Canada Law Journal.

VOL. XLV. MARCH 15. No. 6.

THE SUPREME COURT AND THE NATION.

Imperialists strong in their conviction that the British Empire is to stand, and foreseeing the day when much of the burden of its maintenance will have been transferred to the great Dominion, view not with disquietude but with unrestrained sympathy the fast-rising national consciousness of the people of Canada. They recognize that the Empire to endure must be stronger in some of its component parts than it is to-day, and that the mother country alone will not forever be equal to the tremendous task of upholding it. Canada, small in population, stunted in development and destitute of national spirit, would be a source of weakness to the Empire at its most vulnerable point. To some minds the attachment between ourselves and the motherland was more real and vital when our sense of dependence upon it was greater than it is to-day and when our aspirations towards a national ideal grouped themselves exclusively about the greatness and sovereignity of the parent state.

A new and more adequate conception of Imperialism has arisen with the advance to nationhood of Canada and other overseas members of the Empire. It is perceived that the full realization of the ideal of empire can only be reached by the preservation to each of its parts of the utmost scope for the attainment of its own national life. The Empire will exist as an alliance or partnership between free and equal states, bound together by a sense of kinship which it is hoped will never die out and common interests having more than sentimental value. An Imperialism that dwarfed the national life of the outlying portions of the Empire by completely centering the spirit of their people in the larger life of the world-wide fabric of Imperial rule, could never be as attractive to ourselves, once we realized the extent of our resources and our fitness for nation-

hood, as a development that gave untrammelled expression to our national desires and did not sacrifice them to union with the Empire. Nor can it be doubted that the Empire rests on a securer basis if the inner national spirit of its members is vigorous and derives its strength from a proud sense of self-reliance that if such spirit were absent because of its absorption in the Empire. I fail to agree that a strong national consciousness within the Dominion is at variance with a larger patriotism. To-day it may seem to many observing minds that Canadians are no longer deeply interested in the Empire or the problem of its future. If there is this self-absorption it is not to be wondered at. The imagination of its people is bound to be profoundedly stirred by the significance of the progress the Dominion is making. It is a frame of mind that will not forever obtain, and it does not for a moment mean want of sympathy with the Empire. For the present the Empire is in a transition stage because of the evolution going on in Canada and others of the large self-governing states.

So far as we in Canada are concerned, until we have achieved a considerable measure of the larger national growth that is so rapidly coming upon us, we cannot determine what our relations to the Empire should be, or what form of unity would best conserve our interests and aspirations. When the Dominion has gained the proportions of a nation and the spirit of nationality is abundant within it, it is certain that its people will be vividly aware of the advantage and greatness of their Imperial destiny. Though in the meantime the Empire does not appear to be making conscious and defined progress towards a fixed goal, a change is taking place in the fortunes and status of its different members that is carrying it forward to a scale of dignity and grandeur scarcely dreamed of when the Imperial movement began. In those days no one intimately foresaw that a future of vast power was just ahead of Canada or that it was to become a bulwark of surpassing strength to the Empire. With us federation was felt to be a greater need than it was thought to be to Great Britain. A larger vision is now ours.

We see ourselves an equal partner in the Empire, bearing its burdens and sharing in its glories, because to us there has come a great access of national strength that will some day be sufficient for Empire tasks of greatest magnitude.

In the shaping of this national life which we believe to be so necessary to our development it should not be considered disloyal to the Empire or to our future place in it, if we seek to build up in the Dominion whatever forces or influences or even attributes of national power which give us distinction and dignity as well as an effective sense of unity. Whatever makes for the centralization of authority within our borders and for the unifying of national thought, we should not be deficient in these new and momentous days of nation building upon which we have entered. It is not certain that the national life of our country would not be sensibly richer if years ago whatever means were open to us had been used for drawing our people together into a sense of their common life. To-day we cannot afford to allow those means to be disregarded. If the new populations pouring into Western Canada are to adopt the Canadian point of view not only upon the ordinary questions of citizenship but upon the wider subject of Canadian destiny as a nation within the circle of the Empire, our Canadianism should be permitted to appeal to their sympathies in the strongest possible light. There is no way in which it can be so impressively done as through our great institutions if they are national in their character and the ideals they shadow forth.

Canada in connection with the settlement of its North-West is confronted with a task of statesmanship of greater seriousness than is commonly suspected. The conditions are wholly unlike those which existed in the United States when it had to deal with the problem of assimilating the alien peoples that came to it. Immigration to the United States did not commence to take place to any appreciable extent till the year 1830. The native population then amounted to 13,000,000, a number large enough and sufficiently influential to secure the permanency of American ideals. Western Canada is too large and too sparsely

settled with native Canadians to absorb its foreign settlers in the same way. If the newcomers are to be attracted to our ideals they will need to find not only that they are fervently cherished by Canadians but that they are worthily reflected in our institutions. The Canadian spirit is to-day strong and it will every year become stronger. It cannot be too strong if it is to exercise a controlling influence among the new populations of the West and is to withstand the pressure of opposing or modified ideals that our newcomers may some day be numerous enough to set up. And that this spirit may be strong and not fail in the full measure of its appeal to the stranger, I believe that every tie with the mother country, not indispensable to our connection with the Empire, that denotes our colonial position and that hinders our national development, should be given up.

Canada has not, except in the Province of Quebec, and it is to be hoped it never will have, a jurisprudence distinctive from that of England. No break or change in our relations with the mother country could be a worse misfortune than that the development of our laws should proceed upon lines dissociated from those of England. Nor can one think that the future of the English common law on Canadian soil is not as safe as that of the English tongue. Superior as that system of law is to any that we in Canada could substitute for it, and indispensable as it is that the vital unity between our legal development and that of England should be maintained, there is singular cogency in the view that our courts of justice should be exclusively our own and that their subordination to the Judicial Committee of the Privy Council should be brought to an end. The argument that a tribunal situate in England, free from all possibility or suspicion of bias or political prepossession, is necessary for the interpretation of the Canadian Constitution as well as in the case of ordinary civil disputes, can have no validity unless all confidence is to be withdrawn from Canadian courts and all other functions of self-government are to be given up. Nor can the argument obtain acceptance because of the great

and indisputable learning and wide experience of English judges. A Canadian can acknowledge in unqualified terms the immeasureably great service rendered by the Committee to the Dominion in connection with its invaluable opinions construing our Constitutional Act. Lord Watson had a more enlightened and more statesmanlike view of the respective legislative powers vested in the Dominion and Provincial Parliaments by the British North America Act than Canadian jurists on many occasions displayed. His success may be due to the freedom he exercised in having regard to the spirit and policy of the Act rather than to its literal terms, and to his refusal to be bound by the canons of construction which ordinarily guide courts of law. In the case of appeals from other colonies the Committee has not always been fortunate enough to inspire the same degree of confidence, and it has been complained that because of a lamentable want of knowledge of local conditions serious error has been committed in respect of Australian and New Zealand cases. The advantage, most considerable as it has been to Canada, to have had its constitution expounded by the Committee, cannot be allowed to weigh against the harmful effect to the development of Canadian legal institutions wrought by placing the Supreme Court of Canada in a position of inferiority to it.

Those who have observed the great position in the American constitution assigned to the Supreme Court of the United States, and the influence it wields as one of the most august tribunals in the world, are sensible that it gives dignity to the nation and serves as a majestic symbol of the unity of the American people. The Supreme Court of Canada might some day come to hold a position of similar dignity and intrinsic influence if it were the final Court of Appeal for the Dominion. Like the Supreme Court of the United States, it would have high constitutional and political duties to perform in determining the validity of Dominion and Provincial laws; functions which are not found in the courts of any other land, and which would bring before it questions of the highest possible consequence. These questions may arise in connection with the litigation of private

suitors or they may be submitted by the Governor-General in Council as questions arising in the course of governmental administration, under powers for that purpose contained in the Constitutional Act and the Supreme Court Act. This power has been exercised on a number of occasions, as in the reference to determine whether the power to enact Lord's Day legislation resides in the Provinces or in the Dominion. A most notable use of it illustrating the classes of matters requiring elucidation under the law in Canada was made by Orders in Council in 1894 and 1895 when several cognate questions relating to our fisheries and waters were submitted for the opinion of the court and subsequently on appeal to the Judicial Committee of the Privy Council. One of these questions was: "Did the bed of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limit of the several Provinces and not granted before Confederation, become under the British North America Act the property of the Dominion or the property of the Province in which the same respectively are situate?" A further question was whether there was any, and, if any, what, distinction between the various classes of waters—salt or fresh, tidal or non-tidal, navigable or non-navigable waters—between the great lakes, such as Superior, Huron and Erie and other lakes; between great rivers such as the St. Lawrence, Richelieu and Ottawa and other rivers. The questions also covered an inquiry as to the power of the Dominion Parliament to pass legislation relative to works, navigable rivers, and fisheries, and to the granting of licenses to fish, and also as to the rights of riparian proprietors before the Act of Confederation. The opinion of the Supreme Court was reviewed and substantially confirmed by the Judicial Committee.

