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THE HON. CHARLES FITZPATRICK, K.C., CHIEF JUSTICE OF THE SUPREME COURT OF CANADA.

It is right and proper, and comes as no surprise, that a Minister of Justice so excellent as was Mr. Fitzpatrick, should be asked to fill the important position of Chief Justice of the highest Court of the Dominion. He goes there as the right man in the right place, with none to cavil at the appointment. Not merely is he the one chosen at the instance of the political party to which he belonged, but he goes there with the best wishes and esteem of his former opponents in the political arena.

Under his guidance and supervision we may well believe that matters which will come before the Supreme Court for adjudication will be despatched with the promptitude and vigour and with the intelligence and judgment which was characteristic of his work as Minister of Justice.

The statute book tells its own tale both of his industry and of his appreciation of the requirements of an expanding community, growing rapidly into a great nation, in connection with the all important subject of the administration of justice.

The Halls of Parliament will miss the prominent figure of perhaps its keenest and best debater, and one of its most useful members.

We have already given to our readers a portrait of the late Minister of Justice with a brief sketch of his career up to that period (35 C.L.J. 657). We congratulate the country as well as the new Chief Justice upon the appointment.

Sir Henry Elzear Taschereau, who has recently resigned his position as Chief Justice of the Supreme Court of Canada, has been on the Bench for some 35 years. During the last four years of this period he has presided in our highest Court, succeeding Sir Henry Strong. We are glad to record and to concur in

the following remarks of Hon. Mr. Justice Sedgewick on the opening of the Supreme Court last month:—

"At the close of the Court yesterday the Right Hon. Sir Elzear Taschereau waited on us, announcing his retirement as Chief Justice of this Court, and wishing us an affectionate good-bye. It seems to me fitting that this morning we should place on the records of the Court a statement of our appreciation of his services to the jurisprudence of Canada as it exists among the several Provinces to-day. Coming to us from the Province of Quebec, well versed in the Roman law, the civil law of France, and in the domestic law of his own Province, he was equally erudite in the English system which together with the French, forms the law of Canada. By reason of his accuracy, experience and ability he was able to bring into our consultations a trained mind which was of the greatest possible advantage to the Court in the decision of the various cases brought before it from different parts of the Dominion. His uniform courtesy alike to his colleagues and to the gentlemen practising at the Bar were greatly appreciated and will long be remembered. We officially part from him with the most profound regret, and trust that in his well-earned retirement he may enjoy many years of health and happiness.

THE NEW MINISTER OF JUSTICE.

When some months ago Mr. A. B. Aylesworth, K.C., at the urgent invitation of the Premier, entered the Dominion Cabinet as Postmaster-General it was anticipated that, in view of Mr. Aylesworth's distinguished career as a lawyer, he would succeed in a short time to the office of Minister of Justice. This has now happened upon the appointment of the Honourable Mr. Fitzpatrick to the Supreme Court Bench. There can be no question that the new Minister of Justice is pre-eminently fitted to be the head of the legal profession in the Dominion. For many years Mr. Aylesworth, by reason of his intellectual attainments, personal force and high character, has held a foremost place among the leaders of the Ontario Bar, which suffers a distinct

loss by his retirement from active practice. Mr. Aylesworth has always shewn in his work a broad grasp of principles, untiring industry and complete devotion to the matter in hand. The Dominion gains greatly by the accession to office of a man who possesses so many admirable qualities for the discharge of parliamentary and administrative duties, and who entertains high ideals of what the administration of justice should be.

The Honourable Mr. Aylesworth was born at Newburgh, Ontario, on 27th November, 1854, of United Empire Loyalist ancestry. He took the Arts course in the University of Toronto, graduating in 1874 with double first-class honours and the Prince's prize. Called to the Bar in 1878 he joined the law firm of Harrison, Osler & Moss—an office which during the past quarter of a century has given to the Ontario Bench many of its most eminent judges. Mr. Aylesworth came rapidly to the front as a counsel, and for years past he has appeared in most of the important Ontario cases and has also held many briefs from the other provinces in the Supreme Court and before the Judicial Committee of the Privy Council. In 1889 he was appointed a Queen's Counsel by the Ontario Government and subsequently the Dominion Government conferred the same honour. Mr. Aylesworth was twice offered a seat on the Supreme Court Bench. In 1903 Mr. Aylesworth became an international figure by his patriotic and independent stand as an arbitrator on the Alaska Boundary Commission. Mr. Aylesworth is one of the most active and useful Benchers of the Law Society of Upper Canada. He has sat continuously since 1891 and is at present Chairman of the Library Committee.

DAMAGES FOR MENTAL SUFFERING.

Three years ago (see 39 C.L.J. 503) the subject of damages for mental suffering came up for discussion in our columns based on an article in the *Central Law Journal* of St. Louis. That excellent periodical again returns to the charge in an article which we reproduce. With the views there expressed we entirely agree.

It was held recently by a Divisional Court in the Province of Ontario, in the case of *Geiger* v. *Grand Trunk Ry. Co.* (41 C.L.J. 841) that where a person suffers no visible bodily injuries, but complains only of a mental or nervous shock that there is no legal damage. The trial judge had held (*ib.* 654) that damages for nervous shock are not too remote where there has been direct physical impact through the negligence of the defendant. The case of *Victorian Railway Commissioners* v. *Coultas* (1888) 13 App. Cases 222, which was followed in the *Geiger case* was also cited in *Dulieu* v. *White* (1901) 2 K.B. 669, 37 C.L.J. 808; but Kennedy and Phillimore, JJ., there refused to adopt the conclusion arrived at in the *Victorian case*. Some United States authorities are also noted in 36 C.L.J..

The article referred to in our contemporary has especial reference to delayed telegraph messages and reads as follows:

The great number of instances in which telegraph messages are delayed without one particle of excuse makes the question one of great interest. It is true that the great weight of authority is against allowing damages for the mental suffering caused by such delays, on the ground that such an element is too uncertain for proper measurement. Yet the fact that such delays do cause in many people very great agony of mind is certain at least to those who have been prevented from reaching the sick beds and death beds of those who are dear to them. Here is a great wrong permitted to go unpunished because of some judicial opinion to the effect that the element is too uncertain to permit of measurement, and yet the law gives a jury a right to measure physical pain and suffering as an element of damage. We have a rule of law which is made to prevent wrongs where one party mixes his goods wrongfully with another's in such a way as to be unable to distinguish his from the other. The law will compel the party committing the wrong to undergo the uncertainty of the confusion brought about by his misconduct even to the extent of surrendering the whole even though his may have been the most and by reason of this aiding of the remedy against the wrong-doer the law is made effective to prevent wrongs.

The great telegraph companies of the country have grown

rich in the returns from the public which they serve; the service is a great and beneficial one, it is true, and deserves to be well paid, but the public has a right to demand the best service which may be rendered within reasonable limits. It is not unreasonable to demand that telegrams which announce the illness of near relatives or friends should be delivered with the greatest possible promptness and that a failure to do so should be met with a policy of the law which will tend to prevent the wrong of it. It is morally certain that in those States where the law recognizes the pain and suffering caused by such delays in question as an element of damages there are fewer delays than in those jurisdictions which do not. The law is a rule of civil conduct prescribed by the highest power of the State not only to command what is right but to prohibit what is wrong. Now it is a fair question to ask, and one worthy the serious consideration of every one, which of these jurisdictions is making it possible to best prevent a kind of a wrong which it is a burning shame to permit to go unpunished?

Why mental suffering may not be expected to follow certain wrongful acts which might give rise to them as certainly as that physicial pain should follow wrongful acts which result in bodily injury, is indeed difficult to understand when we consider how many uncertain elements are permitted to enter into the policy of the law in order to prevent wrongs. When parties enter into contracts which are to run a period of years, and one of them wrongfully refuses to be further bound by its terms, the conditions existing on the day of the breach are taken into consideration in order to estimate the profits for the future, which the injured party might have made by a faithful performance of it. There might be shewn to be many elements of uncertainty in the future of the contract, but the policy of the law to prevent wrongs leaves them out of consideration. It would seem in those cases which do not recognize the mental suffering which results from a wrongful delay in delivering a telegram to a mother, a husband or a father, or any one who ought to be informed and had a right to the prompt delivery, that the element of the law which is intended to prevent wrongs was left out of considera-

tion. It would naturally occur to any one that a husband or wife or mother might be greatly shocked to know that a wife, husband or child had been very ill for a day and that a telegram should have been delivered a day sooner, but for the negligence of the agents of the company.

