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MARRIAGE WITH DECEASED WIFE'S SISTER.

In view of the recent change in the law of England it will be of interest to refer to an article on this subject which appeared in our columns two years ago (ante, vol. 41, p. 345), where it was discussed at some length.

The contest between the Lords and the Commons has at length been concluded by a victory for the latter and for those who for years have sought to legalize marriage between a man and his deceased wife's sister. As our readers are aware the law now passed in England has been in force in this country since 1882.

The enactment as it now appears in the Revised Statutes of Canada, 1906, c. 105 (which is an epitome of 45 Viet. c. 42 and 53 Viet. c. 36) is thus expressed: "A marriage is not invalid merely because the woman is a sister of a deceased wife of the man or a daughter of a sister of a deceased wife of the man."

This provision now appears in its proper place in the statute book, not hidden away as it was in the revision of 1886 as an Act which was "not considered a proper Act to be consolidated." This has already been remarked upon as odd on the part of the revisers; but whatever was the cause of this the opposition to the change both here and in England came from the clergy of the Churches of England and of Rome. It may be noted that there is no legislation as to the marriage of a widow with her deceased husband's brother, possibly for the reason suggested in the article referred to at page 356.

The subject matter of the judgment delivered by the Chancellor of Ontario referred to in *Re Solicitor*, post p. 575 is of much interest to the profession. A correspondent takes exception to the conclusion arrived at, but we cannot, of course, without a full understanding of the facts and reasons given by the learned Chancellor for his decision, criticise his findings. But assuming that these are in accordance with the existing state of the law as to costs between solicitors and clients, the thought arises whether the ancient law of champerty is entirely in keeping with the business relations and social conditions existing in the beginning of the 20th century. It has been, and often is a hardship on clients to prevent an agreement whereby the solicitor is to share with the client in the proceeds of a litigated claim as compensation for services rendered. A poor man may thus be prevented from recovering a claim to which he is justly entitled. The subject, however, is a large one, and any change in the law could only be made after careful consideration, and ascertaining, as far as possible, the result in other countries of a change in the old law of England to one which many contend is a more beneficial system and more in accord with present conditions. We should be glad to hear from some of our subscribers as to their views on this subject.

According to the *Law Times* a remarkable feature of the legislation in England of the last twenty years is the manner in which it has resulted in the separation of the law of England and Ireland. Common law and equity, of course, form the basis of the law in both countries, but the statute law of the two countries is drifting farther and farther apart. An evidence of this development is the fact that English text books are becoming less useful in Ireland than they formerly were. That such a retrograde movement in matters appertaining to jurisprudence should take place in the twentieth century is curious, and it would seem to be only possible in the case of the "sister kingdom" and that for a reason well understood by those who live there, but which apparently is impossible of remedy.

It has been the complaint in England for years past that the administration of justice there is in a very unsatisfactory condition, and that considerable changes must be made and more money spent if the country is to have speedy and efficient justice. The Attorney-General has promised that the many reforms suggested in the recent debate on the subject as being necessary will be taken into consideration and it is thought that the evils may to a great extent be remedied by the increase in the number of their judges and the remodelling of their circuit system. As a Court of Criminal Appeal has been decided upon, that will impose further serious duties upon the Bench and will, it is supposed, occupy the time of at least three judges. As a preliminary the House of Commons has passed a motion praying His Majesty to appoint an additional judge for the King's Bench Division.

THE POWER OF APPELLATE COURTS TO CUT DOWN EXCESSIVE VERDICTS.

The action of many of our Appellate Courts in cutting down verdicts of juries as excessive is worthy of careful consideration. It would seem that, in the connection many of our Courts have almost lost sight of the underlying maxim of our jury system that "Ad questionem facti non respondent judices, ad questionem juris non respondent juratores." That this maxim is not of universal application was clearly pointed out by Professor Thayer.[1] That it did apply in the case of verdicts rendered by juries, where the element of passion or prejudice was not shewn to have entered, and no mistake of law alleged, was unquestioned until the last few years. Theoretically the power of the Courts in this respect is the same to-day, unless changed by statute, as it was a century ago. The change that has taken place in practice is well illustrated by extracts from decisions rendered at different periods in our judicial history. In the case of *Townsend* v. *Hughes*,[2] decided in the time of Charles II., a new trial

[1] "Preliminary Treatise on Evidence at the Common Law," c. 5.

[2] 2 Mod. 150.

was demanded on the ground that excessive damages had been given. It was refused, one of the judges remarking, "Suppose the jury had given a scandalous verdict for the plaintiff as a penny damages, he could not have obtained a new trial in hopes to increase them; neither shall the defendant in hopes to reduce them." In a New York case decided in 1812,[3] the Court stated that, "Unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the Court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot consistently with the precedents, interfere with the verdict." The rule here laid down was followed unquestioningly until the last few years. The modern tendency is illustrated in a recent Washington case[4] where the Court cut down the verdict, remarking that, "a duty devolves upon the Court to restrain juries from awarding verdicts unnecessarily large." No claim was made that the jury had been actuated by passion or prejudice. The old rule was likewise pared down by the California Courts until, according to one case, it is sufficient to justify a remission of part of the damages given by a jury if the evidence is "very clear" that an excess has been given. The Supreme Court thus sets up its opinion as to what is a proper verdict against the opinion of the jury, and declares its intention of overruling the opinion of the jury whenever there is a substantial disagreement. The Court considers, not what verdict "might" be given by reasonable men, but what verdict "ought" to be given. The fallacy of this was pointed out by Lord Halsbury in an English case some years ago.[5] If the objection is made that passion or prejudice must be shewn the Court will reason thus: "We have examined the evidence and conclude that the verdict given is excessive. Therefore, the jury must have been influenced by passion or prejudice to render

[3] *Coleman* v. *Southwick*, 9 Johns. 45, 6 Am. Dec. 45; *Acc. Coffin* v. *Coffin*, 4 Mass. 1; *Collins* v. *Council Bluffs*, 32 Iowa 324.

[4] *Hart* v. *Cascade Lumber Co.*, 39 Wash. 279.

[5] *Trabing* v. *Cal. Nav. & Imp. Co.*, 65 Pac. 478. (Not reprinted in full in Cal. Reports).

[6] *Metropolitan R. Co.* v. *Wright*, 11 App. Cases 152.

such a verdict.'"[7] In many cases the necessary element of passion or prejudice is absolutely disregarded by the Appellate Court. It will merely consider the evidence, and if it concludes that the amount of damages given by the jury is excessive, will proceed to cut it down.[8] A distinction is often made between excessive verdicts rendered by mistake and those rendered under the influence of passion or prejudice.[9] It is claimed that an excessive verdict may be honestly rendered by a jury, and that where such is the case, the Appellate Court may require a remittitur or allow a new trial. Where the damages are liquidated, such a distinction may rightfully be made. But where they are not liquidated and no mistake of law is alleged, the only ground on which the Court can require a remittitur is that it disagrees with the jury in regard to the weight to be given to the evidence. This however is not sufficient to justify the intervention of the Court. The power to interfere with the verdict of the jury in such a case does not belong to it unless expressly given by statute. This class of cases was entrusted to juries for the very reason that their opinion was regarded as more valuable than the opinion of a Court. Where passion or prejudice is shewn to have actuated a jury in rendering a verdict, even though the damages are liquidated, some Courts will attempt a calculation at the part that such factor has played, and will cut down the verdict accordingly.[10] The same objection exists to such action that was mentioned in the former case. The verdict of a Court is substituted for the verdict of a jury. The additional and more vital objection exists that if passion or prejudice is found, the verdict is vitiated, that the discovery of one of those elements ipso facto nullifies the verdict and renders it incapable of lawful ratification, even in part. An interesting answer was made to this objection by a Tennessee Court. It was there held that if a reduc-

[7] Cf. *Chicago & N. W. R. Co.* v. *Jackson*, 55 Ill. 128.

[8] Cf. *Gallamore* v. *Olympia*, 34 Wash. 390.

[9] Enc. of Pl. & Pr., vol. 18, p. 144.

[10] *Trow* v. *Village of White Bear*, 78 Minn. 432, 80 N.W. Rep. 1117; *Baxter* v. *C. & N. W. R. Co.*, 104 Wis. 307, 80 N.W. Rep. 644.

tion in the verdict was made with the assent of the plaintiff, that the verdict was thereby "purged of its taint."[11] But if passion or prejudice actuated the jury in the formation of its verdict the Court has no right to attempt such calculation as to the part played by those elements, and frame a verdict accordingly. As was said in a Missouri case,[12] the Court has "no scales by which it can determine what portion is just, and the result of reason, based upon the evidence and what part is poisoned by prejudice and passion."

