Canada Law Journal.

VOL. XLV. TORONTO, APRIL 15. No 8.

SIR JAMES WHITNEY'S INVASION OF THE RIGHTS OF MUNICIPALITIES.

After carefully surveying the situation raised by the legislation bringing into being the Hydro-Electric Commission, including the last act in this strange drama, and after reviewing what has been said and written on the subject we are confirmed in the position we have taken. We have nothing to retract; but, on the contrary, there is much additional that might be said condemnatory of the course taken by the government of this Province in its dealing with the contracts referred to in these Acts. Furthermore, our contention is based upon legal and constitutional grounds with which politics have nothing to do. It is our duty to discuss and we intend to discuss freely any subject of a constitutional character, where, as in the present case, the interests of the country are affected by legislation likely to injure the fabric of our body politic, in view of what we conceive it to be under the British constitution as affected by the provisions of the British North America Act.

Briefly stated, in reference to the matter now under discussion, our position is this:—The Premier's enactment has undertaken to make that legal which the courts have declared to be illegal, and by so doing has shaken public confidence in the stability of contracts legitimately entered into, and in the ability of the courts to maintain them. Thus the whole subject of civil contracts and the rights of property is placed at the mercy of a single elective body, chosen as partizans, and led by men subject to all the influences of party government. There is to the aggrieved no means of redress. The power of disallowing acts of the provincial legislature vested in the Dominion government, which the constitution intended as a protection against hasty or unfair legislation may or may not be exercised. There

may be reasons why it should be exercised, as there seem to be in this case reasons which did not obtain in others where disallowance has been refused. But however that may be, an investor in thi Province must now see that he has no certainty that transactions which appear to be based upon principles of law and equity to-day, may not be declared illegal to-morrow for no other reason than that some adverse influence has been able to gain the support of a minister backed by a majority willing to accept his dictum upon a subject in which many of them have no interest, and with the merits of which they have not the information to deal.

It manifestly does not lie in the mouth of the Premier to charge us with damaging the credit of the Province. It is the action he has taken which has done and is doing the mischief, and our only fault is that we have been trying to make him understand what the consequences will be.

Let us briefly again call attention to what the bill just passed proposes to do. Certain municipalities made contracts with the Hydro-Electric Commission for the supply to them of electric power for a certain sum per h.p. delivered, based upon by-laws passed by the ratepayers. The Commission varied the terms of these contracts by charging a price per h.p. at the place of development and not at that of delivery, leaving an undetermined sum to be paid for transmission. This was not the contract which the ratepayers have agreed to and their consent being necessary to its validity the variation was fatal. The changed contract the mayor of Galt refused to sign, and the courts held that he was right in so doing.

Then the legislature steps in and tells the ratepayers that, whether they like it or not, and no matter what the cost to them of the change may be, they must accept it, and not only must they accept it, but they must not question it—they are forbidden to appeal to the courts for redress—all actions for that purpose are to be "forever stayed"! The illegal is declared to be legal, and no man may dare to say to the contrary!

Those of our readers who cannot readily refer to the Act just

passed can see for themselves the sort of legislation to which the Premier has committed the House, by reading the following extracts:—

"Sec. 4. It is hereby further declared and enacted that the validity of the said contract (executed by the various municipalities) shall not be open to question and shall not be called in question on any ground whatever in any court, but shall be held and adjudged to be valid and binding on all the corporations mentioned in s. 3, and each and every of them according to the terms thereof as so varied as aforesaid and shall be given effect to accordingly.

"Sec. 5. The said contract shall be treated and conclusively deemed to have been executed by the said corporation of the town of Galt.

"Sec. 6. The said contract shall be conclusively deemed to be a contract executed by the corporations and it shall not be necessary that the said contract be approved of by the Lieutenant-Governor in Council.

"Sec. 8. Every action which has been heretofore brought and is now pending wherein the validity of the said contract or any by-law passed or purporting to have been passed authorizing the execution thereof by any of the corporations hereinbefore mentioned is attacked or called in question, or calling in question the jurisdiction, power or authority of any municipal corporation or of the councils thereof or of any or either of them to exercise any power or to do any of the acts which the said recited Acts authorize to be exercised or done by a municipal corporation or by the council thereof, by whomsoever such action is brought shall be and the same is hereby forever stayed."

It is difficult to deal seriously with a proposition such as this. The rolls of parliament will be searched in vain for action of such a character. Failing to find a precedent in any modern code of laws, the Premier of Ontario, who has declared himself to be personally responsible for this precious piece of legislation, has evidently sought for one in the record of the decrees of the King of Babylon, with which he is doubtless familiar, for in

them will be found, both in language and in substance, a very close resemblance to the Act to "validate (sic) certain contracts entered into with the Hydro-Electric Commission, etc." The leader of a government that will introduce and force through such legislation may be relied upon in any emergency.

By these and other sections a supposed champion of public rights so protects the greatest monopoly in the province that he forever closes the doors of the court of justice to any one who may be wronged thereby. That the proposed scheme is in its operation a monopoly, and a very dangerous one, could easily be demonstrated; suffice it to say that under it competition is impossible, and competition is the only real safeguard against a monopoly, whether carried on by a so-called commission (but really a creature of the government of the day) or by a joint stock company.

The dropping out in the 6th section of the former requirement of an approval of the contracts by the Lieutenant-Governor in Council is very suggestive. As is well known matters are discussed much more freely within the secret and sacred walls of the council chamber than they could be in public, where there must be an apparent oneness of thought if disaster is to be avoided. Some of the incidents connected with the passing of the third reading are also suggestive. An amendment to the principle of the bill was, by agreement, moved at that stage, instead of, as is usual, on the second reading. The amendment was shortly discussed by its proposer, but the Premier promptly rose and claimed that it was out of order for several reasons, and it was so declared by the speaker; consequently no vote was taken upon it. Whether or not it was out of order, or whether or not there was any breach of faith in thus summarily dismissing the amendment, or any informality which threw the opponents of the bill off their guard it is not our province to discuss, though they were spoken of at the time. But however that may be, the amendment was ruled out; and this fact may possibly be fortunate for some of those who might have felt bound to follow their leader in voting against the amendment (now on

the records of House) as it sets forth some constitutional principles which it might have been awkward to gainsay.

What the future of such legislation may be we do not venture to prophesy, but it would have been well for the credit of the country if it had never been introduced.

DOMINION LEGISLATION.

It is important to know what the law is, but it is no less important, perhaps, that those specially concerned—we refer to the legal profession—should be enabled to keep track of proposed legislation, both for the purpose of checking objectionable measures and of knowing in advance what the law is likely to be. To this end we give a resumé of the legislation already introduced into each House of Parliament during the present session, with such comments as the proposed measures seem to suggest.

The present session has been called a "business session," and the expression is not inappropriate. It is the first session of the eleventh Parliament, and the new members have brought forward some of the more important subjects which, perhaps, have been pressed upon their attention during the recent campaign. On the other hand, the Government appears to be introducing only such measures as it expects to put through, leaving contentious legislation for another year.

Public bills may be divided, in general terms, into the following classes:—(a) Bills which the Government introduces and desires to pass; (b) Bills which the Government seeks an expression of opinion upon, with a view to future legislation (e.g., the Insurance Bill of the last Parliament); (c) Bills which private members really desire to become law, either for the public good or in the interests of their constituents; and (d) Bills which private members introduce for the purpose of gaining the votes of some particular class of their constituents, and without any care whether or not a second reading, even, is ever obtained. Classes (a) and (c) are the largest, but class (d) is not a small one.

Lawyers, as usual—and properly so—are conspicuous for fathering bills. Among these may be mentioned, more particularly, Messrs. Lancaster (Lincoln); Lewis (Huron); Macdonell (Toronto), and Clarke (Essex).

It will be convenient to take up the measures in their order of introduction, commencing with those in the Lower House. The first bill introduced each session is always entitled "An Act respecting the Administration of Oaths of Office." In point of fact no such bill ever exists. It is merely the instrument to assert the well-recognized right of the House of Commons to enter upon its business before replying to the speech from the Throne.

