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LAW REFORM.

It has been recently announced that the Attorney-General contemplates introducing at the next session of the Ontario Legislature a bill for effecting further reforms in legal procedure.

We are accustomed to these measures, and in the course of the last fifty years have experienced the effect of them. They began with the Common Law Procedure Act, they were continued in the Administration of Justice Acts during the earlier days of the Mowat regime, and may be said to have culminated in the Ontario Judicature Act, in which, following, and in fact going beyond English procedure, we finally accomplished the feat of providing that law and equity should be administered by the same tribunal and that the suitor seeking for justice should no longer be driven from one Court to another.

All these changes which were thus from time to time made were supposed not only to simplify the process of obtaining justice, but also to lessen its expense; but we find to-day, after all the efforts of our Legislature in pursuit of cheap law, that it is found still to be as expensive a luxury as ever it was. The new machinery for discovery which was formerly one of the peculiar engines of the Court of Chancery for extracting the truth from the adverse suitor, has been made applicable in all cases, with the result that divers large items are added to every bill of costs. There is no doubt that the procedure of discovery is a very useful means of getting at the real merits of the question in controversy, but those who desire to reap its benefits find that they have to pay for it.

The idea of cheap law is a very seductive one. The poor suitor with the meritorious case appeals very strongly to the imagination as a person who ought to be relieved. Surely such

a one should n ,t be debarred f.om asserting his rights merely by reason of his poverty; and indeed to the lay mind it must always seem an anomaly and tantamount to a denial of justice, that an appeal to the Court should so often involve the suitor in such a liability for costs as to amount to a practical prohibition to any prudent man engaging in a law suit, whether as plaintiff or defendant, if he can by any means avoid it.

But it is not only for the cost of the improved machinery that the suitor has to pay, but he has also to pay for getting it in running order. Such is the infirmity of human language, that no matter how carefully a statute or a rule of Court may be drawn, it is almost certain to admit of differences of interpretation, and judicial decision alone can determine which is the correct one. Judicial decisions, however, are not to be had for nothing—notices of motion have to be given, affidavits prepared and sworn, and then copied and filed, briefs made and counsel employed, on both sides, before the knotty point can be settled, and for all this the suitors have to pay. It is safe to say that almost every measure of law reform inevitably involves more or less of this expense before the legal meaning of the changed law or procedure is judicially settled. Then, to keep track of all these decisions which settle the meaning of the scheme of procedure laid down in the statutes and rules of Court, a necessarily very expensive book of practice is required, which, to be useful, must from time to time be republished with the additional cases both in the Provincial and in the English Courts. This involves a heavy tax on the legal profession at periodical intervals, and for all this they naturally and properly seek reimbursement from their clients in some way or other.

The result of all our legislation and of our efforts in pursuit of cheap law is to demonstrate that thus far it has proved a veritable "will o' the wisp," and we are no nearer to the desired object than we were fifty years ago; and indeed it may well be doubted whether law is one bit cheaper now than it was then.

There is an element in the case which the public and litigants never seem to consider, but which is nevertheless a most important one, and that is the fact that lawyers, like every other class

of the community, have to live. Nor are they exempt any more than any other class from the changed conditions which the last fifty years have brought about in the cost of living. For them as for every one else, the price of everything has increased, so that it is safe to say that it costs at least one-third more than it did fifty years ago to maintain the same scale of living. No corresponding increase has, however, been made in the tariff of fees. However much a conscientious lawyer might wish for the sake of avoiding expense to dispense with some of the usual proceedings in the way of discovery, etc., he has to face the possible contingency of being told (as he has in fact been told) by the Court after the trial of an action that his neglect to obtain information which he might have obtained by proceedings before trial is no excuse for surprise at the trial, and no ground for a new trial. Thus the safety of his client, quite apart from his own interest, requires the practitioner to avail himself of all methods of procedure and particularly those relating to discovery, which add so much to the expense of law suits. The excuse that he neglected it for the purpose of saving expense would not for a moment be listened to by the Court or regarded as an extenuating circumstance.

The profession is supposed to be monopolistic, and, in the interests of the public, it is considered expedient to prohibit any one from practising the profession of the law who has not first been duly qualified and authorized so to do. But this theory is departed from in practice and for the sake of saving a little expense to some people a considerable part of the conveyancing business of the Courts, which should be the exclusive business of the profession, is permitted to be transacted by persons having no legal qualifications. The profession, it is true, has occasional compensation by reason of the law suits to which the labours of these unskilled conveyancers give rise; but none the less they are deprived of what might reasonably be a source of legitimate profit. The profits they lose in this way renders it, of course, more difficult for them to make a reasonable living.

Then the profession has further to contend with the fact that a portion of the annual fees they are required to pay to the Law

Society are not expended for their benefit but are used to educate other men to be their competitors and to divide into still smaller fractio.. the law business of the Province. It may well be asked if the time has not arrived when persons desirous of following the legal profession should be required to obtain the necessary knowledge at their own expense, without any assistance from the rest of the profession.

The facts and circumstances we have referred to may be ignored in the future as they have been in the past, and schemes of law reform and new methods of procedure may be devised, but we do not think the wit of man will be able to produce any other result than what has attended the like efforts in the past.

It is to the interest of the people of the Province that the legal profession should not be too easy of access, asd it is not for the best interests of the public that every Tom, Dick and Harry should be assisted to enter its ranks. The standard of conduct of lawyers should be high, and we may say much higher than that of the average man, for they occupy positions of trust and responsibility and, moreover, from the ranks of the profession judges and legislators are to be drawn, and the Province can hardly pay too highly for the very best men that can be produced. Certainly men of the necessary calibre are not likely to be produced from a generation of Division Court agents. The refinement, culture and moral worth expected in the ranks of the legal profession cannot be maintained where the ordinary emoluments do not admit of attaining a decent competence. We are driven, therefore, to the conclusion that in the present condition of things cheap law means a lower standard for the profession and an inferior Bench.

This is a view which those in charge of, and who control the legislation of the Province, should take to heart. Tinkering with statutes is a cheap and easy way for an irresponsible member to gain notoriety with his constituents, but a strong and wise government will make no change, or do anything, to shake the buttress which an honourable and high toned profession forms for the well being of the State.

We noticed recently that in one of the Swiss Cantons it was said that an ordinance had been passed limiting the number of physicians in a particular city. Those who were authorized to practice were put upon a salary and were required to give their services gratuitously to those in need of them. Though we do not at present advocate such a scheme for lawyers nor see how it could be made workable, it is arguable that more real and effective good to the public would result therefrom than any changes in the existing practice. We feel confident that to again upset the practice of the Courts, and to leave the weightier matters to which we have referred unremedied, would only be holding out hopes which will never be realized, and probably create for litigants a possibility of being involved in even greater expense than they are at present.

Should the Provincial Government be sincerely desirous of cheapening litigation, one very obvious method would be the abolition of Court fees. It is absurd and anomalous that litigants should be called on to pay for the administration of justice or any part of it, and it is even more ridiculous that lawyers should be compelled to act as collectors of the tax thus imposed on litigants. The disbursements for fees in every bill of costs form a large portion of the whole amount, and the opprobrium attaching to a lawyer's bill is largely due to the fact that in it are included disbursements which ought rather to appear in the public accounts.

Chapter 332 of R.S.O. 1897, s. 2, declares that "The King shall sell to no man nor deny or defer to any man either justice or right," and yet no one can go into His Majesty's Courts to enforce any civil right or be brought there to defend his rights without being mulcted at every turn. This may not be "selling justice," but it looks very like it. Those who wish sincerely to cheapen law, and not merely to reduce the present inadequate emoluments of the legal profession, might very well address themselves to secure the enforcement of our own statute which embodies the provisions of Magna Charta.

MR. JUSTICE RIDDELL.

The vacancy in the King's Bench Division caused by the lamented death of the late Mr. Justice Street has been filled by the appointment of Mr. W. R. Riddell, K.C., to the position. We think congratulations are due, not only to Mr. Riddell, who has won the legal equivalent of the "Marshal's baton" which Napoleon said was in the knapsack of every grenadier, but also to the public and the profession which will feel that the Canadian Government has in this instance duly appreciated one of its most important duties, that of filling up from the ablest members of the Bar the vacant places in the ranks of those who are chosen to the high office of the interpretation and administration of the law.

