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LABOUR LEGISLATION.

The whole system of the so-called "labour legislation" including that monument of legislative imbecility, the alien labour laws, and of trade-unionism generally, has such inherent defects that nothing but the clearest necessity can justify its existence.

And, again, if the system is bad in principle, the methods adopted to carry it out are worse. If a man is willing to work for ten hours instead of eight in order to earn money which he greatly needs to feed and clothe his family, or in any way to promote his own interest, it seems to be in accordance with the universal law of liberty that he should be free to do so. Or if it suits him to work for one dollar per day instead of one dollar and a half, why should he not? Or if I, an employer of labour, find that Smith can earn two dollars a day, while, at the same work, Brown can only earn one, why should I be obliged to place both men on the same footing, and either pay Brown for work that he cannot do, or not pay Smith the wages he can honestly earn? It is the enjoyment of such simple rules of liberty that trade unions deny to their members, and the tyranny of their rule is one of he weapons employed to coerce those who refuse to obey their behests.

Of the results of the working of the system in starvation and suffering, in riot, lawlessness and brutality, we have had of late abundant evidence, and they are practically the only results, for in scarcely a single case has the workman really gained anything more than the unalterable law of supply and demand would have given him.

But let it be understood that we by no means intend to imply that labour unions are alone to blame for the disputes that have arisen, and the crime and suffering that have followed. The personal relations that formerly existed between employer and employed exist no longer. Corporations consisting of shareholders

who know nothing of the business from which their income is derived, and nothing of those whose labour carries it on, do not and cannot be expected to feel that personal sympathy which alone can bridge over the chasm which divides labour from capital. The golden rule which bids us to do to others as we would they should do to us is entirely ignored in the present relationship between employer and employed, and David Harum's travesty of it in "doing to others as they would do to us, and do it first" is the maxim generally accepted and acted upon. That work can be done under the opposite conditions, and that master and man can be friends and co-workers, instead of rivals —that profit in business can be combined with due regard for the well-being both material and mental of those who carry it on—that mutual confidence and good will can take the place of mistrust and animosity has been proved in a number of well-known instances in which great commercial success has been achieved, while the happiness and comfort of all concerned has been secured.

In this country the extremes of poverty and wealth, so dangerous to the peace of the community, do not yet exist There is yet time for the voice of reason to be heard, and for this sense of charity and good will by which we all profess to be governed to prevail over selfishness and mistrust. There is yet time for capitalists to consider their ways and be wise, lest in the struggle with those dependent upon them for their daily bread such a sense of injustice is aroused as will sweep away all the defences by which the security of property, and the safety of life and liberty, are maintained. There is time, too, for labour unions to consider well their position, and to ask themselves whether the policy they are pursuing is one likely to result in either present advantage or permanent good. They are being bought and sold by their own trusted agents, and made the tools of a few designing men as crafty and unscrupulous as any trust that ever existed. They cannot with impunity set at defiance the rules of reason and justice which hold society together, and any attempt at so doing, while it may meet with success for a time, can only result in ultimate defeat, and injury to a cause which, within proper bounds, has much to be urged in its favour.

When, however, we come to deal with the existing state of things the prospect seems almost hopeless. Every day makes more complete and efficient the organization of the unions. No consideration of humanity—no respect for the rights of others—no regard for the convenience or even the necessities of the innocent public, are allowed to stand in the way of their demands. Flourishing industries are destroyed, business rendered uncertain, trade in many cases paralyzed, the worst passions excited, and that reverence for law and order which is the foundation of all prosperity is uprooted. Anarchy takes advantage of this state of unrest, and lends its aid in promoting a condition of things which nearly approaches revolution. Then the politician steps in. The unionists have votes, therefore their demands, however unreasonable, must be respectfully listened to, and legislation must be framed to carry out their objects.

On the other side employers combine, and an army of "strike-breakers" is organized, and thus we have the two opposing forces face to face with the results already described.

But though the law is powerless to deal with the sources of the evils arising out of the conflict between labour and capital, as it is powerless to deal with other elements in human nature which produce the crimes it is its duty to suppress, yet it is its duty to prevent, and, if need be, to punish any action which violates the law of the land by breach of the peace, or interference with rights of person or property. Law cannot prevent strikes or lockouts, which are not in themselves lawless acts, but it can, and should, at all costs, and all hazards, and by any means that are necessary, prevent strikers or union men from interfering with any person, however repugnant to their views or interests the conduct of such person may be, or however much public sympathy may be enlisted in their favour.

The public also has rights which must be protected. For example the employees on a street railway may strike if they please, but the right of the company to work their line as they choose and the rights of the public to use the line must be protected, even though the object of the strikers may thus be frustrated. To view the matter otherwise is to place the strikers above the law, and to make the demands of a few however equit-

able those demands may be, paramount not only to law but also to every other interest concerned. Moreover, the law is bound to protect itself. It cannot be violated on any pretext without injury to society at large, and to the weakening of its legitimate and necessary authority. It must not allow such scenes of lawlessness as have been witnessed in the streets of large cities, not only because they are a violation of law, but because they let loose passions which give rise to further excesses, and bring about disregard for all lawful authority. For these objects no legislation is necessary. The common law is clear enough on these points, and special legislation always seems to indicate a limit to common law where often no such limit exists.

To write as above seems almost childishly trite and commonplace, but such wild ideas prevail upon the subject of the rights and claims, and still more the power, of labour unions that some kind of protest is needed lest the rights of persons and of the public should be entirely forgotten. Indeed between the great corporations on one side and the labour unions on the other, the public, whether individually or collectively, are being reduced to a condition of impotence pitiable to behold, and intolerable to endure.

There is however one point of importance upon which, as the Courts are unable to agree, legislation may be necessary, or upon which legislation may properly be invoked.

It is a monstrous doctrine that a body like a trade union, enforcing by its own method the collection of large sums of money, and exercising absolute control over its members, can, by unlawful means, work injury to a person or to a corporation liable by common law or by act of incorporation for damages which his or its acts may cause, and yet be free from all liability. To incorporate the unions would be the simplest way of remedying the evil. That of course the unions would never agree to, and it is doubtful whether our House of Commons would pass any measure which would treat the funds of the union as subject to penalty. As the question is now sub judice we may leave it till the points raised have been finally settled.

Though properly considered in connection with trade unions the alien labour law stands upon a different footing, and must

be regarded as a political as well as an industrial question. Unionists indeed uphold it as a means of preventing employers from meeting the effects of a strike, and mechanics and labourers generally demand redress against a system which would exclude them from finding employment upon the other side of the boundary while freely admitting the same class of labour to compete with them at home. It is not surprising that a retaliatory measure has been demanded on our side, but the onus of this absurd legislation certainly lies upon our southern neighbours. Political necessity may for the time being require the enforcement of these laws, but as they are not the fruit of wisely considered legislation, but a concession to the narrowest and most selfish of class interests, they will yield in time to a more enlightened public opinion. In the meantime some better mode of giving effect to our law must be found than deportation. Whether or not Mr. Justice Anglin be right in his view of the law his judgment leaves no doubt on this point. It should be easy to make the offence of coming to work in this country punishable by fine or imprisonment, the penalty falling either on the sinner who came, or the greater sinner who brought him, as the sense of justice of our law makers may decide. The present difficulty is of their contriving, and it is their business to find a way out of it.

W. E. O'Brien.

MECHANICS' LIEN.

The Authority of Russell v. French.

This decision (28 O.R. 215) affects the liability of an owner under the Mechanics' Lien law. It gives to the lien-holders the twenty per cent. drawback whether owing or not, and requires the owner to pay that portion, even if it never becomes due to the contractor.

The profession have accepted it as a rough and ready method of settling expensive disputes, although opposed to other decisions of equal authority. The principle involved in it has never been directly reviewed by the Court of Appeal—leave to appeal

to that Court was refused by one of its judges, but solely because, in his judgment, as the practice then stood, the case was unappealable.

It does not rest on a very satisfactory foundation, and it is therefore proper to examine the authority which exists both for and against it, and to enquire whether as a matter of pure construction it is unassailable.

It will be admitted that the view expressed by Spragge, C., in *Crone* v. *Struthers* (1875), 22 Gr. 247, is the proper one with which to begin an examination of the mechanics' lien legislation. He there said (p. 248) "The lien of the plaintiff is the creature of the statute, and must be limited by its provisions. . . . . Without any express qualification, the Courts, I apprehend, would imply one, rather than give a construction that would compel the owner of a building to pay twice over for the same thing; once to the contractor, and then to the person who has furnished materials to the contractor."

Ferguson, J., in *Re Cornish* (1884) 6 O.R. 259, gives the practical method of working out the owner's rights when unaffected by this Act. That is (p. 270) by adding the extras to the contract price, then deducting what has been paid to the contractor, and from what remains deducting such sum as would, when the event occurred upon which the contractor ceased to carry on the work, have been fairly and justly necessary to expend in completing the work according to the contract.