The Railway Act is always a fruitful field at Ottawa, as is the Municipal Act in local legislatures. The first bill pro bono publico asks for the issue of books of mileage tickets at two cents per mile. Another provision would compel a company to accept a ticket issued by another company when presented by a passenger who is inadvertently upon the wrong train. Mr. Lancaster's bill respecting the rate of speed at level crossings has again been passed by the lower House, and, as occurred last session, has been amended in the Senate. This probably means that its fate is again sealed, as it may not be reached again in the Commons. A Government measure gives authority to the Board of Railway Commissioners to fix the price of electricity in cases of dispute between the lessee of a water power and an applicant for electricity. A private member appears to have found that railway companies taking over charters of other companies have ignored the obligations of the latter, to the detriment of municipalities and persons interested. Legislation is asked to provide that where a company operates a railway which it "has acquired or owns or is in possession or occupation of, or is operating," the Board may make such order as seems just for the proper fulfilment of any agreement, duty or obligation. Another amendment would authorize an application to the court instead of to the Board in the matter of farm crossings. Another amendment would compel every company to

construct and put in operation one tenth of its railway during the first two years and an additional one tenth each year thereafter. If the railway is over 250 miles in length this amount is cut in half. This amendment is designed to prevent persons obtaining charters but not constructing the railways. The interests of the unsettled districts are looked after by a provision which deals with the liability of a company in the absence of sufficient fences or cattleguards, whereby animals are killed. A Government measure contains many important amendments to the Act. One of these gives the Board jurisdiction in cases of breach of agreement. A recent case rendered it advisable to give statutory authority to a company to reissue securities which have been deposited or pledged by a company as security for a loan, it having been held that the power to issue such securities was extinguished by the original issue. More detailed and complete authority is given to the Board with regard to highway crossings, and the question of diversion of the railway, or the highway, or both, is taken up from every point of view, and the Board may apportion the costs thereof between the company and the municipality. An important section to be added to the Act reads, in effect, as follows:—"In any case where a railway is constructed after the passing of this Act the company shall, at its own cost and expense (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipality) provide all protection, safety and convenience for the public in respect of any crossing of an existing highway by the railway." A very important and practical amendment appropriates $200,000 a year for five years to aid in providing protection, safety and convenience in respect of highway crossings at rail level. The numerous accidents of late have pressed this question upon the attention of the Government, which has not been slow to act. The Government has adopted the amendment of Mr. Clarke, of Essex, increasing the liability of a company for damage by fire from locomotives.

Government railways are in the future to be equally liable, with other railways, for loss of cattle killed or injured. This would seem but reasonable.

A man is no longer permitted to "assault and beat his wife or any other female" if this results in actual bodily harm. If he does so he is liable to be whipped as well as imprisoned. The imprisonment, however, is not to be for so long a period if a man beats a woman as if he beats a man, and, moreover, the clause is added to the section which deals with indecent assault. We fear that magistrates will find a difficulty in inflicting the proper penalty. That some measure is required is not doubted, for the thugs which have appeared in Montreal, Hamilton and other places require severe treatment. We hardly think, however, that the proposed legislation will meet the case.

Mr. Macdonell (South Toronto) would have election day a public holiday, and would also repeal the provision requiring a deposit of $200 at the nomination of a candidate.

Compensation to the extent of $25 is now made for the loss of a registered domestic article, similarly to the existing provisions respecting an article from a foreign country lost in Canada.

The revelations in the Marine enquiry has produced a bill, by the Minister of Justice, entitled "The Secret Commissions Act," which makes it an offence, punishable by fine or imprisonment, to accept any gift or consideration as a reward for doing, or forbearing to do, any act relating to his principal's business, or to offer a reward to an agent, or to make a false statement to an agent which is intended to mislead his principal.

The interests of labour are not neglected. There are in the House two strong advocates for labour. One of these would prevent labourers in the employ of contractors with the Government from working more than eight hours a day. This subject has a familiar sound. The other member has proposed legislation which is, perhaps, more in the interests of the public even than in the interests of labour. His bill would reduce the hours of duty of operators, train despatchers and others who have to do with train movements, so that they will not have to work more than eight hours in any twenty-four, except in cases of emergency. This bill is a very important one, for it cannot be denied that many accidents have been caused through the neglect of operators who have become fatigued by too long hours of duty.

Much discussion has ken place over the government bill to create a "Department of External Affairs." The intention of the Government is to have a central bureau where all correspondence and despatches with foreign Governments can be received, distributed and, if necessary, answered. There is much to be said in its favour; the chief objection is as to whether or not we have arrived at that grade of nation which requires such a department.

An Insurance bill was introduced last session for the purpose, largely, of inviting discussion before changing the present law. The bill was then fairly well threshed out. This session it has been reintroduced, with many modifications and changes made at the instance of insurance men and others. We fail, however, to find in it much result from the expensive investigation into insurance matters which was had a year ago.

An amendment to the Adulteration Act deals with stock foods, and requires that every package, tag or label shall give the percentage of fat and proteids and the manufacturer's name.

A Government bill respecting agricultural fertilizers requires that every brand shall be registered, and an annual license obtained. Every package or tag shall give the name of the brand, the registration number, the name and address of the manufacturer, and the analysis, for the protection of purchasers. Another bill respecting commercial feeding stuffs, also introduced by the Government, will be of considerable interest to those concerned.

Vessels navigating the inland lakes and coasting waters of Canada are not neglected. The Government will appoint an inspector who is to make a yearly inspection, without which the vessels may not be navigated. Steam yachts, and steamboats used for fishing purposes, over five tons, must carry sufficient life boats, life preservers, etc., in a conspicuous place.

The Minister of the Interior has introduced a new Immigration bill, which is of a much more extended scope than the present Act. The bill is modelled, largely, from the United States Act, as a reference to the notes at the foot of each section indicate. While it is not to be expected that the measure will

pass in its present form, it is undoubtedly framed to cover many difficulties and to meet particular cases which have arisen by reason of the large additions to our population, both from Europe and the Orient.

The Criminal Code comes in for its share of amendments, to which Mr. Lewis, of Huron, makes his contribution. One amendment requires a permit from a chief of police or a magistrate before a revolver can be purchased. Another amendment in the same bill deals with bodily harm inflicted by a revolver, knife, stiletto or razor. The Italian and the negro would seem to be sufficiently indicated. An unobstrusive clause would, in effect, prevent a public hanging, by requiring that a prisoner convicted of a capital crime be removed to a penitentiary. A bill respecting assaults and offences to persons is in line with previous bills on the same subject. It authorizes the arrest of a person believed to be carrying a knife or revolver, and authorizes the arrest of vagrants. Further, it imposes upon a vagrant a sentence of an indefinite period, subject to liberation upon a favourable report by the inspector of prisons, and provides that "if, after liberation, he commits any criminal offence he shall, upon conviction, be sentenced to be confined in a prison or penitentiary, with hard labour, for a term of not less than five years, nor more than ten years, in addition to the sentence for the crime last committed." Another bill authorizes the search, without warrant, of any person believed to possess or carry an offensive weapon.

Every law-making body is now engaged in dealing with motor vehicles. The matter being, in most cases, a question of civil rights, Mr. Lewis is confined to amending the Criminal Code by making the owner, driver and person in charge guilty of an indictable offence when his automobile causes a horse to run away, and thereby to occasion bodily injury.

As the author of a legal work on shipping we might expect Mr. Lewis' interest to be continued, and he has shewn it by a comprehensive bill respecting load lines on ships, modelled on the English Act, and following on the lines of a bill he introduced last session. Two other bills by Mr. Lewis deserve par-

ticular attention. One requires that "every sea-going and coasting passenger ship, over 400 tons gross tonnage, registered in Canada, and every sea-going and coasting freight ship over 1,200 tons, gross tonnage, registered in Canada, shall be equipped with an apparatus for wireless telegraphy." Those of the better class of ships now crossing the Atlantic are already equipped with such an apparatus, and others are following suit. Mr. Lewis has anticipated a popular demand, which must eventually become law in some modified form.

The other bill, to which we have referred, by the same member, is entitled "An Act respecting the saving of daylight." It is worth quoting in full.