The real reason for this tendency on the part of our Appellate Courts to reduce verdicts, is expressed by Justice Marshal, of Wisconsin, that it should be taken as indicating that "our jurisprudence is still developing towards the ideal of perfection where the administration of the law is truly the administration of justice," and not as "a tendency to narrow or invade the functions of the jury."[13] The objections of law and logic are, however, only overridden by such a justification. A disclaimer of any intention to invade the province of the jury does not do away with the facts in the case.

The proper action to take would be to adhere to the law[14] as it exists until a formal change should be made. This change has been made in several states upon the refusal of the Supreme Court to reduce verdicts without authority for so doing." The matter may not seem of much importance in this particular matter, but it is only by adherence to the law as it actually exists that rights can be secure. A deviation in one respect may serve as a precedent for a deviation in another. The value of a written Code of laws is largely impaired if it can be varied at the whim of the Courts.

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[11] *Telegraph Co.* v. *Frith*, 105 Tenn. 167, 58 S. W. Rep. 644.

[12] *Gurley* v. *Mo. Pac. R. Co.*, 104 Mo. 211. Subsequently overruled by *Burdict* v. *Mo. Pac. R. Co.*

[13] *Baxter* v. *C. & N. W. R. Co.*, 104 Wis. 307, 80 N. W. Rep.

[14] *e.g.* Ill. Tex. La.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] SINCLAIR *v.* OWEN SOUND. [June 24.

Municipal law—Vote on by-law—Local option—Division into wards—Single or multiple voting.

Section 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law," does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act, R.S.O. (1897) c. 245.

Appeal dismissed with costs.

Nesbitt, K.C., and *Wright*, for appellant. *Hodgins*, K.C., and *Frost*, for respondent.

N.B.] DALY *v.* BROWN. [June 24.

Executor and trustee—Moneys of testator—Deposit in bank—Authority to draw against—Gift—Sale by executor—Undervalue—Jurisdiction of Probate Court.

D. deposited money in bank in the joint names of himself and a daughter with power in either to draw against it. The daughter never exercised this power and when D. died she and her co-executor of his will, in applying for probate, included said money in their statement of the testator's property.

Held, that the money in bank remained the property of D. and did not pass to the daughter on his death.

An executor sold property of the estate for $800 his wife being the purchaser. On passing the accounts the judge of probate found, as a fact, that the property was worth $1,800 and ordered that the executor account for the difference.

Held, that though the Probate Court could not set aside the sale it had jurisdiction to make such order.

Where by will money was bequeathed to the testator's daughter "to hold and be enjoyed by her while she remains unmarried" with a bequest over in case of her decease or marriage.

Held, that the daughter was only entitled to the income from said money and not to the possession and disposition thereof.

Remarks on the absence from the record of the decree of the Court of original jurisdiction. Appeal dismissed with costs.

Newcombe, K.C., and *McKeown*, K.C., for appellant. *Gregory*, K.C., and *Macrae*, for respondents.

N.S.] [June 24.

CITY OF HALIFAX *v.* MCLAUGHLIN CARRIAGE CO.

Appeal — Stated case — Provincial legislation — Assessment — Municipal tax—Foreign company—"Doing business in Halifax."

An Ontario company resisted the imposition of a license fee for "doing business in the City of Halifax" and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of the said Court to the Supreme Court of Canada counsel for the City of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the Province, and therefore, and because the proceedings did not originate in a Superior Court, the appeal to the Supreme Court of Canada did not lie.

Held, per FITZPATRICK, C.J., and DUFF, J., that as the appeal was from the final judgment of the Court of last resort in the Province this Court had jurisdiction under the provisions of the Supreme Court Act, and it could not be taken away by provincial legislation.

Per DAVIES, J., provincial legislation cannot impair the jurisdiction conferred upon this Court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under order xxxiii, Rule 1 of the Judicature Act.

Per IDINGTON, J. If the case was stated under the Judicature Act Rules the appeal would lie, but not if it was a submis-

sion under the charter for a reference to a judge at request of a ratepayer.

By s. 313 of the charter (54 Vict. c. 58) as amended by 60 Vict. c. 44 "every insurance company or association accident and guarantee company, established in the City of Halifax, or having any branch office or agency therein shall . . . pay an annual license fee as hereinafter mentioned . . . Every other company, corporation, association or agency doing business in the City of Halifax (banks, insurance companies or associations, etc., excepted) shall . . . pay an annual license fee of one hundred dollars."

Held, that the words "every other company" in the last clause were not subject to the operation of the ejusdem generis rule, but applied to any company doing business in the city. Judgment appealed from overruled on this point. See 39 N.S. Rep. 403.

A carriage company agreed with a dealer in Halifax to supply him with their goods and gave him the sole right to sell the same in a territory named, on commission, all monies and securities given on any sale to be the property of the company and goods not sold within a certain time to be returned. The goods were supplied and the dealer assessed for the same as his personal property.

Held, DAVIES and MACLENNAN, JJ. dissenting, that the company was not "doing business in the City of Halifax" within the meaning of s. 313 of the charter and not liable for the license fee of one hundred dollars thereunder.

Appeal dismissed with costs.

F. H. Bell, for appellant. *Newcombe*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] CRAWFORD *v.* TILDEN. [April 22.

Constitutional law—Mechanics' Lien Act—Dominion railway.

A lien under R.S.O. 1897, c. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act,

and declared thereby to be a company incorporated for the general a antage of Canada.

Decision of a Divisional Court, 13 O.L.R. 169, affirmed.

E. L. Dickenson, E. D. Armour, K.C., and *A. M. Stewart*, for various parties.

Full Court.] [April 22.

MCKENZIE *v.* GRAND TRUNK RY. CO.

Railway—Farm crossings—Agreement—Maintenance—Rights of land owners—Application to Board of Railway Commissioners.

A railway constructed by the defendants' predecessors in title crossed the plaintiffs' respective farms. In 185[illegible], when the line of railway was being laid down, bridges and an under-pass were constructed by the railway company to enable the owners of the farms to pass from one side of the railway to the other, and were for more than 50 years maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and their predecessors in title, without any objection on their part.

Held, on the evidence, that the bridges and under-pass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreements or arrangements under which the defendants' predecessors in title acquired their right of way through the lands in question, and the defendants were bound by them. There could be no question of ultra vires; the subject matter of the agreements was within the powers and authority of the railway company in dealing for the acquisition of a right of way. The defendants were in the wrong in assuming to alter or reconstruct the bridges and under-pass without the sanction of the Board of Railway Commissioners; and it was for them, and not for the plaintiffs, to apply to the Board.

Judgments of BOYD, C., and MEREDITH, C.J.C.P., affirmed.

Wallace Nesbitt, K.C., for defendants, appellants. *T. G. Meredith*, K.C., and *D. A. McDonald*, for plaintiffs.

Full Court.] STILL *v.* HASTINGS. [May 13.

Malicious prosecution—Want of reasonable and probable cause—Functions of judge and jury—Nonsuit—Setting aside—New trial.

Appeal by the defendant from the order of a Divisional Court, 13 O.L.R. 322, setting aside a nonsuit and directing a new trial, was dismissed at the hearing.

Moss, C.J.O., Osler, J.A., Garrow, J.A., Meredith, J.A., Riddell, J.] [June 5.

EMERY *v.* FICK.

Parent and child—Conveyance of farm by father to daughters—Agreement for maintenance—Action to set aside transaction—Understanding and capacity of grantor—Absence of undue influence—Improvidence—Status of heir at law as plaintiff.

The decision of a Divisional Court, 13 O.L.R. 178, dismissing an action by one of the heirs at law of the grantor to set aside a conveyance of a farm by a father to his daughters, for undue influence, improvidence, etc., was affirmed, the majority of the Court of Appeal agreeing with the reasons given by the Court below.

Per MEREDITH, J.A.:—If the transaction had been attacked by the grantor in his lifetime, it would have been set aside; it was not so attacked, but rather confirmed; and (per RIDDELL, J., also) no one representing or claiming under the grantor could successfully attack it.

