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The election of the thirty Benchers of the Law Society of Upper Canada for a term of five years will be held between the 26th of March and the 4th of April. The office of Bencher is one of dignity and influence, and is rightly prized by members of the legal profession. It is to be feared, however, that the duties of the office are frequently discharged in a perfunctory way. If one may judge from a perusal of the proceedings of the Law Society for the past five years many of the Benchers have not attended the meetings with any shew of regularity. It has been customary at former elections for a number of the leading Benchers to combine in sending out to the profession a list of those, including themselves, for whom they ask re-election. On the other hand new candidates have been wont to flood the Province with circulars on their own behalf. In this way some leaders of the Bar, whose qualities clearly entitle them to election, but who decline to canvass for office, are passed by. We would point out that any member of the Bar is eligible and that nomination is not required. It behooves each elector in making out his ballot to choose men who have proper qualifications.

In connection with the approaching election of Benchers several new names of varying merit have been suggested. In our opinion that body would be strengthened by the addition of Mr. E. F. B. Johnston, K.C., who, we understand, has never sought election. Mr. Johnston not only is in the front rank as a counsel, but in addition he is a man of keen business insight, a fearless critic and a strong advocate of needed reforms.

The profession should also be reminded of Mr. Nicol Kingsmill, K.C. We all know Him as an honoured member of the profession, and who is also entitled to a seat with the Benchers.

The head note of *Adams* v. *Sutherland*, 10 O.L.R. 645, describes the deposit of a sum of money with the sheriff as "special bail." We need hardly remind our readers that the term "special bail" as a term of art is properly confined to "bail above," as it used to be called, or "bail in the action," and does not include bail to the sheriff or "bail below" as formerly called (see Arch. Pr. 12th ed., pp. 801, 829). Bail in the action or "special bail" is to be given in one or two ways, either by payment into Court, or by a bond to the plaintiff by the defendant, or with the plaintiff's consent by any other form of security (see Rule 1036). The condition of bail to the sheriff is that the defendant will give bail in the action, or render himself (see Rule 1030), but the condition of bail in the action is that he will pay the debt or render himself (Rule 1037). The reporter may possibly have been misled by the learned judge having inadvertently used the expression "special bail" in his judgment.

One of our exchanges when speaking of the success of many Southern men who practise law in New York, says that their success may well be attributed in a large degree to their courteous, pleasant manners. A writer on the subject says that the full measure of unassuming courtesy is found in its perfection among the Southern lawyers. The reason given is that a very large portion of them are graduates of some college or law school in the southland where these principles of courtesy are exalted in the minds of the students. A leading judge has remarked that the polite deference of the younger men of the south for their elders was a noticeable and charming characteristic.

In referring to the same subject, a writer in the *Central Law Journal* makes the following excellent comments: "Few things are more important in the education of young lawyers than the development of good manners. Good manners will win many a narrowly contested case; and serve to win that undercurrent of human sentiment that in the last analysis unconsciously bends the human mind in the direction of its own desires. A gruff man will often win a good case, but a polite man will more often win

a doubtful one. Human nature would have to be made over were a different result to be the rule rather than the exception. A Southern lawyer said to the writer, 'We are not so much concerned here about the accumulation of wealth; our section of the country affords a plenty of the good things of this life. To share in these, to be able to help a friend or neighbour in need, to aid in the work of the churches and share in the works which tend to uplift humanity, makes life worth living here, and the majority of us are satisfied to live with such surroundings rather than seek greater wealth in the larger cities.'" We cannot too strongly commend the foregoing observations to those whom it may concern in this country; though we are glad to know that breaches of good manners here are the exception and not the rule of the profession to which we belong.

It would be well if our public school authorities were to pay some attention to this matter; that is where the education should begin. It is painful to see how good manners are *not* taught in public schools and collegiate institutes in this Province of Ontario—not excepting the City of Toronto, where children are as badly behaved as in any other part of His Majesty's dominions. There is a marked absence of any effort in this direction on the part of the school authorities, and this absence is a blot on our school system. Some of those who occupy high positions as inspectors and teachers seem to think that ordinary politeness and respect to those in authority or holding high positions is servility, and, as such, should be discouraged in the rising generation. They thereby shew their own ignorance as well as their want of breeding. Such a lack of appreciation of a very important part of a child's education is a common subject of complaint. Gentlemanly behaviour and courteous demeanour are not only entirely consistent with self-respect and independence of character, but mark the possession of those excellent qualities.

When speaking of public school education it may not be amiss to refer to the following observations in the recent number of the London *Law Times*: "It would probably be admitted by most

thinking persons that the general curriculum applied to the mass of our subsidized state schools is far enough from being an ideal one. A child must often start out to earn its living totally lacking in the definite information which would assist him to do so, and has, therefore, almost no chance at all of beginning life in a fair wage-earning class."

If children were given a little more persistent teaching in the "three great R's"; were properly grounded in elementary knowledge, the foundation of true "education"; were taught to write, and not left to scrawl illegible characters that would disgrace a spider emerging from an inkbottle; had their thinking powers drawn out and strengthened, instead of having their minds crammed with a mass of undigested scraps of information of absolutely no use in the battle of life, then, young men and young women would be of more use in their day and generation, and not be the exhibition they too often are when they enter on positions for which they have no fitness. Those who have brains and energy would take their proper place and rise to higher things; and the rest be much more useful, than they are under present conditions, as mechanics, farm hands, domestic servants or factory girls, or in other walks of life according to their capacity.

SERVICE OF SUBPŒNAS—PROCESS OF CONTEMPT.

The special attention of solicitors is directed to the recent case of *Woods* v. *Fader*, 10 O.L.R. 643, in which a point of practice was decided turning upon Con. Rule 333. This Rule provides that "it shall not be necessary to the regular service of any writ, order, or other original document, that the original shall be shewn, unless sight thereof is demanded, except in cases of arrest or attachment."

The learned judge, in the case referred to, held that, before you can proceed against a defaulting witness for contempt, you

must be prepared to shew that the original subpœna was shewn to him at the time of service, whether demanded or not. We gather from the observations of the learned judge that his decision is founded on the concluding words "except in cases of arrest or attachment," which he holds apply to the service of a subpœna, whenever the arrest or attachment of a witness for default is sought.

The judgment refers to the English practice, which expressly requires that the original shall be shewn, and also to the former common law and equity practice in Ontario which also required it. But the present English practice does not now govern in Ontario, unless it can be said to have been expressly adopted; and the former practice both at law and in equity in Ontario is, by Rule 2, expressly superseded, so far as it is inconsistent with the Con. Rules; and by Rule 3, as to matters not provided for in the Con. Rules, the practice, so far as may be, is to be regulated by analogy thereto. The Con. Rules do not expressly provide anywhere for the exhibition of an original document at the time of the service of a copy thereof, unless the concluding clause of Rule 333 can be said so to do.

The present decision, as we understand it, works a change in the practice which has, of late years, been generally adopted by the profession.

If witnesses generally understood that they could safely pocket their witness fees, and at the same time disregard the subpœna served upon them, whenever the original subpœna has not been shewn to them, we fear a great many witnesses would not scruple to follow that procedure.

The logical result of this decision goes beyond the point decided, for it would apply not only to subpœnas, but to other proceedings, and virtually lays down the rule, that whenever a proceeding is to be served on anyone, which may possibly be followed by proceedings to commit for contempt in case of disobedience, then the original of the copy served must be shewn at the time of service, whether demanded or not, or the proceedings to commit will prove abortive. The exception contained in Rule 333, has, we believe, heretofore been considered to apply only to the actual

proceedings to commit, and the service of a subpœna not being a proceeding to commit, has been, therefore, considered not to be within the exception. The contrary construction, however, having now been given to the Rule, it is needless to say that that construction must now govern, unless or until overruled or changed.

A COMPLEXITY IN INTERNATIONAL LAW.

The use of a vessel of Norwegian register to convey the Banwells from Jamaica to Halifax raises, under the special circumstances of the case, a question of some interest. Before the vessel sailed, one, at least, of the fugitives was in the custody of a detective officer from Toronto by virtue of a mandate from the Governor of the Island, which authorized his surrender to Canada. The statute by which his apprehension and removal were sanctioned is the Fugitive Offenders' Act.

This Act discloses, in the main, the framework of an extradition Act, based upon a convention, entered into between foreign states vested with the sovereignty required to make it efficacious and binding. The cardinal features observable in such a convention and Act—regular notification by the pursuing country of the crime alleged to have been committed, a demand, with certain formality, for the return of the accused, the setting in motion of some judicial officer to effectuate this, and the ultimate action by the executive of the sister Dominion—are all to be found in the scheme for intercolonial rendition which the statute in question comprises.