"(1) This Act may be cited as The Daylight Saving Act. (2) This Act shall not apply to the Yukon Territory. (3) From and after two o'clock in the morning of the last day of April in each year until two o'clock in the morning of the last day of October in each year the local time shall be one hour in advance of the standard time now in use. (4) The time hereby established shall be known as local time, and when any period of time is mentioned in any Act of Parliament, deed or other legal instrument, the time mentioned or referred to shall, unless it is otherwise specifically stated, be held to be local time under this Act. (5) Greenwich mean time, as used for the purposes of astronomy and navigation, shall not be affected by this Act. (6) This Act shall come into force one year after the passing thereof."

A bill to the same effect has passed the British House of Commons, after a favourable report by a special committee, and has gone to the Lords. The proposed change is one which, like many others, will not be adopted very readily, but the advantages seem sufficiently great to make it probable that this legislation will not be long delayed.

An officer in the nature of a public prosecutor in cases before the Board is suggested by a bill to amend the Railway Act. The amendment provides that "the Board shall appoint a solicitor to examine into and, if advisable and proper, lay before the

Board any complaint made by any person who, in the opinion of the said solicitor, is unable, for any reason, to personally prosecute such complaint, and may act on behalf of such persons in any appeal from any decision of the Board thereon." The clause is wide in its scope, and somewhat ambiguous. Another amendment requires the Board to appoint inspectors for defined territorial divisions who, in addition to their duties under s. 284 of the Act, "shall inspect the sanitary fittings of the stations, buildings and passenger cars of the railways within their districts, and make reports to the Board."

An amendment to the Elections Act is proposed by Mr. James Conmee, whose knowledge of this subject will be unquestioned. He would provide polls at certain divisional points on railways where a railway employee may vote upon a certificate obtained for him upon the application of the candidate or an elector from the returning officer of his own riding, provided that such employee is unable to be in his own riding during election hours. The deputy returning officer for these polls would send back to the returning officer of each riding represented at his poll the ballots cast for the candidates in such riding. The author modestly informed the House that he did not expect the bill to pass this session. His expectations will be realized.

In the Senate, the Water Carriage of Goods Act is a legacy from the last Parliament, when it passed the Senate but failed to be reached in the Commons. The bill applies to ships carrying goods within Canada, or to any port outside of Canada, and renders void, ab initio, clauses in bills of lading whereby the owner, charterer, master or agent of a ship is relieved from liability for loss or damage to goods by negligence in loading or custody of goods, or in carrying. There are also other stringent provisions relating to the conduct of the ship and the care of its cargo.

The Government Annuities Act is to be amended as to the converting of the husband's annuity into an annuity for the wife, and deals with the transferee of annuities, and the refund of moneys paid if the annuitant dies before receiving the annuity.

The Hon. Mr. McMullen would amend the Railway Act by an amendment which is commonly known as the "stop, look and listen bill." It makes any person who crosses or attempts to cross a railway at a rail level crossing in any vehicle, liable to a penalty if he does not first bring such vehicle to a standstill at a distance (to be hereafter decided) from the railway, "and looking along the same in both directions, and also listening carefully to ascertain whether a train is approaching thereon." Should the unfortunate person be killed by failure to stop, look and listen the bill makes no provision for collecting from the corpse. Possibly, however, the fine might be collected from his executors. Perhaps the latter might be convicted in the unavoidable absence of the testator.

Sec. 109 of the Bills of Exchange Act now reads as follows:—"In order to render the acceptor of a bill liable it is not necessary to protest it." The proposed amendment reads, "In order to render liable the acceptor, endorser or any party to a bill of exchange, cheque, or promissory note, it is not necessary to protest the bill, cheque or note."

It is perhaps well known that no divorce bill in the Senate is ever carried unanimously, for the reason that the Roman Catholic Church being opposed to the principle of divorce the Senators who belong to that religion oppose every such bill pro forma, apart from the merits. Consequently every such bill that passes is declared carried "on a division" at each reading. A bill restricting the evils of divorce, introduced by the Hon. Mr. Cloran, would declare that the offender or guilty party to a marriage contract shall have no right to re-marry in Canada after the obtention of a divorce from Parliament, and that if such party re-marry he or she shall be a bigamist while within Canada, and if such party re-marry outside of Canada the marriage shall be invalid and illegal.

Much good and some bad legislation have been proposed this session, and there probably will only remain a few weeks in which to sift the chaff from the wheat.

THE UNSATISFACTORY COURSE OF JUDICIAL DECISION.

A writer in a recent issue of the *Central Law Journal* discusses this subject in an interesting and intelligent manner. There is no question as to the correctness of his conclusions. The difficulty is to find a remedy. The amount of money we spend for the printing and publishing of judgments which add nothing to jurisprudence, and the time we waste in wearily wading through them is appalling. The tendency of all this is bad; for the temptation now is strong to spend time in hunting cases rather than in studying principles. The article is as follows:—

"This journal is constantly within hearing distance of the despairing cries of many practicing lawyers who find themselves overwhelmed by the mass of case-law, that has accumulated and is still accumulating at an alarming rate of increase.

If case-law were not to be regarded as law at all, as most often it should not be, the lawyer's task would be easy. Or, if authorities were limited, as under the old civil law of Rome, to the works of a few great master jurists, like Paulus and Ulpian, and others, the labours of the counsellor would not be at all difficult.

But in a country where every new proposition of law is settled by overburdened and sometimes incompetent courts by simple reference to what some other court has said in a similar case, "on all fours," the lawyer is put to it, not to discover the right principle which ought to decide his case, but to find the latest declaration on a similar state of facts by any of a comparatively vast number of other appellate tribunals, whose decisions fill hundreds of massive volumes.

To one familiar with the manner in which legal opinions are written to-day, we are surprised that either the lawyers or the people stand for the expense of their publication, much less for the imposition and resulting confusion in being compelled to recognize so many of these decisions as announcing any rule of law binding on either the court in subsequent cases, or on other citizens of the state not parties to the case decided.

When cases were few and judges learned in the law laboured to discover correct principles rather than merely to dispose of a multitude of cases pressing for decision, the reports were veritable text-books full of the best learning of the age. It is no longer so. With prominent exceptions here and there, a volume of state reports is a mass of elementary repetition that ought not to exist to encumber a lawyer's shelves, nor to confuse the public mind, nor to be a burden and an expense upon the taxpayer as well as the lawyer.

This system has had its effect upon the lawyer. He no longer regards the authority of text-writers, like Bishop, Greenleaf and Cooley, as highly as he does the declaration of some possibly incompetent appellate tribunal in some remote corner of the country, when, as a matter of fact the carefully considered opinions of such text-writers and jurists are of incomparably greater value.

How different it was in the golden age of Roman civilization, when the praeter or judge bowed to the opinion of the jurisconsults who in turn received their authoritative instructions from masters of jurisprudence at whose feet they sat, and who together, in the calm light of reason alone, determined the application of principles of abstract law and justice, and thus from out of a mass of irreconcilable customs and laws of all tribes within the jurisdiction of the Roman empire, wove into one harmonious fabric, that wonderful system of universal common law known as the jus gentium.

There seems to be no place for the jurist to-day. The lawyer is impatient of him; the courts have lost sight of him; the result is confusion. If a text-writer argues out, never so carefully, each proposition of law, he is repudiated. "We do not care what he thinks," says the lawyer to the publisher, "we want to know what the courts say." And so have sprung up in recent years a number of so-called text-writers, who are nothing but compilers, whose volumes teem with inconsistences and irreconcilable declarations of law which they do not nor even dare not, attempt to reconcile. We have more regard for a good digest than for such a text-book.

A number of suggestions have been made. Some have suggested codification of all laws. Codification, however, has proven a disappointment in many cases, because of its unbending rigidity. Others have suggested that courts be forbidden to write opinions at all and that the rule of stare decisis be abandoned. This remedy is rather too harsh, and while it would probably be effectual as a surgical operation it should be resorted to only as a last resort. Some have suggested that the opinions of the Supreme Court of the United States be regarded as controlling on all questions of substantive law passed upon by that court. This is not an impracticable suggestion but would meet with considerable opposition from those who are jealous of the growing ascendancy of federal power over state autonomy.

Mr. James Bryce, of England, in one of his notable contributions to the literature of the law, recommends, in lieu of codification, the enactment of the Roman precedent of giving to the works of certain jurists or text-writers a certain degree of authority much after the manner of the Law of Citations of Valentinian, which gave to the works of Paulus, Ulpian, Papinian, Gaius and Modestinus, quasi statutory force. Bryce's Studies in History and Jurisprudence, p. 685. There is much to be commended in this idea.