A court charged with a final voice upon the questions of the public importance of the foregoing (and questions of an equally grave and complex nature under our Constitution are constantly arising) could not fail to gather to itself not only a distinguished reputation but a position of commanding influence as a great national institution. That fame and authority do not at the

present time attach to the Supreme Court. However weighty and learned may be its utterances they lack the prestige which belongs to judgments of a final court of appeal. The element of finality is absolutely necessary in the case of a court depending upon its constitution as well as its learning for its position in general esteem. At the present time such of its judgments as are not appealed from in matters of importance where a diversity of opinion could be well thought to exist, have their full effect diminished because of the circumstance that the Judicial Committee may in subsequent cases disclose a different opinion. Nor is the right of a suitor to appeal to the Judicial Committee rather than in the first instance to the Supreme Court, on appeal from the judgment of a Provincial court (a right which is frequently exercised), consonant with the dignity of the Canadian appellate tribunal. If the Supreme Court were our court of last resort there is not the least doubt that the appointing power would select its members with the utmost care, or that talent which in well-known instances has not coveted place upon its bench would have looked with greater favour upon an appointment to it. Occupied by men of the highest eminence in the profession, their careers and attainments would lend lustre to it, as they would in turn be advanced in public regard and reputation by their connection with it. With the passing of time great causes would have come to its keeping, distinguished associations and memories would hallow it, and it would become a chief possession of the Canadian people and a mighty bulwark of their nationality.

What I have said as to the importance and dignity that would belong to the Supreme Court as a final appellate court can be said with greater force of a Court of Appeal constituted for the Empire, and clothed with the appellate jurisdiction of the House of Lords and the Judicial Committee. As an Imperial tribunal no other court would be comparable with it. Its decisions would be binding over a greater area of the earth's surface than that reached by the rescripts of the Roman Emperors. Before it would be spread the laws of every clime; those of the

most ancient peoples in the world as well as the radical legislation of the most democratic parliaments of modern times. Like the Privy Council it would have to be at home in interpreting obscure and complex passages in Mahommedan and Hindu law in connection with Indian appeals; on an appeal from South Africa it would need knowledge of Roman law overlaid with Dutch accretions; if the case were from the West Indies, of Spanish law, modified by local customs. Before now the Privy Council has had to determine the meaning of some text in the Mitakshara or Daya Bhaga, while the familiarity of some of its members with old French law and the Custom of Paris, is only rivalled by their knowledge of 16th century ecclesiastical dogma. A few years ago the London *Times*, a paper of splendid Imperial sympathies and an ardent upholder of the jurisdiction and functions of the Judicial Committee, spoke of colonials prizing as a precious constitutional boon the right of free access to the King in Council. It is a right which the citizens of Great Britain ceased to esteem so long ago as the reign of Charles I., for by the Petition of Right of 1628 and afterwards in 1640, any judicial jurisdiction of the King in Council in matters arising within the realm was declared illegal. Nor is the *Times* correct in its repeated references to the Committee as an institution which above all others is universally accepted as the visible symbol of the unity of the Empire. A tribunal which has no jurisdiction with respect to English, Scotch or Irish appeals, falls short of ideal symbolism.

If the colonies in the evolution of their relations to the mother country are to become equal partners with it and are to be on a plane of equality with it, the anomaly can scarcely survive or be defended which places jurisdiction as to British appeals in one court and cases of colonial origin, in another. Yet it is very much to be distrusted if the legal sentiment of Great Britain would favour substituting for its law Lords a Court of Appeal made up of members drawn from all parts of the Empire. In 1900 Mr. Chamberlain stated in Parliament that he contemplated the creation of such a court, fusing the

House of Lords with the Privy Council. Numerous objections were raised to the feasibility of the plan, and it was recognized that there would be the greatest if not insuperable difficulty in carrying it out. While the Judicial Committee has attracted to itself a great deal of business, because of its high efficiency, it is doubtful if it were composed to a considerable extent of members from the different parts of the Empire, the same need would be felt of resorting to it that now exists. The utmost that can be said in favour of a central court for the Empire is that it would have an immense sentimental aspect. That it is required in order that there may be a competent elucidation of the legal questions that arise within the Empire, I scarcely believe can be proven if colonial courts were made up of the best men available. The Empire will in the end establish itself for certain great and central objects, such as community of commercial interests and as an impregnable defensive league. It will be knit together by the abiding loyalty of its people to the throne, and the flag we now reverence will be its cherished heritage. For agreement and action in all matters of Imperial concern a deliberative, representative assembly of the Empire, will some day be established that will signify the reality of the Empire in a more vital way than an Imperial Court could ever hope to do. On all questions of general policy whether relating to itself or affecting other nations the Empire will speak with a common voice. The litigation that arises within the Empire is not a matter falling within the purview of its Imperial concerns, but is a subject of local interest. A scheme of Empire which consistently preserves to each of its constituent parts complete autonomy as to all domestic affairs as an arrangement founded on convenience and necessary for the full development of its individual nationality, will, I should think, so regard it.

WALTER H. TRUEMAN.

Winnipeg.

NEW RULES OF THE JUDICIAL COMMITTEE OF PRIVY COUNCIL.

The rules of practice in appeal to the Privy Council have recently been amended and consolidated by an Order in Council of the 21st December, 1908. Canadian practitioners who have had occasion to look into points of practice or procedure in the Privy Council will welcome the convenient pamphlet containing in 88 rules and 3 schedules a more or less complete codification of the practice which is to apply to all appeals entered on and after January 1st, 1909.

The chief amendments of the former practice indicate a desire to simplify procedure and to accelerate the hearing of appeals. A notable instance of simplification is the abolition of the old procedure by means of case orders to compel a dilatory opponent to lodge his case and so get the appeal set down for hearing. The former practice was to apply by petition for a first case order requiring the party in default to lodge his case within one month, followed by another petition and a second or peremptory case order requiring the case to be lodged within a further period of fifteen days before the appeal could be set down for hearing. Under the new rule a party who has lodged his own case has only to serve a case notice requiring the other party to lodge his case within one month. The notice may not be served until after the record is printed and non-compliance entitles the party serving the notice, subject to other conditions being fulfilled, to set down the appeal for hearing. In this and other respects the new rules may effect an appreciable saving of costs.

The period within which an appellant must enter appearance has been reduced (in appeals from Canadian Courts) from three to two months from the arrival of the record at the council office. The appellant is also required to lodge his petition of appeal within one month after the completion of the printing of the record in England or within two months from the arrival of the printed record at the Council office. Respondents are, however, dealt with more leniently and are not in default unless

they delay entering appearance for more than three months after the lodging of the appellants' petition of appeal.

Other changes in the practice which may be noted are that paupers may not have more than £25 (instead of £5); that certain petitions may be disposed of without the attendance of the agents; that 40 instead of 50 printed copies of the record will be accepted; that petitions may be withdrawn or dismissed summarily for non-prosecution and that some changes are made in the fees payable to the Council office and in the scale of solicitor's charges.

An appeal to the Privy Council still in theory arises upon the petition of the subject to the throne and the remedy when granted involves an exercise of the royal prerogative. Having regard to this and the necessity of framing the practice to meet the varying needs of so many colonies and dependencies, as well as various Indian states and British communities having consular courts, the framers of the new rules are to be congratulated on having fairly met the demand made at the Colonial Conference of 1907 for a simplification of the practice in the Imperial Court.

F. A. C. REDDEN,
(Blake & Redden.)

17 Victoria Street, London, S.W.

THE MEANING OF "ADJOINING."

The use of the word "adjoining" in legal documents is unavoidably of such common occurrence that an analysis of the recent decisions in which the meaning attributable to it has had to be considered by the courts may not be without interest to our readers. In many dictionaries "adjacent" is quoted as a synonym for "adjoining." But that view is not borne out by the most modern of the English decisions to which we shall have occasion to refer, although in the Scotch case of *Cameron* v. *Caledonian Railway*, 6 Fraser 763, Lord Trayner went so far as to say that he was prepared to hold that the two words were synonym-

ous. A thing adjacent to another, however, is certainly not always one to which the word "adjoining" can strictly be applied, which word has, in the absence of some special reason, usually been held to mean actually contiguous. As was said in the judgment of the Judicial Committee of the Privy Council in the case of *City of Wellington* v. *Borough of Lower Hutt*, 91 L.T. Rep. 539; (1904) A.C. 773, "adjacent" is "not confined to places adjoining, and it includes places close to or near." The judgment added: "What degree of proximity would justify the application of the word is entirely a question of circumstances." And an illustration of that appears from the case of *Kimberley Waterworks Company, Limited* v. *De Beers Consolidated Mines, Limited*, 77 L.T. Rep. 117; (1897) A.C. 515. There it was held that a mine situate four miles distant from another was not "adjacent" thereto, even in the wide region of South Africa.

