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The recent appointment to the Supreme Court of the North-West Territories indicates that the Government recognizes the utility of placing on the bench of our sparsely settled and growing territories active men who have, to some extent, grown up with the country, although in the older provinces they would be described as of the junior bar. The new judge—Horace Harvey, B.A., LL.B. (Tor.)—was called to the bar of Ontario in 1889, and practised there till 1893, when he removed to Calgary, where he was Registrar of Land Titles from 1896 to 1900, in which year he was appointed Deputy Attorney-General for the Territories. Much of the important legislation during the past few years is said to have been upon his initiative and to have been framed by him in his dual position of Deputy Attorney-General and Law Clerk of the Legislative Assembly. The appointment of Mr. Justice Harvey now gives a sixth judge to the Court. His district is not as yet assigned, but will be some portion of Alberta. We congratulate the new judge on the honour and the bar on having obtained an able and painstaking judge.

BRIBES TO AGENTS.

Dr. Johnson in his celebrated Dictionary defined a "broker" to be "a person who steps in between two parties and robs them both." Possibly the learned Doctor was bent more on framing a telling epigram than an exact definition; at any rate he put in a concise sentence a practice which not only brokers but other agents are prone to adopt alike contrary to their legal and moral duty to their principals, viz., the acceptance of pay from third persons with whom they are employed to negotiate; such payments are euphemistically termed commissions, but the law regards them as bribes.

Although in certain circumstances a broker may legitimately act as agent for two parties to a transaction and receive pay from both, yet it is perfectly clear that the ordinary rule applicable to the relations of principals and agents forbids an agent receiving

pay, commissions or bribes from the person with whom he is employed by his principal to negotiate. For an agent to do so, without the consent of his principal, is a distinct breach of duty. This was well illustrated lately in the case of *Andrew* v. *Ramsay* (1903) 2 K.B. 635 (see ante p. 111), where the plaintiff recovered from his agent not only the commission he had been paid for his services by the plaintiff, but also the commission he had also received from the opposite part in the transaction in which the defendant had been employed as agent.

The first Ontario case on the subject seems to be *Kersteman* v. *King* (1879) 15 C.L.J. 141 (County Court, York), in which the Court, anticipating the rule laid down in *Andrew* v. *Ramsay*, held that an agent employed to purchase land for his principal forfeits his rights to his commission if he receive any remuneration or commission from the vendor.

In the last case however, *Webb* v. *McDermott* (not yet reported), the principal failed to recover against the agent, because at or about the time of the completion of the transaction (a sale of timber limits) the plaintiffs were informed by the purchasers that the agent was to be paid a commission by the purchasers. In that case we understand it did not appear that the plaintiffs had full and complete information as to what the agent was to receive, or when the bargain had been entered into under which the payment was to be made. The Divisional Court (the Chancellor, and Meredith and Anglin, JJ.) however, thought that the plaintiffs had received sufficient notice to put them on inquiry, and that, not having elected to rescind the contract, after notice that a commission was to be paid by the purchasers, they must be held to have waived the right to object to the agent receiving such commission for his own use.

In the case of *Bartram* v. *Lloyd*, 90 L.T. 357, recently decided by the English Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.), that Court seems to have considered there could be no binding ratification of a contract effected through an agent who has been bribed except on the fullest disclosure of all material facts. In that case the defendant through his agent contracted with the plaintiffs for the building of a ship for the defendant. The ship was built, and the defendant being unable to pay for it, it was arranged that it should be sold, and that the defendant

should pay the loss arising on the sale. The ship was accordingly sold, and there remained a deficiency of over £7,000. The defendant, being unable to pay this sum, had an interview with the plaintiffs, when he was informed that his agent was claiming a commission from the plaintiffs, and they then pressed him to pay a sum however small on account of the £7,000, and he then paid them £1. This the plaintiffs claimed was a waiver of the right of the defendant to object to the plaintiffs paying a commission to the defendant's agent; but the Court of Appeal held that it was not, because all the facts were not disclosed to the defendant, and particularly the circumstance that the bargain to pay the agent the commission had been made before the contract was entered into by the defendant, and they held that, notwithstanding all that had taken place, the defendant was still entitled to repudiate the transaction altogether.

That of course was a different case from *Webb* v. *McDermott*. In both cases, however, the ratification of an illegal act was in question, in the one case notice that the payment was to be made was held to be sufficient to estop the plaintiffs from disputing their agent's right to retain a profit illegally bargained for in fraud of his principals, whereas in the English case, the Court founded itself on the well settled principle that there can be no valid ratification of a contract tainted by fraud which is based on a mere constructive notice of the facts, but that a full and actual knowledge of all the facts is necessary.

The decision in *Webb* v. *McDermott* seems to us to be unsound, and to undermine the very salutary principle that an agent who bargains for a bribe cannot hold it against his principal without his express consent, after full disclosure of all material facts, and to sanction the idea that agents may successfully bargain for benefits over and above what their principals have agreed to pay them. For even though it be true that the plaintiffs in that case elected not to repudiate the contract after knowledge that a commission was being paid by the purchasers to the plaintiffs' agent, that fact does not really seem to be any ground for denying the plaintiffs' right to say to their agent "the only benefit you are entitled to out of this transaction is what we agreed to give you, and whatever you have received or bargained for over and above that is ours, not yours." The commission paid the agent being in truth

and in fact a part of the price actually agreed to be paid, but surreptitiously abstracted and given to the agent by way of bribe instead of to his principals, and thus a payment to which the agent has no title except with the express consent of his principal after full disclosure of all the facts.

The Divisional Court appears to have assumed that the plaintiffs in *Webb* v. *McDermott*, when they learnt that a bribe was being paid to their agent, were shut up to the single remedy of repudiating the contract, and that by affirming the contract they necessarily affirmed the payment made by the purchasers to their agent, and deprived themselves of the right to claim the benefit of it.

We very respectfully venture to doubt the correctness of that position. The affirmance of the contract after knowledge of the intended payment of the bribe to the agent would doubtless debar the principal from recovering the bribe from the purchasers, but we fail to see how it affects the right of the principal to recover it from the agent. Too great weight appears to have been given by the Divisional Court to the fact that the plaintiffs had learned that a commission was to be paid by the opposite party to the agent, and they seemed to have considered that the payment must be secret, and only discovered after the contract is closed, to entitle the plaintiffs to recover the bribe from their agent; but the cases would seem to show that the principal may in law say to the purchaser "I adopt the transaction, I know that you are to pay or have paid my agent some bribe or commission, or whatever you choose to call it, but I also know that I have never agreed to his retaining it for his own use, and I know that the law, rightly expounded, will say that I am entitled to recover it from him."

The law on this aspect of the case is, we believe, correctly stated in Wright on Principal and Agent, 2nd ed., p. 392, where it is said "If the principal chooses to affirm the contract where the third party has succeeded by bribing the agent in getting him to enter into a disadvantageous bargain, he has two distinct and cumulative remedies. He may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any

deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third party first;" and see per Lord Esher, M.R., in *Mayor of Salford* v. *Lever* (1896) 1 Q.B. 168.

The fact that the bargain is disadvantageous to the principal is not material except on the question of damages; even though it be advantageous the principal is nevertheless entitled to recover the bribe paid to his agent: *Cohen* v. *Kusclike*, 83 L.T. 102, and see *Harrington* v. *Victoria Graving Dock* (1878) 3 Q.B.D. 549. In holding that the agent was entitled to retain the bribe against his principals in *Webb* v. *McDermott* we venture to think the Court not only erred, but gave its sanction to a vicious principle subversive of commercial morality. It appears to us that in such cases the Court should be astute to protect the principal rather than the agent. This acting by an agent for parties with conflicting interests, which by the way is all too common, opens the door to all sorts of fraud and falsehood by agents and the Court should set its face against such a practice.

NEGLIGENCE.

LEAVING UNPROTECTED A LOADED GUN ON THE HIGHWAY.

In the recent Irish case of *Sullivan* v. *Creed*, Ir. Rep. 1904, 2 K.B.D. 317, the Irish Court of Appeal had to consider whether an injury to the plaintiff was due to the negligence of the defendant in laying aside a loaded gun. It appeared that the defendant on a Sunday morning went out to shoot rabbits, and having loaded his gun put it on full cock. He found no rabbits and did not discharge the gun, but left it loaded and cocked standing against a fence on his lands and beside a stile through the fence, which stile led to a private and short passage to his house from the public road. He then visited some potato fields with a friend, and afterwards entered a cottage and remained there reading a newspaper for some short time. After coming out of the cottage he heard the report of the discharge of a gun. The plaintiff, a boy of sixteen years old, was returning home from mass by the public road, and on his way met Daniel Creed, a son of the defendant, aged fifteen or sixteen, and two other boys. Daniel Creed left them at a gap leading to the defendant's house. The plaintiff and the two other

boys continued along the high road, and had gone about twent-five yards when he heard Daniel Creed, who had come back to the high road, cry "Hi lads!" The plaintiff looked round, and saw a gun in Daniel Ceed's hands pointed towards him. The gun went off; the plaintiff was hit in the eye and lost the sight of it. The son was called as a witness for the plaintiff, and said: "I saw the gun. It was up against the ditch near the gap. I saw it the moment I went through the gap. I was playing with the gun. I did not know it was loaded." No evidence having been called for the defendant, the jury were asked to assess the damages in case the defendant was liable, and these were fixed at £50, but a verdict was entered for the defendant. Kenny, J., who presided at the trial, being of opinion that the defendant was not legally responsible for the act of his son. Upon a motion to enter the verdict for the plaintiff, it was contended that there was sufficient evidence to warrant a verdict in his favour, for it was the duty of the defendant to use reasonable care to prevent any mischief of which there might be a reasonable apprehension. The defendant, on the other hand, contended that the negligence in firing the gun, which was the proximate cause of the injury to the plaintiff, was the act of a third person, and it was a mere accident that this person was the defendant's son. The King's Bench Division (Palles, C.B.; Gibson, J., and Boyd, J., dissenting) ordered that the verdict should be entered for the plaintiff, and their decision was supported by the Court of Appeal. While thinking that the case was on the border line, the learned judges were clearly of opinion that the jury might reasonably come to the conclusion that the defendant, as a reasonable man, ought reasonably to have anticipated the consequences which ensued. The case may be added to many others in the English courts which relate to reckless dealing with firearms, and though each case must more or less depend upon its particular circumstances, we think the decision may be profitably consulted by those who have to consider the liability of persons in possession of dangerous instruments.—*Solicitor's Journal.*

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—CONTRACT BY AGENT IN NAME OF HIS PRINCIPAL BUT IN HIS OWN INTEREST—LIABILITY OF PRINCIPAL.