To properly appreciate the changes which have been relied upon in departing from both the principle of construction adopted by Spragge, C., and the practical method outlined by Ferguson, J., it is necessary to consider some of the amendments of the original statute.

The subject of a building owner's liability to a sub-contractor has seen three distinct phases. Under the earliest Mechanics' Lien Act, affecting sub-contractors (1874, 38 Vict. c. 20) such lien-holders by virtue of their lien merely obtained a right to intercept payments to which the contractor became entitled and for which he could enforce a lien. If nothing was due to him they got nothing. This is exemplified by such cases as *Forhan* v. *Lalonde*, 27 Gr. 604, the case of an agreement by a

contractor waving his lien which was held to bind his sub-contractors, and *Crone* v. *Struthers*, 22 Gr. 248, where nothing was yable under the contract to the contractor, and *Donovan* v. *Baumhard* (Judge McDougall 10th D.C. York 1882), where a builder had agreed to work out an old account by erecting a building, and it was held that neither he nor his sub-contractors could enforce a lien. See also *Hovenden* v. *Ellison*, 24 Gr. 448.

The second phase was a relaxation of that rigid rule in favour of wage earners by 45 Vict. c. 15.

The third was the extension of that principle in 59 Vict c. 35, as expounded, wrongly I think, in *Russell* v. *French*.

By it the twenty per cent. drawback became a fund belonging to the lien-holders, and upon which they had a specific lien up to 30 days after the completion or abandonment of the contract. This fund the owner was bound to have and to pay irrespective of whether he owed it or not.

The earliest Mechanics' Lien Act affecting sub-contractors provided that the lien should not attach so as to make the owner liable to the payment of any greater sum than the sum payable by the owner to the contractor (1874, 38 Vict. c. 20). All the owner's payments made in good faith were protected.

In 1878 (41 Vict. c. 17, s. 11), the protected payments were limited to ninety per cent. of "the price to be paid for the work," etc., and the lien, which previously existed only upon the owner's estate, was extended so as to operate as a charge to the extent of ten per cent. of "the price to be paid as aforesaid." There was no express provision barring the owner's claim to deduct damages, etc., from "the price to be paid."

In 1882, by 45 Vict. c. 15, s. 4, liens for wages were given priority to the extent of the ten per cent. of the price to be paid, over all other liens and over any claims by the owner against the contractor for or in consequence of the failure of the latter to complete his contract.

In the two last mentioned Acts there are to be found substantially the same provisions as exist to-day, viz., the creation of a drawback, the absence of protection to payments encroaching on that drawback, and the direction that the owner's liability is not to be extended beyond what he owes the contractor

save as is provided for in the Act. This latter exception may refer to the drawback, but certainly points to a liability created by disregard of a lien after proper notice and to a wage earners' lien. There is one important difference, however, that the present drawback is to be calculated upon the "value of the work, service and materials actually done, placed or furnished," instead of upon "the price to be paid."

The question, therefore, is whether the change in the basis of calculation from the price to the value of the work done has effected a change which the creation of a drawback, the establishment of a charge upon it, and the absence of protection to payments which would encroach upon the drawback failed to do.

The drawback, and the charge upon it, were provided for as far back as 1878 by 41 Vict. c. 17, s. 11.

No consideration of the difficult provisions of the Mechanics' Lien Act, as to an owner's liability, can properly take place unless one cardinal fact is kept in view, namely, that he is absolutely protected as to eighty per cent. or eighty-five per cent. of his payments, when made in good faith, and that beyond that, while not protected, he is not in terms made liable. His position must, therefore, be determined by inferences made from other portions of the Act, and it may be said that his rights are at least as strong as those of the sub-contractors.

In *Goddard* v. *Coulson*, 10 A.R. 1, the attempt was made to make the owner liable for ten per cent. upon the whole contract price, which the contractor never earned. The case was therefore presented to the Court in such a way as to invite defeat.

But if the ten per cent. were to be calculated upon the whole contract price then the ninety per cent. must likewise be so calculated, and up to that extent the owner was protected. Hence as the remaining ten per cent. was never earned the decision appears to be logical and sound, having regard to the basis upon which it was presented to the Court. The case also discloses the fact that the owner suffered more damage than the ten per cent. (p. 5), and the decision somewhat, though not very distinctly, involves the allowance of the owner's claim for damages. The subsequent cases depend largely upon the view taken in them of this decision. They disclose an essential difference between the

old Chancery Division and the Q. B. Division. The former considers that the owner is liable for the ten per cent. and the latter that he is not so chargeable.

In *Re Cornish*, 6 O.R. 259, the owner finished the work within the contract price (see per Ferguson, J., p. 270). But the Court, holding that the ten per cent. was to be calculated upon the value of the work done (treating thewords "the price to be paid" as equivalent thereto), charged the owner with the ten per cent upon that basis, and in so doing made the owner pay $100 over and above the contract price—the $235 there allowed being partly offset by the amount in the owner's hands on the abandonment.

But in *Truax* v. *Dixon*, 17 O.R. 366, the owner's claim for damages was allowed, the Q.B. Divisional Court professing to follow *Goddard* v. *Coulson*, and in *Sears* v. *Woods*, 23 O.R. 474, the same Court again based a similar decision upon the same case, and declared that even the wage earner's priority did not involve payment by the owner of the ten per cent. whether the percentage had become payable or not.

In *Harrington* v. *Saunders*, 7 C.L.T. 88, His Honour Judge McDougall, decided that, provided the payments to the contractor have been only ninety per cent. or under, of the value of the work actually performed, the sub-contractor's claim on the ten per cent. is postponed to the claim of the owner on the contractor for damages for non-completion.

The Court of Appeal and Judge McDougall appear to have struck upon the prime factor, already adverted to, in considering an owner's liability, viz., that he was protected to the extent of ninety per cent. of his payments. In *Goddard* v. *Coulson* the effect of the statute giving priority to wages liens was considered as throwing no light upon the subject, while the contractor had, upon the basis of value, been fully paid, to the extent, however (per Patterson, J., p. 8), of only ninety per cent. To that extent the protection is positive. Beyond that, while he is not protected, the statute is negative in its quality, and does not actively make him liable. In this conflict of authority it becomes necessary to consider how far the changes in the statute give validity to one, or to the other, view.

If, owing to a contractor's default, it costs the owner more than the balance of the contract price or of the price to be paid, the ten per cent. would not become payable to the contractor, and would be absorbed by or set off against the loss. Does the provision giving priority to wage earners enure to the benefit of sub-contractors for the supply of material? or does the giving of a lien upon the ten per cent. of the value of the work done in favour of such sub-contractors make the owner liable to pay it, even if it never became payable, or if absorbed by his claim for damages? Or does the proviso "save as herein provided" do more than express that in some cases, e.g., payment to a contractor after notice of a lien (s. 10) or payment in defiance of a wage earner's priority, the owner may be liable for more than the sum "justly due to the contractor."

Russell v. *French* professes to be founded on the fact that *Goddard* v. *Coulson, Re Cornish,* and *Re Sears* v. *Woods,* are no longer applicable owing to changes in the statute. Those changes are more clearly developed in the argument than in the decision itself. They are the difference between the basis of calculation of the ten per cent.—the value of the work as against the price to be paid and the words "save as herein provided," and the priority of liens for wages.

But in the first of those cases the owner did not need to set off damages, because he had only paid ninety per cent., and was therefor protected. In the second of these the Court disclaims any intention of deciding against the owner's claim for damages (see p. 265). Yet the lien given upon the ten per cent. was considered, and the subsequent addition of the words "save as herein provided," in the statute neither aided nor weakened its conclusion, while the "price to be paid" was construed as equivalent to "the value of the work done." In *Re Sears* v. *Woods,* the same provisions were under review.

The result of the foregoing is that *Russell v. French* is in conflict with the cases before the Q.B. Divisional Court, and with the opinions of Mr. Dalton (in *Re Cornish*), Mr. Cartwright (in *Re Sears* v. *Woods*), and Judge McDougall (in *Harrington* v. *Saunders*), is not supported upon the facts nor by the law laid down in *Goddard* v. *Coulson,* and can find little support from

Re Cornish, where the Court pointedly refrain from deciding the question at issue.