We have no suggestion of our own to make at the present time although the subject has given us frequent occasion for deep meditation and consultation with the authorities.

The appellate tribunals, it may be taken for granted, will be the last to oppose any remedy for the present overwhelming, unsatisfactory and irreconcilable course of judicial decision in this country. On our part, we shall welcome suggestions of the bar looking to a solution of this perplexing situation."

NEGLIGENCE OF SERVANT TEMPORARILY TRANSFERRED TO ANOTHER.

In a recent case the United States Supreme Court gives an admirable discussion of the problem, elementary but none too well settled, whether the general or the temporary master is liable

for the negligence of a servant temporarily transferred to another: *Standard Oil Co.* v. *Anderson*, 29 Sup. Ct. Rep. 252. The plaintiff in the case was employed by a stevedore engaged in loading a vessel with oil at the defendant's dock. The cases of oil were transferred from the dock to the vessel by means of a winch and drum, with the usual outfit of tackle, guy rope, and hoisting rope, the property of the defendant. The winchman in charge of the apparatus, by whose negligence the injury occurred, was in the general employ of the defendant company, to which for his services the stevedore paid a fixed price. The cases of oil swung upon the crane were brought over the hatch, and at a signal given by one of the stevedore's men stationed on deck were lowered by the winchman through the hatch into the hold of the ship. On one occasion when a draught of cases of oil was suspended over the hatch, the winchman lowered it suddenly into the hold without waiting for the signal. The plaintiff, who was in the hold receiving and packing the cases, was, without negligence on his part, struck by the cases of oil and injured. He brought an action against the defendant company to recover for the injuries thus inflicted. Of course, the defendant could only be liable if the winchman in the performance of his duties in loading the oil was its servant, not the servant of the stevedore. Two cases in the Circuit Court of Appeals on very similar facts had reached exactly opposite conclusions, and so the matter came for final decision to the Supreme Court.

A., having certain work to be done, may decide to do it himself, with workmen furnished by B., who places them under A.'s entire control, so that A. becomes pro hac vice their master; or A. may employ B. to do the entire work under B.'s sole direction with servants of B.'s own selection. "In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because though it is done for the

ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking." After examining several cases and citing a number of others, the court declares that the power of substitution or discharge, the payment of wages and other circumstances frequently made the basis of decision "are not the ultimate facts but only those more or less useful in determining whose is the work and whose is the power of control." In the case before the court, the winchman remained in the general employ of the defendant, who selected him, paid his wages, and had power to discharge him. To make him another's servant, it must appear that his relation to the defendant had been for a time suspended and a like new relation with another substituted. But nothing of the sort appeared. Defendant, at an agreed price, furnished the work of its own apparatus and its own workman to the stevedore. The company was therefore, under the facts, held liable.

At first sight the decision seems opposed to the well-known case of *Murray* v. *Currie*, L.R. 6 C.P. 24; but in that case the stevedore selected from among the sailors furnished to him, at his own discretion, one to operate the winch of which he was in entire control.—*Law Notes.*

NOTARIES, THEIR ORIGIN AND OFFICE.

Few things tell more of the wide extent of the British Empire than what appears in the various legal journals published in those many parts of the world which come under the domain of the Union Jack. One of these, conducted with great ability, is the *South African Law Journal*, a recent number of which contains several articles of much interest. Amongst them is

one on the subject of notaries; we copy a part of it. The remainder of the article has special reference to the position of these officers under the Roman Dutch Law which prevails in South Africa:—

"No profession among the ancients seems to have been of so much importance as the notarial. It is true that in the early period of their history the Romans at one time looked upon it with contempt, and said it was an office fit only for slaves. But this must have been through jealously; for where slaves acted as notaries it was in most cases when their masters either could not write at all, or wrote with difficulty. Many slaves used to practise writing, in order to write for their masters, and thus be of more use to them. The Emperors Arcadius and Honorius forbade slaves to become notaries, and conferred the office only on free persons. But let us trace the office of a notary a little further back, as it began at a much earlier period than the Roman. Many writers class notaries under the various terms of scribae, logographi, exceptores, actuarii, notarii, libarii, tabelliones, tabularii, and other more modern names, especially when designating those appointed as notaries or prothonotaries, to kings, popes, bishops, abbots, chapters, ecclesiastical and particular courts and princes; but most of these more modern ones have fallen into disuse. The term used by our law is derived from the Roman law, and is either notarii or tabelliones. Let us consider some of these ancient terms.

"The scribes in the early Hebrew times, at any rate prior to the captivity, were engaged not only as writers of the law, but in administrative capacities as well. Some of them were high functionaries. We find many employed in the reigns of the kings of Judah, where they are often mentioned as high officers of the Crown; for instance, Seraiah was scribe, or secretary, to King David (2 Sam., 8, 17); Elihoreph and Ahiah were scribes to King Solomon (1 Kings, 4, 3). As there were few people in those days who could write well, the employment of a scribe, or writer, was of considerable importance. The scribes of the people, who are frequently mentioned in the Gospels, were copyists of the sacred writings. It is known that the system

of writing sometimes employed in the Hebrew period was in the form of notes or abbreviations, marks, secret signs, or in cipher, and hence we may call this the early or the first period of the stenographic art.

"From the Hebrews let us come to the Greeks. It is said that Xenophon was originally written in abbreviated form and in a kind of shorthand which might be called stenography. When the philosophers in the Greek schools dictated the lessons to their pupils, and sometimes so hurriedly that the pupils could not write the words in full, they invented the art of abbreviation of words. In this respect the Romans copied the Greeks; and as the character of the system of abbreviations differed, and in order to avoid confusion, the Emperor Justinian forbade his Corpus Juris Civilis being written. per Sigilla, i.e., in this abbreviated form (Cod. 1, 17, 2, s. 22).

"Under the Roman Republic we find mention of the scriba. There the scribae were chiefly employed in drawing up legal documents in the Roman courts, and used symbols of abbreviation (Cod. 4, 21, 17; Novellae, 73, c. 5, and Dig. 29, 1, 40). Under the Empire the scribae were called tabelliones. This was from the fact that, in the absence or scarcity of writing materials, they made 'notes' on the tablets. So that in course of time, from taking or making notes (nota, a mark or sign) they came to be called notarii, notaries.

"Hence the term 'notary' is etymologically derived from the Latin word nota, and means originally any one who by notes or signs takes down the words or speech of another person. It was the stenographic system of the ancient days now called shorthand. In this sense all the ancient writers use this term. Later, in Rome, in the fourth century, we find the alternative terms used, notarii or tabelliones. The term tabellio or tabularius, means a keeper of the archives or register, a public notary (Just. Inst. 7, 9). Holland has adopted the Roman terms and in a plakaat, to which we shall refer later on, on the subject of notaries, the terms notarii or tubularii are used to mean the same persons; and so also at a later period Groenewegen, an eminent Dutch jurist, in his work, De Legibus Abro-

gatis (C. 10, 31, 15), says: Hodie tabelliones sive notarii etiam decuriones creari possunt, et ita utimur.

"In modern usage, notaries are public functionaries, duly authorised to act as such, to attest contracts or writings of any kind, and to make and authenticate public acts, especially when for use in foreign countries. In practice their business is now very much limited in England as well as in Holland and in South Africa. What documents must still be executed notarially in the latter country we shall mention further on. At present we shall first define what is meant by a notary's 'minute,' his 'grosse,' and his 'protocol.'

"The Minute.—Before legislation on the subject of notaries was resorted to in Holland, the notaries till then had made only notes or short summaries of a deed or any other act passed before them. These notaries were not judicially recognised; they were not appointed by any one; in short, they were persons who assumed unto themselves the title, just as at the present day many people assume and dub themselves to be masters and even 'professors' of certain professions or trades which have as yet no legal status. These notaries kept no protocol. The notes, or summary, which they called the 'minute,' they kept and got signed by the contracting parties and the witnesses and themselves. They then issued a deed elaborated from this summary or minute, and called it the 'grosse.' It may be reasonably inferred that these 'grosses' often contained more than was contemplated by the original summary or minute, and as often also, no doubt, misrepresented the original. The Dutch words for this summary were minut or minuut, or, plural, minuten. In the time of Charles V., who first legislated on the subject of notaries in Holland, these words retained their meaning and were adopted in practice as such: but that emperor did away with a short minute or summary, and ordered that the deed should be in full as agreed upon to be signed, and that the 'grosse' thereof should be a true copy without any omission or addition, and that copies of the original should be the same, word for word, as the original or the minute. Since that period, there-

fore, the 'minute' means the original deed in full in the notary's protocol.