In *Hambro* v. *Burnand* (1904) 2 K B. 10, the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.) have reversed the decision of Bigham, J. (1903) 2 K.B. 399 (noted ante vol. 39, p. 713). The defendants, other than Burnand, had given written authority to Burnand to underwrite policies, and among others he underwrote a policy guaranteeing the solvency of a certain company which he was personally interested in keeping afloat. The plaintiff did not inquire into his authority when accepting the policy. Bigham, J., came to the conclusion that the principals might under these circumstances repudiate the act of their agent, but as Romer, L.J., points out, if the plaintiff had inquired into Burnand's authority and had seen the writing it would have been hopeless to argue that his principals could afterwards as against persons dealing bonâ fide with him, have repudiated his acts done within the limits of that authority, on the ground that he had acted from sinister motives, and the mere fact that they did not inquire into his authority was really immaterial, by so doing they merely ran the risk of his having in fact the authority to enter into the contract which he claimed to have; but having in fact that authority, the plaintiffs, who had acted bonâ fide, could not be affected by the fact that the agent in exercising it was actuated by improper motives.

HABEAS CORPUS—JURISDICTION—WRIT OF HAB. CORP. DIRECTED TO PERSON OUT OF THE JURISDICTION AT DATE OF ORDER THEREFOR—(R.S.O., c. 83, s. 1.)

In *The King* v. *Pinckney* (1904) 2 K.B. 84, the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) have determined that there is no jurisdiction to order the issue of a writ of habeas corpus against a person who, at the time of the making of the order, is out of the jurisdiction of the Court. In this case the applicant for the writ was the father of a child in the custody of

her mother who was out of the jurisdiction, and Walton, J., whose attention was not drawn to that fact, made the order and a writ was issued. Subsequently, on appeal, the Divisional Court quashed the writ, but gave leave to issue a new writ which was ordered to lie in the office until there should be an opportunity of serving it within the jurisdiction, but the Court of Appeal held that was unwarranted by the practice on the simple ground that the Court had no jurisdiction to make any order for such a writ as against a person out of the jurisdiction of the Court.

LANDLORD AND TENANT—LEASE OF PUBLIC HOUSE—COVENANT BY LESSEE NOT TO "SUFFER" ANY ACT TO BE DONE TO FORFEIT LICENSE ACT OF SUB-LESSEE—"ASSIGNS."

Wilson v. *Twamley* (1904) 2 K.B. 99, was an action by landlord against tenant for breach of a covenant whereby the lessee for himself and his "assigns" bound himself not to do or "suffer" any act to be done on the demised premises whereby the license might be forfeited, or its renewal refused. The defendant had sub-let the premises (a public house) and the sub-lessee had permitted acts to be done in consequence of which a renewal of the license was refused. The plaintiffs were assignees of the reversion and the defendants were assignees of the lease, and there was no question that the covenant ran with the land. The only question was, whether the defendant was responsible for the act of his sub-lessee, and the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) held that he was not, and the fact that, owing to the loss of the license, the premises had lost the character of a public house and become an ordinary dwelling, was held not to be a breach of a covenant that no other business than that of a public house should be carried on on the premises.

GAMING DEBT—CONSIDERATION—WITHDRAWAL OF LETTER TO DEBTOR'S CLUB —ILLEGAL CONSIDERATION—BILL OF EXCHANGE.

In re Browne (1904) 2 K.B. 133, although a case in bankruptcy, is deserving of attention. The case turned on the validity of certain bills of exchange which the holder claimed to prove against the bankrupts' estate. The trustee set up that they had been given for an illegal consideration and were null and void. The facts were, that the debtor had had betting transactions with Martingell and £800 was due to him in respect thereof. Martingell brought an action for the £800 in which the debtor set up the

Gaming Act and the action was dismissed. Martingell then wrote to the committee of a club of which they were both members complaining that the debtor had failed to pay his debts of honour. On learning this the debtor applied to Martingell to withdraw the letter and in consideration of his so doing gave him the bills of exchange in question. Buckley, J., held that the withdrawal of the letter was a valid consideration for the giving of the bills of exchange, and that the defence of illegal consideration failed.

SALE OF GOODS—CONTRACT—"ABOUT AS PER SAMPLE"—VARIATION IN QUALITY BETWEEN BULK AND SAMPLE—VALIDITY OF CUSTOM AS TO SALE BY SAMPLE.

In re Walker & Shaw (1904) 2 K.B. 152, was a case stated by an arbitrator. Barley had been sold under a contract that it was to be "about as per sample," and which contained an arbitration clause. The buyers having rejected the barley for not being up to sample, the dispute was referred to arbitration and the sellers proved before the arbitrator that there was a custom of the London Corn Exchange applicable to such contracts by which the buyer was not entitled to reject for difference in quality unless it was excessive or unreasonable, and was so found by arbitration under the contract. The arbitrator proved that there was a variation in quality from the sample, but that the inferiority was not excessive or unreasonable, and he awarded that the buyers were bound to accept the barley with an allowance in price in respect of the inferiority. Channel, J., held that the custom was good in law, being neither unreasonable nor uncertain nor contrary to the written contract, and he therefore upheld the award in favour of the sellers.

HIGHWAYS—LOCOMOTIVES—STATUTORY PROHIBITION AS TO SPEED OF LOCOMOTIVES—CROWN—PREROGATIVE.

In *Cooper* v. *Hawkins* (1904) 2 K.B. 164, the defendant was prosecuted for the infringement of a statutory provision regulating the speed of locomotives on highways. The defendant was an engineer in the service of the Crown, and had driven the locomotive on the occasion complained of in the performance of his duty, and the question was whether the statutory provision applied to a servant of the Crown acting in the performance of his duty, the Crown not being expressly named in the Act, and it was held by the Divisional Court (Lord Alverstone, C.J., and Wills and

Channell, JJ.) that the Act did not apply to the Crown or its servants, and therefore that the conviction of the defendant must be quashed, there being no evidence that the defendant was personally liable on the ground of nuisance or improper performance of his duty.

WILL—CONSTRUCTION—CHATTELS REAL—RENT CHARGE ISSUING OUT OF LEASEHOLDS—INTESTACY—NEXT OF KIN ESTATE CHARGES ACTS—(R.S.O., c. 128, s. 37.)

In re Fraser, Lowther v. *Fraser* (1904) 1 Ch. 726. An appeal was brought from the decision of Byrne, J. (1904) 1 Ch. 111 (noted ante p. 190), on which a question not discussed before Byrne, J., was raised. By the will in question made in 1886 the testator gave all his personalty except chattels real to his executors in trust, and he gave all his real estate and chattels except what he had otherwise disposed of by his will to his brother absolutely. In April, 1898, the testator entered into a contract for the purchase of a rent charge issuing out of leaseholds. In July, 1898, the testator made the last of seven codicils to his will, in this codicil he stated that his brother was dead, but he did not revoke the bequest to him or the general bequest of personalty. The testator died in August, 1898, the purchase money for the rent charge not having been paid. The question was raised before the Court of Appeal whether the exception of chattels real had not been made from the general bequest to the executors of the personal estate merely for the purpose of the bequest to the brother who had predeceased the testator, and therefore as the specific bequest of the chattels real had failed, whether they did not fall into the general bequest of personalty. but the Court (Williams, Stirling, and Cozens-Hardy, L.JJ.) declined to accede to that contention, and held that the exception of the chattels real was good for all purposes, and consequently that as to them there was an intestacy; and they affirmed the judgment of Byrne, J., that the rent charge was a chattel real and passed as on an intestacy, and that the next of kin must take cum onere and were bound to discharge the unpaid purchase money.

TRADEMARK—FANCY WORD—TABLOID.

In *Wellcome* v. *Thompson* (1904) 1 Ch. 736, it was held by Byrne, J., and the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) (Stirling, L.J., dubitante) that the word "Tabloid" is a fancy word, and therefore a good trade mark.

ESTOPPEL IN PAIS—LEASE BY MORTGAGOR—AFFIRMANCE BY MORTGAGEE OF LEASE OF MORTGAGOR.

Keith v. *Gancia* (1904) 1 Ch. 774, was an attempt on the part of the assignee of a mortgagee of a leasehold interest to recover possession of the property from a lessee of the mortgagor, and the question was whether the plaintiff's predecessors in title had not affirmed the lease and estopped themselves and the plaintiff as assignee from claiming paramount thereto. The case is unaffected by the Conveyancing Act, 1881, which enables a mortgagor to make leases in certain cases which would be valid against the mortgagee. The facts were a little complicated, and were as follows:—Gooch being a tenant of premises for sixty years, in 1892, by way of under lease for the unexpired term, less three days, mortgaged them to Neve; the mortgagor afterwards, in 1892, leased the premises for 21 years to Gancia at a yearly rent of £140, which lease contained a covenant not to sub-let without leave of the leasor or her assigns. In 1895 Neve foreclosed the mortgage, but the last three days of the term were not got in by the mortgagee, and Gancia was not a party to the foreclosure proceedings. After the foreclosure Gancia continued in occupation, and paid £140 rent to the mortgagee, and in 1899, with the leave and license of Neve's executors, sub-let part of the premises to one Sinclair. Neve's executors subsequently sold their interest to the plaintiff, who had actual notice of the lease to Gancia and the sub-lease to Sinclair, and the assignment was made expressly subject to the under-lease to Gancia. Gancia subsequently became insolvent, and the plaintiff claimed to recover possession both as against his trustee and Sinclair by title paramount. The case of the plaintiff was very learnedly argued, but Joyce, J., was of opinion that the plaintiff was effectually estopped by the acts of Neve's executors, who had affirmed the lease of Gancia and the sub-lease to Sinclair, and it was not open to the plaintiff to disaffirm either lease.

