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THE BOARD OF RAILWAY COMMISSIONERS.

A little more than four years ago the Board of Railway Commissioners for Canada came into existence. Of the three original members, two still remain. Mr. Justice Killam, of the Supreme Court of Canada, became chief commissioner in the place of the Hon. A. G. Blair, who resigned. The strength that Mr. Blair brought to this railway court was well continued by Mr. Killam, whose judicial training was invaluable as the chief justice of a Court of which the other two members were laymen. The latter, however, now have experience which should enable them to give useful and practical decisions in accord with the growing condition of railway affairs in this country.

For a long time previous to the lamented death of Mr. Killam, it had been manifest that the Board was unable to cope with the work which was devolving upon it, and the Board is now three months behind in its work. This is not necessarily any reflection on the care and labour bestowed by the non-legal members of the Commission upon matters brought before them, but it is not to be expected that they would possess that acumen in giving decisions on questions which to a lawyer or trained mind would involve little doubt. Without, then, considering whether or not there was any inherent weakness in the Board, we find that its work had increased to such a point that its usefulness was impaired. The chief cause of this is the increased power that has already been conferred upon it by statute, while the continued growth of railways in Canada has added year by year a larger field. As the railways spread, questions of crossings become more frequent, rates have to be settled and transportation matters to be dealt with. Owing to this increase in the business of the Commission many important matters have

been shunted or side-tracked until a more convenient season—which often did not arrive.

In our issue of October 15, 1907, we referred to the diversity of forms of bills of lading in use, and we then said:—"Whilst this matter should have been attended to long ago, the Board may, possibly with some reason, seek to excuse itself on the ground of the pressure of the work in relation to other matters of great importance in various parts of the Dominion. If this means that the Board as at present constituted is not equal to the strain of work laid upon it, the necessary changes must be made in its personnel, or more members must be added." The Government has recognized the need of strengthening the Court numerically, and it has now an opportunity to make the Board strong in calibre as well as numbers.

On February 27, the Minister of Railways introduced a bill to amend the Railway Act as respects the constitution of the Board of Railway Commissioners. This bill increases the number of commissioners to six, and the Board is empowered to hold more than one sitting at the same time. The Board will now consist of a chief commissioner, an assistant chief commissioner, a deputy chief commissioner, and three ordinary members. The chief commissioner and the assistant chief commissioner must each be or have been "a judge of a superior court of Canada or of any province of Canada, or a barrister or advocate of at least ten years' standing at the bar." The bill then regulates the powers of the assistant chief and deputy chief in the absence of the chief commissioner. Another clause, debated at length in the House upon the introduction of the bill, is as follows:—"The chief commissioner, when present, shall preside, and the assistant chief commissioner, when present, in the absence of the chief commissioner, shall preside, and the opinion of either of them upon any question arising when he is presiding, which, in the opinion of the commissioners is a question of law, shall prevail."

An agent's book must now be kept in the office of the secretary of the Board, in which railway companies must enter the

name and address of an Ottawa agent, where he may be served, for the company, with any notice, summons, regulation, order, direction, decision, report, or other document, and the Board may direct that the fact of service upon an agent and the nature of a document served shall be communicated to the company by telegraph.

There is, as yet, no provision for an appeal from one commission . or from two commissioners sitting together, to what might be termed a "Full Board." The desirability of a right of appeal to the Board itself has not yet been determined.

The appointment of a lawyer as assistant chief commissioner, ranking next to the chief commissioner, will enable the assistant chief to preside over a division of the Board in which the other members are not lawyers. In introducing the bill, the Minister said, referring to the new position of assistant chief commissioner:—"It has been found absolutely necessary that the head of that Board, the chairman conducting its affairs, should be a legal man with power to grasp the legal situation, with a firm grasp of the Railway Act." If both the chief commissioner and the assistant chief commissioner are present at a sitting, and disagree upon a question of law, the ruling of the chief would prevail. The evident intention is that in all possible cases either the chief or the assistant chief shall preside. This is a wise provision.

The question of costs in cases before the Board received some attention in the discussion, as did also the question of counsel to represent parties opposed to the railway companies. The latter suggestion would seem to lead to multiform complications, and savours of a form of democracy which does not, at the moment, appeal to us.

We feel assured that His Majesty's advisers will be mindful that this is, perhaps, the most important Court, and possesses wider powers than any Court in Canada, and that it is not a political shelf. At the time the creation of a Commission was mooted it was said—unofficially no doubt—on the part of the Government, that the intention was to appoint three mem-

bers, one a lawyer, one a business man, and one a railway man. Only the first of these good intentions was fulfilled. Now would appear to be a suitable opportunity to give the Commission, more fully, the confidence of the people. We would prefer to see three lawyers in this Court of six members, for, whether it be the home section or a travelling section of the Court, there should be a competent legal member always present to decide questions of law.

As to what sections of the community the other two new commissioners should represent, very many suggestions have been made, e.g., railway men, business men, manufacturers, shippers, telegraphers, farmers, mechanics and railway employees, but it seems most important that a man with railway experience should be a member of the Board. There is nothing in the argument frequently advanced that such a man would be influenced in favour of railway companies; while, on the other hand, his technical knowledge of the workings of railways would be of inestimable value is assisting the Board to arrive at a proper conclusion. One familiar with transportation would be a useful member. We hope to find that all the new members are practical men, and we fail to see why any section of the community should be represented other than lawyers, railway men and business men. These three seem to combine all the necessary requirements of a competent Board.

The death of the Chief of the Railway Commission, in addition to delaying and crippling the general work of that body, may be realized in a definite way in connection with the Bell Telephone investigation, in which the late Chief had heard an enormous amount of evidence and was preparing his judgment. It is possible that the evidence may have to be reheard, although by consent of the parties this will be unnecessary. At the time of Mr. Blair's resignation the Fort William telephone case, and others, were in a similar position, and it was

agreed that Mr. Killam might proceed without a rehearing of the evidence. Mr. Killam was also chairman of the arbitration committee which has, for several years, been attempting to arrange the differences between the Intercolonial and Grand Trunk Railways. The evidence in this matter already fills some eight volumes, and it was only ten days before his death that he urged counsel to endeavour to expedite the matter so that the committee might be relieved of its duties.

THE BENCH IN BRITISH COLUMBIA

The administration of justice demands that an end shall be put at once to such objectionable exhibitions as have recently been witnessed on the Bench in British Columbia. The Government should take the matter in hand, and apply such remedy as may seem appropriate.

For some time past there has been friction between Chief Justice Hunter and Mr. Justice Martin; and, as to this, the feeling of the Bar in that Province is in favour of the former. This friction has been evidenced by various incidents from time to time, and has culminated in the one hereafter referred to.

The important facts of the most recent of these episodes are simple. By a rule of Court it is the duty of the chief justice to arrange all sittings of the Supreme Court, whether civil, criminal or appellate, and to assign these sittings to such judge or judges and in such manner, as may, in his opinion, be necessary or proper, and generally he has power to control and direct the business of the Court, and it is the duty of the judges to carry out such directions as the chief justice may make.

The Rule also provides that only those judges shall sit in any appeal who are so assigned, and that not more than three judges shall sit in any appeal unless specially summonsed.

It appears that Mr. Justice Martin had, under the above rule, been assigned by the chief justice to sit as one of the judges appointed to hear an appeal in the case of *Hunting* v.

McAdam. This assignment was subsequently, on November 27, cancelled by direction in writing from the chief justice, to the effect that Mr. Justice Martin should take the sittings at Nelson and Rossland, and that the other judges should hold the Special sittings in February, at which the appeal referred to was to be heard. The chief justice subsequently assigned Mr. Justice Irving, Mr. Justice Morrison and Mr. Justice Clement to be the Court to sit on the above appeal, and directed the registrar to notify all the judges and the counsel concerned of this arrangement. In all this the chief justice seemed to be within his rights.

It appears that Mr. Justice Martin did not take the sittings at Nelson and Rossland, but insisted upon what he claimed to be his right to sit on the above appeal on the footing of the cancelled assignment, which he contended could not be changed; and when the case came on for hearing he took his seat on the Bench along with the other three judges.

It is difficult to understand upon what principle such a claim could be maintained, but even if technically maintainable it was most undesirable that such a matter should have been brought up for discussion in open Court, and so provoke an unseemly wrangle, the blame for which, must, we fear, rest upon the shoulders of Mr. Justice Martin.

The three judges assigned to hear the appeal decided that they were the Court, and that Mr. Justice Martin, who was also present, had no right to sit. During the discussion the later is reported to have said: "This matter should not be decided by this Court. It is not an independent tribunal—its members are so dominated by the extraordinary powers granted to the chief justice. I regret to have to say these things. I intend to go on sitting here as an enduring protest against these proceedings."

Mr. Justice Irving naturally took exception to the slur cast upon the Court, saying as is reported: "I regret that the Attorney-General is not here to hear the language which has been used on this Bench."

