Canada Law Journal.

VOL. XLIII. MAY 15. NO. 10.

ADMIRALTY JURISDICTION OVER MARITIME TREATY RIGHTS.

A recent judgment of the Supreme Court in the case of *The Ship D. C. Whitney* v. *St. Clair Navigation Co.*, 43 C.L.J. 252, 38 S.C.R. 303, promulgates what seems to be a new doctrine in maritime law that a foreign vessel, passing through a river dividing Canada from the United States, under a treaty conceding that the passage of the ships, vessels and boats, of both nations, shall be equally free and open to both nations is not—even when on the Canadian side of the river—within Canadian control, so as to subject such foreign vessel to arrest on a warrant from the Court of Admiralty. The warrant to arrest a foreign vessel cannot be issued until she is within the jurisdiction of the Court.

The trial was for a collision between two American ships in American waters; the offending ship having been arrested on the Canadian side of the river Detroit; while, as found by the Supreme Court, on a voyage "passing through" such river from one American port to another—a fact apparently not proved before the trial Court, as there is no record of it in the printed appeal book. Mr. Justice Idington says "the vessel was assumed, but not proven, to have been in motion." The judgment of the trial Court is reported in 10 Ex. C.R. 1.

The Supreme Court holds that the following article in the Ashburton Treaty of 1842 renders an American ship immune from arrest by a Canadian Court while "passing through" the Canadian side of the boundary rivers named.

"VII. It is further agreed that the channels in the rivers St. Lawrence on both sides of the Long Sault Islands, and of Barnhart Islands; the channel in the river Detroit on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores; and all the several channels and pas-

sages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties."

To the rivers in "passing through" which all American vessels are thus declared to be immune from Admiralty process of arrest, must be added the St. Lawrence, Yukon, Porcupine and Stikine, under article XXVI. of the Treaty of Washington, 1871, which provides that the navigation of these rivers, ascending and descending "from, to, and into, the sea, shall forever remain free and open for the purposes of commerce" to the subjects of the Britannic Majesty and to the citizens of the United States, "subject to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation."

This latter clause in the article conceding free and open navigation for the purposes of commerce to both nations, subject to the conditions prescribed, is an acknowledged doctrine of international law, and though not expressed in the article of the Treaty of 1842, applies equally to that treaty as it does to the Treaty of 1871. For no treaty can be construed to carry with it, by presumption or implication, a surrender, in so far as the privileged territorial concession is concerned, of one of the highest rights of sovereignty, viz., that of legislation (Hall's International Law, 5th ed., p. 340); or to relieve the treaty-privileged alien citizens of the foreign nation, while within the territory of the conceding nation, of their subordination to the general public laws and police regulations affecting such privileged territorial concession within such territory. And one of the doctrines of international law is that all such treaties are to be construed most favourably to the conceding nation: *United States* v. *Arredondo*, 7 Peters U.S. 691.

The Roman law declared that all navigable rivers were so far public property, that a free passage over them was open to everybody; and the use of their banks (jus litoris), for anchoring vessels, lading and unlading cargo, and acts of the like kind, and to be incapable of restriction by any right of public domain.

It will not, however, be necessary to review the opinions of text writer on the claims of this natural right of nations to the free passage of ships through rivers flowing through several sovereignties. Wheaton on International Law says: "It was a right, as real as any other right; and were it to be refused, or to be shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us (the United States) it would then be an injury of which we should be entitled to demand redress."

The reasons given by the learned judge of the Supreme Court, which were concurred in by a majority of the Court, are thus expressed: "I do not think that the D. C. Whitney, a foreign ship, while sailing from one port of a foreign country to another port of that country, and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian Court by the sovereign authority in control of the Dominion of Canada even though that channel happened to be Canadian waters": 38 S.C.R. 309.

The "jurisdiction conferred on the Canadian Court by the sovereign authority in control of the Dominion of Canada" over any vessel being in, or lying, or passing off the Canadian coast, or being in or near a Canadian channel, river or navigable water, is thus described in the Imperial "Merchant Shipping Act, 1894," not cited to, or noticed by, the Supreme Court, although it has been statute law since 1854:

"685. Where any district within which any Court, justice of the peace, or other maigstrate, has jurisdiction, either under this Act, or under any other Act, or at common law, for any purpose whatever, is situate on the coast of any sea, or abutting on, or projecting into, any bay, channel, lake, river, or other navigable water, every such Court, justice, or magistrate shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river or navigable water, and over all persons on board that vessel, or

for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, justice or magistrate."

"712. This part of this Act shall, except where otherwise provided, apply to the whole of Her Majesty's Dominions." And section 13 of the Admiralty Act, 1891, supplements these sections of the Imperial Statute: "Any suit may be instituted in any district registry, when the ship or property, the subject of the suit, is, at the time of the institution of the suit, within the district of such registry."

The decision of the Supreme Court seems also to conflict with the ratio decidendi of cases in which international rights have been violated. In the case *Richmond* v. *United States*, 9 Cranch U.S. 102, Chief Justice Marshall, of the Supreme Court of the United States, held that although the seizure of an American vessel within the territorial waters of a friendly nation was an international offence against that nation, the civil Court had no jurisdiction to take cognizance of it. The jurisdiction affecting the mode of seizure belonged to the political, not the judicial, department of the government; and the civil Court could not connect an international trespass with the subsequent seizure and trial of the vessel by the civil Court having ordinary jurisdiction in the case, so as to annul the proceedings against such vessel; that being "found" within the territorial jurisdiction of the civil Court, it was competent to try the case.

A similar doctrine governs the powers of criminal Courts. Thus where an alleged criminal has been kidnapped in Peru and brought to the United States, the Court held that having been "found within the jurisdiction of a Court competent to try him," his mode of arrest could not be considered by the Court, or used as evidence to oust its jurisdiction to try him for the offence charged: *Ex parte Ker*, 18 Fed. R. 167. So where an alleged criminal had been captured in Hamburg, and brought to England against his will, it was held by the Central Criminal Court that being "found within the jurisdiction of a competent Court," that Court had jurisdiction to try him for the alleged offence: *Reg.* v. *Sattler*, 27 L.J.M.C. 50.

None of the above sections, or any doctrine of international law recognizes any immune doctrine freeing foreign offending vessels from Canadian jurisdiction when "passing through" Canadian rivers. On the contrary, the clauses of the Merchants Shipping Act, 1894, must be read as a grant of additional juridiction to that conferred by the Colonial Courts of Admiralty Act of 1890, which thus defines the jurisdiction of the Canadian Admiralty Courts: "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise; and the Colonial Court of Admiralty may exercise such jurisdiction in like manner, and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations." And by the Imperial Act of 1861 a wide-world jurisdiction is conferred upon the High Court in England: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

We are glad to learn from the English *Law Times* that "Lord Loreburn has again made it abundantly clear that he does not intend to allow political opinion in any way to interfere with the appointment of justices of the peace. The sole qualification that will be considered will be the personal merit of the individual to be appointed, and the Lord Chancellor has unequivocally stated that he will not look beyond the question: Is this person respected in his locality and likely to administer justice impartially, with knowledge and with sympathy of the population at large? Had only this question been considered by those responsible for the appointments in the past, we should not have heard the complaints—complaints, we must admit, not without foundation—that the Benches throughout the country are largely filled by persons of one political feeling." After referring to some other matters, the writer continues as follows: "So long, at any

rate, as the present Lord Chancellor remains in office, political reward will not be given in the form of appointments to the Bench of justices."

These wholesome and patriotic views of the Lord Chancellor of England are well worthy of consideration by those responsible for judicial appointments in this Dominion. To make the Bench, whether judges or magistrates, a refuge for worn out politicians or clamorous partisans is to do a most serious injury to the country at large, and brings both the appointing power and the Courts into disrepute. It seems strange that even strong party men cannot see that good political capital is to be made by occasionally appointing to the Bench, or to the Senate, or such like responsible positions, the best men of the opposite stripe of politics. Politicians do not seem to realize that there is a large and powerful independent vote that takes notice of these things, and when the time comes, expresses its opinion with no uncertain sound. In other words, it pays politically to make good appointments.

One of our English exchanges refers to the suggestion that it would be desirable to institute a scheme for affording gratuitous legal advice to persons standing in need of it, but who are too poor to command such a luxury. The writer of the article questions the wisdom of such a step, and thinks that more harm then good would result from pandering to that trait in human nature which desires to get something for nothing; and points out some experiences in that direction in the administration of the poor laws and the giving of free medical advice. The latter has been officially said to have sown seed from which has grown up a harvest of pauperism. The recipient of such charity "soon learns to discover the whereabouts of various sentimental schemes, whereby he is able to throw off other burdens of manhood."