In the recent case of *Hamrick* v. *Western Union Telegraph Co.* (N. Car.), 52 S. E. Rep. 252, the Court reiterated the doctrine previously laid down in that State, that in such cases damages may be recovered. It is also worthy of note in this regard that the Supreme Court of North Carolina, has one of the strongest supreme benches of the country the opinions of which are most worthy of confidence and respect. Alabama, Texas and Kentucky are in line with North Carolina, and we predict that this doctrine will become the law generally. Any one who has witnessed the agony of a mother resulting from a delay in a telegram informing her of the serious illness of a child at a long distance from her, would hardly fail to see the wisdom of the policy of the law which regards such suffering as a proper element of damages, for which there should be a recovery. There is good reason why the mental suffering in the case of delayed telegrams, at least, should be compensated in damages separate and apart from the proof of other injuries for which damages might be allowed arising out of the same matter.

THE BRITISH CRIMINAL APPEAL BILL.

Among those entitled to speak about the merits of the Criminal Appeal Bill there is, on the whole, a remarkable consensus of opinion. It is admitted by most of our correspondents in the many letters which we have received on the subject that the present system of appeal, or the absence of it, is unsatisfactory. Something more is needed than the recognition of a right to have a special case stated. Public opinion has changed much on the subject. It is not convinced by the arguments used by some of our correspondents against assimilating in any way civil and criminal procedure. The public conscience cannot reconcile itself to the existence of the present facilities for appeal

when property, even of a trifling value, is at stake, and the absence of them when life or liberty is the issue. The Lord Chancellor's Bill gives expression to a notable change in public opinion. If it is unlike past measures bearing the same name, it is in part because people do not think quite as they did about these matters. But to correct the present system does not necessarily mean all that the Government Bill proposes. To an unrestricted right of appeal which it would permit both as to law and facts there are solid objections. One is very practical, indicated in the report of some seventy magistrates of the County of London. In normal years about 9,000 to 10,000 persons are convicted at assizes and quarter sessions. Assuming that even one-fourth of those convicted appealed, there would be about 2,000 to 2,500 convictions to be examined. A Court which "reheard" cases could not, on an average, deal with more than two a day—an average probably not put too low in view of the fact that new evidence may be called, and that cases in which "there is money" would generally be argued at inordinate length. This would mean about a thousand sittings of three judges. Taking the judicial year at 200 days, one Court would be engaged for about five years in disposing of a single year's appeals. This would be the paralysis of our judicial system; a result to be avoided only by very greatly increasing the number of judges, or withdrawing the majority of them from civil business.

To some extent the full effect of this evil might be averted by transmitting a large part of the civil and criminal work of the judges of the High Court to the County Court judges. Such transmission would leave untouched another and a greater evil. Would the verdict of a jury in a criminal trial be under the proposed system as trustworthy as it now is? Would they decide with the full sense of responsibility which is now upon them if they knew that their verdict might be corrected? Is it certain that this innovation, proposed in the interests of mercy, would not in practice increase convictions? Might no juries who now say "We have a doubt; we dare not bring in a verdict of guilty, which is irreversible," be disposed to say "Some one has

committed a heinous crime; the evidence is strong against the prisoner; we will convict, and if we are mistaken the Court of Appeal will set us right?'' Is there any certainty that in seeking to correct an evil which is rare we should not introduce one which would be common, and that criminal appeals, becoming frequent, would not gradually deteriorate the verdicts of juries? We say nothing as to other objections.

To the power of revising sentences which the bill proposes to confer there are serious objections. . . . A Court of Appeal powerless to revise sentences would lose much of its value. But we contemplate with apprehension the results of such a system if, as is proposed by the bill, the Court is not competent to increase as well as diminish sentences. The convicted offender does by no means now always get his deserts. In these days, at all events, sentences are sometimes over-lenient. To prevent almost universal appeals convicted prisoners must know that they may fare worse above.—*The Times.*

Senator Ferguson has again introduced a bill with reference to the extra judicial employment of judges. This provides that judges appointed to act under a commission issued under the authority of a statute, or under any power possessed by the Governor-in-Council, or by a Lieutenant-Governor-in-Council, shall not receive any remuneration in respect of services under such commission, other than salaries payable by law to him as a judge, except such necessary travelling expenses as are actually incurred. Senator Ferguson's previous bill (introduced in 1903) was to prevent a judge acting on a commission such as above referred to. This present bill is a modified provision, and will meet some of the objections to the present practice. We have already expressed our views on this subject.

REVIEW OF CURRENT ENGLISH CASES.

TRADE UNION—OFFICER WILFULLY WITHHOLDING MONEY OF UNION—ABSENCE OF FRAUD—PENALTY—TRADES UNION ACT, 1871 (34 & 35 VICT. C. 31), SS. 9, 12—(R.S.C. C. 131, S. 12).

Madden v. *Rhodes* (1906) 1 K.B. 534 was a proceeding before magistrates against a trade union official to recover a penalty for wilfully withholding the money of the union. The applicant applied on behalf of the Amalgamated Society of Tailors, a society registered as a trade union, and the defendants were the trustees of the West End branch of that union. A dispute had arisen between the executive council of the union (which was the general committee of management of the union) and the local branch in respect to the duties and appointment of an officer (not mentioned in the rules) referred to as the out-collector of the West End branch, and the local branch having refused to comply with a resolution of the executive council the latter demanded the resignation of the branch officers, and authorized the appellant to compel the trustees of that branch to deliver up all moneys, etc. The West End branch replied with a resolution that their officials had done nothing to justify the action of the executive council and demanded the withdrawal of the adverse resolution of the council; and failing that, authorized their officers to withdraw the branch from the union. Upon a case stated by the magistrate who dismissed the application the Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.,) agreed with the magistrate, that, no fraud or dishonesty being charged or shewn, the defendants were not liable to the penalty imposed by the Trades Union Act, 1871 (34 & 35 Vict. c. 31), s. 12, (R.S.C. c. 131, s. 12), the decision of *Barrett* v. *Markham*, L.R. 7 C.P. 405, being applicable.

PAUPER—POOR LAW GUARDIANS—INMATE OF WORKHOUSE—LIABILITY OF GUARDIANS TO PAUPER INMATE OF WORKHOUSE FOR TORT—MASTER AND SERVANT—COMMON EMPLOYMENT.

Tozeland v. *West Ham Union* (1906) 1 K.B. 538 was an action of tort brought by a pauper inmate of a workhouse against the guardians of the poor to recover damages for tort, in the following circumstances. The defendants were carrying out an enlargement of electric light installation in the workhouse

of which the plaintiff was an inmate, by means of their own servants, the work being done under the supervision of their engineer, a permanent official of the workhouse. The plaintiff was ordered by the labor master to assist, and was put to work on a staging, which owing to its improper and negligent construction gave way causing the plaintiff the injury complained of. The defendants contended that the plaintiff was a servant of the defendant, and that the doctrine of common employment applied and relieved them from liability. The action was tried in the County Court and the plaintiff recovered judgment for £100, and on appeal the judgment was upheld by the Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.). The fact that the plaintiff was acting under compulsion in assisting in the work in the opinion of the Court prevented the application of the doctrine of common employment. In order that that doctrine may apply it is necessary that there should be a voluntary assumption of the risks of the employment; but while conceding the difficulty in applying to public bodies who act by agents, the ordinary rule of law as to the liability of a principal for the acts of his agents, which in some cases is held to be applicable and in others not; yet the Court concludes that the result of the cases is that if a public body is doing by their agents a work connected with their ordinary ministerial or administrative duties, that body will be liable for injury resulting from the commission of a negligent act on the part of a subordinate, while on the other hand it may be relieved from liability from injury caused by a subordinate's neglect or omission to comply with his instructions, he being a proper person for the post he fills. This case was held to fall within the former class of cases.

COUNTY COURT JUDGE—APPOINTMENT OF TWO DEPUTIES.

In *King* v. *Lloyd* (1906) 1 K.B. 552 the applicant was not content with the decision of the Divisional Court (1906) 1 K.B. 22 (noted ante, p. 181), but carried the case to the Court of Appeal (Williams, Stirling and Moulton, L.JJ.). By the County Courts Act the judge may appoint a deputy and the question was whether he could under this power appoint two to act concurrently. The Divisional Court said "no," and the Court of Appeal agree, Moulton, L.J., however, *dubitante*.

PAYMENT INTO COURT WITHOUT DENIAL OF LIABILITY—LIBEL—DEATH OF DEFENDANT—ABATEMENT OF ACTION—PAYMENT OUT OF MONEY PAID IN SATISFACTION—RULES 255, 259—(ONT. RULES 419, 420, 423).

In *Brown* v. *Feeney* (1906) 1 K.B. 563, which was an action for libel, the defendant paid money into Court in satisfaction of the plaintiffs' claim without denying liability. The plaintiff did not take the money out of Court, but proceeded with the action, and before trial the defendant died whereby the action abated. The defendant's executors now applied for payment of the money in Court to them. Walton, J., refused the application, and the Court of Appeal (Williams, Stirling and Moulton, L.JJ.,) dismissed the appeal from his order, and ordered the money to be paid to the plaintiff.

