan. 7.

Municipal council—Disqualified person continuing to sit—Remedy by quo warranto—Presumption.

Defendant rented and resided in a house in the town of L. for which he paid rent as a yearly tenant. He also, by arrangement with his father who resided with him, paid the taxes rated and assessed in respect to the house, but it appeared that the house was rated and assessed in the name of the father and not in the name of defendant.

Held, 1. Defendant was not a "ratepayer" within R.S.N.S. (1900) c. 71, s. 26 (2) and was not qualified to be elected or to sit as a councillor for the town.

2. It appearing that defendant was not a ratepayer at the time of his election the disqualification must be presumed to continue to exist, and defendant having continued to sit and act as a councillor an information in the nature of a quo warranto was the proper remedy to test his right to do so, the proceeding not being one to question the election or return but to

try the right of defendant to hold an office in which the statute said he should not serve.

H. Mellish, K.C., for informant. *J. J. Ritchie*, K.C., for defendant.

Full Court.] [Jan. 7.

THE KING *v.* DOMINION COAL CO.

Mines Regulation Act—Payment of employee otherwise than in money — Company store — Penalty — Enforcement under Summary Convictions Act—Amendment of statute—Appeal.

Under R.S.N.S. (1900) c. 19, s. 27, the wages or salary of any employee of any coal mine shall not be paid otherwise than in money current in the Dominion of Canada and owners who contravene or fail to comply are held to be guilty of an offence against the chapter and liable to a penalty of not less than $50 or more than $100. The informant, who was a miner in the employ of defendant company, and his father with whom he lived, contracted debts at the company's store, and by an arrangement which had been running for some time, a portion of the informant's wages was deducted and credited on the accounts and the balance paid to him in cash.

Held, 1. The company was within the provision respecting the penalty and was liable.

2. TOWNSHEND, J., dubitante, that the matter was one in respect to which there was an appeal from the judge of the County Court to this Court.

3. The fact that the form of conviction in the Summary Convictions Act contains a clause providing for imprisonment in default of distress, which would be inapplicable to corporations, does not displace the remedy under that Act.

The judge of the County Court made a fresh conviction in which he directed that the penalty should be paid out of money deposited by defendant to the informant as the "person aggrieved." These words had been struck out of the statute before the information was laid and as the law stood at that time it did not give the penalty to the person aggrieved.

Held, that the case must be remitted to the County Court to have the order amended in this respect.

Covert and *Robertson*, for appellant. *J. McK. Cameron* and *W. F. O'Connor*, for respondent.

Longley, J.] McNeil *v.* O'Connor. [Jan. 9.

Mortgage—Action on covenant to recover balance after foreclosure—Costs.

A sale by foreclosure of premises mortgaged by defendant to plaintiff failed to realize the amount of the mortgage with interest and costs. Plaintiff thereupon brought an action on the covenant in the mortgage to recover the balance due.

Held, that plaintiff was entitled to judgment for the balance claimed, but as he could have included the claim on the covenant in the former action, when seeking foreclosure of the mortgage the judgment must be without costs.

H. A. Lovett and *James Terrell*, for plaintiff. *H. Mellish*, K.C. for defendant.

Longley, J.] Lownds *v.* Clay. [Jan. 9.

Bills and notes—Action by indorser against maker.

A promissory note made by defendant in favour of L. was indorsed by L. and after having been indorsed by plaintiff at the request of L. was discounted at the bank.

Defendant having failed to pay the note when due, plaintiff was called upon to do so, and paid the amount and then brought action against defendant for the amount. On application for judgment under O. 14 it was claimed on behalf of defendant that the note was made for the accommodation of L. and that plaintiff was aware of this when he indorsed it, and that the note being overdue when plaintiff became the holder of it defendant could raise as against him any defence that he might have had against the original payee.

Held, that this did not constitute a defence as against plaintiff and that he having paid the note was entitled to recover against defendant as maker.

J. B. Lyons, for plaintiff. *W. F. O'Connor*, for defendant.

Meagher, J.] Donnelly *v.* Vroom. [Jan. 9.

Crown grant—Mud flats flowed by tide—Rights of owner held subject to right of public to enter and dig clams.