Per RIDDELL, J.:—Since the Devolution of Estates Act, the right of the heir at law to sue to set aside a transaction of this kind is not higher than the right of a residuary legatee to sue in respect of personal property; the plaintiff had no right to bring the action at all until the expiration of the period of the three years fixed by 2 Edw. VII. c. 17, s. 3, amending R.S.O. 1897, c. 127, s. 13; and the fact that the personal representative was made defendant did not assist the plaintiff.

J. S. MacKay, and *J. M. McEvoy*, for plaintiff, appellant. *Douglas*, K.C., and *V. C. Brown*, for defendants.

Full Court.] BOHAN *v.* GALBRAITH. [June 5.

Vendor and purchaser.

The decision of a Divisional Court, 13 O.L.R. 301, affirmed.

Moss, C.J.O.] WADE *v.* ELLIOTT. [June 27.

Court of Appeal—Leave to appeal direct from judgment at trial—Jurisdiction—Amount in controversy.

At the time of the commencement of an action to declare void two mortgages given to secure the same debt, the amount of the debt exceeded $1,000. Upon an application by the plaintiff for leave to appeal direct to the Court of Appeal from the judgment pronounced at the trial, it was contended by the defendant that pending the litigation moneys had been realized by him which reduced the claim below $1,000, but this was disputed by the plaintiff.

Held, that the proper conclusion was that the matter in controversy in the appeal exceeded the sum or value of $1,000 exclusive of costs, and therefore there was jurisdiction under 4 Edw. VII. c. 11, s. 76*a*(O.) to make the order asked for.

A. C. McMaster, for plaintiff. *F. M. Field*, for defendant Elliott.

Full Court.] GEORGE *v.* GLEEN. [June 28.

Judgment on default of appearance.

On an appeal by the defendant the judgment of the Divisional Court, reported 13 O.L.R. 189, was affirmed, MEREDITH, J.A., dissenting.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Magee, J., Clute, J.] [April 9.

ANDERSON *v.* ROSS.

Covenant—Restraint of trade—Termination of partnership—Covenant not to engage or be interested in competing business—Carrying on business as manager for another.

The plaintiff and defendant were partners in a jewelry busi-

ness carried on in the town of Port Arthur. The articles of partnership provided that the plaintiff should procure her husband to work in the business and to devote his whole time and attention to it; and the plaintiff covenanted that her husband should not, after the determination of the partnership, "carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business" of the defendant. After the dissolution of the partnership, the plaintiff's husband entered into the employment of B., as manager of a jewelry business belonging to B., upon premises in Port Arthur situate in close proximity to the shop at which the defendant was carrying on the business which had been carried on by the partnership; and the business of B., was, beyond question one which competed with the business of the defendant.

Held, that what had been done by the plaintiff's husband was a breach of her agreement with the defendant.

Judgment of MABEE, J., reversed.

H. Cassels, K.C., and *R. S. Cassels*, for defendant. *DuVernet*, for plaintiff.

Mulock, C.J. Ex.D.] [April 25.

DUNCAN v. TOWN OF MONTREAL.

Intoxicating liquors—Local option by-law—Passing before expiration of two weeks from the voting.

A municipal council cannot finally pass a local option by-law until the expiration of the two weeks next after the clerk of the council has declared the result of the voting thereon; and a by-law passed before the expiry of such period was therefore quashed.

J. B. MacKenzie, for the motion. *F. E. Hodgins*, K.C., contra.

Boyd, C.] [April 27.

RE PETERBOROUGH COLD STORAGE CO.

Company—Directors—Transfer of shares before first payment made, and to insolvent persons—Breach of duty.

On the issue of letters patent under Ontario Companies Act, R.S.O., 1897, c. 191, incorporating a company, the directors

subscribed for stock therein, making no provision however, for the payment nor making any calls thereon—while applications for stock by others were only accepted on their paying 25 per cent. on subscription and 25 per cent. on allotment. Subsequently and some time before the company were declared insolvent, the directors knowing of its insolvent condition, and desiring to get rid of their stock, on which nothing had been paid, employed C., the promoter of the company, to procure persons willing to take the stock. C. accordingly procured five persons, whom he knew were of little or no substance, and, as to whom he had carefully abstained from any enquiry, to take all of the stock, except one share for each director on which he could qualify and make the transfers, informing these persons that they would be the directors, and, as to four of them at least, that they would incur no liability on the stock as he would arrange for its disposal. The purchasers were to give their promissory notes for the first 25 per cent. payable in six months without interest, but instead of the notes being delivered when the transfers were made, and made payable to the directors, and endorsed over by them to the company, the were delivered prior thereto, and made payable to the company itself, the object being that they should be treated as a payment of the 25 per cent. for which the directors were liable.

Held, that the transfers were invalid, as being made contrary to s. 30 of the Act before all calls had been paid, the liability for the 25 per cent. being substantially the same as a call; and also in that the directors were guilty of a breach of trust in not exercising their powers in the best interests of the company. The directors were therefore directed to be placed on the list of contributories for this stock.

Order of the local master at Peterborough reversed.

R. E. Wood, for liquidator. *D. O'Connell*, for directors.

Boyd, C., Magee, J., Mabee, J.] [April 29.

CARPENTER *v.* CARPENTER.

Covenant—Restraint of trade—"Continue to carry on business" —Sale of business to company—Covenantee interested in company and acting as manager.

The plaintiff and defendant were engaged as partners in the business of nurserymen and fruit sellers. Upon dissolving part-

nership, the plaintiff continued the fruit branch and the defendant the nursery branch, each agreeing that for ten years he would not engage in the kind of business to be done by the other. The defendant's covenant was that he would not compete with the plaintiff the fruit business, provided the plaintiff should "continue for such time to carry on the fruit business."

Held, that this was to be read as a personal engagement for ten years by the defendant that he would not interfere with the fruit business of the plaintiff, provided that the plaintiff should always during that time continuously carry on as proprietor that business: and the plaintiff had ceased to carry on the fruit business by entering into an incorporated company and transferring to that body his plant, property, and goodwill in the business, although he was a shareholder and as manager while the company did business, and when that ceased, resumed the fruit business on his own account; and therefore he was not entitled to restrain the defendant from engaging in the fruit business during the ten years. *In re Sax, Barned* v. *Sax* (1893), 62 L.J. Ch. 688, 68 L.T.N.S. 849, approved and applied.

Judgment of CLUTE, J., affirmed.

Washington, K.C., for plaintiff. *Lynch-Staunton*, K.C, for defendant.

Divisional Court.] [May 2.

IN RE WYNN AND WESTON.

Municipal corporations—By-law—Motion to quash—Persons entitled to vote.

Held, 1. Upon an application to quash a municipal by-law on a proper interpretation of s. 348 of the Con. Mun. Act, 1903, the clerk was justified as treating as included in the list of voters therein referred to the names of persons found to be entitled to vote by the county judge, upon revising the voters' list of the municipality.

2. The provisions of s. 368 requiring a statutory declaration of secrecy to be made by every officer and clerk authorized to attend at a polling place is directory only and that the failure of the officers to comply with its requirements does not invalidate the election.

3. It is competent for the council not to hold a poll in each

sub-division of the municipality if in its judgment it is thought expedient not to do so.

Harrison, K.C., for the motion. *Irwin*, K.C., for the municipality.

Anglin, J.—Trial.] [May 3.

TORONTO GENERAL TRUSTS CORPORATION *v.* KEYES.

Gift—Fund deposited with trust company in names of donees—Executed trust.

Mrs. P. deposited with the plaintiffs $3,000 in the names of three of her relations, the defendants, $1,000 for each, and obtained from the plaintiffs three documents acknowledging the the receipt from each of the defendants of $1,000 "in trust for investment," and guaranteeing the payment of interest. Mrs. P. informed the three defendants of what she had done, saying that the money deposited was theirs and they could draw it. She, however, retained the receipts in her own possession, where they remained until her death, and did not inform the defendants of their existence. The cheques for the interest which occurred during Mrs. P.'s lifetime were made payable to the three defendants, but were indorsed by them in favour of Mrs. P., and were cashed by her for her own benefit.

Held, that there was a complete and executed trust created by Mrs. J., enforceable by the defendants, the cestuis que trust.

Gorman, K.C., for plaintiffs. *H. Fisher*, for defendants.

Mulock, C.J., Anglin, J., Magee, J.] [May 5.

RE KEMP.