Upon principle it seems likewise unsound. The words "save as herein provided" may apply to other cases, as is pointed out in *Sears* v. *Woods*. And of themselves they establish nothing. The wage earner's priority is a two-edged argument, for it seems to shew an intention to provide only for the case of liens for wages, and certainly does not carry the priority upon the ten per cent. beyond that class. The Court of Appeal in *Goddard* v. *Coulson* so viewed this amendment. The argument that the ten per cent. of the value of the work done must of necessity be earned does not decide the question. It was not considered decisive in *Re Cornish*. But if actually earned, it may not, and generally is not payable by the terms of the contract, and even if so payable it is not made exigible by the sub-contractor, but only a charge upon it is given in his favour. The provision for a specific lien upon the ten per cent. is, therefore, the only change giving colour to the exclusion of the owner's claim for damages. But a lien can only exist upon a fund "provided such a portion remains or is in existence" (per Hagarty, C.J.O., in *Goddard* v. *Coulson*, p. 7), or as expressed by Patterson, J. (at p. 8), that provision cannot "do more than to charge, in favour of the mechanic, etc., ten per cent. of the money *which becomes payable* by the owner to the principal contractor."

The giving of a lien upon a fund presupposes a fund which must arise from something tangible. If it never comes into existence there is nothing for the lien to operate upon.

Even if in existence what is there in the statute which deprives the owner of his right to claim that it is set off or absorbed by his claim for damages. The rule, unless excluded by the express words of the statute, given by Ferguson, J., in *Re Cornish* (p. 270), is still applicable. The owner's equity is at least equal to that of a sub-contractor, not in privity with him, and in *Crone* v. *Struthers* (1875, 22 Gr. 247) is preferred to the latter.

The fair solution seems to be this: The owner's payments up to ninety per cent. are absolutely protected. The remaining ten per cent, if it becomes payable, or if it remains in hand after

taking the accounts on the footing of the contract upon the basis set out by Ferguson, J., in *Re Cornish*, is charged with a specific lien. It cannot be paid away to the contractor, but it may be in existence as owing to him. But if no such fund remains, the specific lien upon that amount is a charge upon a non-existent fund, as many a lien upon a fund assigned by a debtor turns out to be. Giving a lien upon a fund cannot create that fund; it must be found and established before the lien operates upon it. And when found, it is in the hands of the owner subject to his superior equity.

FRANK E. HODGINS.

Benjamin Franklin once said that there never was a good war or a bad peace. Certainly such of the nations of men as stand outside the immediate influences of the Russo-Japanese war cannot find anything bad in the Peace of Portsmouth, which has just been concluded. True the press of the two countries directly involved are busily demonstrating the injustice, one way or the other, of the terms agreed upon; but that is to be expected; even the stoicism and reticence of the Japanese character not being proof against the tendency to become petulant under the nervous strain of ending a great war. That Japan has won in the Conference as well as on field and flood is clear to the thoughtful observer. Russia has conceded Japan's preponderant influence in Korea. Manchuria is to be governed by China according to the pledges made by Russia in 1902, and the "open door" policy for the country is to be maintained. Russia transfers to Japan Port Arthur, Dalny, and the Blonde and Elliott islands contiguous to the Liao Tung peninsula. The southern branch of the Manchurian railway from Port Arthur to within ten miles from Harbin is to be under the control of the Japanese; and fishermen of that nation are to have the right to fish in the waters of the Russian littoral from Vladivostok to Behring Strait. Japan is to have a moiety of Sakhalin island. In view of these facts, how can it be said that Russian diplomacy has undone the effect of the reverses of the war? The railway

and fishery concessions are clearly in the nature of indemnity; and in view of the Russian vaporing about national dignity being involved in the cession of territory, what about Sakhalin?

Undoubtedly this is a day of great doings in the family of nations. Following upon the "Peace of Portsmouth" comes the news of the negotiation of a new treaty between Great Britain and Japan which is most remarkable in its terms. Outwardly it would appear to be a compact between the powers signatory for the very human purpose of dominating the Orient from Persia to the Pacific; but its real value and purpose is on a higher ethical plane than that, for a careful examination shews that it is intended as a guarantee of world-wide peace. Under the former treaty between these two nations it was provided that either nation must come to the assistance of the other only in the event of that other being simultaneously attacked by two powers. That this stipulation prevented a general conflict between the powers during the war just ended is well-known; but it was only because Germany feared Britain's sea-strength. If the united naval strength of Russia and Germany had approximated that of England and Japan the greatest war in human history would have resulted. Under the terms of the new treaty each of the powers signatory is bound to assist the other when attacked by any third power or powers; in other words, the new treaty is simply an offensive and defensive alliance. This, at first blush, would seem to be promotive of a general war rather than deterrent; but it must be remembered that Japan's ambition is to develop her native resources as a commercial nation rather than to enlarge her boundaries by the subjugation of alien races; that the sea-strength of the two nations is equal to that of the other powers combined—leaving out the United States—and so not lightly to be meddled with; and, further, that Great Britain's interest lies in maintaining the status quo in the far East. Hence this treaty affords an instance of the truth of the old saying, "Qui desiderat pacem, praeparet bellum."

The constitution of the new Russian National Assembly is but a sop to the Cerberus of democracy. It is in no wise a revival of the old zemsky sobor, which corresponded to the Witenagemote of our Saxon forefathers, but a *duma*—a purely advisory body. The zemsky sobor regulated taxation and public expenditures, and even elected Czars; on the other hand the new *duma* has no real power as a law-making or administrative body, and cannot be called a representative institution seeing that it is based upon a suffrage limited to less than five per cent. of the adult male population of the empire. However, absolute freedom to express opinions upon matters within the competence of this body will be allowed to its members; and so it will have its use in preparing the country at large for a real measure of representative government which is sure to come in a decade or so, even to slow-going, ignorant Russia.

As we go to press it is announced that the vacancy on the Supreme Court Bench caused by the retirement of Mr. Justice Nesbitt has been filled by the appointment of Mr. Justice Maclennan of the Court of Appeal for Ontario. We congratulate the learned judge upon his promotion. The good wishes of the Bar of Ontario will go with him. A most courteous judge, a man of the highest character and a kind friend, he will be missed by a large circle in the City of Toronto where he has spent most of his life. Mr. Justice Maclennan was born in 1833. In Michaelmas Term, 1857, he was called to the Bar, and was appointed to the Court of Appeal in October, 1888. His career up to that time is referred to, ante, vol. 24, p. 546.

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—LEGACY TO SERVANTS—YEAR'S WAGES.

In re Ravensworth, Ravensworth v. *Tindale* (1905) 2 Ch. 1. A testator had bequeathed "to all my servants who should be in my employment at my death, and shall have been in my employment for five years previously thereto of one year's wages, and of all death duties thereon in addition to any wages which may be accruing or owing to any of them and unpaid by me at my death," and the question was whether this bequest enured to the benefit of domestic servants employed at a yearly wage, and also outdoor employees employed at a weekly wage paid monthly or fortnightly with corresponding conditions as to notice to determine the employment, and an application was made by the executors for the opinion of the Court as to whether the latter class of servants were entitled to the benefit of the bequest. Joyce, J., on the authority of *Blackwell* v. *Pennant*, 9 Ha. 551, held that only those servants who were hired by the year were entitled, and this decision was affirmed by the Court of Appeal (Lord Alverstone, C.J., and Williams and Stirling, L.JJ.,). The chief justice thought that it was desirable that the authorities should be considered by the House of Lords, but that having been so long acquiesced in they ought not to be overruled by the Court of Appeal. Williams, J., thought independently of the cases he would have arrived at the same conclusion, but Stirling, J., doubted whether he would have done so.

COSTS—DISCRETION—DEPRIVING A SUCCESSFUL DEFENDANT OF COSTS—RIGHT OF APPEAL—RULE 976—(ONT. RULE 1130).

King v. *Gillard* (1905) 2 Ch. 7 was an appeal on the question of costs. The action had been dismissed as against the appellant without costs by Kekewich, J., the reason assigned for depriving him of costs being that he had, in offering his goods for sale to the public, untruly represented that they had been awarded medals at public exhibitions, which appeared to the learned judge to be "distinct dishonesty which the Court ought to reprobate," but the Court of Appeal (Williams, Romer, and Stirling, L.JJ), considered that the act which Kekewich, J., had characterised as dishonest might have been a mere inadvertence,—but even if the statement were untrue it was not a ground for

depriving the defendant of costs, unless the wrong were in some way done to the plaintiffs as individuals, and in the course of the transaction of which the plaintiffs complain.

COMPANY—NOTICE OF MEETING—NOTICE OF SECOND MEETING GIVEN CONTINGENTLY.

In re North of England SS. Co. (1905) Ch. 15. The Court of Appeal (Williams, Romer and Stirling, L.JJ.,) have been unable to agree with the judgment of Buckley, J. (1905) 1 Ch.. 609 (noted ante p. 533), and have reversed his decision, and held that the second meeting, though called for the confirmation of a resolution in case it should be passed at a prior meeting of which notice was given by the same notice, was validly called and the resolution passed thereat confirming the resolution passed at the prior meeting was binding on the shareholders. *Alexander Simpson*, 43 Ch. D. 139, on which Buckley, J., relied, the Court of Appeal points out was based on the construction of the articles of association which differed materially from those of the company now in question, which expressly authorize the giving of the notice in the form in which it was given in the present case, and which they hold were not ultra vires.