"The word minut is derived from the Latin minuere (to lessen). It means, in Dutch practice, the first or rough draft of a deed which is intended to be signed by the parties and to be retained in the protocol. This rough draft was generally written, as the etymology of the word implies, in small characters. There is no reason why the writing should have been small and the lines close to each other, unless we assume that writing material was scarce in those days. Anyhow, in course of time the word minut, or minuut, or, as it has been anglified since, 'minute,' came to be understood in practice to be the original act or instrument, whether written in small characters or not, passed before a notary, of which a 'grosse' and authentic copies were afterwards granted. This 'minute' must be signed by the appearers to the deed in the presence of the notary and the witnesses, and it must remain in the custody of the notary, and be retained in his protocol. From this 'minute' the notary issued the 'grosse,' and any authentic copies that might be required. The 'grosse' was signed only by the notary, and only one 'grosse' could be issued. If any more were required, they were called copies. Any number of copies, as required, could be issued. The difference between a 'grosse' and a certified copy consists only in this, that the former concludes with the words 'signed by the appearers and the witnesses in my presence'; whereas the latter contains a copy, word for word including the signatures to the minute, and the notary at the foot simply writes, 'A true copy of the original filed in my protocol,' and signs it. Instead of making a 'grosse' and copies there was, however, nothing to prevent (and it is frequently done, and is preferable) the deed being signed by all parties, appearers, witnesses and the notary, for as many originals as may be required; in which case the 'minute' is still called such, and the others are called duplicate, triplicate, quadruplicate and so on.

"The Grosse.—This has already been partly explained above. The work is derived from the French gros; Latin, crassus, which

means great, large, thick. The Dutch writers wrote and pronounced the word as Dutch, gros. While the 'minute' was written in small characters, the gros was written in large characters; and while the former was a rough draft, with probably erasures and interlineations, the latter had to be written in a large hand, plainly and neatly. Thus we have the English word 'engross,' to copy in large, fair hand. Shakespeare says:—

'Here is the indictment of the good Lord Hastings,
Which in a set hand fairly is engrossed.'

"The force and effect which the law gives to notarial acts consists in this, that they are in themselves a praesumptio veritatis et solemnitatis; that is, whatever is written thereon is taken for the truth, and the act is considered to have been drawn in proper form until the contrary be clearly proved. The only charge that can be brought against a notarial act, per se, is the accusation of falsity. The person who makes the charge must prove it; otherwise its bone fides and due execution are presumed in all courts of law till the contrary be proved. Hence the 'grosse' can be registered in our Deeds Registry Office, and provisional sentences can also, with us, be obtained on it. No notary may issue two 'grosses' of an act or deed passed before him, without the leave of the court, for fear of deprivation of his office. In the Cape Supreme Court the question of a 'minute' or a 'grosse' was discussed, but not decided, in the case of *Stanford* v. *Brunette* (3 Searle, 101), which was confirmed by the Privy Council (ibid. p. 112). By making the 'grosse' many notaries think their duty requires it, and that it must be so. In this they are mistaken. Instead of a 'grosse,' it would be preferable to issue a duplicate, triplicate, quadruplicate, and so on, if necessary, of the minute. The inconvenience of not doing this is shewn by the court's orders that the originals of all wills, etc., must be filed with the Master in terms of the Ordinance.

"The Protocol.—This word is spelled the same in English as in Dutch; some writers put k for c, though the old writers all use c. The word is also pronounced the same in both languages. It is

derived from the Latin protocollum, which is merely the Greek protokollon, meaning originally the first leaf pasted or gummed in a book. 'Protocol' therefore means the book kept by a notary in which is contained the originals or 'minutes' of all acts and deeds passed before him. Of course, any original despatch, treaty, or other instrument, if bound, especially in political matters, may also be called a protocol. But the word is here used in the legal sense as applicable to notaries (see Justinian's Novellae, 44, c. 2).

"Before the time of Charles V. notaries were not bound to keep protocols, for the simple reason that till then they were irresponsible men; but that emperor compelled notaries appointed since his plakaat on the subject to keep a proper register or protocol of all acts and deeds passed before them, on pain of arbitrary punishment and deprivation of office. In this protocol the acts and deeds must be arranged according to date. On the death of a notary his protocols must be filed with the registrar of the court where he practised, in order that access may be had to them when necessary. If any damage or wrong is caused by a notary having no date, or a wrong date, of execution to a document, he is liable to make it good."

The periodical from which the above is taken has several articles of interest. It contains a copy of the proposed South African Act of Union, which has many resemblances to our British North America Act, but has some material and suggestive differences. This matter will be referred to in our next issue.

REVIEW OF CURRENT ENGLISH CASES.

MARRIAGE—VALIDITY OF MARRIAGE—ENGLISH MARRIAGE—HUSBAND A BRITISH SUBJECT DOMICILED IN INDIA—HINDU CONTRACTING MARRIAGE IN ENGLAND.

Chetti v. *Chetti* (1909) P. 67 is a case of some importance on the law of marriage. The action was brought by a wife for a judicial separation. The husband set up that the alleged marriage was invalid. It appeared that the husband was a Hindu British subject domiciled in India and that the marriage had been celebrated between the parties in England, the wife being a Christian. By Hindu law the defendant could not in India marry any one outside of his own caste or any one not of the Hindu religion, and by Hindu law a plurality of wives was admissible. It was argued on behalf of the defendant that he carried this personal law of domicile with him and that the marriage must be deemed to be subject to that law; but Barnes, P.P.D., who tried the case, rejected that argument as one that had never been recognized by the law of England, and held that the marriage was valid according to the law of England notwithstanding the Hindu law which he held only applied to marriages in India.

SHIP—BILL OF LADING—DAMAGE TO CARGO—NEGLIGENCE OF SHIP OWNER'S SERVANTS.

The Schwan (1908) P. 356. This was an appeal from the decision of Deane, J., noted, ante. p. 66. For the facts of the case that note may be referred to. The Court of Appeal (Lord Alverstone, C.J., and Williams, Buckley, L.JJ.), have reversed the decision of Deane, J., as they hold that there was no evidence that the ship was unseaworthy when she started on her voyage, and in so far as the damage to the plaintiffs' cargo was occasioned by either or both of the two causes—namely the improper adjustment of the three way cock; and the return valve not being closed—these were either defects of machinery, or defects caused by the neglect of the engineer, against both of which the defendants were protected by the terms of the bill of lading.

COMPANY—DIRECTORS—ARTICLES OF ASSOCIATION—VESTING OF MANAGEMENT IN DIRECTORS—GENERAL MEETING OF SHAREHOLDERS—RESOLUTION INCONSISTENT WITH ARTICLES OF ASSOCIATION.

Salmon v. *Quin* (1909) 1 Ch. 311 was an action brought by the plaintiff a director of the company to restrain the company and his co-directors from acting on a resolution passed at a general meeting of the company, as being contrary to the articles of association. The defendant company was formed for carrying on a draper's business, and by the articles of association it was provided that the business of the company should be managed by the directors, and it was also provided that no resolution of the directors having for its object the borrowing of money, the entering into any contract exceeding £1,000 in amount on the acquisition by purchase, lease or otherwise of premises, etc., should be valid or binding unless not less than 24 hours' notice in writing should be given to the managing directors, Axtens and Salmon, and neither of them should have dissented before or at the meeting at which such resolution should be passed. A resolution was passed by the directors for the acquisition of premises at a cost of £2,100. From this resolution Salmon the plaintiff dissented. A general meeting of shareholders was called at which a resolution for the acquisition of the property in question was also passed; and it was to prevent that resolution being acted on that the action was brought. Warrington, J., thought the resolution was not inconsistent with the articles of association and refused the injunction but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J.), held that he was wrong, and reversed his decision, being already of opinion that the resolution objected to, was an attempt to alter the articles of association which constitute a contract not merely between the shareholders and the company but between each individual shareholder and every other.