Life insurance—Declaration in favour of wife and children—Variation in favour of creditor beneficiary—Intention to exonerate estate from the debt—Invalidity—Trust—Improper exercise of power.

By sub-s. 1 of s. 159 of R.S.O. 1897, c. 203, the insurance money payable under a benefit certificate to preferred beneficiaries is constituted a trust fund therefor, and so long as any object of the trust remains shall not be subject to the control

of the insured or his creditors or form part of his estate. By sub-s. 1 of s. 160 the insured is empowered to vary the apportionment in favour of one or more of the preferred beneficiaries; and by s. 2 no authority is deemed to be conferred to divert the moneys from the class to a person not of the class or to the insured himself or his estate.

Hislop, for appellants. *Carey,* for respondent.

Meredith, C.J.C.P., Magee, J., Mabee, J.] [May 15.

VEZINA *v.* W. H. NEWSOME CO.

Foreign judgment—Quebec Courts—Company not domiciled or resident in Quebec—Nullity—22 Vict. c. 5, s. 58 (C.)—International law.

In an action brought in a County Court in the Province of Ontario upon a judgment recovered in a Circuit Court in the Province of Quebec, against an incorporated company, who, at the time the Quebec action was begun, had no office or agent in the Province of Quebec.

Held, that the Act of the Legislature of the Province of Canada, 22 Vict. c. 5, s. 58, is not now in force, and *Court* v. *Scott* (1881), 32 C.P. 148, is no longer applicable; the binding effect of the judgment sued on depended upon the rules of international law; and the defendant company not having been domiciled or resident in Quebec when served with the writ of summons, the judgment there obtained must be treated in the Courts of Ontario as a nullity.

Judgment of the County Court of York reversed.

Cohen, for defendants. *Raney,* for plaintiff.

Britton, J.] [May 25.

RE HALLIDAY AND CITY OF OTTAWA.

Municipal law—Early closing by-law—Motion to quash—Right to shew on that petitioner not of specified class—Month in which by-law was to be passed—Time directory—Right of withdrawal before final passing.

On a motion to quash an early closing by-law, passed under the Ontario Shops Regulation Act, R.S.O. 1897, c. 257, it may be

shewn that persons who signed the petition as presumably of the trade or business whose shops the by-law was designed to close, were not as a matter of fact of such trade or business.

In this case where the by-law was for the early closing of grocer shops, it was proved on the motion to quash that a number of the names in the petition were not of the requisite class, and that after striking off the names of such persons, there was not the three-fourth majority required by the Act, that the by-law therefore could not be supported, and must be quashed.

Semble, 1. The time specified under the Act for the final passing of the by-law, namely one month after the presentation of the petition is merely directory, and therefore the fact of the passing of the by-law after the lapse of such period is not necessarily fatal.

2. Under this Act the petitioners have the right of withdrawal before the final passing of the by-law, it being different from a petition for a local improvement or drainage by-law, where property is to be benefited by an expenditure of money and to be assessed, and in which there is a quasi contract.

R. S. Code, for applicant. *T. McVeity*, for City of Ottawa.

Riddell, J.] [May 25.

IN RE ARMOUR AND TOWNSHIP OF ONONDAGO.

Municipal corporations—Local option by-law—Mode of computing three-fifths majority—Qualification of voters—Finality of roll—Subsequent disqualifications—Deputy returning officers—Right to vote—Indian reserve—Necessity for exclusion from by-law—Designation of newspaper—Three weeks—Computation of—Inclusive of Sundays and holidays—Irregularities in meetings of council—Illegality in election of members—Scrutiny—Non-statement of on face of by-law.

The proper mode of dealing with votes improperly cast on the submission of a local option by-law under 6 Edw. VII. c. 47(*o*) is to deduct them from the total number cast, and take two-thirds of the remainder.

The Court will not, under s. 89 of 3 Edw. VII. c. 19(*o*), enquire into the qualification of those entered on the voters list. *Reg. ex rel. McKenzie* v. *Martin* (1897) 28 O.R. 523 followed.

Objection to the following votes by reason of what had taken

place after the final revision of the roll, were over-ruled and the votes held good:

(1) Where two farmers' sons were assessed as owners, the father being the owner of the farm, the subsequent death of the father and the devise of the farm to one of the sons, (2) Where a farmer's son was assessed as owner, the father being the owner of the farm, the subsequent sale of the farm by the father, but who acquired another farm before the voting.

The following votes were also held good: (1) where the son, the voter, lived with his mother, who had a life estate in the property with a power of appointment amongst a class included the son, (2) A farmer's son, assessed as owner and living with his father, the owner of the farm, but who subsequently became the tenant, (3) A farmer's son assessed as owner, living with his father, the owner, but carrying on a blacksmith business off the property, (4) An infant who became of age before the voting took place, (5) A farmer's son, the father and another being tenants in common of the farm, (6) Where the property had been acquired after the roll had been made up, but before the final revision thereof.

Deputy returning officers, are not entitled to vote on such a by-law, s. 347 of 3 Edw. VII c. 19(O.) not overcoming the effect of s. 351 of the Act whereby they are debarred from voting; nor is it necessary that they should be selected before the publication of the by-law, and their names mentioned therein, nor was it necessary to name a day for the final passing of the by-law, these being cured by 4 Edw. VII. c. 22, s. 8(O.).

An Indian reserve, within the territorial limits of a township, but over which the municipal council had no jurisdiction, need not be specifically excepted in the by-law, for the municipal council must be assumed to have dealt only with the territory within their jurisdiction.

An objection to the designation of the newspaper in which the notice was published was overruled, where it appeared that the name used was that given in the display head, the name contended for being that contained in the sub-title of the paper.

In construing the word "week" in dealing with the required three weeks publication of the by-law, it must be taken in its ordinary acceptance which would include Sundays and holidays, and therefore, not necessarily seven days, exclusive thereof.

Irregularities in the meeting of the township council, or ill-

legality in the election of the members cannot be raised in a proceeding of this character.

Re Vandyke and Village of Grimsby (1906) 12 O.R. 211 referred to.

It need not appear on the face of the by-law that a scrutiny could be demanded.

J. B. MacKenzie, for applicant. *Brouster*, K.C., for township.

Boyd, C., Anglin, J., Magee, J.] [May 28.

MOFFATT *v.* CARMICHAEL.

Costs—Scale of—Action for injury to land—Value of land—Easement—Disturbance of—Damages under $200*—Jurisdiction of High Court.*

The defendant in the course of severing his house from that of the plaintiff's, which adjoined it, the two houses being built together as one building, by his negligence, damaged the plaintiff's house to the extent of $140, for which he recovered judgment, the property itself was now worth over $200.

Held, that the value of the property, and not the amount of the damages sustained, was the factor in determining the question of jurisdiction, so that the action was properly brought in the High Court, and the plaintiff entitled to tax his costs on the High Court scale. Order of CLUTE, J. affirmed.

Proudfoot, K.C., for appellant. *T. P. Galt*, for respondent.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [May 28.

ROMAN CATHOLIC EPISCOPAL CORPORATION *v.* O'CONNOR.

Will—Execution—Procurement by importunity—Setting aside—Construction—Life estate.

The testator had made a will on August 6, when he was very weak and ill. On August 9, when he was in the same condition, according to the medical evidence a condition in which he would do anything and give in anything for the sake of peace and quiet, he executed another will, upon the loud importunity of his sister, who was strong in body and will. He died August 13.

Held, that the will so procured could not stand.

Semble, also, that upon the proper construction of the words of the second will, "I give . . . all my estate . . . to my sister . . . for her own use, with power to sell or dispose of the same as she may see fit . . . and after the death of my said sister I desire the remainder of my estate, if any, to be equally divided between," etc., the sister was entitled to a life estate only.

Judgment of MABEE, J., reversed.

Kelly, for plaintiff. *J. B. Dow*, for O'Connor. *David Henderson*, for Attorney-General.

Teetzel, J.] [June 12.

LESLIE *v.* TOWNSHIP OF MALAHIDE.

Municipal corporations—Contract—Necessity for seal.

The only exceptions to the rule that a corporation can only act by its seal in regard to, (1) Insignificant matters of every day day occurrence or matters of convenience amounting almost to necessity, (2) Where the consideration has been fully executed, (3) Contracts in the name of the corporation made by agents or representatives who are authorized under the seal of the corporation to make such contracts.

