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THE RETIREMENT OF THE HON. MR. JUSTICE OSLER.

By the retirement of Mr. Justice Osler from the Bench, the province will lose one of its most valuable and erudite judges, and one that it can ill afford to spare. At the same time we heartily congratulate the learned judge that having served the province and his sovereign so faithfully and well for 31 years, he is able, while still in the full possession of his health and faculties, to withdraw from the Bench, and has not been compelled to wait until diminished powers have rendered him less efficient, and we trust he may for many years enjoy during the remainder of his lifetime that otium cum dignitate which he has so well earned.

The learned judge, as is well known, is a member of a family of whom at least three other members have gained distinction for intellectual capacity of a high order. His brother, the late Mr. B. B. Osler, Q.C., whose premature death is still mourned, was an advocate of conspicuous merit, whose brilliant abilities were not in any wise marred by that subtle humour which was also one of his distinguishing characteristics, a quality, too, which is equally remarkable in Professor Osler, the learned Regius Professor of Medicine, but which does not seem to be possessed to the same degree by either Mr. E. B. Osler, the popular member for Toronto, or the learned judge of whom we speak. But if lacking in that faculty of playful humour which has distinguished two of his brothers, Mr. Justice Osler was and is the possessor of qualities which have enabled him to be an ideal judge.

There are judges whose sense of duty does not permit them to indulge in any vagaries for gaining popular attention, who are content to apply the best faculties of their minds to the elucidation and vindication of sound principles of law and justice, who do not regard suitors or witnesses as proper targets either for

wit or sarcasm, but are content that justice shall be so administered by them, not in a flashy, but in an entirely modest and impartial way, and so far as it is humanly possible, so as to bring conviction of its intrinsic merits home even to the unsuccessful litigant, and after all it is really one of the most important duties of a judge not only to do right, but to convince, if it may be, even the litigant who fails, that right has been done.

Judging as far as we can from external appearances, we should say that Mr. Justice Osler must have set some such ideal of duty before him in the discharge of his judicial functions. No judge on the Bench was less conspicuous than he. He has never sought to attract attention to himself. His manner has been always modest and rather retiring and yet no judicial deliverance has commanded more attention or respect than his.

On the Bench he has been ever courteous and attentive, and whatever he may have felt, he has managed by an imperturbable manner to conceal his feelings from any offensive display, even in cases where some other judges would perhaps have been less reticent.

Fifty years have passed since the learned judge was called to the Bar and first began the practice of the law in partnership with the Hon. Jas. Patton, the firm being known as Patton & Osler; later he was joined by the late Hon. Thomas Moss, when the firm became Patton, Osler & Moss, a firm which through various fluctuations of membership may be said to have continued to this day. On Mr. Patton's withdrawal the firm continued as Osler & Moss, and afterwards on the accession to its ranks of the late Hon. R. A. Harrison it became known as Harrison, Osler & Moss, all three of its members being ultimately promoted to the Bench. In those days when Mr. Osler was in practice law and equity were distinct branches, and Mr. Osler confined his attention, we believe, exclusively to the common law side of the business--the equity branch being taken by Mr. Moss, the future Chief Justice of Ontario, and one of the most brilliant of Canadian lawyers, whose early death in the zenith of his powers was a national calamity. Mr. Osler was not often seen in the Assize Courts, his reputation as a profound and skilful lawyer was won

in the retirement of his chambers or before the court in Term, rather than in the more public forums of the nisi prius courts; and where, after 19 years at the Bar, he was promoted to the Bench of the former Court of Common Pleas, the appointment was received with general satisfaction by the profession and was amply justified by his judicial career from that day to this. But from his temperament and general disposition the Court of Appeal was a more appropriate tribunal for the display of his judicial abilities, and to this court he was, with the hearty approval of the profession, elevated in 1883, and there he has remained until his retirement, notwithstanding the offer of promotion to the Supreme Court Bench, which he declined in 1888.

Mr. Justice Osler may be said to be a judge of the old school who has combined dignity with learning and simplicity of manners. It has been enough for him to do his duty without ostentation, and he leaves behind him the record of a painstaking, fair-minded, learned and able judge, of whom the province has every reason to be proud.

REVIEW OF CURRENT ENGLISH CASES.

VESTING ORDER—INFANT—STOCK IN NAME OF INFANT AND ANOTHER TO WHICH INFANT IS ENTITLED—TRUSTEE ACT, 1893 (56-57 VICT. c. 53), s. 35—(R.S.O. 336, s. 15).

In re De Haynin (1910) 1 Ch. 223. In this case, stock to which an infant was beneficially entitled, was standing in the joint names of himself and another person, who was subsequently appointed his guardian, but had been superseded. Another guardian had been appointed for the infant, and an application was now made on the part of the infant and such guardian under the Trustee Act, 1893, s. 35, (R.S.O. c. 336, s. 15), for an order vesting the right to transfer the stock into the name of the present guardian, she undertaking to pay the money into court. Joyce, J., owing to some variation in the wording of the Act of 1893, and the Trustee Act of 1852, thought there was no power to make the order; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) considered that the case came within the Act of 1893, and made the order on the above undertaking as to bringing the money into court.

FUND IN COURT—TRUSTEE BENEFICIARY—EQUITIES AS BETWEEN TRUSTEE, BENEFICIARY AND OTHER BENEFICIARIES—DISTRIBUTION OF FUND IN COURT—ADJUSTMENT OF RIGHTS OF BENEFICIARIES INTER SE.

In re Rhodesia Goldfields, Partridge v. *Rhodesia Goldfields* (1910) 1 Ch. 239. This was a debenture-holder's action, and short point decided therein by Eady, J., is that when there is a trust fund in court, a trustee beneficiary against whom proceedings are pending to recover moneys alleged to belong to the trust fund, is not entitled to receive any share of the fund in court until the amount (if any) due from him to the trust fund shall have been ascertained and made good.

TRADE MARK—PASSING OFF GOODS AS THOSE OF PLAINTIFF—PARTIES—INJUNCTION.

Warwick Tyre Co. v. *New Motor & G.R. Co.* (1910) 1 Ch. 248. This was an action to restrain the defendants from using the name of "Warwick," as applied to tires for motor cars, the

facts being that from 1896 to 1905 the plaintiffs had manufactured tires for cycles and motor cycles under the name of "Warwick," so that by the year 1905 the name had become distinctive of the plaintiffs' tires. In 1905 they transferred their business, with the exclusive right to manufacture and sell "Warwick" tires to the Dunlop Company; but they did not assign their goodwill in their trade name of "Warwick." The plaintiffs never manufactured or sold tires for motor cars, nor did the Dunlop Company sell motor tires under the name of "Warwick." The defendants, on the other hand, only manufactured and sold motor tires, and in 1908 the name of their managing director being Warwick, they commenced to sell tires made by them as "Warwick motor tires," and the present action was brought to restrain them from so doing on the ground that they were passing off their goods as those of the plaintiffs. The Dunlop Company was not a party to the action. Two points were made by the defendants, first, that motor tires were distinct from cycle tires, and that as the plaintiffs did not make motor tires there was no ground for assuming that the defendants' goods were those of the plaintiffs, and, secondly, that in the absence of the Dunlop Company the plaintiffs were not entitled to relief. Neville, J., decided both points against the defendants, considering that the name "Warwick" had become a distinctive title of the plaintiffs' tires, and could not be applied by defendants to motor tires made by them, although the plaintiffs did not make motor tires; and as the plaintiffs still retained their goodwill in the name it was unnecessary to make the Dunlop Company parties.

TRADE MARK—INNOCENT INFRINGER OF TRADE MARK—DAMAGES.

Slazenger v. *Spalding* (1910) 1 Ch. 257. This was an action to restrain an infringement of the plaintiffs' trade mark as applied to golf balls of their make. The defendants were innocent infringers of this trade mark, and on being notified of the plaintiffs' rights, they at once undertook to remove the mark from balls sold by them, and also from their catalogues. The plaintiffs insisted that they were entitled to an account of sales of golf balls bearing the objectionable mark. The defendants declined to render an account and offered £10 as damages. This the plaintiffs refused to accept and brought the case to trial before Neville, J., who held on the authority of *Edelstein* v. *Edelstein*, 1 D.J. & S. 185, that the plaintiffs were not, in the circumstances, entitled to substantial damages or to an inquiry,

and that the subsequent passing of the Trade Marks Act had made no difference. He, therefore, gave the plaintiffs costs only up to the date of the defendants' offer.

LANDLORD AND TENANT—BREWER'S LEASE—TIED HOUSE—COVENANT TO BUY LIQUORS FROM LESSOR—BREACH OF COVENANT—FAIR AND REASONABLE PRICES—CURRENT MARKET PRICES—INJUNCTION.

In *Conrage* v. *Carpenter* (1910) 1 Ch. 262 the plaintiffs sought to restrain a breach of covenant by their lessee, the defendant, in the following circumstances: The plaintiffs were brewers, and had leased to the defendant a public-house, the defendant covenanting to buy, and the plaintiff covenanting to sell all malt liquors required for sale in the house at fair and reasonable prices. Owing to the excise on malt liquors being increased, the plaintiffs, in common with other brewers, raised their prices, which was agreed to by the trade generally, but some of the smaller brewers did not raise their prices; the defendant refused to pay the increased price, and purchased liquors elsewhere. Neville, J., who tried the action, held that the increased price was fair and reasonable, and that consequently the plaintiffs were entitled to an injunction, and it was immaterial that by raising prices the plaintiffs and other brewers were shifting the burden of taxation from their own shoulders to those of others.