VENDOR AND PURCHASER—SALE OF SLAG AND CINDERS—SLAG TO BE SEVERED AND REMOVED BY PURCHASER—INTEREST IN LAND—BREACH OF CONTRACT—DEFECT IN TITLE OF VENDOR—DAMAGES—SALE OF GOODS.

Morgan v. *Russell* (1909) 1 K.B. 357 was an action by a vendor to recover the price of certain slag and cinders agreed to be sold to the defendants, in which the defendants counterclaimed for damages for breach of contract by the plaintiff.

The facts were that the plaintiff was lessee of certain premises on which was a quantity of slag and cinders which had become part of the soil, and he had also obtained a license from the owners of adjoining premises to enter and remove slag and cinders therefrom which had also become part of the soil. The slag and cinders to which he claimed to be entitled he contracted to sell to the defendants at so much per ton, but the plaintiff also included in the agreement the slag and cinders on other premises adjoining to which he had no title. After a considerable quantity of slag and cinders had been removed, the owners of the land and premises to which the plaintiff had no title intervened and prevented the defendants from removing any more slag or cinders therefrom, and for the breach thus occasioned, the defendants claimed damages, but the Divisional Court (Lord Alverstone, C.J., and Walton, J.), were of the opinion that the principle of *Flureau* v. *Thornhill* (1777) 2 W. Bl. 1078, and *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158, applied, and as the vendor's failure to perform the contract was due solely to defect in his title, the purchasers could not recover any damages for loss of his bargain. Their lordships were also of opinion that the agreement was not a contract for the sale of goods so as to entitle the purchaser to recover as damages the difference between the contract and market price of the slag, etc.

RAILWAY—LEVEL CROSSING—ROAD RAISED ON EITHER SIDE OF RAILWAY—REPAIR OF ROADWAY.

Hertfordshire v. *Great Eastern Ry.* (1909) 1 K.B. 368. The defendant company under its statutory powers had constructed its railway across a public highway, the track was laid at a higher level than the highway and in order to bring the roadway up to the level of the railway inclined planes on either side of the railway were also made by the railway under its statutory powers. The question in this action was whether or not the railway were bound to keep these two inclined planes in repair. Jelf, J., who tried the action, came to the conclusion that the defendants having been empowered by statute to interfere with the roadway, thereby incurred a common law liability to keep in repair the whole of the roadway dealt with by them, and were therefore liable to keep the whole of the inclined planes including the parts thereof lying outside the line of the railway fences, in repair.

STATUTE OF LIMITATION.—SIMPLE CONTRACT DEBT—ACKNOWLEDGMENT—UNCONDITIONAL ACKNOWLEDGMENT OF DEBT COUPLED WITH HOPE TO PAY SAME.

In *Cooper* v. *Kendall* (1909) 1 K.B. 405, Darling, J., came to the conclusion that under *Chasemore* v. *Turner* (1875) L.R. 10 Q.B. 509, the following acknowledgment of a debt was insufficient to stop the running of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3 (R.S.O., c. 324, s. 38), viz., "I admit I owe your client the sum of £210 5s., but I cannot meet this liability at the moment, although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan." The Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.), however reversed his decision, they being of the opinion that there was nothing in the acknowledgment to negative the implication of an unconditional promise to pay.

COPYRIGHT—MUSIC—"PIRATED COPY OF MUSICAL WORK"—PERFORATED MUSIC ROLL, FOR USE ON INSTRUMENT.

In *Mabe* v. *Connor* (1909) 1 K.B. 515, a Divisional Court (Lord Alverstone, C.J., and Bigham and Walton, JJ.), hold that a perforated roll of music for use on a piano for reproducing the music of a copyright song is not "a pirated copy" of the work within the Music Copyright Act of 1902, following *Boosey* v. *Wright* (1900) 1 Ch. 122 (noted, ante, vol. 36, p. 207).

SOLICITOR AND CLIENT—BILL OF COSTS—ORDER FOR TAXATION ON APPLICATION OF CLIENT—SUBMISSION TO PAY—EXCLUSION OF STATUTE BARRED ITEMS—STATUTE OF LIMITATIONS.

In re Brockman (1909) 1 Ch. 354. This was a special application by a client to tax his solicitor's bill, and it was claimed on the client's behalf that a special direction should be inserted in the order, directing the taxing officer to disallow statute barred items. This Warrington, J., held could not be done, because according to the practice of the court when a client applies to tax his solicitor's bill the order must contain a submission to pay what may be found due, irrespective of the Statute of Limitations. If the client desires to raise that defence, he must have the solicitor to bring an action, in which the defence may be pleaded, but it is not pleadable in a proceeding initiated by himself. In these circumstances the applicant abandoned the application.

Correspondence.

LEGISLATION EXTRAORDINARY.

To the Editor,

CANADA LAW JOURNAL:

SIR,—By the statute which bears the title of "The Power Commission Amendment Act, 1909," Sir James Whitney has undertaken to validate a large number of contracts between various municipalities and the Hydro-Electric Power Commission. In an article in the CANADA LAW JOURNAL, a month ago, p. 138, it was mentioned that one of those contracts has already been declared void on the ground that in certain material particulars its terms differed from those ratified by the votes of the ratepayers concerned. In the same issue (p. 164) you gave a summary of the effect of a case in which it has been held by the Divisional Court that the plaintiffs in suits brought for the annulment of two other contracts are entitled to proceed, although the Attorney-General had refused to issue a fiat allowing the Commission to be made a party defendant. That the relief asked for in these suits would be granted if they should ever advance to a stage at which judgments on the merits should be rendered can scarcely be doubted. But the new statute operates so as absolutely to preclude ratepayers from resorting to the courts for the purpose of procuring a determination of their legal rights.

In order that the true scope and design of this remarkable piece of legislation may be rendered perfectly plain, its author has inserted, in addition to the general validating clause, other specific provisions to the effect that "the validity of the contracts as so varied shall not be open to question in any court (sec. 4); that "it shall not be necessary that the said contracts as so varied shall be approved of by the Lieutenant-Governor in Council (sec. 6); and that "every action now pending wherein the validity of the said contract is called in question is hereby for ever stayed" (sec. 8).

Such an extraordinary abuse of legislative power as that which is indicated by these provisions is believed to be wholly unex-

ampled in any of the British possessions. That no precedent for it can be found in any enactment passed by the Parliament of the Mother Country since the time when the British Constitution was finally established on its existing basis by the Revolution of 1689, is at all events a proposition which is beyond dispute. There is a technical sense in which it may be said that all infringements of the rights of property are equally culpable, irrespective of the number of persons affected. From this standpoint the statute here under review may be regarded as being neither more nor less censurable than those by which its author had previously cut off the remedial rights of the claimants in the *Cobalt Case*. But in determining the degree of blame which a measure of this sort deserves, it is not unreasonable to take into account the practical consideration that the new statute is far more wide-reaching in its operation than the earlier ones. The gravity of the situation produced by this arbitrary and high-handed use of a Parliamentary majority, will be apparent when we consider that it will result in fastening upon thousands of ratepayers in different localities more onerous obligations than any which they have ever consented to assume.