COMPANY - STATUTE OF LIMITATIONS—DIVIDENDS—REDUCTION OF CAPITAL BY REPAYMENT TO SHAREHOLDERS.

In re Artizan's Land and Mortgage Co. (1904) 1 Ch. 796, was an application by the liquidators of a company being wound up for a declaration that the claims of shareholders in whose favour warrants for dividends had been issued more than six years before

the commencement of the winding-up were barred by the Statute of Limitations, and also that certain shareholders who became entitled to a return of 10s. per share on a reduction of the capital more than six years prior to the winding-up, were also barred. Byrne, J., held that the certificate of the shares being under seal, and referring to the memorandum and articles of association, the money payable to the shareholders thereunder, whether as capital or dividends, constituted a specialty debt to which the twenty years' limitation was applicable.

PRACTICE—ADMINISTRATION—ORDER TO PAY COSTS OUT OF FUND IN COURT—PRIORITY OF ADMINISTRATORS' COSTS.

In re Griffith, Jones v. *Owen* (1904) 1 Ch. 807, was an administration action in which an order had been made for the payment of the costs of all parties out of a fund in Court, the fund proved insufficient for the payment of the costs of all parties in full, and the administrator claimed to be paid his costs in full in priority to the other parties. Farwell, J., held, notwithstanding the general terms of the order, he was entitled to this priority.

COMPANY—TRANSFER OF SHARES—REFUSAL TO REGISTER TRANSFER OF SHARES—FORM OF TRANSFER.

In re Letheby (1904) 1 Ch. 815, Buckley, J., decided that directors of a company acting under articles which provide that any member may transfer his shares, "but every transfer must be in writing in the usual, common form," cannot properly refuse to register a transfer merely because it omits particulars which, though found in the common form, are in the circumstances immaterial. In this case the transfer omitted the address of the transferor and omitted to state the number of the share. The transferor had only one share in the company, and with the transfer was sent the certificate of the share which showed the transferor's address. These omissions, therefore, the learned judge held immaterial.

LEASE—TENANTS' FIXTURES—FORFEITURE OF LEASE—REMOVAL OF FIXTURES—MORTGAGE OF LEASE.

In re Glasdir Copper Works (1904) 1 Ch. 810. The question in this case was whether certain tenants' fixtures were removable by a mortgagee of a lease after the lease had been determined by forfeiture. The lessee was a limited company, and the lease contained

a proviso that, in the event of the company going into liquidation, the term should cease. The company had issued debentures which constituted a floating charge on all its property, including the leasehold, and a debenture-holders' action had been instituted in which a receiver had been appointed, and he took possession of the premises and obtained leave from a judge to sell the tenants' fixtures, the lessor being represented and not objecting. Subsequently, and before removal of the fixtures, the company entered into voluntary liquidation, whereby the lease came to an end, and the lessor then claimed to be entitled to the fixtures as against the receiver: but Joyce, J., held that, notwithstanding the termination of the lease, the receiver was entitled to a reasonable time to remove the fixtures under the order for sale previously obtained by him, and that his rights under that order could not be defeated by the subsequent voluntary act of the lessee.

ACCUMULATIONS—PAYMENT OF DEBTS—DEBTS PAID OUT OF CAPITAL—PROVISION FOR RECOUPING CAPITAL—ACCUMULATIONS ACT 1800 (THELLUSSON ACT, 39 & 40 GEO. III., c. 98) s. 2—(R.S.O., c. 332, s. 3.)

In re Heathcote, Heathcote v. *Trench* (1904) 1 Ch. 826. The neat point decided by Eady, J., is that a provision in a will for accumulating income for the purpose of recouping capital applied in payment of debts is not "a provision for payment of debts" within s. 2 of the Thellusson Act (R.S.O., c. 332, s. 3).

SOLICITOR—COSTS—COLLECTION OF RENTS—COMMISSION.

In re Shilson (1904) 1 Ch. 837, is a case that shews that only strictly professional services are properly includable in a bill of costs of a solicitor. Possibly since the abolition of the rule making the cost of taxations between solicitor and client turn upon whether or not a sixth is struck off, the point involved in this case is no longer very material in Ontario. The charges in question in this case were a lump sum by way of commission for collecting rents, Eady, J., held that the solicitor had no right to charge a lump sum if the services were professional, but could only charge therefor by items, and if the work was non-professional then it ought not to be included in the bill. It may be observed that the taxation was had at the instance of a third party. The effect of the decision was to strike the items out of the bill and leave the matter of the solicitor's remuneration for the collection of the rents at large as between the parties.

PRACTICE—COMPROMISE—ABSENT PARTIES—JURISDICTION—RULE 131A.

Saragossa & M. Ry. Co. v. *Collingham* (1904) A.C. 159, was an appeal from the decision of the Court of Appeal in *Collingham* v. *Sloper* (1901) 1 Ch. 769 (noted ante vol. 37, p. 496). The majority of the Court of Appeal there held that there was no jurisdiction under Rule 131A to bind absent parties by a compromise order. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) gave no formal judgment, but expressed their dissent from the views of Rigby and Stirling, L.JJ., in the Court below and reversed their decision.

COMPANY—FORFEITURE OF PARTLY PAID SHARES—SALE OF FORFEITED SHARES—CALLS.

In *New Balkis* v. *Randt Gold Mining Co.* (1904) A.C. 165, partly paid shares in a limited company having been forfeited by the company for non-payment of calls were subsequently sold by the company to the appellants—the certificate delivered to the purchasers stated that they were to be deemed to be the holders of the shares "discharged from all calls due prior to the date" of the certificate. Subsequently a further call was made on the shares and the House of Lords (Lords Macnaghten, Davey, Robertson and Lindley) sustained the judgment of the Court of Appeal (1903) 1 K.B. 461 that the purchasers were liable therefor. The shares in question were for 5s. each on which 3s. 4d. had been paid, the prior call, for non-payment of which the shares were forfeited, was for 1s. 3d., the call made subsequent to the purchase was also for 1s. 3d., the purchasers contended that the call having been once made on the shares could not be made again, but their lordships held that although the purchasers were relieved from all liability for the call made prior to their purchase, they were nevertheless liable to all subsequent calls until the shares should be fully paid up.

ANCIENT LIGHTS—SUBSTANTIAL INTERFERENCE—NUISANCE—LIGHT—ANGLE OF 45 DEGREES—MANDATORY INJUNCTION.

Colls v. *Home and Colonial Stores* (1904) A.C. 179, is a very important decision on the subject of ancient lights, inasmuch as the House of Lords have reversed the judgment of the Court of Appeal in this case (1902) 1 Ch. 302 and also overruled its decision in the prior case of *Warren* v. *Brown* (1902) 1 K.B. 15 (noted

ante vol. 38, p. 189). The Court of Appeal had taken the view that any appreciable obstruction of ancient lights constituted an actionable wrong for which a mandatory injunction to remove the obstruction might properly be granted; their Lordships (Lords Halsbury, L.C., and Lords Macnaghten, Davey, Robertson and Lindley) however have taken a more liberal view of the matter, and have come to the conclusion that it is not every interference with an ancient light which will give a right of action; in the words of Lord Hardwicke, adopted by the Lord Chancellor "it is not enough to say that it will alter the plaintiff's lights;" in order to entitle a plaintiff to relief he must show a substantial diminution amounting to a nuisance, or which sensibly affects the plaintiff's premises and makes them less fit for occupation. In the present case the defendant's building was on the opposite side of a street 40 ft. wide, and though the plaintiff's lights were diminished, he had still sufficient for ordinary purposes.

LANDLORD AND TENANT—CONDITION TO TAKE OVER SHEEP ON EXPIRATION OF LEASE—FORFEITURE OF LEASE.

In *Breadalbane* v. *Stewart* (1904) A.C. 217, the appellant had entered into an agreement with a tenant that on his "away going at the expiration of the lease" he would take over the tenant's sheep at a valuation. The lease contained a proviso for forfeiture of the term for nonpayment of rent, and under this proviso the lease was forfeited; the House of Lords, on appeal from a Scotch Court, held that the agreement to take over the sheep did not apply to an "away going" by reason of forfeiture, but only applied to an away going at the contemplated expiration of the term for which the lease was granted by effluxion of time.

SALE OF GOODS—APPROPRIATION OF GOODS TO CONTRACT.

In *Reid* v. *Macbeth* (1904) A.C. 223, a contract had been made by the defendants with one Carmichael for the building of a ship, the contract provided that "the vessel as she is constructed all the engines, boilers and machinery and all materials from time to time intended for her or them whether in the building yard, workshop, river or elsewhere, shall *immediately as the same proceeds*, become the property of the purchasers (the defendants) and shall not be within the ownership, control or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid

purchase money." Before the ship was completed the builders became bankrupt. At the date of the bankruptcy there were lying at railway stations a quantity of iron and steel plates at the orders of the ship builders, intended and marked by Lloyds for the defendant's vessel. These plates were claimed by the trustee in bankruptcy of the ship builders, and also by the defendants under the above mentioned clause of this contract. The House of Lords, overruling the Scotch Court of Session, held that the defendant's contract was for a complete ship and the materials in question could not be regarded as appropriated to the contract, or sold to the defendants, and that the clause in the contract did not operate until there had been an actual incorporation of the materials in the vessel.