Defendants were the owners under a grant from the Crown to their predecessors in title, more than seventy years ago, of

land bounded on one side by Digby Basin together with the flats in front of the granted land down to low water mark. The grant also purported to convey the right of fishery. The flats, at low water, were left entirely bare for a distance of some hundreds of feet from the shore, and at full tide were covered by a sufficient depth of water to float small vessels. The only use to which they were put by the owners was the erection of weirs for taking fish, and the occasional digging of clams in small quantities. Plaintiff landed on the flats at low water without permission and proceeded to dig for and remove clams. Defendants ordered plaintiff to desist and, on his refusal to do so, took possession of the clams dug and also of plaintiff's boat and oars. To an action by plaintiff claiming damages for conversion defendants counterclaimed damages for breaking and entering defendants' close, digging up the soil, etc.

Held, that the public right of navigation and fishery could not be affected or diminished by any transfer of an arm of the sea or its shores to an individual. That plaintiff as one of the public had the right to go on the flats and dig for and take away clams, and if, in the exercise of that right, to which defendants' rights, as owners of the soil, were subject, he dug up the soil for the purpose of securing clams he did only what he was lawfully entitled to do, and he was not liable in trespass for entering the flats nor in trover for carrying away the clams so obtained.

F. Jones and *W. E. Roscoe*, for plaintiff. *J. J. Ritchie*, K.C., for defendants.

Full Court.] McINTOSH *v.* CAMPBELL. [Jan. 10.

Witnesses and evidence—Commission to take evidence out of province—Judge's discretion.

The judge of the County Court granted an order appointing a special examiner to take the evidence of plaintiff and other witnesses at Rossland, B.C., it appearing that the plaintiff and the witnesses whom it was desired to have examined resided there, that the amount involved was only $126.72 and that it would be much cheaper to have the evidence taken under commission than for the witnesses to attend personally at Sydney, C.B., where the trial was to be had.

Held, that the order was reasonable and proper and that the judge's discretion in granting it should not be interfered with.

W. F. O'Connor, for appellant. *H. Mellish*, K.C., for respondent.

Weatherbe, C.J.] REX *v.* HOARE. [Jan. 11.

Canada Temperance Act—Third offence—Proof of date of previous information.

Defendant was convicted before the stipendiary magistrate of the Town of Stellarton for a third offence against the second part of the Canada Temperance Act, and was sentenced to imprisonment for the term of three months.

The previous convictions made against him were proved as permitted by the statute by the certificates of the convicting justices, but the dates of the informations on which these convictions were based were proved only by a statement in the certificates and by the oral testimony of the prosecuting solicitor.

Held, that this was not legal proof and that the prisoner was entitled to his discharge.

Held, also, folowing *Reg.* v. *The Troop*, 29 S.C.R. 662, that the objection was one going to the jurisdiction.

J. J. Power, for the prisoner. *W. B. A. Ritchie*, K.C., and *W. McDonald*, for prosecutor and stipendiary magistrate.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., and Russell, J.] [Jan. 12.

ST. CHARLES *v.* ANDREA.

Garnishment—Money deposited in bank by husband to credit of wife—Not attachable—Remedy under Married Woman's Property Act.

Money deposited by a husband in a bank in the name of his wife, in fraud of his creditors, cannot be recovered by the husband as against the wife and therefore is not a debt due from the wife to the husband and cannot be attached as such by the husband's creditor.

But, under the provisions of the Married Woman's Property Act, R.S. (1900) c. 112, s. 12, moneys so deposited or invested may be followed by creditors as they might be before the Act.

W. A. Henry, for appellant. *H. Mellish*, K.C., for respondent.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., and Russell, J.] [Jan. 12.

THE KING *v.* MCKENZIE.

Customs—Conviction for violation—Excessive term of imprisonment—Power of Court to reduce—Code, ss. 883, 879—*Words "hear and determine."*

A conviction made by two justices of the peace whereby defendant was convicted of a violation of s. 197 of the Customs Act of Canada, as amended by the Customs Amendment Act of 1888, s. 14, s. 38, imposed a penalty of $50 for the offence and $18.20 costs, and in default of payment imprisonment for six months. No term of imprisonment was specified in the special section referred to and the term in such case, under the general provision in the Code was three months.

The conviction having been removed into the Supreme Court by certiorari.

Held, 1. The Court in such case has the like powers as the County Court, viz., (1) To hear and determine the charge upon the merits; (2) To reverse or modify the decision; (3) To make such other conviction as the Court thinks just.

2. The Court having the depositions before it and being satisfied from their perusal that the offence had been committed, had power under the Code (ss. 883, 879) to amend the conviction by reducing the term of imprisonment from six months to three and that as so amended the conviction should stand and the motion to set the same aside be dismissed, but without costs.