The right conclusion seems to be that "adjacent" is applicable to objects lying near to, but not necessarily in actual contact with, each other; while "adjoining" generally means lying near to, so as to touch in some part. In short, that word may be said to be almost identical with "contiguous," except, perhaps, as to the larger extent of the contact which is involved in the latter. At the same time, the interpretation must inevitably depend on the context in the document in each particular case. As is shewn by the authorities, the context may require a wider meaning to be attached to the word in some instances than in others. Thus, in *Re Lady Bateman and Parker's Contract*, 80 L.T. Rep. 469; (1899) 1 Ch. 599, a piece of land agreed to be sold as an addition to an existing churchyard, but separated therefrom by a public highway about twenty feet wide, was held by Mr. Justice Kekewich to be "adjoining to an existing churchyard," within the meaning of s. 1 of the Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133). The learned judge purposely refrained from defining the meaning of "adjoining" in the section, because as his Lordship remarked if he were to try to do so, his definition would probably be more or less inaccurate, like most definitions. He contented himself with saying that, in the case

before him, the provisions of the section were satisfied. Two authorities cited in the course of the argument in that case in some measure supported the view taken by Mr. Justice Kekewich. They were *Coventry* v. *London, Brighton and South Coast Railway Company*, 17 L. T. Rep. 368, L. Rep. 5 Eq. 104, and *London and South Western Railway Company* v. *Blackmore*, 23 L.T. Rep. 504, L. Rep. 4 E. & I. App. 610. In the former, the court, construing s. 128 of the Lands Clauses Consolidation Act, 1845, held that land separated by a private road was immediately adjoining certain superfluous lands. In the latter, lands were held to be adjoining though divided by a wall.

An even stronger case than the above-mentioned was that of *Haynes* v. *King*, 69 L.T. Rep. 855, (1893) 3 Ch. 439, decided by Mr. Justice North. His Lordship there held that, where the document of title is sufficient to pass the soil *ad medium filum viæ*, houses on opposite sides of a street are "adjoining or contiguous" to each other. Those words were contained in covenants by lessees not to obstruct any access of light to the lessors' premises, and a reservation to the lessors of the right to erect or suffer to be erected, on the "adjoining or contiguous" premises, buildings obstructing the access of light to the demised houses. Inasmuch as the leases passed the subsoil to the middle of the street, the houses on the opposite sides of the street were held to be "adjoining or contiguous" to each other. Mr. Justice North was of opinion that the word "contiguous" was used in the covenants by someone who did not fully understand its meaning. The learned judge did not think that it was intended to have its strict meaning, viz., "touching." He thought that the two words "adjoining" and "contiguous" were not intended to be merely synonymous, but were meant to be alternative, and that the meaning really was "such adjoining or neighbourly premises." Even, however, if the word was to be construed strictly, that did not affect the conclusion arrived at by his Lordship. In *Vale and Sons* v. *Moorgate Street and Broad Street Buildings, Limited, and Albert Baker and Co., Limited*, 80 L. T. Rep. 487, on the contrary, it was decided by the present Master

of the Rolls (then Mr. Justice Cozens-Hardy) that "adjoining premises" did not include all the houses in a block of buildings, but merely the next-door premises. His Lordship adopted the view expressed by Mr. Justice Parke in *Rex* v. *Hodges*, Moo. & M. 341, at p. 343, that "ground cannot be properly said to adjoin a house unless it is absolutely contiguous without anything between them." The ground in that case was separated from the house by a narrow walk and a paling with a gate in it. The learned judge held that the requirements as to "adjoining" in s. 38 of the penal statute 7 & 8 Geo. IV. c. 29, was not complied with. In the case which Mr. Justice Cozens-Hardy had to deal with there was a covenant by a lessor not to allow a certain trade to be carried on in the "adjoining premises." The learned judge was of opinion that the word "adjoining" was confined to the two houses on either side of the demised premises, although the lessor was, at the time of the lease, the owner of a block of buildings of which the two houses formed part only.

A similar decision was come to by the Court of Appeal in *Ind, Coope and Co., Limited* v. *Hamblin*, 84 L. T. Rep. 168, where there was a conveyance on sale of a portion of the plaintiffs' land to the defendant. The defendant covenanted that he would not "in the erection of any buildings adjoining the hereditaments of the vendors" insert or permit to be inserted any lights overlooking such other hereditaments. The defendant constructed a number of houses the backs of which were twenty feet from the boundary fence separating his property from that of the plaintiffs. Their yards or gardens stretched to this fence, and there were windows in the houses which overlooked the plaintiffs' property. It was decided by the Court of Appeal that the defendant's houses did not adjoin the plaintiffs' property within the meaning of the covenant. The Court of Appeal reversed the decision of Mr. Justice Buckley, 81 L.T. Rep. 779, who was of opinion that premises might be adjoining though they were not contiguous. His Lordship distinguished the decisions in *Rex* v. *Hodges*, ubi sup., and *Vale and Sons* v. *Moorgate Street and Broad Street Buildings, Limited, and Albert Baker and Co., Limited*, ubi sup., where, as already stated, it was held that the

word "adjoining" means actually contiguous. As to the former of those cases, the learned judge pointed out that it turned upon the construction of a penal statute, which drew a distinction between the words "adjoining" and "belonging to" in such a way as to narrow the meaning of the word "adjoining." In the other case, he said, the two sets of premises were separated by a block of buildings, and one was in one street and the other in another. The Court of Appeal, on the other hand, came to the conclusion that the words must be construed in their ordinary sense—that is to say, as meaning actually contiguous, and not as meaning "near to" the plaintiffs' property.

Another decision to the same effect is to be found in *White* v. *Harrow; Harrow* v. *Marylebone District Property Company, Limited,* 86 L. T. Rep. 4. There an underlease contained a covenant by the lessee that he would not "object to any works to adjoining premises" that might be sanctioned by or on behalf of the lessor or the superior landlords or landlord. A company had acquired an interest in certain property adjoining the demised premises, and, with the approval of the lessor, were proposing to erect thereon some buildings which, as the lessee alleged, would obstruct the access of light hitherto enjoyed by his premises. The Court of Appeal decided that the words "adjoining premises" did not extend to any buildings which were situated near enough to affect materially the demised premises by obstructing easements, but only to buildings which came into physical contact with the demised premises; that "adjoining" meant adjoining in the sense in which it was used in s. 90 of the London Building Act, 1894, and could not be used in the sense of "neighbouring;" and that, consequently, the lessee was not precluded on that ground from objecting to the erection of the buildings.

Having regard, therefore, to the two decisions of the Court of Appeal in late years, it is manifestly erroneous to read "adjoining" in a legal instrument as having the same meaning as "adjacent," unless—as was the foundation of the decisions above cited of judges of first instance—there is some special reason to the contrary in the circumstances of the case.—*Law Times*, Eng.

REVIEW OF CURRENT ENGLISH CASES.

EXPROPRIATION OF LANDS—CHARITY—APPLICATION TO COURT TO SETTLE NEW SCHEME—COSTS.

In re Woodgreen Gospel Hall (1909) 1 Ch. 263. Certain lands belonging to a charity were, pursuant to statutory powers, expropriated by the London County Council; and in consequence of such expropriation, it became necessary to apply to the court for a new scheme for the regulation of the charity, and it was held by Warrington, J., that the costs of such application are payable by the expropriators.

COMPANY—ACTION IN NAME OF COMPANY—DIRECTOR HAVING MAJORITY OF VOTES—MOTION IN NAME OF COMPANY TO STAY ACTION BROUGHT IN ITS NAME—COSTS—SOLICITOR.

In *Marshall's Valve Gear Co.* v. *Manning* (1909) 1 Ch. 267 a motion was made in the name of the plaintiff company to stay the action as having been brought without its authority. The facts were that there were four directors of plaintiff company who between them held substantially the whole of the subscribed share capital of the company. One of them, Marshall, held the majority of the shares, but not three-fourths. The other three shareholders were also interested in the defendant company, which was owner of a patent, which, as Marshall claimed, was an infringement of a patent owned by the plaintiff company, and he authorized the present action to be brought against the defendant company to restrain such alleged infringement. The other three directors were opposed to the bringing of the action. In these circumstances the three opposing directors in the name of the plaintiff company moved to stay the action. It was admitted that it would be useless to call a meeting of shareholders, as Marshall had the majority of votes and wished the action to go on. Neville, J., was of the opinion that the majority of the shareholders had a right to control the action of the directors, and that the motion must be refused, and that with costs, and as the opposing directors who had instituted the application were not nominally before the court, the solicitors who had instituted the proceedings must be personally ordered to pay them as between solicitor and client.