Held, that in this case a settlement come to in respect to certain claims against it was not binding on the defendant corporation as not coming under any of the above heads.

Middleton, for plaintiff. *Cameron*, for defendant.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [June 17.

WILLIAMS *v.* ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Benefit society—Change of beneficiary—Wife of member—Foreign divorce—Validity—Estoppel—Re-marriage—Second wife and adopted daughter—Claim of.

The deceased was married in 1860 in one of the United States to M., where they both resided until 1886, when in consequence of his becoming amenable to the criminal law he left and came to Canada where he had since resided, the wife re-

maining in the States and apparently thence forward supporting herself. In 1891, on proceedings taken by M. therefor, the deceased not appearing, she obtained a decree of divorce a vinculo upon the ground of desertion and cruelty. In 1896 the husband went through a form of marriage with one C. and thereafter continued to live with her as his wife down to the time of his death. In 1889 the deceased became insured in a fraternal society for $2,000, which by the benefit certificate was made payable to his wife M., and was so continued until 1896, when he endorsed on the certificate a revocation of the payment to M., and procured a duplicate certificate to be issued, stating that M. was dead, and having the amount made payable to C. and an adopted daughter, and the insurance so continued until his death, C. for several years before his death paying the premiums.

Held, 1. Without deciding whether or not the divorce obtained by M. was valid, that M. under the circumstances could not be heard to impugn the jurisdiction of the Court in the United States she had invoked to grant the divorce.

2. It was not necessary to decide whether or not C.'s marriage was legal, for that the society had not contested its validity and that it was not open to M. to do so.

C. and the adopted daughter were therefore held entitled to the monies.

J. E. Jones, *G. Grant*, and *M. C. Cameron*, for various parties.

Boyd, C.] BRADLEY v. BRADLEY. [June 19.

Vendor and purchaser—Person holding option agreeing to sell—Offering land by auction—Vendors notifying auctioneer not to proceed—Refusal of auctioneer to sell—Loss of resale—Action for damages.

B. one of the beneficiaries of an estate who had given a two weeks' option to purchase certain land for $12,000, less his share of the estate $1,200, agreed to sell same for $13,500, but was allowed by his purchaser to first offer the property for sale by auction to secure if possible a better price. This he proceeded to do, when the defendant, one of the vendors wrote notifying the auctioneer that the plaintiff had no right to sell, whereupon the auctioneer refused to go on with the auction

sale and the purchaser refused to carry out his agreement to purchase, and the two weeks elapsed without B. being able to carry out his option.

Held, that no actionable wrong was shewn on the part of the defendant, for that B.'s only right was that secured him by the option, the right to the performance of which on his payment of the amount specified therein was not interfered with, the agreement made by B. with his proposed purchaser being altogether foreign to the transaction.

W. S. Morphy, *W. J. Hanna*, and *E. G. Graham*, for various parties.

Boyd, C.] RE SOLICITOR. [June 20.

Solicitor—Contract with client—Share in fruits of litigation—Illegal bargain—Champerty—Refusal of solicitor to proceed unless a round sum paid.

The confidential relationship existing between a lawyer and his client forbids any bargain being made between them, whereby he is to draw a larger return out of the litigation than is sanctioned by the tariff and the practice of the Courts; and especially does the law forbid any agreement whereby the solicitor is to share in the proceeds of a litigated claim as compensation for his services, as being in contravention of the statute relating to champerty, and a violation of the oath of a barrister on his being called to the Bar; nor is it open to a solicitor, during the progress of a case to call upon his client to pay a round sum, or any sum (other than the costs) before he will go on with the action, such being a sort of stand and deliver outrage which the Court will not sanction or allow to stand when once attention is called to it.

A lawyer who was a barrister and solicitor was therefore held disentitled to enforce a bargain made with the client whereby he was to be paid 25 per cent. of the amount recovered on the action, and therefore unable to deduct the amount from the fruits of the judgment which he had received on behalf of the client; nor could he enforce payment of a sum of $200 which the client had agreed to pay him by reason of his refusal to appear for his client on appeal taken by the other side from the judgment recovered for the client at the trial unless such amount were paid.

M. Wright, for appellant. *Middleton*, for solicitor.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [June 21.

OSTERHOUT *v.* FOX.

Costs—Scale of—Covenant—Amount due under—Deduction by way of payment or set off—Jurisdiction.

In an action on a covenant in a deed to pay the plaintiff a specified yearly sum, the amount found to be due the plaintiff was the sum of $262.50 from which the trial judge deducted $69.00 which the defendant, at the plaintiff's request, had paid to a creditor of the plaintiff, but which was in no way connected with the covenant, this reducing the amount to $193.50, for which judgment was entered.

Held, that the plaintiff was entitled to costs on the High Court scale, the claim being within the jurisdiction of the High Court, for that the $69 was allowed to the defendant, not by way of payment under the covenant, but as a set off. Order of TEETZEL, J., recovered.

J. H. Spence, for appellant. *Monahan*, for respondent.

Riddell, J.] RE ASHMAN. [June 24.

Distribution of estates—Absentee next of kin—Advertisement for creditors and others—Publication in newspaper—Failure of absentee to make claim—Bar to future claim.

The administrators of the estate of an intestate, who died in 1906, inserted three times in a newspaper published at the place in Ontario where the intestate had resided, an advertisement headed "Notice to Creditors" given pursuant to R.S.O. 1897, c. 129, calling upon "all creditors and others having claims against the estate" of the deceased to send them in to the solicitor for the administrators by a named date, and stating that after such date they would not be liable to any person of whose claim notice should not have been received. One of the next of kin, who would, if alive, have been entitled to a distributive share of the estate, had left Canada, in 1876, and no communication had since been received from him or information about him, except that soon after his departure a sister of his heard that he was in Oregon, and in 1895 an aunt heard that he was dead. Diligent inquiry was made for him in 1882,

but he was not then found. No one had ever heard of his marrying. No claim was made on his behalf upon the estate.

Held, that the advertisement was sufficient; that it covered next of kin; and that the absentee would be barred if he were hereafter to make any claim; and therefore the administrators should divide the assets amongst those entitled as though the absentee were assuredly dead without ever having had issue.

Horace Pratt, for the applicants, administrators.

Riddell, J.] [June 25.

RE CANADIAN PACIFIC RY. CO. AND BYRNE.

Railway—Lands required for—Infant remainderman—Tenant for life—Order authorizing conveyance—Costs.

Where a widow was entitled to a life estate in certain lands and her infant children to the remainder in fee, and she had made an agreement with a railway company to sell them such part of the lands as they required for their right of way, at a reasonable price approved by the official guardian on behalf of the infants, an order was made by a judge under s. 184 of the Railway Act, R.S.C. 1906, c. 37, giving her power to sell the lands and the rights of the infants therein, which power, joined to her legal power as tenant for life, would enable her to sell and convey the fee; the purchase money to be paid into Court, and the company to pay the costs.

Re Dolson (1889), 13 P. R. 34, followed, the sections of the Act as it now stands being substantially the same as in the Act of 1888.

A. D. Armour, for widow and company. *F. W. Harcourt*, for infants.

Divisional Court.] HOUSE *v.* BROWN. [July 11.

Contract—Incomplete—Price payable by instalments—Deferred payments—Not settled and ascertained—Breach—Damages.

Plaintiff by agreement in writing, sold to defendant a machine to be paid for, part in cash and part in instalments for which notes were to arranged and given after the machine was found satisfactory. The machine was delivered and after trial by the defendant returned as unsatisfactory. In an action for

specific performance and for the price of the machine or in the alternative for damages for breach of the contract.

Held, that although the written agreement named the price, it provided for deferred payments not therein specified and extrinsic evidence shewing that the parties relegated to future negotiations the determination of the terms and amounts of the deferred payments which were not subsequently arranged there was no completed contract: and the action was dismissed.

Judgment of the County Court of York reversed.

Field, for appellant. *F. E. Hodgins*, K.C., contra.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MARSHALL *v.* SCHWARTZ. [May 4.

Practice—Certiorari—Crown rules.

Appeal from Meagher, J., allowing a certiorari to remove an order for payment of seaman's wages under s. 52 of the Seamen's Act, R.S.C. 1886, c. 74. Appellant relied chiefly on the ground that upon the motion for a writ applicant did not furnish an affidavit verifying the fact that the recognizance and affidavits of justification required by Rule 29 had been filed.