3. There is nothing in the expression "hear and determine" which limits the investigation to be made by the Court to the hearing of oral evidence, the words being the expressions most commonly used to express the act of the Court in disposing of cases upon evidence already taken.

J. J. Ritchie, K.C., for appellant. *W. F. O'Connor*, for respondent.

Weatherbe, C.J., Townshend, J., Graham, E.J., and Russell, J.] [Jan. 24.

LOTT *v.* SYDNEY AND GLACE BAY RY. CO.

Street railroad—Injury to child—Liability of company—Failure to provide fender.

Plaintiff an infant under the age of two years was run down and injured by an electric or tram car on the defendant company's road causing the loss of a leg. The evidence shewed that the child was seen approaching the track in time to have enabled the motorman to stop the car and avert the accident, but instead of doing so he came to the conclusion that the child was about to go back and increased the speed of the car so that it was impossible for him to stop in time, thus causing the accident.

Held, 1. There was a clear case of negligence for which defendant was responsible in damages.

2. Where an electric or tram car is operated without having attached thereto proper, necessary and efficient fenders as required by law, such absence is evidence of negligence.

TOWNSHEND, J., dissented.

W. B. A. Ritchie, K.C., and *T. R. Robertson*, in support of appeal. *H. Mellish*, K.C., contra.

Graham, E.J.] BRAYLEY *v.* NILSON. [Jan. 24.

Building contract—Defective workmanship—Damages.

Plaintiff contracted to build two cottages for defendant for the sum of $150 each defendant finding the materials. The cottages were to be built like another cottage and it was stipulated that they should not leak. Defendant paid $200 on account and there was a balance of $104, including a small amount for an extra not in dispute, due at the time of action brought. The cottages were found to be defectively constructed and to leak badly, particularly around the windows. Plaintiff sued for the balance of the contract price and the extra, and defendant counterclaimed damages for the defective construction.

The evidence shewing that the leak complained of was due to defective work and not to defective materials.

Held, that defendant was entitled to recover on his counterclaim with costs for the defective construction, and that plaintiff

should have judgment with costs for the balance in his favour, the costs to be set off.

C. R. Smith, K.C., for plaintiff. *T. S. Rogers* and *S. Jenks*, for defendant.

Graham, E.J.] MATHESON *v.* REID. [Jan. 24

Constable—Arrest — Justification under warrant — Abandonment of levy—Estoppel—Costs.

Defendant, a constable, levied under a warrant upon a number of articles in satisfaction of a sectional school rate due by plaintiff, but subsequently returned the articles taken upon demand by plaintiff's solicitors claiming that they were unlawfully taken, and giving notice of action for a return of the property taken and for damages in default of their immediate delivery. Defendant afterwards made affidavit that he was unable to find goods sufficient to satisfy the warrant and a justice of the peace, thereupon, under R.S. 1900, c. 73, s. 83, issued a warrant against plaintiff authorizing defendant to levy upon the goods and chattels of plaintiff for the amount due and in default of goods to take the body. Defendant made a further demand and failing to obtain goods arrested plaintiff and conveyed him to jail. Plaintiff brought an action for assault and imprisonment, but just before the trial amended by adding paragraphs claiming damages for trespass in connection with the taking of the goods levied upon and returned, and for other alleged acts of trespass, etc.

Held, 1. So far as the arrest and imprisonment were concerned defendant was protected by the warrant.

2. The levy made having been abandoned and the goods restored, there was not such a satisfaction of the claim as would prevent the subsequent issue of and the arrest under the individual warrant.

But *semble*, that plaintiff having demanded and received back the goods as unlawfully taken would be estopped from saying that a levy had been made which barred a subsequent levy and arrest.

Held, that defendant having returned the goods on the assumption that they were unlawfully taken was liable in damages for the taking and detention (assessed at $1), but as he was entitled up to the time of the amendment to have the action dis-

missed he was entitled to costs of all issues found in his favour as against the one issue found against him.

T. S. Rogers, and *A. G. McKenzie*, for plaintiff. *J. L. Ralston*, for defendant.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., Russell, J.] [Jan. 26.

REX *v.* MCGILLIVRAY.

Canada Temperance Act—Arrest on Sunday—Taking bail and fixing day.