The report continues by giving the remarks of Sir Hibbert Tupper as follows: "Speaking for the Bar, I may say that no such idea has entered the head of any member of the Bar, and if such remarks had been made by any barrister the Law Society would take the matter up and his gown would be stripped from his back." The provocation must have been great when a man of the fairness, ability and experience of Sir Hibbert Tupper thought proper to use such forcible language. The Court rose shortly afterwards and upon its re-assembling Mr. Justice Martin retired.

We do not care further to pursue this unpleasant subject, nor to comment upon the language above quoted, nor to discuss the alleged strained relations referred to; but it cannot be tolerated that this sort of thing should continue. No one should be allowed to say anything or do anything which might tend to lower the dignity of the Bench, or to bring it into contempt in the eyes of the public and thereby tend to impair its efficiency. But what is required in this regard of every citizen is required vastly more of those who sit on the Bench, including in this case Mr. Justice Martin. It is unnecessary to enlarge upon such a self-evident proposition. The profession will insist that such things as these should cease to be.

PERMISSIVE WASTE BY TENANTS FOR LIFE OR YEARS.

If a lawyer in Ontario were asked to advise whether a tenant for life, or a tenant for years is liable, in the absence of any contract, or limitation to the contrary, for permissive waste, he would, perhaps, feel in somewhat of a quandary. From the case of *Patterson* v. *Central Canada L. & S. Co.*, 29 Ont. 134, he might possibly conclude that neither a tenant for life nor years is liable for permissive waste, but if he adopt the views expressed by Meredith, C.J.C.P. in *Morris* v. *Cairncross*, 14 O.L.R. 544, then he must conclude that both tenants for life

and tenants for years, are so liable. There is, however, a difficulty about the case of *Morris* v. *Cairncross*, owing to the fact, that the result of the judgment was to affirm the judgment of the learned Chancellor then in appeal, but on different grounds, and it may therefore hereafter be found that *Morris* v. *Cairncross* is not an authority binding on any other Divisional Court except for the point actually determined.

The question at issue in *Morris* v. *Cairncross* was whether a lease made by a tenant for life, extending beyond his own life, was binding on the remainderman under the Settled Estates Act (R.S.O., c. 71). The validity of the lease depended on whether or not it had been made "without impeachment of waste." The lease in question was in the usual statutory form, but it exempted the tenant from liability to repair or rebuild in case of reasonable wear and tear or damage by fire or tempest. The learned Chancellor held that this exemption went beyond the statutory form as regards damage by tempest, and had, as to such damage, the effect of exonerating the tenant from liability for waste occasioned by tempest, though due to negligence on his part; but he held that such damage would be merely permissive waste for which the tenant for years was not legally liable, relying to some extent on his previous decision as to tenants for life, in *Patterson* v. *Central Canada L. & S. Co.* supra, but, on appeal from this judgment, this curious result was arrived at, viz., that the Divisional Court held that the result was right, but the reasons were wrong, and tenants for years are, in the absence of any contract to the contrary, liable for permissive waste, but that the lease in question did not exonerate the tenant from such liability, because neither wear and tear, nor damages by fire or tempest not due to the tenant's own negligence are within the category of permissive waste at all, notwithstanding the decision of Kekewich, J., in *Davies* v. *Davies*, 34 Ch.D. 499, to the contrary, and it was further held that the exception did not have the effect of relieving the tenant from liability for waste if the damage by tempest was attributable to negligence on his part. The lease was therefore held

valid and the decision of the Chancellor was affirmed, but upon grounds entirely different from those on which the original decision was based.

The law on this point may, therefore, appear to be in Ontario in the same illogical condition in which it also appears to be in England, viz., that tenants for life are not liable for permissive waste, but tenants for years are: see Fawcett's Landlord and Tenant (1905), p. 352; that is, so far as judicial decisions are concerned.

But it is submitted that since the consolidation and revision of the Imperial Statutes in R.S.O. (1897) vol. 3, the liability of lessees for life, and years, for voluntary or permissive waste in Ontario is reasonably plain, and the only doubt there can be is in regard to that class of tenants for life (other than tenants by curtesy, and dowresses,) who are not in the position of lessees.

In order to arrive at a proper conclusion as to their liability, it is necessary to bear in mind that waste is an active or passive injury to a tenement by a person rightfully in possession, wherein it differs from trespass, which is a tortious act done by a stranger. Secondly, that according to ancient writers, the only persons who were liable for waste at common law were tenants by curtesy, tenants in dower, and guardians in chivalry; and the reason for this, as stated by Coke, and generally accepted, was because tenants of this kind held by virtue of estates created by law, and the law, for the protection of the remainderman and infant heir, annexed the obligation that such tenants should not be guilty of waste; whereas in the case of tenants for life or years, their estates were created by the owner of the fee who might have provided against the commission of waste by the tenant: Co. Lit. 54a, 300; Co. Inst. 145.

Some doubt was cast on this by Reeves, in his History of English Law, upon the presumed authority of Bracton: 1 Reeves' His. 386, who thought that all tenants for life were liable at common law for waste; but Chief Baron Comyn, whose opinion alone was said by Lord Kenyon to be an authority, declares in his Digest that "By the common law, waste did not lie against

lessee for life or years, for it was laches in the lessor that he did not provide against waste:" Com. Dig., tit. Waste A. 2; and see Cruise's Dig. vol. 1, p. 119, s. 25. It has been remarked by a learned judge in the Connecticut Supreme Court that "If it be said that the persons whose works are cited, found themselves on the doctrine and reasons of Sir Edward Coke, it will not be denied. It only proves that the authority of Bracton cannot stand in competition with the transcendent authority of the great law luminary in the opinion of celebrated jurists, perfectly capable of appreciating their respective merits," per Hosmer, C.J., 3 Conn. p. 488, and see Doc. & Stud. pp. 102-3 (Muchall's ed.).

If Lord Coke is right, then it follows that the liability for waste, except in the cases provided for by the common law, is the result of statute law, and the liability only extends to those tenants to whom the statute, in terms or by necessary implication, applies.

The only statutes which impose liability on tenants for life or lessees for years are the Statutes of Marlbridge and Gloucester.

The Statute of Gloucester (6 Edw. I, c. 5) as now revised and consolidated in Ontario R.S.O. (1897) c. 330, s. 21, reads as follows: "A tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured." And here we may note that as regards tenants by curtesy and tenants in dower, the statute is merely declaratory of the common law, but as regards other tenants for life, and tenants for years, it imposes a liability, which as we have seen did not exist at common law, if we accept Sir Edward Coke and Littleton as authorities.

The Statute of Marlbridge (52 Henry III. c. 23), which is now revised and consolidated in Ontario as R.S.O. 1897, c. 330, s. 23, reads as follows: "Lessees making or suffering waste on the demised premises without license of the lessors shall be liable for the full damage so occasioned." This it may be ob-

served, was the earlier statute in point of time, and this difference between the two sections is to be noted, viz., that while the Statute of Marlbridge is confined to lessees for life or years, the Statute of Gloucester includes all tenants for life, whether holding under lease or otherwise; and while the Statute of Gloucester as revised (as in the original) merely speaks of "waste," the Statute of Marlbridge, as revised, expressly includes those "suffering" waste, which is but another mode of saying "permitting waste." But it is also to be noticed that neither statute includes within its provisions tenants at will, or at sufferance, neither do the words used expressly include tenants for a year, or less than a year, or tenants from year to year.

Littleton, however, says (s. 67): "Also, if tenements be let to a man for a term of half a year, or for a quarter of a year, etc., in this case if the lessee commits waste the lessor shall have a writ of waste against him, and the writ shall say *quod tenet ad terminum annorum;* but he shall have a special declaration upon the truth of the matter, and the Court shall not abate the writ, because he cannot have any other writ upon the matter." This, as appears by Coke's comment, was due to the fact that the form of the writ of waste had been settled under the authority of an Act of Parliament, and could not be changed without the like authority, and Coke on this section at Co. Lit. 54(*b*), says: "In this particular case the Statute of Gloucester c. 5, which giveth the action of waste against the lessee for life or years (which lay not against them at the common law) speaketh of one that holdeth for term of years in the plural number; and yet here it appeareth by the authority of Littleton, that although it be a penal law whereby treble damages, and the place wasted, shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the same remedy though it be out of the letter of the law, for qui hæret in litera hæret in cortice." We may venture to doubt whether this is perfectly sound reasoning and whether all the authorities noted in the margin bear out this comment, the citation from Bract. Lib. 4, pp. 315-317, does not, neither

does Britton, pp. 162, 168; nor 37 H.6. 26: and it would seem improbable that Bracton or Britton, who is supposed to have died in 1268, could furnish any light on the construction of statutes passed in 1267 and 1278. But 7 H.7. 2 and 14 H.8. 12, support Coke's comment, and so does Fitzherbert Nat. Brev. 60, although he adds, a quære, see Littleton 14," but whether this is p. 14 or s. 14 is not clear, but s. 14 of Littleton does not appear to throw any light on the subject. Doctor and Student (Muchall's ed.) 107, 113, also supports the text.