The new Workmen's Compensation Act in England seems to be bearing fruit in rather a novel way. It is said that some clergymen, in order to avoid liability thereunder, are proposing to engage choristers without any agreed remuneration, the suggestion being that they should receive an annual present. We doubt whether this will get over the difficulty, but it indicates one of the many evil results of class legislation. The Trades Dispute Act, recently passed, is equally objectionable. A legal writer says (post p. 00) that "the ancient maxim may now be rendered—the King and trade unions can do no wrong." The end is not yet, but it is coming, and when it does come the so-called "civilized world" will not be a very pleasant place to live in.

A writer in a recent number of *Law Notes* (p. 27), collects numerous authorities on the subject of "the attitude of equity toward the strike and boycott—use of the injunction." He sums up as follows:—

First: An injunction will not issue to prevent a strike, even though there may be a combination in order to secure a simultaneous cessation of work of a great number of employees, but will issue to prevent persons, not parties to the controversy, from inciting a strike of employees otherwise satisfied with their employment.

Second: There is a division of opinion as to the right of an injunction to prevent boycotts, some courts holding that it should properly issue to prevent the use of means to make effective the boycotts, while others have refused to grant injunctive relief.

Third: There would seem to be a tendency on the part of Courts to be a bit more liberal toward labor in the matter of combination than formerly, for the reason that changed industrial conditions, resulting in combination of capital, also require a combination in labor to insure equal ground to both.

REVIEW OF CURRENT ENGLISH CASES.

NULLITY OF MARRIAGE—DISSOLUTION OF ENGLISH MARRIAGE BY FOREIGN COURT ON GROUND NOT RECOGNIZED BY ENGLISH LAW—DOMICIL—CONFLICT OF LAWS—LEX LOCI CONTRACTUS.

Ogden v. *Odgen* (1907) P. 107 was a suit for a declaration of nullity of marriage. The defendant, an Englishwoman, had in England married a Frenchman; the marriage had subsequently been dissolved by a French Court for want of the consent of the husband's father which was necessary according to the law of the husband's domicil, but not according to English law. The wife then went through the ceremony of marriage in England with the plaintiff a domiciled Englishman, her French husband being still living. Deane, J., held that the ceremony was null and void and that the French decree could not be recognized as a valid dissolution of the first marriage.

ANNUITY—DIRECTION TO PURCHASE ANNUITY—DEATH OF ANNUITANT BEFORE ANNUITY PURCHASED—RIGHT TO VALUE OF ANNUITY.

In re Robbins, Robbins v. *Legge* (1906) 2 Ch. 648. A testator by his will directed his trustees out of the proceeds of the sale of his estate to purchase in the name of his wife a government annuity of £400 for her life. The wife survived the testator, but before probate had been granted of his will, she died. Her representatives claimed to be entitled to the value of the annuity at the time of the testator's death, and Eady, J., held that they were entitled to such a sum as would at the date of the testator's death, have purchased a government annuity of £400 for the life of the widow.

COMPANY—INTEREST ON MONEY BORROWED FOR CONSTRUCTION—PAYMENT OF INTEREST OUT OF CAPITAL.

In Hinds v. Buenos Ayres G.N. Tramways Co. (1906) 2 Ch. 654, Warrington, J., holds that where a limited company issues debentures to secure a loan for money to be expended on construction works, there is no general rule of law which would prevent the company paying out of their capital account the in-

terest which accrues on the loan pending the period of construction, and in the absence of any provision to the contrary in the articles of association it is competent for the directors of a company to provide that the interest shall be so paid as part of the cost of construction, and such payment cannot be prevented at the instance of the shareholders of the company.

PRINCIPAL AND AGENT—SECRET PROFIT BY AGENT—RIGHT OF AGENT TO COMMISSION—SEPARATE TRANSACTIONS—MISCONDUCT OF AGENT.

Nitedals Taendstikfabirk v. *Bruster* (1906) 2 Ch. 671 was an action by principals against their agent for an account. The defendant had been employed to sell the plaintiffs' goods on commission, and, while acting as the plaintiff's agent, he agreed not to act for any rival trader. In the course of his agency the defendant had misconducted himself, (1) by acting for a rival trader, and (2) by obtaining from customers, in some cases, a larger price for the plaintiffs' goods than that which he credited to the plaintiffs, he having retained the excess for his own use, but in other cases he had acted honestly. The plaintiffs claimed that by reason of his misconduct the agent had forfeited all right to any commission or remuneration whatever: and *Andrews* v. *Ramsay* (1903) 2 K.B. 635 (noted ante, vol. 40, p. 111), was relied on. Neville, J., however, held that where, as here, the transactions were separable, the misconduct of the agent only disentitled him to commission in respect of the transactions in which the misconduct took place, but had not the effect of depriving him of commission in respect of any transactions in which he had acted honestly.

WILL—ANNUITY—DIRECTION TO PAY OUT OF INCOME—ALTERNATIVE GIFT—CHARGE ON CORPUS—CONTINUING CHARGE ON INCOME.

In re Boden, Boden v. *Boden* (1907) 1 Ch. 132, was an appeal from Joyce, J., on the construction of a will whereby the testator gave all his residuary real and personal estate to trustees upon trust for sale and conversion and investment and to hold the same on trust, in case he should leave any child living, 'out of the income'' of his residuary estate to pay his widow a sufficient sum to make up her income to £8,000 a year and in case he left no child or leaving any children they should all die

"then upon trust to pay her during her life such further sum as should make up the annual sum to £10,000." The testator left no child, and the income of his residuary estate proving insufficient to pay his widow £10,000 a year, the question submitted to the Court was whether the annuity was a charge on the corpus, and if not whether it was a continuing or cumulative charge on the income. It will be noticed that though the £8,000 was directed to be paid out of income, there is no such express direction as to the £10,000. Joyce, J., held that the annuity was a charge on the corpus of the residue and the deficiency in income must be made good out of the capital: but the Court of Appeal differed in opinion, the majority (Williams and Buckley, L.JJ.). came to the conclusion that the £10,000 as well as the £8,000 were intended to be paid out of income, and that the annuity was not a continuing or cumulative charge on the income, but that if the income proved insufficient the annuitant would have to bear the loss. Moulton, L.J., on the other hand thought it an indefensible addition to the will to import the clause as to payment out of income, into the clause relating to the £10,000, and that even if it were, as the majority of the Court held, payable only of income it constituted a continuing charge on the income until fully paid.

EXECUTORS—NO NEXT OF KIN—BENEFICIAL TITLE TO UNDISPOSED OF RESIDUE—LEGACIES TO EXECUTORS—CROWN—ESCHEAT.

In re Glukman, Atorney-General v. *Jefferys* (1907) 1 Ch. 171. Eady, J., holds that where a testator leaves a pecuniary legacy to his executors, that has the effect of depriving them of any beneficial interest in the undisposed of residue of his estate when there are no next of kin; and that in the case of several executors it is immaterial that the legacies are of unequal amounts. In such a case the residue escheats to the Crown.

WILL—CONSTRUCTION—GIFT TO SON AT THIRTY-FIVE—DISCRETIONARY TRUST FOR MAINTENANCE OUT OF INCOME.

In re Williams, Williams v. *Williams* (1907) 1 Ch. 180. In this case a testator gave all his residuary estate upon trust as to one third part to pay the income or such part thereof as his trustees should think fit to his son William for his advancement, preferment or benefit by equal instalments until he should attain thirty-five and then to pay him the corpus. The son who

at the testator's death was twenty-five years of age, claimed that the legacy was vested, and that he was entitled to immediate payment of the corpus; and Neville, J., following Jessel, M.R., *In re Parker*, 16 Ch. D. 44, held that he was so entitled.

COMPANY—PAYMENTS OUT OF COMPANY'S FUNDS FOR COST OF PROXY PAPERS AND CIRCULARS AND POSTAGE FOR SENDING AND RETURN—INFLUENCING NOTES—DIRECTORS—ULTRA VIRES.

In *Peel* v. *London & N.W. Ry. Co.* (1907) 1 Ch. 5 Warrington, J., decided that it is ultra vires for directors to have proxy papers prepared, together with a circular explaining the facts and the views of the directors, and asking the support of the shareholders at the meeting and defraying the cost thereof together with the postage for transmitting the same to shareholders and the postage for transmitting the proxies to the directors' and he granted an injunction restraining payments. But the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) unanimously overruled his decision and dismissed the action.

MASTER AND SERVANT—COMBINATION OF FIRMS—ENGAGEMENT OF SERVANT ON BEHALF OF COMBINATION OF FIRMS—COVENANT IN RESTRAINT OF TRADE—LIMIT OF SPACE—REASONABLENESS—INJUNCTION.