WILL—ANNUITY—DIRECTION TO PURCHASE ANNUITY—DEATH OF ANNUITANT BEFORE PURCHASE—RIGHT OF ANNUITANT'S REPRESENTATIVE TO CAPITAL VALUE OF ANNUITY.

In re Brunning, Gammon v. *Dale* (1909) 1 Ch. 276. In this case a testator bequeathed an annuity to his sister for life, to commence from his decease, and directed his executors to provide therefor by buying a government annuity. One quarter's payment of the annuity had been made, but before the annuity was brought the annuitant died. Her personal representative claimed to be paid the capital value of the annuity at the date when the last payment was made, and Neville, J., held that she was so entitled, the only point contested was as to the date at which the annuity should be valued, the residuary legatee contending it should be valued at the time of the testator's death, and the quarterly payment deducted from the value as then ascertained.

TRUST—POWER TO APPOINT NEW TRUSTEE—EXECUTORS OF LAST SURVIVING TRUSTEE—APPOINTMENT BY DONEE OF POWER—VALIDITY OF APPOINTMENT—CONVEYANCING AND PROPERTY ACT, 1881 (44-45 VICT. C. 41), S. 3—(R.S.O. C. 127, S. 4)—TRUSTEE ACT, 1896 (56-57 VICT. C. 53), SS. 10, 25—(R.S.O. C. 129, S. 4; C. 336, S. 21).

In re Routledge, Routledge v. *Saul* (1909) 1 Ch. 280. The validity of an appointment of new trustees was in question. By a separation deed made in 1874 property was conveyed to two trustees upon certain trusts and by the same deed power to appoint new trustees was given to William and Jean Routledge. Both the trustees died, and the executors of the last surviving trustee under 44-45 Vict. c. 41, s. 3 (see R.S.O. c. 127, s. 4), acted as trustees. In 1908 William and Jean Routledge, under the Trustee Act, 1896, s. 10 (see R.S.O. c. 129, s. 4), appointed new trustees, and made the usual vesting declaration (see R.S.O. c. 129, s. 5). The executors claimed that the appointment was a nullity because they were the existing trustees, and though willing to retire could not be displaced except by the order of the court under 56-57 Vict. c. 53, s. 25 (see R.S.O. c. 336, s. 21), but Neville, J., held that although the executors were trustees of the settlement until the new trustees were appointed, the appointment of new trustees under the power was valid and operated forthwith to oust the executors for all purposes of the trust, and that they were bound to hand over the trust property and all muniments of title to the new trustees.

LANDLORD AND TENANT—OPTION TO PURCHASE LANDLORD'S INTEREST—CONDITION PRECEDENT—PROVISO THAT RENT SHALL HAVE BEEN "DULY PAID"—PART OF PURCHASE MONEY TO BE SECURED BY MORTGAGE—SPECIFIC PERFORMANCE.

In *Starkey* v. *Barton* (1909) 1 Ch. 284 the defendant was lessee of a house at a ground rent which she sub-let to the plaintiff with an option to the plaintiff to purchase the defendant's interest in the property on the plaintiff giving notice in writing of her intention so to do, provided that the plaintiff should in the meantime have "duly paid" the rent reserved. On December 25, 1907, a quarter's rent became due which wa snot paid till the 10 January, 1908. On March 20, 1908, the plaintiff gave notice of her intention to purchase the defendant's interest. The defendant refused to sell on the ground that the rent had not been duly paid. The present action was for specific performance, and Parker, J., held that "duly paid" did not mean "punctually paid," and that the condition precedent to the exercise of the option had been fulfilled. He also held that the fact that the agreement provided that part of the purchase money was to be secured by mortgage of the property did not make it an agreement for a loan, and therefore the plaintiff was entitled to specific performance as claimed.

MARRIED WOMAN—SEPARATE TRADING—BUSINESS OF MARRIED WOMAN MANAGED BY HER HUSBAND—MARRIED WOMEN'S PROPERTY ACT, 1882—(R.S.O. c. 163, s. 6).

In re Simon (1909) 1 K.B. 201 was an application to declare a married woman bankrupt, and the jurisdiction to do so turned on whether or not the married woman had been carrying on a separate trade. The evidence on this point was that a business belonging exclusively to the married woman had been managed by her husband, and it was held by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), affirming the registrar in bankruptcy, that notwithstanding her husband managed the business, it was a trade carried on by the married woman separately from her husband within the meaning of the Married Women's Property Act, 1882 (see R.S.O. c. 163, s. 6).

INNKEEPER—TRAVELLER—LOSS OF PROPERTY—GUEST—COMMON LAW LIABILITY OF INNKEEPER—CONTRACT BY THIRD PERSON TO PAY FOR GUEST'S ACCOMMODATION.

In *Wright* v. *Anderton* (1909) 1 K.B. 209, the plaintiffs were

two members of a hockey team, and as such had put up at the defendant's inn; the captain of the team having contracted to pay the charges. While guests at the defendant's inn their room was entered and watches, money and jewellery, the property of the plaintiffs, were stolen. The point was raised by the defendant, that there was no liability, because there was no contract between the plaintiffs and the defendant; but Bigham and Walton, JJ., affirming the judgment of a County Court judge held that the common law liability of the innkeeper to a guest for the loss of property arose notwithstanding a third person had agreed to pay the charges; the relationship of innkeeper and guest arising, as soon as the traveller enters the inn with the intention of using it as an inn, and is so received by the host.

PRACTICE—DISCOVERY—EXAMINATION FOR DISCOVERY—ACTION FOR SLANDER—DEFENCE OF FAIR COMMENT.

Walker v. *Hodgson* (1909) 1 K.B. 239. This was an action for slander, the words complained of having been spoken by the defendant as the chairman of a meeting. The defendant pleaded that the words complained of so far as they consisted of statements of fact, were true, and in so far as they consisted of comment were fair and bonâ fide comment upon matters of public interest. The defendant claimed to be entitled to interrogate the plaintiff for discovery for the purpose of establishing the truth of the matters of fact alleged in the speech complained of, and in the particulars delivered by him of the matters upon which his defence of fair comment was based. Bray, J., held that in the absence of a plea of justification the defendant was not entitled to put any of the proposed interrogatories, but the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) reversed his decision in part, they being of opinion that without a plea of justification the defendant is entitled to interrogate the plaintiff as to the truth of the allegations of fact on which the alleged defamatory statements were based, or which the defendant desired to prove at the trial for the purpose of supporting his plea of absolute privilege; and on this intimation of opinion the parties agreed as to the questions which might be put.

CRIMINAL LAW—PRACTICE—SUBPŒNA ISSUED FOR IMPROPER PURPOSE—SETTING ASIDE SUBPŒNA.

Rex v. *Baines* (1909) 1 K.B. 258 appears to be a little interlude in the suffragette agitation now going on in England. The

defendants appear to have so behaved themselves that they became subject to prosecution for a breach of the peace, which took place in Cookridge Street, Leeds. The Prime Minister and the Hon. Herbert Gladstone were at the time of the alleged breach of peace, present at a meeting held in a building called the Colliseum, which opened into Cookridge St., but were on a platform sixty feet from a door with glass panels which opened into the street. A subpœna was issued to require their attendance as witnesses on the trial, and the present application was made on their behalf to set aside the subpœna on the ground that they knew nothing about the matter and their attendance at the trial would seriously interfere with their official duties as Ministers of the Crown. The application was granted without prejudice to the judge at the trial, ordering the attendance of the applicants if he should think it necessary.

TRADE UNION—PROCURING BREACH OF CONTRACT—BREACH OF CONTRACT BY WORKMEN — PROCURING CONTINUANCE OF BREACH.

Smithies v. *National Association of Operative Plasterers* (1909) 1 K.B. 310 was an action against a trade union for procuring a continuance of a breach of contract by the plaintiff's workmen. The facts, though exceedingly complicated, may be briefly stated as follows. Two workmen who were members of a trade union had entered into contracts with the plaintiff to serve him for a term of two years, and had broken their contracts by striking, together with others in the same employ, and continuing on strike during the periods they had respectively contracted to serve. The defendant trade union had originally sanctioned the strike in ignorance of the aforementioned contracts, but after they became aware of the contracts they continued to give the workmen strike pay, in order to keep them out on strike; and it was held by Lord Alverstone, C.J., who tried the action, that the union had thereby rendered themselves liable to the plaintiffs in damages for procuring a continuing breach of contract by the workmen in question, and on this point the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) agreed with him. He also held that an agreement having been made by the trade union with a federation of employers, including the plaintiff, for the reference of disputes between the employers and their workmen to arbitrators, a bonâ fide belief on the part of the defendants that the plaintiff was in-

tending to evade a settlement of the dispute in accordance with the agreement, or even an actual intention on the part of the plaintiff so to do, would justify the trade union in procuring the breach by workmen of their contracts with the plaintiff; but with this view the Court of Appeal did not concur, and held that neither a bonâ fide belief that the plaintiffs were intending to evade, nor an actual evasion by them of the settlement of the dispute by arbitration, would justify the defendant union in procuring a continuing breach of contract by the plaintiffs' workmen. The Court of Appeal therefore held that the plaintiff was entitled to succeed against the union.