William Renwick Riddell, as we are informed in the indispensable "Morgan," is "the son of Walter Riddell of the family of Riddell of that ilk in Scotland," and was born near Cobourg, with which town many of the leading events in his career have been associated. His name suggests, what is indeed the fact, that his ancestors came from that rugged border-land of Dumfries which has produced so many strenuous Scots, from the days of Bruce and Douglas to those of Thomas Carlyle. Mr. Riddell received his education at the well-known Collegiate Institute of his native town in which he was afterwards for some time the mathematical master, and at Victoria University, of which he is one of the most distinguished alumni. From that University he received high honours in mathematics and natural science, and also the Bachelor's degree in arts, science and law. Early in life he attained a high position as an educationist, being appointed Professor of Mathematics in the Ottawa Normal School in 1875. The attractions of law, however, were not to be gainsaid, the teacher's desk was abandoned for that of the student-at-law, and in 1883 he was called to the Bar, standing first in all his examinations and winning the gold medal of the Law Society. He began practice in Cobourg, where he soon took a leading position which justified his removal to a wider arena in Toronto in 1892, first in partnership with Mr. Charles Millar and Mr. R. C. Levesconte, and subsequently as a member of the well-

known firm headed by Mr. W. H. Beatty and the late Mr. T. G. Blackstock, which has already contributed two of its members to the Bench, though one of them, unfortunately, like the lost Pleiad, too soon refused any longer to shine in the serene atmosphere of the Supreme Court!

Mr. Riddell soon acquired a large practice as a counsel in both civil and criminal cases. An active Liberal in politics, he was recommended by the Tupper Government of 1896 for the appointment of Q.C., and not long afterwards received the coveted "silk" at the hands of the Ross administration. Although in the "middle fifties," he is still a young man, to all intents and purposes and will no doubt undertake the weighty duties and responsibilities which fall upon a Canadian judge with the same buoyant energy and conscientious application which have been recognized in his work as an advocate.

The many friends of Mr. Justice Duff will be glad to know of his appointment to the Bench of the Supreme Court of Canada in the room and stead of Hon. Robert Sedgewick, deceased. This is the first appointment from our Pacific Province. Mr. Justice Duff's promotion has been rapid. He was called to the Bar of Ontario in 1893. In February, 1904, he was appointed to the Supreme Court of British Columbia, on the retirement of Mr. Justice Walkem. Our remarks at that time (ante, vol. 40, p. 169) are as appropriate on this occasion as they were then:—"The appointment is none the less welcome and to be appreciated in that Mr. Duff never was a politician, but has attained his high position at the Bar by force of character, brains, industry, and rectitude." We congratulate him on his promotion and venture to predict he will greatly strengthen the Supreme Court Bench and be a useful and successful judge.

It being settled law that a "strike" will not excuse delay or neglect in performing a contract, unless there is a provision therein that its occurrence shall exempt a contractor from damages for the breach, it is interesting to note some recent cases as

to what the Courts look upon as a "strike" in this connection. The following definitions may be noted: "A strike may be defined as a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend on the means by which it is enforced, and upon its objects:" *Farrer* v. *Close*, L.R. 4 Q.B. 612. "A combined effort among workmen to compel the master to the concession to a certain demand by preventing the conduct of his business until compliance with the demand:" *Farmer's Loan & Trust Co.* v. *Northern Pacific R.R. Co.*, 60 Fed. Rep. 819. "The act of quitting work; specifically, such an act by a body of workmen, done as a means of enforcing compliance with demands made on their employer. It is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and refusing to resume work until the demanded concession shall have been made, and is not necessarily unlawful, and does not necessarily engender a breach of the peace:" *Longshore Printing Co.* v. *Howell*, 26 Oreg. 527, 38 Pac. Rep. 547. "A combination among employees having for its object their orderly withdrawal in large numbers, or in a body, from the service of their employer on account simply of a reduction in their wages, is not a strike within the meaning of the word as commonly used:" *Arthur* v. *Oakes*, 63 Fed. Rep. 327.

POWERS OF REVOCATION IN DEEDS.

Attorneys are frequently called on to draw deeds of family settlement, conveyances by parents to children, or others, in consideration of an agreement to support the grantors during the remainder of their lives, and the like. These transactions are attended with the danger of depriving the grantor of property for which no return is given, a misfortune not contemplated at the time. Sometimes they concern the welfare of persons unfitted to manage their own property, but who, while desiring to prevent dissipation, do not wish to relinquish control over it.

More frequently, however, they involve the entire, or greater part, of the property of aged people, which represents the accumulation of years and on which they must depend for maintenance. Too often such conveyances result in placing the property beyond the control of the grantor, and the grantor at the mercy of those benefitted, or making litigation necessary in a case of misplaced confidence. Yet, notwithstanding the miscarriages of justice shewn by the reports to have so frequently occurred, trust in one's relatives does not abate, and the desire to make family settlements does not decrease; and, notwithstanding the uncertainty of such a course, clients sometimes prefer to dispose of property during their lifetime, rather than direct how it shall be done after their death, believing that their wishes in that regard are less liable to be thwarted by a disposition they, themselves, may make, than by a distribution according to the law of descents, or if only a will, subject as it is to attack, be left to direct.

Is there not a way, known to the law, of protecting such persons, while still making a disposition to their satisfaction? It would seem that they would be amply secured in most instances by the insertion in the deed of a power of revocation. While this protection does not seem to have been universally relied on in this country, judging from the many instances where it was omitted from deeds of settlement without apparent reason, the power to revoke a deed by virtue of a reservation of that right has long been recognized under the law of England. Coke has sanctioned such a power.[1]

The law in England, by which the same property can be kept in the same family for many years, has, perhaps, caused greater importance to be given in that country than in this to the insertion in deeds of settlement of a power of revocation and appointment to other uses. In fact, the British Courts, in their discussions of the subject, give more attention to the omission of such a power as perpetrating a fraud on the grantor, than to the reservation of such a power as being a constructive fraud on others, or to the validity of such a reservation. Concerning family settlements, they say, that any one taking any advantage under a voluntary

[1] Butler's Case, 3 Coke, 25.

deed and setting it up against the donor, must show that he thoroughly understood what he was doing, or, at all events, was protected by independent advice. It has been almost laid down that where there is no power of revocation the deed will be set aside.[2] But later decisions have modified and so construed these cases so that it cannot be said that a voluntary settlement is voidable unless it contained a power of revocation. According to these authorities, the absence of a power of revocation is a circumstance to be taken into account in connection with the other circumstances of the case; the absence of advice by counsel given the grantor as to the propriety of inserting such a reservation stands on the same footing.[3] But these authorities recognize beyond question the validity of such a power in a deed, and our own Courts, when the question has been presented to them, have been inclined to favour this plan for protecting the grantor.

It cannot be said that the grantor does not part with his power or dominion over the property conveyed because he retains a right to annul or revoke the deed. A power of revocation is perfectly consistent with a grant or the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the grantee and remains vested, notwithstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it is reserved, before the death of the grantor, it can have no effect on the validity of the conveyance or the right of the grantee to the property.[4]

The argument that the reservation of a power of revocation nullifies the conveyance is answered by the opinion of the Court in the case of *Jones* v. *Clifton*.[5] That case involved a conveyance by the husband to the wife of certain realty, the deed containing a clause reserving to the grantor "the power to revoke the grant in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might desig-

[2] *Coutts* v. *Acworth*, Law Rep. 8 Eq. 558; *Wollaston* v. *Tribe*, Law Rep. 9 Eq. 44; *Everitt* v. *Everitt*, Law Rep. 10 Eq. 405.

[3] *Toker* v. *Toker*, 3 De G., J. & S. 487; *Hall* v. *Hall*, Law Rep. 8 Eq. 430; *Phillips* v. *Mullings*, Law Rep. 7 Eq. 244.

[4] *Stone* v. *Hackett*, 12 Gray, 232; *Van Cott* v. *Prentice*, 104 N.Y., 10 N.E. Rep. 257; *City of Providence* v. *St. John's Lodge*, 2 R.I. 46.

[5] Reported in 101 U.S. 225.

nate, and to cause such uses to spring or shift as he might declare." The conveyance was made at a time when the husband was not involved, but subsequently became embarrassed, and was adjudged a bankrupt. The assignee in bankruptcy contended that the deed passed no interest to the wife as against creditors, but was fraudulent as to future creditors, the husband retaining and controlling the use of the property; and further insisted that the power of revocation and appointment passed to the assignee for the benefit of creditors. The Court held that "the right of a husband to settle a portion of his property on his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing the existing claims of creditors, is indisputable." The Court proceeded also to say: "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended to meet the ever-varying interests of family connections. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and appointment to other uses in a deed of family settlement has often been considered a badge of fraud, and, except when made solely to guard against the extravagance and imprudence of the settler, such settlements have in many instances been annulled on that ground." In the same case the Court held that the power reserved was not an interest in the property which could be transferred to another, or sold on execution, or devised by will. While the grantor might exercise the power by deed or will he could not vest the power in any other person to be thus executed. Neither was it a chose in action, so as to constitute assets of the bankrupt in the hands of his assignee.