It need scarcely be mentioned that where transit from one quarter of His Majesty's possessions to another may only be affected by sea, and where it becomes necessary to proceed beyond the three-mile limit, authority for the entry and passage must be conferred by the Imperial Parliament: *Reg.* v. *Mount*, 6 P. Cap. 283. In that case the Judicial Committee, taking up this very point of a dependency's control over the High Seas, declare, by their mouthpiece, Sir Montague E. Smith, that

"This construction creates no conflict between Imperial and Colonial authority, and in no way affects the rights and privileges of the Colonial Legislatures. It simply affirms that the Imperial statute, which gave the Courts of the Colonies, quoad offences committed upon the seas beyond their territorial limits, a jurisdiction which their own Legislatures could not confer, was altered by a subsequent Imperial Act."

This being so, and international law prescribing that any vessel of a foreign State is part of its territory (the conception of floating territory has been evolved by some writers; by others, that of "a stage of national action") we are not surprised to find that by the Fugitive Offenders' Act detention, in transitu, of a surrendered fugitive is permissible on a British vessel only. The provision, which reads, "Where a fugitive or prisoner is authorized to be returned to any part of Her Majesty's dominions in pursuance of this Act such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty, or any of her subjects," was manifestly enacted to preclude invasion of what civilized powers have, as before stated, adjudged to be foreign territory. Aside, however, from the violation of the statute which occurred in this instance, consider a few of the embarrassments liable to happen from the compulsory taking on board of the prisoner and his continued restraint by an officer incapable of urging the least justification therefor.

He might have proceeded to any extreme in order to escape from the unlawful duress, even seizing, with the aid of such of the crew as he might have been able to win over to his project, the vessel herself, and direct her course to any quarter that he might think would afford him a secure asylum. In *Reg.* v. *Sattler*, Dears. & B. 525, it was held that so long as the prisoner was actuated by no motive other than a desire to obtain his liberty he need stop at nothing to secure it, so that even were he to have killed any one who resisted him in his attempt he would be guilty of no offence.

Since the detective's possession of the money would partake of the vice of his wrongful custody of the prisoner, it might per-

haps have been retaken as well, without a fresh larceny being committed.

Another peculiarity of the situation is that by force of the separation of Norway from Sweden any treaty between the kingdoms, as united, and Great Britain was probably dissolved.

PROTECTING STATE EMBLEMS.

During the recent political campaign in England which resulted in the defeat of the Balfour administration, attention was called to the fact that some one or more of the candidates had used representations of the Royal Arms in connection with their campaign literature and exception was taken to this His Majesty expressed desire that no such use should be made of any emblem in connection with Royalty, that being out of the realm of party politics. A similar question has recently been brought before some of the Courts in the United States. A Massachusetts statute makes it unlawful to use the arms or the great seal of the Commonwealth or any representation thereof for any advertising or commercial purposes. This enactment was held to be constitutional in *The Commonwealth* v. *Sherman Manufacturing Co.* (Mass.) 75 N.E. 71. In that case a representation of the arms of the Commonwealth was used on labels for advertising purposes. The Court held that the legislature of the State had a perfect right to forbid the use of a design which the Commonwealth had appropriated to itself as a symbol of its sovereignty. In the case above referred to other authorities were cited which dealt with statutes to protect the national flag from use for commercial purposes. In some of these cases there was no legislation restricting the use of the flag. It would appear from the correspondence which took place in England on this subject that there is no legislation there affecting the matter, but we are glad to know that the expressed wish of our most gracious and deservedly popular sovereign will doubtless be as effectual as any statute or enactment to prevent anything being done, which he thinks inappropriate and objectionable.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—DAMAGE BY TWO COLLISIONS —SIMULTANEOUS REPAIRS—APPORTIONMENT OF DAMAGES.

The Haversham Grange (1905) P. 307. Action to recover damages for a collision. The vessel in question had suffered damages by two separate collisions with different vessels, and in order to repair the damage thus done, the vessel was put into dry dock and the damage caused by each collision repaired simultaneously. The defendants objected to being charged with any part of the dock dues because, as they alleged, the damage caused by the collision for which they were responsible occupied a shorter time to repair than those caused by the other collision, and, therefore, the plaintiff had not been put to any extra expense thereby, but the Court of Appeal (Collins, M.R., and Romer, L.J.), held, reversing Barnes, P.P.D., that the defendants were liable for a proportionate part of the dry-docking and incidental expenses.

WILL—CONSTRUCTION—ABSOLUTE GIFT CUT DOWN TO LIFE ESTATE BY LATER WORDS—ADMINISTRATION WITH WILL ANNEXED TO RESIDUARY LEGATEE.

Re Lupton (1905) P. 321 was an application by a person claiming to be residuary legatee for a grant of administration with the will annexed and in order to determine the applicant's right it became necessary for Barnes, P.P.D., to construe the will of the testator. The will was on a printed form with holograph additions, and it first purported to leave all the testator's property to the testator's wife "for her own absolute use and benefit," but in a subsequent clause the testator had added, "and after her death to come absolutely to (the applicant) to her and her heirs forever," after payment of two legacies of £20; and it was held by the learned President that upon a proper construction of the whole will the concluding clause had the effect of cutting down the prior absolute gift to the wife to an estate for her life only, and that the applicant was therefore entitled to the grant as residuary legatee.

PATENT—"EXERCISE AND VEND"—SALE IN ENGLAND—DELIVERY ABROAD.

Badische Anilin Fabrik v. *Hickson* (1905) 2 Ch. 495 was an action to restain an alleged infringement of an English patent for an invention. The alleged infringement consited in defendant buying goods abroad made according to the plaintiffs' patent, to be delivered to the defendant's order at Antwerp and the subsequent sale thereof by defendant in England to an English firm who received the goods in Antwerp and subsequently imported them into England. This, the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), held constituted no infringement of the patent and the judgment of Buckley, J., was accordingly affirmed.

COMPANY—DEBENTURES—DEBENTURES PAID OFF AND TRANSFERRED IN BLANK—RE-ISSUE OF DEBENTURES PAID OFF BY COMPANY.

In re Tasker, Hoare v. *Tasker* (1905) 2 Ch. 587. The Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.), here affirmed the decision of Kekewich, J. (1905) 1 Ch. 283 (noted ante, vol. 41, p. 400). The facts, it may be remembered, were as follows: A company issued debentures as a first charge on its property, the company being restricted from making any mortgage or charge in priority to or pari passu with those debentures. Some of these debentures were issued as security for a loan, the loan was paid off and the debentures delivered to the company with a transfer indorsed, the name of the transferee left blank. Subsequently the company received an application for debentures and thereupon filled in the name of the applicant as transferee and handed over the debentures to him, on the receipt of the full nominal value of such debentures, the transferees being ignorant of the circumstances under which the debentures had been previously issued and paid off. Other holders of debentures of the same series claimed that the transferees of the reissued debentures were not entitled to rank pari passu with them or other original holders, and Kekewich, J., upheld the contention, and his decision is now affirmed on the ground that on payment of the debentures they were dead and gone for all purposes and incapable of transfer. The principle established by *Otter* v. *Lord Vaux* (1856) 2 K. & J. 650, 657; 6 D. G. McG. 638, 643, that a mortgagor paying off a mortgage cannot thereafter set it up as against a subsequent incumbrance, being applied.

EASEMENT—RESERVATION OF EASEMENT—CONTRACT FOR SALE OF LAND RESERVING "RIGHTS OF WAY HITHERTO EXERCISED"—DEED NOT EXECUTED BY PURCHASER.

May v. *Belleville* (1905) 2 Ch. 605 was an action brought to restrain interference with the plaintiff's use of a right of way, the right to which arose as follows. From 1867 to 1902 two farms called "White Lodge" and "Coxhill" had been owned by the same person, and during all that time the tenants of Coxhill had used a way over White Lodge. In 1902 the owner sold White Lodge, the agreement for sale stating that there were reserved to the vendor, his heirs and assigns, the owners and occupiers for the time being of Coxhill and their servants and others authorized by them, all rights of way hitherto exercised by them in respect of Coxhill over any portion of White Lodge, and the conveyance contained a similar reservation, but was not executed by the purchaser. It was contended for the purchaser that there being a unity of title in the two farms there was no right of way, and, therefore, the reservation was of something which did not exist and was, therefore, inoperative, but Buckley, J., found as a fact on the evidence that the right of using the way in question had in fact been used and exercised by the tenants of Coxhill, and that though not in strictness a legal right of way, it was a right to which the reservation in the deed referred and that the purchaser and those claiming under him with notice of the reservation were bound to give effect to it.