WILL—CONSTRUCTION—GIFT OVER TO "NEXT OF KIN WHEREVER THEY MAY BE."

In re Winn, Brook v. *Whitton* (1910) 1 Ch. 278. This was a summary application for the construction of the will of a testator who died in 1855; by his will he directed six sums of £15,000 each to be set apart upon trust to pay the income of each sum to a specified nephew or niece, and after his or her death to his or her husband or wife, in case there was no issue, and half the income, if there were issue, and after trusts in favour of the issue, if any, and in the event of the death of any nephew or niece without issue, or having issue, and such issue dying before becoming entitled to the whole of the £15,000, the trustees were to stand possessed thereof, subject to the aforesaid provisions in favour of his said nephews or nieces, their husbands and wives respectively, "upon trust for any next of kin, whoever they may be, living at the time of the trusts failing, as

aforesaid, except the children or other descendants of my nephew, Thomas Winn, deceased." The testator gave his ultimate residue to the same six nephews and nieces, who were respectively tenants for life of the said sums of £15,000. At the testator's death in 1855 these six nephews and nieces were his sole next of kin, and would have been his sole next of kin if he had died at the date of his will. Frederick Shaw was the survivor of the six, and died in 1902 without leaving issue, but leaving a widow who died in 1909. In these circumstances Parker, J., held that, although the class of next of kin was to be ascertained at the time of the testator's death, yet only those took who survived the time when the previous trusts failed, and that on the death of the widow of Frederick Shaw, all the testator's next of kin, at the time of his death, having died, Shaw's £15,000 fell into the residue.

LANDLORD AND TENANT—RE-ENTRY FOR NON-PAYMENT OF RENT—RECOVERY OF POSSESSION—HALF YEAR'S RENT IN ARREAR—"NO SUFFICIENT DISTRESS"—ASSIGNEE OF LESSOR—RENT ACCRUED PARTLY BEFORE AND PARTLY AFTER ASSIGNMENT—RIGHT OF ASSIGNEE TO MAINTAIN ACTION—COUNTY COURTS ACT, 1888 (51-52 VICT. c. 43), s. 139—(R.S.O. c. 170, ss. 120, 121)—EQUITABLE LEASE.

Rickett v. *Green* (1910) 1 K.B. 253. This was a summary proceeding by the assignee of a lessor to recover possession of the demised premises, on the ground that the lease contained a proviso for re-entry on non-payment of rent; there being a half year's rent in arrear, and no sufficient distress on the premises. Part of the rent in arrear had accrued due before, and part after the assignment. The proceedings were brought under the County Courts Act, 1881 (51-52 Vict. c. 43), s. 139, which is similar to R.S.O. c. 170, ss. 120, 121. Two points were raised, (1) that no distress had actually been made, (2) that the plaintiff as assignee could not succeed because the whole of the half-year's rent in arrear had not accrued after the assignment. The plaintiff was assignee both of the reversion and also of the benefit of the lessee's covenant. The County Court judge who tried the case gave judgment for the plaintiff, and the Divisional Court (Darling and Phillimore, JJ.) affirm his decision on the ground that the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, entitled an assignee to enforce the lessee's covenants both as to rent accrued before and after the assignment. In the absence of such enactment, however, it would

seem that the decision would have been the other way—see *Wittrock* v. *Hallinan*, 13 U.C.R. 135, where it was held that the assignee of a reversion could not recover rent accrued due before the assignment, sed vide *Hope* v. *White*, 17 C.P. 52. There was another little point in the case deserving of notice, namely, the lease in question was void as a legal lease, because it was for more than three years, and not under seal, but the court held that it was a good equitable lease, and as equitable lessor the plaintiff was entitled to the benefit of the statute, as if he had been a legal lessor.

LANDLORD AND TENANT—FORFEITURE OF LEASE—BREACH OF COVENANT—EJECTMENT—ELECTION TO DETERMINE LEASE—APPLICATION BY UNDER LESSEE FOR RELIEF AGAINST FORFEITURE OF HEAD LEASE—EFFECT OF ORDER RELIEVING AGAINST FORFEITURE—CONVEYANCING AND PROPERTY ACT, 1881 (44-45 VICT. C. 41), S. 14—(R.S.O. C. 170, S. 13).

Dendy v. *Evans* (1910) 1 K.B. 263. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), have affirmed the judgment of Darling, J. (1909) 2 K.B. 894 (noted, ante, p. 48), and for the same reasons.

MERCANTILE AGENT—GOODS "ON SALE OR RETURN"—AUTHORITY TO PLEDGE—FACTORS ACT, 1889 (52-53 VICT. C. 45), SS. 1, 2—(R.S.O. C. 150, S. 2(3)).

Weiner v. *Harris* (1910) 1 K.B. 285. In this case the plaintiff, a wholesale jeweller, entrusted one Fisher, a retailer, with the possession of jewellery on the terms that it was to be sold by Fisher, who was to be entitled to one-half the profits, but if not sold it was to be returned to the plaintiff. Fisher, without authority, pledged the goods with the defendant, a pawnbroker, and the action was brought to recover the goods. Pickard, J., who tried the action, held that Fisher was not a mercantile agent, and was not within the Factors Act (52-53 Vict. c. 45) (see R.S.O. c. 170), and consequently had no power to pledge the goods, and, therefore, that the plaintiff was entitled to recover; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), took the opposite view, and held the Act applied, and dismissed the action, holding that though the words "sale or return" were used in the letter under which the goods were forwarded to Fisher, yet it was not really a transaction of that kind, because a sale to Fisher was not contemplated, but a

sale by him, and *Hastings* v. *Pearson* (1893) 1 Q.B. 62 was overruled.

ARBITRATION—UMPIRE—WITNESS CALLED BY UMPIRE—MISCONDUCT OF UMPIRE—EVIDENCE—REMOVAL OF UMPIRE—ARBITRATION ACT, 1889 (52-53 VICT. c. 49), s. 11—(9 EDW. VII. c. 35, s. 13 (ONT.)).

In re Ensch & Zaretzky (1910) 1 K.B. 327. This case is deserving of attention, because the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) has very strongly disapproved of the dicta of the late Lord Esher, M.R., in *Coulson* v. *Disborough* (1894) 2 Q.B. 316, and *In re Keighley* (1893) 1 Q.B. 405. In the former case he expressed the opinion that a judge might call a witness, and it would be discretionary whether a witness so called could be cross-examined by either party. In the second case he intimated that an arbitrator is not bound by the strict rules of evidence. In the present case upon a reference under an arbitration the umpire had undertaken, on his own responsibility, and without the consent of parties, to call a witness who gave evidence as to matters which one of the parties wished to rebut by evidence of witnesses in Rangoon, and asked an adjournment of the reference for that purpose, which was refused. The Court of Appeal held this to be improper conduct on the part of the umpire, and they disapproved of the dicta of Lord Esher, in the above cases, and on the contrary were of the opinion that arbitrators are bound by the ordinary rules of evidence, and that neither an arbitrator nor a judge has any power to call a witness on his own motion without the consent of parties. In this case the umpire had also refused to state a case unless paid £150, and this also was held to be misconduct, and he was ordered to be removed, and the judgment of the Divisional Court (Darling and Lawrence, JJ.), was reversed.

CRIMINAL LAW—CONSPIRACY—AGREEMENT TO INDEMNIFY BAIL—ABSENCE OF WRONGFUL INTENT—ACT CONTRARY TO PUBLIC POLICY.

The King v. *Porter* (1910) 1 K.B. 369. This was a prosecution for conspiracy to commit an unlawful act. The act being the indemnification of bail given in a criminal case. The facts being that one Clark was charged with felony, and Porter and one Brindley together became bail for the appearance of Clark to stand his trial, and Porter and Brindley then entered into an agreement with Clark, that Clark should indemnify them against

liability as such bail. Jelf, J., who tried the case, told the jury that a contract to indemnify bail was contrary to public policy, and illegal, and that if the parties had entered into an agreement of that kind they were guilty of a criminal conspiracy, even though the jury should find there was an absence of any intent to do an illegal act. The jury found the prisoners guilty, and Porter appealed to the Court of Appeal (Lord Alverstone, C.J., and Darling and Phillimore, JJ.), and by that court the conviction was affirmed. The opinion of Martin, B., in *Reg.* v. *Broome*, 18 L.T. (O.S.) 19, and which was acted on in *Rex* v. *Stockwell*, 66 J.P. 376, to the effect that bail might contract for an indemnity, was held to be bad law.

SUNDAY OBSERVANCE—SUNDAY TRADING—LESSEE OF CROWN.

In *Kelly* v. *Hart* (1910) A.C. 192 the defendant was prosecuted for breach of a Sunday Observance Act which forbade trading on that day. The defendant was a lessee of the Crown of the refreshment room at a station of a railway operated by the Crown. The lease empowered him to sell cigarettes to actual or intending passengers, and there was no restriction against sales on Sunday. The defendant contended that the Crown was not bound by the Act in question and that he as lessee of the Crown stood in its place to the extent of his rights as lessee, and was therefore not liable. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Collins and Shaw and Sir A. Wilson), however, held that the onus lay on the defendant to shew that the purchasers were actual or intending passengers, and not having discharged that onus he should have been convicted; their Lordships refrain from expressing any opinion as to whether or not the Crown is bound by the Act.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Ont.] [February 22.

TOWN OF BERLIN v. BERLIN & WATERLOO STREET RY. Co.

Street railway—Franchise—Assumption by municipality—Valuation—Operation in two municipalities—Compulsory taking—R.S.O. (1897), *c.* 208, *s.* 41.