SHIP—CHARTER PARTY—UNSEAWORTHINSS AT STARTING—PERSONAL NEGLIGENCE OF OWNER.

City of Lincoln v. *Smith* (1904) A.C. 250, was an action by the charterers of a vessel for damages occasioned by the personal negligence of the shipowner. The charter party contained no provision exempting the owner from liability for damages occasioned by his personal negligence, and the loss in question was occasioned by the vessel being so laden by his orders as to be top, heavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise the vessel would have weathered in safety. The Judicial Committee of the Privy Council (Lords Macnaghten and Lindley and Sir Arthur Wilson and Sir John Bonser) under these circumstances found no difficulty in affirming the judgment of the Australian Court holding the owner liable for the loss so occasioned.

That Mr. Augustine Birrell, K.C., possesses literary enthusiasms, matters which have been said to be dangerous to the lawyer and fatal to the critic, is manifest in the following observation on Lord Acton's letters, which have been recently published: "There might well be some solemn household rite to celebrate the placing of such a book in the library." Lord Acton was a lover of "liberty based on the people's will," and his test of liberty is "the security of minorities." A lawyer may well admire such political philosophy.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] PROVIDENT SAVINGS LIFE SOCIETY *v.* BELLEW. [May 23.

Life insurance—War risk—Service in South Africa—Extra premium—Special condition—Consideration for premium.

Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war." Each policy also provided that "the assured has hereby consent to engage in military service in South Africa in the army of Great Britain any restriction in the policy contract to the contrary notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived in South Africa after hostilities ceased and an action was brought against the company for return of the extra premium on the ground that the insured had never been soldiers of the army of Great Britain in the time of war.

Held, DAVIES, J., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid was a sufficient consideration for the extra premium and it could not be recovered back.

Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone.

Appeal allowed with costs.

Greenshields, K.C., and *Laflamme*, K.C., for appellants. *Ryan* and *Garneau*, for respondent.

Que.] [May 25.

MONTREAL PARK, ETC., R.W. CO. *v.* CHATEAUGUAY, ETC., R.W. CO.

Construction of railway—Injunction—Interested party—Public corporations—Franchises in public interest—Lapse of chartered powers—"Railway" or "Tramway"—Agreement as to local territory—Invalid contract—Public policy—Work for general advantage of Canada—Limitation of powers.

An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy and cannot be enforced by the courts.

Per SEDGEWICK and KILLAM, JJ.—A company having power to con

struct a railway within the limits of a municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of article 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter.

Per GIROUARD and DAVIES, JJ.—A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter and which does not own a railway line within the limits of a municipality where such powers were granted has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with powers to construct railways and tramways, has allowed its powers as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of art. 479, of the Quebec Municipal Code. Appeal allowed with costs.

Macmaster, K.C., and *Campbell*, K.C., for appellants. *Lafleur*, K.C., and *Beaudin*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.] FARLEY *v.* SANSON. [April 18.

Landlord and tenant—Lease—Renewal—Arbitration—Appointment of arbitrators—Procedure—Interference by injunction—Jurisdiction.

A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors, one by the lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within 7 days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final. After the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbi-

trator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal, and protesting against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of an arbitrator, and assumed to appoint a sole arbitrator as upon default for 7 days after notice.

Held, affirming the judgment of BOYD, C., (5 O.L.R. 105,) that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal.

North London R. W. Co. v. *Great Northern R. W. Co.*, 11 Q. B. D. 30, and *London and Blackwall R. W. Co.* v. *Cross*, 31 Ch. D. 354, distinguished.

Direct United States Cable Co. v. *Dominion Telegraph Co.*, 28 Gr. 648, 8 A.R. 416, followed.

Semble, per OSLER, J.A., that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf.

Marsh, K.C., for appellants. *Delamere*, K.C., for respondents.

From Teetzel, J.] REYNOLDS *v.* TRIVETT. [April 18.

Limitation of actions—Title to land—Cancellation of deed—Cloud on title—Plan and survey—Real Property Limitation Act—Acts of ownership—Lands in state of nature—Fence built before entry—Cutting wood—Pasturing cattle—Commencement of statutory period—Knowledge of true owner.

The plaintiff claimed cancellation of a deed as a cloud upon his title so far as it affected 14 acres of land as to which the plaintiff alleged title in himself, and sought an injunction and damages in respect of trespass thereon.

Held, upon an examination of defendant's title deeds, that they did not in fact convey the 14 acres, nor even profess to do so, and therefore the plaintiff was not entitled to cancellation of the deed.

Held, also, upon the evidence, that the plaintiff had established his paper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan shewing that the 14 acres were outside of the land covered by the defendant's title deeds.

The defendant contended that he had exercised such acts of ownership upon the 14 acres more than ten years before action as had dispossessed the plaintiff, and constituted such a possession by himself as to bar the action. The 14 acres had never been built upon or cleared or cultivated or resided upon. The defendant relied upon the building of a

brush fence along the south limit of the 14 acres in 1880 or 1881 by his predecessor in title. At that time the title to the 14 acres was still in the heirs of the patentee, who had never taken possession.

Held, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner and having entered in 1888, before the statutory period had run, it became his property as absolutely as if he had built it himself.

The defendant also relied upon acts done since 1888, namely, cutting and removing wood and pasturing cattle upon the 14 acres.

Held, that these acts, being intermittent and isolated, were merely occasional acts of trespass, and insufficient to constitute possession of the kind required by the statute to bar the true owner.

Semble, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title.

Judgment of TEETZEL, J., reversed.

John MacGregor and *E. R. Reynolds*, for appellant. *J. H. Moss*, for respondent.

HIGH COURT OF JUSTICE.

Street, J.] [April 22.

TORONTO GENERAL TRUSTS CORPORATION *v.* CENTRAL ONTARIO R.W. CO.

Pledge—Securities—Bank — Power of sale — Construction — "By giving notice"—Abortive auction sale—Subsequent private sale—Bona fide purchasers for value.

As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities, etc., by giving 15 days' notice in one daily paper published in the City of Ottawa, etc., with power to the bank to buy in and resell without being liable for loss occasioned thereby." Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements

at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without further notice.

Held, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without a fresh notice.

Held, also, that there was nothing upon the evidence to shew that the purchasers were not bona fide purchasers for value or that they had any reason to suppose that the bank were not authorized to sell; and under these circumstances the construction of the power of sale should not be strained against the purchasers.

G. T. Blackstock, K.C., and *T. P. Galt*, for purchasers. *J. H. Moss*, and *C. A. Moss*, for pledgors.

Boyd, C. Meredith, J. Idington, J.] [April 25.

KINGSTON *v.* THE SALVATION ARMY.

Parties—Unincorporated association—Salvation Army—Estoppel—Interlocutory order—Amendment.

Held, affirming the judgment of FALCONBRIDGE, C.J. K.B., (6 O.L. R. 406), that the Salvation Army is not a legal entity which can be sued for wrongs done by its officers.

Held, also, that the defendants were not estopped by the interlocutory decision of a judge in Chambers, 5 O.L.R. 585.

The plaintiff was given leave to amend upon payment of costs, by adding the chief officer of the Army as a defendant.

D'Arcy Tate, for plaintiff. *A. Hoskin*, K.C., and *Lynch-Staunton*, K.C., for defendants.

Falconbridge, C.J. Street, J. Britton, J.] [April 25.

CRAIG *v.* BEARDMORE.

Sale of goods—Contract—Specific goods—Deliverable state—Property passing—Destruction—Before payment or delivery.

Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; and it is immaterial whether the time of payment or the time of delivery or both be postponed.

The plaintiffs agreed to sell to the defendants a quantity of tan bark which lay in piles in the woods at a distance of 14 miles from the railway siding at which it was to be delivered. The price agreed upon was to cover the plaintiffs' trouble and expense of carrying the bark to the siding

and placing it on the cars there. At the time the contract was made the bark was ready for immediate delivery so far as its condition was concerned; nothing remained to be done by the plaintiffs to entitle themselves to the price but the hauling and shipping. The bark was destroyed by fire where it lay in the woods, payment not having been made by the defendants for it.

Held, that the property had nevertheless passed to the defendants, and they were liable for the price.

R. J. McLaughlin, K. C., for plaintiffs. *H. J. Scott*, K. C., for defendants.

Boyd, C., Meredith, J., Idington, J.] [April 29.

STEACY *v.* STAYNER.

Promissory note—Accommodation indorsers—Payment of note by one—Right to recover against the other—Co-securities—Contribution—Order of indorsements—Parties indorsing after the other.

Appeal by plaintiff from judgment of TEETZEL, J., in an action to recover $920 and notarial fees and interest paid by plaintiff to retire a promissory note made by one T. A. Stayner (now deceased), a brother of defendant, to plaintiff's order, and indorsed first by defendant and then by plaintiff. Plaintiff and defendant were accommodation indorsers. TEETZEL, J., held that the rights and liabilities of plaintiff and defendant as accommodation indorsers were governed by *Macdonald* v. *Whitfield*, 8 App. Cas. 733, and that plaintiff was entitled to recover from defendant, as a co-surety for the maker, only one-half the amount paid.

Upon appeal to a Divisional Court:

Held, per BOYD, C., that plaintiff did not become the holder in due course of the note sued on, but was a party to it for the purpose of lending his name to the maker, and, so far as both parties were concerned, the note was an accommodation one, within the meaning of 53 Vict., c. 33, s. 28. The relations of the parties to each other was that of sureties, and the rule of equitable contribution as between them applied. The case was not to be dealt with under the law merchant, but upon the proved and admitted circumstances under which the note was signed by both indorsers. No doubt each was misled as to the other by the makers, but that left them still inter se sureties for the one debt. Given an accommodation note, the law implies equal contribution as between the accommodation parties: *Macdonald* v. *Whitfield*, 8 App. Cas. 733; *Vallee* v. *Talbot*, Q.R. 1 S.C. 223.