But Littleton in effect lays it down that tenants at will were not within the Statute of Marlbridge. In s. 71 he says: "Also, if a house be leased at will the lessee is not bound to sustain or repair the house as tenant for term of years is tyed. But if tenant at will commit voluntary waste as in pulling down of houses or felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee," and this, as Coke in his comment says, because the act amounted to a determination of the will. With this statement of the law agree *The Countess of Salop* v. *Crompton*, Cr. Eliz. 777, 784; *Panton* v. *Isham*, 3 Lev. 359, and *Gibson* v. *Wells*, 1 B. & P. 290.

In *The Countess of Salop* v. *Crompton*, a tenant at will was sued for having negligently permitted the demised premises to be burnt, and also for damages thereby occasioned to other premises of the plaintiff. The plaintiff recovered a verdict of £15 for damages to the demised premises and £80 for the damage to the other premises. "But all the Court held in this case that for the negligent burning, this nor any action lies; for he comes in by the act of the party, and it was folly that he did not provide for it." But Popham and Fenner, JJ. agreed that trespass would lie against a tenant at will for wilful destruction of the demised property to which, on the case being again mentioned (see p. 784), Gawdy and Clench, JJ., also agreed "because the privity of the lease is determined by this act done which his estate permits not," and it was said a lessee at will does not take "any charge upon him, but to occupy and pay his rent;" and it was also said, "none will affirm if a lessee at will

suffers his house to fall down, that an action should lie against him, for he is not bound to repair it."

It may therefore be considered to have been early and well settled that the expression of "lessees for years" does not include lessees at will. Tenants at sufferance are also not included because they are in by wrong. Both tenants at will, and tenants at sufferance are, however, liable in trespass for any injuries they may do to the premises whilst in their occupation.

But as regards lessees who are within the statute Lord Coke appears to have had no doubt that the words of both the Statutes of Marlbridge and Gloucester included both active and permissive waste. Speaking of the Statute of Marlbridge he says: "To do or make waste, in legal understanding in this place includes as well permissive waste, which is waste by reason of omission or not doing, as for want of reparation, as waste by reason of commission, as to cut down timber trees, or prostrate houses, or the like: and the same word hath the Statute of Gloucester, c. 5, *que aver fait waste*, and yet is understood as well of passive as active waste." 2 Inst. 145, and see per Serjt. Salkeld arguendo in *Hammond* v. *Webb*, 10 Mod. 282.

There are two old cases in Moore's King's Bench Reports which shew that the judges of the time of Elizabeth understood the statutes to cover permissive waste. In an anonymous case, Trin. T. 6, Eliz. at p. 62, we find the waste assigned was in respect of a marsh for that the lessee suffered a wall of the sea adjoining the marsh to be ruinous, by reason of which, by the flow and reflow of the sea the land was surrounded." Carus, J., said: "This assignment of waste is not good ("n'est bone") for the overflowing of the sea does not constitute waste, for the sea cannot be confined within any limit; it is like assigning waste in a house which was destroyed by tempest. Harper (whether a judge or counsel is not clear) suggests if the wind divide the thatch of the house in a small part (peel) the lessee is held bound to restore it, which Dyer, C.J., conceded; and if he suffer that to continue and does not repair it, then at last

when the house is destroyed by tempest, that is waste. Dyer, C.J., further says, "It seems reasonable that if a little breach was in the bank or wall and the lessee does not repair it but suffers it to continue, then, after the violence of the sea breaks all the wall and surrounds the land, that that is waste; for that might be amended by the lessee at the commencement; but if it were suddenly done by violence of the water, then that might be pleaded in bar of the action. But he said it was a rare case, and asked the clerks if they had any precedents for such assignment, and they said they had not."

In Griffith's case in the same Term reported on p. 69, the waste assigned was that the lessee suffered the banks of the River Trent to be unrepaired whereby the water broke the banks and surrounded the land, and it was held by all the justices that that was waste, because the lessee might have kept the river within its banks, and it was unlike the sea which cannot be restrained.

The early cases collected in vol. 30 of the Am. & Eng. Enc. of Law (p. 260, note 2), shew very clearly that down to the time of the publication of Blackstone's commentaries, and for some time after, that there was no question at law that the word 'waste' in the Statutes of Marlbridge and Gloucester included permissive waste.

A dowress was liable for permissive waste, see 18 Edw. III. cas. 72, but we must remember that dowresses were liable for waste at common law, and therefore this case may not be strictly referable to the statute: see however, Doct. & Stud. 113, post.

It was not until after the publication of Blackstone's Commentaries that the Courts seem first to have begun to make inroads on the previously accepted construction of the Statutes of Gloucester and Marlbridge. Although, as we have seen, the earlier authorities clearly laid it down, that all lessees (other than tenants at will) were within the Statute of Marlbridge, and though they were equally unanimous that the waste referred to in that statute included both active and permissive waste, yet the Courts of law without denying that all lessees other than

tenants at will are within the statute, nevertheless decided that while some lessees are liable for permissive waste causing consequential damage, others are not, thereby apparently leading to the inference that though the statute makes no distinction between lessees who are within its scope, it must be construed as if it did; which does not seem to be a very satisfactory conclusion.

Thus, although the earlier authorities, as we have shewn, had held that tenants from year to year were within the Statute of Marlbridge, yet later nisi prius decisions have been given which, it has been assumed, establish that though liable for active, they are not liable for permissive waste: *Anworth* v. *Johnson*, 5 C. & P. 241; *Toriano* v. *Young*, 6 C. & P. 12; *Leach* v. *Thomas*, 7 C. & P. 327; *Horsefall* v. *Mather*, Holt 7. If that is really the effect of these decisions, they seem to be a clear judicial departure from the ancient interpretation of the statute: see Co. Lit. 52(*b*), *et seq.*, and 54(*b*); and inasmuch as it is only by virtue of the statute that such tenants are liable for active waste, and the statute, it is conceded, applies to both active and permissive waste, it becomes hard to reconcile these judicial departures with sound reason. In *Anworth* v. *Johnson*, Lord Tenterden, C.J., said that a tenant from year to year is only bound to keep the house wind and water tight, and in *Leach* v. *Thomas*, a similar rule was laid down by Patteson, J. It appeared by Lord Tenterden's charge, however, that the greater part of what was claimed by the plaintiff in *Anworth* v. *Johnson* consisted of new materials where the old were actually worn out. So that that case cannot be considered very conclusive, because ordinary wear and tear is not waste at all; furthermore, a neglect to keep the demised premises wind and water tight, would, if damage resulted, be permissive waste for which, according to the dicta of Tenterden, C.J. and Patteson, J., the tenant would be liable. It may, therefore, be doubted whether either case has the effect attributed to it. *Toriano* v. *Young* is still less conclusive, for though the defendant was treated by the Court as though he were a tenant from year to year, he was in reality

a tenant overholding under a lease which expired in 1829, and the plaintiff's claim was for damages for permissive waste since that date. It is therefore clear that the defendant was really a tenant at sufferance and therefore not within the Statute of Marlbridge. This case therefore is no authority for the proposition that a tenant from year to year is not liable for permissive waste.

Another nisi prius decision of Gibbs, C.J., in *Horsefall* v. *Mather*, Holt N.P. 7, seems equally unsatisfactory and inconclusive. The action was in assumpsit and the declaration stated that in consideration that the defendant had become and was tenant to the plaintiff of a certain messuage he undertook to keep the same in good and tenantable repair; to uphold and support, and to deliver the same to the plaintiff at the expiration of his term in the condition in which he received it. The evidence was that the tenement was in good repair when the defendant entered, but upon quitting possession he had damaged the ceiling, walls and other parts of the house by removing shelves and fixtures, and had not left the house in good tenantable condition. The action, it will be observed, was not on the case for waste, but in assumpsit on an implied promise to keep in repair, and the chief justice said: "I am of opinion that the plaintiff is not entitled to recover. He has laid his ground too broadly. The defendant is answerable to some extent but not to the extent stated in the declaration. Can it be contended that a tenant at will is answerable if premises are burned down—would he be bound to rebuild if they became ruinous by any other accident? And yet if bound to repair generally he might be called upon to this extent. He is bound to use the premises in a husband-like manner; the law implies this duty and no more. I am sure it has always been holden that a tenant from year to year is not liable to general repairs." This is the whole of the judgment as reported and all that it really decides is that in an action of assumpsit if the plaintiff asked too much, he could not get even what he was entitled to. The liability for permissive waste under the Statute of Marlbridge is not even referred

to. The observations about tenants at will had clearly nothing to do with the case. Then the reporter adds in a note, "Although an action on the case may be maintained against a tenant for commissive or wilful waste, no action can be maintained for permissive waste only: *Gibson* v. *Wells*, 1 N.R. 291," which is a statement altogether unjustified by the case of *Gibson* v. *Wells*, which only decided that such an action would not lie against a tenant at will. But this note is useful as helping to shew how the impression gained currency that an action for permissive waste would not lie against any tenants, whether for life or years (see also the Dig. of Eng. Cas. Law, vol. 14, p. 1847). But the argument that because tenants at will are not liable for permissive waste, therefore tenants for life and tenants for years are not liable, is obviously fallacious. These mistatements of the law were considered by Parke, B., who delivered the judgment of the Court of Exchequer in *Yellowly* v. *Gower*, 11 Ex. 274, and the ancient construction of the Statute of Marlbridge was approved. "We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53, *Harnet* v. *Maitland*, 16 M. & W. 257, though the degree of repairs required from a tenant from year to year by modern decisions is much limited: Smith's Landlord and Tenant, 195." This view was adopted by Kekewich, J., in *Davies* v. *Davies*, 38 Ch.D. 499.