By s. 41 of R.S.O. (1897), c. 208, a municipal corporation which has given a franchise to a street railway company, may, at the expiration thereof, on giving six months' previous notice, assume the ownership of the railway, and all its real and personal property on payment of the value thereof to be determined by arbitration.

The town of Berlin assumed the ownership of the Berlin & Waterloo Street Railway Co., and the latter appealed from the award of arbitrators fixing the value of their railway.

Held, reversing the judgment of the Court of Appeal (19 Ont. L.R. 57), that the proper mode of determining the value of the "railway and all real and personal property in connection therewith," was not by capitalizing its net permanent revenue, but by estimating its value as a railway in use and capable of being operated, excluding compensation for loss of its franchise.

Held, also, that the company was not entitled to compensation for loss of its privilege of operating the railway in the municipality of Waterloo.

On the expiration of the franchise the company executed an agreement extending for two months, the time for assumption by the municipality, but did not relinquish possession until six months more had expired. Shortly before it was taken over by the municipality an Act of the legislature was passed reciting all the circumstances, ratifying and confirming the agreement for extension of time, and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the courts.

Held, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immedi-

ately on the expiration of the franchise its effect was not to confer upon the town of Berlin a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.

Quære. Did the Act just mentioned, by its terms, preclude the company from claiming compensation for loss of franchise?

The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. above the actual value of the property.

Appeal allowed with costs.

Shepley, K.C., and *Drayton*, for appellants. *Bicknell*, K.C., and *McPherson*, K.C., for respondents.

Ont.] [February 25.

JOHN GOODISON THRESHER CO. *v.* MCNAB.

Appeal—Special leave—Time limit—Extension—R.S.O. (1906) c. 139, *s.* 48(*e*).

After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the sixty days, will not enable it to do so.

Motion refused with costs.

J. E. Jones, for motion. *Douglas*, K.C., contra.

Divisional Court.] REX *v.* TEASDALE. [March 3.

Liquor License Act—Conviction for second offence—Amendment of s. 72 after first conviction—Change in penalty for first offence—Interpretation of statutes—Refusal of judge to discharge defendant—Right of appeal to Divisional Court—Rule 777—Proof of previous conviction—Procedure at trial before police magistrate—Failure to comply with R.S.O. 1897, *c.* 245, *s.* 101.

Appeal by the defendant from the order of CLUTE, J., ante 110, dismissing an application by the defendant, on the return of a habeas corpus and certiorari in aid, for his discharge from custody under a warrant of commitment pursuant to a conviction for a second offence against the Liquor License Act.

The appeal was heard by BRITTON, LATCHFORD, and SUTHERLAND, JJ.

BRITTON, J.:—The main objection relied upon before my brother CLUTE was that no conviction for a second offence could be made because of the amendment of s. 72 of the Liquor License Act after the alleged first conviction and before the second conviction. Upon that objection judgment was reserved, and all other objections were upon the argument disallowed. I do not know what the specific objections raised, and so disposed of on the argument, were, but as to the one reserved and afterwards decided as reported, I may say that I wholly agree with the learned judge.

The Crown took as a preliminary objection that there is no appeal: (1) No appeal under the Habeas Corpus Act, as here, to a Divisional Court; although the writ of habeas corpus could have been made returnable before a Divisional Court or before a single judge, in either case the appeal is only to the Court of Appeal; (2) no appeal because of the provisions in the Liquor License Act in regard to appeals, c. 245, ss. 118, 121, R.S.O.

Neither Act in terms prevents such an appeal as is now taken, from a judge in the ordinary course to a Divisional Court. Unless there is a prohibition in terms or by necessary implication, there is no reasons why the case is not covered by rule 777. The judgment pronounced by Mr. Justice CLUTE, if it stands, finally disposed of the matter.

Under the Liquor License Act (s. 121) the appeal will lie to the Court of Appeal from a judgment of the High Court or a judge thereof, "but no such appeal" (i.e., appeal to the Court of Appeal) "shall lie from the judgment of a single judge or from the judgment of the court if the court is unanimous, unless in either case the Attorney-General for Ontario certifies," etc. That seems to imply that a party may as of right and in the ordinary case go from a single judge to a Divisional Court: *Rex* v. *Lowery*, 15 O.L.R. 182.

I am of opinion that the Divisional Court has jurisdiction, and so the objections must be considered.

Assume that the offence charged as of the 3rd November, 1909, was approved, and that the prisoner was found guilty, then, and not before, the prisoner should have been asked "whether he was previously convicted, as alleged in the information."

The allegation in the information is that the prisoner was on the 28th July, 1908, at the town of Cobourg, before the police magistrate in and for the town of Cobourg, duly convicted of

having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, unlawfully sold liquor without the license therefor by law required. The prisoner, after having been made aware of that allegation, should have been asked, in substance, at least, with some regard to the requirement of the statute, whether he was previously convicted as so alleged, or not. If, upon this inquiry being made, the prisoner had answered that he was so previously convicted, he could have been sentenced. Had the prisoner denied or had he not answered directly, proof of the previous conviction would have been required.

The record does not shew that the statutory procedure was complied with.

The police magistrate says, in his minute of conviction, that subsequently, and on the same 11th December, 1909, the defendant pleaded guilty upon a charge of having been previously convicted at the 28th July, 1908, of having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, sold liquor without the license therefor by law required. The place of conviction is not stated, nor is the name of the convicting magistrate, although both are in the information. Then the police magistrate, no doubt acting in perfect faith, and intending to comply with the law, puts the previous conviction in the form of a charge against the prisoner. He is charged with having been previously convicted, and to this charge it is alleged that the prisoner pleaded guilty. It could not be put in the form of a charge. It is not an offence to have been convicted of an offence . . Putting the matter in this form is conclusive evidence to me that the police magistrate did not, in fact, comply with the statute, and it may be a matter of regret that the prisoner, if, in fact, guilty of the previous offence, and subsequent offence of selling liquor without license should escape without the full punishment to which he was sentenced; yet that cannot be avoided. It is important that, before imprisonment, guilt should be established, and that the conviction should be in due form of law. I do not give effect to any of the many objections taken by prisoner's counsel.

My decision is that s. 101 of c. 245, was not, in form or substance, complied with . . .

Reference to *Rex* v. *Brisbois*, 15 O.L.R. 264; *Regina* v. *Fee*, 13 O.R. 590.

Order will go for discharge of prisoner. No costs.

LATCHFORD, J., concurred, stating his reasons briefly in writing.

SUTHERLAND, J., also concurred.

J. B. Mackenzie, for the defendant. *E. Bayly*, K.C., for the Crown.

Ont.] WHYTE PACKING CO. *v.* PRINGLE. [March 4.

Appeal—Special leave—Public interest—Important questions of law—Exemption from taxation—School rates—R.S. (1906) *c.* 139, *s.* 48.

By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates, which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal, 20 Ont. L.R. 246. On motion for special leave to appeal from the latter judgment,

Held, that the case was not one of public interest, and did not raise important questions of law. It did not, therefore, fall within the principles laid down in *Lake Erie & Detroit River Railway Co.* v. *Marsh*, 35 Can. S.C.R. 197, for granting such leave.

Motion refused with costs.

Chrysler, K.C., for motion. *J. Travers Lewis*, K.C., contra.

Falconbridge, C.J.K.B.] [March 7.

REX *v.* BECKETT ET AL.

Criminal law—Conspiracy—Trade combination—Criminal Code, s. 498*—Restraint of trade—Prevention of competition—Evidence—Findings of fact.*

A prosecution for an alleged conspiracy connected with trade and commerce, laid under s. 498 of the Criminal Code.

The indictment was found by a grand jury at Hamilton; the defendants exercised the option given by s. 581 of the Code, and elected to be tried before the Chief Justice without a jury, and by consent the venue was changed to Toronto.

The indictment charged that Henry C. Beckett, George E. Bristol, John I. Davidson, Thomas B. Escott, W. G. Craig, Joseph E. Eby, Thomas Kinnear, the Dominion Wholesale Grocers' Guild, and the Ontario Wholesale Grocers' Guild, did, in and during the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, and 1905, at the city of Hamilton, and elsewhere in the Province of Ontario, unlawfully conspire and agree and arrange one with

the other and others of them, and with some 208 named persons, firms, and corporations, and with the several members, officers, etc., and other persons, firms, and corporations at present unknown: (1) Unduly to limit the facilities in producing, manufacturing, supplying and dealing in sugar, tobacco, starch, canned goods, salt and cereals, and other articles and commodities, being articles and commodities which are the subject of trade and commerce; (2) and to restrain and injure trade and commerce in relation to such articles and commodities; (3) and unduly to prevent, limit and lessen the manufacture and production of such articles and commodities; (4) and unreasonably to enhance the price of such articles and commodities; (5) and unduly to prevent and lessen competition in the production, manufacture, purchase, barter, sale, and supply of such articles and commodities; against the form of the statute, etc.

FALCONBRIDGE, C.J.:—Counsel for the Crown admitted that no case had been made against the defendants under clause (1) of the indictment, corresponding to sub-s. (a) of s. 498 of the Code . . and that the case would have to be maintained, if at all, under the remaining charges corresponding to sub-ss. (b), (c) and (d) of s. 498.

