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THE EXCHEQUER COURT AND ROYAL COMMISSIONS.

The general approval of the appointment of the new judge of the Exchequer Court of Canada shews how much it is to the advantage of a government, to say nothing of the people, when such appointments are made from a sense of what is best in the interest of the country rather than what may seem to be for the benefit of a party. The gain in the one case is lasting, in the other it is soon forgotten, and only serves to whet the appetite of the greedy partisan.

The approval given to the selection of Mr. Cassels has also been given, without stint, to the position taken by that gentleman with regard to the work which he has been called upon to do, an inquiry into charges made against certain officials in the Department of Marine and Fisheries. More than some of his colleagues, Judge Cassels has shewn a proper appreciation of what is due to the position of a judge, and his sense of the danger which attends any departure from his legitimate functions. The dignity of the Bench and therein the country at large, has suffered too much from such departures in the past.

Except under very special circumstances, judges should not be asked to undertake any extra judicial duties, or serve on commissions. This principle is already recognized by legislation. The Judges Act (R.S.C. c. 138, s. 33) enacts as follows: "No judge of the Supreme Court of Canada or of the Exchequer Court of Canada or of any Superior or County Court in Canada shall, either directly or indirectly as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties."

From the above section it is very clear that a judge may not be a director of a company. We regret to say that one judge at least, in the Province of Ontario, does not observe the law.

The section would also seem to prevent a judge acting as an arbitrator, or on a Royal Commission. The case of the judge of the Exchequer Court is further specially provided for by s. 6 of the Exchequer Court Act (R.S.C. c. 140), which reads: "The judge of the court shall not hold any other office of emolument, either under the Government of Canada or under the Government of any province of Canada." The latter provision has been law for many years. In the past it has been circumvented by Parliament voting a sum of money for the purpose of paying a commissioner, who happened to be a judge, for his work on a specified commission. This has been understood to be a virtual abrogation of the statute. We think it is a vicious method of legislation, but it has apparently become recognized as a way to enable a judge to obtain increased pay, and, since it has become customary, Judge Cassels might have taken advantage of the custom to augment his salary—none too large. In his letter to the Prime Minister, which is part of the correspondence relating to his appointment as commissioner, he said: "I have always believed, and do still believe, that no judge or other judicial officer should accept any position as commissioner, arbitrator or otherwise, which may yield him any emolument over and above the pay which the law allows him in virtue of his judicial position. I freely concede to others the right to entertain different views on this subject. I am too old, however, to change my own view." Judge Cassels is, therefore, entitled to all credit for refusing to accept an emolument for the additional work he has been asked to do. His refusal is a new departure, and we trust is the dawn of a better thought with reference to such matters. That judge would be regardless of the good opinion of his fellows, as well as exhibit a mind incapable of appreciating so excellent an example, who should in the future fail to follow it.

Nothing can more seriously affect the integrity of the Bench than the supposition that the judges are ready, for the sake of additional emolument, to undertake any employment outside of the sphere of their regular duties.

The line between what is quasi-judicial and quasi-political, is hard to define, and it cannot be overstepped without affecting the integrity of the Bench, and consequently lowering it in the estimation of the public. Nor is there any need for running risks of so serious a nature. There are men in the legal profession, if professional knowledge is required, as well qualified both by character and capacity as any judge on the Bench for conducting important investigations, and whose judgments, even where political questions are involved, will carry as much weight as those of any judge, and these can be freely discussed and commented on without danger to the best interests of the community.

Recognizing that by conducting the investigation the work of the Exchequer Court would be interfered with, Judge Cassels suggested some provision being made, meanwhile, for the administration of the court, and suggested that the registrar might be appointed a deputy judge, with an appeal, if necessary, to himself. At the present time the registrar has not powers equivalent to those of the registrar of the Supreme Court. The necessary power is proposed to be given him by a bill now before Parliament, which, however, has not yet progressed beyond its first reading. There seem to be very strong reasons for the registrar of the Exchequer Court having increased powers. Not only is the judge of that court frequently hearing cases at a great distance from Ottawa, but he is the only judge; consequently chamber matters, which might be disposed of by the registrar, have to await the return of the judge. In the case of the Supreme Court there are six judges, none of whom has to leave Ottawa, and the registrar also has certain powers of a judge in chambers.

If the registrar of the Exchequer Court be given increased powers there might not be much for a temporary judge to do; but, however that may be, there should be no mere deputy from whose decision an appeal would lie to the judge himself. Such an arrangement would involve a complication of the ordinary course of procedure, and should not be permitted, especially as

it would in some cases cause unnecessary delay and expense. In our opinion the person who is appointed to preside during the absence of the judge of such an important court as the Exchequer Court should be a functionary whose decisions should be equipollent with those of the judge whose place he fills. There is an obvious impropriety in providing for the business of the court in question upon a footing which will, for a period which may possibly extend over several months, expose litigants to the risk of being saddled with the expense of an unnecessary appeal. It may well be described as being especially inopportune at the present time, when legal reforms are being so much discussed, and when the lay press is clamouring for a reduction in the number of appeals now allowed by our existing system of judicature.

THE INDUSTRIAL DISPUTES INVESTIGATION ACT, 1907.

REX v. *McGUIRE*.

The Act above referred to is the most recent, and certainly not the least important of the statutes passed by the Dominion Parliament with the praiseworthy object of promoting the cause of peace in the constantly recurring conflict between capital and labour, and of removing or alleviating the many evils that follow in its train. It may not be without interest to refer briefly to the previous legislation passed with a similar object, especially as the Act now in question owes its origin to defects which were found to exist in the earlier statutes, and to interfere materially with the attainment of the end which they had in view. The principal measures of this kind are the Conciliation Act, 1900, and the Railway Labour Disputes Act, 1903, both of which are now incorporated in the Conciliation and Labour Act, R.S.C. 1906, c. 96.

It is unnecessary for our present purpose to refer to the provisions of the Act of 1903, further than to say that it introduced to a limited extent the element of compulsion which was

altogether absent from the earlier enactment, by giving the power to compel the investigation of causes of difference under oath. This power, however, could only be exercised in the case of disputes between railway employers and employees; and, as regards all other kinds of labour, the provisions of the Act of 1900 alone were applicable.

By these, machinery was provided whereby the Government, in case any dispute existed or was apprehended between employers and workmen, could inquire into the causes of the trouble, and promote an amicable settlement by getting the "parties together, and if either party desired it, by appointing a conciliator," the general nature of whose duties is indicated by his title, including such functions as the "endeavouring to allay distrust, to remove causes of friction, to promote good feeling, etc."

The provisions of this statute were made use of in a number of cases, with very beneficial results, but it was subject to a serious defect in that it provided no means by which the warring interests could be compelled to desist from aggressive measures, such as strikes and lockouts, before the appointment of a conciliator, or even while he was engaged in waving the olive branch. The result, too frequently, was that before his services were invoked, hostilities had been precipitated by one party or the other, and the feelings of both became so embittered that conciliation as a voluntary measure was the last thing they thought of. Much individual distress and public inconvenience resulted from this state of affairs, and at last a peculiarly flagrant example of these evils made the urgent need of a remedy abundantly clear.

We, in Ontario, fortunately, do not know by experience what a real "fuel famine" means, but everyone must remember how narrowly such a catastrophe was averted in the Province of Saskatchewan at the close of 1906, when, on account of a long continued strike among the coal miners at Lethbridge, the settlers throughout large districts were forced, in the complete absence of other fuel, to burn "lumber at $30 a thousand, willow bramble, twisted hay and grain," and while these sources

were almost exhausted, November blizzards were blowing with zero weather. While matters were in this critical condition, the contending parties were at last induced to avail themselves of the provisions of the Act of 1900, with the result that a friendly settlement was arrived at just in time to prevent complete disaster.

We have referred at some length to the Lethbridge strike, because it was apparently the cause of the legislation which is the subject of the present article.

It was felt that while, in that case, the worst evils of the strike had been averted for the time being, through the agency of the Act of 1900, yet there was need for some more drastic remedy than that measure provided. This is clearly stated in the report presented to the Ottawa Government by Mr. Mackenzie King, the energetic deputy minister of labour whose efforts as a "conciliator" under the Act had been largely instrumental in bringing about the settlement. He there suggests that "the State would be justified in enacting any measure which will make the strike or lockout in a coal mine a thing of the past," and that such an end might be achieved by providing that "all questions in dispute might be referred to a Board empowered to conduct an investigation under oath," and that "pending the investigation and until the Board has issued its finding the parties be restrained, on pain of penalty, from declaring a lockout or strike."