Held, that Rule 29 required such an affidavit, and, following *McIsaac* v. *McNeill*, 28 N.S.R., the requirements of the rule being prohibitive, were therefore imperative. Appeal allowed with costs.

Lane and *J. A. McDonald*, for appellant. *O'Connor* and *Matheson*, for respondent.

Full Court.] CREASER *v.* CREASER. [May 4.

Negligence—Setting fire for fumigating purposes—Stat. of 6 Anne, c. 58.

Defendant placed a tin pan containing sulphur, paper and chips in his hen house for fumigating purposes and after set-

ting fire to the same, retired. The fire spread to the walls of the hen house which was a room in a building also used as a barn; and being communicated to some hay above the hen house, the building was consumed and the fire spread to and destroyed plaintiff's barn. The issues were tried before Forbes, Co. J., who gave judgment for defendant, chiefly on the ground of inevitable accident.

Held, 1, following *Furlong* v. *Carroll*, 7 O.A.R. 145, allowing the appeal, with costs, that the defendant was liable as the case came within the doctrine laid down in *Rylands* v. *Fletcher*.

2. That (though this defence was not pleaded) the use of the fire in the manner indicated did not place defendant within 6 Anne c. 58 which enacts that no suit shall be maintained against a person in whose house a fire occurs accidentally, the accident theory not being applicable to this case; and that the above statute is in force in Nova Scotia.

Mellish, K.C., and *Lane*, for appellant. *O'Connor* and *Matheson*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Perdue, J.A.] ANDREWS v. MOODIE. [June 10.

Contract—Consideration—Agreement with A. to pay A.'s debt to B.—Novation—Equitable assignment of chose in action.

Appeal from County Court. The defendant's wife having sued him for alimony, they met by arrangement in the office of the wife's solicitor, and in his presence agreed to become reconciled and to resume cohabitation and to settle the suit and the defendant, as a part of the settlement, agreed to pay directly to the wife's solicitor her costs of the action, which were then fixed at the sum of $50. This action was brought by the solicitor to enforce payment of these costs. The particulars of the claim were stated thus: "The plaintiffs claim from the defendant the sum of $50 being the amount of the costs of suit of defendant's wife against the defendant, which the defendant

agreed to pay as one of the terms of settlement between the said parties."

Held, that the plaintiffs could not recover in an action in the form in which it was set up, as the plaintiffs in such an action would be strangers to the contract: *Gandy* v. *Gandy*, 30 Ch.D. 57; Leake on Contracts, p. 292; neither could the plaintiffs sue as cestuis que trustent claiming a beneficial interest under the agreement, for the evidence did not shew that the $50 was to be paid to the defendant's wife as trustee for the plaintiffs: *In re Empress Engineering Co.*, 16 Ch.D. 125. But that there was under the circumstances an equitable assignment of the wife's claim for costs to the solicitors, which was assented by the three parties all present together, and which enabled the plaintiffs, by an amendment of their particulars of claim, to maintain an action in their own names for the costs in question, and that, upon such amendment being made, the verdict in favour of the plaintiffs in the County Court should be allowed to stand. Appeal dismissed without costs.

Burbidge, for plaintiffs. *Phillipps*, for defendant.

Richards and Perdue, JJ.A.] [June 29.

SLINGSBURY MANUFACTURING CO. *v.* GELLER.

Partnership—Limited partnership—R.S.M. 1902, *c.* 129, *ss.* 61-81.

Appeal from decision of PHIPPEN, J.A., noted ante, p. 219, allowed with costs.

Held, that Rosenthal, having agreed to enter into a partnership with his co-defendants, though intending to take advantage of the provisions of the Act so as to limit his liability to that of a special partner, and having contributed $4,000 to the capital of the firm not as a loan, as he had failed to comply with such provisions, had made himself liable, upon common law principles, as a general partner.

To become liable as a general partner, it is not necessary that the person should be clothed with authority to bind his fellow partners as their agent. He may be a silent or dormant partner and yet liable as a general partner.

Pooley v. *Driver*, 5 Ch.D. 474, followed.

Cameron and *Phillipps*, for plaintiffs. *Bradshaw*, for defendant Rosenthal.

Full Court.] [June 29.

UNION BANK *v.* DOMINION BANK.

Bank cheque—Forgery—Indorsement of cheque—Liability as between banks for loss of money paid on forged cheque.

Appeal from decision of DUBUC, C.J., noted vol. 42, p. 773, allowed with costs.

Held, that, the cheque having been marked on the back with the rubber stamp of the Dominion Bank before going through the clearing house in a manner which, under the rules of the clearing and the practice among Winnipeg bankers, had the legal effect of an indorsement in blank, the defendants were liable to repay the amount to the plaintiffs either by the direct effect of the statute: Bills of Exchange Act, R.S.C. 1906, c. 119, ss. 50, 133(c); or because of the warranty to be implied from their indorsement that the cheque was what it purported to be and that they were the lawful holders: *Bank of Ottawa* v. *Harty*, 12 O.L. R. 218.

Held, also, that the fact that the defendants waited until after they knew that the plaintiffs had honoured the cheque before paying out the $800 to the forger, made no difference, as the liability was either statutory or contractual.

Leather v. *Simpson*, L.R. 11 Eq. 398; *Smith* v. *Mercer*, 6 Taunt. 76, distinguished. *London & River Plate Bank* v. *Bank of Liverpool* (1896), 1 Q.B. 7 dissented from.

Wilson, for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

Howell, C.J.A.] WATT *v.* DRYSDALE. [July 8.

Animals running at large—Fences—By-law regulating.

Appeal from the verdict of County Court judge. The plaintiff's claim was for damage to his crops caused by the cattle of defendant, an adjoining proprietor, breaking through the line fence between the two farms. At the trial before the County Court judge it was shewn that such line fence was not of the character required by the by-law of the municipality. The by-law contained a clause (No. 7) providing that no person should be entitled to recover damages for injuries done to his crops by trespassing cattle unless his fences were of the character required by the by-law. It also contained a number of clauses

prohibiting the running at large of animals of various kinds at any time and of certain animals from sunset to sunrise the next morning from June 1st to October 15th, but there was no express permission for the running at large of any animals at any time. The trial judge found that the plaintiff had suffered damages to the extent of $50; but, holding the by-law referred to valid, decided that it precluded the plaintiff from recovering and entered a verdict for defendant. At the hearing of the appeal it was argued that cl. 7 of the by-law was authorized by s. 644(d) of the Municipal Act, R.S.M., 1902, c. 116, which says that the council of every municipality may pass by-laws "for limiting the right to recover damages for any injury done to any cattle, horses or sheep trespassing upon land . . . to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law," but that sub-section did not become law until after the date of the passing of the by-law.

Held, that the subsequent legislation did not ratify or legalize the previously existing by-law, that there was no legislative authority for the enactment of clause 7 at the time the by-law was passed, and that there was nothing to prevent the plaintiff from recovering the damages sued for. *King* v. *Nunn*, 15 M.R. 288, followed.

Appeal allowed with costs and verdict entered for plaintiff for $50 and costs.

Haggart, K.C., for plaintiff. *Mulock*, K.C., for defendant.

KING'S BENCH.

Richards, J.A.] MITCHELL *v.* WINNIPEG. [May 29.

Municipality—Negligence—Contributory negligence—Notice of action—Winnipeg charter—Remedy over against third party.

The plaintiff's claim was for damages caused by falling from his bicycle into a deep unguarded excavation in a lot owned by the defendant Luce on the corner of a public street and a lane in the City of Winnipeg. He was riding down an inclined part of the highway towards and close to a portion of it which was only about 30 feet wide and which was obstructed for half the width by a pile of building materials and, observing that the

remainder of the roadway was at the moment occupied by a team with a loaded waggon, he attempted to stop by back-peddling. But the chain then came off the sprocket wheel, and, being unable to check his speed, he tried to turn into a lane on the higher side of the obstructions. His speed was too great, however, and he ran into the excavation at the edge of the lane, being seriously injured. It was clear that the defendant Luce was responsible for both the obstructions on the street and the unguarded excavation. It also appeared that the proper city officials had notice of the obstructions being on the street for a considerable time previously.

It was contended on behalf of the city that the plaintiff was guilty of contributory negligence, as he was aware of the condition of the street and of the chance that it might be wholly blocked at any time, and that he should not have run the risk of the chain slipping off whilst going down the incline. He was, however, an experienced bicycle rider and had used the same wheel for several years without the chain having ever come off.