(The Chief Justice referred to portions of the evidence; and then cited and quoted from the following authorities: Jolly on Contracts in Restraint of Trade; *Nordenfeldt* v. *Nordenfeldt-Maxim* (1894) A.C. 535, 553, 556; *Ontario Salt Co.* v. *Merchants Salt Co.*, 13 Gr. 540, 542, 543; *Rex* v. *Elliott*, 9 O.L.R. 648; *Rex* v. *Master Plumbers' Association*, 14 O.L.R. 295, 300, 302, 309; *Mogul SS. Co.* v. *McGregor* (1892) A.C. 36; *Allen* v. *Flood* (1898) A.C. 138; *Wampole & Co.* v. *W. E. Karn Co.*, 11 O.L.R. 619; *Quinn* v. *Leathem* (1901) A.C. 506; *The King* v. *Clark*, 14 Can. Crim. Cas. 46, 57; *The King* v. *Gage*, 13 Can. Crim. Cas. 415; *Gibbons* v. *Metcalfe*, 15 Man. L.R. 583; Eddy on Combinations, vol. 1, s. 556; *Bohm Manufacturing Co.* v. *Hollis*, 54 Minn. 223, 55 N.W.R. 1119, 1120; *Commonwealth* v. *Grimstead*, 108 Ky. 59, 111 Ky. 203; *Gibbs* v. *Consolidated Gas Co.*, 130 U.S. 396, 409; *People's Gas Light Co.* v. *Chicago Gas Light Co.*, 20 Ill. App. 492.)

I find the facts then to be as follows:—

1. The defendants have not, nor has any of them, intended to violate the law.

2. Nor have they, nor has any of them, intended maliciously to injure any persons, firms, or corporations, nor to compass any restraint of trade unconnected with their own business relations.

3. They have been actuated by a bonâ fide desire to protect their own interests, and that of the wholesale grocery trade in general.

As far as intentions and good faith or the want of it are elements in the offence with which they are charged, the evidence is entirely in their favour.

Have they been guilty of a technical breach of law? This question is answered by the citations, which I have given above, and which cover every branch of the case.

I, therefore, say that the defendants are not, nor is any of them, guilty as charged.

These are minor matters as to which I, sitting as a jury, give the defendants (as I am bound to do) the benefit of the doubt, and as to which I warn the defendants, and those in like case to be careful. e.g., as to alleged efforts to coerce wholesale dealers into joining the guild.

It is of the essence of the innocence of the defendants that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesalers, whether they choose to join the guild or not.

G. T. Blackstock, K.C., and *S. F. Washington*, K.C., for the Crown. *E. F. B. Johnston*, K.C., *E. H. Ambrose*, and *Eric N. Armour*, for the defendants.

Divisional Court.] [March 7.

BARNETT *v.* GRAND TRUNK R.W. CO.

Railway—Collision—Negligence—Injury to licensee or trespasser on train run into by car of another railway—Liability for gross negligence—Highway—Findings of jury—Reversal of judgment of trial judge—Judgment for plaintiff instead of new trial.

An appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the defendants, in an action for damages for injuries sustained by the plaintiff by reason of a collision between a train of the Pere Marquette Railway Company upon which the plaintiff was riding, and a van or car of the defendants in the railway yard at London, the collision being caused by the negligence of the defendants, as the plaintiff alleged.

The appeal was heard by BOYD, C., MAGEE, and LATCHFORD, JJ.

The judgment of the court was delivered by BOYD, C.:—

Though the conductor was on the train of empty cars which were being backed to the junction, he was not in charge of the movement; it was in the hands of Cole, who gave the signal to switch —for the information of the Grand Trunk officials—and was at the moving end of the coach with lantern on the look-out. Before the backing began, the plaintiff was on the platform, which was then at the front of the backward movement, close beside Cole, to whom he spoke, and also leaned over him to see what delayed the starting after the signal had been given. From the evidence of the plaintiff and the plaintiff's wife, I would infer that what Cole says as to his being on the platform before the backing began and at the time of the collision, actually occurred, and that he was there with the permission of the man in charge of the cars. This may have been in contravention of rules or orders not known to the plaintiff, but with the knowledge of Cole, who, however, made no objection to the plaintiff being where he was. This was the only occasion when the plaintiff had taken this ride on this train, for his own convenience, when in charge of these men, and he did not know Cole—but the uncontradicted evidence is that he had done this on many other occasions without check or comment from the officials—so that he was not a mere trespasser, but under an honest mistake that he was not transgressing this permissive use of the train. I should find on this evidence his legal status to be that of a licensee getting a gratuitous lift on the cars to the stopping place at the junction. The duty of the defendants was to manage their cars so that no negligent injury should be done to the Pere Marquette cars using this "lead," which is said to be their property. It is conceded that this caboose of the defendants was moved violently against the backing cars of the Pere Marquette Railway Company so as to injure the plaintiff. This is characterized by the learned Chief Justice as the "result of gross negligence." If the plaintiff was not wrongfully where he was on the Pere Marquette train, then he is entitled to recover damages against the defendants—by the English authorities.

(Reference to *Harris* v. *Perry* (1903), 2 K.B. 219; *Wilton* v. *Middlesex R.R. Co.*, 107 Mass. 108; *Philadelphia and Reading R. Co.* v. *Day*, 14 How. S.C. 468; *R.R. Co.* v. *Stout*, 17 Wall S.C. 661; *Sievert* v. *Brookfield*, 35 S.C.R. 494; *Grand Trunk R.W. Co.* v. *Richardson*, 91 U.S. 454, 471; *Nightingale* v. *Union Colliery Co. of British Columbia*, 35 S.C.R. 67.)

Now the law is with the plaintiff clearly if he is a licensee, and I think so also if he is an honest or mistaken trespasser.

Such an one is described by Beven, Can. ed. (1908), vol. 2, pp. 952, 953. I do not read the answers of the jury to the questions submitted as a finding that the plaintiff was a trespasser upon the defendants' train. All they have found is that the plaintiff was not on the train or platform by the permission of the Pere Marquette Railway Company.

It is not without significance that the accident—the collision—happened upon the tracks laid on the public highway on Waterloo Street . . . Given the circumstances of this case, it does not seem to me that the defendants are exempt from liability, though the plaintiff was nothing else than a mere trespasser.

As to the degree of liability incurred by the Pere Marquette Railway Company, had they been the authors of the jury, and imputing a like degree of liability as to the defendants—and for the defendants the situation cannot be put more favourably to them—the authorities mark a distinction of duty between the case of permitting a licensee to be on a place or pass over a place, and that of taking him on a vehicle or otherwise carrying him. That is discussed in *Harris* v. *Perry*, and it is indicted that a greater degree of care is called for in the latter case. But, after all, it is a question for the jury, and the observations of ESHER, M.R., in *Thatcher* v. *Great Western R.W. Co.*, 10 Times L.R. 13, are very pertinent. "No doubt," he says, "in strict logic, the railway company had not the same amount of duty to persons permitted to come on their premises as they had to persons who paid money in consideration of being taken as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other." And in the same case LOPES, L.J., says (discarding the term "licensee"): "If a person permitted another to come on his premises, and knew him to be there, it was his duty to take reasonable care not to injure him." See *Barnes* v. *Ward*, 9 C.B. 393, 420.

It appears to me that the plaintiff is entitled to a verdict, and that it is not necessary for us to direct (in view of the consent of counsel to our dealing with the case) that there should be a new trial.

Judgment for the plaintiff with costs.

J. F. Faulds, and *P. H. Bartlett*, for the plaintiff. *W. Nesbitt*, K.C., for the defendants.

Divisional Court.] [March 9.

ST. GEORGE MANSIONS *v.* KING.

Landlord and tenant—Possession after expiry of lease—Treaty for new lease—Tenancy at will.

Appeal by the defendant from the judgment of DENTON, Jun. J., of the County Court of York, in favour of the plaintiffs in an action in that court to recover rent of an apartment under an alleged lease or agreement for a period after the defendant had vacated the premises on the 30th April, 1909, having given one month's previous notice in writing of his intention to quit. The court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND) held that the defendant being permitted to continue in possession pending negotiations for a new lease, was not a tenant for a year, nor from year to year, but only a tenant at will: *Idington* v. *Douglas*, 6 O.L.R. 266. Appeal allowed with costs, and action dismissed with costs.

J. M. Ferguson, for the defendant. *J. A. Macintosh*, for the plaintiffs.

Divisional Court.] [March 9.

HOSKIN *v.* MICHIGAN CENTRAL R.R. Co.

Railway—Injury to passenger alighting—Defective step—Negligence—Jury.

An appeal by the defendants from the judgment of MAGEE, J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $1,250 damages for personal injuries sustained by the plaintiff in alighting from a car of a train of the defendants at Amherstburg. The plaintiff alleged that the injuries were attributable to the defendants' negligence in permitting the car to be equipped with a defective and improper step. The court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) held (RIDDELL, J., dissenting), that they could not interfere with the verdict. The plaintiff was not bound to adduce specific evidence that the use of such a step constituted negligence. The jury had a right to infer that the use of a ricketty, insecure, or unsuitable box for the purpose of assisting passengers to alight, constituted negligence. RIDDELL, J., was of opinion that the jury had not found sufficient facts upon which to base a finding of negligence on the part of the defendants, even if such a finding could in any sense be based upon the fact that the portable step was not of the same length as the car step. He was in favour of directing

a new trial. The judgment of the court was that the appeal should be dismissed with costs.

D. W. Saunders, K.C., for the defendants. *J. R. Rodd*, for the plaintiff.

Master in Chambers.] HARRIS *v.* WISHART. [March 10.

Foreign commission—Postponement of trial.

Motion by the defendant for a commission to take evidence in England and to postpone the trial until the return.

Held, that, while it may be a great inconvenience to the plaintiff to have the trial delayed, the first consideration is a fair trial to all concerned: *Ferguson* v. *Millican*, 11 O.L.R. 35; and the evidence sought is material. Order made for a commission.