No time was lost by the Government in acting upon this recommendation, and within three months from the settlement of the coal strike, an Act was passed, the full title of which is "An Act to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities."

This is the Act to which we have thought it desirable to call the attention of our readers, both as being interesting in itself, and also in view of the important question as to its construction, which was raised in the case of *Rex* v. *McGuire*, recently decided by a Divisional Court.

The defendant in this case was convicted by the police magis-

trate of Cobalt on a charge of unlawfully inciting the employees of a mining company to go on strike, at a time when neither party to the dispute had asked for the application of the provisions of the Act. Against this conviction the defendant appealed to the Divisional Court before which his counsel argued at great length and with great ingenuity, that the magistrate had no jurisdiction to try the case under the Act, as it had not been invoked by either the mine owners or the workmen. It is quite obvious, that if this contention had prevailed, it would be possible for the contending parties to push their quarrel to the last extremity so long as both concurred in neglecting to avail themselves of the provisions of the Act.

The 60th section under which the conviction was made, provides that any person who incites any employee to go or continue on strike "contrary to the provisions of this Act," shall be guilty of an offence and liable to a fine. The interpretation of this section involves the question of what is meant by "going on strike contrary to the provisions" of the Act, and in this connection it was necessary to consider section 56, the true construction of which is the point on which the decision in this case principally turned. That section declares that "it shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions" of the Act. The "man on the street" would probably think that this language indicates, with sufficient clearness, that no lockout or strike could be lawfully declared until after recourse to the means of conciliation provided by the Act, and there can be no doubt that one of its objects would have been defeated if a contrary construction had been adopted by the Court. This, however, it refuses to do, and the conviction in its essential points was confirmed.

The following quotation from the judgment of Mr. Justice Magee well states the reasons which make the decision a satisfactory one from the point of view of the framers of the Act and of the general public. "The limited class of industries to

which the Act applies affords the strongest indication of the purpose of Parliament and the strongest reason why there should be no interruption of the work. They are 'mining properties' and 'agencies of public service utility.' As regards the latter, upon which the community depends for daily and constant necessary service the public interest in, and need for, their unbroken operation is manifest. As regards coal mines, apart from damage to the same, the loss and privation which may result to manufacturers and consumers at large through wide sections from a general interruption of production is matter of recent history and common knowledge. Parliament has seen fit, doubtless for good reasons, some of which readily occur to one, to include silver and other mines in the same category in this Act, and they cannot be separated in interpreting it."

THE CRIME OF PERJURY.

When speaking recently of the crime of perjury and its prevalence, we were aware that some of our judges at least in the Province of Ontario, are fully alive to the present condition of things in that regard. For example, in the case of *McCullough* v. *Hughes*, tried at Barrie in October last, Mr. Justice Riddell recommended the prosecution of a witness, who was subsequently convicted of perjury on two counts, before the county judge. At the Sandwich assizes in the same month, three witnesses were, upon the direction of the same judge under R.S.C. 1906, c. 146, s. 870, indicted for perjury, and a true bill found. His practice in regard to the matter is also referred to in *Hall* v. *Berry*, not reported, where he says that if he found that a witness had committed perjury in a case before him, he would have directed a prosecution as he had done in other cases. In another case he says: "The crime of perjury seems to be alarmingly on the increase, and all legitimate means should be taken to punish it, and thereby prevent its repetition." Other judges have also brought crimes of this character to the attention of the Crown authorities, and recommended prosecutions, and in their charges to the grand juries have called attention to the evil.

But whilst all this is true, it still continues, and the remedy has not yet been found. All our judges should be vigilant and aggressive in this matter. A systematic and consistent use of the powers given by the enactment quoted above might be largely effective. The responsibility at least is on them to do what they can.

CANADIAN EDITION OF THEOBALD ON WILLS.

Of the making of books there is no end; and this applies, measurably, to legal text-books; so much so that it is only occasionally that space permits for more than a passing reference to those which stand out prominently as demanding special attention. Such a one is the volume above referred to.

It is unnecessary to refer to the excellence of Mr. Theobald's most useful book, which in three years has reached another edition. So far as the English edition is concerned, few changes have been made; but a new, and to the Canadian profession an important departure, has been made by the addition to Mr. Theobald's standard work of Mr. Armour's notes on Canadian cases; so that now it may be said that the whole law affecting wills, as laid down in England and Canada, is comprised in the volume before us, which is an unusually large one of about 1,300 pages, inclusive of 300 pages of Canadian notes.

The Canadian authorities referred to by Mr. Armour are about eight hundred in number, and their arrangement follows as far as possible Mr. Theobald's method of dividing the subject, and are appended to each chapter of his work, so that the law affecting the various branches of the subject is to be readily found, and makes a complete whole. Mr. Armour's notes include our statutes, and all the cases in the concluded volumes of reports for the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba and British Columbia, are noted. In this connection it will be remembered that the same legislation as to wills prevails in all these provinces.

The arrangement adopted has the additional advantage that

it enables the reader to compare and contrast the English and Canadian cases on any particular branch as they are to be found in the same chapter.

For greater convenience there is a separate index and table of cases of the Canadian notes so that we have in effect a scientific digest of all the authorities reported in the various provinces above referred to.

It will therefore be readily seen what a complete and useful work we now have on this most important subject. The material is all there, and we can well be satisfied that such learned lawyers, such accurate writers and such experienced authors as Mr. Theobald and Mr. Armour have not, in this instance, failed in the excellence of their work.

An examination of the volume before us leads us to hope that in future editions of other standard English text-books, others may follow the example thus set by Mr. Armour.

DEFAULT IN CONTRACTS.

The recent decision of the Divisional Court in *Labelle* v. *O'Connor*, 15 O.L.R. 519, is an instance of a Divisional Court not following the decision of the Court of Appeal notwithstanding the Judicature Act, s. 81. In *Labelle* v. *O'Connor*, the court decided that where a purchaser makes default in a contract for the sale of land, in which time has been made of the essence of the contract, though he forfeits his deposit, he does not forfeit other payments which have been made on account of the purchase money. In *Fraser* v. *Ryan*, 24 A.R. 441, the Court of Appeal held that the forfeiture extended to all payments which had been made on account of purchase money, and this was followed by Street, J., in *Gibbons* v. *Cozens*, 29 Ont. 356. These cases, however, seem to have escaped the notice of the court in *Labelle* v. *O'Connor*.

THE MAXIM THAT THE LAW DOES NOT REQUIRE IMPOSSIBILITIES.

The Most Usual Mode of Expressing the Maxim.—It is an ancient and familiar maxim of the law which is embodied in the Latin phraseology, Lex non cogit ad impossibilia.

Literally, the maxim would mean that the law does not coerce to impossibilities, or compel impossibilities. Here there are certain words to be understood. It is not the impossibilities which the law fails to compel, but the doing or performing of impossibilities. As a matter of fact, however, the law not only does not but cannot compel "impossibilities," where they are such in the strict sense of that term. It could order the performance of such impossibilities, but could not enforce its order. The translation of the maxim is therefore more properly put in the form, which is usually adopted, that the law does not require impossibilities.

"The law never requires impossibilities" is the phraseology used in the statutes of some of the states.

Various Forms of the Maxim.—Sometimes the words of the maxim are put in a different order, so as to read Ad impossibilia lex non cogit.

The maxim is also sometimes mentioned in a way which while keeping the sense, leaves out the negative word in the Latin.

So the maxim is sometimes made to denote that the law compels "no one" to impossible things, by being put in the form, Lex neminem cogit ad impossibilia.

The familiar maxim on the subject is also put in the form which indicates that the law does not "intend" anything impossible, or in the Latin phraseology, Lex non intendit aliquid impossibile.

What may be regarded as practically a variation of the same maxim is found in the Latin words, Impotentia excusat legem, or literally, Impotence excuses law, which may be freely translated, Want of power is an excuse in law. This form of the maxim is especially invoked in regard to tenancy by curtesy,

where entry by the husband to give seisin is precluded during the lifetime of the wife.

Three other modes of expression may also be viewed as variations of the maxim, or at any rate as embodying like ideas. One of these, declaring that An impossibility involves no obligation is in the Latin form, Impossibilium nulla obligatio est. Literally, An impossible thing is no obligation. Another insists that No one is bound to do an impossibility, or, in the Latin form, Nemo tenetur ad impossibile.

The third declares, in antique language, that the law respecteth the possibility of things.