TRADE UNION—OBJECTS OF UNION—PAYMENT OF MEMBERS OF PARLIAMENT—(R.S.C. c. 125, s. 2).

Osborne v. *Amalgamated Society of Railway Servants* (1909) 1 Ch. 163. This was an action by a member of a trade union to restrain the union from applying its funds towards the payment of members of Parliament. The rules of the society provided for the moneys of the union being so applied, and Neville, J., considering himself bound by *Steele* v. *South Wales Miners' Federation* (1907) 1 K.B. 361 (noted ante, vol. 43, p. 364), refused to interfere, and dismissed the action. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), however, overruled that case, and reversed the decision of Neville, J., and granted the injunction asked, holding that the Trades Union Acts define the objects for which trade unions may be formed, and it is not possible by rules to extend or alter those purposes.

MINES AND "OTHER MINERALS"—CHINA CLAY—EXPERT EVIDENCE —RAILWAY COMPANY—EXPROPRIATION OF SURFACE.

Great Western Ry. v. *Carpalla U.C.C. Co.* (1909) 1 Ch. 218. In this case the plaintiffs had under their statutory powers expropriated the surface of certain lands for the purposes of their railway; beneath this land was a deposit of china clay, occupying only a small fraction of the subsoil. The defendants were the owners of the minerals and claimed the right to work the deposit of china clay as being a mineral, and had given notice to the plaintiffs of their intention so to do. The action was then commenced to restrain the defendants from so doing. The case was tried by Eve, J., and occupied nine days and a great deal of expert evidence was given on the point whether china clay was techni-

cally a "mineral." The learned judge came to the conclusion that it was, and dismissed the action; and his judgment was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.). Both Moulton and Farwell, L.JJ., considered the evidence of experts as to whether or not china clay is scientifically regarded as a "mineral," irrelevant and inadmissible. Their Lordships are of the opinion that the question was really one for the court to say whether china clay came within the term "mineral," not as a matter of scientific nomenclature, but as a matter of general understanding of the term; and that it was quite immaterial that though in 1881 scientific men had regarded it as a "mineral," they had since changed their minds on the subject.

LANDLORD AND TENANT—LEASE—PROVISO ENABLING LESSEES TO TERMINATE LEASE—NOTICE BY ONE OF TWO LESSEES.

In re Viola, Humphrey v. *Stenbury* (1909) 1 Ch. 244. In this case Warrington, J., decided that where a proviso in a lease enabled the lessees to determine the lease by notice, a notice given by one of the lessees, is, in the absence of any proof of agency, insufficient. The principle of the case of *Doe* v. *Summersett,* 1 B. & Ad. 135, in which it was held that a notice to quit given by one lessor of several, who were entitled as joint tenants, was valid, was decided not to be applicable, because joint tenants hold per my et per tout.

COMPANY—SHAREHOLDERS' ADDRESS BOOK—RIGHT OF SHAREHOLD TO INSPECT AND COPY BOOK—ACTION TO ENFORCE RIGHT OF SHAREHOLDERS—COMPANIES ACT, 1845 (8-9 VICT. C. 16) S. 10—(7 EDW. VII. C. 34, S. 117, ONT.)—(R.S.C. C. 79, S. 91).

In *Davies* v. *Gas Light & Coke Co.* (1909) 1 Ch. 248, the plaintiff brought an action for a mandamus to compel the defendant company of which the plaintiff is a shareholder, to permit him to examine and take copies from the shareholders' address book, to which he was entitled under 8-9 Vict. c. 16, s. 10 (see 7 Edw. VII. c. 34, s. 117, Ont.; R.S.C. c. 79, s. 91). The defendants sought to go into evidence to shew that the plaintiff had some improper motive in requiring the inspection, on the ground that the case must be decided on the same principles as an application for a prerogative mandamus in which case the court has an absolute discretion and is entitled to inquire into all the circum-

stances. But Warrington, J., held that the plaintiff had the statutory right which he claimed and that the case must be determined on the same principles as are applicable to an action for an injunction and that it is not open to the court to inquire into the motives of the plaintiff, and he granted the mandamus as claimed.

UNDISCLOSED ASSIGNMENT—CONSIDERATION—ANTECEDENT DEBT—LIFE POLICY—"BONA FIDE INTEREST BASED ON VALUABLE CONSIDERATION."

Wigan v. *English & Scottish Life Assce. Association* (1909) 1 Ch. 291 involves a somewhat peculiar state of facts; one Hackblock was the holder of a policy of insurance on his own life in the defendant company for £5,000, which was subject to a condition that it should be void if he died by his own hands, "but without prejudice to the bonâ fide interests of third persons based on valuable consideration." Hackblock was indebted to Wigan in the sum of £15,000, and in August, 1906, was being pressed for payment; and on 30 August, 1906, he instructed his solicitors to draw up an assignment of the policy to Wigan by way of mortgage, which was accordingly done and the mortgage was executed by Hackblock and delivered to his solicitors, but was not communicated to Wigan. The solicitors negotiated with Wigan, but without producing the mortgage, and they shortly afterwards, at Hackblock's request, destroyed it. No notice of the assignment was ever given to the defendant company. Hackblock committed suicide in September, 1906. After his death the facts concerning the assignment became known to Wigan's representatives (he having also died), and they brought the present action to recover the amount of the policy, contending that they were third persons having a bonâ fide interest based on valuable consideration. Parker, J., who tried the action came to the conclusion that the mere existence of an antecedent debt did not constitute a valuable consideration for the assignment, and dismissed the action on that ground, without adjudicating on the point whether the assignment had been actually delivered, or was merely an escrow.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] [Feb. 12.

HILDRETH *v.* MCCORMICK MANUFACTURING CO.

Patent of invention—Anticipation.

Canadian patent No. 79392, granted on Feb. 17, 1903, for improvements in candy pulling machines declared void for want of invention, having been anticipated by earlier inventions in the United States. Judgment of the Exchequer Court (10 Ex. C.R. 378) reversed on this point. Appeal dismissed with costs.

Anglin, K.C., for appellant. *Gibbons*, K.C., and *Haverson*, K.C., for respondents.

Ex. C.] NEW YORK HERALD *v.* OTTAWA CITIZEN. [Feb. 12.

Trade mark—"Buster Brown"—Validity of registration.

In 1902 the *New York Herald* began the issue of a comic section of that paper under the titles of "Buster Brown" and "Buster Brown and Tige," and have since continued to sell the same and licensed other newspapers to do so. In 1907 the *Herald* registered said titles as trade marks and brought action against the Ottawa Citizen Co. for infringement and an injunction against the use of them.

Held, that the terms "Buster Brown" and "Buster Brown and Tige" were not susceptible of registration under the Act respecting trade marks. Appeal dismissed with costs.

R. V. Sinclair, K.C., and *D. H. McLean*, for appellant. *Ewart*, K.C., for respondents.

Ont.] FAULKNER *v.* CITY OF OTTAWA. [Feb. 12.

Municipal corporation—Negligence—Flooding from drain—Vis major.

F. brought action against the city of Ottawa claiming damages for the flooding of his premises owing to the alleged incapacity of the drainage for the area in which they were situated.

Held, that as the drain installed by the city was capable of carrying off a fall of 1½ inches per hour, which was the standard adopted by all the cities of Canada and the Northern States, and was considered to meet the requirements of good engineering, the city was not liable.

Per IDINGTON and DUFF, JJ., dissenting, that the drain was not, according to the evidence given, capable of carrying off a fall of 1½ inches per hour.

Held, also, IDINGTON and DUFF, JJ., contra, that a fall at the rate of 3 inches per hour for nine minutes was one which could not reasonably be expected and which the city was not obliged to provide for.

Appeal dismissed with costs.

G. F. Henderson, K.C., for appellant. *Sheply*, K.C., and *McVeity*, for respondent.

Ex. C.] THE "NANNA" *v.* THE "MYSTIC." [Feb. 12.

Admiralty law—Salvage—Injury to salving vessel—Necessities of service—Seamanship—Appeal on nautical questions.

In an Admiralty case the Supreme Court of Canada must weigh the evidence for itself unassisted by expert advice, and will, if the evidence warrants it, reverse the judgment appealed from on a question of seamanship or proper navigation. The ship "M." brought an action for the value of salvage services rendered to the "N.," part of the damages claimed being for injury to the "M." in performing such services.