LEGITIMACY DECLARATION ACT, 1858 (21 & 22 VICT. C. 93)—(R.S.O. C. 135, S. 33)—FOREIGN DOMICIL—DIVORCE GRANTED IN STATE NOT PLACE OF DOMICIL—RECOGNITION OF VALIDITY OF DIVORCE BY LAW OF DOMICIL—ENGLISH LAW.

In *Armitage* v. *Attorney-General* (1906) P. 135, Barnes, P.P.D., has determined that where a divorce has been granted by a Court in a State which is not the place of domicil of the husband, but which divorce is recognized as valid by the law of the State of the husband's domicil, such a divorce though it dissolves a marriage solemnized in England will also be recognized as valid by the Courts of England. In this case the divorced husband was an American citizen having his domicil in the State of New York, and was married in England to an English woman. The husband never changed his domicil. The wife went to South Dakota and took proceedings for divorce. The husband was notified and appeared and defended the suit and made a cross-claim, and a decree of divorce was pronounced. It appeared, by expert evidence, that a divorce granted under such circumstances would be recognized as valid by the Courts in the State of New York. Both parties had married again, but the husband desiring to get rid of his second wife had instituted proceedings of nullity in the English Divorce Court on the ground that the divorce was invalid; and the divorced wife then instituted proceedings under the Legitimacy Declaration Act (see R.S.O. c. 135, s. 33), to have it declared that her second marriage was valid, and both cases were disposed of together with the result above mentioned.

ADMIRALTY—SALVAGE—DERELICT—AWARD TO SALVORS OF TOTAL PROCEEDS.

The Louisa (1906) P. 145, is reported no doubt because of the somewhat unusual character of the case, as the learned reporter points out in a note. The action was for salvage of a derelict vessel, which after deducting marshall's charges and dock dues realized only £37 2s. 3d., and this sum was all awarded by Deane, J. to the salvors.

COMPANY—TRANSFER OF SHARES—DUTY OF TRANSFEROR—TRANSFEROR IMPEDING REGISTRATION OF TRANSFEREE AS OWNER—DEROGATION FROM GRANT—DAMAGES.

Hooper v. *Herts* (1906) 1 Ch. 549 was in effect an action to recover damages against the transferor of shares for having impeded the registration of the transferee of the shares as owner, by reason whereof the transferee suffered damage owing to the shares having depreciated in value. The facts were as follows. Whalton was the owner of the shares and he executed a transfer in blank and handed it together with the certificate of the shares to one Herts with verbal authority to raise money thereon for his own purposes. Herts applied to the plaintiff for a loan of money on the shares, and the plaintiff, being unable to find the money himself, applied to a bank to lend him the money upon the security of the shares. Herts authorized the transaction to be carried out, and the plaintiff with his consent deducted from the loan a debt due by Herts to him and gave him the balance, and Herts then agreed to repay the loan in two weeks and in default that the shares should be transferred to the bank. He failed to repay the money, and the transfer was accordingly filled up with the bank's name as transferees and lodged with the certificate with the company for registration on 25th March, 1904. Whalton on being informed of its deposit for that pupose on 28th March, 1904, notified the company not to register the transfer. After the 25th March, 1904. the value of the shares were depreciated. The action was commenced on 30th April, 1904, but the plaintiff did not pay off the bank until August, 1904. Kekewich, J., who tried the action, was of opinion that the defendant was liable for damages occasioned by his obstructing the registration of the transfer, but he considered that the plaintiff had sustained no damages because the depreciation in the value of the shares had all taken place before

August, 1904, and therefore the plaintiff had suffered no damage. The Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.,) however were of the opinion that even before paying off the bank the plaintiff was beneficially interested in the realization of the shares and that he was entitled to any damage which he might prove to have resulted from the hindrance in the realization of the shares caused by the plaintiff's action, and a reference was ordered to ascertain the amount of such damages.

WILL—GIFT TO A CLASS WHO SHOULD ATTAIN TWENTY-ONE—CONTINGENT OR VESTED—GIFT OVER ON "DEATH WITHOUT LEAVING ANY CHILDREN"—CHILD SURVIVING AND DYING UNDER TWENTY-ONE.

In re Edwards, Jones v. *Jones* (1906) 1 Ch. 570 the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.,) reversed the judgment of Buckley, J., on the construction of a will. By the will in question the testatrix gave all her real and personal estate to trustees in trust for her children who attained 21 or married, with a gift over to other persons in the event of her death without leaving any children surviving her. She left a son who died in infancy. The question was whether the gift over took effect. Buckley, J., thought the deceased child took a vested estate and that the gift over took effect, but the Court of Appeal was unanimous that the child took only a estate contingent on his attaining 21, or marrying, and that the testatrix not having died without leaving a child surviving her the gift over did not take effect, and that there was consequently an intestacy.

MARRIAGE SETTLEMENT—COVENANT TO SETTLE WIFE'S AFTER ACQUIRED PROPERTY—ESTATE TAIL.

In re Dunsany, Nott v. *Dunsany* (1906) 1 Ch. 578, a somewhat curious question arose on the construction of a covenant in a marriage settlement whereby the wife bound herself to settle after acquired property. During the coverture the wife acquired an estate tail and it was claimed that she was bound to settle it. Kekewich, J., considered *Hilbers* v. *Parkinson*, 25 Ch. D. 100, was a direct authority that such an estate was not within the covenant, because she was not by the covenant bound to

execute a disentailing deed so as to vest the fee simple in the trustees and she could not otherwise convey the estate without destroying the entail, but it was contended that that case had been erroneously decided and the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.,) were asked to reverse it, but that Court considered the case correct and dismissed the appeal and held that an estate tail is a whole, and the wife was not bound to grant a life estate out of it.

WILL—CONSTRUCTION—"BORN IN MY LIFETIME"—CHILD EN VENTR.' SA MÈRE.

In *Villar v. Gilbey* (1906) 1 Ch. 583, the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.,) have been unable to agree with the decision of Eady, J., (1905) 2 Ch. 301 (noted ante, vol. 41, p. 835). By the will in question the testator devised real estate in strict settlement to the first and other sons of his brother successively for life, with remainder to their first and other sons in tail with remainder to the third and other sons of the brother successively in tail. And he declared his intention to be that any third or other son born in his (testator's) lifetime should not take a larger estate than an estate for life, with remainder to his issue in tail. At the date of the will the brother had two sons alive, and the brother had also a third son born three weeks after the testator's death. The first and second sons having died without issue, the question arose what estate the third son took. Eady, J., thought that the estate tail of the third son was not cut down to a life estate, because he was not born in the testator's lifetime; but the Court of Appeal hold that in such a case no distinction is, on the authorities, to be drawn between a child actually born in the lifetime of the testator and a child then *en ventre sa mère*, and therefore the third son took only an estate for his life with remainder to his issue in tail.

VENDOR AND PURCHASER—CONDITIONS OF SALE—CONDITION ENABLING VENDOR TO RESCIND—ARBITRARY EXERCISE BY VENDOR OF POWER TO RESCIND—SPECIFIC PERFORMANCE.

Quinion v. *Horne* (1906) 1 Ch. 596 was an action for the specific performance of a contract for the sale of land. The land had been sold to the plaintiff by the defendant subject to

a condition that if the purchaser should make any objection or requisition which the vendor should be "unwilling to remove or comply with" the vendor might annul the sale. The abstract furnished by the vendor shewed that the land had been devised in 1858 by one, Joseph Sexton, upon trust for his niece, M. A. S. Knevett, a spinster, for life and after her death upon trust to sell the property and divide the proceeds among her children, but if she died without children the property was to be conveyed to her two brothers as tenants in common. In answer to requisitions of the purchaser the vendor gave the date and place of marriage of M. A. S. Knevett and the names, but not the addresses of her children. The purchaser pressed for the date of the birth of any one child of M. A. S. Knevett living at her death in order to obtain a certificate of birth to prove that the trust for sale had arisen. Although the solicitor for the vendor knew the place of residence of one of the children, and also that certain solicitors were acting for the other five children he refused to give the information and declared the contract annulled. The purchaser then brought the present action for specific performance, and Farwell, J., held that the action of the vendor was artitrary and unreasonable, and notwithstanding the condition of sale above referred to he was not entitled to rescind the contract, and specific performance was accordingly decreed.

PATENT—INFRINGEMENT—LICENSE —CONDITION — PURCHASER OF PATENTED ARTICLE WITHOUT NOTICE OF ANY RESTRICTION AS TO USER.

Badische Anlin und Soda Fabrik v. *Isler* (1906) 1 Ch. 605 was an action to restrain an alleged infringement of a patent. The defendant had purchased the patented article from a purchaser thereof from the plaintiffs' licensees. The plaintiffs claimed that the sale to the licensees was made subject to certain restrictions as to the sale which would prevent the sale being made to the defendant, but Buckley, J., held that the plaintiffs had failed to shew that such restrictive conditions in fact existed or that the defendant was bound by them.

WILL—CONSTRUCTION—DISCRETIONARY TRUST FOR MAINTENANCE —REMOTENESS.