INJUNCTION—TRESPASS—DISCRETION TO REFUSE INJUNCTION.

Behrens v. *Richards* (1905) 2 Ch. 614 was an action by a landowner to restrain trespass. The plaintiff's land was situate on an unfrequented part of the sea coast, and he stopped up certain paths running through the property to the sea shore which the defendants claimed were public highways. The defendants having removed the obstructions the action was brought claiming an injunction. The Attorney-General was not a party. Buckley, J., held, on the evidence, that as between the plaintiff and defendants there were no public rights of way over the property in question, and the defendants must pay nominal damages; but he held that inasmuch as the plaintiff was not, in the present state of the neighbourhood, injured by the public use of ways in question, no injunction ought to be granted.

PRACTICE—PLEADING—INDORSEMENT OF WRIT—STRIKING OUT INDORSEMENT—ABUSE OF PROCESS OF COURT—LIS PENDENS, REGISTRATION OF.

In *Huntly* v. *Gaskell* (1905) 2 Ch. 656 the defendants applied to strike out certain claims indorsed on the writ of summons and to vacate the registration of a lis pendens in respect thereof as being an abuse of the process of the Court. The motion had been originally made before Kekewich, J., who struck out the obnoxious claims for the indorsement, but the plaintiffs having appealed to the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.), that Court held that Kekewich, J., had been too lenient and that the writ and indorsement should have been set aside with liberty to the plaintiffs to issue a new writ in which they should state the claims on which they could properly rely, and they varied Kekewich's order accordingly.

PARTNERSHIP—RECEIVER—REMUNERATION OF RECEIVER—OFFICER OF THE COURT—RECEIVER QUA PARTNER INDEBTED TO PARTNERSHIP.

In *Davy* v. *Scarth* (1906) 1 Ch. 55 Farwell, J., holds that where in a partnership action one of the partners is appointed receiver of the partnership assets, he thereby becomes an officer of the Court and is entitled to be paid the proper remuneration for his services and his costs incurred in that capacity, notwithstanding that as a partner he is found indebted to the partnership and is unable to satisfy the debt.

PRACTICE—STRIKING OUT NAME OF CO-PLAINTIFF—COMPROMISE.

In re Mathews, Oates v. *Mooney* (1905) 2 Ch. 460. The action was brought by several plaintiffs, a compromise having been effected by the defendants with one of the plaintiffs, to which the others were not parties, an application was made by the defendants to stay the proceedings as between the plaintiff who had compromised or to have that plaintiff's name struck out, she having withdrawn her authority to proceed with the action, but it was held by Eady, J., that the application was irregular, that one of several plaintiffs cannot, as of course, withdraw from an action without the consent of his co-plaintiffs. That in a proper case where plaintiffs disagree, the dissentient plaintiff may be struck out as a plaintiff and added as a defendant on the terms of security being given for the original defendant's costs. The motion, therefore, failed, and was dismissed with costs.

COUNTY COURT JUDGE—APPOINTMENT OF TWO DEPUTIES.

The King v. *Lloyd* (1906) 1 K.B. 22 was an application for a prohibition, in which the point raised was as to the legality of a judge of a County Court appointing two deputies to act for him at different Courts at the same time. By the County Courts Act a County Court judge may lawfully appoint a deputy to act for a particular Court within his district, and it was contended that this did not authorize the appointment of two deputies for different Courts to be held at the same time within the district; that the judge could not in effect split his office into sections. The Divisional Court (Lord Alverstone, C.J., and Wills and Darling, JJ.), however, came to the conclusion that there was nothing in the Act to prevent the appointment of two deputies to act at the same time in different parts of the district.

CONTEMPT OF COURT—PUBLICATION TENDING TO PREJUDICE FAIR TRIAL—CONTEMPT OF INFERIOR COURT—JURISDICTION OF KING'S BENCH DIVISION TO PUNISH FOR CONTEMPT OF INFERIOR COURT.

The King v. *Davies* (1906) 1 K.B. 32 was an application to commit the defendant for publishing in a newspaper matter calculated to prejudice the fair trial of one Hunter who had been arrested on a charge of abandoning an infant, while the case was under examination before magistrates. At the time of publication it was not known whether the accused would be committed for trial to the sessions or the assizes. In the result she was committed for trial to the assizes on a charge of attempt to murder. The impropriety of the publication was not denied, but on behalf of the defendant it was contended that the Court had no jurisdiction because at the time of the publication the offence charged was one which could have been tried at the sessions, and that the High Court had no jurisdiction to punish for contempt of the inferior Court. But the Divisional Court (Lord Alverstone, C.J., and Wills and Darling, JJ.), adhered to the opinion expressed in *Rex* v. *Parke* (1903) 2 K.B. 432, that in such a case the publication is a contempt of the Court which ultimately tries the case after committal, but that the principle on which the Court acts in such cases is not so much for protecting the Court as a whole or individual judges of the Court from a repetition of such attacks, but of protecting the public and especially those who seek or are compelled to be subject to its jurisdiction, and to prevent undue interference with the administration of justice, a fact, we may say, which was very

noticeably lost sight of by a defendant in a recent case of the kind in Toronto. Therefore, the Court held it was immaterial that at the time of the publication the charge pending would have been triable at the sessions, because it is the duty of the High Court as custos morum of the Kingdom to prevent and punish all interference with the course of justice, even before inferior Courts. The defendant was fined £100 and ordered to pay the costs.

COMPANY—LIMITED LIABILITY—COMPANY FORMED FOR TRADING IN FOREIGN COUNTRY—PERSONAL LIABILITY OF SHAREHOLDERS UNDER FOREIGN LAW—CONFLICT OF LAWS.

In *Ridson Iron & L. Works* v. *Furness* (1906) 1 K.B. 49 the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have affirmed the judgment of Kennedy, J., (1905) 1 K.B. 304 (noted ante, vol. 41, p. 373). The plaintiff company was an English joint stock company with limited liability, incorporated for trading in California. According to the laws of that State, the shareholders of a joint stock company are personally liable for the debts of the company there contracted in proportion to the number of shares held by them. The company in the course of its business incurred debts to the plaintiffs for machinery in California, and the company having become insolvent the creditors of the company sued the defendant, one of the shareholders, for his proportion of the price of the machinery. Kennedy, J., dismissed the action, holding that the defendant's liability was governed by the law of England, and the Court of Appeal hold that this decision was right.

COMPANY—WINDING-UP—SURPLUS ASSETS—DISTRIBUTION AMONG SHAREHOLDERS — BANKRUPTCY OF SHAREHOLDERS — UNPAID SHARES—PROOF OF CLAIM FOR UNPAID CALLS.

In re West Coast Gold Fields (1906) 1 Ch. 1 the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), have affirmed the decision of Buckley, J. (1905) 1 Ch. 597 (noted ante, vol. 41, p. 532). In this case a company had been ordered to be wound-up and a surplus remained for division among the shareholders. The holder of some of the shares on which 10% per share remained unpaid became bankrupt, the company proved a claim for calls and received a dividend of 1s. 6d. in the pound, and it was expected that a further dividend of 1s. 6d. would be paid. In these circumstances the trustee in bankruptcy claimed that, for the purpose of the division of the surplus, the

bankrupt's shares should be treated as paid up shares; but the Court of Appeal agreed with Buckley, J., that they could only be treated as paid up to the extent to which they actually had been paid; and that proof of the claim for the unpaid calls was not equivalent to payment of the calls—and that, therefore, the other shareholders whose shares were paid up in full were exclusively entitled to share in the surplus assets until the amount paid on their shares was reduced to that which had been paid on the bankrupt's shares.

STATUTE OF LIMITATIONS—LEGACY—ACTION TO RECOVER LEGACY —SHARE OF TESTATOR'S ESTATE—EXPRESS TRUST—INFANT LEGATEE—REAL PROPERTY LIMITATION ACT 1874 (37 & 38 VICT. C. 57) S. 8 (R.S.O. C. 133, S. 23).