TRUSTEE—BREACH OF TRUST—CONCURRENCE OF TENANT FOR LIFE IN BREACH OF TRUST—FUND REPLACED—INCOME OF FUND DURING LIFE TENANCY.

In *Fletcher* v. *Collis* (1905) 2 Ch. 24 a trustee in 1855 with the concurrence of the tenant for life of the trust fund, realized the fund and handed it over to the wife of the tenant for life who spent it for her own purposes. In 1891 an action was commenced by a remainderman against the trustee to compel him to replace the trust fund which he accordingly did. In 1902, at the time of the death of the trustee, the whole of the trust fund had been replaced with a considerable surplus representing interest from 1891: this surplus was now claimed by the representatives of the deceased trustee by way of indemnity, and by the trustee in bankruptcy of the tenant for life. The Court of Appeal (Williams, Romer and Stirling, L.JJ.,) held that the representatives of the deceased trustee were entitled as against the tenant for life to the income during his life; and that his trustee in bankruptcy could have no greater right than he himself would have, and that he having concurred in the breach of trust was not in a position to require the trustee to make good the income which had been lost by reason of that breach.

RESULTING TRUST—FUND SUBSCRIBED FOR EDUCATION OF CHILDREN —UNAPPLIED SURPLUS.

In re Andrew, Carter v. *Andrew* (1905) 2 Ch. 48. A number of friends of a deceased clergyman had subscribed to a fund for the education of his surviving children. The education of the children was paid for partly out of the fund thus subscribed and partly out of money left by the deceased, and after the education of the children was completed a surplus remained of the fund subscribed, and the question arose as to whether there was a resulting trust of the balance in favour of the subscribers. Kekewich, J., decided that there was not, but that the children were entitled to it in equal shares.

WILL—CONSTRUCTION—"READY MONEY"—"PECUNIARY INVESTMENTS"—BANKER'S DEPOSIT NOTE.

In re Price, Price v. *Newton* (1905) 2 Ch. 55. A testator bequeathed "all his . . . ready money . . . and pecuniary investments," having, at the time of his death, money on deposit in a bank subject to withdrawal on ten days' notice. Farwell, J., held that money on deposit in a bank subject to more than twenty-four hours' notice of withdrawal was not "ready money," neither was the money on deposit a "pecuniary investment."

WILL—CONSTRUCTION—CHARITABLE GIFT—GIFT TO REGIMENTAL MESS FOR LIBRARY AND PLATE—PUBLIC PURPOSE—GIFT FOR OLD SOLDIERS—PERPETUITY—43 ELIZ. C. 4—"SETTING OUT OF SOLDIERS"—(R.S.O. c. 333, s. 6).

In re Good, Harington v. *Watts* (1905) 2 Ch. 60. In this case a testator had bequeathed his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess, and any surplus to be expended in the purchase of plate for the mess. He also directed that two houses should be for the use of old officers of the regiment at a small rent during their lives. The legal effect of this gift was called in question. On behalf of the officers composing the mess at the time of the testator's death it was contended that it was an absolute gift of the personalty to them as individuals, and that the attempt to cut down the previous absolute gift by the subsequent directions was void. For the Attorney-General it was argued that the gift of the personalty was a good charitable gift under 43 Eliz. c. 4; and on behalf of the next of kin it was contended that the gift was void altogether as being a gift to maintain a library, which

it was argued was not charitable. Farwell, J., held that the gift of the personalty was a good charitable gift as being for a public purpose, and in ease of public taxation, and that it might also be supported as being for the "setting out of soldiers," a clause, by the way, of the statute of Elizabeth which is not preserved in R.S.O. c. 333, s. 6. But the gift of the houses he held failed altogether as being a gift for the benefit of former officers of the regiment without reference to age. Another judge might very possibly come to the conclusion that "old" meant "aged," and that therefore the gift was good.

ESTOPPEL—ENTRANCE OF DEVISEE UNDER VOID WILL—RIGHTS OF REMAINDERMAN UNDER VOID WILL—TITLE BY POSSESSION.

In re Anderson, Pegler v. *Gillatt* (1905) 2 Ch. 70 deals with an interesting question on the law of estoppel. A married woman entitled to the property in question made a will of it whereby she devised it to her husband for life, and after his death to certain persons in remainder. The testatrix had no power to make the will, and it was void; her husband, however, entered upon the property and died, having been more than twenty years in possession. On his death those entitled in remainder under the will, if it had been valid, claimed the property against those claiming it as representatives of the deceased husband on the ground that he, and those claiming under him, were estopped from disputing the validity of the will. Buckley, J., distinguishing *Board* v. *Board*, L.R. 9 Q.B. 48, and *Dalton* v. *Fitzgerald* (1897) 2 Ch. 86, followed *Paine* v. *Jones*, L.R. 18 Eq. 320, and held that the husband and those claiming under him were not estopped from disputing the validity of the will, or from setting up a title by possession adverse to the rights of those claiming in remainder under it. See *Re Dunham*, 29 Gr. 258.

CONFLICT OF LAWS—CHOSE IN ACTION—PERSONAL ESTATE IN ENGLAND—ASSIGNMENT EXECUTED ABROAD OF PERSONAL ESTATE IN ENGLAND—NOTICE—PRIORITY.

In *Kelly* v. *Selwyn* (1905) 2 Ch. 117 the plaintiff claimed to be assignee of a fund in priority to a prior assignee. The fund in question was in England, and the plaintiff had first given notice of his assignment to the trustees of the fund. The defendant's prior assignment was executed in New York, where notice to the debtor is not necessary to preserve priority. Eady, J., held that the fund being in England, the law of England governed the rights of the parties, and that the plaintiff was consequently entitled to the priority he claimed by reason of his prior notice to the trustees.

COMPANY—DEBENTURES—RECEIVER — PRINCIPAL AND AGENT— PERSONAL LIABILITY OF RECEIVER AND DEBENTURE HOLDERS.

Robinson Printing Co. v. *Chic* (1905) 2 Ch. 123 is a case deserving of attention as it deals with the status of receivers, and the liability of themselves and those on whose behalf they are appointed on contracts made by them. Debentures of a limited company gave power to the holders to appoint a receiver of the property and assets of the company and to take possession thereof and carry on the business, sell the property, and make any arrangements the receiver should think expedient in the interest of the debenture holders and apply the receipts in a specified way; but they did not provide that the receiver should be the agent of the company. A receiver was appointed by the debenture holders and he assigned to the plaintiffs certain book debts in consideration of work done by the plaintiffs for the company. Subsequently the debenture holders appointed another receiver in place of the first one, and the second receiver repudiated the agreement made by his predecessor with the plaintiffs, but he agreed to pay for certain work to be performed by them. The work was done, but not being paid for, the plaintiffs sued the company and the receiver and debenture holders for the work done for the second receiver, and also for a charge on the book debts for the work done for the first receiver. Warrington, J., who tried the action, held that as the receivers were not the agents of the company, the receivers were not competent to bind the company by their contracts with the plaintiffs, but that they were agents for the debenture holders; that the receivers had power to pledge the assets in priority to the debentures, and that the agreement of the first receiver was valid and binding on the debenture holders, and that the plaintiffs were entitled to the charge on the book debts in priority to the debentures. He also held that the second receiver and the debenture holders were personally liable to the plaintiffs in respect of the contract made by the second receiver; but as to one of the debenture holders who had acquired his rights after the appointment of the first receiver, he was held to be only liable for such part of the plaintiffs' claim as had accrued after his becoming a debenture holder.

CONTRACT—TRADE UNION—PROCURING BREACH OF CONTRACT— MALICE—JUSTIFICATION.

South Wales Miners v. *Glamorgan Coal Co.* (1905) A.C. 239, which was known in the Courts below as *Glamorgan Coal Co.* v. *South Wales Miners* (1903) 2 K.B. 545 (noted ante, vol. 40, p. 67), has been affirmed by the House of Lords. The action, it

may be remembered, was brought by the plaintiff company against a trade union for damages occasioned by the defendants having induced the plaintiffs' workmen to stop work on certain days in breach of their contract with the plaintiffs. The order was given by the defendants to the workmen not from any malice or ill-will to their employers, but merely with the object of keeping up the price of coal; but this the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) held to be no legal justification, and the plaintiffs' right to recover was affirmed.