Held, that he was not guilty of contributory negligence in the matter.

The city also set up that notice of the claim had not been served on the city clerk, as required by s. 722 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77. The notice relied on was a letter which the plaintiff delivered personally to the chairman of the Board of Works, and which contained full particulars of the accident and of the injuries received. This letter reached the city clerk within the time required by that section.

Held, 1. The statute was sufficiently complied with to entitle the plaintiff to recover.

2. Under s. 728 of the charter, the city was entitled to relief over against Luce for the amount of the plaintiff's judgment and all its costs in the action.

Dennistoun and *Machray*, for plaintiff. *T. A. Hunt*, for the city. *T. R. Ferguson* and *McKay*, for Luce.

Dubuc, C.J.] SHAW *v.* BAILEY. [June 12.

Specific performance—Notice of prior unregistered sale—Fraud.

After the defendant James has sold the property in question to the plaintiff by signing an agreement of sale and a transfer

under the Real Property Act, he made a subsequent sale of the same property to the defendant Bailey who paid the purchase money, registered his transfer and obtained a certificate of title. The plaintiff's purchase money was not paid over and he had neglected to register his transfer, but relied on the fact that his solicitor had told Bailey of the prior sale before he purchased. The latter, however, was afterwards informed by one Watson, a real estate agent, that the property had not been sold but had been placed by James in his hands, for sale. James himself also told Bailey that he had not sold the property and Bailey's solicitor made due search at the Land Titles Office and found that the property still stood in the name of James.

Held, that, under ss. 71, 91 of R.S.M. 1902, c. 148, Bailey's title could only be impeached for fraud, and that the circumstances did not shew fraud on Bailey's part. In order to bring abstinence from inquiry within the category of actual notice there must be wilful abstinence from inquiry and a fraudulent determination not to be informed: *Stark* v. *Stephenson*, 7 M.R. 381. Specific performance refused with costs.

Robson and *Taylor*, for plaintiff. *Anderson* and *Garland*, for defendants.

Dubuc, C.J.] [June 12.

PEDLAR *v.* CANADIAN NORTHERN RY. CO.

Railways—Negligence—Failure to ring bell on approaching highway crossing—Contributory negligence.

The plaintiff's team of horses and waggon were struck by an engine of defendants on a highway crossing in the City of Winnipeg. The horses were killed and the waggon and harness damaged. The evidence was conflicting as to whether the whistle had been blown on approaching the crossing, but it was clear that the bell had not been sounded as required by s. 224 of the Railway Act, 1903. There was, however, some evidence to shew that the driver of the team could easily have seen the engine approaching, if he had looked. The learned judge inclined to the belief that the driver had been negligent in that respect, and that the plaintiffs could not recover because of such contributory negligence: *Winkler* v. *G.W.R.*, 18 U.C.C.P. 250; *Johnston* v. *Northern Ry. Co.*, 34 U.C.R. 432, and *Weir* v. *C.P.R.*, 16 A.R. 100.

The judgment for defendants, however, was founded on the exception within brackets in the section referred to, which provides that the whistle shall be sounded and the bell rung continuously (except within the limits of cities or towns when the municipal authority may pass by-laws prohibiting the same).

The plaintiff had not set up that there was no such by-law, nor had he given any evidence to prove it, and it was held that on that ground, he could not recover.

Action dismissed with costs.

Fullerton, for plaintiff. *Clark*, for defendants.

Dubuc, C.J.] ADAMS *v.* MCGREENY. [June 15.

Contract—Substantial completion of work—Trifling omissions.

Action to recover the amount of the contract price for putting in a steam heating plant for the defendants. The plaintiffs were to "put in a complete job of steam heating" for the sum of $660. There were several objections to the plaintiffs' right to recover, but the only one for which the decision should be reported was that the plaintiffs had omitted to provide floor and ceiling plates around the pipes. These plates were shewn to be worth about ten cents a piece and about $4 for all. On this point the judgment was as follows: "It is true that the contract was an entire one, and substantial performance of such a contract is not sufficient. But the omission to put in those plates must be considered as a trifle; and, under *Lucas* v. *Godwin*, 3 Bing. N.C., p. 744, and *Stevers* v. *Curling*, 3 Scott 755, a trifle of that nature should not be held to prevail so as to make the plaintiffs lose the whole consideration of an otherwise performed contract by such trifling omission."

Monkman, for plaintiff. *Donovan*, for defendants.

Dubuc, C.J.] HEATH *v.* SANFORD. [June 15.

Agreement for sale of land—Specific performance—Statute of Frauds—Authority to agent to sign offer to sell land.

This action was for specific performance of an agreement for the sale of land in the shape of an offer, to hold good for one

week, signed by the defendant's husband and alleged to have been accepted by the plaintiff by letter delivered within the week. The offer did not contain a sufficient description of the property and there was no consideration for the giving of the option. The plaintiff's letter of acceptance was not produced and he had kept no copy of it, but undertook to give the contents in his evidence. The defendant and her husband both swore that the defendant had not given her husband any authority to sign the offer, but the defendant had expressed to the plaintiff a willingness to sell the property at the price mentioned and had referred him to her husband who was not living with her at the time.

In refusing to decree specific performance of the agreement, the learned judge gave his reasons as follows:—

"The facts of the case may be summarized thus: The land, though purchased with money given to the defendant by her husband, stands in her name and is legally her property. The agreement or option was signed by the husband and, as sworn to by both, without any formal authority to him to do so. The said document does not give a complete description of the land as it does not state where it is situate, whether in Portage la Prairie or elsewhere. This might be supplemented by oral evidence if everything else was in proper form; but the document itself is thereby incomplete. The letter of acceptance is not produced; its presumed contents are verbally given by the plaintiff, but that is very unsatisfactory. That leaves some uncertainty as to its true contents and even as to its date. The agreement or option is not under seal and was given without any consideration. With such defects, incompleteness, uncertainty and total absence of consideration, I do not see how the Court, under the circumstances of the case, can decree specific performance of the said agreement." Action dismissed with costs.

Hudson and *McPherson*, for plaintiff. *Anderson* and *Williams*, for defendant.

Dubuc, C.J.] GORDON *v.* LEARY. [June 15.

Principal and agent—Undisclosed principal.

The defendant's son, J .G. Leary, with the assistance of defendant, opened up a meat shop in March, 1906, and carried it on for a few months without success under the firm name of J. G. Leary & Co. In the following June, the defendant em-

ployed one Schofield to act as manager of the business at a salary of $75 per month. Schofield thereafter managed the business under the same firm name and from time to time ordered goods from the plaintiffs, which were supplied and charged to J. G. Leary & Co. Schofield had not been expressly authorized to buy goods from the plaintiffs on credit, but found it necessary to do so in order to carry on the business, and told the plaintiffs that the defendant had engaged him as manager, and would be responsible for the account. He also informed the defendant that he was getting goods on credit from the plaintiffs. In the following December, as the business was not paying, the defendant closed it up. Defendant contended that the business was his son's and that he had not authorized Schofield to pledge his credit with the plaintiffs.

Held, that Schofield's acts in ordering the goods were within the authority usually conferred upon an agent of his particular character and that the defendant was bound by them, although he did not expressly authorize them. The charging of the goods to J. G. Leary & Co. instead of to the defendant, might, under the circumstances be considered as a matter of book-keeping, and even if the plaintiffs had known nothing about the defendant's connection with the business, he would be liable as an undisclosed principal on the authority of *Watteau* v. *Fenwick* (1893) 1 Q.B. 346, and *Hutchings* v. *Adams,* 12 M.R. 118. Verdict for plaintiffs for amount claimed with costs.

Fullerton, for plaintiffs. *Elliott* and *McNeill,* for defendant.

Mathers, J.] DOUGLAS *v.* FRASER. [July 11.