Jones v. *Hill*, I Moore 100, is another case which has been cited as supporting the view that a tenant for years is not liable for permissive waste, but all that it actually decided is, that where there is an express covenant by a lessee to repair, there an action on the case for waste does not lie because "such a contract is a total waiver of tort." This, as the reporter notes, agrees with what is said in Hargrave and Butler's note 359, to Co. Lit. 54 (*b*), viz.: "But if lessee covenants to repair and doth not repair, waste will not lie, 29 E. 3, 43; 21 H. 6, 6; Dy. 198, Hal Moss." In *Martin* v. *Gilham*, 7 A. & E. 540, the plaintiff's declaration charged merely active waste against the defendant,

a tenant from year to year, and the evidence only established a case of permissive waste, and Lord Denman, C.J., said: "It would be confounding things which are different, to say that a charge of voluntary waste is a charge of permissive waste." The plaintiff therefore failed to recover, not because the defendant was not liable for permissive waste, but because the evidence failed to support the waste charged. Properly considered therefore, none of these cases can really be accounted as effectively overruling the ancient interpretation put upon the Statutes of Marlbridge and Gloucester.

There is a passage in Doctor and Student (Muchall's ed.), p. 113, which may here be noted as confirmatory of the ancient view, where it is said: "It hath been used as an ancient maxim of the law, that tenant by the curtesy and tenant in dower should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done, and when an action of waste was given after against a tenant for term of life, then he was taken to be in the same case, as to the point of waste, as tenant by the curtesy and tenant in dower was, that is to say that he shall do no waste, nor suffer none to be done; for there is another maxim in the law of England, that all cases like unto other cases shall be judged after the same law as other cases be, and sith no reason of diversity can be assigned why the tenant for life after an action of waste was given against him, should have any more favour in the law than the tenant by the curtesy, or tenant in dower should, therefore, he is put under the same maxim as they be, that is to say, that he shall do no waste, nor suffer none to be done." Doctor and Student, it may be remarked, was first published in 1518.

The question of the liability of tenants for life and years for permissive waste seems to have been further confused by the erroneous supposition that Courts of Equity had held that they were not liable for permissive waste, a misconception which plainly arises from a misunderstanding of the attitude of Courts of Equity on the subject. The jurisdiction of Courts of Equity in regard to waste was a concurrent jurisdiction with

that of Courts of law. The remedy afforded in equity was found to be more speedy and efficacious than by action at law, and therefore suits to restrain commissive waste practically superseded actions for waste at law in which only damages were recoverable. But the foundation of the interference by Courts of Equity was the prevention of irreparable damage, and the inadequacy of the remedy at law. Where active waste was committed or threatened the Court of Chancery would by injunction restrain it, and, as an incident to the relief by injunction, would also grant an account of the waste committed, but whether the Court would grant an account of waste committed and decree satisfaction where an injunction was not required or grantable, was a point on which there was formerly a difference of opinion: see Eden on Injunction, p. 207. In *Jesus College* v. *Bloom*, 3 Atk. 264, Lord Hardwicke refused to grant an account for waste because no injunction was prayed (see also *Higginbotham* v. *Hawkins*, L.R. 7 Ch. 676), whereas in *Garth* v. *Colton*, 3 Atk. 751, he granted the relief.

It may be further remarked that in order to give equitable relief in cases of permissive waste by injunction, would involve the granting of a mandatory injunction. It would not be a case for restraining a defendant from doing something, but it would be necessary to restrain him from suffering something to remain undone, e.g., the making of required repairs. Permissive waste may, in many cases, be the result of poverty or inability on the part of the tenant to furnish money to make repairs, and it never has been the course of the Court to enforce what in substance are mere pecuniary demands by injunction, except against persons in a fiduciary position. It must be remembered, too, that the disobedience of injunctions is a contempt of Court, and punishable by attachment, and to grant injunctions to enforce pecuniary demands would be practically an evasion of the law abolishing imprisonment for debt. Permissive waste has therefore never in equity been considered a proper subject for relief by injunction, although in the case of *Coldwall* v. *Baylis*, 2 Mer. 408, an

injunction against the commission of active waste appears to have been so worded as to cover also future permissive waste. Whether advisedly or per incuriam it is hard to say, quite possibly the latter. The ordinary purpose for which mandatory injunctions are granted is to compel a party to undo some wrongful act which he has done, not to perform some act which he has omitted to do.

From an early date, therefore, injunctions to restrain merely permissive waste have been refused, not because the plaintiff had not a legal right, but because equity did not consider it was such a right as could be enforced by injunction. *Lord Castlemain* v. *Craven*, 22 Vin. Ab. tit. Waste, p. 523; *Coffin* v. *Coffin* (1821), Jac. 70; *Lansdowne* v. *Lansdowne*, 1 Jac. & W. 522; *Powys* v. *Blagrave*, 4 D. M. & G. 448. Other cases might be mentioned where the Court of Chancery has refused to enforce legal demands by injunction. There is a well-known case of *Lumley* v. *Wagner*, 1 D. M. & G. 604, where the Court restrained a singer who had contracted to sing for the plaintiff from singing elsewhere, or for anybody else, although a mandatory injunction commanding her to sing for the plaintiff would not be granted: see also *Montague* v. *Flockton*, L.R. 16 Eq. 189. But it would be a mistake to suppose that this was because the defendant was not liable at law for breach of her contract to sing for the plaintiff.

So it is equally a mistake to suppose, that because a Court of Equity would not grant a mandatory injunction in the case of permissive waste by a tenant for life or years, it was because such tenants were not legally liable for permissive waste. The true ground being that permissive waste, in the estimation of Courts of Equity, could be sufficiently compensated by damages in an action at law: see per Hardwicke, L.C., in *Jesus College* v. *Bloom*, 3 Atk. 262; and while equity would restrain the commission of active waste, it would not interfere where the defendant was merely doing nothing, and from the nature of such cases, it is easy to see that an interim mandatory injunction could not be safely granted. But in reading cases and text

writers we find that this refusal to grant relief in equity against permissive waste, has come to be treated by some judges and writers as though Courts of Equity had decided that tenants for life and tenants for years are not liable for permissive waste. That some common law judges have taken this view of equity is apparent from the case of *Barnes* v. *Dowling*, 44 L.T. N.S. 809, where Lopes, J., who delivered the judgment of the Court said: "The legal liability of a tenant for life for waste may be doubtful, but authority is strong to shew there is no liability for permissive waste in equity." This statement is perfectly true, but the inference which the learned judge seems to draw from it, viz., that Courts of Equity held that tenants for life are not legally liable for permissive waste; it is submitted, for the reasons above given, is quite erroneous.

But if common law lawyers have failed to appreciate equity decisions and practice respecting permissive waste, some equity lawyers seem to have equally failed to grasp the true effect of the decisions at law on the subject. In *Powys* v. *Blagrave*, 4 D. M. & G. 448, we find a Lord Chancellor, referring to the liability of a tenant for life for permissive waste, saying: "But then it is argued, independently of the trust, that it is the duty of a tenant for life to repair, equitas sequitur legem. But even legal liability now is very doubtful, *Gibson* v. *Wells; Herne* v. *Benbow*," neither of which cases it may be observed cast any doubt whatever on the legal liability of tenants for life for permissive waste. *Gibson* v. *Wells* has been already referred to and as we have shewn was the case of a tenant at will, and therefore had no bearing on the case of a tenant for life; and the facts of *Herne* v. *Benbow*, 4 Taunt. 764, were as follows: The plaintiff sued a defendant, a tenant under a lease containing no covenant for repair, in tort, for permissive waste, the defendant suffered judgment by default and on an assessment of damages before the under sheriff, the jury were directed to allow such sum as would put the premises in tenantable repair. The jury rejected that rule and gave small damages. An application was then made on behalf of the plaintiff for a new assessment of damages which was refused. The judgment

containing these words: "If this action could be maintained a lessor might declare in case for not occupying in a husband-like manner which cannot be. The facts alleged are permissive waste, and an action on the case does not lie against a tenant for permissive waste: *Countess of Shrewsbury's Case*, 5 Co. 13." The case cited is the same case as *Countess of Salop* v. *Crompton*, above referred to, which, as we have seen, was the case of a tenant at will, and had therefore no application to the case in hand, unless it was also a case of a tenancy at will, which does not appear, and while the statement may be true that an action would not lie for not occupying in a husband-like manner, if it only resulted in injury to the tenant himself, still it would seem to be actionable if it resulted in injury to the inheritance, in the same manner as active waste of a like nature: See per Gibb, C.J., in *Horsefall* v. *Mather*, supra, Co. Lit. 536; *Simmons* v. *Norton*, 5 M. & P. 645, 7 Bing. 640; *Wetherell* v. *Howells*, 1 Camp. 227; or converting land to other uses as, e.g., into a cemetery: *Cregan* v. *Cullen*, 16 Ir. Ch. 339; *Hunt* v. *Browne*, Sau. & Sc. 178.