Leetham v. *Johnston* (1907) 1 Ch. 189 was a motion to restrain the defendant from entering the employment of any firm within the United Kingdom carrying on a business similar to the plaintiffs'. The plaintiffs were a combination of several separate firms which carried on business in conjunction. The defendant had been employed to act as agent on behalf of all the plaintiff firms and entered into a covenant that he would not enter the employment of any other person or firm doing the like business to the plaintiffs within the United Kingdom. The plaintiffs' business was very extensive and extended throughout the United Kingdom. The action was brought to restrain the defendant from committing a breach of his covenant. It was contended on his behalf that the covenant was unreasonable and oppressive and in restraint of trade, and that it was not competent for several firms to engage a servant. But Neville, J., though expressing disapproval of the state of the law held that there was nothing to prevent such an employment, and looking to the interests of the employers and the extent of their trade, he could not

say that the covenant was not necessary for their protection though he admitted it made it hard for the defendant to earn his living. Since the foregoing was written we learn that the decision has been reversed by the Court of Appeal on the ground that the restriction was too wide and therefore void.

MORTGAGE—PURCHASE BY FATHER OF INFANTS ENTITLED TO EQUITY OF REDEMPTION—LIABILITY OF FATHER TO ACCOUNT.

In *Griffith* v. *Owen* (1907) 1 Ch. 195 the facts are somewhat complicated, but the sum and substance of the case is simply this. The plaintiffs being infants became entitled under the will of their grandfather to the equity of redemption in certain freehold houses subject to the life estate of their mother. The mortgage being in default the father of the plaintiffs who in right of his wife was tenant for life, applied to the mortgagee and procured him to sell the property to him under the power of sale, at a sum which (as the Court found) was less than its actual value. The plaintiffs contended that owing to the defendant's relationship to the plaintiffs he must be taken to have purchased as their trustee and was liable to account to the plaintiffs for any benefit over and above the amount expended and subject to his wife's life estate, and Parker, J., granted the relief as prayed.

SOLICITOR—TRUSTEE AUTHORIZED TO CHARGE FOR PROFESSIONAL SERVICES AGAINST TRUST ESTATE—"PROFESSIONAL AND OTHER CHARGES FOR HIS TIME AND TROUBLE"—NON-PROFESSIONAL SERVICES BY SOLICITOR TRUSTEE.

In re Chalinder (1907) 1 Ch. 58. A solicitor was appointed a trustee of a will and was empowered thereby to charge the estate with "all professional and other charges for his time and trouble notwithstanding his being such executor and trustee." He rendered services of a non-professional character, which an unprofessional trustee might have rendered without the intervention of a solicitor, but for which a solicitor acting for a trustee would be entitled to recover against his client, but which the latter could not recover over against the trust estate. The question for Warrington, J., was whether this class of charges came under the category of "other charges for his time and trouble" and he held they did not. Perhaps the case is not of much moment in Ontario where the law provides for compensat-

ing all trustees and executors. The charges in question were therefore disallowed.

ADMINISTRATION—CONTINGENT LIABILITY OF ESTATE—RESERVATION OF ASSETS TO MEET CONTINGENT LIABILITIES—PARTLY PAID SHARES—SUMMARY APPLICATION.

In re King, Mellor v. *South Australian Land Mortgage Co.* (1907) 1 Ch. 72 was a summary application to the Court asking for a declaration of the Court that the personal representative of a deceased person was entitled to distribute his estate among the beneficiaries without reserving any sum to meet a possible contingent liability in respect of certain partly paid shares in a company belonging to the estate. The company was notified, but Neville, J., held that it was not competent for the applicant to make them parties to such an application, but he held that the applicant might obtain the necessary protection in administration proceedings and he gave the necessary leave to amend and apply again. At the same time he expresses the opinion that the Court would probably not direct any reservation of assets to meet such a liability where there was no personal liability on the part of the executors of the deceased in respect of the contingent claim.

WAY—EASEMENT—DEVISE—APPURTENANCES—COMMON OWNER—SEVERANCE BY DEVISE—USER OF EASEMENT—LOSS OF RIGHT BY CHANGE IN MODE OF USER OF EASEMENT—INJUNCTION.

Milner's Safe Co. v. *Great Northern and City Ry.* (1907) 1 Ch. 208 was an action by owners of an easement to restrain its use by co-owners in a way not contemplated. The facts were briefly as follows. A testator in 1832 devised several freehold houses "with their appurtenances." They were adjoining houses and had been built by the testator each of them being partly a warehouse and partly a dwelling. They all communicated with a passage, which was a cul de sac, and which ran along the backs of the houses into a side street, and this passage had always been used by the occupants of the houses. The testator did not devise the passage or make any express grant of it to his devisees or any person. The plaintiffs had become owner of one of the houses, and the defendants had become owners of some of the other houses higher up the passage than the plaintiffs' house. These houses the defendants had converted

into a railway station and were inviting the public to use the passage as a means of access to their station. Kekewich, J., held that the right of way passed to the devisees of the houses as an appurtenance, but that the defendants by altering their mode of user had forfeited their right, so that, under present circumstances, it was not exercisable at all; though semble on restoration of their premises to their original character, the right might revive. The case is also interesting as shewing the bearing of actual user, on the construction of an implied grant of an easement of way, as to its nature and extent.

WILL—CONSTRUCTION—BEQUEST ON CONDITIONS—FORFEITURE—"RESIDENCE"—"UNMARRIED"—INVALID CONDITION—RESON MARRIAGE.

In re Wright, Mott v. *Issott* (1907) 1 Ch. 231. A testator by his will bequeathed a leasehold house to trustees upon trust to permit his daughter Caroline to occupy the same free of rent, but subject to a proviso thereinafter mentioned "and to her residing on the said premises during her lifetime." In a subsequent part of the will was a provision that the use of the house was given to Caroline upon the express condition that Caroline should "remain single and unmarried," and, in case she married, there was a gift over. After the testator's death Caroline resided in the house until her marriage, she then went to reside with her husband and rented the house bequeathed to her, reserving one room which she furnished and used two or three times a week. The trustees applied for a construction of the will and for the judgment of the Court as to whether in the events which had happened there was a forfeiture of the bequest of the house. Kekewich, J., held that residing meant "personally residing" and therefore the condition as to residing had not been fulfilled. As to this point see *MacKlem* v. *MacKlem*, 19 Ont. 482, where it was held that a condition as to "actual occupation" was fulfilled by occupation by a caretaker. But the learned judge also held that as the subsequent condition in restraint of marriage was void and reading that into, or with, the condition as to residence for the purpose of construing that clause, "residing during her lifetime" must mean during her lifetime while she was capable of residing, namely, as a spinster; and therefore upon her marriage the condition as to residence ceased to apply, and consequently there was no forfeiture, which is certainly an ingenious way out of the difficulty.

VENDOR AND PURCHASER—CONTRACT—SALE BY TRUSTEE AT REQUEST OF BENEFICIARIES—ABSENCE OF POWER OF SALE—LEGAL ESTATE IN VENDOR.

In re Baker and Selmon (1907) 1 Ch. 238. This was an application under the Vendors and Purchasers' Act. The vendor was a trustee without any power of sale but having the legal estate. The contract stated that the vendor was selling as trustee under the trusts and powers vested in him. It also provided that the tenant for life would join in the conveyance for the purpose of releasing her life estate. On the examination of the title it turned out that the vendor had no express power of sale, but that he had entered into the contract at the written request of the tenant for life and all the other beneficiaries, so that he could compel them to join, and the question was whether the vendor was able to make a good title in accordance with the contract, and Eady, J., held that he was. He distinguished the case from *In re Bryant and Banningham*, 44 Ch.D. 218, where the vendors, finding that they had no present trust for sale, offered to procure a conveyance from the life tenant, a person not bound to convey at their request; and also from *In re Head*, 45 Ch.D. 310, when the offer to procure the concurrence of the beneficiaries was not made until after the contract had been repudiated by the purchaser, and the beneficiaries were even then not bound to concur; on the ground that here all the beneficiaries were concurring in, and could be compelled to carry out the sale.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—REASONABLE GROUND—PURCHASER REFUSING TO ACCEPT INDEMNITY AGAINST CONTINGENT LIABILITY—NOTICE OF RESCISSION—"WITHOUT PREJUDICE."

In re Weston and Thomas (1907) 1 Ch. 244 is another case under the Vendors and Purchasers' Act. In the course of examination of the title it was discovered that the property was subject to a liability in a remote contingency. The vendor offered to give an indemnity against such liability which the purchaser refused to accept. The vendor's solicitor then, assuming to act under the conditions of sale, gave the purchaser notice of rescission of the contract, but the notice was stated to be "without prejudice." In these circumstances Eady, J., held (1) that the refusal of the vendor to accept an indemnity against

a contingent incumbrance no matter how small the amount, or remote the contingency was not a "reasonable ground" for rescission by the vendor, because the purchaser was entitled to insist that the incumbrance should be discharged. (2) He also held that the notice of rescission being given "without prejudice was null and void.