Husband and wife—Married Woman's Property Act, R.S.M. 1902, *c.* 106, *s.* 2(*b*)—*Separate property of wife—Ownership of goods in business carried on in wife's name.*

Interpleader issue to determine the ownership of goods seized under execution at the suit of defendant against the plaintiff's husband who married her in 1886. The defendant's judgment was recovered in 1906 upon a debt which had been incurred in 1895, after which the husband became insolvent. In 1899 a fur business was opened up in the name of the plaintiff and had been carried on up to the time of the seizure. From the beginning, the husband managed the business, did all the buying and

selling, handled all the funds and had entire control. ıe only part the plaintiff took was superintending in the work room in which she herself worked. A large part of the money with which the business was established was derived from the sale by the husband, a few days prior to 21st May, 1900 (when it was enacted that all property standing in the name of a married woman on that date should be deemed to be her property until the contrary is shewn), of a property then belonging to the plaintiff, but which had been given to her by the husband a few years before his failure. This money, $1,300.00, had been received by the husband and deposited with a trustee in trust for himself, before that date.

Held, that, so far as that property was c ·cerned, her claim to it was not supported by the provisions of the previous Act, R.S.M. 1892, c. 95, s. 2 of which gave a married woman who married after 14th May, 1875, without a settlement the right to hold property as a femme sole subject to the concluding words, "but this section shall not extend to any property received by a married woman from her husband during coverture," because the property in question had been received from the husband during coverture, that the plaintiff could only rely on her common law rights as to it, and that at common law the husband had a free hold interest in the land and would be entitled to such proportion of the price for which it was sold as would represent the value of the property during their joint lives.

The business had been started in 1899, except as to about $125 of the plaintiff's own money, with money derived from the rentals of the same property which the learned judge held the husband to have been entitled to at common law, and in 1900 the capital was augmented to the extent of the proceeds of the sale above referred to, a large portion of which the husband was also entitled to according to the above holding.

When the plaintiff commenced business the husband had judgments against him and the wholesale dealers stated that they had sold to the plaintiff and upon her credit and would not have sold to the husband on credit because of the liabilities hanging over him. The business prospered from the beginning and the profits earned in it were used in buying other stock and in generally extending the business. A large portion of these profits were earned after the coming into force of the statute 63 and 64 Vict. c. 27, now R.S.M. 1902, c. 106, and it was contended that they were included in the definition of the word "property" given in s. 2 of the Act, viz., "any real or personal property of

every kind and description of a married woman, whether acquired before or after the commencement of this Act, and shall include the rents, issues and profits of any such real or personal property and includes also . . . all wages, earnings, money and property gained or acquired by a married woman in an employment, trade, or occupation in which she is engaged or which she carries on separately from her husband and in which he has no proprietary interest, etc."

Held, that the business was not a trade or occupation carried on by the plaintiff separately from her husband and that the special mention, in the latter part of the definition, of property acquired by a separate trading excludes from the previous general description property acquired in trading not carried on separately from the husband, and that the Legislature meant to enact that money and property acquired by a married woman by trading in conjunction with the husband should be his and not hers, and therefore the profits of the business were the property of the judgment debtor. The goods seized were mostly if not altogether bought with these profits and the husband was the real and beneficial owner of them although the dealers had sold them to the plaintiff.

Dominion Savings Co. v. *Kilroy*, 15 A.R. 487, and *Dall* v. *Conboy*, 9 M.R. 185, distinguished. *Meakin* v. *Samson*, 28 U.C. C.P. 355, followed.

Pitblado and *McKercher*, for plaintiff. *Daly*, K.C., and *Crichton*, for defendant.

Province of British Columbia.

SUPREME COURT.

Martin, J.] [May 22.

BRYCE v. CANADIAN PACIFIC RY. COMPANY.

Shipping—Collision—Overtaking vessel, duty of—Inevitable accident—"Narrow channel"—Evidence—Whether expert witnesses may be heard where Court is assisted by assessors.

On July 21, 1906, steamer Princess Victoria belonging to defendants, collided with and sank the steamer Chehalis, both vessels being on their way westward out of Vancouver Harbour.

Held, on the evidence that the Master of the Princess Victoria gave the signal indicating his course at the earliest time con-

sistent with the position of the vessels, and that he did not neglect to take any proper precaution which a prudent and skilful navigator should have taken in the circumstances.

Where the Court is assisted by assessors, whose duty it is to advise on matters of nautical skill and knowledge, the evidence of witnesses, tendered for expert testimony purely, will not be received.

The Kestrel (1881) 6 P.D. 182, at p. 189, followed.

Bowser, K.C., *Martin*, K.C., *Peters*, K.C., *Schultz* and *Donoghy*, for plaintiffs. *Bodwell*, K.C., *Davis*, K.C., and *McMullen*, for defendants.

Morrison, J.] [July 11.

CHINESE EMPIRE REFORM ASSOCIATION *v.* CHINESE DAILY NEWSPAPER PUBLISHING COMPANY.

Company law—Non-trading corporation created under the Benevolent Societies Act, R.S.B.C., 1897, c. 13—*Libel of, whether actionable.*

A non-trading corporation, having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation.

Davis, K.C., for plaintiff association. *Sir C. H. Tupper*, K.C., and *Boak*, for defendants.

Full Court.] CAIRNS *v.* B. C. SALVAGE CO. [July 19.

Shipping—Jurisdiction of County Court—Wages—Term of hiring—Accrual of wages de die in diem—Desertion—Forfeiture.

A County Court judge has jurisdiction, in an ordinary action for wages of a seaman, to try a claim for more than $200 where the plaintiff has a good demand at common law; that is, where his cause of action is complete without the aid of the statute. Section 52 of the Seaman's Act merely creates a concurrent tribunal for securing a speedy settlement of claims for

wages. Plaintiff shipped for a voyage of three months. The period expired before the voyage was completed, and while the ship was calling at a port he went ashore, without leave, to seek legal advice, while thus absent the ship sailed.

Held, that he could not be classed as a deserter and had not forfeited his wages.

Peters, K.C., and *Moreshy,* for plaintiff, respondent. *W. J. Taylor,* K.C., for defendants, appellants.

Book Reviews.

International Law, a treatise by L. OPPENHEIM, LL.D., Lecturer in public International Law at the London School of Economics and Political Science (University of London) formerly Professor of Law in the University at Basle. Vol. I. Peace—Vol. II. War and neutrality. Longmans, Green & Co. 39 Paternoster Row, London. 1906. 1,200 pages. Price, for each volume, $9.50.

The author tells us that this treatise is intended to be an elementary book for those who are beginning to study international law—a book for students written by a teacher. Whilst the author thus modestly speaks of his work the reader will see that it gives a complete survey of the subject, discusses all important points, and when space prevents a further pursuit, he refers to other books which go more deeply into the subject. The bibliography given in this treatise to be found at the beginning of each chapter and sub-division will be most useful, enabling those who desire further information on any special subject to refer to the appropriate authority.

Mr. Oppenheim is an original thinker, and seems to have the happy faculty of placing the matter he gives where one would expect to find it. His arrangements are lucid, his definitions sharp and his conclusions, which he is not afraid to express, clearly and concisely stated. The law of nations is so vast that no one book can be expected to contain it all, but we have not seen any treatise which quite as readily puts one in possession of the law, either by stating it or telling you where you can find it.

Leading cases on the Law of Evidence, with notes, by ERNEST COCKLE, of Gray's Inn, Barrister-at-law. Sweet & Maxwell, Limited, 3 Chancery Lane, London. 1907.

The writer's aim has been to select from the English reports leading cases on the most important points of the law of evidence —then to extract the principle from each case and state it as a head-note thereto. This is done in a handy little volume of 224 pages. A preliminary note introduces the cases of a class, and gives a bird's eye view of the leading decisions on that particular branch of evidence. The typographical part of the book is very well arranged, though the names of the cases might better have been in a slightly smaller type.

As the law of evidence is almost entirely case law, one is surprised that something of this sort has not been attempted before. The author has made a good beginning, and we shall doubtless see enlargements and improvements in a later edition.

The Lawyers Reports annotated, new series, Rochester, N.Y., Lawyers' Co-operative Publishing Company. 1907.

We are in receipt of Book 7 of this annotated series of American reports. We have already expressed our opinion upon the excellency of this work and need not further enlarge thereon at present. We have also received the syllabus digest of the opinions reported in the first seven volumes of the new series, with a complete table of cases and a full index of the elaborate annotations. Nothing could be more complete. A separate index of notes precedes the digest, which means that when a person who uses the digest finds a point that he wants, he is at the same time notified if the point is annotated, and is told where the note can be found.

Bench and Bar.

Alexander Dawson, of the City of Winnipeg, in the Province of Manitoba, Esquire, Barrister-at-law, to be a County Court judge for the Eastern Judicial District of Manitoba. (July 10.)