If a voluntary deed is given by a person weakened in body or mind at the behest of one enjoying a confidential relation, the

absence of such a power will impose the burden of proof on the person taking the benefit to shew distinctly an intention to make the gift irrevocable.[6] It has also been contended that a deed containing a power of revocation is in effect a will, and objectionable on that ground. But if an instrument is on its face and in legal effect a deed, and passes a present interest, the power inserted in it does not change its character, notwithstanding the possession of the property conveyed is postponed,[7] or the enjoyment thereof was not to commence until after the grantor's death.[8]

In a Kentucky case,[9] the Court considered the validity of such a reservation in a deed from a different point of view. Subsequently to the delivery of the conveyance the grantee conveyed a proper deed, a right-of-way through the land to a railroad, which constructed its right-of-way through it. The original grantor then executed a deed of revocation in conformity with the provisions of the deed containing the power. The validity of the revocation was assailed as being, among other things, contrary to public policy for the reason that it would enable the parties to the deed to defeat the rights of the grantee's creditors; in other words, that, after becoming indebted, the grantor by exercising the power of revocation would thereby divest the grantee of property which would otherwise be subject to the claims of his creditors. But this contention was considered untenable, inasmuch as the deed itself was notice to the grantee's creditors of the reserved power. It was also objected, in this case, that the reservation of power to revoke was an attempt to impose a condition subsequent, which was void, under the rule stated by Blackstone[10] that a vested estate shall not be defeated by a condition subsequent either impossible of execution, illegal or repugnant. However, the argument did not find favour with the Court.

Under the old rule, a power to revoke a deed might have been exercised by re-entry merely, or now, perhaps, by proper notice

[6] Miskey's Appeal, 107 Pa. St. 629.
[7] *President, etc., of Bowdoin College* v. *Merritt*, 75 Fed. Rep. 480.
[8] *Nichols* v. *Emery*, 109 Cal. 323, 41 Pac. Rep. 1089.
[9] *Ricketts* v. *R. R. Co.*, 91 Ky. 221, 15 S. W. Rep. 182, 11 L.R.A. 422, 34 Am. St. Rep. 176.
[10] 2 Bl. Com. 156.

to the grantee.[11] However, it would probably be wiser to state in the deed how the power therein reserved might be carried out. The mere fact that the law does not recognize the form of the revocation will not operate to defeat it, if it has been exercised in the manner assented to by the parties. Thus, where a deed provided that a revocation, to be effectual, should be an instrument under seal, acknowledged and recorded, as deeds of land are required to be recorded according to law, a revocation in compliance therewith could not be defeated by the fact that the acknowledgment and recording of such an instrument was not provided for by statute.[12] But the act of revocation, to be effectual, must be complete. The interest of a grantor will not be divested by a deed of revocation executed by the grantor in anticipation of a settlement with his creditors, and destroyed by him on failure to effect such settlement.[13]

Since the nature of the power is to leave to the free will and election of the grantor the question whether it shall or shall not be executed, a Court of Equity will not interfere in a case of non-execution, though the non-execution is caused by accident or mistake. But if the exercise of the power was attempted, and was defective, but the intent to revoke is clear, equity would aid the defective execution.[14]—*Central Law Journal.*

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[11] *Ricketts* v. *R. R. Co., supra.*
[12] *Ricketts* v. *R. R. Co., supra.*
[13] *Hill* v. *Cornwall,* 95 Ky. 526, 26 S.W. Rep. 540.
[14] 22 Am. Enc. of Law, 1127.

REVIEW OF CURRENT ENGLISH CASES.

COMPANY—DIRECTORS—RESOLUTION OF MAJORITY SHAREHOLDERS FOR SALE OF UNDERTAKING—REFUSAL OF DIRECTORS TO CARRY OUT RESOLUTION OF SHAREHOLDERS.

Automatic Self-Cleansing Filter Co. v. *Cunninghame* (1906) 2 Ch. 34 was an action by the company and by the plaintiff McDiarmid, a shareholder, on behalf of himself and all other shareholders of the company against the directors of the company to compel them to carry out a resolution passed by a majority of the shareholders of the company authorizing a sale of the company's undertaking. The articles provided inter alia that the management of the business of the company should be vested in the directors, and they considered it would not be in the interests of the company to carry out the resolution and refused to do so. Warrington, J., who tried the action dismissed it, and the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.JJ.) affirmed his decision. The articles of association provided that the directors might be removed by a special resolution of the shareholders, and the Court held that so long as they were continued in office their action could not be overruled by a resolution of a mere majority of the shareholders, as that would in effect be transferring to a mere majority of the shareholders the management of the company which, by the articles, was vested in the directors.

LAND TRANSFER—FORGERY—RIGHT OF REGISTERED PROPRIETORS TO INDEMNITY—RECTIFICATION OF REGISTER—PARTIES.

Attorney-General v. *Odell* (1906) 2 Ch. 47 is an important decision under the English Land Transfer Act. Mrs. Connell was the registered proprietor of a charge on certain land, and her solicitor produced to Odell what purported to be a duly executed transfer of the charge to Odell, which Odell took to the office and registered, and he was entered on the books as the owner of the charge. It was subsequently discovered that the transfer was a forgery, and Mrs. Connell applied for and obtained a rectification of the register. Odell, who had acted bonâ fide, then applied to the Registrar for indemnity, which was granted. An application was then made by the Attorney-General

to rescind the Registrar's order. A preliminary objection was taken that the Attorney-General had no locus standi and that only the applicant for indemnity was entitled to appeal, but this was overruled by Kekewich, J., who held that the Registrar was, on application for indemnity, in a judicial position and that both the applicant and the Crown should be represented before him. On the merits he affirmed the decision of the Registrar, but, on appeal by the Crown, the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) held that the applicant was not entitled to relief because by presenting the forged transfer for registration he had under the decision in *Sheffield v. Barclay* (1905) A.C. 392 warranted its genuineness and that by this act on his part (though innocently done) he "had caused or contributed" to the loss within the meaning of s. 7 (3) of the Act of 1897, and therefore was precluded from obtaining indemnity; and (2) had not in fact any transfer under s. 40 of the Act of 1875 from "the registered proprietor of the charge" and consequently had not "suffered loss by the rectification" within s. 7 (4) of the Act of 1897. See and compare *Fawkes* v. *Attorney-General*, 6 O.L.R. 490.

LANDLORD AND TENANT—DEROGATION FROM GRANT—TRESPASS—ARCHITECT—UNAUTHORIZED ACT OF AGENT—PARTY WALL.

Betts v. *Pickfords* (1906) 2 Ch. 87 was an action by tenants against landlord for an injunction to restrain an alleged trespass. The plaintiffs leased certain premises from the defendants which adjoined other premises occupied by the defendants. By the terms of the lease the plaintiffs were bound to erect a warehouse on the demised premises according to approved plans, which shewed that the back wall was to contain certain windows overlooking the defendants' premises. In order to make room for the warehouse the defendants pursuant to a collateral agreement, removed the end of a building which stood partly on the demised premises and partly on the defendants' own premises, but by verbal agreement with the plaintiffs' architect made without the plaintiffs' authority certain stanchions and roof beams were left projecting over the demised premises which were built into the warehouse wall which was entirely on the demised premises. Subsequently the plaintiffs were called on by the municipal authority to block up the windows in this wall on the ground that by the projection of the stanchions and roof beams from the adjoining premises into the wall it had become "a party wall" within meaning of the London Building Act, 1894.

The plaintiffs thereupon brought the present action to compel the defendants to disconnect their building from the wall, and it was held by Kekewich, J., that they were entitled to the relief claimed; on the ground that during the continuance of the term the plaintiffs were entitled by implied grant to an unqualified right to the access of light to the windows in question, and that the agreement made by the architect was beyond the scope of his authority and was not binding on the plaintiffs and that the user of the wall by the defendants as a party wall was a derogation from their grant.

WILL—GIFT TO TESTATOR'S SON AND HIS CHILDREN—REVOCATION BY CODICIL OF GIFTS TO SON—EFFECT OF REVOCATION ON CHILDREN'S INTERESTS.

In re Whitehorne, Whitehorne v. *Best* (1906) 2 Ch. 121. A testator by his will gave certain benefits to his son G. and after his death for his children; and by a codicil reciting his reasons for dissatisfaction with his son G. he revoked all provisions in his will for his benefit, and directed his will to be construed as if G.'s name had not appeared therein, and by the same codicil he gave a legacy of £500 in trust for the children of G. at twenty-one or marriage, and for their maintenance in the meantime; and the effect of this codicil on the disposition of the will in favour of the children of G. was what Buckley, J., had to determine, and he held that the revocation of the gift to G. did not affect the gift made by the will to his children, but that such gift was accelerated by the codicil, and that the children were consequently entitled both to the benefis given by the will and also to the legacy bequeathed by the codicil.

COMPANY — PROSPECTUS — MISSTATEMENTS — OMISSION — PROPERTY PURCHASED OR ACQUIRED—NON-DISCLOSURE—DIRECTOR —LIABILITY—COMPANIES ACT, 1900 (63 & 64 VICT. C. 48) S. 10—(6 EDW. VII., C. 27, S. 5(G) (ONT.)—"SUB-PURCHASER."