CONSTRUCTION—CONVEYANCE OF LAND—RESERVATION OF ALL "MINES AND VEINS OF COAL"—PROPERTY IN SUBSOIL—PAYMENT OF RENT—MISTAKE—ESTOPPEL.

In *Batten Pooll* v. *Kennedy* (1907) 1 Ch. 256 the plaintiffs claimed to recover rent alleged to be due in respect of an alleged license to make an underground road for coal mining purposes. The facts were that the plaintiffs were owners of the surface rights of the land in question under a conveyance which had excepted and reserved "all veins and mines of coal in or under" the land conveyed. The defendants were owners of the minerals thus reserved: and under a mistake as to their rights had paid for some years to the plaintiffs rent, in the belief that they were bound to do so under a license from the plaintiff to work the coal made by the plaintiffs' predecessors in title in 1822, whether to defendants' predecessors in title or not did not appear. The defendants had for the purpose of working the coal made underground roads, which pierced not only the veins of coal but also the adjacent strata and had paid rent to plaintiffs from 1887 to 1903. Warrington, J., held that, as the owners of the minerals reserved, the defendants had, independently of any license granted by the plaintiffs' predecessors in title, a right to make the roads in question for the purpose of their mining operations, and that they were not estopped, by reason of the payments which they had made, from disputing the right of the plaintiffs as landlords of the road in question. Such payments the learned judge held to be voluntary and made under a supposed legal liability which created no estoppel against the defendants.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—RULE AGAINST PERPETUITIES—WILL—CONSTRUCTION.

In *Re Gome, Gome* v. *Tennent* (1907) 1 Ch. 276 the construction of a will was in question. The testator directed his trustees to hold a sum of £500 and pay the income to his daughter Sarah for life, and after her death upon trial for such child

or children of Sarah, or such child or children of a son or daughter of Sarah, who should die before her as should if a son attain 21, or if a daughter should attain that age or marry. "And as to the share or shares of any girl or girls for her or their separate use without power of disposing of the income or capital thereof otherwise than by will." Two daughters were born to Sarah in the testator's lifetime and still survived. The question was whether as to them the restraint against anticipation was valid, or whether by reason of the possibility of there being others of the class born after the testator's death it was void in toto. Warrington, J., held that the class was severable, and that the restraint against anticipation was valid as to the daughters born in the testator's lifetime. It may be remarked that Jessel, M.R., had held *In re Ridley*, 11 Ch.D. 645, without considering the question of severance, that such a restraint would be invalid where it applied to a class some of whom might be born after the testator's death.

TENANT FOR LIFE—REMAINDERMAN—RETURN OF CAPITAL OUT OF PROFITS—INCOME OR CAPITAL.

In re Piercy, Whitwham v. *Piercy* (1907) 1 Ch. 289 although turning to some extent on the effect of a statute of which there is no Ontario counterpart, may nevertheless be noted as following in the principle case of *Bouch* v. *Sproule* (1887) 12 App. Cas. 385 (noted ante, vol. 22, p. 334) viz., that as between tenant for life and remainderman of shares in a joint stock company, all payments made out of profits the tenant for life is entitled to as income, even though they are purported to be made as a return of capital, unless the same have been first validly capitalized by the company.

MORTGAGE—SALE—SURPLUS PROCEEDS OF SALE OF MORTGAGED REALTY—TRUST IN FAVOUR OF MORTGAGOR HIS HEIRS OR ASSIGNS—REALTY OR PERSONALTY—LUNACY OF MORTGAGOR.

In re Grange, Chadwick v. *Grange* (1907) 1 Ch. 313. In this case a mortgage of land provided that the mortgagee might sell the mortgaged property, and should pay the surplus proceeds of the sale to the mortgagor "his heirs or assigns." After the mortgage was made the mortgagor became a lunatic not so found, and continued until his death in 1906 a lunatic. The mortgaged property was sold in 1900 under the power of sale, and there was a surplus. The question was whether it was to

be regarded as realty or personalty. Parker, J., held that the surplus proceeds were personalty and must be so treated notwithstanding the trust for the "heirs or assigns" of the mortgagor.

CRIMINAL LAW — BIGAMY—OFFENCE COMMITTED ABROAD—NO AVERMENT THAT ACCUSED WAS A BRITISH SUBJECT—OFFENCES AGAINST THE PERSON ACT, 1861—(24 & 25 VICT. C. 100), S. 57—(CR. CODE, S. 307(*b*)).

The King v. Audley (1907) 1 K.B. 383 was a prosecution for bigamy, the offence had been committed abroad, and the indictment did not allege that the defendant was a British subject. On a case reserved whether this omission was material the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Grantham, Lawrence, Bigham and Bucknill, JJ.) held that it was not.

CRIMINAL LAW—PUBLISHING ADVERTISEMENTS FOR SALE OF OBSCENE BOOKS—NEWSPAPER PUBLISHER—AIDING AND ABETTING SALE OF OBSCENE BOOKS, ETC.

The King v. *De Marny* (1907) 1 K.B. 388. The defendant was indicted for selling and publishing, or causing and procuring to be sold and published obscene books, papers and photographs. He was a publisher of a newspaper and had been warned by the police that certain advertisements published in his paper were for the publication and sale of obscene books, etc., he nevertheless continued to publish them. The police inspector wrote to the addresses given and received in return from the advertisers obscene books etc. On a case reserved as to whether defendant had taken part or aided and abetted in the publication of the obscene books as charged, the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Grantham, Lawrence, Bigham and Bucknill, JJ.) held that he had, and his conviction was affirmwas affirmed.

GAMING—LOTTERY—GRATUITOUS DISTRIBUTION OF MEDALS BEARING NUMBERS—PRIZES AWARDED TO ARBITRARILY SELECTED NUMBERS—NOTIFICATION OF WINNING NUMBERS IN NEWSPAPER—POSSIBILITY OF PRIZE WITHOUT PAYMENT FOR CHANCE —GAMING ACT, 1802 (42 GEO. III. C. 119), S. 2 (CR. CODE S. 236).

Wills v. *Young* (1907) 1 K.B. 448. In these days of keen competition it is a matter of common observation, what curious

schemes and devices are from time to time resorted to by newspapers for the purpose of increasing their circulation, and such a scheme was in question in this case. The defendants were proprietors of a weekly newspaper and distributed to the public promiscuously a number of medals each bearing a different number and the words "keep this it may be worth £100. See the weekly Telegraph to-day." Numbers were arbitrarily selected for prizes by the defendants and the winning numbers were published weekly in the defendants' paper. The object of the scheme was to induce the public to buy or inspect the paper. But information as to the winners could be obtained without any payment, or sending in any coupon. The defendants were indicted for holding and carrying on a lottery within the Gaming Act, 1802, s. 2 (see Cr. Code s. 236), and the Divisional Court (Lord Alverstone, C.J., and Darling and Ridley, JJ.) held that it was, and that defendants should be convicted. Darling, J., however, says that he would not be prepared to hold that a gratuitous distribution of chances for prizes, without payment by anyone, would be a lottery, but in the present case he holds that the chances are paid for by the general body of purchasers of the paper, although individual prize winners possibly pay nothing.

NEWSPAPER OFFERING TO GIVE ADVICE—CONTRACT—CONSIDERATION—BREACH OF DUTY—DAMAGES—REMOTENESS—FRAUD OF PERSON RECOMMENDED.

De la Bere v. *Pearson* (1907) 1 K.B. 483 is another case which ought to prove of interest to newspaper men. In this case the defendant was also a newspaper proprietor, and in his paper announced that the city editor would answer inquiries from readers of the paper, desiring financial advice. The plaintiff wrote asking the city editor to recommend a "good stock broker." The city editor in good faith handed the letter to one Thompson who wrote to say that the letter had been handed to him by the editor and that he did most of his business and would be glad to act for the plaintiff. Thompson was not a member of the stock exchange, but what in this country would probably be called "a curbstone broker." He had done business for the city editor, and was known not to be a regular broker, but unknown to him, he was an undischarged bankrupt which by inquiry could have been easily ascertained. The plaintiff confidingly sent to Mr. Thompson £1,400 for investment, and Mr.

Thompson promptly appropriated the money to his own use, and the plaintiff now claimed to recover his loss from the newspaper proprietor. The defendants contended that the defendants' negligence was not the immediate cause of the loss but the fraud of Thompson, but Lord Alverstone, C.J., who tried the action held that the defendants had been guilty of a breach of duty to take reasonable care in recommending a broker, and were liable to the plaintiff for the whole loss sustained by him.