Per MEREDITH, J., held that, upon the conflict of testimony, and upon the whole evidence, no more could be found as a fact than that each of the parties indorsed solely for the accommodation of the maker; that each was, or meant to be, merely a surety for him. The order of signing could

not be found, in the circumstance, to have had reference to any order of liability. The parties then being, according to the evidence, co-sureties, the ordinary rule as to contribution applied, and defendant was at most answerable for one-half of the sum in question; he had not appealed against the judgment against him to that extent.

Per IDINGTON, J., that the judgment should be affirmed, but not on the ground that *Macdonald* v. *Whitfield* governed the case. That case rests upon inferences of fact, shewing a common understanding amongst those held to be co-sureties. There was no such understanding here. Plaintiff was payee of the note, and signed his name as indorser under that of defendant, who had signed on the back of a blank form of note. This did not necessarily entitle plaintiff to succeed: *Robertson* v. *Hueback*, 15 C.P. 298; and upon the evidence plaintiff could not claim to be a subsequent indorser.

E. G. Porter, for plaintiff. *W. E. Raney*, for defendant.

PUBLIC SCHOOL LAW.

IN RE WINDSOR SCHOOLS ARBITRATION.

Public and Separate Schools—Arbitration—Organization of Separate Schools—Division of Property—Allotment of school property to Separate Schools—Proportionate allotment of school property of Protestant and Roman Catholic ratepayers at time of separation—No right of direction as to payment of money.

[Toronto, Feb. 10—STREET, J.

The facts as found by the learned judge who was appointed arbitrator were as follows:—The Public School Board for the then incorporated village of Windsor was first organized in the year 1854. On Jan. 1, 1858, Windsor became a town, and on April 14, 1892, it became a city. From the first organization of the Public School Board until Nov. 18, 1901, all the schools in the municipality were managed by the Board of Trustees elected from time to time under the provisions of the Public Schools Acts, and were supported by rates levied under those acts without any distinction of race or creed. One school building at first, however, and later two school buildings, were set apart as schools intended specially for Roman Catholics, and the children attending these schools were taught by teachers who were Roman Catholics. An appreciable number of Roman Catholic children, however, attended the other schools, and an appreciable number o children who were not Roman Catholics attended the Roman Catholic schools.

The first school building which was set apart as a school intended specially for Roman Catholics was the Goyeau Street School, erected in 1856, upon a lot purchased by the Public School Board from Mr. John

MacEwan for £100, and conveyed by him to "the Board of School Trustees of the Village of Windsor in trust for the use and purposes of a Roman Catholic Common School in and for the said Village of Windsor." The school erected upon this lot was used for some years by the Board as one specially intended for Roman Catholics: it was then used as a high school and collegiate institute, and was finally in the year 1874 transferred by the Board to the town corporation upon their assuming payment of a debt of the Board.

In 1873 the School Board purchased for $1,650 from Mr. Vital Ouellette a site upon which they erected a school building, called St. Alphonsus School, near the centre of the town. This site was paid for with Public School money, and was conveyed by the purchaser on Oct. 7, 1873, to "The Board of School Trustees for the Town of Windsor in trust for the uses and purposes of a Roman Catholic Common School in and for the Town of Windsor." This school seems to have taken the place of the Goyeau Street School upon the conversion of the latter into a high school. In the year 1890 a school called the St. Francis School was built upon property acquired by the Board of Trustees, and was devoted specially to the education of Roman Catholic children. Excepting in these schools the teachers employed were all Protestants. The other schools from time to time built were carried on as ordinary public schools.

During all these years, that is to say, from 1854 to 1891, there were always some Roman Catholic members of the Board of Trustees, and there was one School Inspector for all the schools. No separate accounts were kept of the sums expended upon the maintenance of the schools taught by Roman Catholic teachers and intended specially for the use of Roman Catholic children, as distinguished from those taught by Protestant teachers and intended for Protestant children: nor was there anything to prevent the parents of Roman Catholic children from sending them to Protestant schools or vice versa.

On Nov. 18, 1901, this state of things was terminated by the organization by Roman Catholics of "The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor." The legal effect of this proceeding was that the Windsor Public School Board remained, as it had always been, the owner of all the school property in the corporation, including the St. Alphonsus and St. Francis Schools, although the property of the Roman Catholic ratepayers of the city remained liable for its proportion, along with that of the other ratepayers, of a debenture debt of $50,000, the balance still unpaid of $120,000, which had been raised for the erection and furnishing of schools. The Separate School Board petitioned the Public School Board for redress, and then applied to the Minister of Education. As a preliminary step and for the purpose of arriving at the facts the Honourable the Chief Justice of the King's Bench was requested by the Government of the Province to hold an enquiry into the matter. In the course of this enquiry certain evidence was taken, and

a report was then made that legislation was desirable in order that the matter might be effectually dealt with. In accordance with this recommendation chap. 35 of 3 Edw. VII. was passed and received the Royal assent on June 12, 1903.

Aylesworth, K.C., for Separate School Board. *Clarke*, K.C., and *Bartlett*, for Public School Board.

STREET, J.:—Having been appointed Arbitrator under 3 Edw. VII., c. 35. s. 1, by Order in Council, I have taken some further evidence and have heard argument upon the whole matter.

The evidence shews that, at the date of the passing of the above Act the property owned by the Public School Board was as follows:—

Cameron Avenue School	cost	$19,000	built 1894-5
Park Street "	"	21,900	" 1890
St. Alphonsus " (Site cost $1,650, school and furniture $21,265)	"	21,000	" 1873
Mercer Street School	"	20,000	" 1890
St. Francis' "	"	16,500	" 1890
Louis Avenue "	"	4,300	" 1883
Unoccupied Site	"	800	
		$103,500	

In addition to this property, they owned at the time of the organization of the Separate School Board in 1901 a school called the Central School, the building of which had cost $14,000. The title to the property upon which it was built was, however, never acquired by the Public School Board. At the time the school was erected, an agreement existed for the purchase of the site by the Corporation of the Town of Windsor from the Dominion Government, who owned it, but this was not carried out for some years owing to the neglect of the Town Corporation to pay the price. After the Separate School Board was organized, the City Corporation, having paid the purchase money and obtained title from the Government, gave the Public School Board notice to quit. Being in the position of having erected a school upon property owned by the city, and for which they must pay if they elected to keep it, they accepted $2,000 from the city and gave up the building. The Public School Board estimated that the building was worth no more than the value of the old material in it, which they put at $2,000. On the other hand, three builders who had examined it gave evidence before me that it was worth $8,000 or $9,000. It was not suggested upon the argument that the Public School Board had not acted in good faith in selling the building to the city. They had at the time sufficient school accommodation without the Central School by reason of the departure from the public schools of a large number of the children of Roman Catholic parents, and they would perhaps not have been justified in asserting an equitable right against the city to purchase the site, which

is valued at $18,000, when they did not need it. Under the circumstances I cannot say that they have acted unwisely or improperly, or that the value of the Central School building at the time of the separation in 1891 should be estimated at any greater sum than the $2,000 for which they sold it. This, then, leaves the Public School Board with property at the time of the separation, which should, for the purposes of this arbitration, be taken to be as follows:—

School buildings and furniture, as detailed above	$103,500
Central School, sold for	2,000
	$105,500

It appears from the evidence that during the period from 1854 to 1901 $120,000 in all was raised by the municipal corporation upon debentures at the request of the Public School Board for the erection and furnishing of school houses, and if we add to the above $103,500 the $15,900 expended in building and furnishing the Central School, the result is that the school property at the time of the separation in 1901 almost exactly represented the amount of the monies raised from time to time upon debentures and charged against the whole of the ratepayers of the corporation. This seems to shew that the capital account has been accurately kept separate from the maintenance or income account; that the monies annually raised on the latter account have been spent, and that the capital account is represented by the sites, buildings, and furniture on hand. Of the sum of $120,000 raised upon capital account, it appears that $70,000 has been repaid, and that the remaining $50,000 is a debt still due and payable by the ratepayers.

The question to be determined is whether it is just and equitable that the Separate School Trustees should be allotted a portion of the school property on hand at the passing of the Act, and if so, what portion of it?

I think it is certainly just and equitable that a portion of the property should be allotted to them, and that the allotment should be made upon the basis of $105,500 worth of property; for they ought to have a share of the $2,000 representing the Central School, which was owned by the Public School Board at the time of the Separation.

The next question is, how is the portion which is to be allotted to the Separate School Board to be arrived at?

It seems extremely probable from the data furnished me that the sums spent during the 48 years in question upon the maintenance of the schools set apart as Roman Catholic schools in Windsor have considerably exceeded the rates paid during those years by Roman Catholic ratepayers. It is not possible to obtain exact figures shewing this, because no separate account of the expenditure upon the several schools has been kept, and the expert accountant who endeavoured to separate the accounts last year expressly states that his figures are largely conjectural. Other figures, however, shew that, while the Roman Catholics have paid less than one-fourth

of the whole school rates, their children form nearly one-third of the total average attendance at the schools. Either their families are larger or their properties are less valuable in proportion to their numbers than those of their Protestant fellow-ratepayers. It is urged on behalf of the Public School Board that their interest in the present school property should be treated as having been diminished to the extent of the undue share of the maintenance funds which they have absorbed in the past. I cannot accede to this contention. In the first place the figures cannot be ascertained with any approach to accuracy, and in the second place it must be borne in mind that the Separate School supporters are liable for their share of the $50,000 school debt remaining unpaid. But even if the matter could be reduced to mathematical accuracy, it would be unjust to increase the burdens of Separate School supporters in the present and the future because the Public School Board of past generations have thought proper to spend more of the school income upon the Roman Catholic children of their day than was contributed by Roman Catholic ratepayers.