In re MacKay, MacKay v. *Gould* (1906) 1 Ch. 25. This is a somewhat interesting case. The plaintiff's father died in 1856 leaving a widow and two infant children, viz., the plaintiff, who attained her majority in 1876, and a son, who died in 1874. By his will the father bequeathed all his property to his widow and children. The widow was sole executrix. She married again in 1857, and lent to her second husband all the property of her first husband's estate, amounting to £31,641 odd, on the security of a mortgage, and on the administration of her second husband's estate she was authorized to retain £8,683 odd and certain other personal estate in respect, and in part satisfaction, of her claim under the mortgage. She died in 1885 having left a will whereby she disposed of all her property away from the plaintiff. Her estate amounted to £8,243 odd. The present action was brought by the plaintiff against the representative of her mother's estate, claiming to be entitled to the whole of the estate left by her as being part of the share due to her under her father's will, of which she claimed to have been kept in ignorance until 1902. The defendant set up the Statute of Limitations (see R.S.O. c. 133, s. 23) and Kennedy, J., held that the plaintiff's deceased mother was not an express trustee of the fund, and that the Statute was, therefore, a bar to the action. The plaintiff's ignorance of her rights he held was not made out. The report of the case in 93 L.T. 694 throws a somewhat different complexion on the matter. From that report it appears that the judge found as a fact, that although there might not have been made any division of the father's estate yet the plaintiff had received from her mother money, or its equivalent, to the extent of her share therein; and that she had been left out of her mother's will at her own desire.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] WADE *v.* KENDRICK. [Dec. 22, 1905.

Company—Act of directors—Unauthorized expenditure—Liability of innocent directors.

The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm (of which two directors were members) carrying on business of a similar character continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire and declaring that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor $30,000 and receiving assets worth $12,000, and having eventually gone into liquidation the liquidator brought action to recover from the members of the firm the difference. The Court of Appeal held that K. and F. were not liable though their partners were.

Held, that K. and F. having received the benefit of the money paid by the company were also liable to repay the loss.

Appeal allowed with costs.

Douglas K.C., and *S. B. Woods*, for appellant. *Shepley*, K.C., for respondent Forsythe. *J. W. McCullough*, for respondent Kendrick.

N.B.] IN RE CUSHING SULPHITE FIBRE CO. [Feb. 8.

Appeal—Winding-up Act—Final judgment—Amount in controversy.

By s. 76 of the Winding-up Act, an appeal can be taken to the Supreme Court of Canada by leave of a judge of that Court if

the amount involved is $2,000 or over. On application for leave to appeal from a judgment of the Supreme Court of New Brunswick setting aside an order of a judge in the winding-up proceedings which postpone a sale of lands of the insolvent company in a suit in equity for foreclosure of a mortgage and directing the sale to proceed:—

Held, that s. 76 of the Winding-up Act must be taken in connection with s. 28 of the Supreme Court Act and by the latter an appeal can only lie from a final judgment; and that the judgment in this case was not final and leave to appeal could not be granted.

Held, also, that no pecuniary amount was involved in the proposed appeal and the leave should be refused on that ground also.

Motion refused with costs.

Blair, K.C., *Pugsley*, K.C. and *Hazen*, K.C., for the motion. *R. G. Code* and *Hanington*, contra.

N.S.] McISAAC *v.* BEATON. [Dec. 22, 1905.

Will—Trust—Conditional devise.

A will provided as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same. And I do hereby appoint by brother, Donald McIsaac, and my brother-in-law, Donald McIsaac, tailor, my executors to carry out this my last will and testament."

Held, affirming the judgment appealed from (38 N.S. Rep. 60), that the widow took the real estate in fee with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children to do so.

Appeal dismissed with costs.

A. A. Mackay, for appellant. *Mellish* K.C., and *Jamieson*, for respondent.

N.S.] [Dec. 22, 1905.

MADER *v.* HALIFAX TRAMWAY CO.

Negligence—Trial by jury—Findings—Statutory privilege.

On the trial of an action based on negligence the jury should be asked to state specifically what the negligence of the defendant

was that caused the injury. General findings of negligence, unless the same is found to be the direct cause of the injury will not support a verdict.

Appeal dismissed with costs.

Borden, K.C., and *W. B. A. Ritchie*, K.C., for appellant. *Newcombe*, K.C., and *Mellish*, K.C., for respondents.

N.S.] [Dec. 22, 1905.

INVERNESS RAILWAY & COAL CO. *v.* MCISAAC.

Expropriation of land—Submission to arbitration—Award—Notice—Entry on land—Trespass.

By statute in Nova Scotia the recompense for land taken for railway purposes and for earth, gravel, etc., removed, must be determined by arbitration. A railway company proposed to expropriate and their engineer wrote to M., who had acted for them in similar matters before, instructing him to ascertain if the owners had arranged their title so that the arbitration could proceed and if so to act for the company and request the owners to appoint their man, the two to appoint a third if they could not agree. The engineer added in his letter: "I will send an agreement of arbitration which each one can subscribe to or, if they have one already drafted, you can forward it here for approval." No agreement was sent or received by the engineer, but the three arbitrators were appointed and met and investigated the damages making an award which the company refused to pay and the owner sued.

Held, reversing the judgment appealed from (38 N.S. Rep. 80), that as the company had not taken the preliminary steps required for expropriation the award was not made under the statute and was void for want of a proper submission.

Under the statute the company could enter prior to expropriation on giving notice to the owner of their intention and stating the quantity of land they intended to take. Without giving such notice the company entered and cut down trees and removed gravel. The owner sued on the award and added an alternative claim for trespass. The trial judge held the award bad and dismissed the claim for trespass on the ground that the owner's sole remedy was by arbitration.

Held, that the entry on the land was not under the statute so the remedy by action was not taken away, and the owner was entitled to a new trial on his claim for trespass.

Appeal allowed with costs.

Newcombe, K.C., for appellant. *Alex. McDonald*, for respondent.

N.S.] [Dec. 22, 1905.

DOMINION COTTON MILLS CO. *v.* TREGOTHIC MARSH COMMISSIONERS.

Certiorari—Assessment—Prescription—Delay of judge—Jurisdiction taken away by statute.

Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings.

Held, affirming the judgment appealed from (38 N.S. Rep. 23), Girouard, J., dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void, notwithstanding that it was applied for and judgment on the application reserved before the time had expired.

Held per TASCHEREAU, C.J.—Where jurisdiction has been taken away by statute the maxim actus curiae neminem gravabit cannot be applied, after the expiration of the time prescribed, so as to validate an order either by ante-dating it or entering it nunc pro tunc; that, in the present case the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction, but the appellants were not entitled to it on the merits.

Per GIROUARD, J., dissenting.—Under the circumstances the order in this case should be treated as having been made on the date when judgment on the application was reserved by the judge. Upon the merits the appeal should be allowed, as the commissioners had no jurisdiction in the absence of proper notice as required by the 22nd section of the "Marsh Act," R.S.N.S. (1900) c. 66.

Appeal dismissed with costs.

W. B. A. Ritchie, K.C., and *Sangster*, for appellants. *Newcombe*, K.C., and *Mellish*, K.C., for respondents.

N.S.] [Dec. 22, 1905.

BIGELOW *v.* CRAIGALLACHIE DISTILLERY CO.

Contract—Place of completion—Sale of liquor—Prohibited sale—Knowledge of vendor.

The plaintiffs, who carried on business in Glasgow, in Scot-

land, as whiskey distillers, appointed sales agents at Halifax, N.S., with authority restricted to receiving and transmitting orders, the acceptance of such orders and forwarding of the goods being in the discretion of the plaintiffs' officers in Glasgow. The defendant, who carried on a trade in liquors in Nova Scotia, without any license as provided by the Liquor License Act, R.S.N.S., 1900, c. 100, placed orders, by written memoranda, with these agents which orders were transmitted to the plaintiffs at Glasgow. On receipt of the orders the plaintiffs shipped the whiskey thereby ordered to the defendant, through common carriers at Glasgow, to be forwarded to him at the addresses he gave in Nova Scotia, and, after he had received the goods, passed drafts upon him for the price which he accepted. The drafts were dishonoured at maturity and, upon being sued for the amount, the defendant pleaded that the contract was void, having been entered into in Nova Scotia with the object of enabling him to make illicit re-sales of the whiskey in a locality where the Canada Temperance Act was in force and in contravention of the provisions of that Act and of the local License Act prohibiting such sales on pain of fine and imprisonment.

Held, affirming the judgment appealed from (37 N.S. Rep. 482), IDINGTON, J., dissenting, that the contract was not completed until the acceptance of the orders and delivery of the goods to the defendant at Glasgow, in Scotland, and that the plaintiffs were entitled to recover as there was no evidence to shew actual knowledge upon their part of any intention to contravene the statutes.

Appeal dismissed with costs.

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

N.S.] [Dec. 22, 1905.

MUNICIPALITY OF INVERNESS *v.* MCISAAC.

Railway—Expropriation—Municipal resolution—Confirming Act—Plans.