The Premier's knowledge of constitutional principles may, for aught that appears, be accurate and extensive. His reverence for those principles may be profound and sincere. But it is most assuredly a matter of no small difficulty to reconcile his present course of action with the supposition that he possesses that knowledge, and entertains that reverence. He has undertaken to justify this statute on the ground that he has sufficient reasons for supposing that the municipalities concerned are in favour of accepting the contracts in their altered form. Can it be that a statesman occupying the responsible position of Prime Minister of the Province of Ontario fails to understand that, even if it be conceded that the facts are what he states them to be—a very large concession many will think—the plea put forward by him is open to the unanswerable objection that the willingness of the ratepayers affected to bind themselves by the contracts as varied has never been declared by their votes registered in the manner required by the general laws

which define the rights and powers of municipalities. Every ratepayer in an organized civic community understands that he is liable to be committed at any time to an enterprise of which he disapproves, if the majority of the other ratepayers are in favour of it. This is merely one of the inconvenient risks to which the circumstance of his being a member of that community exposes him, and he assumes it along with any other drawbacks which may attach to the membership. But a wholly different state of facts is presented when he is compelled by special legislation, as in the present case, to undertake financial liabilities which have not been sanctioned by the votes of the ratepayers. In such a situation, he may well utter the protest, *Non hæc in fœdera veni.*

A critic is naturally reluctant to ascribe to Sir James Whitney an inability to appreciate the singular weakness of the only ground of defence which he has vouchsafed to adduce for this most reprehensible statute. But it would seem that the only other method of accounting for his conduct is that he has made up his mind to override, for the sake of a merely temporary political advantage, the rights which municipal ratepayers possess under our system of local self-government. A good many of his fellow citizens, it is to be feared, have already adopted this explanation. This is an aspect of the question, however, which scarcely falls within the province of a legal periodical. Nor indeed is it very material what his motives and springs of action may be. All that need be considered at the present time is that a statute of this sort will inflict a very damaging blow upon the delicate framework of our political institutions, and injure most seriously the financial credit of Ontario, and incidentally no doubt of the Dominion as a whole. Under these circumstances, it is an extremely important practical question whether the persons who believe the validation of these contracts in the manner proposed to be a proceeding which will cause an incalculable amount of mischief have any resource against the evils which they anticipate.

As the Lieutenant-Governor has assented to the measure the power of disallowance by the Governor-General in Council

presents itself as the only available means by which this extremely dangerous invasion of the fundamental rights of self-governoring municipalities can be prevented. It may safely be affirmed that a conjuncture more urgently demanding the exercise of that power has never occurred since the British North America Act was passed.

The unfairness of forcing obligations heavier than those which they originally consented to assume is obvious and glaring. There seems to be some likelihood that in a portion at least of the cities concerned a majority in favour of the revised contracts might not now be obtained. Apart from other considerations, not a few ratepayers may be inclined to question the wisdom of binding themselves for so long a period as that covered by the contracts. In an age when one unexpected scientific discovery succeeds another with startling rapidity, a prudent municipality may well hesitate to commit itself to an unqualified obligation to take, for any considerable length of time, and at a fixed price, power generated in any particular manner. The ratepayers of, let us say, 1930, would scarcely feel grateful to their predecessors of the present generation, if by some new device the Niagara Falls were rendered obsolete as a source of energy commercially profitable. That this event is by no means improbable, anyone who adverts to the extraordinary progress of invention within the last quarter of a century will readily admit. But the view which may be held with regard to this or any other special aspect of the matter is immaterial. The essential point is that the ratepayers should be given an opportunity of declaring whether they wish to become parties to the contracts in their altered form.

JURIDICUS.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] [Feb. 12.

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

Mines and mining—Apex location—Exploitation of vein—Continuity—Extralateral workings—Encroachment—Trespass—Onus of proof.

To justify an encroachment in the exercise of the right, under the British Columbia Mineral Act, 1891, 54 Vict. c. 25, of following and exploiting a mineral vein extralaterally beyond the vertical plane of the side-line of the location within which it has its apex, the owner of the apex must prove the continuity of the vein from such apex to his extralateral workings. In the present case, as the appellants failed to discharge the onus thus resting upon them, the judgment appealed from, 13 B.C. Rep. 234, was affirmed. Appeal dismissed with costs.

Bodwell, K.C., and *Lennie*, for appellant. *S. S. Taylor*, K.C., for respondent.

B.C.] VAUGHAN *v.* EASTERN TOWNSHIPS BANK. [Feb. 12.

Irrigation—Rivers and streams—Pre-emption of agricultural lands—Water records — Appurtenances — Abandonment of pre-emption—Lapse of water record.

Where holders of separate pre-emptions of agricultural lands, under the provisions of the Land Act, 1884, 47 Vict. c. 16 (B.C.), and the amendment thereof, 49 Vict. c. 10 (B.C.), with the object of vesting their respective pre-emptions in themselves as partners, surrendered the separate pre-emptions to the Crown, and, on the same day, re-located the same areas as partners, obtaining a pre-emption record thereof in their joint names, the joint water record previously granted to them, as partners, in connection with their separate pre-emptions, cannot be considered to have been abandoned. The effect of the transaction caused the areas to become unoccupied lands of the Crown, within the

meaning of the statute, and, upon their relocation, the water record in connection therewith continued to subsist as a right appurtenant to the joint pre-emption. Judgment appealed from (13 B.C. Rep. 77) reversed, the Chief Justice and Duff, J., dissenting. Appeal allowed with costs.

J. A. Macdonald, K.C., for appellant. *S. S. Taylor*, K.C., and *H. C. Hamilton*, for respondent.

Que.] HULL ELECTRIC CO. *v.* CLEMENT. [Mar. 29.

Appeal—Court of Review—Reduction of damages — Superior Court judgment—Confirmation—R.S.C. 1906, c. 139, *s.* 40.

Where the Court of Review in Quebec affirms the judgment of the Superior Court as to the liability of the defendant in an action for damages, but reduces the amount awarded the plaintiff, such judgment is confirmed and no appeal lies therefrom to the Court of King's Bench, but there is an appeal to the Supreme Court of Canada.

Simpson v. *Palliser*, 29 Can. S.C.R. 6, distinguished, Idington, J., dissenting.

Application to approve security refused with costs.

Aylen, K.C., for appellant. *Devlin*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] IRVING *v.* GRIMSBY PARK CO. [Feb. 11.

Supreme Court of Canada—Leave to appeal to—Jurisdiction of Court of Appeal—Extension of time—Appeal quashed in Supreme Court—Argument on merits.

The Court of Appeal has jurisdiction, under s. 48(e) of the Supreme Court Act, R.S.C. 1906, c. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under s. 71, to extend the time for appealing, even after the sixty days allowed by s. 69 have expired.

The court (MEREDITH, J.A., dissenting) refused leave to appeal from the judgment in 16 O.L.R. 386, after the time for appealing

had long expired, notwithstanding that an appeal to the Supreme Court of Canada, launched without leave, had been argued before that court upon the merits before being quashed for want of jurisdiction. See *Grimsby Park Co.* v. *Irving* (1908) 41 S.C.R. 35.

G. F. Shepley, K.C., for the defendants. *G. H. Kilmer*, K.C., for the plaintiff.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] DINEEN *v.* YOUNG. [March 25.

Contract for sale of leasehold interest in land—Specific performance—Vendor holding under sub-lease—Objections of purchaser—Waiver—Approval of assignment—Easement of right of way not known to purchaser.

Action for specific performance of an agreement for the purchase by defendant of plaintiff's leasehold interest in land in the city of Toronto. The agreement was contained in an offer addressed to the plaintiff for the purchase of his leasehold interest in the land and building on a lot on the north side of King Street, Toronto, describing it by metes and bounds. The offer was accepted the next day. Among other provisions the agreement contained the following:—

"The vendor shall not be bound to produce any abstract of title or any title deeds or evidence of title except such as he may have in his possession, nor to furnish a surveyor's plan or description or proof that the buildings stand wholly within the limits of the said lands. The purchaser shall search the title at his own expense and shall have ten days from said date of acceptance (i.e., of the offer) to examine the same, and, if no written objection be made within that time, shall be deemed to have accepted the title."

The defendant relied upon various grounds as entitling him to refuse to carry out his contract, there being among them certain alleged misrepresentations which however were held not to be established; also that the land was subject to an easement or right of way and that the plaintiff had not in fact a lease from the owner in fee of the land but was a sub-lessee. There was upon the land at the time the agreement was made a three storey brick building composed of two tenements numbered 124 and 126 King Street West, which included one half of a stairway on the east immedi-

ately adjoining tenement No. 122 King Street West. This stairway extended from the sidewalk in front to a landing on the story above the ground floor. The other half of this means of access was upon the land of the adjoining owner to the east and the whole was owned and used in common by this owner and his tenants and the plaintiff and his tenants, and was the only means by which access could be had by the plaintiff and his tenants to the upper storey of his building.