In re Blew, Blew v. *Gunner* (1906) 1 Ch. 624. Warrington, J., was called on to determine the construction of a will whereby

the testator devised and bequeathed certain real and personal property to trustees upon trust to apply the income thereof in their absolute discretion, for the support of his "son William and his wife and children, or any of them," or to accumulate the same or any part thereof at their like discretion for the benefit of his children who should become entitled to the corpus of the property under the trust thereinafter contained; and subject to such discretionary power he directed his trustees to pay the income to his son during his life and after his decease to his widow for her life, and after the death of the survivor to hold the corpus and income in trust for the children of his son who should attain twenty-one. The son William had died leaving a widow and one child who had attained twenty-one. The trustees applied on originating summons to get the opinion of the Court as to the effect of the clause for maintenance, and Warrington, J., held that it was limited to the lifetime of the son William and therefore that the widow and son now took absolutely.

BILL OF EXCHANGE—RECEIVABLE BILL—"BOOK DEBT"—PROPERTY IN BILL—BILL DELIVERED TO BANKER TO BE DISCOUNTED.

In *Dawson* v. *Isle* (1906) 1 Ch. 633 the question for decision was whether a bill of exchange which had been entered in the books of a company the holders thereof as a bill receivable, but which had been subsequently handed to a bank for discount, but which had not in fact been discounted, was a "book debt." The case arose under an agreement for the sale by the plaintiff to the defendant of certain shares in the company the price of which was to be fixed by certain special provisions inter alia, a clause providing "that the amount of the book debts due to the company (less the discounts) such debts to be taken as good at the amounts standing in the company's books." Warrington, J., following *In re Stevens* (1888), W.N. 110, 116, held that the bill in question was a book debt, inasmuch as the bill was still the property of the company although it was in the hands of their bankers.

COMPANY—SHARES—ASSIGNMENT OF SHARES—EQUITABLE TITLE—REGISTRATION OF TRANSFER—CONFLICTING EQUITIES—PRIORITY—POSSESSION OF CERTIFICATE OF SHARES.

In *Peat* v. *Clayton* (1906) 1 Ch. 659 the plaintiffs were assignees for creditors of all the property of one Clayton. Clay-

ton was the owner of shares in a limited company, and the plaintiffs applied to Clayton for the delivery up of the certificates of the shares, but were unable to obtain them. Clayton through his brokers subsequently sold the shares on the stock exchange, and received the proceeds, and executed a transfer of the shares to the purchaser. The purchaser applied to be registered as owner, but the company refused registration and the brokers furnished the purchaser with other shares. The plaintiffs then brought an action against the debtor and the brokers for a declaration that they were equitably entitled to the shares and to be registered as owners. Joyce, J., held that any lien the brokers might have on the shares was only upon Clayton's interest therein, which was subject to the plaintiff's rights, and that the plaintiff not having been guilty of any negligence to deprive them of their equity were entitled to be registered as the owners of the shares.

WILL—LEGACY TO CREDITOR OF LARGER AMOUNT THAN HIS DEBT—SATISFACTION OF DEBT—CREDITOR APPOINTED EXECUTRIX.

In re Rattenberry, Ray v. *Grant* (1906) 1 Ch. 667. A testatrix gave to her sister a legacy of £400 and appointed her executrix. As the time of the death of the testatrix she owed her sister £150, which carried interest and on which interest had been paid up to her death. Eady, J., held that neither the fact that the legacy was not payable until a year after the death, nor the appointment of the sister as executrix took the case out of the general rule, and the legacy was a satisfaction of the debt.

HUSBAND AND WIFE—PRINCIPAL AND AGENT—CONTRACT BY WIFE FOR NECESSARIES—GOODS SUPPLIED ON ORDER OF MARRIED WOMAN—CONTRACT BY WIFE "OTHERWISE THAN AS AGENT"—NON-DISCLOSURE OF AGENCY—MARRIED WOMAN'S PROPERTY ACT, 1893, c. 63, s. 1 (R.S.O. c. 163, s. 4)—RULE 868—(ONT. RULES 615, 817.

Paquin v. *Beauclerk* (1906) A.C. 148 is an important contribution to Married Women's Property Law. It can hardly be said to be entirely satisfactory inasmuch as the House of Lords were equally divided. The facts were very simple, the defendant a married woman living with her husband and with his knowledge and concurrence opened an account with the plaintiffs for

millinery. The husband from time to time supplied his wife with money for paying the plaintiffs' accounts, but ultimately he became insolvent and absconded. The defendant was described as "Mrs." but the plaintiffs did not make any inquiry as to whether she in fact had a husband, and the defendant did not inform them that she was acting as his agent or pledging his credit. The goods furnished were from time to time charged to the defendant, and such of them as were paid for, were paid for by cheques signed by the defendant. The judge who tried the action gave judgment for the plaintiffs. The Court of Appeal (Collins, M.R. and Mathew and Cozens-Hardy, L.JJ.,) reversed the judgment on the ground that the defendant in fact acted as agent for her husband and the proper inference from the evidence was that the plaintiffs knew she was so acting, and that consequently her husband alone was liable. In the House of Lords, Lord Loreburn, L.C., and Lord Macnaghten, affirmed the judgment of the Court of Appeal, on the ground that the defendant in fact was acting as agent for her husband and it was immaterial whether the plaintiff knew she was so acting or not, and as the Act of 1893 (R.S.O. c. 163, s. 4), only makes a married woman liable where she contracts "otherwise than as agent," she was not liable. Lords Robertson and Atkinson on the other hand thought that the ordinary rule applicable where an agent acts for an indisclosed principal applied, and that the plaintiffs were entitled to treat defendant as the principal debtor. All of their lordships were of opinion that the facts were sufficiently before the Court to entitle the appellate Court to direct judgment under Rule 868 (see Ont. Rules 615, 817), without ordering a new trial, but it is rather a singular fact that two of their lordships concluded that the evidence conclusively established that the defendant was acting as agent for her husband, and the other two, that it conclusively established that she was acting as principal.

FATAL ACCIDENT—CONTRACT THAT DECEASED SHALL HAVE NO CLAIM—QUEBEC CODE, ART. 1056—(R.S.O. c. 166).

Miller v. *Grand Trunk Ry.* (1906) A.C. 187, though an appeal in a Quebec case, deserves attention because it practically overrules the decision of the Supreme Court of Canada in *Reg.* v. *Grenier*, 30 S.C.R. 42. The action was brought under Art. 1056 of the Civil Code of Quebec, which provides that "in all cases where the person injured by the commission of an offence,

or a quasi offence, dies in consequence without having claimed an indemnity or satisfaction his consort and his ascendant and descendant relatives have a right, but only within a year after his death, to recover from the person who committed the offence, or quasi offence, or his representatives, all damages occasioned by such death." Strong, C.J., in *Reg.* v. *Grenier* thought that this provision of the code was in effect a mere reproduction of Lord Campbell's Act (R.S.O. c. 166), and that the decisions under that Act were applicable to cases under this section of the code. The Judicial Committee (Lords Macnaghten and Davey and Sir Ford North and Sir Arthur Wilson) however have come to the conclusion that there is an essential difference between this article of the code and Lord Campbell's Act, and that under the code a separate and independent cause of action is given to the widow and ascendant and descendant relatives of the deceased, whereas under Lord Campbell's Act the right of action is given to the representatives of the deceased. Their lordships also held that a contract by the deceased with the defendants releasing the defendants from liability in consideration of their being contributors to a sick benefit fund in which the deceased was entitled to participate was not an "indemnity or satisfaction" within the meaning of the code for the accident which occasioned his death. Such indemnity must be something real and tangible.

COMPANY—BY-LAW—CONTRACT—INSUFFICIENT QUORUM — PURCHASE—STATUTORY POWERS.

Montreal Light & Power Co. v. *Robert* (1906) A.C. 196 was also an appeal in a Quebec case in which two points are determined by the Judicial Committee (Lords Macnaghten and Davey, and Sir Ford North and Sir Arthur Wilson). First, that where a company is empowered by statute to acquire and hold for the purpose of its business real estate not exceeding a specified sum in yearly value, the company acting bona fide is the sole judge of what is required for that purpose, and second, that where a company enter into a contract for the purchase of land and furnish the vendor with a copy of the resolution of the board of directors authorizing the purchase, on the faith of which the contract is entered into, the company cannot afterwards set up that the transaction was ultra vires on the ground that the resolution was passed by an insufficient quorum.

B.N.A. Act, 1867, ss. 91, 92, 108—Harbour—Jurisdiction of Dominion Parliament to legislate—Provincial Crown property forming part of harbour—Provincial foreshore.