A municipal council passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the General Railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken and including in the aggregate a greater area than could be expropriated

for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The legislature passed an Act confirming such resolution. To an action by the owner of the land taken on an award fixing the value of that in excess of what could be expropriated the corporation pleaded no liability on account of such excess, and also that there was no specific plan on file describing the land.

Held, affirming the judgment appealed from (38 N.S. Rep. 76), that the first defence failed because of the Act confirming the resolution and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution.

Appeal dismissed with costs.

Newcombe, K.C., and *A. A. Mackay,* for appellants. *Mellish,* K.C., and *H. Y. Macdonald,* for respondent.

N.S.] [Dec. 22, 1905.

HUTCHINGS *v.* NATIONAL LIFE INS. CO.

Life insurance—Condition of policy—Payment of premium—Note.

When the renewal premium of a policy of life insurance became due the assured gave the local agent of the company a note for the premium with interest added, which the agent discounted and had the proceeds placed to his own credit in the bank. The renewal receipt was not countersigned nor delivered to the assured, and the agent did not remit the amount of the premium to the company. When the note matured a part was paid and a renewal note given for the balance, which was unpaid at the time of the death of the assured. A condition of the policy declared that if any note given for a premium was not paid when due the policy should cease to be in force.

Held, DAVIES and MACLENNAN, JJ., dissenting, that the transactions between the assured nd the agent did not constitute a payment of the premium in cash and that the policy had lapsed on default to pay the note at maturity.

Appeal dismissed with costs.

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

Province of Ontario.

COURT OF APPEAL.

From Street, J.] HIME *v.* LOVEGROVE. [Dec. 30, 1905.

Vendor and purchaser—Covenant—Building restriction—House —Stable.

The owner of two adjoining parcels of land sold and conveyed one, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators and assigns, not to "erect or build more than one house upon the property hereby conveyed"; with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcels conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold became vested by various mesne conveyances in the defendants, who built a stable upon part of it, sufficient space being left within the prescribed boundaries for the erection of a house in the terms of the covenant, which the defendants asserted they intended to build. The defendants also claimed that the covenant was inoperative by reason of a change in the residential character of the neighbourhood by the erection of factories, etc.

Held, assuming that the plaintiffs were entitled to the benefit of the covenant, and that there had been no change in the residential character of the neighbourhood, no breach of the covenant was proved for that the defendant had the right to build the stable as appurtenant to the house to be afterwards erected.

Bowes v. *Law* (1870) 18 W.R. 102 approved. Judgment of STREET, J., 9 O.L.R. 607 affirmed.

A. Cassels, for appellant. *Alfred Bicknell* and *G. B. Strathy*, for respondents.

HIGH COURT OF JUSTICE.

Divisional Court.] [Oct. 24, 1905.

TOWNSHIP OF MCNAB *v.* COUNTY OF RENFREW.

Municipal corporations—Township bridge—User by other municipalities—Important means of communication—Repair and maintenance—Injustice to township—Liability of county.

By s. 617 of 3 Edw. VII. c. 1 *a* (O.), where a township bridge

is over 300 feet in length the council thereof may, by resolution, declare that by reason of such length, that it is being used by inhabitants of municipalities other than the township, and is situated on a highway, being an important road and affording means of communication to several municipalities, it is unjust that the township should be liable for its maintenance and repair and that such liability should be imposed on the county, an application may be made to the county judge to have it so declared.

Held, that such user need not be by the inhabitants of municipalities within the county, the material point being its extensive use for travel by neighbouring municipalities, whether in or out of the county; nor that the road which affords such means of communication should either be a line of road extending through the municipalities referred to, or a main trunk road with branches into different municipalities; all that is necessary is that it should be an "important road" connected with other roads or ways forming a means of communication, whereby the inhabitants of such municipalities may pass and re-pass over the said bridge.

Judgment of the County judge affirmed.

Aylesworth, K.C., for appellants. *Douglas*, K.C., for respondent.

Meredith, C.J.C.P., MacMahon and Teetzel, JJ.] [Nov. 6, 1905.

CHURCHILL *v.* TOWNSHIP OF HULLETT.

Public Schools—Dissolution of union school section—Formation of new union and non-union sections—Including other lands.

There being nothing in the Public Schools Act to bring an award of arbitrators, appointed under s. 46 of that Act, within the exception contained in s. 47, of the Arbitration Act, R.S.O. 1897, c. 62, there is power in the Court or a judge to remit the matters referred or any of them for reconsideration to the arbitrators.

There is also power in such arbitrators when dissolving a union school section to form both a union and a non-union school section out of the lands which were comprised in the dissolved union section and in doing so, although they cannot bring into the new non-union section any lands which did not form part of the dissolved union section, they have the power to include such other lands in the new union section and there is no reason for

limiting the arbitrators' jurisdiction to either action in exact conformity with the prayer of the ratepayers' petition or a rejection of their request.

In re Sydenham School Section (1903) 6 O.L.R. 417; (1904) 7 O.L.R. 49 distinguished. Judgment of ANGLIN, J., affirmed.

Proudfoot, K.C., for appeal. *Dickinson*, contra.

Trial—Meredith, C.J.C.P.] [Dec. 30, 1905.

JAMES *v.* RATHBUN CO.

Water and watercourses—Floatable stream—Obstruction by dam—Removal by force—Justification—Absence of convenient opening—Statutes.

The plaintiff's dam across the River Soutamattee was, up to the time of the spring freshet of 1904, provided with a slide constructed in conformity with the requirements of R.S.O. 1897, c. 140, and was in good repair, but part of the slide was carried away and part was damaged and broken by that freshet, which was an unusual one.

Held, upon the evidence, that the injury to the slide could not have been guarded against by the plaintiff, and was the result of vis major; that it was not reasonably practical for the plaintiff to have repaired the slide before the defendants' drive of logs and timber coming down the river arrived at the dam; and that the sluice-way did not constitute a convenient opening for the passage of the drive.

Held, therefore, that the defendants were in law justified in blowing up the slide and part of the dam in order to remove the obstruction which they offered to the passage of the drive.

Farquharson v. *Imperial Oil Co.* (1899) 30 S.C.R. 188 followed. *Caldwell* v. *McLaren*, 9 App. Cas.. 392, referred to. *Ward* v. *Township of Grenville* (1902) 32 S.C.R. 510 distinguished.

The history of the Ontario legislation respecting mills and mill dams and rivers and streams referred to.

Johnston, K.C., and *S. Masson*, for plaintiff. *Shepley*, K.C., and *G. E. Deroche*, for defendants.

Teetzel, J.] [Jan, 8.

COPELAND CHATTERSON CO. *v.* BUSINESS SYSTEMS CO.

Practice—Joinder of actions—Conspiracy—Defendants joining conspiracy at different times.

Held, following *O'Keefe* v. *Walsh*, [1903] 2 I.R. 681, that

where an action is brought against a number of defendants jointly for an illegal conspiracy, the fact that several defendants joined the conspiracy at different times is no ground for objection that the action is wrongly constituted in law as joining separate causes of action against separate defendants, there being in substance only one cause of action, namely, the conspiracy to injure. But in such a case the jury may differentiate and assess separate damages against these separate defendants according to the respective dates when such defendants became members of the conspiracy.

Raney, for plaintiffs. *Kilmer*, for defendants.

Teetzel, J.] REX *v.* SMITH. [Jan. 8.

Liquor License Act—Appeal to County Court—Justice of the peace—Police magistrate.

Sec. 118, sub-s. 6 of the Liquor License Act, R.S.O. 1897, c. 245, provides that "an appeal shall lie to the judge of the County Court of the county in which the order of dismissal is made . . where the Attorney-General of the Province so directs, in all cases in which an order has been made by a justice or justices dismissing an information or complaint laid by an Inspector."

Held, that the words "justice or justices" in this sub-section do not include a police magistrate.

Haverson, K.C., for defendant. *Cartwright*, K.C., for County Court judge, and informant.

Cartwright, Master.] [Jan. 30.

CROIL *v.* MCCULLOUGH.

Appearance—Withdrawal of—Conditional appearance.

On an application by a defendant resident in Montreal, in an action brought in Ontario on two promissory notes payable, if at all, in Montreal, to withdraw his appearance and enter a conditional appearance, it was shewn that the defendant had not only appeared on and successfully resisted a motion for immediate judgment on material alleging his intention to counterclaim to have a partnership between the plaintiff and himself in Ontario wound up.

Held, that the application must be refused.

D. W. Saunders, for the motion. *Stiles*, contra.

Teetzel, J.] [Feb. 2.

IN RE MCLEAN AND TOWN OF NORTH BAY.