Held, GIROUARD and MCLENNAN, JJ., dissenting, that the evidence established that said injury was not caused by necessities of the service, but by unskilful seamanship and improper navigation, and the judgment appealed from should be varied by substantially reducing the damages. Appeal allowed with costs.

Mellish, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Ex. C.] [Feb. 12.

PROVINCE OF ONTARIO *v.* DOMINION OF CANADA.

Constitutional law—Indian lands—Extinguishment of Indian title—Payment by Dominion—Liability of province—Disputes between Dominion and province.

Where a dispute between the Dominion and a province of Canada, or between two provinces comes before the Exchequer

Court as provided by s. 32 of R.S.C. (1906), c. 140, it should be decided on a rule or principle of law and not merely on what the judge of the court considers fair and just between the parties.

In 1873 a treaty was entered into between the Government of Canada and the Salteaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Co. By said treaty the Salteaux agreed to surrender to the government all their right, title and interest in and to said lands, and the government agreed to provide reserves, maintain schools and prohibit the sale of liquor therein and allow the Indians to hunt and fish, to make a present of $12 for each man, woman and child in the bands, and pay each Indian $5 per year and salaries and clothing to each Chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was signed the boundary between Ontario and Manitoba had not been defined. When it was finally determined, in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario, and in 1903 the Dominion Government brought before the Exchequer Court a claim to be re-imbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The province disputed liability and, by counterclaim, asked for an account of the revenues received by the Dominion while administering the lands in the province under a provisional agreement pending the adjustment of the boundary.

Held, reversing the judgment of the Exchequer Court, 10 Ex. C. R. 445, GIROUARD and DAVIES, JJ., dissenting, that the province was not liable; that the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians and with a view to the maintenance of peace, order and good government in the territory affected; and that no rule or principle of law made the province responsible for expenses incurred in carrying out an agreement with the Indians to which it was not a party and for which it gave no mandate.

On the counterclaim the Dominion admitted its liability to account. Appeal allowed without costs.

Sir Æmilius Irving, K.C., *Shepley*, K.C., *C. H. Ritchie*, K.C., and *H. S. White*, for Ontario. *Newcombe*, K.C., Dep. Minister of Justice, and *Hogg*, K.C., for Dominion.

Province of Ontario.

COURT OF APPEAL.

Full Court.] MILLIGAN *v.* GRAND TRUNK RY. CO. [Feb. 11.

Appeal to Supreme Court—Leave—Supreme Court Act, R.S.C. 1906, *c.* 139, *s.* 48—*Extension of time—Application after expiry of* 60 *days—Jurisdiction of Court of Appeal—Amount involved not exceeding* $1,000—*No special circumstances.*

Motion by defendants for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal and to extend the time for bringing the appeal, the defendants having attempted to appeal without leave, and their appeal having been quashed by the Supreme Court of Canada. The security on the proposed appeal had been approved by an order of Maclaren, J.A. The defendants moved under s. 48 of the Supreme Court Act (R.S.C. 1906, c. 139) for special leave and under s. 71 of the same Act to extend the time.

The respondents among other answers to the application raised the objection that, inasmuch as these were cases in which no appeal to the Supreme Court lay as of right, and as the 60 days within which an appeal is required to be brought had expired, this court had no jurisdiction to entertain the motion. In other words, unless the application is brought within 60 days from the signing or entry or pronouncing of the judgment sought to be appealed from it could not be entertained.

Held, per MOSS, C.J.O.:—As far as I am aware, this is the first time that the question has been raised, although numerous applications have been heard and several have been allowed under almost precisely similar circumstances. And unless it is plainly apparent that the provisions of the Act prohibit us from so doing, we ought to adhere to the practice which has prevailed up to this time. The power to act under s. 71 is unquestionable in the ordinary case of a judgment pronounced by this court upon an appeal in which the subject matter leaves no question as to the right to entertain it. And so when under s. 76 of the Judicature Act as enacted by 4 Edw. VII. c. 11, s. 2, this court, in the exercise of its discretion, has allowed a further appeal to it from a Divisional Court. Nor does there appear to be any good reason for treating differently a case which under s. 76

leave has to be given to appeal directly to this court instead of to a Divisional Court. An order to that effect having been made, the case is in this court in precisely the same position as if here under either of the other ways. It could have found its way here by other channels, and being here is dealt with as any other case brought before the Court.

Sub-head (*e*) of s. 48 of the Supreme Court Act is intended to enable this court to place any case in which it has given final judgment in the same position as regards an appeal to the Supreme Court as cases following under sub-heads (*a*), (*b*), (*c*), and (*d*). When a case does not come within any of these four sub-heads, it only needs the application by the court of the power given by the 5th sub-head to group it with them. There is nothing in s. 48 imposing a time limit within which the leave must be applied for or granted. For that, reference must be made to s. 69 the effect of which, but for the proviso "except as otherwise provided," would probably be to compel the leave to be at least applied for within 60 days. But then comes the power not possessed by the Supreme Court, but given by s. 71 to the court appealed from or a judge thereof, to allow an appeal, although not brought within the 60 days. There is no time limit imposed and it is left to the court or judge to be governed by such special circumstances as may be presented, having regard to what, in view of all the facts, including the lapse of time, may be fair and just to the respondent. It follows from these conclusions that there is no obstruction to our entertaining the application in this case, even if it be out of time as suggested. The matter in controversy is the sum of $1,000, exclusive of costs, and so fell within sub-head (*b*) of s. 76 of the Judicature Act as enacted by 4 Edw. VII. c. 11, s. 2, and was therefore properly before this court. Unfortunately for the defendants, the Supreme Court has held that the matter in controversy on the appeal to that court does not exceed $1,000, exclusive of costs, and therefore it does not come under sub-head (*c*) of s. 48 of the Supreme Court Act, and it is necessary to obtain leave under sub-head (*e*). But, although I differed from the majority of the court as to the disposition of the appeal, I am unable to say, consistently with our decisions in other cases, that there are in this case any special reasons for treating it as exceptional or any special circumstance which should take it out of the general rule that litigation in a case involving no more than the amount here involved should cease with the rendering of judgment in this court. The mere fact of a difference of opinion

amongst the members of the court is not in itself a sufficient reason: see *Lovell* v. *Lovell*, 13 O.L.R. 587.

OSLER, GARROW and MACLAREN, JJ.A., concurred. MEREDITH, J.A., dissented.

Wallace Nesbitt, K.C., for defendants. *Henderson*, K.C., for plaintiff.

HIGH COURT OF JUSTICE.

Boyd, C., Trial.] ESSERY *v.* BELL. [Feb. 1.

Tax sale—Onus—Proof of validity of assessment and subsequent proceedings—Easement—Extinction by tax sale—"Privilege."

The onus of proving a valid sale for taxes is upon the party setting up title under a tax deed; the production of the deed is not enough; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited.

Jones v. *Bank of Upper Canada* (1867), 13 Gr. 74, and *Stevenson* v. *Traynor* (1886), 12 O.R. 804, followed.

The defendant contended that an easement or right of way enjoyed by the plaintiff over ten feet of land sold for taxes was extinguished by the sale in 1893, as being included in the word "privilege" used in the Assessment Act, 1892, s. 137, then in force.

Semble, that the law of Ontario does not provide for the taxation of easements; and the title to an easement cannot be extinguished by the sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exonerate the land by the payment of taxes.

R. S. Robertson, for plaintiff. *W. A. Henderson*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MCFETRIDGE *v.* MCCABE ET AL. [Feb. 13.

Escheat proceedings—Notice to non-resident—Effect of judgment—Estoppel.

A party who encroaches upon land outside of and adjoining his own land, not having his abode upon the land so encroached

upon, is not a person upon whom service must be made in escheat proceedings taken by the Crown under the provisions of R.S. (1900) c. 175.

Notice of the proceedings, duly posted, is all that is required in case of non-residents upon the land.

Where defendant, the party encroaching, became aware of the escheat proceedings between July, 1890, and June, 1892, and failed to take an action to have the matter re-opened and his rights inquired into.

Held, 1. This fact prevented him from afterwards attacking the proceedings by which the land was revested in the Crown.

2. The effect of the judgment escheating the land was to revest in the Crown not only the title to but the possession of the land, and that no right could thereafter be acquired against the Crown short of 60 years' adverse possession, and that as against the grantee of the Crown, although in possession, defendant was a mere trespasser, and could acquire no title short of 20 years' adverse possession after the date of the grant.

Bell, in support of the appeal. *McKenzie*, K.C., contra.

Full Court.] BOAK *v.* FLEMING. [Feb. 13.

Statute of Limitations—Judgment—Acknowledgment to take case out of statute.