W. J. Boland, for the defendant. *J. E. Day*, for the plaintiff.

Divisional Court.] [March 10.

STAUNTON *v.* KERR.

Solicitor—Costs—Company—Contract—Retainer—Evidence—Conflict—Credibility of witnesses—Corroboration—Finding of trial judge—Appeal.

Appeal by the plaintiff from the judgment of BOYD, C., dismissing the action, which was brought by a solicitor against an incorporated company and another solicitor upon a bill of costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

RIDDELL, J.:—The plaintiff had, as he supposed, a claim for costs against the E. Van Allen Co., Limited; negotiations were going on for the sale of the capital stock of this company to the defendant Kerr's client; and the plaintiff and the defendant Kerr met. The plaintiff was himself the owner of some of the capital stock, and, according to his contention, the defendant Kerr "definitely agreed . . . at that time that, if I would carry out this sale, so far as myself and my friends were concerned, he would pay me the $500 and the disbursements." The stock was transferred.

If this agreement was made in the terms set out, there can be no doubt that the defendant Kerr should pay the amounts agreed upon—the Statute of Frauds has no application to a contract of that kind. But Kerr denies that such an agreement was made; and the trial judge is unable to find that the plain-

tiff's versions is correct. It is true that there is some corroboration of the plaintiff's story, but there is nothing in our law to oblige a trial judge (any more than a jury) to accept the evidence of two witnesses rather than one. The principle referred to by TASCHEREAU, J., . . in *Lefeunteum* v. *Beaudoin*, 28 S.C.R. 89, at p. 93, has no application to this case, even supposing it to be applicable to our law in any case. The learned judge says: "It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, magis creditur duobus testibus affirmantibus quam mille negantibus, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed." I do not accept in our law either the reasons for the supposed rule or the rule itself. But, assuming its application to any case, it has none here—each witness gives his version of what took place at the meeting—Kerr's evidence is as affirmative as Staunton's, and Staunton's is as much a negative of Kerr's as the converse.

In view of the decisions, which it cannot be necessary again to cite, I think it impossible to say that the plaintiff has made out a case against the defendant Kerr.

As regards the company, I do not think it necessary to go into the law affecting a director who acts as a solicitor for a company. After an attentive perusal of the evidence, I am unable to find that Staunton was either in fact or in form retained by the company. It may seem clear enough that Van Allen retained him, but the retainer (if any) was for Van Allen himself, and not for the company.

I am of opinion that the appeal should be dismissed with costs. . . .

BRITTON, J.:—I agree that the appeal should be dismissed.

FALCONBRIDGE, C.J.:—I agree with my learned brothers in their disposition of the appeal as to the defendant company.

But I have the misfortune to hold a different view as to the case against the individual defendant.

The finding of the learned Chancellor involves no expression of personal opinion, but is based on a purely academic and scientific rule; and it is not, therefore, in my humble judgment, entitled to the high deference which is accorded to the specific finding of fact of a trial judge on conflicting evidence, as illustrated in *Bishop* v. *Bishop*, 10 O.W.R. 177; *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury* (1908) A.C. 323, at p. 326.

Without suggesting any impairment of this now well-established rule, and without dissenting from the Chancellor's theory that the parties here are entitled to equal credit, I would have decided that the plaintiff's statement was better corroborated than that of the defendant, and that it was true in fact; and so I am of opinion that the judgment on this branch of the case ought to be set aside, and a verdict entered for the plaintiff against the defendant Kerr . . .

W. N. Douglas, K.C., for the plaintiff. *R. McKay*, for the defendant company. *G. M. Clark*, for the defendant Kerr.

Master in Chambers.] [March 15.

BROWN *v.* CITY OF TORONTO.

Jury notice—Action against municipal corporation—Misfeasance or non-feasance.

Motion by the defendants to set aside the plaintiff's jury notice in an action against the city corporation to recover damages for injuries caused to the plaintiff "by reason of a hole or depression in the boulevard," at the north-west corner of Elizabeth and Albert streets, "caused by the negligence of the defendants taking up the old sidewalk and not filling in."

Held, a case of non-repair within s. 104 of the Judicature Act. Reference to *Burns* v. *City of Toronto*, 13 O.L.R. 109; *Keech* v. *Town of Smith's Falls*, 15 O.L.R. 300, 302; *Sangster* v. *Town of Goderich*, 13 O.W.R., at p. 421; *Dickson* v. *Township of Haldimand*, 2 O.W.R. 969, 3 O.W.R. 52; *Smith* v. *City of Vancouver*, 5 B.C.R. 491; *Goldsmith* v. *City of London*, 16 S.C.R. 231; *Barber* v. *Toronto R.W. Co.*, 17 P.R. 293. Order made striking out the jury's notice; costs in the cause.

H. Howitt, for the defendants. *S. H. Bradford*, K.C., for the plaintiff.

Meredith, C.J.C.P., in Chambers.] [March 16.

KEMERER *v.* WATTERSON.

Writ of summons—Service out of jurisdiction—Con. Rule 162 *(e), (h)—Place of contract—Place where payment to be made—Assets in Ontario—Garnishable debt—Conditional appearance.*

Appeal by the defendant from the order of the Master in Chambers, dismissing a motion by the defendant to set aside the order of a registrar, sitting for the Master in Chambers and the

writ of summons and the service of it upon the defendant in Montreal, but giving him leave to enter a conditional appearance.

MEREDITH, C.J.:—The material upon which the registrar's order, which gave leave to serve the writ out of Ontario, was made, was, no doubt, insufficient, but, upon the material before the Master on the motion, he, upon the authority of *Great Australian Co.* v. *Martin*, 5 Ch. D. 1, properly dealt with the motion upon the material before nim, which would have been sufficient in the first instance to have warranted the making of the order.

The right to have service out of Ontario allowed is rested by the plaintiff upon the provisions of Con. Rule 162, clause (*e*) and (*h*).

The Master, following *Canadian Radiator Co.* v. *Cuthbertson*, 9 O.L.R. 126, being of opinion that, upon the material before him, it was in doubt, "(1) whether payment under the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario, and (2) whether the defendant had assets in Ontario sufficient to satisfy Rule 162, clause (*h*)—though that seemed not unlikely"—made the order which is complained of.

If, as Mr. McCoomb deposed, there was no binding contract prior to the shipment of the goods at Morrisburg, the case comes, according to *Blackley* v. *Elite Costume Co.*, 9 O.L.R. 382, within clause (*e*) of Rule 162, for the contract would then be governed by the law of Ontario, and in that case the place of payment would be in Ontario where the creditor resides.

Mr. McCoomb's statement is disputed by the defendant, and in such cases, as decided by the Chancellor in *Canadian Radiator Co.* v. *Cuthbertson*, the proper practice is "not to try the disputed question of jurisdiction upon affidavits, but to permit the defendant to enter a conditional appearance and thereafter raise his contention on the record."

It is also, I think, shewn that the defendant, at the time the order was made, had assets in Ontario, within the meaning of clause (*h*) of Rule 162. That one person or firm at all events owed him a garnishable debt of more than $200, is not open to question.

It was contended . . . that this debt was not assets in Ontario within the meaning of the rule, but I am unable to agree with that contention. That a garnishable debt is assets within the meaning of a similar rule was the opinion of the Court of King's Bench in Manitoba in *Brand* v. *Green*, 13 Man. L.R. 101, of Mathers, J., in *Gullivan* v. *Cantelon*, 16 Man. L.R. 644; and of Macdonald, J., in *Bank of Nova Scotia* v. *Booth*, 10 W.L.R. 313.

The decisions of the Manitoba courts are in accordance with the statement of the law by Mr. Dicey in his Conflict of Laws (2 ed.), p. 310. . . . *Commissioner of Stamps* v. *Hope* (1891) A.C. 476, 481, 482. . . *Winans* v. *The King* (1898) 1 K.B. 1022, 1030.

If, as was contended . . . , the statement of Mr. Dicey is to be limited in its applications to the determination of the situation of the debt for the purposes of an administration, the reasons which led to its adoption in the case of administration, I think, apply to clause (*h*) of Rule 162.

The purpose of the rule manifestly is to enable a creditor, who is not otherwise entitled to sue his debtor in an Ontario court, to do so for the purpose of obtaining satisfaction out of the debtor's property in Ontario which may be made available to satisfy a judgment recovered in an Ontario court, and it must, therefore, I think, have been intended that whatever property in Ontario might be made available for that purpose should be assets within the meaning of the rule.

(Reference to *Love* v. *Bell Piano Co.*, 10 W.L.R. 657, disapproving it.)

Appeal dismissed; costs in the cause.

E. P. Brown, for the defendant. *W. R. Smyth*, K.C., for the plaintiff.

Master in Chambers.] [March 16.

McDONNELL *v.* GREY.

Venue—Action against License Commissioners—R.S.O. 1897, *c.* 88, *s.* 1.

Motion by the defendants to change the venue from Barrie to Whitby. The action was against the License Commissioners and Inspector for North Ontario for an injunction restraining the defendants from removing a license from hotel premises owned by the plaintiff, or for mandamus to restore the same, and for damages and other relief. The motion was made on the ground that the defendants were persons fulfilling a public duty, within the meaning of R.S.O. 1897, c. 88, and that this was an action which, under s. 15 should be tried in the county where the act complained of was committed, *i.e.*, in the county of Ontario. The defendants relied on *Leeson* v. *License Commissioners of Dufferin*, 19 O.R. 67, and the plaintiff on *Haslem* v. *Schnarr*, 30 O.R. 89. The Master distinguished the *Leeson* case, and following the *Haslem* case, dismissed the motion; costs in the cause.