Municipal corporations — Closing street — Compensation — New access—Condition precedent.

The Municipal Act, 1903, s. 629, provides that no council shall close up any public highway whereby any person will be excluded from ingress and egress to and from his lands, unless the council, in addition to compensation, also provides for the use of such person some other convenient way across to the said lands; and provides as follows: (2) "If the compensation offered by the council to the owner of the lands, or the road provided for the owner in lieu of the original road as a means of egress and ingress, is not mutually agreed upon between the council and the owner or owners, the matters in dispute shall be referred to arbitration. . . ."

Held, that sub-s. 2 does not have the effect of making an offer of compensation, and the provision of another convenient road, conditions precedent to the rights of the council to pass a by-law to close the road; nor was it intended by it to change the law as laid down in *Re McArthur* v. *Corporation of Southwold* (1878) 3 A.R. 295.

Hellmuth, K.C., for plaintiff. *H. E. Rose*, for municipal corporation.

Province of Nova Scotia.

SUPREME COURT.

Full Court] HAINS *v.* LEBLANC. [Jan. 6.

Fraudulent misrepresentation—Party not permitted to take advantage of.

Defendant as bailiff of D. levied upon goods in premises occupied by R. as tenant of D., but which were claimed by plaintiff under a bill of sale given to secure a debt due for services rendered. The evidence shewed and the trial judge found that the wife of R. being entitled to a sum of money held in trust for her, D. and R. were parties to a misrepresentation to the trustee as the result of which D. obtained possession of a portion of the money so held in trust it being agreed between the parties that D. should retain a portion of the money in payment of a debt due to him for professional services and that the balance should

be applied by him in payment of the rent of the premises occupied by R. as tenant of D. It was further shewn and found that the amount received by D. was more than sufficient to satisfy the debt due him for professional services and the rent due up to the time of the distress.

Held, affirming the judgment appealed from, that as plaintiff was not shewn to be a party to the fraud and was not a privy in any sense which would subject her to its consequences, and as her title to the property in question was founded on a bill of sale given for good consideration defendant's principal could not be heard to make the contention that the money obtained from the trustee was received under a fraudulent proceeding to which he himself was a party.

T. R. Robertson and *Grierson,* for appellant. *J. J. Ritchie,* K.C., and *Monroe,* for respondent.

Full Court.] FLEMING *v.* WITHROW. [Jan. 6.

Principal and agent—Sale of mine—Commission—Rescission of agreement—Burden of proof as to new agreement.

Plaintiff obtained from defendants an option on a mining property to expire May 31st, 1902, under an agreement by which he undertook to find a purchaser for the property for the sum of $27,000 for a commission of $5,000, but with a provision that in case it might be found necessary to make a reduction in the price of the property the commission payable to plaintiff should be 20% on the purchase price. Some time before the expiration of this option, on the 12th March, 1902, plaintiff wrote defendants informing them that he had failed to bring about a sale of the property, but that he had induced a person whose name was mentioned to join with him in purchasing it and making a cash offer of $15,000 for the property as it stood, payable in 30 days, and saying, among other things, "This is only a game of chance as far as I am concerned, for I am now a buyer instead of a seller . . . this is a cash offer . . . and it is all I can afford or will offer whether accepted or rejected." The offer was not carried into effect, and defendants having subsequently made an arrangement to sell the property to other parties plaintiff claimed commission.

Held, 1. The relationship established between plaintiff and defendants under the first arrangement, which was practically

that of principal and agent, was terminated when the plaintiff made his offer of the 12th March, and plaintiff having then elected to associate himself with the parties who were proposing to purchase the property was estopped from claiming remuneration from defendants in connection with the sale made subsequently.

2. The relationship between plaintiff and defendants having been severed on the 12th March the burden was on plaintiff to shew by express evidence that it was subsequently revived.

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

Full Court.] FARLINGER *v.* INGRAHAM. [Jan. 6.

Collection Act—Rights of assignee as against sheriff levying under execution.

The assignment made by a debtor under the provisions of the Collection Act, R.S. (1900), c. 182, s. 28, is to be regarded as part of the legal process provided by the statute to enable the creditor to enforce payment of his debt and essentially differs from and is in no way analogous to a voluntary assignment, and is not subject to the provisions of the Bills of Sale Act requiring an affidavit of bonâ fides or other requirements of the Act.

The assignee in such case does not take his rights under the assignor so as to be bound or affected by his fraudulent act, but as a judgment creditor enforcing his statutable remedy, and he may in that capacity attack any previous fraudulent conveyance made by his assignor.

The assignment so obtained confers upon the judgment creditor an absolute title to the property assigned in trust to satisfy his judgment and in the next place to hold the balance for the benefit of those beneficially entitled thereto.

An assignee under the Act who has taken possession under his assignment is entitled to recover against the sheriff levying under executions placed in his hands subsequently to the date of the assignment.

J. J. Ritchie, K.C., and *C. P. Fullerton*, for plaintiff. *Drysdale*, K.C., and *Duchemin*, for defendant.

Full Court.] EASTERN TRUST CO. *v.* ROSE. [Jan. 6.

Will—Construction—Distribution of estate.

Testator by his last will directed that his property should be sold and that his trustees should pay the interest and rents to his wife and four children named. On the death of any one of his said children leaving issue the share of such child or children to be paid to their off-spring in equal shares, and should any child die without issue his share to be divided equally among the survivors. In the event of the death of his wife unmarried the interest of her share to be paid to his son W., who was not one of the four children first named, and after the death of W. his share to be divided equally among his children.

Held, affirming the judgment of RUSSELL, J., that the provisions of the will indicated an intention on the part of testator to divide his property into five equal parts and to give one part to his widow for life and the remainder to the four children named, and that when he directed the division of his property among his children what he had in mind was its division among the four children named. That the children of W. took only the share of the widow, in which their father had a life interest and that the remainder was to be divided equally among the survivors of the four children first named in the will.

Whitman, for appellants. *Henry* and *W. E. Thompson*, for respondents.

Full Court.] SANDERS *v.* SUTCLIFFE. [Dec. 18, 1905.

Damages—Breach of contract—Failure to complete work by time agreed—Loss of tenant—Evidence—Waiver.

In an action by plaintiff on a promissory note given by defendant in part payment of the contract price for the erection by plaintiff of a vault in an office building owned by defendant, defendant counterclaimed damages on account of the imperfect condition of the vault and also on account of the loss of a tenant who had agreed to take a five years' lease of one floor of the building on condition that the vault was completed by a specified date.

Held, that in order to recover on the latter part of the counterclaim defendant must shew that there was a contract by plaintiff to complete the vault by a specified date and that plaintiff was so far aware of the agreement between defendant and

his proposed tenant that he must be taken to have contracted to bear the loss covered by the repudiation of the tenancy in consequence of his failure to carry out the terms of his contract. And that in the absence of evidence of a contract on the part of plaintiff to complete his work within any definitely stated period, or of such notification of the agreement between defendant and his proposed tenant as to give rise to a contract on the part of plaintiff to bear the loss occasioned by the refusal of the tenant to take the premises on account of the non-completion of the vault defendant could not recover.

In answer to a letter from defendant complaining of delay in the commencement of the work and stating that on plaintiff's assurance he had promised M., the prospective tenant, that the work would be completed by the first of March, plaintiff took the ground that the contract called for security and offered to proceed with the work as soon as satisfactory security was given. There was nothing about security in the letters containing the offer and acceptance which constituted the contract, but defendant acquiesced and furnished the security asked for.

Held, that while defendant might have refused to give security and have insisted upon the prosecution of the work in accordance with the terms of the contract he could not, after assenting to and acting upon plaintiff's requirement, claim that there was any breach of agreement on the first of March.

W. F. O'Connor, for appellant. *H. Mellish*, K.C., and *J. A. Knight*, for respondent.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] A. *v.* A. [Sept. 13, 1905.

Alimony—Misconduct of wife before marriage—Condonation—Property in engagement ring and wedding presents.

Suit for alimony. The plaintiff was found to have been guilty of unchastity with another man before her marriage to defendant, in consequence of which she gave birth to a child four months after the marriage. She had entirely concealed the matter from her husband until after the birth of the child.

Held, following *Nelligan* v. *Nelligan*, 25 O.R. 8, and *Aldrich* v. *Aldrich*, 21 O.R. 447, that such conduct on the part of a wife is not sufficient to deprive her of the right to alimony.