The Statute of Limitations, R.S. (1900) c. 167, s. 22, provides that no action or other proceeding shall be brought to recover any sum of money secured by any . . judgment . . but within 20 years after the present right to receive the same has accrued . . unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereto has been given, etc."

Held, 1. The mere issue of a writ of execution and the placing of the same in the hands of the sheriff without any further action being taken thereon to enforce payment, was not sufficient to bring the judgment within the saving clause of the statute so as to keep it in force, and that the judgment being dead the execution fell with it.

2. The section refers to judgments generally.

3. The issuing of a summons under the Judgment Debtors Act, calling upon the debtor to appear for examination, is not such an acknowledgment as to take the case out of the statute.

O'Hearn, for. *F. W. Russell*, contra.

Full Court.] POWER *v.* POWER. [Feb. 13.

Parent and child—Deed given in consideration of agreement to support—Promissory note—Consideration.

Defendant secured a deed of a piece of land from his father in consideration of an agreement on his part to provide for the support of his father during the remainder of his life. Defendant failed to carry out his agreement and plaintiff, with other members of the family, in the lifetime of the father were about to take proceedings with a view to setting the deed aside when defendant, in consideration of the proposed proceedings being abandoned, agreed to give plaintiff and the other members of the family, each, his promissory note for the sum of $300.

Held, that the claim made by plaintiff being a serious one there was good consideration to support an action on the note, irrespective of whether plaintiff could have succeeded in the proposed proceedings or not.

Semble, that consideration for the note was afforded by the fact that it was given as part of a family settlement or arrangement.

Roscoe, K.C., for appeal. *J. J. Ritchie,* K.C., contra.

Full Court.] MCFARLANE *v.* MCLEAN. [Feb. 13.

Sales—Seizure of goods—Time for payment—Repudiation of contract—Quantum meruit.

Plaintiff sold a quantity of cloth to defendant who carried on a tailoring business on the terms that the cloth was to be made up into suits and paid for as it was made up. Before the cloth could be manufactured into suits it was seized and taken away under claim of title by virtue of a chattel mortgage.

Held, 1. The manufacture of the cloth into suits must be done within a reasonable time and that even if without default on the part of defendant he became unable to carry out his agreement that did not excuse him from making payment.

2. The fact of defendant having wholly repudiated his obligation under the contract discharged plaintiff from any obligation that he was under to give credit and enabled him to sue on a quantum meruit for the value of the goods.

D. McNeil, for appeal. *O'Connor,* contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] MONROE *v.* HENBACH. [Feb. 10.

Agreement for sale of land.

Appeal from decision of MATHERS, J., noted ante, vol. 44, p. 630, dismissed with costs.

KING'S BENCH.

Cameron, J.] RE SANFORD ESTATE. [Feb. 2.

Administration—Compensation to trustees.

Application to fix the amount of compensation to be paid to the trustees in Manitoba of the estate of the late W. E. Sanford, whose duties were to realize on his real estate and transmit the proceeds to the Ontario executors. At the time of the testator's death the real estate was valued at $158,000, but before the lands were all sold their values had so increased that $366,000 was realized. The judge gave great credit to Mr. Riley for his successful handling of the sales of these lands.

Held, that in fixing the amount of compensation there should be taken into consideration (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; (5) the success which has attended its administration. *Re Toronto General Trusts Co.* v. *Cent. Ont. R.W. Co.*, 6 O.W.R. 354, per Teetzel, J., and the compensation allowed must be fair and just, but not necessarily *liberal*, also that Mr. Riley was not entitled to a commission on the value of lands sold by him on the basis of a real estate agency, though he might have employed an agent to make the sales and paid him the usual commission. A. & E. Encyc., vol. 2, p. 1306.

The judge took into consideration the length of time, nine years, taken up in the administration, and that it had been carried through without criticism and with unusual success, and allowed Mr. Riley, who had performed the greater part of the work, two per cent. of the gross amount realized by the sales

and the other two executors who did not live in Manitoba, together an additional two per cent.

Aikins, K.C., for Riley. *Hough*, K.C., for the estate.

Cameron, J.] [Feb. 17.

WATSON MANUFACTURING CO. *v.* BOWSER.

Practice—Application to extend time for service of statement of claim.

Application under Rule 176 of the King's Bench Act to extend the time for service of the statement of claim on defendant McDonald. The action was commenced Nov. 15th, 1907, against Bowser and McDonald to recover on four promissory notes, the last of which fell due on the 1st March, 1902, so that unless the application were granted, the right of action against McDonald was gone. Under the rules of court the statement of claim must be served within six months, but there is no time fixed within which an order extending the time must be applied for.

Held, that unless there be extraordinary circumstances such an application should be made within six months, especially as the plaintiff can obtain substitutional service or some other remedy under Rule 203, and in all cases an honest attempt to serve the defendants within the proper time should be shewn.

The affidavit in support of the application shewed only that the plaintiff's solicitor had been constantly endeavouring to "locate" the defendant McDonald, but without success, until recently, when it was discovered that he resided in Wasota, in Saskatchewan.

Held, that this affidavit did not shew that reasonable efforts had been made to effect the service, and that the application should be refused. *Doyle* v. *Kaufman*, L.R. 3 Q.B.D. 340, followed.

Fillmore, for plaintiffs.

Mathers, J.] [Feb. 19.

BANK OF NOVA SCOTIA *v.* BOOTH AND DOMINION FISH CO. GARNISHEES.

Manitoba Evidence Act, R.S.M. 1902, *c.* 57, *s.* 57, *as re-enacted by c.* 11 *of* 4 *&* 5 *Edw. VII.—Order of foreign court for examination of witnesses in Manitoba—Order for attendance of witnesses for purposes of suit before foreign tribunal.*

In an action in the High Court of Justice of Ontario a gar-

nishing order was served on the Dominion Fish Co. An application was then made at Toronto to set aside the garnishing order, and in support of such application affidavits made by two officials of the company were filed. An order was made by the Master in chambers in Toronto for the cross-examination at Winnipeg upon these affidavits. Upon an ex parte application made to a judge of this court, an order was made under s. 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by c. 11 of 4 & 5 Edw. VII., commanding the attendance of these officials before the examiner named in the order of the Master in chambers at such time and place as he might appoint, and for the production of the books and documents, etc. Upon application made to set aside the last mentioned order,

Held, that nothing in the statute referred to authorized a judge of this province to make an order requiring the attendance of a person making an affidavit in a suit or proceeding pending in a court outside the Province of Manitoba for the purpose of being cross-examined on it within the province and that, although the officials sought to be examined had acquiesced in the order by attending for partial examination and in other ways, they had not lost their right to move for the rescission of the order. *Smurthwaite* v. *Hannay* (1894), A.C. 501, and *Hoffman* v. *Crerar*, 18 P.R. 473, followed.

Order set aside but without costs because of the long delay before moving against it, and because the plaintiffs had been allowed to incur considerable expense in attempting to enforce it before the application was made.

Burbidge, for plaintiffs. *Knapp*, for garnishees.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Feb. 10.

RE JONES & MOORE ELECTRIC CO.

Company law.

Appeal from judgment of MACDONALD, J., noted vol. 44, p. 246, dismissed with costs.

Full Court.] PELEKAISE *v.* MCLEAN. [Feb. 10.

Conditional sale—Lien note—Dealer disposing of horses in the ordinary course of his business.

Appeal from judgment of CAMERON, J., noted ante, vol. 44, p. 710, allowed with costs, on the ground that the plaintiff had failed to give any evidence of title to the horses, other than that he had purchased for value from one Brett and had failed to give evidence of the sale to Foorsen or of the sale by Foorsen to Brett, and that the facts proved fell short of those proved in the case of *Brett* v. *Foorsen*, 17 M.R. 241.

The court expressed no opinions as to whether that case was rightly decided or not.

Leave given to plaintiff to have a new trial on payment of the costs of the former trial and of the appeal.

Hudson and *McKerchar*, for plaintiff. *Wilson*, for defendant.

Full Court.] [Feb. 15.

CHARLES H. LILLY CO. *v.* JOHNSTON FISHERIES CO.

Company law—Unlicensed foreign company suing on foreign judgment—"Doing business," what constitutes—Winding up—Notice of—Action against company in liquidation—Liquidator first appearing in action on appeal—Costs.

A foreign company is not precluded by any provision in the Companies Act, 1897, compelling registration before it can transact any of its business in the province, from access to the courts of the province in the capacity of an ordinary suitor.

Per IRVING, J. (dissenting on this point).—That the bringing of an action without the jurisdiction by an unlicensed foreign company was carrying on business as aimed at by ss. 123 and 143 of the Companies Act, 1897.

Judgment having been obtained against defendants in a foreign jurisdiction, suit was brought in British Columbia on the foreign judgment. The defendant company had been wound up prior to the commencement of the suit, but that fact was not pleaded, and was only raised on the opening of the trial by counsel for defendant Johnston, the liquidator of the company not being present or represented; nor was the permission of the court obtained to sue the company.