Sources of the Maxim.—The first appearance of the maxim under consideration in the English reports seems to be in a case decided in 1610 and preserved in Hobart's Reports, which were printed in 1646. The maxim there appears with the omission of the word "ad" (to) before "impossibilia" and in combination with that other form of the maxim "Impotentia excusat legem." The latter form is preceded by the Latin word for "but," ("sed") and so given as a species of equivalent for the maxim in its first form.

The form of the maxim, Lex non intendit aliquid impossibile, appears in a matter which came up two years later, in 1612, as described in Coke's Reports of which the thirteen parts or volumes were published between 1600 and 1615.

The source most usually assigned to the maxim in its most familiar form is, however, Coke upon Littleton, forming the first part of Coke's Institutes, and of which the fourth edition appeared in 1639. Here the maxim appears in its ordinary phraseology, preceded by the Latin word for "since" ("quia").

The variation or equivalent of the maxim in the phraseology, Nemo tenetur ad impossibile, appears in a source later than most if not all of these authorities. This is Jenkins' Reports, or Centuries, as he terms them and as they are sometimes cited, because they comprised Eight "Centuries" of cases, or eight hundred cases. These were compiled during the reign of

Charles I., who, it will be remembered, came to the throne in 1625.

Can the Maxim be Traced to the Influence of the Ancient Roman Law?—But if we seek beyond the English law for sources of the maxim, we might possibly trace its origin to the form or variation Impossibilium nulla obligatio est, known to the ancient imperial Roman law. It may not, however, be recognized as a maxim under that name, since the term maxim was not used by those old jurists. But it appears as a mode of expression such as was usually designated as a rule or Regula.

We find, indeed, many illustrations of impossible stipulations or promises given by Justinian in his Digest, as well as some in his Institutes and in those of Gaius. Among these instances are those where a person stipulates that some thing shall be given him which in the nature of things, does not exist or cannot exist, as a freeman he believed to be a slave, a sacred or devoted spot he thought subject to man's law, or a fabled creature that cannot exist.

When, however, the expression under consideration is rendered by the words, "An impossibility creates no obligation," it is to be recalled that the word "obligation," as used by the Roman jurists, has an implication of a binding legal tie, or connecting element, such as it does not strictly have in English law.

The ancient Roman law likewise defined and dealt with impossible conditions. Justinian in his Institutes explains that if an impossible condition be annexed to a stipulation, the stipulation is of no avail.

It will thus be seen that the ancient Roman law dealt sufficiently and with enough conciseness of statement with impossibility to give plausibility, at least, to the suggestion that the influence of that law may have been felt in the framing of the maxim under consideration. A species of further support to this idea may be regarded as derivable from the fact that even those writers most inclined to minimize the influence of the Roman upon the English law, and to claim that such vogue as that law may, at one time, have had, was academic rather than

professional, acknowledge a certain superficial currency of the leading rules or maxims of the Roman law among the early English lawyers.—*Central Law Journal.*

The subject is not one of much practical interest, in this country at least, but it may be noted that the Bar Council of England has adopted a resolution that the answering of legal questions in newspapers or periodicals, at a salary, or at ordinary literary remuneration, is not contrary to professional etiquette, provided that the name of the barrister giving the answer is not disclosed to the public, nor directly or indirectly brought to the knowledge of the person asking the question. A contemporary says that this seems a sensible compromise of a matter, as to which there has been wide divergence of opinion in the old country.

A man was convicted and sentenced for the crime of obtaining money by false pretences in the United States Court in China, which was created by Act of June 30, 1906. The court has jurisdiction over offences against the laws of the United States, and when these are deficient to furnish suitable remedies, in accordance with the common law, it was held that 30 Geo. II. (1757), making this act a crime having been passed prior to the separation of this country from England, it is an offence at common law within the meaning of the Act of 1906. *Biddle* v. *U. S.*, 156 Fed., 759.

In several states, English statutes passed prior to July 4, 1776, have been held to be in force.

In other states, only statutes passed prior to 4 James I. (1607) are considered as part of the common law. 6 Am. & Eng. Encyc., 278 (2nd ed.).—*U.S. Exchange.*

REVIEW OF CURRENT ENGLISH CASES.

PRACTICE—ACTION BROUGHT BY WRONG PERSON—ADDING ATTORNEY-GENERAL AS PLAINTIFF — AMENDMENT — TERMS OF AMENDMENT—COSTS.

Attorney-General v. *Pontypridd Waterworks Co.* (1908) 1 Ch. 388. This action was originally commenced by a municipal body for a mandatory injunction to enforce the provisions of an Act of Parliament. It was objected by the defendants that the statement of claim disclosed no cause of action. Thereupon the plaintiff obtained leave to amend the writ and statement of claim by adding the Attorney-General as a co-plaintiff, and the question was reserved as to the terms on which the amendment should be allowed to be disposed of by the judge at the trial. Warrington, J., held that the original plaintiffs had no right of action, and that the terms on which the Attorney-General should be added were first that the plaintiffs should pay all costs up to the order adding him, and that the Attorney-General should only be entitled to such relief as he could have claimed if the action had been commenced at the date on which he was added as a party.

POWER—APPOINTMENT BY WILL—TESTAMENTARY DOCUMENT NOT PROVABLE AS A WILL—INVALID EXECUTION OF POWER—WILLS ACT, 1837 (1 VICT. c. 26) ss. 1, 9, 10—(R.S.O. c. 128, s. 13.)

In re Barnett, Dawes v. *Ixer* (1908) 1 Ch. 402 is a singular case because Warrington, J., as judge in deciding it refused to follow a decision which he himself, as counsel for the plaintiff, had persuaded the late Mr. Justice Kekewich to give *In re Broad* (1901) 2 Ch. 86. The question in both cases was whether a power to appoint by will is well executed by a document, which, though purporting to be a will, and an exercise of the power, is nevertheless unprovable as a will by reason of defect of execution, or other cause. Kekewich, J., had held that it was a good execution of the power, but Warrington, J., holds that that decision is clearly contrary to the express provisions of the Wills Act, s. 10 (R.S.O. c. 128, s. 13) and he therefore declined to follow it. He naively suggests that counsel and the judge must have forgotten that section when *Re Broad* was argued.

POWER OF APPOINTMENT—PARTIAL EXERCISE OF POWER—EXTENSION OF RANGE OF INVESTMENT BY DONEE OF POWER—INVALIDITY.

In re Falconer, Property and Estates Co. v. *Frost* (1908) 1 Ch. 410. In this case a wife had, under her husband's will, power of appointment over trust property in favour of her children. She made partial appointments in favour of some of the children; and without making any appointment in favour of the others, she purported to authorize the trustees to invest the trust fund in other investments than were authorized by the will, including mortgages of leaseholds. The trustees made such investments, but Warrington, J., held that they had no power to invest upon leasehold security any funds representing shares subject to the trusts of the will and passing in default of appointment.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—COVENANT NOT TO SUE.

Sprange v. *Lee* (1908) 1 Ch. 424 is one of those cases which illustrate the peculiar result of a restraint against anticipation by a married woman. In this case a separation deed was made between husband and wife whereby the husband covenanted to pay £1,000 to a trustee upon trust to pay the income to the wife and to pay him a further annual sum for her separate use without power of anticipation. Subsequently the husband commenced divorce proceedings, which were compromised, the wife purporting to release the husband from his covenant to pay the further annual sum. This release, however, by reason of the restraint against anticipation was void; the wife, however, covenanted not to sue for any additional income or support beyond the income of the £1,000. This was paid to and accepted by her during her life. She died bequeathing her property to an adopted daughter, and her legal personal representative brought the present action to recover the arrears of the annuity on the ground of the nullity of the release given by the wife. The husband counterclaimed for damages for breach of covenant of the wife not to sue and Neville, J., held that both plaintiff and defendant were entitled to succeed on their claim and counterclaim respectively, and he therefore made no order except that the plaintiff should pay the costs of the action and counterclaim.

COPYRIGHT—ASSIGNMENT TO INTENDED COMPANY—REGISTRATION —VALIDITY OF ASSIGNMENT—GOODS IMPORTED TO SUPPLY ORDER GIVEN BEFORE REGISTRATION—INFRINGEMENT—FINE ARTS COPYRIGHT ACT 1862 (25 & 26 VICT. C. 68) SS. 1, 4, 9, 11.