TRADE UNION—APPLICATION OF FUNDS OF UNION CONTRARY TO RULES—STRIKE PAY—ACTION FOR INJUNCTION BY INDIVIDUAL MEMBER OF UNION—"DIRECTLY ENFORCING AGREEMENT"—TRADE UNION ACT, 1871 (c. 31), s. 4—(R.S.C. c. 131, s. 4).

Yorkshire Miners' Association v. *Howden* (1905) A.C. 256 is the case known in the Courts below as *Howden* v. *Yorkshire Miners' Association* (1903) 1 K.B. 308 (noted ante, vol. 39, p. 350), and was an appeal from the Court of Appeal. The action was brought by a member of a trade union to restrain an alleged misapplication of the funds of the union in payment to members of the union of "strike pay." In the Court below the principal question discussed was whether the alleged payments were warranted by the rules of the association, and the Court of Appeal held that they were not. On the appeal to the House of Lords the argument was confined to the question whether the plaintiff could maintain the action, which, it was contended, was in effect attempting "to enforce an agreement" in reference to the application of the funds of the union which the Court was expressly prohibited by the Trade Union Act, s. 4 (R.S.C. c. 131, s. 4) from entertaining. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey, James, Robertson and Lindley) unanimously affirmed the decision of the Court below that an action to restrain the misapplication of the funds of the union is not an action to enforce an agreement for any of the matters specified in s. 4, and they dismissed the appeal.

PRINCIPAL AND AGENT—AGENT UNTRULY REPRESENTING TO PRINCIPAL THAT HE HAS MADE A CONTRACT—MEASURE OF DAMAGES.

Salvesen v. *Nordstjernan* (1905) A.C. 302 was an appeal to the House of Lords (Lords Halsbury, L.C., Davey and Robertson) from the Scotch Court of Session. The question discussed is as to the proper measure of damages recoverable by a principal against his agent who has untruly represented that he has

made a contract on behalf of his principal. Their Lordships held that in such a case the measure of damages is the loss actually sustained by the principal in consequence of the misrepresentation, but not any prospective profits which the principals might possibly have made had the representation been true.

COMPANY—COMPROMISE—CONCEALMENT OF ASSETS—RE-OPENING AGREEMENT OF COMPROMISE—LAPSE OF TIME.

Watt v. *Assets Co.* (1905) A.C. 317 is also an appeal from the Scotch Court of Session. The action was of a somewhat extraordinary character. The City of Glasgow Bank had gone into liquidation in 1878. In 1879 the liquidator compromised the amounts claimed from the defendants as contributories. In 1882 the assets of the bank were vested in the plaintiffs, the Assets Co., who in 1901 and 1902 brought actions to set aside the compromise of 1879 on the ground that the defendants in negotiating with the liquidator had concealed or failed to disclose a portion of their property. The compromise was made on the express terms that any untrue statement by the debtors should invalidate the discharge. Notwithstanding the long delay, strange to say, the Court of Session gave effect to the plaintiffs' claim; but the Lords (Halsbury, L.C., Macnaghten, Davey, James and Robertson) unanimously reversed the decision, holding that no concealment of assets had been proved or could at this distance of time be assumed.

TRUSTEE—BREACH OF TRUST—TRUSTEE ACTING UNDER ERRONEOUS ADVICE OF SOLICITOR—TRUSTEE ACTING HONESTLY AND REASONABLY—(62 VICT. (2) C. 15, S. 1, ONT.).

National Trustees Co. v. *General Finance Co.* (1905) A.C. 373, although an appeal from an Australian Court, deserves attention because it places a construction on an Australian statute similar in terms to the Ontario statute 62 Vict (2) c. 15, s. 1. The facts of the case were simple. A married woman died, and on her death her husband became entitled to the whole of his deceased wife's proportion of a fund of which the appellants were trustees. Under the erroneous advice of their solicitor the appellants paid two-thirds of the fund to the wife's children and one-third into Court, the solicitor assuming erroneously that the fund was thus distributable under a statute which, however, was not passed until after the wife's death. The appellants contended that they had "acted honestly and reasonably, and ought fairly to be excused" under the provisions of the Trustee Act above referred to, but the Judicial Committee of the Privy Coun-

cil (Lords Davey and Lindley and Sir F. North and Sir A. Wilson) held that the payment to the children was a breach of trust and that it was no defence that it was made on the erroneous advice of the applicants' solicitor. That the respondents having accepted and acted upon the applicants' statement as to their rights was no evidence of acquiescence, and although the appellants had acted honestly and reasonably they had not shewn any ground why they "ought fairly to be excused," because they had made no effort to replace the fund or shewn any excuse for not doing so; and moreover, they were not gratuitous trustees and could not throw upon the respondents, who were not in fault, the loss of the fund which they had misapplied in the course of their business. In regard to the latter point, their Lordships say: "The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as a gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants, their Lordships think it is a circumstance to be taken into account."

CRIMINAL LAW—STATUTE EXTENDING TIME FOR PROSECUTION—RETROSPECTIVE EFFECT OF STATUTE—PROCEDURE.

The King v. *Chandra Dharma* (1905) 2 K.B. 335 was a prosecution for carnally knowing a girl over thirteen and under sixteen. The offence was committed on July 15, 1904. Under the law then in force the prosecution was required to be commenced within three months. On Oct. 1, 1904, an Act was passed extending the time for commencing prosecutions for such offences to six months from the commission of the offence. The prosecution in this case was not commenced until 27 December, 1904, and it was contended that it was too late, but the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Lawrance, Kennedy, Channell and Phillmore, JJ.,) unanimously held that the statute extending the time, merely related to procedure, and therefore was retrospective in its operation, but Channell, J., was of the opinion that if the time limited by the former Act had actually expired when the amending Act came into force, the case would be different, and the amending Act in that case would not have the effect of reviving the right to prosecute for an offence which had become barred.

RECEIVER—EQUITABLE EXECUTION—INJUNCTION.

In *Lloyd's Bank* v. *Medway Upper Navigation Co.* (1905) 2 K.B. 359 the plaintiffs applied for a summons for the appointment of a receiver of the tolls and rents arising from the navigation of a river to which the defendants were entitled. The affidavit shewed that the plaintiffs had recovered judgment against the defendants, and that the defendants had no goods and chattels out of which the money could be made, but were entitled to the rents and tolls in question. There was, however, no suggestion that there was any danger of the defendants parting with their rights pending the proceedings. Jelf, J., in granting the summons, included in it an interim injunction against the defendants receiving or alienating the rents or tolls until after the hearing of the application. On appeal from this part of the order the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.,) held that in the absence of any suggestion of any danger of the defendants parting with or incumbering their rights in the rents and tolls, the injunction should not have been granted, and it was accordingly dissolved.

ASSIGNMENT OF DEBT—CHOSE IN ACTION—MAINTENANCE—TRUST IN FAVOUR OF ASSIGNOR—COLLATERAL OBJECT IN TAKING ASSIGNMENT OF DEBT—JUDICATURE ACT 1873, S. 25, SUB-S. 6 (ONT. JUD. ACT, S. 58, SUB-S. 5).

Fitzroy v. *Cave* (1905) 2 K.B. 364 was a. action brought by the assignee of a number of debts due by the defendant to the plaintiff's assignors. The defendant was a co-director with the plaintiff of a joint stock company, and the plaintiff's object in getting the assignments was to put the defendant in bankruptcy and thereby oust him from his directorship: by the terms of the assignments any moneys received in respect of the debts assigned were to be paid by the plaintiff to the respective assignors. The defendant contended that the assignments were invalid, as savouring of maintenance, and Lawrance, J., with some doubt, so held, but the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.,) held that *Comfort* v. *Betts* (1891) 1 Q.B. 737 had in effect established the validity of such assignments and they allowed the appeal.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

BOARD OF RAILWAY COMMISSIONERS.

Killam, C.C., and Bernier, C.] [July 14.

Interchange of traffic—Interswitching—Railway Act, 1905, ss. 253, 266, 267, 271.

The Canadian Pacific Ry. Co. applied to the Board for an order directing the Grand Trunk Ry. Co. to afford proper facilities for the interchange of traffic between the companies for a branch to be constructed by the Grand Trunk from a point on its line between London and St. Mary's to the line of the Canadian Pacific, between London and Toronto, and to fix the amount to be charged for such interchange of traffic and interchange of cars. The lines of the two railways in London before the construction of this branch were a considerable distance apart. Those operated by the Grand Trunk through London were in existence long before the construction of the Canadian Pacific. The former company has extensive terminal properties at that point. The business of the latter in the same city is comparatively small. By means of the branch railway cars have access to a number of business premises to which the Canadian Pacific had heretofore no direct access, and this company can in this respect offer the Grand Trunk very few advantages as compared with what they will acquire.

For this reason it was claimed that in the division of rates a very large proportion should be assigned to the older company —much greater than that which would be a fair remuneration for the mere services to be rendered by that company in the transportation, loading and unloading of cars over the branch.