Attorney-General of B.C. v. *Canadian Pacific Ry.* (1906) A.C. 204, was an appeal from the Supreme Court of British Columbia. The question in issue was the validity of s. 18a of the Dominion Act 44 Viet. c. 1 (the defendants' Act of incorporation) which purported to grant certain powers of expropriation to the defendant company over certain provincial Crown lands being part of the foreshore. The Dominion Government in pursuance of that section had granted the land in question to the company. The Provincial Court had held that the statute and the grant made in pursuance thereof were intra vires of the Dominion Government, the land in question forming part of a public harbour and as such within the control of the Dominion Government under ss. 91, 92, and 108 of the B.N.A. Act, and the Judicial Committee have affirmed that decision. Their lordships also hold that the terms of the special Act override the provisions of the general Railway Act as to closing streets and that the general Act applies only so far as it is not inconsistent with the special Act.

Ship—Invalid mortgage—Registration of invalid mortgage of ship—Rectification of ship's register.

Brond v. *Broomhall* (1906) 1 K.B. 571 was an action to rectify a ship's register by expunging therefrom an alleged invalid mortgage, and, considering the vast shipping interests of Great Britain, it must strike most lawyers as a somewhat singular circumstance how extremely few cases regarding the transfer of ships ever come before the Courts, a fact which seems to speak volumes in favour of the system of transfer of such property, a system, we may remark, on which the Torrens system of land tranfer is based. In the present case the plaintiff had signed a blank form of mortgage and handed it to the defendant who, in fraud of the plaintiff, had filled it up as a mortgage to himself to secure a sum which was not in fact owed to him by the plaintiff. Phillimore, J., held that the Court had inherent jurisdiction in such a case to cancel the register, and ordered the mortgage in question to be expunged.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [May 1.

TORONTO RAILWAY COMPANY *v.* CITY OF TORONTO.

Contract—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract—Abandonment of monopoly.

Except where otherwise specially provided in the agreement between the Toronto Railway Company and the City of Toronto set forth in the schedules to 55 Vict. c. 9 (1892), the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 O.L.R. 657) reversed.

The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines and the service, time-tables and routes thereon. Judgment appealed from affirmed.

As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heating. Judgment appealed from reserved. Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it ceases to have any right of action against the city for subsequent grants of the privileges to others, the right of making such grants accrues, ipso facto, to the city but is not the only remedy which the city is entitled to invoke. Judgment appealed from affirmed.

The cars started out before midnight as day-cars may be re-

quired by the city to complete their routes so connected, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight eo instanti, their character would be changed to night-cars and all passengers entering them after that hour could be obliged to pay night fares.

Nesbitt, K.C., and *Laidlaw*, K.C., for appellants. *Aylesworth*, K.C., and *Fullerton*, K.C., for respondent.

N.B.] [May 8.

CUSHING SULPHITE FIBRE CO. *v.* CUSHING.

Appeal—Winding-up Act—Amount in controversy.

In proceedings under the Winding-up Act an appeal lies to the Supreme Court of Canada only when the amount involved exceeds $2,000.

Held, that an order for winding up a company does not involve any amount and no appeal lies from the judgment of a Provincial Court refusing to set it aside.

Appeal quashed without costs.

Powell, K.C., and *Hanington*, K.C., for appellants. *Pugsley*, K.C., *Hazen*, K.C., *Currey*, K.C., and *Ewing* for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] E. *v.* F. [April 23.

Seduction—Daughter's evidence—Rape.

On an appeal from a judgment of a Divisional Court reported 10 O.L.R. 489.

Held (affirming the judgment), that the case was one to be submitted to a jury to say whether upon the whole evidence they could find that the defendant seduced the girl.

Per MOSS, C.J.O., MACLAREN, J.A., and CLUTE, J.—If the evidence should establish a case of rape and disprove a connection yielded to in the end, though commenced with violence and resisted for some time, in fine a case of seduction, the plaintiff's right of action could only rest upon his daughter being his servant, which was not this case, and the provisions of R.S.O. 1897, c. 69, ss. 1 and 2, do not apply.

Per GARROW, J.A.—The action will lie although trespass vi et armis might have been sustained. It would be no defence that the crime was rape not seduction.

Middleton, for appeal. *T. J. Blain*, contra.

HIGH COURT OF JUSTICE.

Divisional Court.] GIGNEC *v* CITY OF TORONTO. [April 30.

Municipal law—Highway—Repair—Notice.

Sources of recurring and repeated danger on a street are to be watched and guarded against by a municipality.

Where planks had been laid on a sidewalk fastened at both ends with iron straps to keep them together, which straps were raised from time to time by teams and waggons passing over leaving a space between the straps and the planks into which a passer-by put her foot and was thrown to the ground and injured.

Held, that when the normal condition of a sidewalk is disturbed it is the primary duty of a municipality to see that in its altered state it is kept in proper repair, and in a busy and much frequented place in excellent repair, and that when the source of danger has existed in a crowded city street for two weeks or less, notice of the want of repair and dangerous condition will be attributed to the authorities. In this case the corporation was liable notwithstanding there was evidence of repair by nailing down the straps when discovered to be loose.

Judgment of Britton, J., affirmed.

Fullerton, K.C., and *MacKelcan*, for the appeal. *Godfrey*, contra. *Rose*, for third party.

Cartwright—Master.] [May 7.

LEFURGEY *v.* GREAT WEST LAND CO.

Discovery—By defendant resident out of Ontario—Where examinable.

The provision of R.S.O. 1897, c. 73, s. 16(4) seems to contemplate only the attendance of witnesses at a trial and is not applicable to the examination of a party for discovery merely on an application under Con. Rule 477.

Held, that a defendant (who is in a very different position from a plaintiff) resident in the Province of Quebec could not be compelled to attend for examination for discovery within the Province of Ontario.

Meldrum v. *Laidlaw*, 12 Dec. 1902 (not reported), followed. *Smith* v. *Babcock* (1881), 9 P.R. 97 not followed.

G. B. Strathy, for the motion. *J. E. Jones*, contra.

This decision was affirmed by Meredith, C.J.C.P.

Teetzel, J.] IN RE MOODY ESTATE. [May 19.

Will—Specific devise—Residuary devise—Bequest of personal estate—Provision for payment of debts and funeral and testamentary expenses "out of my estate"—Incidence of debts, etc.

A testator bequeathed all his personal estate to his son to whom he also specifically devised a farm, and he devised the residue of his real estate to his executors upon certain trusts. He directed that the debts, funeral and testamentary expenses should be paid "out of my estate."

Held, that the whole personal estate was primarily chargeable with the payment of debts, funeral, and testamentary expenses, and that the balance remaining unsatisfied should be borne by all the real estate pro rata.

Section 7 of the Devolution of Estates Act provides that: "The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto)

be applicable ratably according to the respective values to the payment of his debts."

Held, that this section does not apply where there is not both real and personal property comprised in the residuary gift; and that, therefore, even if the bequest in the above will, embracing as it did all the testator's personal property, was in its nature residuary, the section did not apply to it.

Graham, Heggie and *Harcourt*, for various parties.

Clute, J.—Trial.] [May 19.

WAMPOLE *v.* KARN CO.

Contract—Sale of goods—Agreement as to prices on re-sale—Illegal combination or conspiracy unduly to enhance prices and lessen competition—Refusal to enforce contract—Criminal Code, ss. 516, 520.

The plaintiffs, who are manufacturing chemists and sole owners of certain proprietary medicines, brought this action for damages for and an injunction to restrain the breach of two contracts entered into between themselves and the defendants, in one of which the defendants covenanted not to sell wholesale any of the plaintiffs' preparations below the price therein mentioned, and in the other not to sell the same to any retailer except at the prices therein mentioned, and then only when such retailer had signed an agreement with the plaintiffs.

Held, that the defendants' agreements were a breach of ss. 516 and 520, of the Criminal Code, inasmuch as they not only affected, but entirely destroyed competition in the articles referred to, and affected the entire trade in such articles. *Rex* v. *Elliott*, 9 O.L.R. 648, specially referred to.

Frost, for plaintiffs. *Godfrey*, for defendants.

Mulock, C.J., Britton, J., Mabee, J.] [May 26.

PURCELL *v.* TULLY.

Deed—Construction—Life estate—Remainder in fee—Grant of land — Habendum — Repugnancy — Remainderman not named—Description of, as children of life tenant—Sufficiency.

A grantor by deed granted to the grantee "for and during the term of his natural life the lands and premises hereinafter

mentioned and upon his death unto those of his children who shall survive him or shall have died before him, leaving lineal descendants surviving at his death, their heirs and assigns forever in equal shares in fee simple as tenants in common: the said estate granted to the children (of the grantee) to be subject however to the support and maintenance off the said lands hereinafter mentioned of the wife (of the grantee) during such time as she shall remain widow (of the grantee)." The deed then went on "to have and to hold unto (the grantee) his heirs and assigns to and for his and their sole and only use forever."

Held, that the grantee took only a life estate, his children having the remainder in fee simple.