Millar v. *Polak* (1908) 1 Ch. 433 was an action to restrain the infringement of a copyright. The author of drawings and designs for Christmas cards in February, 1905, agreed with the trustee of an intended company to be called M. & L. to sell the drawings and designs to the company when formed, and on March 1, 1905, executed an assignment thereof to the M. & L. company. On March 3, 1905, the company was incorporated and afterwards executed the usual adoptive agreement. In September, 1906, the company registered the drawings and designs which had been so assigned under the Fine Arts Copyright Act, 1862, and entered on the register March 1, as the date of the assignment to the company. The defendants, subsequent to September, 1906, imported into England infringements in fulfilment of orders given prior to the registration. Neville, J., who tried the action, held that the drawings or designs were proper subject matter for registration as drawings under the Act of 1862, and that the copyright extended to the right of multiplying copies, or reproductions of, by engravings thereof, be also held that the date of the assignment was properly stated as March 1, 1905, notwithstanding the company had not, on that date, been incorporated. Also, that it was an infringement of the copyright to import the copies above mentioned after registration, even though the importation was in fulfilment of an order given prior to the registration of the copyright.

INTERNATIONAL COPYRIGHT—FOREIGN MUSICAL COMPOSITION—REGISTRATION—UNAUTHORIZED PERFORMANCE IN ENGLAND—'WILFULLY' CAUSING OR PERMITTING UNAUTHORIZED PERFORMANCE—COPYRIGHT ACT, 1842 (5-6 VICT. C. 45)—INTERNATIONAL COPYRIGHT ACT, 1844 (7-8 VICT. C. 12)—MUSICAL COMPOSITIONS ACT, 1882 (45-46 VICT. C. 40)—INTERNATIONAL COPYRIGHT ACT (49-50 VICT. C. 40)—BERNE CONVENTION, 1887, ARTS, 2, 11—MUSICAL COPYRIGHT ACT, 1888 (51-52 VICT. C. 17) S. 3.

Sarpy v. *Holland* (1908) 1 Ch. 443. In this case a copyright in a musical composition was claimed under the International

Copyright Act, 1844, and one question was whether registration was necessary. It had not been registered as required by the Act of 1842, and Neville, J., held that the registration required by the Act of 1844 is in substitution for and not in addition to the registration required by the Act of 1842, and as the proprietor had been relieved by virtue of the International Copyright Act of 1886 (49-50 Vict. c. 33) ss. 4, 6, and the Berne Convention, 1887, and the Orders in Council adopting the same, from registration under the Act of 1844, no registration under the Act of 1842 was necessary. But he also held that the proprietor of such a copyright desiring to retain it in force in England must on the title page of every copy published in England print in English the notice reserving such right required by the Musical Compositions Act of 1882 (45-46 Vict. c. 40) s. 1. He also held that when a proprietor, tenant or occupier of a place of entertainment, at which an unauthorized performance of a copyright musical composition takes place, does not "wilfully cause or permit such unauthorized performance knowing it to be unauthorized," he is, by virtue of the Musical Compositor's Act, 1888 (51 and 52 Vict. c. 17) s. 3, relieved from liability to any penalty or damages in respect thereof, and in such cases an injunction will not be granted unless he threatens and intends to continue the performance. In this case the defendant, a hotel keeper, had hired musicians to play at his hotel, leaving it to their discretion what to play, and without his knowledge they performed a piece which was subject to copyright, and on his attention being called to the fact, he forbade the further performance of it. The plaintiff, moreover, failed to support his copyright because the publications of his composition in England bore only a notice in French reserving his rights.

MUNICIPAL CORPORATION—COUNCIL MEETINGS—RIGHT OF PUBLIC —NEWSPAPER REPORTER—EXCLUSION OF PUBLIC FROM MEETING OF COUNCIL.

Tenby v. *Mason* (1908) 1 Ch. 457. This was an action brought by the municipal corporation of the Town of Tenby against the defendant, a newspaper proprietor and ratepayer and burgess of the town, to restrain him from being present at council meetings without the permission of the council. The plaintiffs had passed a resolution excluding reporters, but the defendant had attended a meeting in that capacity and refused to leave when required so to do. The defendant claimed the

right to be present without such permission. The late Mr. Justice Kekewich, who tried the action, held that he had no such right, and granted an injunction and condemned the defendant in costs, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) affirmed his decision, holding that there is no inherent right on the part of the public to attend the deliberations of a public representative body, and that in the absence of any statutory enactment to the contrary, it is competent for any such body to exercise its discretion as to the admission or exclusion of the public.

Correspondence.

TO THE EDITOR, *Canada Law Journal*:

DEAR SIR:—

The dignified course adopted by Mr. Justice Cassels in reference to his appointment by the Dominion Government to investigate the charges against the management of one of the Public Departments at Ottawa is one which it is to be hoped may hereafter be generally adopted by the judiciary of the Dominion. We may reasonably expect that the conclusions at which the learned judge may arrive on the matters submitted for inquiry by him will be received by the public as a judicial utterance, and that the tongue of calumny, which is ever ready to wag on the slightest pretence, will be silenced.

There will at least be no pretence for saying that the learned judge has been influenced in his conclusions by any pecuniary gain, or by the hope of getting further extra judicial jobs of the like nature.

READER.

We refer to this matter in our editorial columns.—Ed. *C.L.J.*

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] INVERNESS RY. CO. *v.* JONES. [March 23.

Maritime law—Material men—Supplies furnished for "last voyage"—Privilege of dernier équipeur—Round voyage—Charter-party—Personal debts of hirers—Seizure of ship—Construction of statute—Ordonnances de la Marine, 1681.

A steamship lying at the port of Liverpool was chartered by the owners to P. for six months, for voyages between certain European ports and Canada, the hirers to bear all expenses of navigation and upkeep until she was returned to the owners. The ship was delivered to the hirers at Rotterdam, where she took on cargo and sailed for Montreal. On arriving at Montreal she unloaded and re-loaded for a voyage to Rotterdam, with the intention of returning to Montreal, and obtained a supply of coal from the plaintiffs which was furnished on the order of the hirers' agent at Montreal. The ship sailed to Rotterdam and returned to Montreal in about one month touching at Havre and Quebec, discharged her cargo and proceeded to re-load, obtaining another supply of coal from the plaintiffs in the same manner as the first supply had been furnished. Within a few days, the price of these supplies of coal being still owing and unpaid, the hirers became insolvent, and the plaintiffs arrested the ship at Montreal, claiming special privilege upon her as derniers equipeurs in furnishing the first supply of coal on her last round voyage, the right of attachment before judgment in respect of both supplies, and seizing her under the provisions of articles 2391 of the Civil Code and 931 of the Code of Civil Procedure.

Held, per FITZPATRICK, C.J., and DAVIES, MACLENNAN and DUFF, JJ., that the voyage from Montreal to Rotterdam and return was not the ship's "last voyage" within the meaning of article 2383(5) of the Civil Code; that the voyage out from Montreal and that returning from Rotterdam did not constitute one round voyage but were separate and complete voyages, and that, consequently, there was no privilege upon the ship for the

supply of coal furnished from Montreal to Rotterdam. And also, that the provisions of article 2391 of the Civil Code did not render the ship liable to seizure for personal debts of the hirers, and, consequently, that she could not be attached therefor by saisie-arrêt. Judgment appealed from (Q.R. 16 K.B. 16) affirmed, GIROUARD, J., dissenting.

Per DAVIES, J.:—The "last voyage" mentioned in article 2383 Civil Code, refers only to a voyage ending in the Province of Quebec.

Per IDINGTON, J.:—As the terms of the charter-party expressly excluded authority in the hirers to bind the ship for any expenses of supply and as nothing arose later that could by any implication of law confer any such authority on anyone and especially so in a port where the owners had their own agents, any possible rights that might in a proper case arise under article 2383 of the Civil Code did not so arise here; and, therefore, though agreeing in the result he expressed no opinion on the meaning of the term "last voyage" therein. *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115, should govern this case.

Casgrain, K.C., for appellants. *MacMaster*, K.C., and *Hickson*, for respondent.

N.S.] CHISHOLM *v.* CHISHOLM. [March 23.

Mother and child—Guardian—Transfer of guardianship—Agreement—Family arrangement—Public policy.

Where a widow, whose husband left no estate, agreed to give up her natural rights of guardianship over her young daughter and transfer the same to the latter's grandfather, who, on his part, agreed to educate the child, provide for her afterwards, and allow as full intercourse as possible between her and her mother, the fact that the arrangement included an allowance to the mother for her maintenance did not necessarily make it void as against public policy. IDINGTON and DUFF, JJ., dissenting.

Appeal dismissed with costs.

Wallace Nesbitt, K.C., for appellant. *Harris*, K.C., for respondent.

Que.] [March 23.

HETU *v.* DIXVILLE BUTTER AND CHEESE ASSOCIATION.