Held, 1. It has never been the policy of the law to offer compensation for loss or injury occasioned to enterprises, such as railway companies of long standing by the coming into existence of new ones. The public good is the only question to be considered. The provisions of the Act as to interchange of traffic are not for the purpose of benefiting one railway company at the expense of another, but wholly in the interest of the public; and the law cannot recognize anything in the nature of a goodwill in the business of either company affected for which the other should give compensation.

2. The division between such companies under such circumstances as above should be made upon the principle of giving reasonable compensation for the services and facilities furnished by the respective companies in respect of the particular traffic interchanged, and not by reference to the magnitude of the business of one company or the other at particular points, or to the respective advantages which either affords, nor by comparing the loss which one is likely to sustain with the gain likely to accrue to the other.

3. The Board cannot properly deal with this question of division of rates or allowance of charges for interswitching in a general way, and by reference to all the points in Canada where these railways connect.

J. E. MacMullen and *Angus MacMurchy*, for the C. P. Ry. Co. *Cowan*, K.C., for the G. T. Ry. Co., and *T. G. Meredith*, K.C., for the City of London.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.] [April 12.

ONTARIO LADIES' COLLEGE *v.* KENDRY.

Company—Subscription for shares—Conditional subscription—Condition not fulfilled—Representations of agent—Materiality—Evidence—Corroboration—Written contract—Contemporaneous oral contract.

In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiffs' agent that two other named persons had each subscribed for $10,000 of shares upon the condition that subscriptions for $50,000 were obtained by a certain date; that the defendant's subscription was required to make up the $50,000; and that his subscription would not be binding unless the $50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscriptions, and that $50,000 was not subscribed on or before the date named. The defendant's

testimony was not contradicted, the plaintiffs' agent having died some years before the commencement of the action; and the trial judge credited the testimony.

Held, that it was sufficient without direct corroboration and, in the absence of facts or circumstances of countervailing weight, should be accepted.

Held, also, that the plaintiffs were bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not.

Held, lastly, that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement.

Wallis v. *Little*, 11 C.B.N.S. 69, applied and followed.

Watson, K.C., and *Dow*, for appellants. *Porter* and *Medd*, for respondent.

From Street, J.] [April 12.

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

Pledge—Securities—Railway bonds—Bank—Power of sale—Construction—Notice—Abortive auction sale—Subsequent private sale.

As collateral security to a promissory note, the makers deposited with a bank 300 railway bonds, and, by a memorandum of hypothecation authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the City of Ottawa . . . with power to the bank to buy in and re-sell without being liable for any loss occasioned thereby."

Held, reversing the judgment of Street, J., 7 O.L.R. 660, Osler, J.A., dissenting, that the power was to sell by auction, and that the bank had no power to sell by private contract.

Semble, that, even if there was power to sell by private contract, the sale made to the respondents could not upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledgees.

Aylesworth, K.C., and *J. H. Moss*, for appellant. *G. T. Blackstock*, K.C., and *T. P. Galt*, for respondents.

HIGH COURT OF JUSTICE.

Master in Chambers.] [April 18.

ARMOUR *v.* TOWN OF PETERBOROUGH.

Jury notice—Action against municipal corporation—Non-repair of highway—Judicature Act, s. 104.

In an action for damages for injuries sustained by the plaintiff from a fall upon a highway under the control of the defendant municipality, the statement of claim alleged that the accident to the plaintiff was caused by the faulty, improper, and negligent construction of the pavement, which, being built upon an incline and having a smooth surface, "would call for the ordinary rough finish which it is customary and prudent to build under said conditions."

Held, that the action was for "injuries sustained through non-repair" of the highway, within the meaning of s. 104 of the Judicature Act, R.S.O. 1897, c. 51, and that a jury notice was therefore irregular.

Grayson Smith, for defendants. *C. W. Kerr*, for plaintiff.

Street, J.] [April 27.

SIMS *v.* GRAND TRUNK RY. CO.

Railway—Negligence—Injury to person crossing track—Failure to look for train—Contributory negligence—Case for jury.

The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries.

Held, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence, and must be left to the jury.

Morrow v. *Canadian Pacific R.W. Co.* (1894), 21 A.R. 149, and *Vallee* v. *Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224, followed.

John MacGregor, for the plaintiff. *W. R. Riddell*, K.C., and *J. P. Mabee*, K.C., for the defendants.

Britton, J.] QUEEN'S COLLEGE *v.* JAYNE. [April 28.

Vendor and purchaser—Contract for purchase of land—Negotiations—Incomplete contract—Specific performance.

The plaintiffs' solicitor wrote to the defendant suggesting that the latter should offer $13,000 for a farm owned by the plaintiffs, of which the defendant had a lease. The defendant wrote in answer, "I have concluded to purchase the farm at your price, $13,000," and the plaintiffs' solicitor replied, "I accept your offer of $13,000." In none of these letters was anything said about the terms of purchase, except that in the first the solicitor stated that the terms of payment could be made very easy. At a subsequent interview between the defendant and the solicitor, terms of payment were discussed, and the solicitor made an informal memorandum of the mode, time, and amount of payments to be made by the defendant, which the defendant signed, but refused to sign a formal agreement afterwards drawn up by the solicitor, containing the same provisions with the addition of one for payment of interest.

Held, that no completed contract had been established; and an action to compel specific performance was dismissed.

Bristol, Cardiff and Swansea Aerated Bread Co. v. *Maggs* (1890) 44 Ch. D. 616, and *Hussey* v. *Horne-Payne* 4 App. Cas. 311 followned.

Farrell, for plaintiffs. *Whiting*, K.C., for defendant.

Falconbridge, C.J.K.B., Britton, J., Magee, J.] [May 8.

TOWNSHIP OF ELMSLEY *v.* MILLER.

Discovery — Production of documents — Privilege — Documents secured in view of possible litigation.

Documents obtained by the solicitors of the plaintiffs to aid them in forming an opinion as to the legal rights of the plaintiffs in reference to a road, are privileged from production in an action brought as a result of the opinion formed by the solicitors, notwithstanding that an action was not expressly contemplated when the solicitors were instructed to obtain the necessary information and give the opinion.

Learoyd v. *Halifax Joint Stock Banking Co.* (1895) 1 Ch. 686 followed. Decision of TEETZEL, J., affirmed.

C. A. Moss, for plaintiffs. *Grayson Smith*, for defendants.

Teetzel, J.] Re Barrett. [May 18.

Will—Gifts to religious societies—"Charitable use"—Date of execution of will—Six months' limitation—Statutes—Repeal by implication—Religious Institutions Act—Mortmain Acts—Construction—"Land"—Proceeds of sale.

A testatrix, dying June 14, 1904, by her will, executed Dec. 4, 1903, gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to the trustees of a church, upon certain conditions, and on failure of compliance with the conditions to pay one-half of the moneys to a home misisonary society and the other half to a foreign missionary society for their sole use.

By 50 Vict. c. 91 (O.) these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate should be valid unless made by deed or will executed at least six months before the death of the testator. There is a similar provision in s. 24 of the Religious Institutions Act, R.S.O. 1897, c. 307.

Held, that the six months' limitation contained in these two Acts must be regarded as having been repealed by s. 4 of the later Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, the original of which was passed April 14, 1892.

2. Gifts for religious purposes are within the term "charitable use" in s. 4.

3. The gift was not of "land," as interpreted by s. 3 of c. 112, but of "personal estate arising from or connected with land," within the meaning of s. 8.

In re Sidebottom (1902) 2 Ch. 389, and *In re Ryland* (1903) 1 Ch. 467 followed.

4. The statute which is now R.S.O. 1897, c. 112, was based upon the English Act of 1891, and the later Ontario Mortmain and Charitable Uses Act, 1902, upon the earlier English Act of 1888; but by s. 1 of the Act of 1902, it is provided that that Act shall be read as part of c. 112; and the result is to put the two Ontario Acts practically in the same position as the two English Acts (*In re Hume, Forbes* v. *Hume* (1895) 1 Ch. 422); and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances inter vivos. *Re Kenney* (1903) 6 O.L.R. 459 followed.

5. The question whether the full period of six months had elapsed between the making of the will and the testatrix's death,

was not determined, it being assumed for the purposes of the decision that it had not elapsed.

C. F. W. Atkinson, for executors. *H. L. Drayton*, for charitable devisees and legatees. *Shepley*, K.C., *C. P. Smith* and *Backhouse*, for other legatees.

Falconbridge, C.J.K.B., Anglin, J., Magee, J.] [May 27.

GLASCOTT *v.* CAMERON.

Mortgage—Interest—Payment—Advances by agent.