Held, 1. The description of the interest of the plaintiff as a leasehold interest imports that his interest is that of a lessee under a lease granted by the freeholder, and it is settled that under an agreement to sell such an interest the purchaser is not bound to accept an interest under a sub-lease: *Madeley* v. *Booth*, 2 DeG. & Sm. 718; *Broom* v. *Phillips*, 74 L.T. 459, and Dart on Vendors and Purchasers, 7th ed. 1086.

2. The defendant, however, was not entitled now to raise this objection, as he was required to make his objection within ten days, but not only made no objection within the ten days, but on June 22, 1907, the plaintiff's solicitor sent to the defendant's solicitors a draft of the assignment of the lease to the defendant, which was returned approved on July 11, following and in this draft assignment it was shewn that the plaintiff held under a sub-lease.

3. As to the objection that there was an easement or right of way, it did not appear that the defendant was aware of the existence of it at the time the contract was entered into, and that he had no knowledge of its existence until a survey was made in July. Nor had anything that had taken place the effect of waiving the right of the defendant to refuse to complete on the ground that the plaintiff was unwilling or unable to procure a release of the easement or right if the existence of it entitled the defendant to refuse to complete.

4. The vendor was not entitled to force a contract against an unwilling purchaser where there was a misdescription upon a point material to the due enjoyment of the property, in this case there being an easement or right of way over it, and the purchaser was not bound to take the land subject to such easement although there would pass with it an easement over a part of the adjoining owners' land equal in area to the part of the plaintiff's land which is subject to the easement. It might be that most purchasers would prefer to have what the plaintiff could convey, but the defendant was within his rights in answer-

ing the claim that he is bound to do so by saying non haec foedera veni.

Millar, for plaintiff. *Holman*, K.C., for defendant.

Meredith, C.J.C.P.] [April 2.

RE TAYLOR & THE VILLAGE OF BELLE RIVER.

Municipal law—Closing road—Meaning of "wholly within the jurisdiction of the council."

Application by a ratepayer to quash a by-law to close up part of the Tecumseh Road in the said village. The question was as to the jurisdiction of the council to close part of a continuous highway extending into another municipality which was the case of the above road. It was provided by the Con. Mun. Act, 1903, s. 637, that municipal councils may pass by-laws for "opening, making, preserving, improving, repairing, etc., or stopping up roads, streets, etc., wholly within the jurisdiction of the council." It was contended by the applicant that the use of the word "wholly" had the effect of limiting the powers so conferred to the stopping up of a road lying wholly within the municipality.

MEREDITH, C.J.—I am unable to agree with this contention. If it were to prevail, it would seem to follow that the duties imposed on corporations as to the repair of highways would not apply to the part of the Tecumseh Road which lies within the municipality of Belle River, and there would be no power in its council to pass by-laws for preserving, improving or repairing it. A construction that would lead to such a result ought not to be given to the enactment unless its language admits of none other, which in my opinion is not the case. The motion is dismissed with costs.

Province of Manitoba.

KING'S BENCH.

Cameron, J.] [March 27.

MULDOWAN *v.* GERMAN-CANADIAN LAND CO.

Company—Powers of general manager—Contract not under seal—Commencing business contrary to requirement of statute—First directors.

Held, 1. A company incorporated by letters patent under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, for

the purpose of buying, selling and dealing in land, will, by the combined effect of ss. 26, 31 and 64 of the Act, be bound by a contract for the sale of land signed on its behalf by one of the persons named in the letters patent as the provisional directors of the company representing himself, with the acquiescence and knowledge of the other directors, to be the general manager, although no proceedings, subsequent to the issue of the letters patent, had been taken to organize the company, no by-laws had been adopted and no directors elected, if the purchaser deals with the company in ignorance of the absence of these formalities.

2. The Act speaks only of first directors and contains nothing to indicate that their authority is only temporary or limited, and, therefore, though called "provisional" in the letters patent, the persons named were, under s. 26 of the Act, directors of the company with all the powers and duties set out in ss. 31, 64 and other sections of the Act. *Johnston* v. *Wade* (see ante, p. 25), followed. *Monarch Life* v. *Brophy*, 14 O.L.R. 1, distinguished.

3. Under s. 64 of the Act, the contract need not be under seal, nor was it necessary to prove that it was made in pursuance of any by-law or special resolution or order. *Thompson* v. *Brantford Electric Ry. Co.*, 25 A.R. 340, and *Mahony* v. *East Holyford*, L.R. 7 H.L. 869, followed.

4. It makes no difference in such a case that the company had commenced business in violation of s. 22 of the Act, ten per cent. of the authorized capital not having been subscribed nor ten per cent. of the subscribed capital paid up; for that provision should be held to be directory and not mandatory, as far as concerns dealings with strangers ignorant that it had not been complied with. Maxwell on Statutes, 556; Masten on Company Law, 564-5, 567; Dictum of Lord Hatherly in *Mahony* v. *East Holyford*, supra, at p. 894, followed. *Pierce* v. *Jersey Waterworks Co.*, L.R. 5 Ex. 209, distinguished.

Moran, for plaintiff. *Laidlaw* and *St. John*, for defendants.

Macdonald, J.] RE CHALMERS AND FREEDMAN. [March 2.

Landlord and tenant—Mortgagor and mortgagee—Distress for rent—Eviction of purchaser of mortgaged premises.

The purchaser of mortgaged premises is not a tenant of the mortgagee or his assignee and cannot be dispossessed by the summary procedure provided for by the Landlords and Tenants Act, R.S.M. 1902, c. 93, although the mortgage contains clauses creating the relation of landlord and tenant between the parties

and giving the mortgagee the right to distrain for arrears of interest as rent.

Neither can the mortgagee or his assignee, in such a case, distrain upon goods other than those of the mortgagor for such arrears of interest.

Chalmers, for applicant. *Morrisey*, for occupant.

Macdonald, J.] McAULEY *v.* McAULEY. [March 9.

Voluntary conveyance—Husband and wife—Fraudulent conveyance—Resulting trust.

The plaintiff caused the land in question to be conveyed to his wife, the defendant, and registered the deed without her knowledge. His motive was to avoid payment of an anticipated claim against him.

Held, that he could not succeed in an action to compel her to reconvey the land to him. *Curtis* v. *Price*, 12 Ves. 103, and *Roberts* v. *Roberts*, 2 B. and Ald. 367, followed. *Childers* v. *Childers*, 1 De.G. & J. 481, and *Hargh* v. *Kaye*, L.R. 7, Ch. 469, distinguished.

Monkman and *Nason*, for plaintiff. *Dennistoun*, K.C., and *Young*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] REX *v.* TANO. [March 22.

Criminal law—Habeas corpus—Offence by foreign sailor on British ship—Leave of Governor-General for prosecution—Criminal Code, s. 591—Territorial Waters Jurisdiction Act, 1878 (Imp.), c. 73.

A preliminary hearing before a magistrate of a charge against a foreign seaman for an indictable offence committed on board a British ship within the English admiralty jurisdiction is not such a proceeding for the trial and punishment of such person as to require the consent of the Governor-General pursuant to s. 591 of the Criminal Code.

Griffin, for the application. *J. K. Kennedy*, for the Crown.

Clement, J.] [March 26.

IN RE MOODY AND THE COLLEGE OF DENTAL SURGEONS.

Statute—Construction—"Unprofessional conduct"—Dentistry Act, 1908, c. 2, s. 66.

Where a professional class is governed by a statute applying to that profession and such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise.

Cassidy, K.C., for appellant. *Reid*, K.C., for College of Dental Surgeons.

Martin, J.] REX v. NARSINGH. [March 31.

Criminal law—Summary trial—Police magistrate—Stipendiary magistrate for county acting for—Persona designata—Crim. Code, s. 777, sub.-s. 2.

Even though a stipendiary magistrate for a county may have conferred upon him by a provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under s. 777 of Crim. Code.

It is desirable that there should be uniformity of decisions in all the courts of Canada on federal legislation.

Craig, for the accused. *W. A. Macdonald*, K.C., for the Crown.

Bench and Bar.

JUDICIAL APPOINTMENTS.

William Wallace Burns McInnes, of the city of Vancouver, British Columbia, Barrister, to be the judge of the County Court of Vancouver, in the Province of British Columbia, in the room and stead of His Honour George Fillmore Cane, deceased.