Malicious prosecution—Reasonable and probable cause—Bona fide belief in guilt—Burden of proof—Right of action for damages.

An action for damages for malicious prosecution will not lie where it appears that the circumstances under which the information was laid were such as might lead to an honest belief in the guilt of the person accused. *Abrath* v. *North Eastern Railway Co.* (11 App. Cas. 247) and *Cox* v. *English, Scottish and Australian Bank* ((1905) A.C. 168), referred to.

Semble, that in such cases, the rule as to the burden of proof in the Province of Quebec is the same as that under the law of England, and the plaintiff is obliged to allege and prove that the prosecutor acted with malicious intentions or, at least, with indiscretion or reprehensible want of consideration. *Sharpe* v. *Willis*, Q.R. 29 S.C. 148, 11 Rev. de Jur. 538, and *Durocher* v. *Bradford*, 13 R.L. (N.S.) 71, disapproved.

Judgment appealed from, Q.R. 16 K.B. 333, affirmed.

Belanger, K.C., and *Verret*, for appellant. *Shurtleff*, K.C., for respondents.

B.C.] HUTCHINSON *v.* FLEMING. [March 23.

Principal and agent—Secret profit—Trust—Clandestine transactions by broker—Sham purchaser—Commission.

H., a broker, undertook to obtain two lots for F., as an investment of funds supplied by F. for that purpose, at prices quoted, and on the understanding that any commission or brokerage chargeable was to be got out of the vendors. H. purchased one of the lots at a price lower than that quoted, receiving, however, the full amount quoted from F., and by representing a sham purchase of the other lot, got an advance from F. in order to secure it.

Held, affirming the judgment appealed from, that H. was the agent of F. and could not make any secret profits out of the transactions, nor was he entitled to any allowance by way of commission or brokerage in respect of either of the lots so purchased.

W. S. Deacon, for appellant. *D. G. Macdonnell*, for respondent.

Ex. Court.] [March 23.

MONTREAL TRANSPORTATION CO. *v.* NEW ONTARIO STEAMSHIP CO.

Admiralty — Preliminary Act — Amendment — Collision — Evidence.

In an action in the Admiralty Court claiming damages for injury to plaintiff's ship "Neepewah" through collision with that of defendants, the "Westmount," the preliminary act stated that the port quarter of the latter struck the stern of the "Neepewah" which was substantially repeated in the statement of claim. The judge held that it was proved that the collision occurred by the sterns of the two ships coming together and, by his judgment, without request from plaintiff's counsel, and in spite of objections by defendant's counsel, allowed the statement of claim to be amended accordingly, stating that the admission of the evidence had not been objected and the defendants would not be prejudiced.

Held, 1. Such amendment should not have been made; that the objection to the admission of evidence was taken at the trial; and that the amendment presented a new case and different from the one raised by the preliminary act and statement of claim and greatly prejudiced the defence.

2. Errors in the preliminary act may be corrected by the pleadings, but if not, the parties must be held most strongly to what is set forth in the Act.

Per DAVIES, MACLENNAN and DUFF, JJ., that the plaintiffs had not proved that the collision, even under the amended statement, had actually occurred.

Per FITZPATRICK, C.J., that the evidence shewed that no collision had taken place.

Appeal allowed with costs.

Geo. F. Henderson, K.C., for appellants. *Lynch-Staunton*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O.] [March 23.

WHITEMAN *v.* HAMILTON STEEL & IRON CO.

Appeal to Court of Appeal—Judgment at trial affirmed by Divisional Court—Security for costs—Application to dispense with or reduce—Poverty of applicant.

Section 76 of the Ontario Judicature Act, as amended by 4 Edw. VII. c. 11, s. 2(O.) (Con. Rule 826 being to the same

effect) provides that subject to rules of court, on appeal from a Divisional Court . . . security, unless otherwise ordered by the Court of Appeal, shall be given for the costs of appeal.

In an action for damages under the Fatal Injuries Act, the trial judge, being of opinion that there was no evidence to submit to the jury, dismissed the action; but directed the jury to assess the damages, which they did at $3,500, in case it should be held on appeal that there was such evidence; and on appeal to a Divisional Court, the trial judge's finding was affirmed.

An application to a judge of the Court of Appeal, on the ground of the alleged poverty of the appellant, to dispense with or reduce the amount of security for costs of an appeal to the Court of Appeal was, under the circumstances, refused.

A. M. Lewis, for plaintiff. *W. L. Ross*, for defendants.

HIGH COURT OF JUSTICE.

Boyd, C.] ROBERTSON *v.* ROBERTSON. [March 31.

Foreign judgment—Alimony—Arrears—Writ of summons—Special endorsement—Summary judgment.

An action lies for arrears of alimony past due upon a foreign judgment, and the claim therefor may be the subject of a special endorsement of the writ of summons under Con. Rule 138 and of a motion for summary judgment under Con. Rule 603. *Swaizie* v. *Swaizie* (1899) 31 O.R. 324 applied and followed. Decision of the Master in Chambers affirmed.

A. R. Clute, for plaintiff. *Hellmuth*, K.C., and *Hassard*, for defendant.

Boyd, C.] RE REITH *v.* REITH. [April 1.

Surrogate Courts—Removal of cause into High Court—Will—Undue influence—Value of estate—Importance of issues.

Upon an application under s. 34 of the Surrogate Courts Act to remove a cause from a Surrogate Court into the High Court, the importance of the case and its nature are not to be tried on counter-affidavits; it is enough if it appears from the

nature of the contest and the magnitude of the estate that the higher court should be the forum of trial. Much is left to the discretion of the High Court judge as to the disposal of each application.

And where the contest was over the will of a widow, whose husband died in 1905, leaving to her an estate valued at over $27,000, which had shrunk at her death in 1907 to $5,850, and the allegation was that she had not been able to protect herself against the undue influence of the chief beneficiaries, her two sons, to whom it was said a large part of her husband's estate had been transferred in her lifetime, an order was made for the removal of the cause into the High Court.

McLean Macdonell, K.C., *Hughson*, *Harcourt*, K.C., and *Grayson Smith*, for the various parties.

Boyd, C.] RE HUDSON. [April 3.

Will—Construction—Gift of whole estate—Incomplete enumeration—"Appurtenances"—Farm stock and implements—"Household goods"—Money—Intestacy.

A testator by his will, after directing payment of debts, etc., proceeded: "I give, devise and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say: I give, devise and bequeath to my son W. my farm . . . which is my present residence, and all appurtenances connected therewith, with all my household goods of which I may die possessed:" and appointed an executor.

Held, that all the testator's estate, including money, farm stock, and farm implements, passed by the will to the son named.

Middleton, K.C., *Sinclair* and *A. B. Macdonald*, for the various parties.

The executor did not appear.

Falconbridge, C.J.K.B., Britton, J. Clute, J.] [April 3.

WHALEN *v.* WATTIE.

Appeal to Divisional Court—Division Court appeal—Amendment—Filing certified copy of proceedings—Extension of time for—Jurisdiction.

A Divisional Court of the High Court, which is the court for hearing Division Court appeals, has no power to extend the

time limited by s. 158 of the Division Courts Act for filing the certified copy of the proceedings in the Division Court, and has no power, under sub-s. 2 of s. 158 (as added by 4 Edw. VII. c. 12, s. 2) or otherwise, to extend the time for setting down the appeal until it is seised of the appeal by the filing of the certified copy, the time for filing which may be extended by the judge in the Division Court.

R. U. McPherson, for defendant. *A. J. Thomson*, for plaintiff.

SURROGATE COURT—COUNTY OF VICTORIA.

IN RE ESTATE OF W. E. SMITH.

Succession Duty Act—Benevolent and Provident Society Act—Beneficiary—Certificate.

The estate of the deceased was less than $10,000, unless there should be added to it the amount of a beneficiary certificate in the Canadian Home Circles, which, however, was payable at the death of the deceased to his nephew.

Held, that the amount of this certificate so payable formed no part of the estate of the deceased, which thus, being under $10,000, was not liable to succession duty.

[Lindsay, June 11, 1907—MCMILLAN Co. J.

The estate of the deceased came before the judge of the Surrogate Court of the County of Victoria for the passing of accounts, etc., when it appeared that the total amount of the personal estate and effects of the deceased which came into the hands of the executor was in all $8,727. It appeared also that the deceased at the time of his death held a beneficiary certificate in the Canadian Home Circles of $3,000, which amount, if added to the above sum, would so increase the estate of the deceased as to make it liable to succession duty.