In the case of *Woodhouse* v. *Walker* (1880), 5 Q.B.D. 404, 42 L.T. 770, an action against a deceased tenant for life's personal representative for permissive waste suffered by the tenant for life in her lifetime, was held to be maintainable. In that case the land had been devised by a testator to his wife "during her life, she keeping the same in repair." It is submitted that the words "she keeping the same in repair," was merely a statement of the duty which the statute imposed on her. Her estate could only be liable on the supposition that she herself if living would be also liable. Formerly the right of action in respect of waste whether active or permissive would subject to the exception in case of active waste hereafter mentioned have died with the tenant for life, but now under R.S.O. c. 129, s. 11 (see Impl. St. 3 & 4 W. 4, c. 42, s. 2), such actions may be brought against the representatives of a deceased wrongdoer (see notes to *Greene* v. *Cole*, 2 Saunders 251), but even before the statute last referred to, where the wrongdoer's estate had benefited by the waste, his estate might have been made liable

therefor at law, after his death; see *Hambly* v. *Trott*, 1 Cowp. 371.

The case of *Woodhouse* v. *Walker* was followed in *Re Williames, Andrew* v. *Williames* (1884) 52 L.T. 40, affirmed by the Court of Appeal, (Brett, M.R. and Bagallay and Fry, L.JJ.), 54 L.T. 105, and though the Court held that the liability for permissive waste arose by reason that a duty to repair was imposed by the instrument creating the life estate, yet surely, as has been already said, that stipulation creates no higher or greater duty than the Statute of Gloucester imposes: see also *Re Skingley*, 3 Mc. N. & G. 221; *Gregg* v. *Cootes*, 23 Beav. 33.

But assuming that the imposition of a condition by the instrument creating the estate that a tenant for life is to repair does impose a greater liability than the Statute of Gloucester, then at all events as to such tenants for life according to the above cases there is a liability for permissive waste. But it is submitted that altogether apart from such conditions, the liability of tenants for life under the Statutes of Marlbridge and Gloucester is perfectly plain according to the ancient interpretation of those statutes, and that without any such conditions or provisoes there is a liability on tenants for life both for active and permissive waste.

In view of what has been already said it is somewhat difficult to understand the language of Kay, J., in *Re Cartwright*, 41 Ch.D. 532. "At the present day it would certainly require either an Act of Parliament, or a very deliberate decision of a Court of very great authority, to establish the law that a tenant for life is liable to a remainderman in case he should have permitted the buildings on the land to fall into a state of dilapidation." The Statute of Gloucester as interpreted for 500 years, seems a pretty good foundation for the doctrine which he impugns and what is really needed to support the decision, *In re Cartwright* is an act repealing the Statutes of Gloucester and Marlbridge. *Re Cartwright*, moreover, seems inconsistent with another decision of Kay, J., himself, *In re Bradbrooke*, 56 L.T. 106. *In re Cartwright* was followed by North, J., *In re Parry* (1900) 1 Ch. 160; and by Boyd, C., in *Patterson* v. *Cen-*

tral Canada L. & S. Co. (1898), 29 Ont. 134, and by Teetzel, J., in *Monro* v. *Toronto Ry. Co.* (1904), 9 O.L.R. at p. 305, but as Teetzel, J., concurred in the judgment of *Morris* v. *Cairncross*, it may be taken that he, at all events, is now of the opinion that his previous opinion in *Monro* v. *Toronto Ry.* was erroneous.

Although it be, as we have endeavoured to shew, that all tenants for life and years in the absence of any contract or stipulation to the contrary, are liable for permissive waste, there is a distinction drawn in the cases as to the extent of that liability. It would appear from the judgment of the Court of Appeal (Cotton, Bowen and Fry, L.JJ.), *In re Courtier, Cole* v. *Courtier* (1886), 34 Ch.D. 136; 55 L.T. 547, that a tenant for life is not required to keep the premises in any better condition than they are in when he enters, and see Co. Lit. 53a (sed vide *Re Bradbook*, 56 L.T. 106); and in the case of tenants from year to year, or for a year, or half a year, the measure of repair required of them may be less than in the case of a tenant for years or for life. The statute, however, as we have said, makes no such distinction. Formerly, as we have seen, equity would ordinarily not decree merely an account in cases of waste, except in special circumstances, as in *Garth* v. *Cotton*, supra, and would give no relief at all in cases of permissive waste. The High Court being armed with all the powers of the former Courts of law and equity may, if it sees fit, direct the damages in an action for permissive waste to be ascertained by a master, as well as by a jury, but no doubt the same reasons which induced the Court of Chancery to refuse to interfere by mandatory injunction in cases of permissive waste, will still prevail in the High Court; see *Lawson* v. *Crawford*, ante p. 40. The Judicature Act has also had the effect of converting that inequitable form of waste which was formerly known by the strangely incongruous title of "equitable waste," into what is known by the equally incongruous term of "legal waste:" see s. 58(2).

To return to the inquiry with which we started, viz., whether a tenant for life, or years is liable in the absence of any contract or limitation to the contrary, for permissive waste, we

should say with all due respect to the adverse opinions to which we have referred, that the answer ought to be in the affirmative, and that the case of *Morris* v. *Cairncross* ought to be taken to have settled the point as far as the Province of Ontario is concerned.

GEO. S. HOLMESTED.

JUDGE OF EXCHEQUER COURT.

The Dominion Government has seldom made an appointment to the Bench that will meet with more general approval than that of Mr. Walter G. P. Cassels, K.C., to the Exchequer Court. That the position should have been filled without delay was imperative, in view of the amount of work demanding attention. Mr Cassels is known throughout Canada as one of the leaders of the Ontario Bar, with a wide and varied knowledge, and a courteous address. He will be in all respects a fitting successor to the late Judge Burbidge. The new judge is recognized as one of the best patent lawyers in Canada, and for some years past has been in nearly every patent case before the Exchequer Court; and questions affecting patents have become particularly numerous in that Court during recent years. Consequently Judge Cassels's knowledge will be specially applicable. We congratulate the new judge on his appointment to that very important federal Court.

Various names have been spoken of as desirable to fill the vacancy in the Railway Board caused by the death of Mr. Killam:—Chief Justice Mulock (who, however, has stated that he would not undertake it); Mr. Justice Mabee, and Mr. E. F. B. Johnston, K.C. Either of these would be excellent appointments; and we do not know of any who possess to as great a degree as either of these the qualifications necessary for this most important position. The name of Mr. F. H. Chrysler has also been suggested as one who would make a most useful member of the Board, and with this we entirely agree.

REVIEW OF CURRENT ENGLISH CASES.

BANKRUPTCY—COSTS ORDERED TO BE PAID BY CREDITOR TO TRUSTEE—SET-OFF OF COSTS AGAINST DIVIDEND—ASSIGNEE OF CREDITOR.

In re Mayne (1907) 2 K.B. 899, although a case in bankruptcy, deserves a passing notice. A creditor of the bankrupt lodged a proof against the estate which was contested, and in the result the creditor was ordered to pay the costs of the contestation to the trustee in bankruptcy. The creditor then assigned her claim to her solicitors who lodged a new proof which was allowed. The costs not having been paid, the trustee claimed the right to deduct them from any dividend payable in respect of the claim; this was resisted by the assignees but Bigham, J., gave effect to the trustee's contention.

PRACTICE—EXECUTION—MONEY BELONGING TO DEBTOR—DEATH OF DEBTOR BEFORE SEIZURE OF HIS MONEY BY SHERIFF—(R.S.O. c. 77, s. 18.)