C. stated as agent for the plaintiff in investing money for her upon a mortgage, and as agent for the owners of the equity of redemption in collecting the rents of the mortgaged land until July, 1904, after which he collected these rents as agent for the plaintiff, qua mortgagee in possession. The rents proving insufficient to pay the plaintiff's interest in full, C. nevertheless remitted to the plaintiff half-yearly the full amount of the interest accrued, making up the deficiency out of his own pocket.

Held, upon the evidence, that the advances made by C. were not intended to be payments in satisfaction of the plaintiff's claims for interest upon her mortgage, or to discharge the mortgaged premises therefrom, and, therefore, that the plaintiff, in proving the amount due upon her mortgage, was entitled, as against a second mortgagee, to include the sums paid by C. for interest out of his own pocket.

Simpson v. *Eggington* (1855) 10 Ex. 845 followed.

Decision of MEREDITH, J., reversed.

H. T. Beck, for plaintiff. *J. H. Denton*, for defendant Lyttle.

Teetzel, J.] RE ROBERTS AND BROOKS. [May 31.

Will—Construction—Executors—Power of sale—Devolution of Estates Act.

The testatrix in the first part of her will gave her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife and their three children, "to be divided and shared equally between them." She then proceeded: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture . . . but the real estate if I have not disposed of it shall

be sold and equally divided, and I appoint my stepson . . . and his daughter . . . to execute this my will."

Held, that the right of the executors to sell the real estate of the testatrix was not affected by the Devolution of Estates Act, but that, independently of that Act, the executors had, upon the true construction of the will, an express power to sell the real estate.

Tremeear, for vendor. *Grierson*, for purchaser. *M. C. Cameron*, for official guardian.

Trial—Anglin, J.] [June 30.

CLEARY *v.* CORPORATION OF WINDSOR.

Municipal corporations—By-law—Construction of sidewalk—Electorate—Ultra vires—Width of sidewalk—Time for completion.

A municipal by-law, submitted to and approved of by the electorate, provided for the raising, by the issue of debentures, of $56,000 for the construction of certain sidewalks five feet wide to be completed within the year 1904; and delegated to the city engineer the duty of defining the line and grade upon which such sidewalks should be constructed. A subsequent by-law of 1905, not submitted to the electorate for approval, purported to reduce the width of the sidewalk, which had not yet been constructed, to four feet.

Held, that this latter by-law was ultra vires, both as altering the width, and as extending the time for completion.

F. E. Hodgins, K.C., and *J. L. Murphy*, for plaintiff. *A. H. G. Ellis*, for defendants.

Falconbridge, C.J.K.B.] [July 10.

RE JAMES SCOTT ESTATE.

Will—Annuitant—"Certain"—Liability to contribute to income tax of estate.

A testator directed his executors to pay his sister out of his estate the annual income of $6,000 per year for her life, and in case there should be a deficiency, to make it up out of the principal of the estate, "my wish being that my sister shall receive during her life an annual income of $6,000 per annum certain."

Held, that the said income was chargeable with a proportion of the municipal income tax assessed against the estate through the executors and trustees.

Raymond, for executors and trustees. *J. Douglas*, and *D. T. Symons*, for the various parties.

Falconbridge, C.J.K.B.] July 14.

IN RE DEY v. MCGILL.

Division Court—Action against executor de son tort—Jurisdiction—Prohibition.

Application for a prohibition to a Division Court of the County of Simcoe in an action brought against an alleged executor de son tort on a claim against the estate of the deceased. The claim rested on s. 72 (*d*), of the Division Court Act, R.S.O. 1897, c. 60. "When the amount . . is ascertained by the signature of the defendant or of the person whom as executor or administrator the defendant represents."

Held, that it was not the intention of the statute that in one and the same proceeding the declaration was to be made which alone could make a defendant liable; and that before that point is reached the defendant is to be clothed in advance with the representative character so as to confer jurisdiction on the Court to pronounce the judgment against him. Prohibition granted.

G. Grant, for defendant, applicant. *Gash*, for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] THE KING v. SKINNER. [July 4.

Vagrancy—Causing disturbance in public street—Summary conviction—Commitment for want of distress—Justice's finding as to insufficiency of distress—Warrant not shewing insufficiency of distress, or that distress would be ruinous—Invalidity—Curative sections not applicable—Return to habeas corpus—Affidavit of gaoler—Cr. Code ss. 207(f), 872(a), 875, 886, 939.

1. A warrant of commitment for want of distress upon a summary conviction is invalid and will be quashed, if it recites only

default in payment of the fine, and does not shew on its face either a return of the distress warrant and that no sufficient distress was found or that a distress was dispensed with under Code s. 875 upon an adjudication thereunder.

2. An affidavit of the gaoler verifying a copy of the warrant claimed as the cause of detention may be accepted as a return to a writ or order of habeas corpus.

J. B. Kennay, for the prisoner. *J. J. Power*, for the Crown.

Province of Manitoba.

KING'S BENCH.

Full Court.] CAMERON *v.* OVEREND. [July 14.

Slander—Use of words capable of two constructions—Province of judge and jury.

Held, in an action for slander, that if the words proved to have been made use of by defendant are capable of being reasonably understood in a slanderous sense, it should be left to the jury to say if they were used in that sense, and that it is not proper to nonsuit the plaintiff on the ground that the words did not necessarily impute the commission of a crime.

Ritchie v. *Sexton*, 64 L.T. 210, and *Simmons* v. *Mitchell*, 6 A.C. 156, followed.

Potts, for plaintiff. *Elliott* and *Deacon*, for defendant.

Full Court.] [July 14.

WINNIPEG LAND CORPORATION *v.* WITCHER.

Landlord and tenant—Tenancy from year to year—Contract to be implied when tenant holds over after expiration of term under lease.

Defendant was tenant to plaintiffs under a lease for a year, which expired on March 1, the rent being $25 per month. After the expiration of the lease nothing was done about the future holding until March 29, when the plaintiffs' agent notified the defendant in writing that after the May 1 following the rent of the house would be $30 per month. Defendant made no objection

at the time and paid the rent for May and June at the increased rate. Then, after taking advice, she considered that she might hold the premises as a yearly tenant at the old rate of $25 a month and refused to pay more.

Held, that this position was untenable and that defendant was liable for rent at $30 a month during her subsequent occupancy.

As another year had expired before the judgment was given it was held unnecessary to decide whether defendant, during the second year, was a tenant from year to year at the increased rent or only a monthly tenant.

Howell, K.C., for plaintiffs. *Elliott*, for defendant.

Full Court.] GIBSON *v.* COATES. [July 14.

Promissory note—Consideration—Holder in due course—Bills of Exchange Act, 1890, ss. 29, 30—Objections not raised at trial.

Appeal from verdict of County Court judge in favour of defendant in an action to recover the amount of a promissory note for $250 made by defendant payable "to the order of T. F. Higgins or bearer" and transferred by delivery and before maturity to one Buchanan, by Buchanan to one Dunbar, and by Dunbar to plaintiff.

Defendant had given the note to Higgins in settlement of a claim made upon him by Higgins which was unfounded in law, but the evidence appearing in the notes of the trial judge left it doubtful whether Higgins believed his claim to be good or not.

Held, per Richards, J., that, as the trial judge found in favour of the defendant, it should be assumed that he found that Higgins did not believe himself to have a legal claim, and the evidence fairly supported such finding, so that, under s. 30 of the Bills of Exchange Act, 1890, the onus was on the plaintiff to prove that he was a holder in due course within the meaning of s. 29 of that Act, or that either Buchanan or Dunbar had, in good faith and without notice of any defect in the title to the note, given value for it.

As to the acquisition of the note by the plaintiff, the only evidence appearing in the notes was that he gave a team of horses to Dunbar in exchange for the note and another note made by Dunbar for $85; and as to the transfer of the note from Higgins to Buchanan the only evidence was that of Buchanan who swore that he had bought the note from Higgins,

giving him in exchange his own note for $100 and a mare worth $125, that he had not heard that there was anything wrong about the note, that he thought it was all right or he would not have taken it and that he thought it was good to collect. This evidence was not contradicted.

Held, per Richards, J., that, in the face of the trial judge's verdict, it could not be said that the plaintiff had satisfied the onus of proof cast upon him.

The plaintiff objected that the defence under s. 30 of the Bills of Exchange Act, 1890, had not been set up by the dispute note, but such objection was not taken at the trial or in the grounds of appeal.

Held, per Richards, J., that, even if valid, such objection could not be raised on the argument of the appeal.

PERDUE, J., dissented on all points.

Appeal dismissed with costs.

Aikins, K.C., for plaintiff. *Howell*, K.C., for defendant.

Richards, J.] BROWN *v.* HOARE. [July 25.

Specific performance—Contract—Sale of land.