McDiarmid, for the executor. *Hopkins*, for the Treasury Department.

MCMILLAN, Co. J.—Section 4 of the Succession Duty Act states that in determining "dutiable value" the value of the estate shall be taken as of the date of the death of the deceased, allowances to be made as therein mentioned.

I find that the deceased made application to the Home Circles for the insurance of $3,000 on the tenth of August, 1903, and by said application a certificate was issued made payable to Alexander Smith, the father of the said deceased, and upon the death of his father in or about the year 1905, the said William Edson Smith had a new certificate issued by said order, which directed that any sums becoming payable under such certificate should be paid to Wilbur Milton Smith, nephew of the deceased.

On page 32, s. 2 of the laws of the Home Circles in force at the time this certificate was issued, the benefit may be made payable to a class of persons, a list of which is given; among which class "nephews" are included. Under another section a benefit certificate cannot be made payable to a creditor, nor be held in whole or in part by assigns, to secure any debt, which may be owing by a member. Since issue of the above certificate the constitution and laws of the Home Circles have been amended, but the amendments do not in any way vary the said two sections.

Sec. 12 of the Benevolent and Provident Society Act, R.S.O. c. 211, in my judgment precludes the certificate issued by the Home Circles in this case from being made part of the estate of the said deceased at the time of his death. This section provides that on the death of a member and any sum of money becomes payable, the same shall be paid by the treasurer or other officer of the Society to the person or persons entitled thereto under the rules of the society or shall be applied by the society as may be provided by such rules.

I find that under the rules of the society the amount of the certificate in question herein became payable at the death of the deceased, and was, in my judgment, no part of the estate of the said William Edson Smith. I therefore do not allow any deduction for succession duty, the estate of the deceased in my judgment being under the amount of $10,000.

Mr. Hopkins, for the Treasury Department, cited *Attorney-General* v. *Dobree* (1900) 1 Q.B.D. 442, but this case in my judgment does not destroy the effect of the Benevolent and Provident Societies Act, and does not apply to insurance taken under the provision of that Act in Ontario.

DIVISION COURT—COUNTY OF FRONTENAC.

Madden, Co. J.] [March 18.

KNOWLES *v.* BANK OF MONTREAL.

Cheque—Stopping payment—Notice to bank.

Action to recover $60 damages for wrongfully paying plaintiff's cheque for $50 after notice of countermand. Shortly before the presentation of the cheque at a branch of the bank, the plaintiff went to one of the ledger-keepers with the intention of countermanding payment of the cheque. He was told that the cheque had not been presented to him to be cashed, whereupon the plaintiff said, "I want to stop the cheque," to which the ledger-keeper replied, "All right." The latter communicated that request to the paying teller in his department. There was some conflict of evidence as to details which, however, is immaterial for the decision.

Held, 1. The countermand was insufficient inasmuch as it was not given to the manager or acting manager of the branch; notice to the ledger-keeper not being sufficient.

2. A notice countermanding payment of a cheque to be effective, must be a written notice. A verbal notice is insufficient, inasmuch as the revocation, or cancellation of the authority to the bank to part with its money must be evidenced in the same way as the authority itself.

Reference was made to *Cohen* v. *Hale & Midland R. Co.*, 3 Q.B.D. 1878, p. 373, and *Courtice* v. *London City & Midland Bank*, K.B.D. 1907, Weekly Notes, p. 146.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] PONTON *v.* CITY OF WINNIPEG. [Feb. 29.

Municipality—Contracts of municipality requiring by-laws—Estoppel by conduct—Winnipeg charters—Meaning of "sufficient evidence" in statute.

Appeal from judgment of MATHERS, J., noted ante, p. 80, dismissed. Since appealed to the Supreme Court of Canada.

Galt and *Minty*, for plaintiff. *I. Campbell*, K.C., and *Hunt*, for defendants.

Full Court.] CLAYTON v. CANADIAN NORTHERN RY. CO. [Feb. 29.

Railway company—Animals killed on track—At large through negligence of owner—Railway Act, R.S.C. 1906, *c.* 37, *ss.* 254, 294, 427—*Liability to maintain proper fences along right of way.*

Appeal from decision of a County Court judge refusing to nonsuit the plaintiff in an action to recover damages for horses killed by a train of the defendants on the right of way, upon which the animals entered through a defective gate opening on a public road. On the morning of the accident plaintiff's agent turned the horses loose in a field from which there was, to the knowledge of both, free access to the road through an opening in the fence left by the removal of a gate.

Held, HOWELL, C.J.A., dissenting, 1. It being clear from the plaintiff's own evidence that the horses "got at large through the negligence or wilful act or omission" of the plaintiff or his agent within the meaning of sub-s. 4 of s. 237 of the Railway Act, 1903 (s. 294 of c. 37 of R.S.C. 1906), the plaintiff could not recover damages by virtue of that sub-section, although the company had failed to observe the requirements of s. 199 (now 254) by neglecting to repair the defective gate in the fence along the right of way. *Murray* v. *Canadian Pacific Railway*, 7 W.L.R. 50; *Becker* v. *Canadian Pacific Railway*, 7 Can. Ry. Cas. 29, and *Bourassa* v. *Canadian Pacific Railway*, 7 Can. Ry. Cas. 41, followed.

2. Section 294 of the Railway Act, 1903 (s. 427 of c. 37, R.S.C. 1906), which provides that, when the railway company does anything contrary to the provisions of the Act or omits to do anything the Act requires it to do, the company is liable to any person injured thereby for the full amount of damages sustained in consequence of such act or omission, does not apply to a case like the present. It is general, whereas s. 237 is special and intended to cover fully all questions of liability in cases of animals at large getting on the railway; and besides, the expression "person injured," may extend only to personal injuries to human beings and not to damages for loss of property.

Appeal allowed with costs and nonsuit entered.

Hough, K.C., for plaintiff. *Clark*, K.C., for defendants.

KING'S BENCH.

Mathers, J.] BENNETTO *v.* WINNIPEG. [Feb. 28.

Arbitration—Award not made within the time limited—When arbitrator functus officio—Winnipeg charter.

Motion by the City of Winnipeg for an order prohibiting the County Court judge of Winnipeg from appointing an arbitrator on behalf of the city to determine the compensation payable to Bennetto for lands injuriously affected pursuant to a city by-law.

There had been a previous arbitration to settle the same matter, but the arbitrators had been unable to agree and had allowed the time within which, under sec. 812 of the city charter, they could make an award, to elapse without coming to any decision.

Bennetto now took fresh proceedings, reappointed his arbitrator and served notice on the city, under s. 802 of the charter, to appoint an arbitrator on its behalf. The city having failed to act in the matter, Bennetto gave notice of an application under s. 805 to have the County Court judge appoint an arbitrator on behalf of the city. The prohibition was asked for on the ground that in the former arbitration the city had, by by-law, appointed R. T. Riley as its arbitrator and that said by-law had never been repealed and that Riley was still the city's arbitrator in the matter.

Held, that an arbitrator's authority ceases as soon as he has made an award, or as soon as the time fixed, whether by consent or otherwise, within which he shall make his award, has expired, and that Riley's authority to act under the by-law appointing him had ceased whether that by-law had been repealed or not, and that a new appointment of an arbitrator on behalf of the city was necessary. Russell on Arbitration, 111; 2 Am. & Eng. Enc., 696; 3 Cyc., 631; *Ruthven* v. *Ruthven*, 8 U.C.R. 12. Application dismissed with costs.

O'Connor and *Blackwood*, for Bennetto. *Robson* and *Auld*, for City of Winnipeg.

Macdonald, J.] [March 11.

PATTON *v.* PIONEER NAVIGATION CO.

Injunction—Dredging sand out of bed of navigable river causing subsidence of banks—Riparian owner—Ownership of bed of non-tidal navigable stream.

This action was brought to restrain the defendants from continuing to dredge and remove sand for building purposes from

the bed of the Assiniboine River opposite the plaintiff's property fronting on the river, on the ground that such dredging had already caused the banks to cave in and, if continued, would cause irreparable damage to the plaintiff.

By an amendment of the statement of claim the plaintiff set up that he owned the bed of the river opposite and adjacent to his land to the middle of the river and the sand thereon. The defendants claimed that the river was a navigable stream and that the bed and bottom and the banks thereof, up to the low water mark, were and still are vested in and owned by the Crown in right of the Government of Canada, and that the sand belonged to said Government. It was not disputed that the Assiniboine River, at the place in question, is a navigable stream. The trial judge found as facts that the greater quantity of the sand taken out of the river by the defendants had been carried down the river by the current, but that there was a real danger of the banks being worn away if the dredging operations should be continued, although he was not satisfied that the dredging already done had caused any subsidence of the banks.