Brookes v. *Hansen* (1906) 2 Ch. 129 was an action against the director of a company for omitting to disclose particulars of property proposed to be purchased by the company as required by the Companies Act, 1900 (63 & 64 Vict. c. 48) s. 10 (6 Edw. VII., c. 27, s. 5(*g*) (Ont.). It was conceded that the prospectus had been issued bonâ fide and that there was no intentional fraud on defendant's part. It appeared by the evidence that in

May, 1901, an agreement was entered into whereby one Wheeler sold certain patent rights to the African Patent Rights Company for £15,000, and that by a second contract made in June, 1901, the African Patent Rights Co. agreed to sell to one Wheeler as trustee for the South African Super-Aeration Co. the same patent rights for $58,500 and only the second contract was referred to in the prospectus. It was contended that the company was a sub-purchaser within the section and the particulars of the prior contract should have been stated; but Joyce, J., held that there was no obligation to disclose the amount paid by the company's vendor for the property however comparatively small, nor however recent the purchase, and that the South African Company was not a sub-purchaser within the meaning of the section. And as a general rule he considers that a company is not to be regarded as a sub-purchaser unless it has to pay purchase money to some one other than its own vendor.

LANDLORD AND TENANT—COVENANT BY LESSOR TO REPAIR—DEMISED PREMISES BECOMING WORN OUT.

Torrens v. *Walker* (1906) 2 Ch. 166 was an action by a tenant against his landlord to recover damages for breach of a covenant to repair. The demised premises were 200 years old, and in the year 1905 the front and back walls had become so dangerous that the municipal authority notified the tenant that they must be rebuilt. The notice was sent to the lessor who had covenanted that he would at all times during the term keep the outside of the premises in good and substantial repair. At the time the notice was given the walls had become so worn out by old age that they were incapable of repair. Nothing was done and the municipal authority in pursuance of its statutory powers caused the two walls to be taken down which left the premises uninhabitable. Warrington, J., held that the lessor was not liable because no liability arose on the covenant until notice was given to the lessor of the want of repair, and at the time the notice was given the walls had ceased to be repairable, and the landlord was not under his covenant liable to rebuild walls which had fallen to decay through old age.

LANDLORD AND TENANT—AGREEMENT OF TENANCY, TERM UNDEFINED—CONSTRUCTION.

Austin v. *Newham* (1906) 2 K.B. 167 was an action of ejectment by landlord against tenant. The defendant had entered

into possession of the premises under an agreement of tenancy dated May 9, 1904, "for a period of twelve months with the option of a lease after the aforesaid time at the rental of £30 per annum." Some time before the expiry of the twelve months the plaintiff demanded delivery of possession on May 9, 1905. The defendant refused to go out and claimed that under the agreement he was entitled to a further lease for the period of at least one year. The judge at the trial so held, and dismissed the action. On appel to a Divisional Court (Kennedy and Lawrence, JJ.) this decision was affirmed, Kennedy, J., however, inclining to the opinion that the defendant might have claimed a lease for his life, Lawrence, J., thought that the words "£30 per annum" shewed that the additional term was contemplated by the parties to be at least for one year.

PARTNERSHIP—ASSIGNMENT OF BOOK DEBTS BY ONE MEMBER OF A FIRM—FORGERY OF PARTNER'S NAME—VALIDITY OF ASSIGNMENT.

In re Briggs & Co. (1906) 2 K.B. 209 although a bankruptcy case involves a point of partnership law of general interest. The facts were simple. One of two partners of a firm executed an assignment of the book debts of the firm in favour of a creditor of the firm to secure a debt, and signed the deed in his individual name, and also (without authority) in the name of his partner. Bigham, J., held that notwithstanding the forgery, the assignment was an effectual transfer of the debts as an equitable assignment because it was within s. 6 of the Partnership Act, 1890, an act or instrument relating to the business of the firm, and done in a manner shewing an intention to bind the firm by a partner, who, by reason of the partnership, had authority to bind the firm. The Partnership Act, though not yet enacted in Ontario, we believe is, on this point, merely declaratory of the existing law of Ontario.

PRACTICE — DISCOVERY — PRODUCTION OF DOCUMENTS — REPORT MADE TO PARTIES FOR WHOSE BENEFIT ACTION IS CARRIED ON—NOMINAL PLAINTIFFS.

In *Nelson* v. *Nelson* (1906) 2 K.B. 217 the action was brought by cargo owners against shipowners for breach of warranty of seaworthiness. The plaintiffs were insured against loss, and after the commencement of the action the insurers paid the

loss, and the action was thenceforward prosecuted by the insurers' solicitor for their benefit. During the loading of the ship the insurers had procured a report from a surveyor as to the condition of the ship, and the defendants claimed discovery of this document, but Bigham, J., held that they were not entitled to its production, and the Court of Appeal (Collins, M.R., and Cozens-Hardy, and Farwell, JJ.) affirmed his decision, the Court distinguishing the case from *Willis* v. *Baddeley* (1892) 2 Q.B. 324, because there the actual plaintiffs were really merely the agents of the parties beneficially entitled and on whose behalf the action was brought. Under Ont. Rule 446 it is possible, even in the circumstances of *Nelson* v. *Nelson*, that production might be ordered.

TRAMWAY—CARRIAGE OF PASSENGER—RIGHT OF PASSENGER TO BREAK JOURNEY.

Bastaple v. *Metcalfe* (1906) 2 K.B. 288 was a prosecution for riding on a tram car without a ticket. The facts were, that the defendant had purchased a ticket entitling him to travel a certain distance, he alighted at an intermediate stopping place, walked a quarter of a mile in the direction of his destination and then got on another tram car, which was performing the same journey, in order to get to the point he might have travelled by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to continue his journey with his original ticket. The justices dismissed the complaint, but the Divisional Court (Lord Alverstone, C.J., and Darling, J.) held that he ought to have been convicted, that by alighting from the car, and suffering it to proceed, he had put an end to the contract. The Court, however, was careful not to commit itself to any opinion as to the effect of a passenger alighting for a merely temporary purpose on notice to the conductor.

AUCTIONEER — PARTNERSHIP — BILL OF EXCHANGE — IMPLIED AUTHORITY TO BIND PARTNER—TRADER.

In *Wheatley* v. *Smithers* (1906) 2 K.B. 321 the Divisional Court (Ridley and Darling, JJ.) held that an auctioneer is not a trader, and, therefore, that a member of a firm of auctioneers has no implied authority to bind his partner by the acceptance of a bill of exchange in the firm name.

ADMIRALTY—JURISDICTION—COLLISION BY FOREIGN GOVERNMENT SHIP—FOREIGN PUBLIC VESSEL—APPEARANCE ENTERED UNDER MISTAKE OF LAW—EXEMPTION FROM ARREST.

The Jassy (1906) P. 270, was an action in the Admiralty Court for damage by collision against a vessel which was the property of a sovereign state. The vessel had been arrested, and an absolute appearance put in, and an undertaking given to put in bail. Subsequently the chargé d'affaires of the foreign state addressed a letter, in the nature of a certificate, to the Secretary of State for Foreign Affairs stating that the vessel was the property of such foreign state, and asking that the proceedings against the vessel might be terminated, and stating that the appearance had been put in, and undertaking given, under misapprehension, and a copy of this letter was forwarded by the Secretary of State to the Registrar of the Admiralty Court for the information of the President of that Court. The defendants applied to dismiss the action and in the circumstances and notwithstanding the appearance and undertaking Barnes, P.P.D., held that the action must be dismissed.

COLLISION—MEASURE OF DAMAGES—PROSPECTIVE PROFITS.

The Racine (1906) P. 273 was an action in the Admiralty Court to recover damages for a collision, and the only question discussed is the measure of damages. The plaintiff's vessel, which was totally lost, was, at the time of the collision, proceeding from a home port under a charter to a foreign port, and was thence to proceed under charter to another port, and thence under charter home. The Court of Appeal (Williams, Stirling, and Moulton, L.JJ.) affirming Barnes, P.P.D., held that the measure of damages was the value of the ship at the date when she would have accomplished the homeward voyage together with such sum as would represent the profits which would have been realized from the three successive charters, less a reasonable percentage for contingencies.

ADMIRALTY—DAMAGE BY FIRE TO CARGO—"BY REASON OF FIRE"—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT. c. 60) s. 502 (1)—WARRANTY OF SEAWORTHINESS.

The Diamond (1906) P. 282 was an action brought by the plaintiffs against shipowners for breach of warranty of seaworthiness. Owing to the negligence of the crew in overheating a stove a fire broke out on board the defendant's ship and the

plaintiffs' goods were injured. The plaintiffs alleged the ship was unseaworthy, in that the stove was placed too near to a bulkhead, and that as the defendant must be taken to be privy to the position of the stove he could not claim the protection of s. 502 (1) of the Merchants Shipping Act, 1894, which protects the owner of a British sea-going ship from liability for loss happening "without his actual fault or privity," "by reason of fire on board the ship." The plaintiffs also claimed that the damage to their goods was principally caused by smoke and water used to extinguish the fire, and that this was not damage "by reason of fire" within the statute; but Deane, J., held that the defendant was entitled to the statutory protection, because the stove was perfectly safe if properly used, and therefore the vessel was seaworthy, and the defendant was not actually concerned in or "privy" to the negligence of the crew, and that the injury caused by smoke and water was occasioned by reason of fire within the statute.