The rule in Shelley's case did not apply, for if it was made to, there would be no estate in the children charged with the support and maintenance of the widow. The intent was clear that the grantee should only take a life estate: and the habendum being repugnant to the grant was void.

Maclennan, K.C., for plaintiff. *R. Smith*, for adult defendants. *M. C. Cameron*, for infants.

Meredith, C.J.C.P., Maclaren, J.A., Teetzel, J.] [May 30.

BANK OF OTTAWA *v.* HARTY.

Banks and banking—Cheque payable to order—Forged endorsement by person of same name—Collection by third party through his bank—Payment over liability to refund.

The defendant McE., having a cheque payable to his order of which he claimed to be the owner, endorsed and handed it to the defendant H., who had done business for him, to collect and pay over to him. H., believing McE. to be such owner and entitled to receive the money, handed it to the plaintiffs to be collected, telling their manager that he saw McE. endorse it and that he knew him; but when the manager offered to cash it at once if H. would endorse it, H. declined stating he knew nothing of it and it might not be paid: but for the purposes of collection witnessed the endorsement with his name, writing beneath it "without any recourse to me whatever." The plaintiffs collected the money in New York and credited the proceeds to H. who accounted for them to McE. The New York bank, who

paid, later demanded the money back, alleging McE.'s endorsement to be a forgery. The plaintiffs paid back the amount received and brought action against H. and McE.

Held, that H., having acted honestly, was not liable in an action for deceit: but that the facts constituted a contract of warranty by him that he was entitled, as agent for the rightful owner of the cheque, to request the plaintiffs to collect it and pay the proceeds to him as such agent when collected, and that if the endorsement was forged, he was liable to repay.

Collen v. *Wright* (1857) 8 E. & B. 647 followed.

Middleton, for appellants. *M. J. O'Connor*, for respondent.

Province of New Brunswck.

SUPREME COURT.

Barker, J.] BAIRD *v.* SLIPP. [May 8.

Fraudulent conveyance—13 Eliz. c. 5—Consideration.

In 1891, E. S., a farmer, deceased, agreed with two of his sons in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters $1,000 each, that the farm and his personal property should be theirs. The farm consisted of adjoining pieces of land, each worth about $3,200. Subsequently the sons paid over $3,000 in paying off balance of purchase money due on the farm, paid $2,000 to the sisters, and supported the father and mother. On July 19, 1899, the father conveyed the farm to the sons for an expressed consideration of one dollar. At that time he was not in debt, but he was surety with others for loans amounting to $14,000 to a company, of which he and they were directors, the last loan being for $3,000, and made June 7, 1899. On May 3, 1901, the company went into liquidation, and the amount for which the directors were sureties, was paid by them, except E. S. In a suit by them to set aside the conveyance as fraudulent and void under the Stat. 13 Eliz. c. 5,

Held, that the bill should be dismissed.

Connell, K.C., and *Hartley*, for plaintiffs. *Currey*, K.C., and *Vince*, for defendants.

Barker, J.] [May 8.

PETROPOULOS v. F.E. WILLIAMS COMPANY.

Bill of sale—Injunction—Bringing amount into Court.

An interim injunction order in an action to set aside a bill of sale to restrain the mortgagee from taking possession or selling the goods conveyed, will not be granted, except upon condition of the mortgagor bringing into Court the amount due on the mortgage.

Watson Allen, K.C., for plaintiffs. *Trueman*, for defendants.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] OLESON *v.* JONESSON. [April 26.

Description of land—Ambiguity—Construction of contracts—Falsa demonstratio—Evidence to explain latent ambiguity—General followed by specific description.

A. and B. in 1894, together purchased for $270 a fractional quarter section of land of an irregular shape bordering on a lake at the east side and containing about 132 acres. The land was crossed by a highway called the Gimli road running in a somewhat oblique direction through it from north to south. Wishing to divide the land between them, and believing that the Gimli road divided it into nearly equal portions, A. took a deed conveying to him "the west half of the fractional quarter section *or* that part of the said quarter section lying on the west side of the Gimli road," and B. a deed conveying "the east half, etc., *or* that part lying on the east side of the Gimli road." They entered into possession of the respective portions on each side of the road without any measurement of aceas, and continued in possession until, in 1903, B. conveyed his portion to the defendant and, in 1905, A. conveyed to the plaintiff by a deed describing that part of the quarter section lying to the west of a line running due north and south and dividing the quarter section

into two equal parts and making no reference to the Gimli road. The fact being that there was more land in the east side of that road than on the west side, the plaintiff brought this action to recover possession of such excess being part of the land on the east side.

Held, 1. The proper conclusion to be drawn from the wording of the description in the deed to B. is that the parties intended by the latter part of it either to make definite what they conceived to be vague in the first part or that the grantee should have the right of election as to which of the two parcels she would take under the deed: Elphinstone on Deeds, 105; Vin. Ab. Grant H. 5; Shep. Tovels, 106, 251; and, if the latter was the intention, B. had exercised such election to take all the land lying east of the road.

2. As applied to the land in question, the words "east half" were not sufficient to describe with clearness and certainty the land intended to be conveyed and, consequently, the words which followed could not be rejected as falsa demonstratio.

3. This was a proper case for the application of the rule that, when there is a general description followed by a specific description, the specific and not the general description must be taken to govern: *Murray* v. *Smith,* 5 U.C.R. 225, and *Smith* v. *Galloway,* 5 B. & Ad. 57, followed.

The expression "east half" as applied to the fractional quarter section is a general description that must yield to the specific description which follows.

4. The ambiguity in the description in question was a latent one, only becoming patent when evidence was given of the irregular shape of the land, and therefore extrinsic evidence was admissible to shew the intention of the parties. That evidence shewed without contradiction that A. and B. intended that the road should be the dividing line and had always acted in accordance with such intention.

Minty, for plaintiff. *Heap,* for defendant.

Full Court.] [May 7.

SAVAGE *v.* CANADIAN PACIFIC RY. CO.

Practice—Particulars—Order for particulars after close of pleadings.

Appeal from the order of the Chief Justice dismissing an appeal from the referee who had refused an order for particulars

asked for by the plaintiff after the pleadings had been closed. The action was for damages for the death of the plaintiff's husband caused by alleged negligence of the defendants. The defendants set up contributory negligence on the part of the deceased and the plaintiff amended her statement of claim in reply to that defence. Afterwards, and pending an examination of one of the defendants' officers for discovery, the plaintiff made this motion for particulars of the alleged negligence of the deceased.

Held, that, in the absence of special circumstances, particulars will not be ordered after the close of the pleadings.

The practice in England is based on the provisions of Order 19, Rule 6 and 7, to which there is no corresponding rule in the "King's Bench Act," and the Judicature Act has made no change in the practice formerly prevailing in this Court with regard to ordering particulars: *Smith* v. *Boyd*, 17 P.R. 467.

Semble, if the plaintiff had failed, upon the examination for discovery, to elicit the particulars she wanted, that might have been a special circumsta ice warranting an order to furnish them: *Dunston* v. *Niagara*, 4 O.W.R. 218; *Bank of Toronto* v. *Ins. Co. of N.A.*, 18 P.R. 29.

The fact that the person charged with the negligence was killed as a result of the accident, and that the plaintiff has therefore no means of ascertaining what the negligence charged consisted of except discovery from the defendants, cannot be treated as a special circumstance to warrant the order, as the plaintiff was in the same position when pleading over.

Appeal dismissed without costs, Richards, J., dissenting.

O'Connor, for plaintiff. *Coyne*, for defendants.

Full Court.] WILSON *v.* GRAHAM. [May 7.

Contract — Construction — Discrepancy between written and printed portions of contract—Covenant to convey land clear of incumbrances—Real Property Limitation Act, R.S.M. 1902, *c.* 100, *s.* 24.

Action commenced May 30, 1903, to recover damages for breach of covenants against incumbrances contained in a written agreement dated April 3, 1893, for the sale of land by defendant to plaintiff by which defendant undertook to give a deed of the land to the plaintiff

clear of all incumbrances save and except a mortgage for $1,000, which the plaintiff was to assume and pay off, and commanded that on payment of the said sum of money he would convey and assure to the plaintiff by a good and sufficient deed in fee simple with the usual covenants of warranty the said land freed and discharged from all incumbrances. The breaches relied on were that at the date of the agreement the land was incumbered by arrears of taxes, $50, amount due on the mortgage over and above the $1,000, $170, and by registered judgments to the amount of $2,600. The plaintiff never paid anything under the agreement as the mortgagee had already taken proceedings to sell under the mortgage, and afterwards sold and conveyed the land to another person under the power of sale in the mortgage.

Held, 1. The damages claimed were not a "sum of money secured by any mortgage, judgment or lien or otherwise charged upon or payable out of any land or rent" within the meaning of s. 24 of "The Real Property Limitation Act," R.S.M. 1902, c. 100, and therefore the right of action was not barred under that Act by the lapse of more than ten years.