Held, that, on these facts, the plaintiff was entitled to an injunction as prayed for.

The plaintiff's title had been derived through the Hudson's Bay Company, by a mere verbal bargain and sale with livery of seisin, prior to the 15th day of July, 1870, when the laws applicable to the transfer of real property were the laws of England as they stood on May 2, 1670, so far as such laws were applicable. The Statute of Frauds had not been passed and such a transfer was sufficient to pass title both at law and in equity. After the transfer of Rupert's Land to Canada, patents were issued confirmatory of the titles granted by the Hudson's Bay Company. The plaintiff's patent described his land as a portion of a parish lot as shewn on a plan of survey of the parish of St. Boniface. According to the plan referred to, the parish lots run only to the Assiniboine River, but the patent contained a reservation of the free use, passage and enjoyment of, in, over and upon all navigable water, etc.

Held, also, that by the laws of England the title to the bed of a non-tidal river is presumed to be in the riparian owner ad medium filum aquæ, that the reservation in the plaintiff's patent affords a strong presumption of non-ownership by the Crown in the soil underneath the river, and that the title derived

through the Hudson's Bay Company carried with it all the rights of a riparian owner so that the plaintiffs owned the bed of the river as claimed.

Bickett v. *Morris*, L.R. 1 H.L. 47; *Keewatin Power Co.* v. *Town of Kenora*, 11 O.W.R. 266, and *Servos* v. *Stewart*, 15 O.L.R. 216, followed.

Aikins, K.C., *Robson* and *Coyne*, for plaintiffs. *J. Hillyard*, *Leech* and *Sutton*, for defendants. *Hudson* and *Howell*, for Dominion Government.

Mathers, J.] NATIONAL TRUST CO. *v.* CAMPBELL. [March 17.

Mortgage—Foreclosure—King's Bench Act, R.S.M. 1902, *c.* 40, *Rules* 277, 178—*Real Property Act, R.S.M.* 1902, *c.* 148, *s.* 117—*Relief on payment of overdue part of mortgage debt, although whole amount payable under acceleration clause in mortgage.*

Appeal from the order of the referee, in an action for foreclosure and a personal order for payment, staying proceedings after judgment under Rule 278 of the King's Bench Act, R.S.M. 1902, c. 40, upon payment of the overdue instalment of principal, interest and costs.

Held, 1. The action was one for foreclosure within the meaning of Rules 277 and 278 of the King's Bench Act, although judgment for the amount of the debt was also asked for.

2. A provision in a mortgage that, upon default in payment of an instalment of principal or interest, the whole should become due is not one against which equity will relieve as being in the nature of a penalty. *Sterne* v. *Beck*, 1 De G. & S. 595; *Bell & Dunn*, p. 80.

3. Although Rule 278 says that proceedings may be stayed in the action after judgment "upon paying into court the amount then due for principal, interest and costs," the relief ordered could not be granted to the defendant under that Rule, because, by virtue of the acceleration clause in the mortgage, the amount then due was the full amount of the principal debt and equity will not relieve against such a provision.

4. The defendant was entitled to the relief ordered by virtue of s. 117 of the Real Property Act which provides that a mortgagor, under the circumstances appearing in this case, may "pay such arrears as may be in default under the mortgage, together with costs to be taxed by the district registrar, and he

shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become due and payable by reason of lapse of time."

5. Section 117 of the Real Property Act, notwithstanding it is preceded and followed by sections relating only to mortgages registered under the new system, is not so limited, but expressly applies to all mortgages including those registered under the old system.

Galt, for plaintiff. *J. F. Fisher,* for defendant.

Macdonald, J.] VOSPER *v.* AUBERT. [March 18.

Contract—Redemption—Relief against acceleration clause in agreement of sale of land—Verbal agreement varying within contract.

By agreement dated June 7, 1906, the plaintiff sold to the defendant 625 acres of land for $17,500; $1,000 being payable on the execution of the agreement and the balance in yearly instalments with interest. It was provided that on default in payment of any instalment the whole of the purchase money and interest should at once become due and payable. Owing to some difficulty over the title to the property the agreement was not completed until November 8, 1907, when each party got a duplicate signed by the other and the defendant paid $957.60 of the $1,000 payable on the execution of the agreement. On that date there was also past due the second instalment of the purchase money and some taxes which the defendant had covenanted to pay. It was admitted that, prior to the completion of the agreement by delivery, a verbal agreement was arrived at extending the time for payment of the second instalment; but the parties differed as to the terms of this verbal agreement and, as it would contradict the writing, the trial judge held that it should not be given effect to and that the plaintiff was not bound by it. The plaintiff demanded payment of the full amount of the purchase money, claiming that it was due by virtue of the acceleration clause above quoted. The defendant asked, that upon payment of all arrears, he might be relieved from the effect of the acceleration clause.

Held, 1. Such a provision in a contract is not in the nature of a penalty against which equity will relieve. *Wallingford* v. *Mutual Society,* 5 A.C. 705.

2. The plaintiff, by completing the agreement, waived his right to call in the full balance of the purchase price, because at that date the agreement was, so far as the past due payments were concerned, impossible of performance.

3. For that reason, and also because the plaintiff had made default in carrying out a term of the agreement by which he was to place a mortgage of $10,000 on the property for a five year term, the defendant was entitled to the relief prayed for.

Robson, for plaintiff. *A. J. Andrews*, for defendant.

Howell, C.J.A.] REX *v.* THOMPSON. [March 24.

Criminal Code ss. 825, 828—*Speedy trial—Right to elect for after true bill found by grand jury.*

The accused had been bound over to take their trial at this assizes on the charge of theft, and allowed to remain at liberty by the magistrate. At the next assizes indictments were preferred by the Crown for offences set forth in the dispositions sent in by the magistrate and the grand jury found true bills. The accused then delivered themselves into the custody of the sheriff under sub-s. 4 of s. 825 of the Criminal Code, and the sheriff, under s. 826, took them before a County Court judge when they elected to take a speedy trial for which a term was fixed. Upon being arraigned for trial at the assizes, the accused objected to plead to the indictments under the circumstances.

It was argued on behalf of the Crown that, as the prisoners had not previously elected to take a jury trial, s. 828 could not apply, and that sub-s. 3 of s. 825 did not give the right of election after true bills found.

Held, that the accused had a right to elect as they had done even after true bills found, and that such right was conferred under s. 825 of the Code, although the case was not within s. 828.

King v. *Komimsky*, 6 C.C.C. 524, distinguished.

Arraignment postponed until the next sittings of the court, when the Crown can have a stay of proceedings entered if the cases shall have been disposed of in the meantime by the County Court judge.

Patterson and *Bonnar*, for the Crown. *Manahon*, for the accused.

Mathers, J.] HAFFNER *v.* CORDINGLEY. [March 25.

Commission on sale of land—Meaning of words "completion of the sale."

A dispute having arisen as to the plaintiffs' right to a commission on the sale of certain property belonging to the defendant, the former claiming $5,000, the latter denying liability for anything, the parties compromised at $2,000 and the defendant gave the plaintiff a letter which was in part as follows:—"In connection with the sale of (description) from Mrs. Cordingley and myself to John A. Lock et al. I hereby agree that on the completion of the said sale I will pay your firm a commission of $2,000 . . . This amount to be paid on completion of the deal."

The purchaser had previously made a deposit of $2,000, but had not signed a formal agreement of purchase. A few days afterwards the formal agreement was executed by all parties and a further payment of $10,000 made.

The purchaser subsequently made default in payment of further instalments of the purchase money, and the defendant took back the land and released the purchaser from all obligations under the agreement.

The defendants resisted the action for the $2,000 commission on the ground that the sale had not been "completed" within the meaning of his letter.

Held, that the letter should be interpreted in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances, and that what the parties meant by the words "completion of the sale" and "completion of the deal" was the execution of a binding agreement of sale.

Munson, K.C., and *Haffner*, for plaintiffs. *A. J. Andrews* and *Macneill*, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [March 31.

ARMSTRONG *v.* ST. EUGENE MINING COMPANY.

Workmen's Compensation Act, 1902 — *Arbitration — Case stated by arbitrator—Referred back by Full Court—Further case stated to single judge—Jurisdiction of judge to entertain and refer back to arbitrator.*

On a case stated in an arbitration under the Workmen's Compensation Act, 1902, the Full Court referred the question back to

the arbitrator to make definite findings of fact and have the questions of law clearly formulated. Upon the reference back, the case was re-stated, and the learned judge to whom the questions were submitted found they were questions of fact and referred the matter back to the arbitrator to "proceed with the arbitration."