Under s. 30 of the King's Bench Act a wife will be entitled to alimony if, by the law of England as it stood on July 15, 1870, she would have been entitled to a decree for the restitution of conjugal rights, and by that law nothing but cruelty or adultery on the part of a wife after marriage would be a bar to an order for such restitution or entitle the husband to a judicial separation. *Scott* v. *Scott*, 4 S. & T. 113, and *Russell* v. *Russell* (1897) A.C. 395 followed.

There can be no condonation by the husband of any matrimonial offence of the wife unless it is followed by conjugal cohabitation. *Keats* v. *Keats*, 1 S. & T. 334, per Lord Chelmsford at p. 357. After the birth of the child the defendant got from the plaintiff the engagement ring that he had given her, on the understanding as found by the judge that he was to keep it until they should live together again, as he apparently then intended that they should do and led her to believe would be the case at some time in the future.

Held, that the plaintiff was entitled to the return of the ring or payment of its value, but that her claim for wedding presents sent by friends of the defendant should not be allowed.

C. P. Wilson and *T. R. Ferguson*, for plaintiff. *Howell* K.C., and *Huggard*, for defendant.

Full Court.] REX *v.* BARRIE. [Dec. 6, 1905.

Criminal law—Criminal Code, s. 177, s.-s. (b)—Summary conviction—Substitution of valid for defective conviction and warrant of commitment—Habeas corpus—Appeal from refusal of.

The prisoner was convicted under s. 177, sub-s. *(b)* of the Criminal Code, 1892, for an indecent exposure of his person and sentenced to three months' imprisonment. Neither the conviction nor the warrant of commitment stated, although the evidence tended to shew, that the act has been done wilfully. After notice of application for a writ of habeas corpus the prosecution substituted a new conviction and warrant containing the omitted word.

Held, per MATHERS, J., following *Re Plunkett*, 7 Can. Cr. Cas. 365, that such substitution was permissible and that the writ

should be refused, but without costs. The prisoner appealed to the Full Court.

Held, that no appeal to the Full Court lies in this Province from the decision of a single judge refusing a habeas corpus though a prisoner may make successive applications for the writ to one judge after another, or he may make a direct application to the Court en banc. *Ex parte Woodhall*, 20 Q.B.D. 832, referred to.

Patterson, for the Crown. *Laurier*, for prisoner.

Mathers, J.] NIXON *v.* BETSWORTH. [Jan 9.

Practice—Plea of tender before action with payment into Court —Costs.

The defendant paid money into Court and in his statement of defence pleaded a tender of the amount before action. Plaintiff took the money out of Court in alleged pursuance of Rule 532 of the King's Bench Act. Subsequently, and before trial of the issue, defendant had his costs taxed and procured a certificate of the taxing officer.

Held, on appeal from the certificate, that neither party has a right to have his costs taxed before the determination of the issue raised by the plea of tender and that the taking of the money out of Court by the plaintiff was not an admission of the plea of tender. *Griffiths* v. *School Board, etc.*, 24 Q.B.D. 307, and *American Aristotype Co.* v. *Eakin*, 7 O.L.R. 197, followed.

Appeal allowed without costs, as the mistake was that of the taxing officer and the question had not been properly argued before him.

Hoskin, for plaintiff. *Phillipps*, for defendant.

Mathers, J.] COATES *v.* PEARSON. [Jan. 23.

Practice—Joinder of different causes of action—Jury trial— Separate trials of different causes of action.

Under Rule 257 of the King's Bench Act a plaintiff may sue in the same action both for malicious prosecution and trespass, although, by s. 59 of the Act, the former must be tried by a jury, unless the parties waive it, whilst the latter must be tried without a jury unless a judge otherwise orders, and a statement of

claims including both such causes of action is not thereby embarrassing or inconsistent with the rules of practice of the Court.

After the pleadings are closed, a plaintiff suing for both such causes of action may either waive his right to a jury or apply to have the trespass claim also tried by a jury and, if such application fails, then an application might be made under Rule 263, to exclude one of the causes of action or for separate trials, but no application under the last mentioned rule should be made before the cause is at issue.

T. S. Ewart, for plaintiff. *T. R. Ferguson,* for defendant.

Province of British Columbia.

SUPREME COURT.

Duff, J.] [Aug. 30, 1905.

IN RE GEORGE D. COLLINS.

Extradition—Perjury—Self-imposed oath—Alimony — Jurisdiction of California Court—Warrant—Jurisdiction of Extradition Commissioner—Description of offence—Particulars—Materiality—Truth of statement in affidavit—Criminality, evidence of—Habeas corpus.

1. Perjury is an extradition crime within the meaning of the Treaty and the Act.

2. Where the alleged crime is perjury, it is sufficient if the oath was administered in compliance with the formalities of the demanding country.

3. A warrant of committal remanding a prisoner for extradition is sufficient if it states the offence for which he is committed.

4. Such warrant, issued by an Extradition Commissioner under the authority conferred by the Extradition Act, is valid if issued in the form prescribed by the Act.

5. The ordinary technicalities of criminal procedure are applicable to proceedings in extradition to only a limited extent.

6. Where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way. [These holdings are not in accordance with the law as laid down in *Re*

Coppin, L.R. 2 Chy. App. at p. 55, and *In Re Bellencontre* 2 Q.B. (1891), p. 137—Ed. C.L.J.]

7. Where the demanding country is one of the States of the United States of America, it is sufficient if the imputed crime be a crime according to the law of that States, although not an offence against the general laws of the United States.

Ex parte Windsor (1865) 6 B. & S. 522 commented upon.

One test of determining whether the evidence is such as would justify the committal of the accused for trial if the crime had been committed in Canada, is to conceive the accused pursuing the conduct in question in this country, and then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged.

Higgins, for State of California. *Helmcken*, K.C., and *Taylor*, K.C., for accused.

Full Court.] LASELL *v.* THISTLE GOLD CO. [Nov. 9, 1905.

Agreement—Corrupt or illegal consideration—Promise of benefit to employee—Fraud.

L., being the manager and part owner of a mining company which was in financial difficulties and owing him money on account of salary, agreed with H. that the latter should acquire the outstanding debts of the company, obtain judgment, sell the property at sheriff's sale and organize a new company in which H. was to have a controlling interest. L. was to refrain from taking any steps towards winding up the company, and in consideration therefor he was to be given in the new company a proportionate amount of fully paid up and non-assessable shares to those held by him in the old company. He also agreed not to reveal this understanding to certain of the shareholders.

Held (MORRISON, J., dissenting), that if any consideration passed, it was an illegal consideration, a fraud on certain of the shareholders and a breach of trust.

A man who occupies the position of superintendent or manager of a mining company is not to facilitate the remedies of creditors, but to protect the interests of the company.

Bloomfield, for plaintiff. *Belyea*, K.C., and *Morphy*, for defendant.

Full Court.] TANGHE *v.* MORGAN. [Nov. 9, 1905.

Malicious prosecution—False arrest—Termination of criminal proceedings—"No bill" by grand jury—Production of—Sufficiency—Honest belief of prosecutor—Reasonable and probable cause—Damages.

There cannot be a record of proceedings between the King and an accused person in a criminal prosecution until at least a "true bill" has been found by the grand jury.

The production by the proper officer of a certified copy of the bill of indictment, returned "no bill," is sufficient in view of the Evidence Act, R.S.B.C. 1897, c. 71.

Where the act, in respect of which the criminal proceedings were launched, was done in the light of day, in open view of the defendant, and in pursuance of a statutory right, the trial judge was right in leaving it to the jury to say whether, in the circumstances, the defendant really thought the plaintiff was a thief.

Per IRVING, J., dissentiente. The proceedings being in the Court of Oyer and Terminer and General Gaol Delivery (a Court of record), the proceedings are, except as provided in s. 726 of the Code, only proveable in this Court by the production of the record itself.

MacNeill, K.C., for plaintiff. *J. A. Macdonald*, for defendant.

Full Court.] V. W. & Y. RY. CO. *v.* SAM KEE. [Jan. 10.

Statute, construction of—Supreme Court Act 1904, s. 100—Railway Act, 1903 (Dominion) ss. 162, 168—"Event" read distributively—"Issue" as distinguished from "event."

Sam Kee having obtained an award from arbitrators appointed under the Railway Act (Dominion) which award, by reason of s. 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the Railway Company appealed to the Full Court, advancing several distinct grounds of appeal, on all of which with the exception of the rate of interest allowed by the arbitrators, they failed, the interest being reduced to the statutory rate, from 6% to 5%. On the motion for judgment, Martin, K.C., for the Railway Company, contended that having succeeded in reducing the award, they were entitled to costs under s. 100 of the Supreme Court Act, 1904, which enacts that the

costs of every appeal to the Full Court . . . shall follow the event.