M. was arrested on Sunday on a warrant issued for an offence against the Canada Temperance Act. When brought before the magistrate he applied to be admitted to bail and was permitted to make a deposit in lieu of bail and the case was set down for hearing on a week day and M. was discharged from custody. M. appeared at the time appointed and secured a further adjournment upon his agreeing to leave the amount of the deposit as bail for his appearance. On the day last mentioned he appeared and objected to the legality of his arrest on Sunday and to the action of the magistrate in taking bail and fixing a day.

Held, 1. Sec. 564, sub-s. 3 of the Code was made applicable to the case by the Canada Temperance Act, s. 107, and that the warrant could be executed on Sunday.

2. Per GRAHAM, E.J., MEAGHER, J., and RUSSELL, J., assuming that the releasing on bail and fixing a day for the hearing were illegal, that the arrest being legal there was a negligent escape and nothing to prevent the defendant from being retaken, and that the magistrate had jurisdiction to proceed with the case.

3. For such a defect as that contended for in the procedure prohibition was not the proper remedy.

Per TOWNSHEND, J.:—The taking of bail and fixing a day was not illegal, but an act done in connection with the arrest.

WEATHERBE, C.J., dissented.

J. J. Power, in support of application. *W. F. O'Connor*, contra.

Full Court.] WARD *v.* MCKAY. [Jan. 26.

Will—Construction—Words, "my first family," "survivors."

Testator by his last will devised the remainder of his property to A., a son by a second marriage, with a proviso that if A. died in the lifetime of his mother the latter should have the use of the property during her lifetime, and that on her death it should be equally divided among "my first family or the survivors of them." A. died in the lifetime of his mother, at the age of fourteen, and all the children of the first marriage died after A. and before the period of distribution, arrived all, with two exceptions, without leaving issue. One of the children, who had married, disposed of her share, by will, in favour of her husband.

Held, 1. The children of the testator alone could take under the words "my first family," and that the word "survivors" meant the survivors of those children and did not cover descendants.

2. On the death of A. the remainder vested in the children of the first family subject to being divested in favour of the survivors at the period of distribution. But, there being no survivors at that time, and nothing to divest it, it remained the property of the representatives of the children.

3. Expressions in the will explaining the reasons why testator made no other provision for the children of the first family were not intended to and did not exclude them from the right to participate in the remainder on the death of A. in the lifetime of his mother and the death of the life tenant.

J. U. Ross, for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Weatherbe, C.J., Townshend, J., Graham, E.J., and Meagher, J.] [Jan. 26.

IN RE CAMERON.

Magistrate's Court—Writ for service out of country—Requirement as to payment and indorsation of fees—Waiver.

Under the provisions of R.S.N.S. (1900) c. 160, s. 5, when the defendant does not reside in the county in which the writ of summons is issued the plaintiff shall before such writ is issued deposit with the justice issuing the same a sum equal to ten

cents per mile of the distance between the residence of the defendant and the place of trial, and by sub-s. 2, "the amount of such deposit shall be indorsed on the writ of summons and copy and if the same is not actually paid and indorsed such writ and the service thereof shall be void."

Held, per WEATHERBE, C.J., and TOWNSHEND, J., that the provision of the statute was imperative and could not be waived.

Per GRAHAM, E.J., MEAGHER, J., concurring, that notwithstanding the language of the statute the requirement was waived by the filing of a paper in the nature of a defence.

J. J. Power, and *R. G. McKay*, for appellant. *Gregory*, K.C., and *E. L. Gerroir*, for respondent.

Before Townshend, J., Graham, E.J., Russell, J., Longley, J.] [Jan. 26.

SMITH *v.* THOMAS.

Landlord and tenant—Parol lease, rent commencing at future day—Statute of Frauds, R.S. (1900) *c.* 141, *s.* 3.

On Nov. 11, 1905, defendant agreed to take plaintiff's house for a year from Nov. 15, at the rental of $360 payable monthly.

The evidence shewed that after some negotiations defendant asked "if he rented the house when the rent would commence," to which plaintiff replied that "it would commence on Nov. 15, rent payable from that date." Defendant thereupon said "he would take the house."

Held, that the contract was one within the exception in s. 3 of the Statute of Frauds, R.S.N.S. (1900), c. 141, and could be enforced notwithstanding the absence of a note or memorandum in writing or an entry into possession.

Jenks, for defendant, appellant. *W. B. A. Ritchie*, K.C., for plaintiff.

[Jan. 26.