H. P. Cooke, for the defendants. *D. Englis Grant*, for the plaintiff.

Master in Chambers.] [March 17.

STANDARD CONSTRUCTION CO. *v.* WALLBERG.

Conditional appearance—Defendant residing out of the jurisdiction—Joint liability.

Motion by the defendant Wallberg for leave to enter a conditional appearanme. The action was against Wallberg and a company to recover the value of work done by the plaintiffs. The defendant Wallberg resided in Montreal, and was sued as jointly liable for the work. He wished to dispute the jurisdiction of the court, but did not move to set aside the service upon him or the order for the issue of a concurrent writ. The motion was refused. Con. Rule 162(*e*) and (*h*); *Comber* v. *Leyland* (1898) A.C. 527, and *Emanuel* v. *Symon* (1908) 1 K.B. 302, referred to. Motion dismissed with costs to the plaintiffs in any event.

M. Lockhart Gordon, for the defendant Wallberg. *G. F. McFarland*, for the plaintiffs.

Divisional Court.] SMITH *v.* FINKELSTEIN. March 17.

Contract—Work and labour—Non-completion—Payment—Certificate of engineer.

Appeal by the defendant from the judgment of the District Court of Nipissing in favour of the plaintiffs in an action to recover $460 for sinking a shaft on the defendant's mining property. The appeal was based on three grounds: (1) That the certificate of the defendant's engineer was a condition precedent to the right of the plaintiffs to recover; (2) that the plaintiffs failed to complete their contract; (3) that the flow of water into the shaft was not a sufficient reason for abandoning the work.

LATCHFORD, J., delivering the judgment of the court (BOYD, C., MAGEE and LATCHFORD, JJ.), said that there was little merit in the appeal. The plaintiffs did their work as directed and were willing to continue to do any further work the defendant or his engineer might ask them to do. They were willing to sink another shaft, if asked, but they were not asked, and no other work was assigned to them. It was unreasonable to expect that the plaintiffs should keep themselves and their men for days, at large expense, upon the property, awaiting instructions. They were justified, in the circumstances, in abandoning the work. Further sinking in the last shaft was impossible. The strong in-flow from a source several feet below the bottom of the shaft rendered the shaft useless as a mining shaft. It could be worked (if at

all) only at very great expense. The engineer's statement in his telegram to the defendant that the water was surface water was untrue. He asked the defendant whether he should withhold payment; and the defendant, misled by his false statement, so directed him. Whether there was or was not such an interference with his discretion as was discussed in *Wallace* v. *Temiskaming and Northern Ontario Railway Commission*, 12 O.L.R. 126, 37 S.C.R. 696, is immaterial. The report was, in the circumstances, not a condition precedent to the plaintiffs' right to recover. Appeal dismissed with costs.

J. H. Spence, for the defendant. *J. P. MacGregor*, for the plaintiffs.

Divisional Court.] [March 18.

CAMPBELL *v.* COMMUNITY GENERAL HOSPITAL ALMSHOUSE AND SEMINARY OF LEARNING OF THE SISTERS OF CHARITY, OTTAWA.

Contract—Charitable corporation—Absence of seal and writing—Partly executed contract—Powers of corporation—Work and labour—Recovery for work done—Quantum meruit.

Appeal by the plaintiffs from the judgment of BRITTON, J., ante 387, dismissing without costs an action brought to recover the value of work done for the defendants in digging a well.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

BOYD, C. (after stating the facts, which may be found in the former note, p. 387):—That the contract is intra vires does not seem to me to be doubtful. The farm was held by the corporation for the purposes of the well-being of the sisterhood and all the beneficiaries of the charity. It provided supplies of butter, milk and vegetables, which had to be procured from some source and better from this farm managed in their interest than from any other. The farm was largely and substantially ancillary to the proper maintenance of the institution; and it follows that for the proper management of the farm and the stock a plentiful supply of good pure water was indispensable, and in no other way could this be procured than by the digging or sinking of wells. That this well was needed is not disputed—is indeed admitted—the only qualification made by the lady-manager is that it was "not very badly needed."

The modern doctrine as to corporate contracts not under-seal, in the case of other than trading corporations, is thus given in

the Laws of England, published under the imprimatur of the Earl of Halsbury: "The rights and liabilities upon such contracts depend upon whether the contracts relate to matters incidental to the purpose for which the corporation exists, and whether the consideration therefor had been executed by the party seeking to enforce them": vol. 8, tit. "Corporations," p. 383, No. 848 (1909).

Referring to the terms of the charter, it appears that the community had established an hospital for the reception and care of indigent and infirm sick persons of both sexes and of orphans of both sexes, and they were incorporated to carry on the good work, with power to hold and enjoy lands and tenements within the province: s. 1 of 12 Vict. ch. 108. And by s. 2 it was provided that the revenues, issues, and profits of all real and personal property should be applied to the maintenance of the members of the corporation, the construction and repair of buildings requisite for purposes of the corporation, and the payment of expenses to be incurred for objects legitimately connected with or depending on the purposes aforesaid.

These last words are, I take it, ample to cover a contract for the making of a well on the farm-land—that being an expense incurred for an object legitimately connected with the maintenance and the needs of the inmates of the institution. The learned judge puts it very succinctly: "The corporation, being owner of a farm on which stock is kept, requires water for the purpose of carrying on the farm, and this work was a necessity for farm purposes: and that water is not found is not the point.

It seems to me that the distinction once insisted on as to the work done being "essential" to the purposes of the corporation is to be modified by the trend of recent decisions so that "beneficial" work is enough if it be incidental or ancillary to the purposes for which the corporation exists. Mathew, J., in his observations on this line of cases in *Scott* v. *Clifton*, 14 Q.B.D., at p. 903, uses "necessity" as almost synonymous with "benefit" —a seal not being required when the contract is for a purpose incidental to the performance of the duties of the corporate body, and its necessity is shewn by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of its performance.

Complete execution of the contract is not essential where there is actual part performance, and the completion of the work has been prevented by the act of the corporation. The well was sunk to the depth of 150 feet, to be utilized at a later season, and

the plaintiffs were willing and offered to prosecute the work till water had been reached. Of the benefit of this work the corporation has been in possession, and there is no complaint of its improper execution, as far as it has gone.

In *Lawford* v. *Billericay Rural District Council* (1903) 1 K.B. 772, the argument for the corporation was that the combination of the two facts that the work has been done, and that it is incidental to the purposes of the corporation, is not enough to give a right of action. Besides, there must be at the making of the contract a question of convenience amounting to necessity, etc.: p. 778. In giving judgment, Vaughan Williams, L.J., in commenting on *Nicholson* v. *Bradfield Union*, which was based on *Clark* v. *Cuckfield*, says the ground of the decision was that the coals were accepted and used, and that the law raised an implied contract to pay for them, though there was no contract under seal, and he did not understand that the case was decided upon the recognized exception as to necessity: p. 781. And he treats *Clark* v. *Cuckfield* as decided upon the ground of the recognition of a contract arising on the receipt of the benefit of acts done at the request of the corporate body: p. 782.

And in *Bernardin* v. *Municipality of North Dufferin*, 19 S.C.R. 595, the majority of the court approve of the sound and rational principle equally applicable to the case of every corporation, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would be fraudulent for the corporation to refuse to pay for it because of the absence of the corporate seal: p. 595.

I do not further labour this point as to the absence of the seal—which does not appear to me to affect the plaintiffs' right of action.

The learned judge has expressed the opinion that, if the plaintiffs are entitled to recover, their damages should be assessed at $175. But the action is not for breach of contract, but to recover the value of the work done, so far as it went—in effect a quantum meruit—and the usual rule in such case is to take the contract price as the measure to be applied. In that view the plaintiffs should have judgment for $308 and costs and to that I think they are entitled.

MAGEE and LATCHFORD, JJ., concurred.

A. E. Fripp, K.C., for the plaintiffs. *W. E. Middleton*, K.C., for the defendants.

Riddell, J.] [March 19.

TRADERS FIRE INSURANCE CO. *v.* APPS.

Contract—Subscription for company shares—Evidence that subscription obtained by false representation—Corroboration—Refusal to accredit uncontradicted evidence of witnesses.

The defendant, a widow, admittedly signed a subscription for $3,000 of the capital stock of the plaintiffs, a fire insurance company, therein covenating to pay $300 within 60 days and all calls as made by the directors. She paid the $300 and received a certificate for 30 shares. Subsequent calls were made, but she did not pay; and this action was to recover these calls.

RIDDELL, J.:—To avoid liability the defendant sets up that while she knew she was subscribing for $3,000, she was assured that she never would be called upon to pay more than $300; and that the subscription she signed was read over to her as containing such provision. Her son corroborates her. She also says that one Carrol represented that he himself was going to take stock in the company; but even if this were true, it would not advantage the defendant, being not a representation of an existing or past fact; and, moreover, Carrol was not in any way connected with the company.

If I could accept her statements as being true, the well-known cases of *Foster* v. *MacKinnon*, L.R. 4 C.P. 704, and *Lewis* v. *Clay*, 14 Times L.R. 149, would be relied upon as furnishing a complete defence. I shall assume, without deciding, that the principle of these cases applies.

There is no contradiction of the evidence; Camp, the agent, is dead, and it is said that Carrol cannot remember anything about the facts.

When the evidence was being given in the witness box I thought that the defendant and her son were not consciously and intentionally stating what was untrue, but I was not at all satisfied that what they swore to was the truth—rather the reverse. I reserved judgment to see if my mind would be changed by a perusal of the documents and further consideration. I do not think that any good end would be achieved by going into the correspondence and transactions subsequent to the execution by the defendant of the subscription. There is nothing to indicate that the story of the defendant is true.