CHARITABLE BEQUEST—BEQUEST FOR BELL-RINGING—ERECTION OF TOMBSTONES FOR PENSIONERS—"PUBLIC CHARITIES AND INSTITUTIONS OR CHARITABLE PURPOSES FOR THE PUBLIC ADVANTAGE" TO BE SELECTED BY TRUSTEES—UNCERTAINTY—(R.S.O. c. 333, s. 6).

In re Pardoe, McLaughlin v. *Attorney-General* (1906) 2 Ch. 184. A testatrix bequeathed (1) £200 to the vicar and wardens of a church, the income to be distributed annually at Christmas, as to £1 to the ringers of the church who should ring a peal of bells on the anniversary of the restoration of the monarchy; (2) £700 to the vicar and wardens of a church, the income to be applied inter alia in erecting tombstones to pensioners who should die in a certain almshouse and be buried in the churchyard; (3) and she bequeathed her residuary real and personal estate to trustees in trust to pay and distribute the same among "such public charities and institutions, or for such charitable purposes for the public advantage" as the trustees should think fit. All of these were held by Kekewich, J., to be valid charitable bequests.

COMPANY—GENERAL MEETING—POWER OF DIRECTORS TO POSTPONE GENERAL MEETING.

In *Smith* v. *Paringa Mines* (1906) 2 Ch. 193 the simple point determined by Kekewich, J., is that the directors of a joint stock

company, in the absence of express authority in the articles of association, have no power to postpone a general meeting of shareholders regularly convened.

APPOINTMENT—REMOTENESS—RULE AGAINST PERPETUITIES.

In *Re Thompson, Thompson* v. *Thompson* (1906) 2 Ch. 199, Joyce, J., had to deal with the question of the validity of an appointment made pursuant to a will whereby a testator gave his residuary estate to his wife for life, and after her decease upon trusts for the benefit of his brother Charles and his present and future issue, as his wife should appoint. The wife appointed the property in trust for Charles for life, and after his death for all his children who had attained or should attain 25 if born in her lifetime, or 21 if borne after her death. Charles had nine children only, all of whom were born in the lifetime of the testator and all of whom attained 25 before the death of the appointor. Joyce, J., held that upon the appointment taking effect, it was certain that within the limits of the law against perpetuities, not only would the persons to take be ascertained, but their interests would be vested and the amount of their shares fixed; and consequently that the power of appointment was validly exercised.

VENDOR AND PURCHASER — TITLE — RECITAL IN DEED TWENTY YEARS OLD.

In re Wallis & Grout (1906) 2 Ch. 206 was an application under the Vendor and Purchasers Act, and the question was whether the vendor was justified in refusing to produce any evidence of title prior to a deed made in 1882, which recited that by a first mortgage the premises were granted to the mortgagee (the grantor in that deed) to the use of his heirs and assigns "as therein mentioned." Eady, J., held that, notwithstanding the recital, the purchaser was entitled to require the vendor to deduce a forty years' title.

TENANT FOR LIFE—REMAINDERMAN—COVENANT TO PAY ANNUITIES—CAPITAL AND INCOME—APPORTIONMENT—TESTATOR'S LIABILITIES.

In re Dawson, Arathoon v. *Dawson* (1906) 2 Ch. 211 was a question as to the relative liability of a tenant for life and remainderman to satisfy a liability of their testator. The liability in question arose under a covenant by the testator to pay certain

life annuities. He had bequeathed his residuary real and personal estate upon successive trusts for a tenant for life and remainderman. Eady, J., held that the actuarial values of the life estate and remainder at the time of the testator's death must be ascertained; and the successive instalments of the annuities, must be borne by the tenant for life and remainderman according to the proportionate value of their respective estates.

COMPANY—DEBENTURES—DEPOSIT OF BLANK DEBENTURE TO SECURE LOAN—REISSUE OF DEBENTURES.

In re Perth Electric Tramways, Lyons v. *Tramways Syndicate* (1906) 2 Ch. 216. A company having power to issue mortgage debentures. Each debenture was to be under seal in a certain form, and was to be issued to a holder specified therein and registered. The company issued a series of mortgage debentures to secure a loan, but the holder's name was left blank and also the date, and they were not registered. They were deposited with a creditor of the company to secure a loan which was subsequently repaid; and the debentures were returned to the comapny. The question Eady, J., was called on to decide was, whether this amounted to an issue of the debentures so as to preclude the company from re-issuing them, and he held that the deposit of the debentures with the creditor was an issue of them, notwithstanding the omission of the holders' name and date, and, therefore, that it was not competent for the company after repayment of the loan for which they were deposited as security to reissue the debentures, and six of the debentures which had been reissued to a bonâ fide holder for value were ordered to be delivered up to be cancelled.

WILL — SATISFACTION — SETTLEMENT — COVENANT BY FATHER—ABSOLUTE BEQUEST TO DAUGHTER—AFTER ACQUIRED PROPERTY CLAUSE—PERSONS DERIVATIVELY ENTITLED—ELECTION.

In re Blundell, Blundell v. *Blundell* (1906) 2 Ch. 222. This was a case turning on the equitable doctrine of election. By a marriage settlement made in 1898 £10,000 (which included a sum of £5,539 secured to the trustees by the covenant of the wife's father) was settled on trusts for the wife, husband and children, the wife taking the first life interest and covenanting to settle after required property to which she might become entitled during coverture on the same trusts. The father died without satisfying the covenant, leaving a residuary estate of £80,000,

one-third of which he bequeathed to the daughter absolutely for her separate use. The question therefore arose whether this put any and which of the parties entitled under the settlement to an election. Eady, J., held that the bequest was a satisfaction of the wife's life interest in the £5,539 secured by the covenant, but not of the interests of any of the other cestuis que trust, notwithstanding that under the after acquired property clause they might become derivatively entitled to the benefit of the bequest. The wife, therefore, he held, was the only person put to election.

WILL—LEGACY—ADEMPTION—RESIDUE TO CHILD AND STRANGER—ADVANCEMENT TO CHILD.

In re Heather, Pumfrey v. *Fryer* (1906) 2 Ch. 230 was a case arising under a will, whereby the testator bequeathed a legacy to an adopted child to whom he stood in loco parentis, and also bequeathed his residue between that child and a stranger. Subsequently to the will he made an advance to the child which on the evidence was held not to have been a portion, and the question was whether the advance operated as an ademption of the legacy or share of residue bequeathed to the child, and Eady, J., held that the doctrine of ademption by subsequent portion, is not applicable as between a stranger and a child of a testator, and, therefore, even if the edvance had been a portion it would not have constitu.ed an ademption of either the legacy or the share of residue bequeathed to the child.

COMPANY—PROSPECTUS—DIRECTORS' LIABILITY FOR FALSE PROSPECTUS—CONTRIBUTION—DIRECTORS LIABILITY ACT, 1890 (53 & 54 VICT. c. 64) ss. 5, [illegible] S.O. c. 126, ss. 4, 6)—LIABILITY OF ESTATE OF DECEASED DIRECTOR.

Shepheard v. *Bray* (1906) 2 Ch. 235 was an action by directors who had paid certain claims to persons who had been damnified by an erroneous prospectus issued by the directors of a company, to recover from the estate of a deceased director contribution towards the sums so paid. The action was based on the Directors Liability Act, 1890 (53 & 54 Vict. c. 64) s. 5 (R.S.O. c. 216, s. 6). Actions were brought against the plaintiffs in which they were held liable for these claims, these they satisfied and also those of other parties without suit. Warrington, J., held that the defendants were liable to pay their share of the compensation paid by the plaintiffs to the complainants, to-

gether with the latter's costs of action up to judgment, but not the costs of unsuccessful appeals, nor their own costs of such actions.

RESTRAINT OF TRADE—COVENANT NOT TO CARRY ON OR BE INTERESTED IN A SIMILAR BUSINESS—SALE ON CREDIT—INDIRECT INTEREST.

Cory v. *Harrison* (1906) A.C. 274 was an action to enforce a covenant not to carry on or be interested in a similar business to that of the covenantee within a certain area. The covenantor carried on a home and export business of a coal merchant. He sold the home business and covenanted not to carry on a similar business within Great Britain or the Isle of Man. He subsequently sold the export business to a company, receiving payment in shares of the company. The company afterwards sold the business to a firm, the purchase money being payable by instalments lasting over several years. The firm having begun to carry on business in Great Britain the plaintiffs claimed that this constituted a breach of the defendant's covenant as he was indirectly interested in the business as a shareholder of the company, the unpaid vendor thereof. The action was dismissed by Joyce, J., and his judgment was affirmed by the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) and the House of Lords (Lord Halsbury, L.C., and Lords Robertson and Lindley) agreed that the being a creditor of a firm is not being "interested or concerned" in its business, within the meaning of the covenant in question and therefore dismissed the appeal.