SHIP—CHARTER PARTY—DEMURRAGE—LAY DAYS—ARRIVAL AT PLACE OF LOADING—OBLIGATION OF MASTER TO GO TO BERTH NAMED BY CHARTERER.

Leonis SS. Co. v. *Rank* (1907) 1 K.B. 344 was an action by shipowners for demurrage. The charter party provided that the charterers should ship a cargo and that the time for loading should commence to count twelve hours after written notice had been received from the master that the ship was in readiness to receive a cargo. The ship arrived at the port of lading and anchored in a river within the port a few ship's length off the pier, and written notice was given of its readiness to receive cargo. The place where the ship was anchored was not the usual loading place, but a possible place. The charterers required her to be brought alongside the pier, but owing to the crowded state of the port she was delayed in getting a berth there. Channel, J., held that the twelve hours did not begin when the notice of readiness to load was given by the master, but from the time the vessel got a berth at the pier.

TRADE UNION—RAISING FUND FOR MAINTENANCE OF MEMBERS OF PARLIAMENT—RULES OF UNION—LEVYING CONTRIBUTIONS—INJUNCTION—JURISDICTION OF COURT—TRADE UNION ACT, 1874, s. 4—(R.S.C. c. 125, s. 4).

Steele v. *South Wales Miners' Federation* (1907) 1 K.B. 361. This was an action by a member of a trade union for an injunction to restrain the defendants the union, from levying contributions from the plaintiff for a fund to be applied in the support of a member of Parliament. The rules of the union provided that one of its objects was to provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament, but no provision was made for raising such funds. A resolution in favour of a general contribution

from all the members was passed and the officials of the union proceeded to levy it. The plaintiff claimed that, in the absence of rules empowering such levy to be made, it was ultra vires and illegal and should be restrained by injunction. The action was tried in a County Court and dismissed. and the Divisional Court (Darling and Phillimore, JJ.) affirmed the judgment on the ground that although the levies might be irregular as not being provided for by the rules, yet as the purposes for which the levies were made were authorized by the rules, they were not illegal or ultra vires; and therefore the Court ought not to interfere.

DEFAMATION—LIBEL—PRIVILEGED OCCASION — PUBLICATION TO CLERKS OF COMPANY—REASONABLE AND ORDINARY COURSE OF BUSINESS.

In *Edmondson* v. *Birch* (1907) 1 K.B. 371 the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.) have followed *Boxsius* v. *Goblet* (1904) 1 Q.B. 842 (see ante, vol. 30, p. 392), which case it may be remembered explained and qualified *Pullman* v. *Hill* (1891) 1 Q.B. 524 (see ante, vol. 27, p. 236). In the latter case it had been held that the publication of a defamatory letter written by a wine merchant, to his clerk for the purpose of copying it was not privileged and rendered the merchant liable to the person defamed; but in *Boxsius* v. *Goblet*, it was held that publication to a clerk in the ordinary course of business was privileged, in that case the defamatory matter being contained in a letter written by a solicitor on behalf of his client in the ordinary course of business. In the present case the defendants were a company in London having business relations with a company in Japan, and the Japan company employed the plaintiff and it was understood that they should write to the London company to ascertain if they approved of the engagement. The London company's manager telegraphed back in cipher, "have no dealings with Edmondson give notice of dismissal." This telegram was copied into the defendant company's cable book together with a translation of it by one of the defendant company's clerks. The case was tried by Lawrence, J., and jury, and a verdict and judgment were given in favour of the plaintiff. The defendant appealed and moved for judgment, or for a new trial, and the Court of Appeal held that the letter being written in the ordinary course the publication to the defendant's clerks

was privileged, and therefore no action lay. But it may be remarked that Collins, M.R., points out, that the language used may be so defamatory, and so far in excess of the occasion, as to be evidence of malice, and shew that the publication to a clerk was not a use but an abuse of the privilege. Moulton, L.J., thus summarizes the law on this point: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

PRACTICE—LIBEL—PLEADING—DEFENCE OF FAIR COMMENT—PARTICULARS.

Digby v. *Financial News* (1907) 1 K.B. 502 was an action against a newspaper proprietor for libel, which arose out of the following circumstances. The plaintiff advertised for a partner with £250, to complete the formation of a syndicate. Carruthers, a correspondent of the defendants' paper, answered the advertisement and received certain papers in reference to the syndicate, which he afterwards forwarded to the defendants' paper, in which was published an article in a satirical verse commenting on the advertisement and the papers furnished by the plaintiff, as to the purpose for which the money was alleged to be required. This constituted the libel complained of. The defendants' pleaded that in so far as the words consist of statements of fact, the same are in their ordinary signification true in substance and, in fact, and as far as they consist of comment, they were a fair comment on a matter of public interest. The plaintiff claimed that this defence amounted to justification and applied for particulars as to whether the defendants alleged that any of the statements made in the particulars and documents furnished by the plaintiff were untrue, and if so, which of them. The defendants, on the other hand, contended that the defence was simply one of fair comment. The Master granted the plaintiff's application and his order was affirmed by Bucknill, J., but the Court of Appeal (Collins M.R. and Cozens-Hardy and Farwell, L.JJ.,) agreed that the order should not have been made and that the defence only amounted to one of fair comment and could not be regarded as one of justification.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] [March 18.

DOMINION OF CANADA *v.* PROVINCE OF ONTARIO.

Disputed territory—Indian title—Moneys paid by Dominion for surrender of—Contribution by Ontario.

1. The jurisdiction that the Court has of controversies between the Dominion of Canada and a Province of Canada, or between two Provinces, does not authorize the court to decide the issue in accordance only with what may to it seem fair, and without regard to the principle of law applicable to the case.

2. At the time when the North West Angle Treaty No. 3, between Her late Majesty the Queen and the Salteaux Tribe of the Ojibeway Indians was entered into, the boundaries of the Province of Ontario were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, the Dominion Government occupied a position analagous to that of a bonâ fide possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in those lands could not with prudence be deferred until such boundaries were determined. It was necessary for the peace, order and good government of the country, that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion, and that they had a right to administer the same. In this they were in a large

measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiation of the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiation. By this treaty the burden of the Indian title was extinguished. In the case of *The St. Catharines Milling and Lumber Company* v. *The Queen* (14 App. Cas. 60), in which it was decided that the ceded territory within the Province of Ontario belonged to the Province, subject to the burden of the Indian title therein, Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council, and dealing with the question of the liability of the Province to contribute to the Dominion in respect to the obligations incurred by the Dominion in obtaining the surrender of the Indian title, expressed the following opinion:—

"Seeing that the benefit accrues to her, Ontario must of course relieve the Crown and the Dominion of all obligations involving the payment of money, which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

Held, following that expression of opinion, that the Province of Ontario is, in respect of the obligations incurred by the Crown, and the Dominion under the said treaty, which involve the payment of moneys, and which are referable to the extinguishment of the Indian title in the lands described therein, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the Province bears to the whole area covered by the treaty.

3. While the question of the true boundaries of the Province of Ontario was in course of determination, the Dominion authorities, under an agreement for a conventional boundary, administered a part of the territory in dispute, and derived revenues therefrom, for which the Province in this action, set up a counterclaim.

Held, that the Province could not maintain its counterclaim for the moneys so collected by the Dominion without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the obligations incurred in obtaining a surrender of the Indian title.

Semble: The fact that a part of the benefit arising from the surrender of the lands mentioned in the treaty accrued to the

Province of Ontario is not of itself, and without other considerations, sufficient to make the Province liable to contribute to the Dominion a proportionate part of the payment made in pursuance of the obligations incurred by the Crown under the treaty.

If the Parliament of Canada should appropriate, and the Government of Canada should expend public moneys of the Dominion for either Dominion or Provincial purposes, with the result that a Province was benefited, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute to such expenditure. The principle stated would apply as well to expenditures made by a Province with the result that the Dominion, as a whole, was benefited. In all such cases the appropriation and expenditure would be voluntary, and no obligation to contribute would arise.

Newcombe, K.C., *Hogg*, K.C., and *Roy*, for the Dominion; *Irving*, K.C., *Shepley*, K.C., and *White*, for Ontario.

Province of Ontario.

COURT OF APPEAL.

Full Court.] IN RE J. D. SHIER LUMBER CO. [March 21.

Assessment—Timber licenses—Lumber camps—Business tax—Slides and dams.

This was a case referred by the Lieutenant-Governor in Council under sec. 77 of the Assessment Act in respect to assessments. The company are manufacturers of lumber, etc., and hold licenses to cut timber on Crown lands for 1906 and 1907. They were assessed in the present year in the Township of Lawrence upon their said licenses to cut timber, and upon their lumber camps, and upon business tax at the said camps, and upon slides and dams. The company do not own any land nor have they any office or mills in the said township, nor do they carry on any business therein, but cut timber therein, and haul and float it to their mills at Bracebridge, where they own a mill and

factory and which is their chief place of business and where they are assessed on such factory and mill, and also on business.