Defendant held two half sections of land from the C.P.R. Co. under interim receipts signed on behalf of the company, acknowledging payment of $160 on each half section, stating the price to be $3 per acre, and expressed to be given "subject to the conditions of the company, and pending completion of agreement for the purchase of said land." Plaintiff afterwards agreed to buy defendant's interest in the land for $1,440, and to assume the payment of all further sums coming due to the C.P.R. He paid $720 cash and agreed to pay the remaining $720 in thirty days on receiving assignments from the defendant of the agreements of sale from the company to the defendant. When the thirty days expired the defendant had not yet procured the agreements from the company, but offered to assign them to the plaintiff, and deliver to him the assignments and the interim receipts. Plaintiff refused to pay the money until the formal agreements of the company should be procured and handed to him along with the assignments. Defendant then purported to cancel his sale to plaintiff, and made a sale to another party after the company's agreement came to hand.

Held, that plaintiff was entitled to judgment for specific performance by defendant of the contract between them, and that

defendant was bound to procure the formal agreements from the company and deliver them to the plaintiff along with the assignments of same at the time of payment of the second $720.

Aikins, K.C., and *Robson*, for plaintiff. *Wilson* and *Machray*, for defendant.

Province of British Columbia.

SUPREME COURT.

Duff, J.] [August 11.

CAPITAL CITY CANNING CO. *v.* ANGLO BRITISH COLUMBIA PACKING CO.

Territorial waters—Jurisdiction of province—Bed of the sea below water mark—Foreshore leases for fishing purposes.

Held, that the provisions of s. 41 of the Land Act, as amended in 1901, do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea below low water mark. The Legislature was not in that section addressing itself to the subject of fisheries, which are regulated by another Act of the same session.

R. T. Elliott for plaintiffs. *Luxton*, K.C., for defendants.

Martin, J., Loc. Judge.] [August 25.

THE KING *v.* SCHOONER "NORTH."

Maritime law—Three-mile limit—Pursuit commenced within and continued beyond—Continuity of pursuit—Dominion Fisheries law—Infraction of.

The Dominion Government steamer Kestrel, while cruising on the north coast of Vancouver Island, sighted the schooner North inside the three-mile limit, and on approaching her, found some of her dories out fishing. As the Kestrel proceeded to pick up the dories, the schooner stood out to sea. She followed the schooner, arrested her when about four and a half miles from land and brought her to Vancouver, where proceedings were

taken for her condemnation. At the time of seizure a considerable quantity of freshly caught halibut was found on the schooner's deck.

Held, that the pursuit of the offending vessel having been commenced within the jurisdiction of the pursuing ship, and the pursuit having been a continuous one, the capture was lawful. The stopping of the ship to pick up the dories of the schooner was not a discontinuance of the pursuit, but merely an act done to perfect the evidence of the offence.

Macdonell, for the Dominion Government. *Wilson*, K.C., A.-G., for defendant.

Yukon Territory.

YUKON TERRITORIAL COURT.

Craig, J.] THE KING *v.* FLYNN. [May 3.

Jurisdiction — Summary trial — Consent of accused — Keeping common gaming house.

1. The Criminal Code, s. 738(*f*) which confers the power of summary trial for the offence of keeping "any disorderly house, house of ill-fame or bawdy-house" includes as a "disorderly house" a common gaming house.

2. The definition of the term "disorderly house" contained in Criminal Code s. 198 (Part XIV. "Nuisances") applies to the same term in Code s. 783 (Part LV. "Summary Trials") and the rule "noscitur a sociis" does not apply to the interpretation of sub-section (*f*) of s 783.

R. v. *France*, 1 Can. Cr. Cas. 321 (Que.) disapproved.

Book Reviews.

The Law and Practice in Divorce and Matrimonial Causes, by ARTHUR GWYNNE JEFFREYS HALL, M.A., Barrister-at-law. London: Butterworth & Co., Temple Bar, W.C., Law Publishers, 1905. 1371 pages.

The construction of this book is unique. The subject matter is discussed in short and concise articles, summarizing the law and practice, and placed in alphabetical order. To each article is appended a chronological digest of the leading cases decided in the English Court for Divorce and Matrimonial causes and its ecclesiastical predecessors. A cross-reference index precedes each article; and these are broken up into sections to facilitate these references.

This mode of construction and alphabetical arrangement of the subjects strikes one as being very suitable in a treatise on this branch of the law. Whether this style will come into larger use as to other branches remains to be seen, however this may be it is refreshing to have something out of the ordinary routine.

We are glad to say that divorce proceedings are not often invoked in this country, and so the sale of this book must necessarily be limited in the Dominion. The very different condition of things in the Great Republic which dominates the southern and smaller part of the North American continent will give it a large sale there. Whilst this is so, the articles on alimony, the custody of children, etc., and the digests of cases attached thereto will be as useful here as elsewhere. The appendix gives the English statutes relating to marriage and divorce.

Bench and Bar.

Dr. Larratt W. Smith, K.C., D.C.L., who passed away on September 18th, was born in Devonshire, England, November 29th, 1820. He was admitted as an attorney in Michaelmas Term, 1843, and called to the Bar of Upper Canada in the following Term. He was therefore at the time of his death the oldest member of the profession in Ontario. For many years past, however, he took no part personally in practice, although he was the senior member of the firm in which Mr. J. F. Smith, K.C., the most excellent Editor-in-Chief of the Ontario Reports, was also a member. His time in recent years was devoted to the various financial institutions in which he was interested and of many of which he was at the head. Genial and courteous, Dr. Smith was a man of the highest personal character, and of scrupulous honour in all relations in life.

Courts and Practice.

The following resolutions were passed at the Annual Meeting of the delegates from the County Law Library Associations of the Province of Ontario recently held at Toronto:—

That the abolition of enforced qualifications for legal practitioners would not be in the interests of the general public.

That solicitors and counsel be permitted to make contracts with their clients as to the amount of remuneration for professional services either in addition to or in lieu of the tariff.

That the circuit allowance to High Court judges should be fixed at a suitable amount of not less than ten dollars per day and expenses for each sitting, and that a peremptory list be prepared for each day of the sittings containing not more than three cases.

That Rules of Practice when passed should take effect at a future day, and should be at once printed and mailed to all solicitors, so as to reach them before the Rules take effect.

That the Dominion and Ontario Governments be requested to furnish each legal practitioner with one copy of each volume of statutes, and that provision be made to have the ordinary Public Acts not take effect until distributed.

That the powers of local judges should be extended in respect of infants and lunatics, so as to enable the legal business connected with their estates and persons to be transacted in the counties in which they reside.

That the payment of fees in stamps or otherwise to all officers of the Courts should not be required from parties to litigation or collected by solicitors, but should be paid out of the general revenue of the Province.

That every solicitor bringing or defending an action in any county must have a booked agent in the county town.

That the Surrogate Court tariff should be revised and allowances increased, and should provide for the allowance of costs to solicitors and counsel representing parties interested other than the executor or administrator upon the passing of accounts, and that the Surrogate judges should be given a discretion in all cases to allow counsel fees to counsel for all parties appearing upon the passing of accounts.

That, whereas (here follows a recital the reasons for the resolution) the municipal legislation of the Province should be all grouped into one well considered Act, or the municipal law be codified with the assistance of a number of municipal officers accustomed to putting municipal law in operation.

That it would be in the interest of trade and commerce throughout the Dominion if such bankruptcy legislation, as will assimilate the law in various Provinces and enable insolvent debtors under proper restrictions to obtain a release from their creditors, be passed by the Dominion Parliament.

That the Dominion Government should contribute towards the maintenance of county law libraries.

That the Benchers be requested to so arrange tuition fees of the Law School that they will sustain the school, or take steps to transfer the education of legal practitioners to the Universities of the Province, the Law Society retaining the functions of an examining body.

That it would be to the advantage of the legal profession of Ontario to form a Provincial Bar Association.

That each County Law Association be requested by the secretary to contribute the sum of two dollars annually for the purposes of defraying the expenses of this Association and that said contributions be forwarded to W. C. Mikel, Esq., Belleville, secretary.

There has been a doubt in the minds of some members of the profession interested in the subject as to whether s. 6 alone, of the Alien Labour Act of 1897, as amended in 1901, is to be looked upon as ultra vires of the Dominion Parliament. The question recently came up in the case *Rex* v. *Breckenridge* in the Divisional Court of which Mr. Justice Anglin is a member. It was not even suggested by counsel or by the Court that s. 1, under which the conviction there was made, had been affected by the judgment in *Rex* v. *Gilhula*.

Some of the names mentioned in connection with the judiciary recall a story distinctly apropos. A sage old farmer who noted the elevation of his member to the Bench remarked: "Well, it's a good thing Laurier isn't giving everything to lawyers".—*Star*.