Townshend, J., Graham, E.J., Russell, J., Longley, J.]

SMITH *v.* ARCHIBALD.

Sales—Warranty—Trial — Misdirection — Verdict set aside—Costs.

Action for the price of trees sold defence that the trees were sold subject to a warranty and that part of them were not

according to warranty. Motion for a new trial on the ground of misdirection.

Held, that where a judge undertakes to put the evidence before the jury he is not at liberty to present in a strong light all the facts and circumstances that make for the contention of one of the parties, and entirely, or practically, ignore the evidence that makes for his opponent. A charge constructed on such lines is tainted with misdirection and the verdict resultant therefrom will not stand unless the case is so clear that a verdict for the other party, on the evidence before the Court, would be set aside as one that no reasonable jury could give.

W. E. Roscoe, K.C., for appellant. *J. J. Ritchie*, K.C., and *S. Jenks*, for respondent.

Weatherbe, C.J.] [Jan. 30.

AMERICAN HOTEL & SUPPLY CO. *v.* FAIRBANKS.

Foreign company—Failure to comply with Act requiring registration—Exclusion from carrying on business.

Under the provisions of R.S.N.S. (1900) c. 127, s. 18, as amended by Acts of 1904, c. 24, every company not incorporated by or under authority of an Act of the legislature of Nova Scotia, which carries on business in Nova Scotia, is required to "before beginning busines in the province make out and transmit to the provincial secretary a statement under oath shewing, etc."

In an action brought by plaintiff against defendant claiming damages for breach of a contract in writing, whereby defendant undertook, during the period over which the contract extended, to make use in his hotel of an "advertising inkstand cabinet" supplied by the plaintiff, it appeared that plaintiff was a foreign company, incorporated under the laws of Illinois, in the United States of America, and had not complied with the requirements of the statute of this province in relation to registration.

Held, that in the absence of the statement under oath required by the statute, the language of the Act was prohibitory and that the business carried on by plaintiff was within the mischief contemplated and that defendant was entitled to judgment with costs.

W. B. A. Ritchie, K.C., and *T. R. Robertson*, for plaintiff. *H. Mellish*, K.C., for defendant.

Graham, E.J.] THOMPSON *v.* THOMPSON. [Feb. 11.

Building not attached to land—Sale with consent of owner—License coupled with an interest—Consideration.

Defendant gave permission to his son M. to erect a small building upon land of which defendant was in the occupation, agreeing that the building, which was not intended for any permanent purpose in connection with the land should remain personal property and be removable at the owner's pleasure.

Plaintiff, with the assent of defendant, purchased the building from M., defendant agreeing that it could be taken off later.

Held, that defendant could not afterwards claim that the building was a fixture; and that the license given to plaintiff, when he purchased and paid for the building was a license coupled with an interest, which could not be revoked. But, if otherwise, there being a consideration plaintiff could recover damages for breach of the promise.

J. L. Ralston, for plaintiff. *T. S. Rogers*, for defendants.

Graham, E.J.] ROGER *v.* MINUDIE COAL CO. [Feb. 13.

Railway Act, R.S. (1900) *c.* 99, *s.* 219—*Excessive tolls—By-law not approved—Pleading—Counterclaim.*

In an action brought by plaintiff as liquidator of the Canada Coal and Railway Co. against the defendant, for moneys paid on defendant's account to the Intercolonial Railway for cars used at the defendant's mine, a balance was found in favour of plaintiff, against which defendant sought to have set off a claim for excessive charges alleged to have been made by plaintiff for the carriage of defendant's coal. By the Railway Act, R.S. (1900) c. 99, s. 219 (formerly Acts of 1898, c. 4, s. 19), it was provided that no tolls should be levied or taken until the by-law fixing such tolls had been approved by the Governor-in-Council, etc. It appeared that the plaintiff company acquired their line from a former company, known as the "Joggins Railway Co.," and that the Governor-in-Council had, in 1887, approved a by-law of that company fixing the toll for transportation of coal at 28c. per ton, and that after the road passed into the hands of the plaintiff a by-law was passed fixing the rate at 40c. per ton and

was forwarded to the Governor-in-Council for approval, but no action was taken upon it and it was never approved.

Held, that in the absence of such approval the charge made was illegal, and that defendant, having paid the difference between the two rates under protest, was entitled to offset the amount so paid against plaintiff's claim, but that, in the absence of a counterclaim, defendant could not have judgment for any excess.

