RECENT DECISIONS.

1. Supreme Court of Canada.

Reference by the Governor-General-in-Council.

IN RE THE VALIDITY OF THE MANITOBA ACT.

("An Act to Provide for the Collection of a Tax from Persons Selling Grain for Future Delivery.")

22nd May, 1924.

Judges present:—The Chief Justice and Idington, Duff, Anglin, Mignault and Malouin, JJ.

Constitutional law—Statute—Validity—Grain Futures Taxation Act, 13 Geo. V. c. 17 (Man.)

The Grain Futures Taxation Act, of Manitoba, purporting to impose a tax upon every person whether broker, agent or principal, entering into a contract for the sale of grain for future delivery, is *ultra vires* of the legislature.

Appeal allowed with costs.

On appeal from the Appellate Division of the Supreme Court of Ontario.

Judges present:—The Chief Justice and Idington, Duff and Malouin, JJ., and Maclean, J., *ad hoc.*

22nd April, 1924.

DIAMOND v. *WESTERN REALTY CO.*

Judgment — Interlocutory — Res judicata — Appeal — Final judgment— Discretion.

An interlocutory judgment which definitely decides a question of law and from which no appeal is taken may be *res judicata* when the question is raised between the same parties even in the same action.

On appeal to the Appellate Division from a decision of a judge refusing to grant an application for payment out of Court to the applicant of over $6,000 the appeal Court granted the application to the extent of $800 but refused any order as to the residue until rights of the other parties had been determined.

Held, Idington, J., dissenting, that the judgment of the Appellate

Division was not a "final judgment" as that term is defined in the Supreme Court Act and was non-appealable on the further ground that it is discretionary in its nature. Supreme Court Act, sec. 37.

Appeal dismissed with costs.

On appeal from the Appellate Division of the Supreme Court of Ontario.

Judges present:—The Chief Justice, and Idington, Duff, and Mignault, JJ., and Maclean, J., *ad hoc.*

22nd May, 1924.

ROMAN CATHOLIC SEPARATE SCHOOL BOARD v. *CITY OF TORONTO.*

Municipal law—By-law—Building restrictions—Prior status of owners—Deposit of plans—Legal right to permit—Municipal Act, 1 Geo. V. c. 13, s. 10.

The Municipal Act of Ontario by sec. 399a, passed in 1921, empowers the council of a city *inter alia*, to pass a by-law to prohibit, within a defined area, the erection of any building other than a private dwelling, but such by-law is not to apply to any building the plans for which were approved by the City Architect before it was passed. The City of Toronto passed such a by-law in respect to part of a street on which the Separate School Board owned two lots on which it intended to erect a school house and had filed the plans therefor with the architect who refused to grant the permit to build by direction of the Board of Control in view of the contemplated by-law.

Held, reversing the judgment of the Appellate Division (54 Ont. L. R. 224), and applying *Cridland* v. *City of Toronto* (48 Ont. L. R. 266), Idington, J., dissenting, that the architect had no right to refuse to issue the permit; that under the law as it stood the Board was entitled to have its plans considered and approved if in conformity with the law; and the by-law in this case was not a valid exercise of the statutory authority.

Appeal allowed with costs.

On appeal from the Appellate Division of the Supreme Court of Ontario.

Judges present:—Sir Louis Davies, C.J., and Idington, Duff and Mignault, JJ., and Maclean, J., *ad hoc.*

SMITH v. *ATTORNEY-GENERAL OF ONTARIO.*

22nd May, 1924.

Constitutional law — Temperance legislation — Canada Temperance Act, Part IV., 10 Geo. V. c. 8 (D.)—Ontario Temperance Act—Prohibition of sale of liquor—Action for declaratory judgment—Parties—Status.

Part IV. of the Canada Temperance Act, enacted by 10 Geo. V. c. 8, pro-

hibiting, in a province which adopts it, the manufacture and importation of intoxicating liquor, is in force in Ontario.

The Ontario Temperance Act, 6 Geo. V. c. 50, and its amendments, is an Act prohibiting the sale of intoxicating liquor for beverage purposes and enables the Legislative Assembly, by resolution followed by a vote favourable thereto to make Part IV. of the Canada Temperance Act a law of the Province notwithstanding it permits the manufacture and sale of wine containing a large percentage of alcohol, the manufacture and export of malt and spirituous liquors and extra-provincial transactions in liquor.

S., residing in Ontario, gave an order to a firm in Montreal to send him a specific quantity of intoxicating liquor. The firm refused the order on the ground that by filling it the Ontario Temperance Act would be violated and S. brought an action against the Attorney-General of Ontario asking for a judgment declaring that Part IV. of the Canada Temperance Act was not in force in that Province.

Held, that S. had no status to maintain such action.

Judgment of the Appellate Division (53 Ont. L. R. 572), affirmed.

Appeal dismissed with costs.

---

2. PROVINCE OF ALBERTA.

(Supreme Court, Trial.)

BARCHA v. *ATLAS ASSURANCE COMPANY, LIMITED.*

Fire insurance — Insurable interest — Non-disclosure to insurance companies of tax sale—Change material to the risk.