In *Johnson* v. *Pickering* (1908) 1 K.B. 1 the Court of Appeal (Moulton, Farwell and Buckley, L.JJ.) have been unable to agree with the decision of Lawrance, J., (1907) 2 K.B. 437 (noted ante, vol. 43, p. 693). It may be remembered that the question in dispute was whether certain money which had been brought into an execution debtor's house, after a seizure under fi. fa. had been made of his household effects, and while the sheriff was in possession, could be said to be bound by the writ. The sheriff was ignorant of the existence of the money. The debtor having died and an order having been made for the administration of his estate in bankruptcy, the trustee in bankruptcy claimed the money which had been discovered after the debtor's death by his widow. Lawrance, J., thought the money was bound by the execution, but Moulton, L.J., was of the opinion that the statute authorizing the seizure of money does not have the effect of making the fi. fa. binding on money liable to execution, either as at common law from the date of the writ, or as under the Sale of Goods Act 1893, s. 26, from the delivery of the writ to the sheriff (R.S.O. c. 338, s. 11), but merely from

the actual seizure of the money by the sheriff and here there having been no actual seizure in the debtor's lifetime, it was not bound by the writ after his death as against the trustee in bankruptcy who was entitled to the money as he claimed—Buckley, L.J., though agreeing, does so with hesitation—and we should say with good reason. How far the decision is applicable in Ontario seems doubtful.

CHEQUE—FORGED INDORSEMENT—PAYEE—FICTITIOUS PAYEE—BELIEF OF DRAWER—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61) S. 7, SUB-S. 3—(R.S.C. C. 119, S. 21(5).)

In *Macbeth* v. *North and South Wales Bank* (1908) 1 K.B. 13 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have affirmed the judgment of Bray, J., (1906) 2 K.B. 718 (noted ante, vol. 43, p. 13). The facts of the case were briefly as follows. One White falsely represented to the plaintiff that he had agreed to purchase from one Kerr certain shares, and had arranged to resell the shares at a profit, and induced the plaintiff to give him a cheque on the Clydesdale Bank in favour of Kerr for the purchase money for the shares. White, instead of handing the cheque to Kerr, forged his name to the indorsement of the cheque which he then deposited in the defendant bank, which collected the amount from the Clydesdale Bank. It turned out that White had made no agreement to purchase the shares from Kerr and that Kerr as a matter of fact owned no such shares. The Court of Appeal agreed with Bray, J., that Kerr could not be said to be a "fictitious person," within s. 7, sub-s. 3, of the Bills of Exchange Act 1882 (R.S.C. c. 119, s. 21(5), and therefore that the defendant bank was liable to the plaintiff for the amount of the cheque which they had received upon the forged indorsement.

EASEMENT—LIGHT—LESSEE ENTITLED TO EASEMENT—REVERSION OF DOMINANT TENEMENT CONVEYED TO OWNER OF SERVIENT TENEMENT—UNITY OF SEISIN—EXTINGUISHMENT OF EASEMENT—PRESCRIPTION ACT, 1832 (2-3 WM. IV. C. 71), S. 3—(R.S.O. C. 133, S. 36.)

In *Richardson* v. *Graham* (1908) 1 K.B. 39 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L. JJ.), following the recent decision of the House of Lords in *Morgan* v. *Fear* (1907) A.C. 425 (noted ante, p. 29) held, that

where the lessee of premises has, under the Prescription Act 1832 (2-3 Wm. IV. c. 71) s. 3—(R.S.O. c. 133, s. 36), acquired an easement of light, his lessor cannot, by conveying the reversion to the owner of the fee of the servient tenement, defeat or extinguish the easement so far as the lessee is concerned.

LANDLORD AND TENANT—TRADE FIXTURE—HIRE PURCHASE AGREEMENT — CHATTEL AFFIXED TO FREEHOLD — GAS ENGINE — DISTRESS.

Crossley v. *Lee* (1908) 1 K.B. 86 was an appeal from a County Court, and the question for decision was whether a gas engine which had been procured under a hire purchase agreement by a tenant of certain premises, and secured to the floor of the premises by bolts and screws was distrainable for rent. The Divisional Court (Phillimore and Walton, JJ.) held that the engine had been affixed to the freehold, and therefore was not liable to distress, although the tenant might have a right to remove it as a trade fixture, and that the plaintiff was entitled to recover damages for its removal. It is a remarkable circumstance about this case, that the plaintiff was not the tenant, but the person from whom the tenant had got the engine, and who claimed that the engine was his property. It looks, however, as if it was a case of damnum absque injuria, because if the engine were affixed to the freehold as the Court holds it was, then it had ceased to be the plaintiff's property, and therefore even if the distress were wrongful as against the tenant, the plaintiff had no right to complain. In connection with this case it may be well to refer to the recent decision of the Court of Appeal in *Ellis* v. *Glover*, 124 L.T. Jour. 238, where it was held that persons in the same position as the plaintiff in this case, were liable for removing the fixtures without the consent of a mortgagee of the premises.

LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND—COVENANT BY SUB-LESSOR TO PERFORM COVENANTS OF HEAD LEASE OR INDEMNIFY SUB-LESSEE—COVENANT FOR QUIET ENJOYMENT—32 HEN. VIII. C. 34, S. 2—(R.S.O. C. 330, S. 13.)

In *Dewar* v. *Goodman* (1908) 1 K.B. 94 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have affirmed the judgment of Jelf, J., (1907) 1 K.B. 612 (noted ante, vol. 43, p. 399). The action was brought by an assignee

of an under-lessee for breach of covenant by the under-lessor to perform the covenants to repair contained in the head-lease which included other property besides that comprised in the under-lease. The defendant was the assignee of the under-lessor and was entitled to the premises mentioned in the head-lease for the unexpired term subject to the under-lease. The under-lessor having made default in performance of the covenant to repair in the head-lease, the superior landlord had entered and ejected the plaintiff. The Court of Appeal agreed with Jelf, J., that the action was not maintainable, because the covenant to perform the covenants in the head-lease related to premises not demised by the sub-lease, and not being a covenant to be performed on the demised premises, it was merely a collateral covenant which did not bind an assignee of the covenantor though named therein.

ADMINISTRATOR AD COLLIGENDA BONA—LEASE—ENTRY OF ADMINISTRATOR ON LEASEHOLDS—RENT—LIABILITY OF ADMINISTRATOR FOR RENT—USE AND OCCUPATION BY ADMINISTRATOR.

Whitehead v. *Palmer* (1908) 1 K.B. 151 is a case which illustrates the necessity for caution on the part of an administrator in dealing with the leasehold estate of the deceased, if he wishes to protect himself from personal liability for rent. In this case the defendant was appointed administrator ad colligenda bona of a deceased person, but with power to sell the leasehold premises of the estate, the rent of which was £450 a year. On the 7th June he took possession of the premises and endeavoured to sell or sub-let them, but failed. On 24th June a quarter's rent became due. On 23rd August, the rent not having been paid, the lessor commenced an action for recovery of possession and for rent, and mesne profits. Summary judgment for possession was given, and on 18th October defendant went out of possession. The action proceeded to trial before Channell, J., on the claim for rent and mesne profits, and he held that the defendant was personally liable for a proportionate part of the rent from the 7th June until 23rd August and thereafter until he gave up possession for mesne profits at the same rate as the rent reserved by the lease, which appeared to be the fair value of the premises and this, although all the defendant had realized from the premises was £26 5s. 0d. Channell, J., points out that although the rule used formerly to be that an administrator ad colligenda could only collect, and had

no power to sell, yet of late years the Probate Division considered it had greater powers than the old Ecclesiastical Court in this respect.

ASSAULT — SCHOOL MASTER — ASSISTANT TEACHER — CORPORAL PUNISHMENT OF PUPIL—SCHOOL REGULATIONS—NEW TRIAL —BIAS OF JURY—WEIGHT OF EVIDENCE.

In *Mansell* v. *Griffin* (1908) 1 K.B. 160 a Divisional Court (Phillimore and Walton, JJ.) deal somewhat elaborately with an appeal from the order of a judge of a County Court granting a new trial. The action was brought by the plaintiff, a pupil in a public school, against the defendant, an assistant teacher, to recover damages for an assault, the facts being that the defendant had struck the plaintiff with a flat ruler on the arm, for a breach of school discipline. The plaintiff's arm was covered at the time, and the defendant had no knowledge that the plaintiff was, as the fact was, suffering from cartilaginous tumours, and the blows fell on one of these tumours which produced a more serious effect than would have been caused in the case of a child in normal health. The rules of the school provided that corporal punishment of pupils was only to be inflicted by the head master, and all such punishments were to be by birch or cane; but there was no evidence that the parents of the plaintiff had any knowledge of this regulation. The jury found the punishment inflicted was moderate, and that the instrument used was improper according to the school regulations, but was not so hurtful as a birch or cane: that the defendant had exceeded her authority under the regulations, and that there was no damage. On these findings the judge of the County Court entered judgment for the defendant but on the application of the plaintiff granted a new trial on two grounds: (1) A suspicion of bias on the part of the jury, and (2) That the first finding was against the weight of evidence. The Divisional Court held that there was no evidence on which a new trial could be granted on the ground of bias, but on the question of the weight of evidence, which was a matter of discretion, they declined to overrule the County Court judge, but remitted the case to him for reconsideration on that point. On the merits of the case the Divisional Court was of the opinion that the rules as to punishment were domestic regulations, and not being known to the parents, did not affect the implied authority which they might be presumed to have delegated to the defendant to

inflict reasonable punishment; and that, assuming the first and second findings were correct, the jury would be justified in finding a verdict for the defendant.