The Separate School Board contend that the school property on hand should be divided between them and the Public School Board in proportion to the gross amount of school rates levied during the 48 years upon Roman Catholic and Protestant ratepayers respectively.

It has fortunately been found feasible to separate the sum levied for education during the 48 years in question upon the property of Roman Catholic ratepayers from those levied upon the property of persons who are not Roman Catholics (to whom I shall refer hereafter as "Protestants"), and the result is as follows:—

Total school rates levied in 48 years on Protestants	$270,003
" " " " Roman Catholics.	112,174
And upon property belonging to Railway and Trading and other Corporations.....	72,132
Total school rates levied in 48 years.....	$454,309

Then there arises the question as to how the rates levied upon the corporation should be treated. Until the statute 49 Vict., c. 46, s. 53, passed in the year 1886 by the Ontario Legislature, no provisions existed by which any of the school rates paid by incorporated companies could be appropriated to Separate schools. By that Act, however, it was provided that a company might, by notice to the clerk of any municipality in which a Separate school existed, require any part of its real property to be assessed and rated for the purpose of a Separate School, but subject to the proviso that the share or portion of the property of the company rated or assessed in any municipality for Separate School purposes should bear the same proportion to the whole property of the company assessable within its municipality as the amount paid on shares in the company by Roman Catholics bore to the whole amount paid on the shares of the company.

If there had been a Separate School Board organized in Windsor prior to 1886, it could not have claimed any share in the rates paid by Companies until the passing of the Act of that year; and after the passing of that Act it could claim only such share as the Company choose to direct, such share being strictly limited by the interest held in the stock of the Company by Roman Catholics as compared with that held by other persons. The onus of shewing some facts to entitle themselves to claim to have the school rates paid by Companies in Windsor taken into account in the present adjustment, lies upon the Separate School Board: but there is no evidence that any of the companies by whom the rates in question have been paid, including four railway companies, three chartered banks, a telegraph company, the Bell Telephone Co., several loan companies and numerous local companies, have ever paid a farthing towards Separate School rates in any of the numerous municipalities in which they must be assessed, nor has any attempt been made to shew the proportion of Roman Catholic shareholders in any of them. I am therefore entirely without evidence to shew me that it was ever possible for the directors of these companies to have required any part of the taxes paid by them to be devoted to Separate School purposes, and I am compelled to treat all the rates paid by them as rates which should not be taken into account as having been paid by possible Separate School supporters, and they must be added to the rates paid by Protestants. This leaves the figures as follows:—

Rates paid in 48 years by Protestants	$270,003
" " " Corporations	72,132
Total applicable as rates paid by Protestants	$342,135
Rates paid in 48 years by Roman Catholics	112,174
Total rates paid in 48 years	$454,309

The proportion of the total rates paid during this period by Protestants is 75.3 to 24.7 paid by Roman Catholics.

That the school property on hand should be divided between the Public School Board and the Separate School Board in proportion to the contributions to school rates of Roman Cotholic and Protestant ratepayers in the past would undoubtedly in my opinion be the proper solution of the controversy if I could assume, or if it could be proved, that all Roman Catholic ratepayers are Separate School supporters, or that those who are not are equalled by the number of Protestants who are. There are, however, figures before me in evidence and not disputed which seem to prove the reverse. The first assessment for Roman Catholic Separate Schools was made in 1901, for the taxes to be levied in 1902: and that assessment shews the following figures:—

For Public School purposes	$4,572,436
For Separate School purposes	872,889
Total Assessment	$5,445,325

In that year the assessment of Separate School supporters therefore amounted to only 16.03 per cent. of the whole, as against 83.97 per cent. of Public School supporters.

The next assessment was made in 1902 for the taxes to be levied in 1903, and shews the following figures:—

For Public School supporters	$4,618,621
For Separate School supporters	1,066,529
Total assessment	$5,685,150

In that year the assessment of Separate Schools supporters therefore amounted to 18.76 per cent. of the whole, as against 81.24 per cent. of Public School supporters.

For the two years the assessments are as follows:—

17.424 for Separate School purposes;
82.576 for Public " "

Turning to rates arising from the respective assessments of Roman Catholic and Protestant ratepayers down to the time of the separation, I find the average as I have mentioned to be as follows:—

Proportion levied upon Roman Catholic ratepayers 24.7 per cent.
And " " Protestant " 85·3 "

This proportion had been, roughly speaking, fairly constant for a number of years. I find therefore that while the assessment of Roman Catholic ratepayers represented upwards of 24 per cent. of the whole assessment, the assessment of Separate School supporters represented only 18¾ per cent. of the whole, even for 1903, which was the more favourable of the two assessments since the separation. This discrepancy shews plainly that about 5¾ per cent. of the Roman Catholic ratepayers had not become Separate School supporters at the date of the last of these two assessments.

It is necessary to take into consideration the rights of those Roman Catholics who are not Separate School supporters, and in making the division not to give to the Separate School Board the benefit of their assessments when they are Public School supporters. I do not think I should be justified in assuming that the number of Roman Catholic supporters of public schools will in future be so large. The two years in question are those when the Separate Schools had just been organized and when their attractions were probably comparatively few. Until they were in full working order, Roman Catholic parents having children in advanced classes in the Public Schools would be unwilling to become Separate School supporters and to remove their children to the newly-organized Separate schools. The third year of the Separate School organization should, therefore, shew, I think, an increase over the second year in the number of Roman Catholic supporters of Separate schools, as the second did over the first. Bearing these considerations in mind, I should not assume on the one hand that all Roman Catholic ratepayers will ultimately become

Separate School supporters, nor on the other that the proportion of Roman Catholic ratepayers who are not Separate School supporters will always remain so large as it was in 1901 and 1902. I think, in order to do justice, that the line should be drawn about midway. This would give to the Separate School Board 21 per cent. of the property to be divided, leaving the other 79 per cent. to the Public School Board. The amount to be divided should be put, as I have said, at $105,500, and of this the Separate School Board should have 21 per cent., that is to say, property of the value of $22,155.

The question next arises as to the property which should be allotted to the Separate School Board in respect of this sum, and I have heard argument upon this question since I arrived at the figures. The schools of St. Francis and St. Alphonsus are those, as I have said, which before the separation were set apart especially as Roman Catholic schools, the latter being expressly conveyed to the Board of Education in trust for that purpose; and it was for those two schools that the Separate School Trustees asked when they petitioned the Public School Board in December, 1901. Since then, however, they have acquired and are now using as a Roman Catholic Separate School another site and building in the extreme east of the city, and within about 500 feet of the St. Francis' School, so that it would not be proper to allot that school to them, and they object to taking it. They ask for the Park Street School, which is a school built in 1890, in preference to the St. Alphonsus' School, which was built in 1873, and enlarged in 1889. Both of these schools are upon Park Street within 1,000 feet of one another, and comparatively near the centre of the town.

Taking into consideration the fact that the St. Alphonsus' School was selected and built especially for the purpose of accommodating the children of Roman Catholic parents; that it was used by them for a period of 28 years, and that they asked to have it turned over to them at the time of the separation, and there appearing no reason founded upon the question of convenience why they should have the Park Street School in preference to it, I think they should have the St. Alphonsus' School. That school, however, stands in a different position from the others so far as the value placed upon it is concerned. The site was purchased for $1,650 in 1873, and the school was built in that year, costing, with the alterations made in 1889, $20,265. In the valuation of sites and buildings, upon which I have been acting, all the other school sites, buildings and furniture are placed at actual cost; but in the case of St. Alphonsus' School, the site, which cost $1,650 in 1873, is now valued at $4,000, and the building, which cost $20,265, is now valued at $16,000; in other words, while $4,265 is written off the cost of the building by reason of 30 years' wear and tear, $2,350 is added to the value of the site by reason of the improvement in the value of land in its neighbourhood.

The property, however, is to be allotted to them for school purposes, and is intended to be used for those purposes: what they need is rather a

good school building than a valuable site: they would prefer the Park Street School with an $18,000 building and a $2,500 site to the St. Alphonsus' School with a $16,000 building and a $4,000 site even if they were charged with the $500 extra cost of the former. Under these circumstances I do not think I could fairly charge them with the whole of the increased value of the site. The Park Street site cost $2,500 and I think if I charge the St. Alphonsus site at $2,650, which is $1,000 over its cost, I shall be as nearly right as it is possible to get in such a matter.

This would make the St. Alphonsus' School worth to the Separate School Board $19,650, made up as follows:—

Site	$2,650
Value of building	16,000
Furniture, etc.	1,000
Total	$19,650

This would leave $2,505, or say $2,500, still to be allotted to make up the $22,155. I have no power to direct the Board of Education to pay any sum of money to the Separate School Board. I can only under the Act allot real estate or other property owned by the Board of Education.

I take therefore the Louis Avenue School, the site and building of which are valued at $4,000, and I allot to the Separate School Board 25/40ths of it. I should have preferred to have directed one party or the other to pay a sum of money, but the Act gives me no such power. Each School Board has power under the general law to purchase or sell its interest to the other.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.] REX *v.* BREEN. [May 13.

Liquor License Act—Defective information—Prohibition.