Held, on appeal, that there was jurisdiction for such an order; that the arbitrator had not finished his work, and that he is not functus officio until the award is made.

Sir C. H. Tupper, K.C., for appellant. *L. G. McPhillips*, K.C., for respondent.

Full Court.] SCOTT *v.* MILNE. [April 7.

Agreement for sale of land—Time of the essence—Rescission—Laches.

In an agreement for the purchase of land with possession; purchaser covenanted, inter alia, giving vendor power to enter and determine tenancy on default, and that notice of default, addressed to purchaser at Vancouver, B.C., should be sufficient. Purchaser having become in default, and his address changeable, vendor wrote to a firm of brokers who were in communication with him, after two demands for payment of the moneys in arrear, desiring them to instruct purchaser of the cancellation of the agreement.

Held, on appeal (affirming the judgment of CLEMENT, J.) that the time allowed purchaser was not a waiver of the right of rescission under the agreement.

L. G. McPhillips, K.C., for appellant (plaintiff). *Bird*, for respondent (defendant).

SUPREME COURT.

Clement, J.] REX *v.* GARVIN. [March 28.

Constitutional law—B. N. A. Act, s. 91—Adulteration Act—Provincial Health Regulations—Ultra vires.

On a motion to quash conviction by the acting police magistrate of Vancouver who fined defendant for having in his possession milk intended for sale which did not have the minimum

composition required by s. 20 of the Regulations authorized by the Lieutenant-Governor in Council under the Provincial Health Act, R.S.B.C. 1897, c. 91.

Held, that s. 20 of the Provincial Government Regulations governing the sale of milk and the management of dairies, cow-sheds and milk shops is ultra vires.

Craig, for the motion. *J. K. Kennedy*, contra.

Hunter, C.J.] LEVI *v.* GLEASON. [April 10.

Municipal law—Alderman—Property qualification.

A candidate for alderman for the City of Victoria had, prior to his nomination conveyed away the lands on the alleged ownership of which he claimed qualification under s. 13, sub-s. (*b*) of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under s. 20,

Held, that the effect of s. 74 of the Land Registry Act, c. 23, 1906, is to make registration of conveyances taking effect after June 30, 1905, a sine qua non of the vesting of any interest, legal or equitable, in the grantee. *Falconer* v. *Langley* (1899) 6 B.C. 444 considered.

Belyea, K.C., for plaintiff. *Elliott*, K.C., for defendant.

COUNTY COURT.

Howay, Co.J.] MULLER *v.* SHIBLY. [March 28.

County Court—Statute construction—Woodman's Lien for Wages Act, R.S.B.C. 1897, *c.* 194, *s.* 3—"*Woodman*" *defined—Contractor and labourer, distinction between.*

Defendant hired a team of horses from plaintiff for certain logging operations, and on default of payment for the use of the horses, which were not driven or controlled by plaintiff, the latter filed a lien against the logs, for the amount due. On an application to set aside the lien,

Held, that plaintiff was not a woodman within the meaning of the statute, but was a contractor.

Ladner, for the application. *McQuarrie*, contra.

Grant, Co.J.] IN RE THE NATURALIZATION ACT. [March 25.

Application by Japanese—Jurisdiction—Cross-examination.

In accordance with s. 17 of the Dominion Naturalization Act certain Japanese filed notices of intention to apply for naturalization. Objections to their naturalization were filed: (1) That the applicants were subjects of the Emperor of Japan and not free to change their allegiance; (2) That they did not intend to reside permanently in Canada, (3) That they did not understand the oaths taken by them and were not bound by them; (4) They did not intend to become bona fide British subjects.

Counsel for applicants contended that objections were improper and not within the Act, and cited *In re C. C. Webster*, 7 C.L.J. 39, as an authority that the court could not go behind the certificate of justice or notary and inquire whether the evidence on which it was granted was sufficient.

Held, that by the amendments of 1903 to the Naturalization Act, the scope of the judge's duty, as circumscribed in the decision *In re C. C. Webster*, is changed and that the judge has power to take any necessary measures to satisfy himself as to the truth of the facts stated and of the fitness of the applicant for British citizenship. Cross-examination of applicants ordered.

Haney and *Schultz*, for applicants. *Lucas*, contra.

Book Reviews.

A Concise Treatise on the Law of Wills. By H. S. THEOBALD, K.C. Seventh edition. With notes of Canadian statutes and cases by E. D. ARMOUR, K.C., of Osgoode Hall, Barrister-at-law. London: Stevens & Sons, Ltd., Chancery Lane. Toronto: Canada Law Book Company, Ltd. 1908.

We have referred to this valuable work in our editorial columns.

Stone's Justices' Manual for 1908. Fortieth edition. Edited by J. R. ROBERTS, ESQ. London: Butterworth & Co., Bell Yard.

This edition gives, in an appendix, the Act passed last August to establish a Court of Criminal Appeal in England, introducing a new principle in the administration of criminal law in the mother country. The Act came into force on the 18th ult. and its practical working will be watched with interest.

A Treatise on the Law Relating to Devolution of Real Estate on Death, and the Administration of Assets. By ROBBINS & MAW. Fourth edition. London: Butterworth & Co., Bell Yard. 1908.

The general arrangement adopted in previous editions remains unchanged, but considerable alterations in and additions to some of the chapters have been made which will be found helpful.

We have works of our own on the Devolution of Estates Act of Ontario and other provinces, but our practitioners cannot afford to be without the light thrown on this difficult subject by such books as the above. It is now seven years since the previous edition.

Dowell's Income Tax. Sixth edition. By J. E. PIPER, LL.B. London: Butterworth & Co., Bell Yard.

Interesting reading, doubtless, to a large class in England, but not be of much interest here, except to complete some public Law Library.

United States Decisions.

CARRIERS.—A motorman in charge of a street car is held, in *Strong* v. *Burlington Traction Co.* (Vt.) 12 L.R.A. (N.S.) 197, not to be negligent toward a passenger, as matter of law, merely because he fails to sound his gong to warn of the approach of the car one driving on the highway, who turns his horse across the path of the car, causing a collision and the injury of the passenger.

A passenger negligently expelled, because of failure to produce his ticket, from a train at a flag station where there is no

shelter and with the surroundings of which he is not familiar, after dark on a cold and stormy night, is held, in *Tilbury* v. *Northern C. R. Co.* (Pa.) 12 L.R.A. (N.S.) 359, not to be per se negligent in attempting to reach shelter at a station recently passed, by walking along the railroad track, rather than by seeking a highway.

The right of a consignee to refuse to receive a shipment, and to throw it upon the hands of the carrier, merely because of the latter's unreasonable delay in transportation, is denied in *Chesapeake & O. R. Co.* v. *Saulsberry* (Ky.) 12 L.R.A. (N.S.) 431.

DAMAGES.—A telegraph company which fails to deliver a telegram directing preparation for a funeral is held, in *Lyles* v. *Western U. Teleg. Co.* (S.C.) 12 L.R.A. (N.S.) 534, to be liable for mental suffering caused by the exposure of the corpse for several hours to the rays of the sun, and the delay of the burial to a very late hour of the night.

The measure of damages for destruction of a growing crop is held, in *Teller* v. *Bay & River Dredging Co.* (Cal.) 12 L.R.A. (N.S.) 267, to be its value as it stood on the ground at the time of destruction, to be arrived at, not by ascertaining what it had cost at that time, but from evidence of the probable yield of the land, multiplied by the market value of the crop, less cost of producing and marketing.

PROXIMATE CAUSE.—The fright of a traveller at a highway crossing to such an extent as to produce unconsciousness, because of the sudden approach of a train at an unlawful speed without signals, at a place where, because of the obstructed view, the traveller has reached a point of danger, is held, in *Morey* v. *Lake Superior Terminal & T. R. Co.* (Wis.) 12 L.R.A. (N.S.) 221, not to be such an extraordinary and unusual result that the negligence cannot be held to be the proximate cause of the resulting injury to the traveller while unconscious.

Negligence on the part of a railroad company in permitting shippers to accumulate large quantities of lumber on and adjacent to its right of way for shipment is held, in *Bowers* v. *East Tennessee & W. N. C. R. Co.* (N.C.) 12 L.R.A. (N.S.) 446, not to be the proximate cause of the destruction of a building by fire which spreads through such lumber to the building from that of a stranger some distance away, which ignited without fault of the railroad company.