Sutton v. *Sutton*, 22 Ch. D. 511, and *Fearnside* v. *Flint*, 22 Ch. D. 579, distinguished. *In re Power*, 30 Ch. D. 291, followed.

2. It was not a condition precedent to the plaintiff's right to call upon defendant to fulfil his covenant that the plaintiff should first pay the $1,000 to the mortgagee. The language of the printed part of the agreement would bear out that view, but in that respect it was inconsistent with the written portion from which it was clear that it was not the intention of the parties that the mortgage should be paid off before the defendant should convey.

3. A covenant to convey clear of incumbrances is not the same as a covenant that the land is free of all incumbrances. In the latter case the covenant is broken the moment it is made if there are incumbrances in existence, but in the former there is no breach until the covenantee has suffered damage: Blythewood & Jarmans' Conveyancing, at p. 309. There being no evidence that any of the judgment creditors had attempted to enforce their judgments, the mere existence of them was not a breach of the defendant's, covenant and the plaintiff's right to recover should be limited to the amount by which the mortgagee's claim at the date of the agreement exceeded $1,000.

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

Full Court.] NEWTON *v.* LILLY. [May 7.

Fraudulent preference—Sale of stock to person who assumes liability of insolvent to creditor.

The insolvents sold their stock in trade to the defendant Lilly at 87½ cents on the dollar. Being indebted to the defendants, Gault Bros. & Co., in $4,374.27, they accepted Lilly's undertaking to pay that indebtedness, and received cash for the balance. Gault Bros. then discharged the insolvents and accepted Lilly as their debtor. The insolvents within sixty days made an assignment to the plaintiff under R.S.M. 1902, c. 8, for the benefit of creditors generally. The Court agreed with the finding of the trial judge that Gault Bros. did not know and had not sufficient reason to believe that the assignors were unable to meet their liabilities at the time the transaction attacked was entered into. This action was brought to have that part of the agreement providing for the payment by Lilly to Gault Bros. declared fraudulent and void as against the other creditors of the insolvents.

Held, 1. The effect of the arrangement that was actually made and carried out between the insolvents, Lilly and Gault Bros. was the same as if Lilly had paid the cash in full to the insolvents and they had paid it over immediately to Gault Bros., and therefore although Gault Bros. agreed to give time to Lilly, the payment by Lilly to Gault Bros. came within the saving clause of the Act, s. 44, and was to be treated as a payment of money made by the insolvents and so taken out of the operation of s. 41 of the Act. *Gibbons* v. *Wilson*, 17 A.R. 1, and *Johnson* v. *Hope*, 17 A.R. 10, followed. *Burns* v. *Wilson*, 28 S.C.R. 207, explained.

The plaintiff's contention that the transaction attacked was in effect an assignment by the insolvents to Gault Bros. of a chose in action, that is to say, of a part of the purchase money due from Lilly, and so came directly within the meaning of s. 41 of the Act, should not prevail, for the assumption by Lilly of the Gault Bros.' claim and the obtaining of a release from them to the insolvents formed part of the actual consideration for the sale, and it was not the same as if the insolvents had first sold to Lilly and afterwards assigned to Gault Bros. so much of their claim against Lilly for the purchase money.

2. The transaction attacked could not be held void under s. 45 of the Act which, as s. 44 makes good a payment of money by

the debtor to the creditor, must be limited in its scope to transfers of considerations other than money, such as bills, notes or goods.

Quære, whether, if the plaintiff had been held entitled to the relief asked for, Gault Bros. would then have had the right, under s. 46 of the Act, to have restored to them the claim they had previously held against a surety for the insolvents, it being urged that the discharge of the insolvents discharged the surety also.

Haggart, K.C., and *Hoskin*, for plaintiff. *Aikins*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] EMERSON *v.* SKINNER. [May 30.

Construction of statute—Crown—Maxim "nova constitutio futuris, etc."

On an application to discharge an order of replevin taken by plaintiff whereby certain logs had been seized by defendant, purporting to act under authority of recent legislation, relative to timber cut on Crown lands known as the Timber Manufacturing Act, 1906. Sec. 2 of that Act is as follows: All timber cut on ungranted lands of the Crown or on lands of the Crown which shall hereafter be granted, shall be used in this Province or be manufactured in this Province into boards, joists, shingles, etc.," and by s. 4 the Chief Commissioner of Lands and Works and his officers or servants and agents are empowered to do all things necessary to prevent the breach of s. 2, and for that purpose to make seizures and detain all timber so cut and every steamboat towing the same, where it appears to the Chief Commissioner that it is not the intention of the lessee or licensee, owner or holder or person in possession of the timber, to manufacture the same within the Province, and where a seizure is made it is provided that the onus of shewing the timber seized is not subject to the provisions of the Act. The logs seized were admittedly cut before the passage of the Act and the question arose whether

the Act applied to such timber. In other words, was it intended that the Act should be retrospective, it not being so in terms.

Held, that the principle of nova constitutio futuris formam imponere debet non proteritis, applied notwithstanding some judicial obiters to the contrary; that it was not a mere canon of construction adopted by the Courts, but a rule of Parliament itself, and indeed of all civilized law making authorities resting on natural justice and therefore a rule, which the Court cannot hold to have been broken unless it is done so in terms, or unless it is plain beyond all possibility of doubt from the nature of the enactment that it was meant to be broken.

A. W. Taylor, for plaintiff. *W. A. Shaw*, for defendant.

Lampman, Co., J.] [June 1.

CITY OF VICTORIA *v.* BELYEA.

Municipal law—Tax-imposing powers of council—"Profession" —Whether including barrister—"Practising" what acts will constitute—Penalty.

The profession of a barrister is included in the term "profession" in s. 171, cl. 26 of the Municipal Clauses Act, as amended in 1902, c. 52; and s. 173 as amended in 1903, c. 42.

One appearance in the town where the barrister has his office, in Court as counsel for a client, is sufficient to constitute an offence under the statute, although, following *Apothecaries Co.* v. *Jones* (1893) 1 Q.B. 89, acting in several instances would constitute only one offence in respect of which only one penalty could be imposed.

It is not necessary that the tax imposing by-law should fix a penalty. Section 175 of the statute does that, and provides the manner in which it may be recovered.

Eberts, K.C., (*Mason* with him), for the city. *Belyea*, K.C., respondent, in person.

Book Reviews.

International Law, with illustrative cases, by EDWIN MAXEY, M. Dipp., D.C.L., LL.D.; St. Louis. The F. H. Thomas Law Book Co. 1906. 800 pp.

This is a work by the scholarly Professor of Constitutional and International Law in the Law Department of the West Virginia University.

It is, in form and arrangement, more especially conformed to the needs of the class-room; and here we may remark that the work suffers nothing thereby as the table of contents readily shews. We are brought down step by step to the present stage of development of the law on this important subject, and after that the theoretical and practical side is dealt with. The first part is historical; the second deals with the sources of this branch of the law. The remaining parts tell of peace, or as it is called "the normal relation of states," (we doubt this as a fact at least until the millennium comes)—war—neutrals—need of an international conference. The latter is of course desirable, but peace conferences have not done much up to the present time in causing wars to cease.

A very useful feature of this book is the collection of various leading cases. The author's style is simple, but clear, forcible and logical.

The Law of Contracts, by WILLIAM HERBERT PAGE, Professor of Law in the Ohio State University; Cincinnati: The W. H. Anderson Co. 3 vols. 3083 pp.

A monumental work truly. The table of contents alone covers 65 pages; the index over 300 pages, and over 35,000 cases are cited.

No one man knows all the law on any given subject, but it would be difficult to name any subject connected with the law of contracts which is not fully discussed in this treatise. And a treatise it is, and not a mere collection of cases,

The author in his short and modest preface states the object of his labours to be to state the law of contracts as it exists to-day in America. But as no statement of the law can be complete if the original common law theory of contracts and the modification of that theory by the English Courts is omitted we are given the English authorities dealing therewith.

The constant attempt by judicial action to modify the law and to adjust the principles of the law from century to century, as conditions of life change, can be traced in Professor Page's most luminous pages. These conditions of life, circumstances attending commercial transactions, and the general character of events and business relations on this continent, must necessarily be more or less alike in this Dominion and in the United States. Hence we readily see the value to our profession here, of such an exhaustive examination of the law on a subject covering such an endless variety of subjects.

Want of space forbids our attempting to give to our readers any idea of the extent of the ground covered by the author, or his masterly treatment of his subject. They must get the book and see for themselves. It will be well spent money. We know of no law book which gives more for the money than Page on Contracts.

A Digest of English Civil Law, by EDWARD JENKS, M.A., B.C.L., Middle Temple, (Editor). Book II. part I., on the law of contracts, by R. W. LEE. London: Butterworth & Co. Boston: Boston Book Co. 1906.