In *Rex* v. *Van Norman*, 19 O.L.R. 447, I held that "there is no rule in our law that a judge or jury or other trial tribunal must accredit any witness, even although not contradicted": p.

449. The Chief Justice of the Common Pleas refused to allow any appeal from this decision, and I follow it.

On the short ground that, it being admitted that the defendant executed the document sued upon, and consequently the onus is upon her to prove that her understanding of the document was different from its actual contents, and that, from what I saw of the witnesses in the box, I cannot find that she has met the onus, the defence fails. I have no doubt that both she and her son have persuaded themselves of the truth of their story, but I cannot accept it as the fact, and I do not think that any misrepresentation of any kind has been proved.

No objection was taken to the right to recover or the amount if the defendant were held bound by the subscription.

The plaintiffs will have judgment for the amount sued for, interest, and costs.

H. Cassels, K.C., for the plaintiffs. *L. F. Heyd*, K.C., for the defendant.

Morson, Jun. Co., C.J.] [March 23.

REX *v.* HENDERSON.

Medicine and surgery—Ontario Medical Act, R.S.O. 1897, *c.* 176, *s.* 49—*"Practising medicine"—Osteopathy — Treatment — Conviction—Evidence.*

An appeal to the 1st Division Court in the county of York, by Robert B. Henderson, the defendant, an osteopath, from a conviction dated the 14th December, 1909, made by George Taylor Denison, police magistrate for the city of Toronto, of the defendant for practising medicine without being registered, contrary to s. 49 of the Ontario Medical Act, R.S.O. 1897, c. 176, which is as follows:—

"It shall not be lawful for any person not registered to practise medicine, surgery or midwifery for hire, gain, or hope of reward; and if any person not registered pursuant to this Act, for hire, gain or hope of reward practises or professes to practise medicine, surgery or midwifery, he shall upon a summary conviction thereof before any justice of the peace, for every offence, pay a penalty not exceeding $100 nor less than $25."

MORSON, JUN. CO. C.J.:—The material facts are shortly these. Two private detectives, Kissock and Gadstein, employed by one Charles Rose, the prosecuting officer of the Ontario College of Physicians and Surgeons, went to the offices of the appellant on three occasions for treatment, for which they paid, falsely alleg-

ing they were ill and did not know what was the matter. Gadstein said the appellant made him take off his coat and waistcoat; he then manipulated his back by rubbing with his thumbs up and down the spine two or three times; he found a lump, so he said, and attributed it to his bowels being out of order; he asked him how his bowels and kidneys were working; he then made him lie down on his side on a couch or operating bench, and rubbed him again up and down the back pressing hard, and turned him over and rubbed his stomach, and turned him back again and then on his side, and lifted him up bodily twice and stretched his neck, twisted it from one side to the other; he also used an electrical knob, running it up and down his back; he told him to avoid stimulants and eat very little and drink plenty of water to wash out the system. On the visit to his house he made him strip and sit on a stool, and went through very much the same thing, and, when he complained of a pain in the neck, he told him he had caught cold. He then examined his heart with a stethescope, and told him it was beating rather slowly. Kissock in his evidence corroborated Gadstein. He was told his system had been poisoned, and that some medical men would call it pleurisy and give him medicine; but the appellant said he would not, that his method of working was to put the system in a proper condition and let nature do her own work; he also told him to take plenty of exercise and to be careful of his lungs, and that his liver and kidneys were out of order. Dr. Graham Chambers, who heard the evidence of the two detectives, said that what they were told would be what ordinary practitioners would tell their patients; he said they also advised as to the essentials of health, such as moderation in eating and fresh air, and sometimes give medicine and sometimes not; that the administering of medicine was not necessarily a part of the practice of medicine. On cross-examination, he said he would not diagnose kidney or liver disease by merely feeling a patient's back, that what the appellant did was not a diagnose of liver or kidney disease; he further said that medical men did not apply massage, but called in a masseur; that they sometimes practised passive movements only, but it was not general.

On these facts the appellant contends that he was not practising medicine contrary to the Act, because no medicine was prescribed or used. It is quite clear on the evidence that no medicine was used. The treatment adopted appears to have been for nothing in particular, and was what might properly be called physical treatment, as distinguished from the prescribing

of medicine; there was no proper diagnosis of any particular disease, no advice given except in a very general and harmless way, only such as would be given by any one outside the medical profession who was possessed of ordinary common sense and sufficient intelligence to permit nature to be her own physician. The so-called diagnosing and advise and examination of the heart were merely incidents in the treatment, forming in fact no part of it, the substantial treatment being the rubbing of the body and spine, a treatment which is not usually, if at all, adopted or practised by medical men, and which is apparently known as osteopathy.

Is then the practising of osteopathy (if this is the proper term to apply to the treatment in question) the practising of medicine contrary to the Act? On the evidence in the present case, and following *Regina* v. *Stewart*, 17 O.R. 4, I am of opinion that it is not. In that case the defendant neither prescribed nor administered any medicine, nor gave any advice, the treatment consisting of merely sitting still and fixing his eyes on the patient. Mr. Justice McMahon, after defining the word medicine, says: "To practise medicine must, therefore, be to prescribe or administer any substance which has, or is supposed to have, the property of curing or mitigating disease." See also *Regina* v. *Hall*, 8 O.R. 407; *Regina* v. *Howarth*, 24 O.R. 561; and *Regina* v. *Coulson*, 27 O.R. 59—in all of which cases medicine was prescribed or used. There appears to be no case holding that medicine can be practised without the use of medicine. In *In re Ontario Medical Act*, 13 O.L.R. 501, which was a reference to the Court of Appeal by the Lieutenant-Governor in Council as to the construction of this s. 49, a majority of the learned judges expressed the opinion that there might be the practising of medicine without the use of medicine, provided the treatment or method adopted was such as is used by medical men registered under the Act, and this opinion I adopt. They did not, however, so decide, it not being their province to do so under a reference of that kind; they were only to advise what the law was, not to decide it. Chief Justice Moss and Mr. Justice Garrow said they were to be guided in giving their opinion by the decided cases, and that it was not for them to say whether they ought to or might not have been decided as they were. This case then left the law as it was in the cases I have referred to. If, however, the law had been changed, and it had been decided in accordance with the opinions expressed, I think, even then, the treatment and method adopted by the appellant was not such as

is used or adopted by medical men, and there would still be no violation of the Act. If the Ontario Medical Council desire the meaning the word "medicine" extended to cover the present case, they must apply to the Legislature.

As Mr. Justice Meredith says in *In re Ontario Medical Act*, if the medical profession and the public want protection from osteopaths, Christian Scientists, and others of a like class they must obtain it by an Act of Parliament.

For the reasons, then, that I have stated, the conviction is wrong in law, and I quash it with costs.

Glyn Osler, for the appellant. *J. W. Curry*, K.C., for the respondent.

Province of Nova Scotia.

SUPREME COURT.

Graham, E. J.] WINFIELD *v.* STEWART. [Dec. 23, 1909.

Collection Act—Contracting debt and disposition of property—Order for discharge sustained—Costs.

Defendant contracted a debt at a time when he had reasonable expectations of being able to pay. There were no fraudulent circumstances in connection with the disposition of the property purchased, defendant's expenditures did not appear to have been extravagant and his disposition of his property acquired otherwise than through the creditor was sufficiently accounted for. After an examination held under the provisions of the Collection Act, under the circumstances mentioned, an order was made by the Commissioner discharging defendant.

Held, that the order was rightly made and that plaintiffs' appeal must be dismissed with costs, but that defendants' costs must be applied in reduction of the judgment against him.

Power, K.C., in support of appeal. *T. F. Tobin*, contra.

Laurence, J.] [Dec. 30, 1909.

BELL ET AL. *v.* SMITH ET AL.

Partnership—Winding up—Evidence on appeal—Estoppel.

Co-partnership articles between J. S., E. S., and A. S. provided that in the event of dissolution by death or retirement of any partner, the remaining partners, wishing to continue the

business, might purchase the share of the deceased partner at a valuation to be fixed by arbitrators.

The last will of J., one of the members of the firm provided that his interest in the business should be converted into money and that his executors should collect therefor the sum of $10,000 annually until his whole interest was realized.

In an action to set aside an award on the ground that it was bad on its face,

Held, that it was not competent on the trial to hear evidence touching the merits which was or could have been presented to the arbitrators, or which would have affected their judgment in coming to the conclusions reached by them, particularly where plaintiffs relied on the invalidity of the award on its face.

Defendants, after taking over the business after the death of J.S., made payments under the terms of the will and continued to do so down to the time of the making of the award, and after that made payments under the award.

Held, that the acceptance of the payments so made concluded plaintiffs from maintaining the action and disputing the award.

W. B. A. Ritchie, K.C., and *Mellish,* K.C., for plaintiffs. *Harris,* K.C., and *J. J. Ritchie,* K.C., for defendants.

Full Court.] [Jan. 26.

THE MUNICIPALITY OF HALIFAX *v.* FREDERICKS.

Highway Act—Time for performance of Act—Provisions held directing and not mandatory.

Defendant contested his liability to pay a certain road tax or to do commutation work in lieu thereof, on the ground that the Highway Act required the labour in question to be performed between the 1st day of April and the 31st day of July in each year, and that the notice calling upon defendant to pay the tax or to do the commutation work was not given until the 31st July, and called upon him to do the work or arrange for the commutation, on the 9th day of August.