J. L. Ralston, for plaintiff. *W. T. Pipes*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Phippen, J.A.] [Dec. 21, 1906.

SLINGSBURY MANUFACTURING CO. *v.* GELLER.

Partnership—Limited partnership.

The defendant Rosenthal bought an interest in a partnership business carried on by his co-defendants Geller and Haid under the name Winnipeg Shirt and Overall Manufacturing Company, contributed the sum of four thousand dollars to the funds of the partnership and the three undertook to form a limited partnership under R.S.M. 1902, c. 129. They then drew up and signed a certificate in the form set out in s. 66, using the same firm name. This certificate was filed in the office of the prothonotary, who recorded it in the book provided for that purpose pursuant to s. 68, but it was not recorded at large as required by that section. Section 69 says that no such limited partnership shall be deemed to have been formed "until a certificate has been . . . . recorded as above directed," and the plaintiffs sought judgment against Rosenthal upon a promissary note and an acceptance of the firm on the ground that he was liable as a general partner, the limited partnership contemplated not having been effectively formed, also because the firm name chosen did not contain the names of either of the general partners, as required by s. 72.

Held, 1. That "recorded at large" means entered at length, and therefore the limited partnership had not been formed.

2. It was a good objection to the formation of the limited partnership that none of the names of the general partners were used in the style of the firm.

3. As the statute does not expressly impose upon a special partner the liability of a general partner for either of the found defects, but does impose such liability if any false statement is made in the certificate, or if the style of the firm contains the name of such special partner, the defendant Rosenthal was not made liable by the statute as a general partner.

4. There was nothing to shew that Rosenthal had made himself liable as a general partner of the firm by contract, express or implied, or by holding himself out as a partner, or by any subsequent conduct consistent only with the existence of an actual partnership with his co-defendants.

Patterson v. *Holland*, 7 Gr. 1, distinguished, owing to the differences between the respective statutes.

The date of the certificate filed was Feb. 14th, whilst the evidence shewed that it had not been signed until the 17th, when it was recorded.

Held, that this was not such a false statement in the certificate as to render Rosenthal liable, under s. 69, as a general partner.

Cameron and *Phillipps*, for plaintiffs. *Bradshaw* and *A. M. S. Ross*, for defendant.

Mathers, J.] [Dec. 22, 1906.

IN RE MILLER AND THE TOWN OF VIRDEN.

Municipal by-law—Ultra vires—Restraint of trade—R.S.M. 1902, c. 116, *ss.* 368, 632(*i*), 654(*f*)—*Weighing of coal on public scales.*

Application to quash a by-law of the town requiring that all coal sold in the town for delivery therein should be weighed on the public weigh scales established under the authority of the by-law, and that a certificate of the true weight of all coal delivered signed by the public weigh master should be handed to the purchaser at the time of delivery. The objections to the by-law

were, (1) that it was ultra vires, (2) that it was in restraint of trade, and (3) that it tended to establish a monopoly in the weighing of coal.

Held, that the council had power to pass the by-law under the authority of sub-s. (*i*) of s. 632 and sub-s. (*f*) of s. 654 of "The Municipal Act," R.S.M. 1902, c. 116, the language of the latter sub-section being "(*f*) For regulating the mode of measuring or weighing . . . cordwood, coal or other fuel and for imposing a reasonable fee therefor, and for regulating the sale of said articles," and that the by-law was not open to any of the objections urged against it. Dillon, s. 390, Cooley, p. 286, Tiedman, par. 127, and *Stokes* v. *New York*, 14 Wend. 87, followed.

Sec. 368 of the Municipal Act cannot be construed as prohibiting such a by-law.

Agnew, K.C., for applicant. *I. Campbell*, K.C., for Town of Virden.

Macdonald, J.] RE CODVILLE. [Jan. 11.

Conveyance of land—Reservation of claim for compensation.

Held, that an owner of property which will be depreciated in value by the contemplated closing of a street may sell and convey the property in fee simple reserving the right to collect afterwards from the municipality the amount of damage to the property that will accrue when the street is actually closed. Under such circumstances it is no answer to his claim for such damages that he has ceased to have any estate or interest in the land.

Wilson, for claimant. *Aikins*, K.C., for C.P.R. *I. Campbell*, K.C., and *Hunt*, for City of Winnipeg.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 21.

STAR MINING AND MILLING CO. *v.* BYRON N. WHITE CO.

Practice—Appeal—Security for costs.