Held, (IRVING, J., dissenting), 1. The word "event" in s. 100 of the Supreme Court Act, 1904, may be read distributively.

2. Sec. 162 of the Railway Act, 1903, does not apply to costs of appeals to the Full Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by s. 100 of the Supreme Court Act, 1904.

3. The success of the appellant on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken.

Martin, K.C., for appellant. *Cowan*, K.C., for respondent.

Martin, J.] MELLOR v. MELLOR. [Jan. 13.

Husband and wife — Alimony — Costs — Scale — Solicitor and client.

In an action brought by the wife for alimony, in which she obtained judgment,

Held, that the wife was entitled to costs taxed as between solicitor and client.

A. E. McPhillips, K.C., for plaintiff. *Eberts*, K.C., for defendant.

Duff, J.] CHISHOLM v. CENTRE STAR MINING CO. [Jan. 31.

Statute, construction of—Workmen's Compensation Act—Arbitration—Arbitrator's fees.

On application to fix the fee of an arbitrator under the Workmen's Compensation Act, 1902, c. 74, which the Registrar had allowed at $25,

Held, while not disturbing the decision of the Registrar as having allowed an excessive fee, that the schedule to the Arbitration Act, R.S.B.C. c. 9, does not apply to arbitrations held under the provisions of the Workmen's Compensation Act, 1902.

Heisterman, for plaintiff. *H. G. Lawson*, for defendants.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(*Present* Lord Macnaghten, Lord Davey and Sir Arthur Wilson.)

CITY OF TORONTO *v.* TORONTO RAILWAY CO.

Interest on payments in arrear—R.S.O. (1897) c. 51, s. 113.

The above Act provides that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for the jury to allow it."

Held, that under the true construction of this enactment it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been improperly withheld, and compensation therefor seems fair and equitable.

An order by the Court below that the company (appellants) should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed.

[London—Nov. 8, 1905.

This was an appeal from the Court of Appeal for Ontario on a judgment delivered Jan. 23, 1905, which affirmed a judgment of the Divisional Court Feb. 9, 1904 (40 C.L.J. 159). The main question was as to the city's right to recover interest from the company upon track rentals, payment of which had, in the opinion of the Court, been improperly withheld.

Neither the judgment at the trial nor the judgment in appeal therefrom had declared the appellants liable for interest, nor had it been claimed in the statement of claim. The Master in Ordinary had on the reference made to him allowed interest at the rate of 6 per cent. per annum on the amount found due as damages for non-payment of a sum certain, and also which a jury would have been warranted in awarding. The Divisional Court affirmed this finding. In the appellate Court the Chief Justice considered that both sides could equally have ascertained by measurement the exact amount due under the contract, but that the appellants merely objected to the respondents' measurements, making no attempt to ascertain the amount themselves, and procured delay by promises to settle. As no rule required the full legal rate to be paid, the appellate Court reduced it to 4 per cent.

Laidlaw, K.C., and *G. T. Blackstock*, K.C., for the appellant company. As soon as the proper method of ascertaining the exact measurement had been arrived at the claim was paid, so that there was no delay. Interest had not been claimed in the suit nor was the amount capable of ascertainment from any document, and there was no evidence of demand. Secs. 113 and 114 of the above Act have been confined to tradesmen's accounts rendered in ordinary course, and there was no contract to pay interest. See *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1892) 1 Ch. 120; and (1893) A.C. 429; *Sinclair* v. *Preston* (1901) 31 S.C.R. 408.

Shepley, K.C. and *Rowlatt*, for the City, respondents. Interest was claimed at the trial and was within the competence of the referee. This was in effect the case of a debt certain payable by virtue of a written statement at a certain time, as it has all the elements of certainty as appear by the contract and nothing more was required than an arithmetical computation. See *City of Toronto* v. *Toronto Railway Co.* (1893) A C. 511, 515; *McCullough* v. *Newlove* (1896) 27 O.L.R. 62; *McCullough* v. *Clemow* (1895) 26 O.L.R. 467, 473; *London, Chatham and Dover Ry. Case* (ante); *Duncombe* v. *Brighton Club Co.* (1873), L.R. 10 Q.B. 371.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—The action was brought in 1897 on a contract dated Sept. 1, 1891, under which the Railway Company acquired from the corporation the exclusive right of working street railways within the city, which at that time extended no further west than Roncesvalles Avenue. This privilege or franchise was granted for a term of years in consideration of the payment of certain mileage rates. Disputes, however, soon arose about measurements. In February, 1897, the corporation brought this action against the Railway Company, claiming a large sum over and above the periodical payments which had been made from time to time. At the original hearing in 1898 it was, among other things, declared that the company were not liable to pay a mileage rate in respect of the 940 feet of track in dispute. On appeal this part of the Order was discharged, and it was referred to the Master in Ordinary to enquire and report by whom the track was constructed, and at what time and what rights of running upon it the Railway Company possessed. The Master, after reviewing the evidence taken before him, found that this portion of the track was constructed by the Railway Company on or about the 30th of June, 1893, as part of their own

undertaking, and that their rights of running upon it were governed by the agreement of the 1st of September, 1891, and were subject to the same obligations as were imposed upon the company with reference to their other tracks. The Master's finding was upheld in the Divisional Court and also in the Court of Appeal. In their Lordships' opinion the conclusion thus arrived at is plainly right.

The question as to interest is not so simple. If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities, ending in the case of *The London, Chatham and Dover Railway Company* v. *The South-Eastern Railway Company* (1893) A.C. 429, would probably be a bar to the relief claimed by the corporation. But in one important particular the Ontario Judicature Act, R.S.O. 1897, c. 51, which now regulates the law as regards interest, differs from Lord Tenterden's Act. Section 113, which is a reproduction of a proviso contained in the Act of Upper Canada, 7 Wm. IV., c. 3, s. 20, enacts that "interest be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it." The second branch of that section (as Street, J., observes) is so loosely expressed as to leave a great latitude for its application. There is nothing in the statute defining or even indicating the class of cases cited. But the Court is not left without guidance from competent authority. In *Smart* v. *Niagara & Detroit River Railway Company* (1862) 12 C.P. 404 Draper, C.J., refers to it as a settled practice "to allow interest on all accounts after the proper time of payment has gone by." In *Michie* v. *Reynolds* (1865) 24 U.C.R. 303 the same learned Chief Justice observed that it had been the practice for a very long time to leave it to the discretion of the jury to give interest when the payment of a just debt had been withheld. These two cases are cited by Osler, J.A., in *McCullough* v. *Clemow* (1895) 26 O.R. 467, which seemsto be the earliest reported case in which the question is discussed. To the same effect is the opinion of Armour, C.J., in *McCullough* v. *Newlove* (1896) 27 O.R. 627. The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. Acting on this view the Divisional Court and the Court of Appeal, consisting in all of seven learned judges, have given interest in the

present case, though not without some hesitation on the part of Britton, J., in the Divisional Court, and some hesitation on the part of Osler, J.A., in the Court of Appeal.

Their Lordships have come to the conclusion that the judgment under appeal ought not to be disturbed. The question is one in which the opinion of those familiar with the administration of justice in the Province is entitled to the greatest weight. Their Lordships are not satisfied that the decision of the Court of Appeal, which evidently has been most carefully considered, is in any respect erroneous.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellants will bear the cost of the appeal.

Book Reviews.

The Law Annual, 1906. Edited by R. GEOFFREY ELLIS and MAR. A. ROBERTSON, Barristers-at-law. William Green & Sons, Edinburgh. Canada Law Book Company, Toronto.

As a "multum in parvo" we know of nothing which gives so much information in so small a compass as does this annual. Other editors may well look at the clever way in which the material is boiled down and enviously think of the bovine lament —"Alas, my poor brother!"

Part I. is devoted to Circuits of the judges—Stamp duties—Legacy and succession duties—Costs—Fees, etc.

Part II. gives a number of public statutes, revised to date, too many to enumerate, but all useful for reference, grouped under various headings such as Contract and commercial law—Company law—Master and servant—Criminal law—Solicitors' acts —Law of property, conveyancing, etc.

Part III. contains "Points of law"; being a condensed digest of cases, excellently arranged under appropriate headings, concluding with notes on Colonial law by Hon. Mr. Justice Wood-Renton, of Ceylon.

Let it not be supposed that this book is only of use in the British Isles; on the contrary it will be found invaluable to practitioners in this Dominion, giving, as it does, information which is so frequently necessary to the many who have business to do with the old country, or who, for a variety of reasons, require to know the very things that are readily found in this excellent compendium.