This instalment of the digest states the general law of England on the important subject of contracts as it stood at the end of last year. This digest is in the nature of a code. There is necessarily much that is elementary, but the law is stated concisely and clearly, backed up by references to the leading cases under each proposition. The headings of this part are as follows: Formation of—Party to—Performance of—Assignment and discharge of contracts; with a chapter on co-debtors and co-creditors. The typographical execution of this digest is remarkable for its excellence.

A History of English Institutions, by A. T. CARTER, M.A. of the Inner Temple. Third edition. London: Butterworth & Co., Temple Bar. 1906.

This is most fascinating reading to every student of history, especially to those engaged in the study or practice of the law. As it has reached its third edition, it is unnecessary to refer particularly to the contents. The author stands up for the legal system which had its beginning, and has been developed in England; a system he asserts is more interesting, and not less perfect than that of Rome; a system which displays in the history

of its development all those features which the student of jurisprudence is invited to study, and where we find a true view of the relation of historical and analytical jurisprudence.

Principles of the Law of Partnership, by ARTHUR UNDERHILL, M.A., LL.B., Barrister-at-law. Second edition. London: Butterworth & Co., Bell Yard, Temple Bar, 1906. 154 pp.

The author makes no pretence that this is a text-book, but rather a broad view giving the salient features of the subject. The finished picture, with its wealth of detail, is to be found in the elaborate work of Lord Lindley, but this little book has, nevertheless, its uses, both to the practitioner and to the student.

Apices Juris and other Legal Essays in Prose and Verse, by CHARLES MORSE, D.C.L. Toronto: Canada Law Book Company. 1906. 356 pp.

This is a pioneer work of the kind in Canadian legal literature, presenting an appeal to the serious-minded as well as to those who have a bent for the humorous side of the law. It instances on the one hand the original research into the recondite sources of the law manifested in the two essays on "Contract" (pp. 37 and 48) and the "Psychology of Negligence" (p. 96), not forgetting to say something about the value of the enquiry into prerogative law and the constitutional status of the King to-day, embodied in the essay on "The Law and the King" (p. 154). On the other hand the author refers to the lightsome articles, "Apices Juris" (of which the "Green Bag" said when it was there published last fall that it was of the class of "agreeable essays into the borderland of law, literature and philosophy"), "On the Art of being irrelevant" (p. 84) and the "Nobility of the Law" (p. 229). The sonnets and cases in verse must not be forgotten. The "Causeries" which first appeared in our pages were very much appreciated then and will still be. Dr. Morse first made his debut ten years ago as a legal writer in our pages with the rhymed version of *Marriott* v. *Hampton* (p. 252), and has ever since been a valued contributor to our pages. This most readable book comes in appropriately as we think of something to while away some hours pleasantly and profitably during the vacation soon to commence. A good index lends its value to the book.

H. O'B.

United States Decisions.

RAILWAYS.—A father paying full fare is held, in *Whitney* v. *Pere Marquette Ry. Co.* (Mich.), 1 L.R.A. (N.S.) 352, to be entitled to recover for loss of articles of his infant child, packed and carried with his baggage although the child paid no fare.

AUTOMOBILES.—The driver of an automobile, upon meeting upon the highway a horse which is frightened and in such a situation that its driver cannot extricate himself from danger unless the machine is stopped , is held, in *Indiana Springs Co.* v. *Brown* (Ind.), 1 L.R.A. (N.S.) 238, to be bound to stop, and to be liable for injuries inflicted by his failure so to do. An extensive note to these cases covers the whole subject of the law governing automobiles.

LOST PROPERTY.—Property hidden in the earth near a marked tree is held in *Ferguson* v. *Ray* (Or.), 1 L.R.A. (N.S.) 477, not to have been lost, so as to vest title in the finder as against the owner of the soil, although it had remained so long as to indicate that the owner was dead or had forgotten it.

CONTRACTS.—A written contract, signed by both parties, appointing plaintiffs defendant's exclusive agents to sell the latter's product, is held, in *Emerson* v. *Pacific Coast & N. Packing Co.* (Minn.), 1 L.R.A. (N.S.) 445, not to be wanting in mutuality so as to prevent an action for damages for its breach.

The general rule requiring a party seeking to rescind a contract for non-performance by the other to restore or tender back what has been received from the latter, is held, in *Timmerman* v. *Stanley* (Ga.), 1 L.R.A. (N.S.) 379, not to apply where one party agreed to teach another a certain thing, and, after beginning the course of instruction refused to proceed further.

ACCIDENT INSURANCE.—An injury to the hand, superinduced by numbness resulting from using it as a head-rest during sleep, is held, in *Aetna L. Ins. Co.* v. *Fitzgerald* (Ind.), 1 L.R.A. (N. S.) 422, to be covered by insurance against injuries through external and accidental means.

TIME.—The word "noon," used to denote the beginning and termination of the risk under an insurance policy, is held, in *Rochester German Ins. Co.* v. *Peaslee-Gauldert Co.* (Ky.), 1 L. R.A. (N.S.) 364, to be properly interpreted to be standard, and not sun, time, where the use of the former system of reckoning time has been the prevailing custom in the community for a long period.

MASTER AND SERVANT.—One who engages to work in saving property from the debris left by a fire is held, in *Gans Salvage Co.* v. *Byrnes, use of Higgins* (Md.), 1 L.R.A. (N.S.) 272, to assume the risk of injury from falling walls, where the peril is open and obvious.

A youth sixteen years old is held, in *Mundhenke* v. *Oregon City Mfg. Co.* (Or.), 1 L. R. A. (N.S.) 278, to have assumed the risk of injury plainly apparent from coming in contact with exposed gears, though not expressly warned of the danger.

The right of an employee to hold his master liable for injuries caused by the latter's breach of duty to furnish an independent contractor with safe appliances for the performance of the work is denied in *Miller* v. *Moran Bros.' Co.* (Wash.), 1 L.R.A. (N. S.) 283.

The diligence required of a master to learn the habits or characters of servants employed with due care is held, in *Southern P. Co.* v. *Hetzer* (C. C. A. 8th C.), 1 L.R.A. (N.S.) 288, to be reasonable diligence and care only.

STREET CARS.—A street car company which stops its cars for the purpose of receiving passengers is held, in *Normile* v. *Wheeling Traction Co.* (W. Va.) 68 L.R.A. 901, to be charged with the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting the cars.

COMMON CARRIERS.—That livery stable keepers are not within the rule that common carriers of passengers are bound to exercise extraordinary care for the safety of their passengers is decided in *Stanley* v. *Steele* (Conn.) 69 L.R.A. 561.

HOTELKEEPERS.—A trespass committed upon a guest in a hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is held, in *Clancy* v. *Barker* (Neb.) 69 L.R.A. 642, to be a breach of the implied undertaking that the guest shall be treated with due consideration for his comfort and safety, for which the proprietor is liable in damages. A note to this case reviews the other authorities on the liability of an innkeeper for injury to guest by servant. That an innkeeper is not liable for an injury inflicted upon a guest in his hotel by a servant who was not at the time of the injury acting within the apparent or actual scope of his employment is declared in *Clancy* v. *Barker* (C.C. App. 8th C.) 69 L.R.A. 653.

Flotsam and Jetsam.

LAW BOOKS IN 1905.—It is said that one hundred and seven law books were published in England during 1905, of which fifty-six were new works and fifty-one new editions. The average for the last eight years has been 131 per year.

Notwithstanding the protest of our publishers to the contrary we insist on publishing the following:—

HUMOUR OF THE LAW.—When Senator "Joe" Blackburn went into the office of a celebrated lawyer of Kentucky to study law he was surprised by the absence of a library. "Where's the library?" he asked. "Now, Joe, if you want to study law don't begin by asking questions," the old lawyer told him. "There isn't any library. You see that book. That's the statutes of Kentucky and it's all the library any lawyer needs. Don't get a library if you want to become a lawyer; it will only worry you." "I've found that advice was the best I ever received, too," the Senator added.

It may not be generally known, but it is stated in a recent number of the London *Law Times*, that Lord Bacon's death was brought on by an experiment in cold storage. He was driving to Highgate one cold March day when the snow was on the ground. It occurred to him to try the effect of cold to prevent putrefaction. He stopped at a cottage, bought a fowl, had it killed and with his own hand stuffed it with snow. In doing so he contracted a severe chill and died a few days after. In writing to the Earl of Arundel, in whose house he died, apologizing for his intrusion there, he does not forget to note that the experiment had "succeeded excellently well." There is nothing new under the sun.

The Living Age for June 2 opens with the first part of a new story by Count Tolstoy, entitled, "The Divine and the Human, or Three More Deaths." It is a tale of revolutionary Russia, told with singular directness and power, and illustrating, in a striking way, the horrors of the situation created by conspiracies and reprisals. The number for June 9 presents the argument of Herbert Paul, M.P., in favour of the new Education Bill, and an article by the Archbishop of Westminster against it. This interesting joint debate upon the most important measure of the present English government is to be continued in June 16th.