POLICE—PENSION—APPROVED SERVICE—CONTINUITY OF SERVICE.

Garbutt v. *Durham Joint Committee* (1906) A.C. 291 was an action by a former police officer to recover a pension under an Act which entitled him to a pension after twenty-five years of approved service. The King's Bench Division (1904) 1 K.B. 522; and the Court of Appeal (1904) 2 K.B. 514 held that this meant twenty-five years' continuous service, but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Davey, James, Robertson, and Atkinson) overruled that decision and held that it need not be continuous.

INSURANCE—POLICY EFFECTED BY OWNER OF SHIP FOR ALL PERSONS TO WHOM THE SUBJECT MATTER MIGHT APPERTAIN—INTENTION—RIGHT OF CHARTERER TO BENEFIT OF POLICY EFFECTED BY OWNER—RATIFICATION.

Boston Fruit Co. v. *British & F. M. Insurance Co.* (1906) A.C. 336. The plaintiffs in this case were charterers of a vessel.

The owners had effected an insurance on the vessel on behalf of themselves and all persons to whom the subject matter might appertain, and the policy contained a collision clause. There was no stipulation between the owners and charterers that the owners should insure for the charterers' benefit. The charterers were found liable to pay damages caused by a collision, and in the course of the litigation in a foreign Court had expressly disclaimed having any insurance. Having paid the damages they now claimed to recover on the policy effected by the owners as being persons to whom the subject matter appertained. It was admitted that the policy was wide enough in its terms to include the plaintiffs, but it was denied that there was any intention to insure for their benefit. In these circumstances the Court of Appeal (1905) 1 K.B. 637 held that the plaintiffs could not recover, and with this conclusion the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Robertson, and Atkinson) also unanimously agreed.

RAILWAY—CONTRACT—BREACH OF CONTRACT—LIQUIDATED DAMAGES — PENALTY FOR NON-COMPLETION OF CONTRACT — "ACTUAL COST" DOES NOT INCLUDE INTEREST ON MONEYS EXPENDED.

Commissioner of Public Works v. *Hills* (1906) A.C. 368 was an appeal from the Cape of Good Hope. The action was brought by Hills, the respondent, against the Government of the Cape to recover under a contract for the construction of a railway. The contract provided that in the event, which happened, of the contract not being completed within a specified time the plaintiff should forfeit to the Government certain percentages which the Government retained out of moneys payable to the plaintiff under two other contracts, and also certain security money lodged with its Agent-General, "as and for liquidated damages sustained by the Government for the non-completion of the line," and that it should be lawful for the Government to take possession of the incomplete line and pay the balance due in respect of its "actual cost." The Chief Justice of the Colonial Court held that the moneys held by the Government under the two other contracts were held as security only for any damage which the Government might be proved to have sustained by non-completion of the line and as no damages were proved the Government were not entitled to retain the money; and that upon the construction of the agreement the term "actual cost" was meant to

include no more than the money actually paid for materials used and work done by the contractor, and therefore did not include interest thereon as claimed by him and with this conclusion the Judicial Committee of the Privy Council (The Lord Chancellor and Lords Davey, Dunedin and Atkinson, and Sir Arthur Wilson) agreed.

CONTRACT—BREACH OF CONTRACT—PENALTY—LIQUIDATED DAMAGES.

Diestal v. *Stevenson* (1906) 2 K.B. 345 was an action for breach of contract in which the sole question was whether a stipulation in the contract for a penalty in case of breach was to be regarded as a penalty or as liquidated damages. The contract was for the delivery of coal of different qualities, and the contract provided "penalty for non-execution of this contract by either party one shilling per ton on the portion unexecuted, and the amount of proved loss, if any, on freight actually arranged by us." The action was by the vendee for non-delivery of the coal and the plaintiff claimed that the shilling a ton was a penalty, and might be disregarded in estimating the damage, and that he was entitled to recover the difference between the contract price and the market price at the place of delivery which greatly exceeded the 1s. per ton. Kennedy, J., who tried the action, held that the 1s. per ton was, in the circumstances of this case to be taken as liquidated damages and that the plaintiff was not entitled to anything in excess of that amount.

CRIMINAL LAW—LARCENCY—SEPARATE PROPERTY OF MARRIED WOMAN IN THE HOUSE OF HER HUSBAND.

In *Rex* v. *Murray* (1906) 2 K.B. 385 the short point decided by the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Kennedy, Darling, Jelf, and Lawrance, JJ.) was, that where a person is indicted for larceny of property which was the separate property of a married woman, it was bad to allege in the indictment that the property was that of her husband though it was stolen from his house. The conviction of the prisoner was therefore quashed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Magee, J., Mabee, J.] [May 29.

RE FAULDS.

Infant — Custody — Rights of father — Fitness — Religion — Temporal welfare of child—Abandonment—R.S.O. 1897, c. 259.

Upon an application by the father of a girl of eleven years for an order against the maternal grandmother for delivery of custody, it was shewn that the mother of the child was dead, that the child had lived with the grandmother since she was three years old, and had been brought up as a Protestant, while the father had become a Roman Catholic and desired to educate the child in that faith.

Held, upon the evidence, that the applicant was not an unfit person to have the custody of his daughter; that there was no agreement that the child should remain with the grandmother always or until her death, and the father had not abandoned his parental rights; that the child herself had no serious religious convictions; that she would have a better home and a better education in her father's house than with her grandmother; that it would be for her advantage to be brought up in the same home with her only brother; and that no case had been made out which would justify a refusal to give effect to the father's right to the custody of his child.

While the welfare of the infant is in one sense paramount, the paternal right to custody and control is supreme, unless a very extreme case can be made out shewing that it is imperative for the protection of the child that the Court should interfere with that right.

The reluctance of the Court to separate brothers and sisters is very great.

It is the duty of the Court to enforce the wishes of the father as to the religious education of his children, unless there is strong reason for disregarding them. The Court has jurisdiction to

interfere, even against the father's wishes, to prevent the religious convictions of his child being interfered with; but the circumstances must be such as to satisfy the Court that there has been an abandonment or abdication of the paternal right, or at least that the training of the child has imbued it with such deep religious convictions that to disturb them would be clearly dangerous to its moral welfare.

The Children's Protection Act, R.S.O 1897, c. 259, has no application to the case of a child situated as this one was.

Order of ANGLIN, J., affirmed.

W. E. Middleton, for the father. *W. A. McMaster*, for the grandmother.

Anglin, J., Trial.] [June 1.

MACOOMB *v.* TOWN OF WELLAND.

Highway—Dedication—User by public—Action—Parties—Attorney-General—Municipal corporation—Ownership in fee.

In an action for a declaration that a portion of the river road lying between Burgar and Dorothy Streets in the Town of Welland was not a highway, but the private property of the plaintiffs, it appeared that the road had been continuously travelled by the public since the district was first settled, and that in 1855 B., the plaintiffs' predecessor in title as owner of the lands adjoining this portion of the road, agreed with the municipal corporation of the township in which these properties were then situate, to dedicate to the public as highways and to open up for traffic Burgar and Dorothy Streets, and in consideration of his doing so the corporation agreed to close up and convey to him the portion of the river road in question. For this purpose a by-law was passed, admitted by the defendants to be legal and sufficient, and a conveyance to B. was duly executed, which, as admitted, vested the fee in him:—

Held, that if a highway now existed, it must be by virtue of an express or implied dedication by the owner since 1855; and, as such private dedication would vest in the municipality not merely the surface, but the soil and freehold of the highway, it was unnecessary for the purposes of the present action that the Attorney-General should be added as a party.

The by-law enacted that B. should have the right to close up the road as soon as Burgar and Dorothy Streets should be opened for public use and travel. Until 1873 or 1874 Burgar Street was unfit for use as a public highway, and the public con-

tinued to use the river road, and even after Burgar Street was opened and used, the user of the portion of the river road in question continued, and no attempt was made at any time to close it, the public continuously used it without objection, and public money was spent upon it from time to time.

Held, following *Mytton* v. *Duck* (1866) 26 U.C.R. 61, that, even if the user for the first eighteen years should not be taken into account, because of the special clause in the by-law of 1855, there had been, since the right to close became absolute, thirty-two or thirty-three years of uninterrupted user before the bringing of this action, sufficient to establish conclusively a dedication.

Lynch-Staunton, K.C., and *Cowper*, for plaintiffs. *Armour*, K.C., and *Pettit*, for defendants.

Divisional Court.] [June 12.

VOKES HARDWARE CO. *v.* GRAND TRUNK RY. CO.

Mechanics' lien—Time for registering lien—Completion of work—Work to satisfaction of architects—Work done after registration of lien.

Under a contract made with the railway company for the erection of a railway station, the work was to be done to the entire satisfaction of certain named architects. The plaintiffs, who were sub-contractors for a part of the work required to be done, ceased work on the 20th May, under the belief that their work was completed, and their secretary-treasurer, on the 8th of June, made an affidavit stating such to be the fact, with a view of having a lien registered. The architects, however, were not satisfied and required a further work to be done, and work was accordingly done in June, and again in August, and it was not until the 4th of August that the architects were satisfied and accepted the work. The plaintiffs' lien was filed on the 24th of June.