The company claim that there was no jurisdiction to make such assessments on the ground that timber licenses and timber are not assessable, and that camps are not land, their servants and employees being on Crown lands by license to cut and carry away timber, and because by reason merely of maintaining such camps, they are not assessable for business tax in respect thereof, and because such dams and slides are mere temporary arrangements for conveying timber down the rivers and are on Crown lands.

Held, by a majority of the Court that:

1. The holders of timber licenses are not liable to be assessed thereon, such licenses not coming within the meaning of real property as used in the 5th section of the Assessment Act, and also because there is nothing to remove the land from the category of property of the Crown exempt from taxation.

2. Lumber camps are not assessable for they are mere temporary constructions and are removed from time to time from one part of the limits to another, so that it is quite possible they may be in one municipality one day and in another the next. There seems to be no ground on which they could be treated as liable to taxation.

3. The owners of lumber camps are not assessable for a business tax under the conditions mentioned with respect to the camps only. A reference to the provisions of sec. 10, under which a business tax imposed shews that they have no application under the circumstances, stated in the case. Moreover, the holders of the licenses are not using land which is subject to taxation for the purposes of any such business, while it seems from sec. 10 that the land occupied or used must be land subject to taxation.

4. Slides and dams are not assessable under the conditions mentioned. They are temporary structures erected upon Crown property; they may or may not be situate on the limits covered by the licenses and they are used by all persons for the floating down of their logs and timber, and when no longer required are abandoned. There does not appear to be any ground for assessing them under the Act.

E. D. Armour, K.C., and *Mickle*, for company. *G. G. Mills*, for township.

HIGH COURT OF JUSTICE.

Mabee, J., Trial.] CRABBE *v.* LITTLE. [March 21.

Sale of land—Requisitions—Right of vendor to rescind—Waiver of right by negotiations—Conveyancing practice.

Contracts for sale of lands with usual provision that "if any objection or requisition be made by the purchaser which the vendor should be unable or unwilling to comply with, the vendor should be at liberty, by notice in writing, to rescind the agreement." In these cases requisitions on title were made, to some of which the vendor's solicitor replied, to the effect that they related to deeds more than twenty years old, and to facts recited in the said deeds, and that the vendor had been in uninterrupted possession since 1876, and a draft deed was enclosed. He also stated that the vendor was unwilling to go to expense as regards certain requisitions which had not been answered. The purchaser's solicitor insisted that the latter requisitions must be answered, and other negotiations took place between them, and finally the vendor served notice cancelling the contract.

Held, that the vendor's solicitor by attempting to answer the requisitions had lost his right to rescind, which right was waived by the communications between the parties both written and verbal after the delivery of the requisitions. It is on account of this state of the law that the practice has grown up that where a vendor once embarks upon an attempt to comply with requisitions, or remove objections, he reserves to himself the benefit of the right to rescind later on during the negotiations; this, however, had not been done in this case.

Jennings, for plaintiffs. *McCullough* and *Frazer*, for defendants.

Riddell, J.] [April 8.

ERRINGTON *v.* COURT DOUGLAS No. 27 C.O.F.

Division Court jurisdiction—Finding of judge—Interference with—Judge giving himself jurisdiction by error—Motion for prohibition is not an appeal.

On a motion for prohibition to a Division Court judge on

the ground that the defendant declined to give any evidence or enter into any defence on the merits because the plaintiff had not shewn that he had taken the various appeals to the domestic forum provided for by the conditions of a benefit society and so established jurisdiction in the Division Court.

Held, 1. The Division Court had jurisdiction and that the question to be decided was not, in what Court the action should be brought? but can such an action succeed in law? And that then a High Court judge had no right to dictate to the Division Court judge.

2. A finding that the plaintiff "had exhausted every possible means of redress in the domestic forum," could not be interfered with as a motion for prohibition was not an appeal and that the Division Court judge had not given himself jurisdiction by an error but that any mistake he may have made was made in a matter within his jurisdiction to try, and the motion was dismissed with costs.

Proudfoot, K.C., for the motion. *Hugh Morrison*, contra.

Cartwright, Master.] [April 9.

RIGHT OF WAY MINING CO. *v.* LAROSE MINING CO.

Inspection of property adjacent to that on which trespass committed—Mining land—Risk of losing evidence.

In an action for damages and on account of ore or minerals removed by the defendants from the property of the plaintiffs, in which a trespass on part of plaintiffs' property was admitted by the defendants.

An order was made before the delivery of the statement of claim, allowing the plaintiffs to inspect the defendants' property adjacent to that of the plaintiffs, so that they might state their case according to the facts, and because the evidence necessary to ascertain how much ore had been removed, might be lost by delay.

Middleton, for the motion. *Holden*, contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] GALBRAITH *v.* SCOTT. [Feb. 26.

Chattel mortgage—Affidavit for renewal—Words having same meaning as those in form prescribed—Ownership of off-spring of mares covered by mortgage—Removal of chattels from division when mortgage registered—Subsequent purchaser—R.S.M. 1902, *c.* 11, *ss.* 20, 29.

The three plaintiffs, respectively, had purchased from one Brown four colts the off-spring of two mares upon which Brown had given the defendant a chattel mortgage, the description concluding with the words "and also the increase from the mares." The plaintiffs were purchasers of the colts for value and received delivery of them from Brown without any notice of the defendant's claim. Defendant having afterwards seized and removed the colts under his mortgage, plaintiffs replevied them.

Held, that the common law principle "partus sequitur ventrem" applied and that the legal estate in the colts was in the defendant even without the special provisio to that effect in the mortgage. The case was not analogous to that of a mortgage given to cover future acquired chattels, a title to which might be obtained by a purchaser for value without notice before the mortgagee exercised any act of possession.

Dillarn v. *Doyle*, 43 U.C.R. 442, and *Temple* v. *Nicholson*, Cassels Sup. Ct. Digest, 114, followed.

Held, also, that the expression "kept on foot" in the defendant's affidavit for renewal of the mortgage pursuant to s. 20 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, meant the same thing as the words "kept alive" used in that section, and the statute was sufficiently complied with: *Emerson* v. *Bannerman*, 19 S.C.R. 1.

The plaintiff Roper had removed the animal purchased by him from the division in which the chattel mortgage was registered to another division where he had it for over a year before its seizure by defendant. A certified copy of the mortgage had, however, been registered in the latter division, pursuant to s. 29 of the Act, within the required time.

Held, following *Hulbert* v. *Peterson,* 36 S.C.R. 324, that the "subsequent purchaser" mentioned in s. 29 must be one who purchased after the expiration of the time limited for registration in the division to which the goods had been removed, and that the mortgage was valid as against him as well as the other plaintiffs.

Appeal from verdicts in the County Court for plaintiffs allowed with costs and judgments for defendant ordered to be entered in the County Court with costs.

Bradshaw and *Geo. Paterson* (Deloraine), for plaintiffs. *Robson* and *Blackwood,* for defendant.

Full Court.] OTTO *v.* CONNERY. [March 7.

Garnishment—Attachment of money in hands of County Court clerk to which debtor entitled—R.S.M. 1902, *c.* 38—*Equitable execution in County Court.*

Held, that money paid into a County Court for the benefit of one of the parties to a suit in that Court are not attachable in the hands of the clerk of the Court by garnishee process at the suit of a creditor of such party. *Dolphin* v. *Layton,* 4 C.P. D. 130, followed in preference to *Bland* v. *Andrews,* 45 U.C.R. 431. *Ross* v. *Goodier,* not reported, decided by CUMBERLAND, Co. J., in 1894, approved.

Quære, whether the money could not be reached by way of charging order or equitable execution as by the appointment of a receiver.

Thornburn, for plaintiff. *Crichton,* for defendant and garnishee.

Full Court.] [March 7.

COPELAND-CHATTERSON CO. *v.* HICKOK.

Contract—Consideration—Injunction to restrain breach of agreement.

Appeal from judgment of MACDONALD, J., granting an injunction to restrain defendant from carrying on business in competition with the plaintiff company in violation of an agreement signed by defendant that he would not, within one year

after the termination of his employment with the company, engage or be interested in any business or work within Canada or Great Britain in competition with the business of the company. Defendant had been for some months employed as a salesman in the Winnipeg office of the company, when the assistant general-manager came from Toronto, and, acting on instructions from the general-manager, placed the defendant in temporary charge as manager of the Winnipeg office and procured defendant to sign the agreement in question, telling him the company wanted it signed. No change was made or agreed to be made in defendant's salary or in the terms of his hiring. A few months afterwards defendant resigned his position and entered into business of a character similar to that of the plaintiffs.