An information was laid at Halifax on April 25th, 1904, by the Chief Inspector of Licenses for the Municipality of Halifax County, who resides 35 miles from the City of Halifax, before the Stipendiary Magistrate for the County of Halifax, against the defendant, charging him "for that he within the space of six months last past previous to this information" at . . . unlawfully, etc., (*a*) did sell, etc., and (*b*) did keep for sale, etc., intoxicating liquor contrary to the provisions of The Liquor License Act. The only evidence offered by the prosecution was that of the Chief Constable for the County of Halifax, who swore that in company with the

inspector on April 23rd, 1904, he visited the defendant's house within the County of Halifax, and found a gallon of liquor in his bedroom, but there was no bar or other appliances generally found in a place where liquor is sold, and that he had on former occasions served accused with papers under the Act. The defendant gave no evidence nor called any witnesses but asked for a dismissal of the complaint on several grounds. The justice adjourned to consider the application of the defendant, who in the meantime applied ex parte for prohibition under Crown Rule 72.

Held, following *Rex* v. *Boutilier* (p. 439 ante) that as it did not appear by the information that it was laid within six months after the commission of the offence or that the defendant had committed the offence within six months previous to its being laid, and as the evidence given on the trial in the presence of the defendant did not amount to a charge for violation of the law so as to dispense with the formality of an information, the magistrate was acting without jurisdiction and should be prohibited from further proceeding in the matter. *Reg.* v. *Bennett* I. O. R. 445, referred to.

John J. Power, for the motion.

Province of New Brunswick.

SUPREME COURT.

En banc.] LAWTON CO. *v.* MARITIME COMBINATION RACK CO. [June 17.

Contract for manufacture—Time—Work up to sample but not to specification—Conflicting findings of jury.

On Feb. 12, 1902, plaintiff company wrote defendant company, offering to build 200 racks according to specifications that had been sent them "in a specified time" at $8.50 each, and asking in the event of their tender being accepted that a sample rack be shipped them. On Feb. 18 defendant company accepted this tender, "the racks to be made according to specifications and subject to the approval of their inspector." In a letter acknowledging the order defendant company agreed to deliver 100 racks on or about April 20 and the balance on May 20. Defendant company were to furnish certain maleables, and in the last letter the defendant company were notified that these maleables must be delivered not later than April 1. Defendant company wrote that they could not bind themselves to deliver the maleables by that date, but would do so as fast as they could get them from the manufacturers. They sent the sample rack on March 19. On April 7 the maleables not having been furnished, the plaintiff company wrote that this would void the time specified for completion of the racks, but

they would endeavour upon their arrival to finish the racks promptly. On April 26 defendant company shipped one lot of maleables, and on May 1 another, and in a letter notifying the shipment on April 30 stated that this would enable them to finish up 50 of the racks. The plaintiff company was urged several times by letter during May to push on the work and finally on June 24th they were notified that July 15 would be the very latest date on which delivery would be accepted. On July 4 plaintiff company had 48 racks completed and all the materials ready to put the remaining 152 together. Defendant company sent a man to inspect the work. He condemned the completed racks as not in accordance with the specifications and also those which were in process of construction. In an action to recover damages for breach of contract the jury found in answer to questions submitted by the judge that the 48 racks were not in accordance with the contract and specifications, but that they were in accordance with the sample rack furnished by the defendant company; that the plaintiff company after receiving the maleables proceeded to construct the 200 racks within a reasonable time, and that the defendant company agreed that the plaintiff company should have until July 15 for the completion of a portion of the racks. They also found in answer to questions submitted by the defendant's counsel that the defendant company employed a proper and competent inspector and that he acted in good faith in condemning the racks, but that the defendant company wrongfully discharged the plaintiff company from the contract. They assessed the damage at $831.70.

Held, on motion for a new trial, that the plaintiff's verdict could not stand in view of the jury's findings that the inspector acted in good faith and that the plaintiff company did not manufacture the racks in accordance with the contract and specifications.

Bustin and *Knowles*, for plaintiff. *Gregory*, K.C., for defendant.

En banc.] PICKARD *v.* KEARNEY. [June 17.

Trespass—Disputed line—Different surveys—Jury's finding conclusive.

In an action of trespass to land the question turned upon the correctness of different surveys. For the plaintiff two surveys were proved—one by G. in 1878 and one by D. some years later. These two surveys located the disputed line at two different points two or three rods apart, but in either case defendant would be a trespasser. In behalf of the defendant a survey made by H. a few years ago was proved, which placed the locus in quo within the lines of defendant's lot. The jury found for plaintiff.

Held, although the trial judge stated that he would have said H.'s survey was right had the question been for him the verdict should not disturbed, the jury having found otherwise. New trial refused.

Carvell, for plaintiff. *Hartley*, for defendant.

En banc.] HALE *v.* TOBIQUE MANUFACTURING CO. [June 17.

Lumber contract—Contradictory provisions—Discrepancy in scale—Account settled.

This action was brought to recover a balance alleged to be due for logs delivered to defendant on three contracts, under which plaintiff delivered lumber at St. John to the amount of $50,138.86. On account of this he received cash and supplies to the amount of $46,865.39. One clause in the beginning of the contracts stated that the lumber was to be delivered "free from all charges." A later clause provided that "the company were to pay or arrange for the stumpage on the said logs and lumber." The contract also provided that the lumber was to be scaled by a scaler to be appointed by the company. F. H. H., president of the company, notified the plaintiff that H. & Co. of St John had been appointed scalers under this provision, and they accordingly did scale the lumber at St. John. In March, 1903, plaintiff received an account from defendant company showing cash and supplies furnished him on account of the contracts. This he handed to P., his clerk. In June he and P. went with the books and the defendant's account to defendant's office to settle, and went over the accounts with the managing director of defendant company. Previous to this defendant had received a bill of the scale made at Fredericton by the Fredericton Boom Co, which was $964.73 less than the scale made by H. & Co. at St. John. Defendant company in their account adopted the Fredericton scale and they also charged plaintiff with $915.00 stumpage. Plaintiff made no objection to the stumpage in the adjustment of accounts, stating upon the trial that he had not noticed the provision referred to in the contract, but plaintiff did object to the Fredericton scale and claimed he should be allowed upon the basis of the St. John scale. Several items were objected to by defendant company, and an account was made up showing a balance due plaintiff of $1,390.82. P. in his evidence stated that he did certain figuring and arrived at $1,390.82 as the amount due plaintiff upon the basis of the Fredericton scale and charging plaintiff with the stumpage, but both he and the plaintiff denied that they had agreed to this amount. The judge directed the jury that under the contracts the plaintiff was not liable for the stumpage and the jury found that the defendant company accepted the lumber as surveyed in St. John; the plaintiff did not agree to the balance of $1,390.82 and found a verdict for the defendant for the $964.73 and the $915.02, in addition to the $1,390.82—in all $3,270.57

Held, on motion for a new trial, that the defendant was bound by the St. John scale, that the plaintiff was not liable for the stumpage, and that the verdict was right.

Carvell, for plaintiff. *Connell*, K.C., for defendant.

En banc.] PORTER *v.* BROWN. [June 17.

Ejectment—Title by possession—Payment of taxes and insurance—Perverse verdict.

Defendant in an action of ejectment had a deed of the land in question, dated Jan. 8, 1903, from W.P.E., the son and sole heir of M.E., to whom plaintiff leased the land in 1871 for ten years at $40 a year and who died after the expiration of the lease, in 1881, having paid the rent for only the first five or six years. M.E. was a sister of plaintiff. After leasing the land in 1871 she built a house upon it. Shortly after her death W.P.E., an epileptic subject, much addicted to drink and mentally weak, arranged with W.B. and his wife (the defendants) to live with and take care of him upon the place. They accordingly went with him and lived there until the death of W.B. in Jan., 1902, after which defendant continued in possession with W.P.E. until and after the commencement of the action. Defendant swore that under the arrangement with W.P.E. he was to give her the property. Plaintiff swore that after M.E's death he gave notice to W.P.E. thas he was occupying as a tenant at will under him, and at a rental of $100, with the privilege of having the B's as sub-tenants to take care of him and that W.P.E. agreed to this and also that the B's would pay half the taxes and W.P.E. the other half. Plaintiff also swore that the arrangement between the B's and W.P.E. was that they should board and take care of him in lieu of the rent, and that he (plaintiff) consented to this. W.P.E. had some money which plaintiff took charge of and out of which he remitted him from time to time, he testified, small amounts as he would require. Plaintiff swore that he paid the taxes with his own money during the last ten years. Defendant swore that she and her husband paid half the taxes every year for twenty-two years and that plaintiff paid the other half with money which belonged to W.P.E. No rent has been paid since the death of M.E. Plaintiff kept the building insured. In 1895 the house was damaged by fire. He collected the insurance and made the repairs. The B's moving out and returning when they were completed.

The trial judge, summing up the facts, told the jury that it would be difficult for them them "to come to the conclusion that either W.P.E. or the B's were holding in actual, open, adverse possession." The jury, however, found that both W.P.E. and the defendant herself had open, exclusive, adverse possession for twenty years prior to the bringing of the action, and a verdict was entered for the defendant.

Held, on motion for a new trial, that the verdict was not perverse but that there was no evidence to warrant the findings.

New trial.

McMonagle, K.C., for plaintiff. *Grimmer*, K.C., for defendant.

En banc.] GRANT *v.* C.P.R. Co. [June 17.

Damage by fire—Negligence—48 Vict., c. 11—Constitutionality—Applicability to fire on railway line.

This action was brought to recover damages for the destruction of plaintiff's lumber and woodland adjoining defendant company's line of railway by fire alleged to have been negligently started by defendant's servants and allowed to extend to plaintiff's land. N., an employee of the defendant railway, set fires in May 20 and 22, 1903, to burn up some piles of rubbish on the railway line. There had been no rain for some time and forest fires were burning all over the country. Two or three witnesses in behalf of plaintiff swore that they saw the fire on the railway line and traced its course through the fence and to plaintiff's land. N. swore that the fires which he started were all burned out before the fire was seen on plaintiff's property, and other evidence was given to the same effect. The jury found that the fire spread from the fire set by N. and that N. negligently and unreasonably allowed it to extend, and a verdict was entered for the plaintiff for $500.