Held, that the plaintiff must pay the costs occasioned subsequently to the receipt of notice of the company's legal position.

The liquidator of such a company appearing for the first time in the action on appeal.

Held, that he should have only such costs as he could have obtained on an application to a judge in Chambers.

Taylor, K.C., and *Twigg*, for defendant Johnston, appellant. *Prior*, for liquidator. *Russell*, for plaintiffs, respondent.

SUPREME COURT.

Clement, J.] A. *v.* A. AND K. [Feb. 2.

Divorce—Petition by husband—Husband and wife both leading immoral lives after separation—Discretion of court.

On the husband's petition for dissolution of marriage on the ground of infidelity by the wife after separation, if it be shewn that the petitioner is himself leading an immoral life, the court will exercise its discretionary power under the divorce jurisdiction, and refuse the relief prayed for.

R. M. Macdonald, for the petitioner. Respondent did not appear.

Clement, J.] [Feb. 10.

HARVEY *v.* B.C. BOAT & ENGINE CO.

Highway—Obstruction—Nuisance—Prevention of access to property—Right of action by owners.

The right of ingress from and egress to a public highway parting a person's land, is a private right differing not only in degree, but in kind from the right of the public to pass and repass along such highway; and any disturbance of the private right may be enjoined in an action by the land owner alone.

Belyea, K.C., for plaintiff. *Ellis* and *Creayh*, for defendants.

Clement, J.] [Feb. 12.

NATIONAL TRUST CO. *v.* DOMINION COPPER CO.

Practice—Special case—Questions of fact—Proceedings extra cursum curiæ.

A special case, asking the court to determine suggested or possible points of law in advance of an agreement or determination of the facts, is not to be encouraged.

Wilson, K.C., for plaintiffs. *MacNeill*, K.C., *Macdonald*, K.C., and *A. M. Whiteside*, for various parties.

Morrison, J.] PLOWMAN *v.* PLOWMAN. [Feb. 15.

Divorce—Petition for, signed by solicitor for petitioner—Petitioner domiciled within jurisdiction.

In an action for dissolution of marriage, the petition must be signed by the petitioner himself, and not by his solicitor for him, unless leave be given by the court in special circumstances.

Walkem, for petitioner. *Spinks*, for respondent.

Morrison, J.] MACKENZIE *v.* CHILLIWHACK. [Feb. 22.

Municipal corporations—Suicide of prisoner in jail—Negligence of caretaker while discharging duties imposed by legislature.

Action against a municipality by widow of prisoner who, while confined in municipal lock-up set fire to cell and was burned to death, owing to negligence of caretaker.

Held, that the municipality was not liable for the negligence of the caretaker while acting in discharge of his duties, said duties being of a public nature and prescribed by the legislature, and in the performance of which the municipality had no private interest and from which it in no way derives any benefit in its corporate capacity.

Martin, K.C., for plaintiff. *Reid*, K.C., for defendant.

Book Reviews.

Butterworth's Yearly Digest of Reported Cases for the Year 1908. Edited by G. R. HILL, Barrister-at-law, and HARRY CLOVER, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, law publishers. 1909.

This volume is the first annual supplement to Butterworth's Ten Year Digest, and contains the cases decided in the English Supreme and other courts, including a copious selection of reported cases decided in the Irish and Scotch courts, with a list of cases digested, overruled and considered, and of statutes, orders, rules, etc., referred to.

This digest is arranged on the same novel system of classification adopted in the previous work, with its elaborate time saving system of cross references. The series of reports which are included in the present volume are too numerous for reference here, but they seem to include all the reports of every description which are published in the United Kingdom.

Butterworth's Ten Year Digest, from 1898 to 1907, is a most valuable addition to every lawyer's library, and its continuation for the year 1908 gives to busy practitioners every case worth referring to from January, 1898, to December, 1908.

Foreign Judgments and Jurisdiction. Part I. By SIR FRANCIS PIGGOTT, Kt., Chief Justice of Hong Kong. London: Butterworth Co., 11 and 12 Bell Yard, Temple Bar, law publishers. 1908.

This is the third edition of Sir Francis Piggott's great work. The volume before us is divided into three parts. Part I. is subdivided as follows: Book I. The position of foreign judgments in the English court; Book II. Jurisdiction; Book III. Defence and concurrent suits.

The object of the learned writer in this work is to state comprehensively the position of British subjects beyond the realm, with reference to the law of England. In carrying this out he has, as he states, to travel over ground which is in part familiar, but in part lies off the beaten track. Portions of the subject are familiar under such titles as international law and conflict of laws. The other information to complete the general subject has not elsewhere been collected and systematized, but in other books is treated as incidental only, and disposed of in short paragraphs or notes by the way. As to this, the author feelingly remarks: "Those alone who have lived under ex-territorial conditions or in the far-off colonies of the Empire know how difficult of practical application to them some of our highly-prized legal doctrines are, and what grave injustice may result from forcing them on to conditions which were never dreamed of when they were formulated."

Those who have governmental responsibility in reference to affairs of State, as well as professional men in all parts of the Empire owe a debt of gratitude to Sir Francis Piggott for the work which he has accomplished; and he is fortunately in a peculiarly appropriate position to do it satisfactorily.

Digest of the Law of Agency. By WILLIAM BOWSTEAD, Barrister-at-law. 4th edition. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. 1909.

The third edition was published only two years ago. This is a sufficient indication of the usefulness of this book, which is compact, comprehensive and complete. This fourth edition is a revision with reference to the cases reported up to the end of 1908.

Butterworth's Workmen's Compensation Cases. Vol. 1 (new series). Edited by HIS HON. JUDGE RUEGG, K.C., and F. J. COLTMAN, barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard. 1909.

This is a continuation of "Workmen's Compensation Cases," vols. I.-IX., edited by the late R. H. Minton-Senhouse. This being the days of specialities, this volume of cases will doubtless be as useful as its predecessors.

COUNTY OF HASTINGS LAW ASSOCIATION.

The adjourned annual meeting of the County of Hastings Law Association was held February 15, and satisfactory reports were presented. It was decided to continue the series of Bar suppers during the year, and to send representatives to the Ontario Bar Association meetings. The following officers were elected:—Honorary president, J. Parker Thomas, K.C.; president, W. N. Ponton, K.C.; vice-president, F. E. O'Flynn; treasurer, W. S. Morden; secretary A. A. Roberts; curator, W. C. Mikel, K.C.; trustees, E. J. Butler, S. Masson, M. Wright, E. Gus Porter, K.C.; W. B. Northrup, K.C.; auditors, P. J. M. Anderson and W. J. Diamond; librarian, Miss McRae.

The establishment of a practical Faculty of Law, with a short course, in our Provincial University will be urged, to take the place of the three years' lecture course now conducted by the Law Society. The Law Society course keeps all students in Toronto for their final three years, deprives the offices of county towns of their services, and is a very expensive charge upon the profession.

A pleasant feature of the Bar gatherings during the past two years, in addition to the social intercourse with the Bench, has been the reminiscent anecodotes of Mr. J. J. B. Flint, who with Col. Lazier and Mr. Thomas, shares the veteran honours.

Flotsam and Jetsam.

We really cannot refrain from giving the enterprising firm whose names appear below a free advertisement. The following appears in a Nova Scotia weekly: "Notice. We respectfully want our Mahone Bay patrons to make arrangements with Mr. Francis Hollaway, our representative in that town, for advertising, job work and subscriptions. Chas. A. Lohnes and Francis Hollawy, two of His Majesty Justice of the Peace in and for Lunenburg County, Mahone Bay, N.S. Legal writings of all kinds such as Deeds, Mortgages, Bonds, Bills-of-Sale agreements, Wills, Leases, etc., carefully done on short notice. Collections a specialty. Prompt attention and remittance guaranteed. Write for terms."

The idea of a partnership between magistrates seems to be quite novel. The second justice is not clear as to how his name should be spelled; but other great men have been equally hazy, and yet have come down in history all the same. The firm are also a little shaky in their grammar; but what of that? Are not most J.Ps. afflicted in the same way; and then these two are able to do so many things of much more importance. What a fine grist should come to the legal mills of Lunenburg County, from the office of this firm of conveyancers. We wish we lived there.

What is regarded as the quaintest oath still in use is that taken by the High Court judges in the Isle of Man: "By this book and the contents thereof, and by the wonderful works that God hath miraculously wrought in the heaven above and the earth beneath in six days and six nights, I do swear that I will, without respect of favour or friendship, loss or gain, consanguinity or affinity, envy or malice, execute the laws of this isle justly between party and party as indifferently as the herring backbone doth lie in the midst of the fish. So help me, God, and the contents of this book."