Held, that there was no sufficient legal consideration for defendant entering into the agreement and that it was, therefore, not binding upon him.

Appeal allowed with costs.

Coyne, for plaintiffs. *Hugg* and *Wemyss*, for defendant.

Full Court.] [March 9.

MANUFACTURERS' LIFE INSURANCE CO. *v.* ROWES.

Promissory note—Consideration—Liability of insured for premium on life insurance when policy voided for non-payment.

Appeal by plaintiffs from verdict of County Court judge for one-fourth of the amount of defendants' promissory note for the first year's premium on a policy of life insurance issued to him by the plaintiffs. It was a condition of the policy that it should be utterly void if any note given for a premium should not be paid when due, but the note should nevertheless be paid; and in his application for the insurance defendant had agreed that he would accept the policy when issued and pay the first year's premium thereon.

Held, that defendant was liable for the full amount of the note, as it had been given for valuable consideration, and to permit him to pay for only three months' insurance, would be, in effect, to make a new contract between the parties. *Manufacturers' Life* v. *Gordon*, 20 A.R. 309, followed. *Royal Victoria Life* v. *Richards*, 31 O.R. 483, distinguished.

Daly, K.C., and *Crichton*, for plaintiffs. *McMurray*, for defendant.

Full Court.] [March 9.

GRIFFITHS *v.* WINNIPEG ELECTRIC RY. CO.

Jury trial—Action for damages caused by alleged negligence.

Appeal from judgment of MATHERS, J., noted, ante, p. 177, ordering trial of this action by a jury, dismissed with costs.

Manahan, for plaintiff. *Aikins*, K.C., and *Laird*, for defendants.

Full Court.] MOORE *v.* SCOTT. [March 9.

Promissory note—Holder in due course—Rescission of contract—Plea of fraud—Amendment—Restitutio in integrum.

Appeal from judgment of MATHERS, J., noted, ante, p. 174, dismissed with costs.

Aikins, K.C., and *J. F. Fisher*, for plaintiff. *A. J. Andrews*, and *Burbidge*, for defendants.

Full Court.] [April 8.

NAGY *v.* MANITOBA FREE PRESS CO.

Slander of real estate—Publication of statement that house haunted—Damages.

Appeal from judgment of MacDonald, J., noted ante, p. 118, allowed with costs, Perdue, J. A., dissenting.

Per RICHARDS, J.A.—The members of the Court should, as educated men, assume that there are not such things as ghosts and therefore that the statement published by defendants was necessarily false. It is necessary, to enable the plaintiff to succeed, that she should prove malice in the strict sense of the word. It should be presumed that the reporter and the editor who were responsible for the publication of the article, as educated men, knew that the statement was false, and therefore, had no reasonable justification or excuse for publishing it. They thus rendered their employers, the company, liable in damages for the natural results of such publication even though such results were not foreseen by them.

The evidence shewed that the plaintiff lost a sale of the house in consequence of the publication and that the house, being

vacant, was damaged by crowds resorting to it on account of the report that it was haunted.

Per PHIPPEN, J.A.—I agree that the article was untrue, that it caused actual damage to the plaintiff and that such damages were the logical result of the publication. The article directly referred to the plaintiff's premises, it falsely imputed a condition which naturally resulted in loss. It was not published on any public or privileged occasion nor did it deal with a matter in which the defendants were specially interested. To my mind, as against the plaintiff, it was wrongful and as such actionable, apart altogether from any consideration of actual malice. It falls within the principle of *Riding* v. *Smith*, 1 Fraser (Court of Sessions Cases, Scotland) 327, rather than within that other class of cases where, on the ground of public policy, the Courts have held honest statements to be lawful, although occasioning damage to the innocent.

Per PERDUE, J.A.—In such a case the plaintiff must prove that the statement is false, that it was published maliciously and that special damage resulted.

The statement can only be actionable if it was intended to be believed and was believed by some person who was influenced by it to the detriment of the plaintiff: *Longridge* v. *Levy*, 2 M. & W. at p. 531. But, if it was so repugnant to common sense and common knowledge that no proof of its untruth would be necessary, it is difficult to see how anyone could have been deceived by it. The plaintiff failed to shew that the statement complained of was wrongful and was made with the knowledge that it would cause, or was likely to cause, injury to the plaintiff, or that the defendants, in publishing it, intended or contemplated any injury to the plaintiff or her property, and without such evidence the plaintiff should not recover. Intention to injure must be established either directly or by reasonable inference to support such an action: *Quinn* v. *Leathem*, (1901) A.C. 495, at p. 524; *Read* v. *Friendly Society*, (1902) 2 K.B. 732, at p. 739. It is clear that the statement was only published as an item of news, with no intention to do any wrong to the plaintiff, and without any idea that the publication would cause any damage to the plaintiff's property.

The plaintiff also failed to prove that she sustained special damage resulting directly from the publication complained of. The finding of the trial Judge on this point and as to those parts of the evidence which should be believed or disbelieved should not be interfered with. It must be shewn than an actual

sale was prevented. Evidence of opinion to shew a general depreciation of value caused by the statement is not sufficient in such a case where no lasting injury was shewn to have been caused.

The Court ordered that the judgment in the King's Bench for defendants should be set aside and that judgment should be entered there for the plaintiff for $1,000, with the costs of the action.

O'Connor and *Blackwood*, for plaintiff. *Hudson* and *Howell*, for defendants.

KING'S BENCH.

Mathers, J.] EMERSON *v.* WRIGHT. [March 8.

Receiver—Duty to deposit trust moneys in bank promptly—Municipal treasurer allowing discount on taxes not paid within time fixed—Negligent omission of taxes from roll—Costs.

The defendant was appointed receiver of the Town of Emerson under legislation conferring on him all the powers and authority previously exercised by the mayor and council and by the clerk, treasurer, assessors and collector under the Municipal Act, the mayor and council having resigned in consequence of the town being unable to meet its liabilities. Defendant held the said office from 1894 until 1901, when his appointment was cancelled, and the plaintiff Unsworth appointed receiver in his place. An advisory board of three, was also appointed by Order in Council under a statute to assist the new receiver. In carrying on the affairs of the town and providing money for the support of the schools, the defendant during his term of office frequently had to borrow money on overdrafts from a local bank on his personal guaranty, and to pay interest on such overdrafts. It was also his duty to collect taxes.

This action was brought for the recovery of money alleged to be due from defendant to the town, and for an account of all moneys received, or which should have been received, for the town by him, and for moneys alleged to have been improperly disbursed by him a such receiver. The statement of claim con-

tained a great many charges of improper and fraudulent conduct on the part of the defendant, but the evidence at the trial, was entirely confined to the questions of his liability, (1.) for interest which he had paid on overdrafts at the bank in excess of that which would have been payable if he had from time to time deposited the cash received promptly.

2. For the sum of $168.00, which he had allowed as discounts on taxes paid in the year 1897, after the 15th of December, after which date no discounts were legally allowable; and

3. For a sum of $147.20, taxes dropped from the tax rolls through the error or negligence of the defendant.

Held, 1. Defendant should have, at least once a week, deposited in the bank all town moneys in his hands, and was liable for any excess of interest paid on overdrafts, that would not have been charged if such deposits had been made.

2. Defendant was not liable for the discounts allowed, as he had previously consulted with the municipal commissioner, the member of the Government charged with municipal matters, and had received his permission to use his own discretion in the matter, and the allowance of the discounts had been ratified by the plaintiff Unsworth, and the advisory board, with full knowledge of all the facts.

3. Defendant was not liable for the amount of the taxes he had omitted to insert in the rolls, because these taxes had not been dropped purposely or in bad faith by defendant, and had been subsequently placed on the rolls by the new receiver, a considerable part of them collected before the action began, and the balance remained a charge upon the taxed property in favour of the town. Even if the town had suffered a loss because of such omission, the defendant would not be liable if the omission took place through error, or was not due to bad faith or dishonesty: *Peterborough* v. *Edwards*, 31 U.C.C.P. 231.

When the defendant was dismissed from office, there was an overdraft in the bank for $343.95, which he as receiver had borrowed for school purposes on his personal guaranty.

Held, that defendant was entitled to judgment for that amount on his counterclaim against the plaintiffs.

Reference to the Master. No costs to plaintiffs, up to and including the trial, on account of their having made many serious and damaging allegations, in the statement of claim against defendant, and their entire failure to support such charges by evidence.

Other costs reserved.

Minty, for plaintiff. *Laird*, for defendant.

Mathers, J.] [March 14.

CANADA RAILWAY ACCIDENT CO. v. KELLY.

Security for costs—Company resident out of jurisdiction—Assets within jurisdiction—Branch office in province—Foreign Corporations Act, R.S.M. 1902, c. 28.