MUNICIPAL AUTHORITY—PLANS—WRONGFUL REFUSAL OF MUNICIPAL AUTHORITY TO APPROVE OF PLANS—MANDAMUS.

Davis v. *Bromley* (1908) 1 K.B. 170. This was an action by a builder to recover damages against a municipal body for wrongfully refusing to approve of plans of buildings submitted to them by the plaintiff. The plaintiff contended that the plans in all respects were in accordance with the defendant's by-laws, but that the defendants in consequence of a feeling created by previous litigation between the plaintiff and defendants, had wrongfully refused to approve of the plans. The case was tried before Lawrance, J., who non-suited the plaintiff and his judgment was approved of by the Court of Appeal (Villiams, L.J., and Barnes, P.P.D., and Bigham, J.) that Court holding that the plaintiff's remedy was by motion for a mandamus.

GIFT BY HUSBAND TO WIFE—FRAUD ON CREDITORS—SET-OFF BY WIFE OF DEBT DUE BY HUSBAND.

Lister v. *Hooson* (1908) 1 K.B. 174, though a case arising in bankruptcy, deserves attention. The bankrupt made a voluntary gift of £250 to his wife which was set aside on the application of the trustee in bankruptcy, and the wife was ordered to refund the money. She claimed to set-off a debt of £250 due to her by her husband, and Graham, J., held that she was entitled to do this; but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) held that the £250 claimed in respect of the voluntary settlement was not a debt due to the bankrupt from his wife, and therefore she had no right of set-off. Moulton, L.J., however, dissented from this conclusion. But the gift being void as against creditors, it would have been equally void as a preferential payment, and it would have been a curious result if it could have been retained on the ground of set-off.

VOLUNTEER—COMMANDING OFFICER—GOODS SUPPLIED TO VOLUNTEER REGIMENT ON CREDIT OF COMMANDING OFFICER—LIABILITY ON CONTRACT.

Samuel v. *Whetherly* (1908) 1 K.B. 184. In this case the decision of Walton, J., (1907) 1 K.B. 709 (noted ante, vol. 43, p. 446) to the effect that where a commanding officer of a vol-

unteer corps orders goods to be supplied to the corps, he is personally liable on the contract, has now been affirmed by the Court of Appeal (Lord Halsbury, L.C., and Barnes, P.P.D., and Bigham, J.). The Court of Appeal considered it was really a question of fact and that they were unable to dissent from the finding that the commanding officer intended to make himself liable to the defendants for the goods in question.

STATUTE RELIEVING INSURANCE MONEYS FROM LIABILITY FOR DEBTS —CROWN—PREROGATIVE.

Attorney-General v. *Curator of Intestate Estates* (1907) A.C. 519. This was an appeal from the Supreme Court of New South Wales. By an Australian statute the proceeds of insurance policies on the lives of deceased persons were exonerated from liability for the debts of the deceased insured. On behalf of the Crown it was claimed that notwithstanding this provision the Crown was entitled to recover payment of debts out of such moneys. The Colonial Court held that the Crown was by necessary implication bound by the statute, but the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Ashbourne and Macnaghten, and Sir A. Wilson and Sir A. Wills) reversed the decision. We may observe that the debt due to the Crown in this case was payable in respect of the maintenance of the deceased in a public lunatic asylum.

DENTISTS' REGISTER — REMOVAL OF NAME OF DENTIST FROM REGISTER—PROFESSIONAL MISCONDUCT.

In *Clifford* v. *Timms* (1908) A.C. 12, the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten and Atkinson) have dismissed the appeal from the decision of the Court of Appeal (1907) 2 Ch. 236 (noted ante, vol. 43, p. 722). Their Lordships were of the opinion that it was a matter of indifference whether the order of the General Medical Council should be admitted or not, because, as their Lordships held, the advertisements issued by the appellant themselves constituted the gravest professional misconduct by reason of their insinuating that other practitioners did not take the precaution to sterilize their instruments, and that the honour of female patients was not safe in the hands of other practitioners.

Clifford v. *Phillips* (1907) A.C. 15 is an appeal in a case of the like nature, from the judgment of the Court of Appeal (1907) 2 Ch. 236, and met with the like fate.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] MACILREITH *v.* HART. [Feb. 18.

Municipal corporation—Unlawful expenditure—Action by ratepayers—Intervention of Attorney-General—Validating Act—Right of appeal.

Prior to the passing of the Act of the Legislature of Nova Scotia, 7 Edw. VII. c. 61, the city council of Halifax had no authority to pay the expenses of the mayor in attending a convention of the Union of Canadian Municipalities. Where a municipal council illegally pays out the money of the municipality an action to recover it back may, if the council refuses to allow its name to be used, be brought by one, on behalf of all, of the ratepayers and need not be in the name of the Attorney-General. Pending such an action the legislature passed an Act authorizing payment by the council of any sums for principal, interest and costs incurred by the defendant "in the event of judgment being finally recovered by the plaintiff."

Held, per FITZPATRICK, C.J., and MACLENNAN, J., that the words quoted meant that the case was to be prosecuted to a finality including any possible appeal and did not put an end to the appeal to the Supreme Court of Canada.

Per FITZPATRICK, C.J., and MACLENNAN, J.—*Quære*, should not the action have been brought on behalf of all the ratepayers and inhabitants of the municipality?

Appeal dismissed with costs.

F. H. Bell, for appellant. *Allison*, for respondent.

Que.] TANGUAY *v.* CANADIAN ELECTRIC LIGHT CO. [Feb. 18.

Constitutional law—Crown domain—Floatable streams.

The beds of rivers and streams in the Province of Quebec which are floatable for loose logs (bûches perdues) alone are

not a part of the Crown domain, but belong to the riparian owners. Appeal dismissed with costs.

Lane, K.C., for appellants. *Stuart*, K.C., and *Pelletier*, K.C., for respondents.

N.W.T.] UNION INVESTMENT CO. *v.* WELLS. [Feb. 18.

Promissory note—Interest payable by instalments—Indorsement after default—Overdue note—Good faith.

Where a promissory note is payable at a certain time after date with interest payable periodically during its currency, the non-payment of an instalment of such interest does not make it an overdue note.

The doctrine of constructive notice does not apply to bills and notes transferred for value. Appeal allowed with costs.

Ewart, K.C., for appellant. *Hudson*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] RUSSELL *v.* CITY OF TORONTO. [Jan. 7.

Sale of land for taxes—Invalid assessment—Purchase of lands by city—Delegation of powers to official—Personal service on owner—Ejusdem generis.

On a sale of land for taxes for the years 1892-1896, the fullest description given in the assessment rolls, except that in some of the years the depth was given, was that for the year 1893, namely: "Carlaw Avenue East, south end, commencing 120 feet from Queen, vacant land, owner John Russell (the plaintiff) 1242, $8\frac{57}{100}$ acres," not stating on which side of Queen Street it was, and, as a matter of fact, it was 132 feet therefrom, and not vacant. Before the date to which the sale had been adjourned for want of bidders, or by reason of the bidders

being below the amount in arrear, the Board of Control made a report to the Council which, after referring to the powers confined on the municipality to purchase land in such cases, recommended that the assessment commissioner be authorized to purchase and acquire for the city such lands as might be deemed advisable. This was adopted by the council, the owner, who was an alderman, being present, and voting in favour of it. Notice of such adjourned sale and of the intention of the city to purchase was duly advertized in the daily newspapers and in the *Ontario Gazette*, but no written notice was served personally on the owner, but he knew of the land being taxed, and of its being offered for sale, and had paid part of the taxes for the three first years.

Held, MEREDITH, J.A., dissenting, that the description was insufficient, and that personal service of the said notice on the owner was essential.

Per GARROW and MEREDITH, JJ.A.—It was not essential under sections 183 and 184 of the Assessment Act, R.S.O. 1897, c. 224, that the council should consider and determine as to each specific lot to be purchased, but could delegate such power to the assessment commissioner as one of its officers.

Section 8 of 3 Edw. VII. c. 86(O.), after, in general terms, validating and confirming all sales, proceeded to specify irregularities in the assessment, but not specifying an invalid assessment, and as to the failure to comply with the provisions of sections 183 and 184; and concluded: "and notwithstanding any failure or omission by the city or any official of the city to comply with any requirement of the said Acts, and notwithstanding anything to the contrary in either of the said Acts contained," namely, the Assessment Act in the R.S.O., and the Municipal Act, 1903.