Held, on motion for a new trial, that the evidence was sufficient to warrant a verdict.

Held, per MCLEOD, J., following *Rylands* v. *Fletcher*, L.R. 3 E. & I. App. 330; *Nichols* v. *Marsland*, L.R. 1 Ex. Div., and *Jones* v. *Festiniog Railway Company*, L.R. 3 Q.B. 733, and *Phelps* v. *Southern R.W. Co.*, 14 S.C.R. 432, that the defendant was liable, though no acts of negligence were shewn, they having brought at their own peril a dangerous element upon their land not naturally there.

Held, also, per MCLEOD, J., that ss. 3, 4, 5 and 9 of 48 Vict., c. 17, entitled "An Act to prevent the destruction of Woods, Forests and other property by fire," is intra vires of the Local Legislature.

Held, also, per MCLEOD, J., that the provision requiring notice to be given to the owner of adjoining land of an intention of starting a fire, and providing that failure to give such notice shall be conclusive evidence of negligence applies only to a case where a person desires to clear land and not to a case like the present, but that this case falls within the provisions of the Act declaring that a person starting a fire, except for certain purposes specified in the Act between May 1 and Dec. 1, is guilty of negligence, and that the defendant is therefore liable under the Act as well as at common law.

Carvell, for plaintiff. *Connell*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Dubuc, C.J.] CZUACK v. PARKER. [June 1.

Specific performance—Sale of land—Purchaser for value without notice—Contract—Cancellation—Service of notice of cancellation—Costs—Further relief—Amendment.

Action for specific performance of an agreement for sale of land by defendant Hough to the plaintiff dated 24th November, 1902, for the sum of $640, of which $200 was to be paid in cash and the balance in five annual instalments, with interest at six per cent per annum, payable half-yearly. The plaintiff paid the $200, went into possession of the land, built a house and stable on it and did some ploughing. He did not register his agreement, the land having been bought under "The Real Property Act." In July, 1903, the defendant Robinson, wishing to acquire title to the property in question so as to add it to adjoining land owned by him, through his solicitor obtained from Hough an assignment of the agreement and also a transfer of his title to the land on payment of the amount due by plaintiff under the agreement. Before signing such documents Hough informed the solicitor that he had sold the land and stipulated verbally with him that the plaintiff was to be protected in his purchase. The assignment and transfer were prepared by Robinson's solicitor, and contained no reference to the sale that had been made to plaintiff. The trial judge found as a fact that Robinson had been guilty of fraud in procuring said transfer with the intention of depriving the plaintiff of the benefit of his purchase. Plaintiff having neglected to pay the interest due in May, 1903, Robinson undertook in the following August to cancel the agreement of sale held by the plaintiff, and swore at the trial that he had sent a notice of the cancellation by mail to the plaintiff, as provided for in the agreement. There were two clauses in the agreement providing for cancellation in case of default by the purchaser in making payment; the first saying that, after such default, the vendor might cancel with or without notice; the second, that "in case of default, and the vendor shall see fit to declare this contract null and void by reason thereof, such declaration may be made by notice from the vendor addressed to the purchaser directed to the post office at Gonor, Manitoba.

Held, that the vendor might elect to adopt one or other of such modes, that if he elected to cancel without giving notice he could not do so by a mere operation of his mind, but must do something by which he clearly gives the purchaser to understand that he decides to avoid the contract and that the relation of vendor and purchaser no longer exists between them, or he must do some act directly affecting the vendee in his position or interest, as, for example, a sale to another: *McCord* v. *Harper*, 26 U.C.C.P. 104; and on the other hand, if he adopts the mode of cancel-

lation by notice he is bound to do so in the manner provided and must conform strictly to the mode prescribed.

The proof of the mailing of the notice was conflicting and far from satisfactory. The plaintiff swore positively that he had never received any such notice, and there was no evidence to show that he had. The proof of the contents of the notice was by an impressed tissue paper copy and the name of the addressee was thereon written as Paul *Cynack*, whilst the plaintiff's name, as clearly written in the agreement, was *Czuack*, so that, assuming that the name on the envelope was spelled in the same way, the post master might easily have handed the letter to some other person.

Held, that notice of cancellation was not sufficiently proved, and that the agreement had not been effectively cancelled by the proceedings taken. Assuming that the plaintiff really understood the full meaning of the two clauses, he had a right to expect that the second mode would be adopted in case he made default and had reason to feel perfectly safe until he would receive a notice to pay or otherwise that the agreement would be cancelled.

Robinson, however, afterwards conveyed the property to the defendant Parker, who denied all knowledge of the plaintiff's position and rights with respect to it, and claimed to be a purchaser in good faith without notice. His conduct was, in the opinion of the judge, open to unfavourable inference or surmise, but there was no proof that he had actual notice of the plaintiff's rights or of his possession of the land or that he had any knowledge of the fraudulent schemes of Robinson. Fraud is not to be presumed on mere suspicion, but must be positively proved.

Held, that the plaintiff could not have specific performance against Parker, as the land was under the Real Property Act, and Parker was not bound to inquire as to the rights of any person in actual possession: Real Property Act, R.S.M. 1902, ss. 70, 74, 76.

The plaintiff was allowed to remove the house which he had erected on the land; but, if he elected to do so, he was required to pay Parker $100 as damages for cutting wood on it, for which Parker had counterclaimed. If plaintiff did not take away the house Parker to accept it in full of the damages.

Action dismissed as against Hough and Parker. Defendant Robinson ordered to pay plaintiff's costs, also those of his co-defendants, as he was found guilty of fraud.

In his statement of claim the plaintiff had asked only for specific performance of the agreement, but under the power conferred on the Court by section 38 (K) of the King's Bench Act and Rules 344 and 346 as to amendment of the pleadings if found necessary. The judge granted the plaintiff further relief against Robinson by ordering the latter to pay the plaintiff, by way of damages, what he had paid to Hough on account of the purchase money of the property with interest.

Haggart, K.C., and *Whitla*, for the plaintiff. *Aikins*, K.C., for Parker. *Robson*, for Robinson. *A. C. Ferguson*, for Hough.

Province of British Columbia

SUPREME COURT.

Duff, J.] IN RE VANCOUVER ENGINEERING WORKS. [May 17.

Alien Labour Act—Infraction—Advertising for workmen.

Case stated for the opinion of the court by way of appeal from the Police Magistrate of Vancouver. The information charged the company with an infraction of the Alien Labour Acts.

60 & 61 Vict. (D) c. 11, s. 1, reads as follows.

"From and after the passing of this Act, it shall be unlawful for any person, company, partnership, or corporation in any manner to prepay the transportation or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labor or service of any kind in Canada."

1 Edw. VII (D) c. 13, s. 4, an amending section, enacts, that "it shall be deemed a violation of this Act for any person, partnership, or corporation to assist or encourage the importation or immigration of any person who resides in or is a citizen of any foreign country to which this Act applies by promise of employment through advertisement printed or published in such foreign country, and any such person coming to this country in consequence of such advertisement shall be treated as coming under contract as contemplated by this Act, and the penalties by this Act imposed shall be applicable to such."

The accused caused to be inserted in a newspaper published in Seattle, U. S., the following advertisement;—"Wanted, first-class machinists. Apply Vancouver Engineering Works, Ltd., Vancouver, B.C."

The Police Magistrate dismissed the information. The question submitted for the opinion of the Court was—"Does the above advertisement contain a promise of employment within 1 Edw. VII. c. 13.

Held, that the advertisement did not contain a promise of employment, but was merely an invitation to apply for employment, and it did not help the prosecution that the legislation thus construed imposes no effective restraint upon the importation of foreign labor and that the result is alien to the spirit and design of the enactment.

J.E. Bird, for the prosecution. *C.B. Macneill*, for the defendants.

Book Reviews.

A Treatise of the Law of Eminent Domain in the United States, by JOHN LEWIS. Second edition. Vol. 1. Chicago, U.S., Callaghan & Co.; 1,555 pages. $12.00.

Although this second edition has already been before the public for some little time the subject is so important that a reference to it even at this late date is desirable. The first edition was published in 1888 and in that volume some 6,000 cases were referred to. In the present edition they count up to nearly 13,000. It is interesting to note the tremendous increase in litigation falling under the title of Eminent Domain, and that there are more decisions on the subject in the United States since the first edition than in all the previous history of that Country. The first edition did not refer to English or Canadian authorities. The present edition cites 245 from England and 108 from Canada. New York leads off with the enormous number of 1,728. Whilst a large number of the cases discussed are of interest only to American readers by reason of their being based on statutes which have no force in this country, there is nevertheless such a similarity in the circumstances of the Dominion and the United States that much light is shed upon many of our constitutional questions, such for example as—"What constitutes a taking?"—"Public use"—"Just compensation," etc. The marvellous multiplication of the means of transportation and communication, added to the many new public utilities which involve the taking and damaging of property, have brought in many new and strange questions, and renders the subject of this book one of great importance to all professional men.

As Mr. Lewis' book has been for many years a standard work it is scarcely necessary to criticise it. It may be said, however, that a reference to such a multitude of cases necessarily makes the work largely a digest of authority, but arranged in such a convenient and accessible manner as to give the reader a comprehensive view of the various matters discussed.

COURTS AND PRACTICE.

Horace Harvey of the City of Regina, N.W.T., Barrister-at-law, to be Puisne Judge of the Supreme Court of the Northwest Territories. Gazetted July 16th, 1904.

The Living Age : Boston, U.S.—This excellent publication, containing a collection of articles of interest appearing in the various reviews of the day, still continues to give much more than its comparatively small cost. The articles at present appearing are very timely and especially give a comprehensive view of the conditions of things in the far East. Added to these are discussions on a variety of topics of a literary and historical character. Fiction is not forgotten, and a novel called "Lychgate Hall" is just being commenced, which promises well.