Appeal from an order of the referee setting aside an order for security for costs taken out by defendant on præcipe under Rule 978 of the King's Bench Act. The plaintiff company was described in the statement of claim as a corporation "having its head office in the City of Ottawa in the Province of Ontario, and a branch office in the City of Winnipeg."

Held, following *North-West Timber Co.* v. *McMillan*, 3 M.R. 277, and *Ashland Company* v. *Armstrong*, 11 C.L.R. 414, that defendant was prima facie entitled to the præcipe order.

(2) The assets of the company in this province, consisting of some office furniture of small value and the premiums collected at the branch office in Winnipeg for transmission to the head office in Ottawa, were not of such a character as to warrant setting aside the order for security.

(3) The plaintiffs had not acquired a residence in Manitoba, within the meaning of that term in Rule 978, by having a branch office here and taking out a license under the Foreign Corporations Act, R.S.M., 1902, c. 28, to transact its business in this province: *Ashland Company* v. *Armstrong*, supra.

Appeal allowed with costs to defendant in any event of the cause.

Coyne, for plaintiffs. *O'Connor*, for defendant.

Macdonald, J.] [March, 16.

MATTICE v. BRANDON MACHINE WORKS CO.

Patent of invention—Novelty—New combination of well-known devices.

Action for damages for infringement of plaintiff's patented grain pickling machine by defendants, and for an injunction. The defendants established the existence of two similar machines, patented before that of the plaintiff. The principle of each machine was the same, the grain being fed into a hopper on the top of a box containing a revolving worm or screw, and the

pickling liquid being in a box so placed that the liquid would fall into the box containing the worm so as to mix with the grain in its progress to the discharging end of the box; but in the plaintiff's machine the liquid was conveyed through a lead tube into the side of the box containing the worm to a point underneath the opening in the hopper so that the liquid and the grain ran through together, and much space was saved. The mixing of the grain, and the pickling fluid was, owing to the use of the lead tube, more thoroughly done by the plaintiff's machine than by either of the others, and its capacity was considerably greater.

Held, that there was sufficient novelty and improvement in the plaintiff's machine to support his patent.

Judgment for damages and an injunction.

Noble and *Card*, for the plaintiff. *Coldwell*, K.C., and *Henderson*, for defendants.

Mathers, J.] [April 3.

CANADA PERMANENT *v.* EAST SELKIRK.

Mandamus—Enforcing writ of execution against school district by levy of taxes—Compelling treasurer to make levy directed by sheriff—Who to apply.

The plaintiffs, being judgment creditors of the defendant school district, placed in the sheriff's hands a writ of execution to recover the amount of the judgment, and the sheriff, pursuant to the provisions of sec. 263 of the Public Schools Act, R.S.M. 1902, c. 143, issued his precept to the treasurer of the municipality directing him to levy a rate upon the lands in the school district sufficient to realize the amount of the judgment with interest and costs.

The treasurer having neglected to make such levy, the plaintiffs applied for a mandamus to compel him to do so, replying on sub-s. (f) of s. 263.

Held, that, although it had been held in *London & Canadian Co.* v. *Morris*, 9 M.R. 377, that the sheriff could apply for such mandamus, there was no reason why the execution creditors, being the parties chiefly interested, could not also make such application.

A. C. Ewart, for plaintiffs. *Heap*, for defendants.

Mathers, J.] TELLIER v. SCHILEMANS. [April 3.

Administrator pendente lite—Appointment of.

Application for the appointment of an administrator, pendente lite, of the estate of Denny D'Aout, in a suit to set aside his will and also a mortgage and bill of sale of his livery stable property to the defendants, Schilemans and Dujardin, on the ground that the same were executed by deceased when he was in a physically weak state, and under undue influence.

Held, following *Harrell* v. *Witts*, L.R 1 P. & D. 103, that it is only in case of necessity when it is shewn that the estate is in jeopardy, that such an appointment will be made; and that as to that portion of the estate in the hands of the defendant Dujardin, to which he did not claim title under the will and which he was taking good care of, no such case had been shewn; but that, as to the rest of the estate, the evidence brought the case within the rule laid down in *Bellew* v. *Bellew*, 34 L.J.P.M. & A. 125, and an administrator pendente lite of that portion of the estate should be appointed.

O'Connor, for plaintiff. *Haggart*, K.C., for defendant.

Mathers, J.] GULLIVAN v. CANTELO. [April 9.

Service out of the jurisdiction—Breach of contract to be performed within the jurisdiction.

The plaintiff, a resident of Manitoba, sued the defendant, a resident of Saskatchewan, for commission on the sale for defendant of lands situated in Saskatchewan. The bargain respecting the agency was closed between the parties at Winnipeg, when defendant agreed to pay a certain commission in case plaintiff could find purchasers. The statement of claim was served out of the jurisdiction without obtaining any order for leave and the referee, on the defendant's application, set aside the service.

Held, on appeal, that the service was authorized by sub-s. (e) of Rule 201, of the King's Bench Act, for, if any commission became payable under the contract, it would be the duty of the defendant to pay it to the plaintiff at his residence in Winnipeg, and so there would be, in case of non-payment, a breach within Manitoba of a contract "which according to the terms thereof ought to be performed within Manitoba."

Reynolds v. *Coleman*, 36 ch. D. 453, followed.

Appeal allowed with costs.

MacNeil, for plaintiff. *Phillipps*, for defendant.

Province of British Columbia.

SUPREME COURT.

Clement, J.] [March 2.

CITY OF FERNIE *v.* CROW'S NEST PASS, LIGHT & POWER CO.

Municipal law—Trades licenses—By-law, registration of, B.C. Stat. (1906) c. 32, s, 86.

A municipal by-law, providing for the imposition of a license "for every six months," was passed and registered on the 18th of September, and the time limited for the expiration of the first license thereunder was fixed for the 15th of the ensuing January. There was no provision made for the period of time between the passage of the by-law and the 15th of January.

Held, that a conviction of defendant company for carrying on business, on or about the 4th of December intervening, without having taken out a license under the by-law, was bad, in that section 1 of the by-law could apply only to a six months' license for which a six months' fee had been paid.

Held, further, that the copy of the by-law deposited for registration, having impressed upon it the seal of the municipality that was sufficient, and that it was not necessary to affix the seal to the certificate of the municipal clerk authenticating the by-law.

W. A. Macdonald, K.C., for plaintiff. *S. S. Taylor*, K.C., for defendants.

Hunter, C. J.] MACLEOD v. MCLAUGHLIN. [March 18.

Jury, right of to return a general verdict.

Before the charge to the jury, council for plaintiff asked for a direction to the jury to return a general verdict. Council for defendant objected, and urged that the jury had a right to return a general verdict if they chose, but that they should not be directed to do so.

Held, in *Mayor* and *Burgesses* of *Devises* v. *Clark* (1835) 3 A. & E., 506, it is stated that the jury may stand on their rights to return a general verdict, but the modern view is that it is the right of either of the litigants to have a general verdict.

A. D. Taylor and *Garrett*, for plaintiff. *Davis*, K.C., and *W. J. Whiteside*, for defendant.

Hunter, C.J.] RAINEY *v.* RAINEY. [April 27.

Order for sale of real estate pendente lite.

Rule 1, of order 50 provides, in part, "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold, the Court or a judge may order the same to be sold."

Held, that this is a general power, to be exercised by the Court or a judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action.

Craig, for plaintiff. *Wade*, K.C., for defendant.

Book Reviews.

Digest of the Law of Agency. By WILLIAM BOWSTEAD, of the Middle Temple, Barrister-at-law. Third edition, London: Sweet & Maxwell, Limited, 3 Chancery Lane, W.C. Canada Law Book Company, Ltd., 32 Toronto Street, Toronto. 1907. 514 pp. $5.00, cloth. $6.00, half calf.

This book is more than a digest, and more valuable than a mere digest could be. It is more in the nature of a code. The author first states his legal proposition and then illustrates it with the leading cases. So far as we have been able to examine the work, these legal propositions are sound as to law and they are certainly concise as to form. The arrangement of the subjects is convenient and logical. The author evidently is not in love with the Trade Disputes Bill, under which he says: "No action will lie against a trade union, or against any members or officials thereof, on behalf of themselves and all other members, in respect of any tort alleged to have been committed by or on behalf of the trade union. The ancient maxim may now be rendered; The King and trade unions can do no wrong."

The law and practice of interpleader in the High Court and County Court. By S. P. J. MERLIN of Gray's Inn, Barrister-at-law. London: Butterworth & Co., Bell Yard. 1907. 256 pp.

This is a handy book for the English practitioner, and will also be useful in the English speaking provinces of the Dominion. It has in addition a useful appendix of forms.