Held, MEREDITH, J.A., dissenting, that the defects were not cured by the said Act; that the ejusdem generis doctrine applied, and that the Act was only applicable to the specific cases referred to and cases of a like character.

The sale was therefore held bad, and the deed to the city set aside, and the owner held entitled to redeem the lands on payment of the amount of taxes in arrear and interest. Judgment of MacMahon, J., at the trial affirmed.

H. Cassels, K.C., and *R. S. Cassels*, for plaintiff, respondents. *Fullerton*, K.C., and Chisholm, for defendants, appellants.

Full Court.] DUNCAN *v.* TOWN OF MIDLAND. [Jan. 22.

Municipal law—Local option by-law—Requisite two-thirds majority obtained—Two weeks allowed for scrutiny—Final passing by council before expiry thereof—Refusal to quash.

By sub-s. 11 of s. 141 of R.S.O. 1897 c. 141, the Municipal Council may pass a local option by-law, provided that before the final passing thereof it has been approved by the electors "in the manner provided by the sections in that behalf of the Municipal Act;" but by s. 24 of 6 Edw. VII. c. 47(O.), if three-fifths of the electors voting on the by-law approve of it the council shall within six weeks thereafter finally pass it, and that the duty so imposed may be inforced by mandamas or otherwise.

Held, per OSLER and GARROW, JJ.A.—The provisions of the Municipal Act, sections 369 and 374, as to the ascertainment by the clerk of the result of the voting and as to the right to a scrutiny, apply to a by-law of this kind; and, therefore, the by-law should not be finally passed by the council until the expiration of the two weeks next after the clerk has declared the result of the voting thereon; but as the fact of there being the requisite two-thirds majority and no attempt made to obtain a scrutiny, and the only objection made was as to the faulty third reading, and as this was only a formal and ministerial act, as the council could be compelled to pass the by-law, nothing would be gained by quashing it.

Per MACLAREN and MEREDITH, JJ.A.—The bylaw could properly be passed by the council at any time within the six weeks, notwithstanding the non-expiry of the two weeks for the scrutiny, so long as there is a three-fifths majority, there being nothing to prevent a scrutiny be had afterwards.

MOSS, C.J.O., agreed in the result.

Judgment of Divisional Court affirmed and judgment of MULOCK, C.J., reversed.

J. B. Mackenzie, for appellants. *F. E. Hodgins*, K.C., for respondents.

Full Court.] MONTGOMERY *v.* RYAN. [Jan. 22.

Banks and banking — Overdrawn account—Collateral securities —Transfer to third person—Inspection of account—Interest —Compounding.

R., having had an account with a bank for many years pre-

vious to the 16th July, 1906, was on that day indebted to the bank in a large sum for moneys advanced, for which the bank held securities pledged to them by R. and a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. had been negotiating with the bank for an assignment of the debt due to R., and had been permitted by the bank to see the entries in their books relating to that debt, and, on the day mentioned, the bank assigned to M. the sum due and all the securities held by them, covenanting that the sum named was due and to produce and exhibit their books of account and other evidence of indebtedness, etc. The pledged securities were handed over to M., and afterwards the demand note, upon which he sued R., who brought a cross-action against the bank and M. for an account and damages and other relief.

Held, 1. The bank was not prohibited by section 46 of the Bank Act, 1890, from allowing M., for the purposes mentioned, to inspect the account of R. with the bank; that the agreement was not invalid; that M. was entitled to succeed in his action upon the note, and that R.'s action failed.

2. MEREDITH, J.A., dissenting. The bank were not entitled to charge R. compound interest; but where the bank had made a discount or an advance for a specified time and had reserved the interest in advance, this should be allowed; in other cases, where there had been an overdraft, and payments had been made, interest should be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus to the discharge of so much of the principal.

Judgment of CLUTE, J., reversed.

Shepley, K.C., for the Bank of Montreal, appellants. *C. Millar*, for Montgomery, appellant. *Watson*, K.C., and *N. Sinclair*, for Ryan, respondent.

Full Court.] WOODS *v.* PLUMMER. [Feb. 10.

Slander—Privileged occasion—Malice—Evidence of.

The defendant, the yard master in a railway yard, forthwith reported to the train master, to whom it was his duty to report, that he had seen the plaintiff, a car examiner, break into a car and take therefrom a bundle of handles, whereupon the train

master reported it to the company's detective, and, some four days afterwards, the plaintiff was called into the company's office, the train master, the detective and a couple of other officials being present, and, on his denying any knowledge of the handles, the defendant was called in, and on being questioned thereto, made the charge already referred to. In an action for slander brought by the plaintiff against the defendant the plaintiff stated that shortly before being called into the office he had met the defendant, who informed him of the car having been broken open, but that he did not know who did it.

Held, that while the occasion on which the alleged defamatory statement was made was one of qualified privilege the statement made by the defendant to the plaintiff was evidence of the defendant's disbelief in the truth of the charge, and therefore of malice to go to the jury to displace the protection afforded by the privileged occasion.

Judgment of the Divisional Court reversing the judgment of ANGLIN, J., at the trial, affirmed.

Wallace Nesbitt, K.C., and *Harding*, for appellant. *R. S. Robertson*, for defendant.

HIGH COURT OF JUSTICE.

Boyd, C., Magee, J. Mabee, J.] [Jan. 22.

ALLAN *v.* PLACE.

Fi. fa. goods—Equity of redemption in goods—Bona fide sale before seizure.

On August 15, the defendant agreed to purchase the stock in trade and fixtures of a grocery and meat business carried on by B. at 85 cents on the dollar, on an amount to be ascertained by stock taking. On the 17th she paid $40 on account, and on the 23rd, the stock taking having been completed and the amount ascertained to be $977.69, she gave her cheque for $400 and a promissory note for 6537.69, being the balance of the amount due and entered into possession. The goods and chattels were subject to an overdue chattel mortgage for $810 and interest, on which B. paid the mortgage, $100, in cash, and endorsed over to him the note, which was paid at maturity. On the 18th

the plaintiff placed a fi. fa. goods in the sheriff's hands for $365 on a judgment recovered against B.; but no seizure was made until October 25.

Held, that under R.S.O. 1897, c. 77, s. 17(O.), as amended by 62 Vict. c. 7, s. 9, s.-s. 2(O.), and 3 Edw. VII. c. 7, s. 18(O.), the writ did not bind the goods until seizure, and in the meantime the defendant had acquired the title thereto.

Griffiths, for respondent, appellant. *Lynch Staunton*, K.C., for plaintiff, respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] C. L. B. Co. *v.* X. Y. [Jan. 20.

Execution—Exemptions—Seizure of goods for the price of which the action was brought—Suit on bill of exchange given for such prices.

Under sub-section (*c*) of section 29 of the Executions Act, R.S.M. 1902, c. 58, the books of a professional man are exempt from seizure under execution, but section 36 provides that nothing in the Act shall be construed to exempt from seizure such books if the purchase price of them is the subject of the judgment proceeded upon by way of execution.

The plaintiffs had sued only upon a bill of exchange accepted by the defendant for the price of the books.

Held, that the purchase price of the books seized was, nevertheless, "the subject of the judgment proceeded upon" within the meaning of section 36 of the Act, and that they were not exempt. Black on Executions, par. 217; 18 Cyc. 196; 12 Am. & Eng. Ency. 175, followed.

Burbidge, for plaintiffs. Defendant in person.

Mathers, J.] SCHATSKY *v.* BATEMAN. [Feb. 6.

Practice—Replevin—Præcipe order for.

The plaintiff's action was for replevin of a team of horses. Under Rule 862 of the King's Bench Act, he took out an order on præcipe for the replevin of the team. This order was made out in Form No. 112 referred to in Rule 865 and embodied a direction to the sheriff not only to seize the team, but to hand them over to the plaintiff, contrary to the express provision of Rule 869.

The sheriff carried out the order and turned over the team to the plaintiff.

Held, that the defendants were entitled, under Rule 864, to have the replevin order set aside with costs, the horses to be delivered back to the defendants, the sheriff to be protected from any action and to have his costs paid by defendants and added to their costs.

Levinson, for plaintiff. *Burbidge*, for defendants. *A. B. Hudson*, for the sheriff.

Bench and Bar.

APPOINTMENTS.

Walter Gibson Pringle Cassels, of the City of Toronto, Province of Ontario, one of His Majesty's Counsel, learned in the law, to be the judge of the Exchequer Court of Canada, in the room and stead of the late Mr. Justice Burbidge, deceased.

(March 2.)

The ignoble but embarrassing subject of tips to waiters has been ennobled by a solemn judgment in the English Court of Appeal. The effect of the decision is that tips received by a waiter ought to be taken into consideration as part of his weekly earnings, and it came up in a case as to assessing compensation under the Workmen's Compensation Act. The Court of Appeal, however, made it clear that their decision would not extend to tips which would involve or encourage any breach of duty on the part of the recipient to his employer, or which were casual or sporadic or trivial in amount.