Held, that, under the contract the architects being the persons to determine when the work was completed, it was not so completed until they had signified their approval and therefore the lien was registered in time.

St. John, for plaintiffs. *Heyd*, K.C., for defendants.

Meredith, C.J.C.P., Britton, J., Magee, J.] [June 13.

CHAMBERS *v.* JAFFRAY.

Discovery—Libel—Examination of defendant—Answers tending to criminate.

Upon the trial of an action for libel, s. 5 of the Ont. Witnesses and Evidence Act, as now enacted by 4 Edw. VII. c. 10, s. 21, would be applicable, and the defendant would not be excused from answering proper questions because the answers might tend to criminate him; and Con. Rule 439 (1250) puts a party on his examination for discovery in the same position as he would be in if he were being examined as a witness at the trial, and he is therefore not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him, and if he objects to answers on that ground his answer is within the protection of s. 5.

Regina v. *Fox* (1899) 18 P.R. 343 applied.

Order of Mulock, C.J. Ex. D., affirmed.

R. McKay, for Jaffray. *J. B. Clarke*, K.C., for plaintiff.

Meredith, C.J.C.P., Britton, J., Magee, J.] [June 14.

LIFE PUBLISHING CO. *v.* ROSE PUBLISHING CO.

Copyright — Drawings — Publication in newspapers — British copyright — "Book" — Contract — "Assign" — Foreign author—4 & 5 Vict. c. 45 (Imp.)—Infringement—Form of judgment—Injunction—Delivery up of copies.

The plaintiffs claimed copyright in certain cartoon drawings and the accompanying titles and letter-press prepared for the plaintiffs by a celebrated artist, and first published simultaneously in the plaintiffs' newspaper in the United States and in another newspaper in England owned by one H., under agreements between H. and the plaintiffs, to which the artist was also a party. By the agreements H. was acknowledged to be the owner of the British copyright. H. granted a license to the artist to publish the drawings in book form in the United Kingdom. Entry was duly made at Stationers' Hall of H.'s ownership of the copyright of his newspaper. Subsequently this copyright was said to have been assigned by H. to H. & Sons, and before this action was brought H. & Sons registered eight copies

of the newspaper containing the eight drawings and letter-press in question, and assignments thereof to the plaintiffs. Before this registration the defendants had, without the consent of the plaintiffs or their predecessors, printed in Canada for the purpose of sale a quantity of pictorial post cards, on which were reproduced copies of the eight drawings, taken from books published by the artist under the license mentioned, but not registered at Stationers' Hall. The artist was not a British subject, and was not, at the time of the preparation or publication of the material in England, within any part of the British dominions. None of the material was protected by a Canadian copyright.

Held, 1. The effect of the agreements referred to was to vest in the plaintiffs the common law right to copyright in the drawings, and this right was validly transferred to H., who was an "assign" of the artist or author, within the meaning of section 3 of the Imperial Copyright Act, 4 & 5 Vict. c. 45; and the English newspaper was a book within the meaning of that section, and H. became entitled thereunder to statutory copyright in the drawings as part of his book, for when drawings form part of a book they come within the provisions of that Act, and are protected not only as part of the book, but as drawings. *Maple* v. *Junior Army and Navy Stores* (1882) 21 Ch. D. 369, and *Bradbury* v. *Hotten* (1872) L.R. 8 Ex. 1 followed.

2. The evidence sufficiently established the plaintiffs' title to the copyright by re-assignment.

3. The present Copyright Act protects the productions of foreign authors wheresoever resident, where there is a first or contemporaneous publication within the Empire. The plaintiffs, therefore, were entitled to an injunction, and to delivery up of the infringing copies.

Jefferys v. *Boosey* (1854) 4 H.L.C. 815, and *Routledge* v. *Low* (1868) L.R. 3 H.L. 100 discussed.

Judgment of Teetzel, J., affirmed.

H. Cassels, K.C., and *R. S. Cassels*, for the plaintiffs. *J. H. Denton*, for the defendants.

Teetzel, J.] CARTRIGHT *v.* CARTRIGHT. [June 22.

Life insurance—Attempt to change beneficiary—Necessity of consent thereto—Trust—Application of existing law.

Under an insurance certificate for $3,000 issued by a society in 1883, the insured's wife was made the beneficiary. The cer-

tificate was delivered to her and had always remained in her possession. In 1886 the husband purported to surrender this certificate procuring another one to be issued in favour of his son and daughter, which was delivered to the daughter and had always been in her possession. In 1887 the wife procured a divorce from her husband, but which was admitted to be invalid; and in 1889 the husband went through a form of marriage with one E., when he purported to surrender the last named certificate, procuring another one to be issued in E.'s favour, to whom it had been delivered, and who had always retained possession of it. On the husband's death a claim made by E. was settled, and the question was as to the rights of the wife and children under the respective certificates.

Held, that, under the statute then in force, 47 Vict. c. 20(O), the first certificate became a trust in the wife's favour, over which, so long as she lived, the husband had no control except under s. 5 and 6 of that Act, which however, did not empower him to surrender and replace it by another, for this only could be done with the wife's consent under 48 Vict, c. 28, s. 1, sub-s. 3(O).

J. B. Clarke, K.C., and *C. Swabey,* for plaintiff. *C. A. Moss,* for defendants.

Divisional Court.] [July 5.

ALLAN *v.* SAWYER MASSEY COMPANY.

Negligence—Master and servant—Injury to servant—Dangerous work—Neglect to provide safe guards—Evidence—Damages.

The plaintiff employed as a workman in the defendants' foundry was working within a few feet of another workman, who was chipping off the rough projects from a large cast iron cylinder, when he was struck in the eye by one of the flying chips, so as to cause him to lose the sight of that eye. The evidence shewed that the work was dangerous to those in the immediate vicinity, and that the accident might have been avoided by the use of a screen, or by having the casting on a pivot, and having the chipping done in a direction away from the other workmen, or by having it done in an open yard apart from the other employees.

Held, 1. There was evidence of negligence to submit to the jury.

2. A finding of $2,000 damages was not excessive.

Lynch-Staunton, K.C., for appellants. *Counsell*, for respondents.

MacMahon, J.] [Aug. 8.

IN RE TALBOT & CITY OF PETERBOROUGH.

Municipal corporations—By-law—Motion to quash—License fee—Cigarettes—Prohibitive fee.

Where a municipal corporation passed a by-law imposing a license fee of $200 on owners or keepers of stores or shops selling cigarettes,

Held, that the by-law was ultra vires, as, on the evidence, such license fee was excessive and in effect prohibitive, and therefore the by-law was not one regulating the sale of cigarettes within the meaning of s. 583, sub-ss. 28, 29 of the Mun. Act, 3 Edw. VII. c. 19.

D. O'Connell, for the motion. *E. H. D. Hall*, for the corporation of Peterborough.

Anglin, J.] IN RE RODNEY CASKET CO. [Sept. 8.

Practice—Winding-up—Service of petition for—Assignee for creditors of company.

Held, that service of a creditors' petition for a winding-up order upon the assignee for creditors of a company, is not service upon the company as required by s. 8 of the Dominion Winding-up Act, R.S.C. c. 129; nor could such assignee be held an agent of the corporation within the meaning of Con. Rule 159 for the purpose of such service.

G. M. Clark, for petitioners. *R. C. H. Cassels*, for assignee.

Anglin, J.] LEES *v.* TORONTO & NIAGARA POWER CO. [Sept. 8.

Railways — Expropriation — Sufficiency of notice — Immediate possession.

The defendants had, under their special Act, power to acquire "any privilege or easement required by the company . . . over and along any land, without the necessity of acquiring a title in fee simple thereto"; and the Act defined "land" as including any such privilege or easement, etc. In giving notice of

expropriation of certain land the defendants did not state whether it was the fee simple of the land, or merely some easement or privilege over and along them which they sought to acquire, but only that the company proposed to acquire the land "to the extent required for the corporate purposes of the company."

Held, that such notice was too uncertain to serve as the foundation for proceedings instituted to effect forcible deprivation of property, and the defendants were not entitled to a warrant for immediate possession under section 170 of the Railway Act of 1903.

R. Henderson, for defendants. *R. McKay*, for plaintiffs.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 1.

CITY OF TORONTO *v.* GRAND TRUNK RY. CO.

Costs — Taxation — Preparing for trial — Searches for missing documents—Party and party costs.

In this action a certain contract and certain plans which were of material importance to the trial were lost, and the plaintiffs employed two former solicitors of the City of Toronto to search and endeavour to find these documents or copies of them, which they succeeded in doing, and the same were put in evidence at the trial. For these services a sum of $350 was paid to them.

Held, that this expenditure was property taxable among the plaintiffs' party and party costs, though not specially provided for in the tariff.