Plaintiff bought property in April, 1922, assuming, as part of the consideration, payment of the taxes in arrear. He had it insured by a policy of defendant company issued September 19th, 1922, without a written application. The property had been sold to the town under tax sale in November, 1921. Before the period for redemption expired plaintiff began negotiating for redemption. The town became the registered owner in January, 1923. It had retained a sum tendered in November, 1922, by plaintiff on account of taxes. Negotiations for redemption were continued. The town mayor and secretary told plaintiff he could have until September 2nd, 1923, to redeem. The property was assessed to him for 1923. He occupied it. It was destroyed by fire July 2nd, 1923.

Held: 1. Plaintiff had an insurable interest at the time of the fire.

2. That under the circumstances the sale for taxes was not such a material fact as to make its non-disclosure, when the policy was issued, even if plaintiff knew of it (which did not appear) fatal to the policy under statutory condition I, the plaintiff having in fact (as the Court found) told of the back taxes and his efforts to pay and get time therefor.

3. That, though the plaintiff before the fire knew of the vesting of the title in the town and did not notify defendant thereof, the policy was not avoided under statutory condition 2; such vesting, under the circum-

stances, made no change in plaintiff's right to redeem, and it was therefore not a change material to the risk; moreover, the Court was inclined to the opinion that the change covered by statutory condition 2 is a physical change in the property insured, such as an alteration in its structure or in its method of heating or lighting or in the character of its occupancy.

(Appellate Division.)

BURD v. *MACAULAY.*

Limitation of actions—Plaintiff struck by motor car—Interpretation of 21 Jac. 1, ch. 16, sec. 3.

The period of limitation for an action for damages for personal injuries suffered by being struck by a motor car through the alleged negligent driving thereof by defendant is four years next after the cause of action arose.

The act complained of in such a case is one of "assault" and "battery" within the meaning of 21 Jac. 1, ch. 16, sec. 3, even though due to negligence and not intentional; and the statute clearly intended that for direct violence to the person, whether intentional or negligent, an action could only be brought within four years after the occurrence.

The expression "action of trespass" in said enactment is not intended to express a single category. It is a general term which in the several clauses of the section is defined and limited by the words which follow and which express particular types of the action of trespass. The real enquiry in the present action would be whether it comes properly within "action upon the case" or "actions of assault, battery," under the statute.

Although it is probably true that under the old system the plaintiff in the present claim would have had the option of pleading in "case" or in "trespass," the period of limitation was not intended to depend upon the choice in form of pleading but upon the facts alleged to have occurred.

Judgment of Harvey, C.J., 1 W. W. R. 369, affirmed.

---

3. PROVINCE OF SASKATCHEWAN.

(Court of Appeal.)

HOGAN ET AL. v. *CITY OF REGINA.*

Damages—Street railway accident—Nervous shock—No apparent actual physical injury.

Damages claimed for nervous shock, as a result of an accident arising from negligence, cannot be recovered where the nervous shock produces only a mental disturbance "unaccompanied by any actual physical

injury" (*Victorian Ry. Commrs.* v. *Coultas*, 13 App. Cas. 222, 57 L. J. P. C. 69). If impact is not necessary to entitle a plaintiff to recover, and their Lordships of the Privy Council carefully guarded themselves in the *Coultas* case, *supra*, against saying that it is, it is a question of fact in each case whether or not the plaintiff sustained physical injury and whether such injury was the natural and reasonable result of the defendant's negligence.

In the case reported, where there had been impact, a plaintiff claimed damages for illness, suffering and shock. There was no apparent actual, physical injury, such as broken bones, bruises, or abrasions of the skin. The jury at trial had been properly charged as to their duty not to award damages for mere mental shock unaccompanied by actual physical injury. The jury found that the plaintiff had suffered physical injury as a result of the defendants' negligence and awarded to the plaintiff general damages $5,000, and to her husband $2,000.

Held, that the jury on the evidence before them were entitled to say that, as a result of the impact and the nervous shock thereby caused, the plaintiff had suffered physical injury although no bones were broken and there was neither bruise nor abrasion of the skin.

(Court of Appeal.)

MACDONALD-CRAWFORD LIMITED v. *BURNS ET AL.*

Guarantee—No primary liability attaching to principal debtor—Transaction ultra vires of association.

Where an association, incorporated under The Agricultural Co-operative Associations Act, R. S. S. 1920, ch. 119 (which provides that "the association shall, except as hereafter provided, pay for all goods purchased upon delivery") purchases and receives delivery of goods on credit, the transaction is *ultra vires* and the association is not liable for the price.

There being no primary liability on the part of the association in respect of the price, there is also no liability on the part of guarantors who have guaranteed the due payment of the price.

Where, in such circumstances, the guarantors are directors of the association they cannot be held liable on the ground of breach of warranty of authority. It is as much the business of the vendor as of the directors to know what the law is. All persons dealing with the association must be held to know the provisions of the statute and the limits set by it to the authority of the association and its directors.