Defendants applied under s. 114 of the Companies Act for the costs of the action which had been decided in their favour, and also for the costs of the appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, defendants were aware of the plaintiffs' inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place June 27, 1906, and the application for security was made July 30, 1906.

Held, on appeal, that the application was made too late, plaintiffs having in the meantime perfected all necessary steps for taking an appeal.

Held, as to the costs of the appeal, that 110 of the Supreme Court Act, which limits the security that may be required for costs of appeal to $200, governed.

Decision of HUNTER, C.J., affirmed.

Bodwell, K.C., and *Lennie*, for appellants. *Davis*, K.C., and *S. S. Taylor*, K.C., for respondents.

Full Court.] DE BECK *v.* CANADA PERMANENT. [Jan. 21.

Mortgagee—Power of sale—Orders nisi and absolute Accounts —Rents, receipt of—Tender—Interest.

A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not dsposited for

registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs if the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem.

Held, affirming the decision of HUNTER, C.J., that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens* v. *Theatres, Limited* (1903) 1 Ch. 857; and *Campbell* v. *Holyland* (1877) 7 Ch. D. 166 followed.

Davis, K.C., and *Cayley*, for plaintiffs. *Bodwell*, K.C., and *Shaw*, for defendants.

Full Court.] IN RE LONSDALE ESTATE. [Jan. 21.

Statute, construction of—Land Registry Act—Mandamus.

There was submitted to the municipal council of North Vancouver a plan shewing a sub-division of a portion of a lot in pursuance of s. 68 of the Land Registry Act. The plan shewed a portion of the lot abutting on the waterfront, left not sub-divided, the strip so remaining averaging some 400 feet long the end of the lot between First Street and the waterfront. The reeve declined to certify the plan on the ground that under s. 68 of the Land Registry Act the streets should be shewn extending down to the water. On application to IRVING, J., a writ of mandamus was issued directing the reeve to certify the plan in compliance with s. 68. From this the municipal council appealed.

Sec. 68 provides that in case a lot borders on the shores of any navigable water, the streets leading to and continuing to such water must be shewn at a not greater distance apart than 600 fee'

Held, that the object of the section was to require land abutting on navigable waters to be sub-divided so as to provide straight and continuous access to the water at intervals of not less than 600 feet.

Per MARTIN, J.:—The section does not apply unless the streets which lead towards the water reach it.

A. D. Taylor, for appellant. *Davis*, K.C., for respondent.

Full Court.] [Jan. 30.

MCGREGOR *v.* CANADIAN CONSOLIDATED MINES.

Statute, construction of—Penal statute—Inspection—"Machinery hereinafter mentioned," meaning of.

Rule 21a of s. 25 of the inspection of Metalliferous Mines Act, as enacted by s. 12 of c. 37 of 1902, provides that "every person . . . . employed in or about a metalliferous mine in which the machinery hereinafter mentioned shall be operated for more than twenty hours in any twenty-four, (1) operates any direct acting, geared or indirect-acting hoisting machine exceeding fifty horse-power, or (2) operates any stationary engine or electric motor exceeding fifty horse-power, and shall perform any such duties for more than eight hours in any twenty-four shall be guilty of an offence under this Act."

Held, that the phrase "machinery hereinafter mentioned" must be read distributively; or as meaning "any of" the machinery hereinafter mentioned.

Held, that the words "preceding section" in Rule 21b, refer to the preceding rule.

Decision of DUFF, J., affirmed.

A. H. MacNeill, K.C., for appellants. *Maclean*, K.C. (D.A. G.), for the Provincial Government.

Errata are things which will occur in the best of regulated publications. Sometimes the original scribe is to blame; sometimes an over-wise proof reader, sometimes an unwise printer. Perhaps most of the readers of the article on page 42 may have noticed that in two places the word "injury" was inserted in place of "inquiry," to say nothing of the curious Latin on page 43, also that on page 82 on the twenty-first line the word "ascertaining" should read "enabling." We trust our readers will make due allowances for a long suffering editor.

Injury to a passenger by a dog on a street car is held, in *Westcott* v. *Seattle, R. & S.R. Co.* (Wash.), 4 L.R.A. (N.S.) 947, to make the carrier liable.

A contract made on Sunday, the formalities of completing which are not finished until another day, is held, in *Jacobson* v. *Bentzler* (Wis.), 4 L.R.A. (N.S.) 1151, to be illegal.