R. C. H. Cassels, for the Grand Trunk Ry. Co. *Shirley Denison*, for the Canadian Pacific Ry. Co. *W. Johnston*, for the City of Toronto.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] IN RE LAWTON. [July 13.

Infant—Guardian—Removal.

It is a ground for the removal of the guardian of the persons

of infant children that he has removed out of the jurisdiction of the Court.

J. Roy Campbell, for the application.

Barker, J.] FAIRWEATHER *v.* ROBERTSON. [May 22.

Costs—Appeal to Judicial Committee of Privy Council—Order of King in Council—Construction.

In a suit against L. and R., the bill was dismissed by this Court with costs. An appeal to the Supreme Court was allowed with costs. On appeal by R. to the Judicial Committee of the Privy Council, it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree of this Court should be restored.

Held, that costs under the original decree should be taxed to L.

M. G. Teed, K.C., for defendants. *G. W. Allen*, K.C., for plaintiff.

Barker, J.] SEARS *v.* HICKS. [August 24.

Agreement—Family arrangement—Consideration.

Held, that the agreement which was under discussion in this case, as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased without fraud, or misrepresentation, should be upheld.

White, K.C., and *Friel*, for plaintiff. *Powell*, K.C., and *Bennett*, for defendant.

Province of Manitoba.

KING'S BENCH.

Full Court.] [June 25.

HAYWARD *v.* CANADIAN NORTHERN RY. CO.

Railway company—Negligence—Condition requiring notice of claim for damage to goods.

The plaintiff's claim was for damage to goods shipped over defendants' railway, caused by the negligence of their

servants. The shipping bill contained a condition providing that there should be no claim for damage to goods unless notice in writing and the particulars of the claim were given to the station freight agent at or nearest to the place of delivery within thirty-six hours after delivery. No such notice had been given, but plaintiff's counsel contended that, under sub-section 3 of section 214 of the Railway Act, 1903, the defendants could not be relieved from the action by the condition relied on, as the damage had arisen from the negligence or omission of defendants or their servants.

Held, that section 214 of the Act must be read along with section 275, which provides that "no condition . . . made by the company impairing, restricting, or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability . . . unless such . . . condition . . . shall have been first authorized or approved by order or regulation of the Board of Railway Commissioners of Canada," and that, as the condition in question had been approved by that Board, it was binding on the plaintiff and she could not recover.

G. T. R. v. *MacMillan*, 16 S.C.R. 543, and *Mason* v. *G. T. R.*, 37 U.C.R. 163, followed.

Daly, for plaintiff. *Laird*, for defendants.

Richards, J.] WOOD *v.* JOHN ARBUTHNOT CO. [August 24.

Set-off—Principal and agent.

The defendants ordered a quantity of fence wire from the Imperial Implement Company, which had previously, to the knowledge of the defendants, been selling the wire as the agents of the Canadian Steel and Wire Company. Prior to the order, however, the Canadian company had sold the wire to the plaintiffs. The Imperial company delivered the wire and billed it in their own name to the defendants.

Held, in an action by the plaintiffs for the price of the wire, that the defendants could not set off a claim which they had against the Imperial Company, although they might have done so if the Imperial Company had been the owners of the wire or if they had not known that that company was only the agent for its sale.

So far as the claim of set-off was concerned, it was immaterial whose agents the defendants thought the Imperial Company to be.

Boulton v. *Jones*, 2 H. & W. 564, distinguished.

Hoskin, for plaintiffs. *Craig*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] BESSETTE *v.* BUTTERS. [July 31.

B. C. Land Act, ss. 7, 8, 13, 95—Powers of commissioner under s. 13—Right to appeal—"Person affected"—"Unoccupied lands."

Butters was the holder of a record and certificate of improvements in respect of certain Crown lands. Bessette made application to the commissioner to purchase the same lands and asked that Butters' record be cancelled on the grounds that he had obtained it by fraud, and, further, that he had ceased to occupy the land within the meaning of the Act. The commissioner refused the application and his decision was confirmed by Morrison, J. Bessette appealed.

Held, 1. The commissioner has no power under section 13 to cancel a record because of false statements made in applying for record under sections 7 or 8. *Hereron* v. *Christian*, 4 B.C.R. 246, overruled in this respect.

2. Lands which are the subject of an ex facie valid record, especially where the premptor has obtained a certificate of improvements, are not "unoccupied" lands within the meaning of the Act, and are therefore not open to pre-emption or purchase.

3. The lands in question not being open to pre-emption, Bessette was not a "person affected" by the commissioner's decision, and, therefore, had no status to appeal under section 95.

Davis, K.C., for appellant. *Creagh*, for respondent.

Bench and Bar.

Death has been busy with the profession in the Province of Ontario during the past year, commencing with the loss of Christopher Robinson, K.C., on Oct. 31st, 1905. Without pretending that the following list is complete, we record the passing also of R. T. Walkem, K.C., of Kingston; J. A. Robinson, Barrister of St. Thomas; N. Simpson, County Attorney at Sault Ste. Marie; Walter Barwick, K.C., of Toronto, whose tragic death in England will not soon be forgotten; T. G. Blackstock, of Toronto; Henry Carscallen, K.C., of Hamilton. Nor has the

Bench escaped. Mr. Justice Sedgewick, of the Supreme Court of the Dominion; and Mr. Justice Street, of the Supreme Court of Judicature of Ontario; Judge Elliott, of London, and Judge Fitzgerald, of Port Arthur have also passed off the scene.

WILLIAM RENWICK RIDDELL, of the City of Toronto, Esquire: to be a judge of the Supreme Court of Judicature for Ontario; a Justice of the High Court of Justice; and a member of the King's Bench Division of the said High Court of Justice, in the room of Hon. William Purvis Rochfort Street, deceased.

Mr. C. E. D. Wood, formerly Deputy Attorney-General of the North-West Territory at Regina, has now resumed the practise of his profession in that city. The position thus vacated has been filled by the appointment of Mr. Frank Ford, Barrister, of Toronto, who is so well and favourably known in Ontario.

Law Associations.

ONTARIO BAR ASSOCIATION.

A meeting of certain members of the Ontario Bar was held at Osgoode Hall in the closing days of last month, many of them coming from outside points, to discuss the advisability of the formation of a Provincial Bar Association. Mr. A. H. Clarke, K.C., M.P., was appointed Chairman of the meeting. After discussion by a number of those present, an organization was formed entitled "The Ontario Bar Association"; all practising barristers and solicitors in Ontario being eligible on payment of one dollar per annum. A committee was thereupon appointed to draft the objects of the Association. A motion that some change should be made in the present mode of voting for Benchers of the Law Society was favorably received, and a committee appointed to confer with the Attorney-General and the Benchers to endeavour to introduce some system of nominations, and do away with the circulation of the list of retiring Benchers. This is certainly a move in the right direction and one which we have long advocated.

The committee appointed to define the objects of the Association brought in a report defining them as follows:—

1. To watch the legislation of the Dominion and Province affecting the rights of the public.

2. To suggest such amendment or betterment of the laws and the administration of justice and procedure of the Courts as may be thought advisable from time to time.

3. Generally to lend aid when possible to the proper administration of the laws.

To deal with questions arising from time to time which may affect the interest of members of the legal profession in the Province of Ontario and to watch over the interests of the legal profession generally in the province.

5. To keep in view the idea of united action by the members of the profession and to devise and carry out steps for promoting the idea from time to time.

6. To promote the interchange of ideas and closer intercourse between members at all times.

The following officers were then appointed: A. H. Clarke, K.C., M.P., of Windsor, President; Frank Arnoldi, K.C., Frank E. Hodgins, K.C., and Frank M. Field, of Cobourg, Vice-Presidents; W. C. Mikel, of Belleville, Secretary, and G. C. Campbell, of Toronto, Treasurer.

UNITED STATES DECISIONS.

The liability of a municipal corporation for the death of an employee from injuries inflicted in the performance of an ultra vires act is denied in *Switzer* v. *Harrisonburg* (Va.) 2 L.R.A. (N.S.) 910.

A sub-contractor undertaking to furnish steel frame work for a tank is held, in *Galbraith* v. *Illinois Steel Co.* (C. C. A. 7th C.) 2 L.R.A. (N.S.) 799, not to be liable to a property owner for losses due to collapse of the tank, although it would not have resulted but for his failure to perform the work according to contract.

One who directed a servant to recapture a chicken is held, in *Malony* v. *Bishop* (Iowa) 2 L.R.A. (N.S.) 1188, not to be liable for the breaking of a window caused by the chicken's flying against it in its endeavours to elude the pursuer.

Engaging, at a large salary, to take charge of the engineering and manufacturing department of a corporation, and assuming the duty of improving its product and devising and designing articles for its benefit, are held, in *Pressed Steel Car Co.* v. *Hansen* (C. C. A. 3rd C.) 2 L.R.A. (N.S.) 1172, not to require one, as a matter of law, to assign to the corporation patents for articles so designed. The right of a master to inventions of his servant is the subject of a note to this case.