Held, affirming the judgment of the County Court judge for District No. 1, and the judgment of the stipendiary magistrate for the county of Halifax, that the provisions of the Act were directory and not mandatory.

O'Hearn, in support of appeal. *Mackay,* K.C., contra.

Russell, J.] THE KING *v.* HARDWICK. [February 24.

EX PARTE EDWARDS.

Intoxicating liquors—Canada Temperance Act—Proclamation bringing into force—Judicial notice.

On application for an order for a writ of certiorari to remove into the Supreme Court a record of conviction made by the stipendiary magistrate of Annapolis Royal for a violation of the Canada Temperance Act, on the ground, among others, that the magistrate had no jurisdiction because there was no evidence before him that the Act was in force.

Held, refusing the application, that in such cases the magistrate is compelled to take judicial notice of the proclamation in the *Canada Gazette* bringing the Act into force, and that his power to take such notice is not restricted to cases where the matter is brought to his attention by the prosecutor.

Milner, in support of application. *J. J. Ritchie*, K.C., contra.

Laurence, J.] [March 11.

RE MARKLAND PAPER CO., IN LIQUIDATION.

THE ST. CROIX PAPER CO., CREDITOR.

Landlord and tenant—Company in liquidation—Claims for repairs and rent.

The St. Croix Paper Co. leased certain premises described, including their mills, etc., to S., as trustee for the Markland Paper Co., then in process of formation, for the period of five years, commencing the 1st day of February, 1909.

The Markland Co. went into liquidation on the 5th January, 1910.

Held, that St. Croix Company was entitled to recover against the company, in liquidation, for repairs which the latter company was required under the terms of the lease to make, and also for rent to accrue due under the lease, the latter being a provable claim under the Winding-up Act, R.S. 1900, c. 129.

Allison, for the creditor. *Murphy*, for the liquidator.

Laurence, J.] RE PISTONI AND DEPENTI. [March 17.

Intoxicating liquors—Applications for licenses—Power of council to consider individually or en bloc.

A number of applications for licenses to sell intoxicating liquors, under the provisions of the Liquor License Act, R.S.

1900, c. 100, were considered by the inspector for the city of S., who presented his report to the mayor and council dealing particularly with each application by reporting against them all.

The council, without considering each application separately, adopted the report of the inspector, thereby refusing them all.

Held, that it was in the discretion of the council whether to dispose of the applications separately or en bloc; that as the council had the discretion to refuse an application even where the applicant had complied with all the provisions of the law and no personal objection could be urged against him, they might exercise that discretion in respect to all the licenses or any number of those applied for by one act or resolution.

O'Connor, K.C., in support of application. *F. McDonald*, contra.

Province of Manitoba.

Full Court.] LAWRENCE *v.* KELLY. [January 17.

Negligence—Master and servant—Defect in system—Accident to workman—Negligence of fellow workman.

The plaintiff, a structural iron worker in the employ of the defendants, while working under the direction of an experienced foreman believed by the defendants to be a competent man, was severely injured by the falling of a steel column set vertically upon a cement pier to which it was fastened by split anchor bolts through the flanges and holes drilled in the pier. Plaintiff had been sent to the top of the column to assist in connecting it with a horizontal steel beam at a height of about 25 feet. The case was tried without a jury by a judge, who was unable to find whether the falling of the column had been caused by the faulty construction of the pier or by defective filling in of the holes with cement after the bolts had been driven in or by the dropping out of the wedges in the lower ends of the bolts, so that the bolts did not spread out at the bottom, or by sending the plaintiff to the top of the column before the cement had sufficient time to harden properly.

It was only as to the last of these suggested causes that there was any evidence to shew knowledge on the part of the defendants that the work was being done improperly and, if the fall of the column was from any of the other causes, the negligence was that of the foreman only.

Held, that, as the plaintiff's claim was based wholly upon a common law right of action, the rule of common employment applied, and he was bound to shew that the injury had resulted from some negligent practice on the part of the foreman of which the defendants were aware, and that, as he had failed to shew this, he could not recover.

Bartonshill Coal Co. v. *Reid*, 3 Macq. 290, followed.

Smith v. *Baker* (1891) A.C. 325; *Sword* v. *Cameron*, 1 Sc. Sess. Cas., 2nd Ser. 493, and *Pattersons* v. *Wallace*, 1 Macq. 748, distinguished.

Appeal from judgment of MACDONALD, J., noted vol. 45, p. 573, dismissed with costs.

Trueman, for plaintiff. *Galt*, K.C., and *Towers*, for defendants.

Full Court.] WILLIAMS *v.* BOX. [February 21.

Mortgagor and mortgagee—Foreclosure—Real Property Act, R.S.M. 1902, *c.* 148, *ss.* 71, 113, 114 *and* 126—*Certificate of title, effect of.*

Appeal from decision of MATHERS, J., noted in vol. 45, p. 491, dismissed, RICHARDS, J.A., dissenting.

Robson, K.C., and *Coyne*, for plaintiff. *Wilson*, K.C., for defendant.

Full Court.] [March 2.

SEYMOUR *v.* WINNIPEG ELECTRIC RY. CO.

Negligence—Street railway—Liability for injury to person risking his life to save that of another.

A statement of claim alleging, in effect, that a child about two years of age had fallen on the track of the defendants' street railway on a public street in the city; that one of the defendants' cars was approaching the child at a high rate of speed, and that, owing to the negligence of the motorman in charge of the care in not stopping it, the child's life was endangered without negligence on her part, that the plaintiff, observing this, necessarily rushed in front of the car in an attempt to save the child, and that, owing to the motorman's negligence in not stopping the car or reducing its speed, he was struck and injured by the car, discloses a good cause of action.

Eckert v. *Long Island Railroad Co.*, 43 N.Y. 502, followed.

Anderson v. *Northern Railway Co.*, 25 U.C.C.P. 301, distinguished.

Chapman and *Cohen*, for plaintiff. *Anderson*, K.C., and *Guy*, for defendants.

Full Court.] [March 7.

WINNIPEG *v.* TORONTO GENERAL TRUSTS.

Pleading—Counterclaim—Matter pleaded in anticipation of defence—Striking out pleadings as embarrassing.

A counterclaim should not contain allegations set up only by way of anticipating the defence that the defendant supposes the plaintiff will make to it, and such allegations will be struck out as embarrassing with leave to the defendant to file a proper pleading in lieu thereof.

Robson, K.C., for plaintiffs. *Wilson*, K.C., and *McKercher*, for defendants.

Province of British Columbia.

Morrison, J.] [Nov. 22.

GOLDSTEIN *v.* VANCOUVER TIMBER & TRADING CO.

Practice—Amendment of writ on ex parte application—Neglect to serve order amending—Application to add liquidator as party—Steps in proceedings—Order 64, *r.* 13.

An application, ex parte, to amend the writ by adding to the endorsement a description of certain real estate, is a step in the proceedings, although the amending order was not served on the defendants.

Sir C. H. Tupper, K.C., for plaintiff. *A. D. Taylor*, K.C., for defendants.

Bench and Bar.

The quarterly dinner of the Belleville Bar Association was held at Belleville, on March 16th, the president Mr. W. N. Ponton, K.C., in the chair.

The Honourable Mr. Justice Teetzel was present, and in responding to the toast of his health referred to the early history of the Law Society of Upper Canada and to Chief Justice Osgoode, after whom Osgoode Hall was named, and spoke in eloquent terms of the prominent part played in public life by

the Bench and Bar of Canada. He referred also to the re-adjustment of the tariff of costs of solicitors to modern conditions, and the proposal to bring together more closely the educational work of the Law Society with that of the University of Toronto.

Mr. N. S. Morden, in proposing the toast of the County Judiciary, referred to the protection afforded to the members of the medical profession at the cost to them of about $2.00 a year each, while, as he claimed, the legal profession were not protected though the members paid about ten times that amount.

Colonel Lazier, as Master in Chancery, replied to the toast and attributed much of the good feeling that existed between Bench and Bar to the quarterly social gathering of the members.

The toast of "Our Guests" was acknowledged by Mr. Hugh E. Rose, K.C., whose father, the late Mr. Justice Rose, spent several years of his early career in Belleville; Mr. A. B. Colville of Campbellford, Mr. A. A. McDonald, and Mr. Emerson, the veteran Official Court Reporter. Among others present who contributed to the enjoyment of the evening were: Mr. Mallon, inspector of legal offices; Mr. E. G. Porter, K.C., M.P.; Sheriff Morrison, Mr. J. F. Wills, Mr. E. J. Butler, Mr. N. Carney, Mr. M. Wright, and Mr. W. Jeffers Diamond.

Mr. F. E. O'Flynn ably filled the position of vice-chairman, and excellent speeches were made by the younger members of the profession, especially Mr. R. D. Ponton, Mr. N. Jones, Mr. P. M. Anderson and Mr. E. T. O'Flynn.

United States Decisions.

MORTGAGES.—Foreclosure: The rule that a debtor making voluntary payments may specify upon which debt they shall be applied, does not apply to the application of the proceeds of sale of mortgaged property.—*Bank of Defiance* v. *Ryan*, Iowa 123 N.W. 940.

LANDLORD AND TENANT.—Injury to Tenant's Goods: A landlord in a lease held not liable for leakage of the roof simply because the roof was in bad condition ascertainable by the exercise of ordinary care. *Pratt, Hurst & Co.* v. *Tailer*, 119 N.Y. Supp. 803.—Lease: The leniency of a landlord in not insisting on prompt payment of the rent does not constitute a waiver of his right to forfeit lease for non-payment.—*O'Connor* v. *Timmermann*, Neb. 123 N.W. 443.