HON. COLIN CAMPBELL, K.C.

ATTORNEY-GENERAL OF MANITOBA

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HON. COLIN H. CAMPBELL, K.C.

Mr. Campbell is a native of Ontario having been born at Burlington, December 25th, 1859, and was educated at the Burlington School and the Oakville High School.

Mr. Campbell studied his profession in Toronto under Colonel Fred C. Denison and the late Alfred Hoskin, K.C., and was called to the Ontario Bar in February, 1881. After his call he commenced practising at Port Perry, removing to the city of Winnipeg in the year 1882, and was called to the Bar of Manitoba in June, 1882, and entered into partnership with the late John Beverley Robertson and the late Horace E. Crawford. He subsequently practiced in partnership with Mr. Crawford under the firm name of Campbell & Crawford until the death of the latter in 1903, when he formed his present partnership. He was created a Queen's Counsel by Lord Aberdeen in 1893.

Mr. Campbell is a Liberal Conservative in politics and contested the Winnipeg Riding in that interest in the elections for the House of Commons in 1893. In 1899 he was elected a member of the Provincial legislature for the Province of Manitoba, representing the constituency of Morris, and was re-elected for the same constituency in July, 1903, and again in March of 1907. Immediately on his election he became a member of the government of Hon. Hugh John Macdonald, as Minister without portfolio, and, on the resignation of the latter in 1900, he contested the Riding of Brandon in the Dominion elections. He was afterwards appointed Attorney-General and Minister of Education for Manitoba, holding the two offices for some years; and, until the appointment of the Hon. G. R. Coldwell as Minister of Education, Mr. Campbell retained the office of Attorney-General, which he still holds.

Mr. Campbell is an eminent company lawyer, and has successfully looked after the interests of a large number of corporations; he has also, during his term of office as Attorney-General, been instrumental in bringing about the settlement of many important matters for the Province. He is a member of the Presbyterian Church, a d has, for many years, taken a prominent part in all meetings of that body, and is prominently associated with many church, charitable and educational works and institutions. He has recently presented many valuable works of art to schools throughout the Province.

Mr. Campbell was married in July, 1884, to Minnie J. B. Buck, second daughter of Dr. Ansen Buck of Parlemo, and has two children, a son and a daughter.

ANOMALOUS OR IRREGULAR INDORSEMENT.

No one but a payee or subsequent holder can properly be an indorser, but a number of cases have occurred in England, Canada and the United States in which the courts have been obliged to consider the effect of an indorsement made in contravention of this principle by one who is not either the payee or a subsequent holder and the decisions on the subject are infinitely conflicting and confusing.

In an early case of *Bishop* v. *Hayward*, 4 T.R. 470, an attempt was made to evade the principle just stated. It was a note declared upon as made by Collins to Bishop or order and afterwards endorsed by Bishop to the defendant Hayward, who afterwards re-indorsed it to the plaintiff. No other facts are stated, the case having come before the Court on a motion in arrest of judgment on a verdict for the plaintiff, but counsel suggested in the course of argument as a possible state of facts consistent with the declaration that Collins, being indebted to the plaintiff, the latter refused to accept his note unless Hayward would endorse it. Had this been done simpliciter the question would arise whether Hayward, who was not the payee, could be held liable as indorser, and it would have been contrary to the

principle stated to have held that he could be. Then the suggestion is made that Hayward put his name on the bill and delivered it to the payee, Bishop, who had written his name upon it by way of form. Lord Kenyon, in giving judgment in the case puts it that Bishop, the first indorser, is suing Hayward, a subsequent indorser. "Nothing can be clearer in law than that an indorsee can resort to either of the preceding indorsers for payment, whereas the present action is an attempt to reverse this." He admits, however, "a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on the note, e.g., that his own name was used originally for form only, and that it was understood by all the parties to the instrument, that the note, though nominally made payable to the plaintiff was substantially to be paid to the defendant."

In a later case the very state of facts was proved by evidence that had been suggested by counsel in the case of *Bishop* v. *Hayward*, and stated by him to have been the facts of the case, although not presented in such form that the court could take notice of them. In *Morris* v. *Walker*, 15 Q.B. 588, Ballam had made a note to Morris for £23, which was declared on as indorsed by Morris to defendant Walker and re-indorsed by Walker to the plaintiff. The defendant pleaded that the plaintiff Morris and the Morris alleged to be the payee were one and the same person, from which it appeared that the plaintiff could not be permitted to recover against Walker as an indorser, seeing that Walker would, in the event of his paying, be entitled to recover against the plaintiff as a prior indorser, the consequence of which would be that the court would have tried and determined two actions between the same parties on the same instrument with the result of leaving them both in exactly the same position as when they began their litigation. Had the pleadings ended here the case would have been concluded for the defendant, but the plaintiff put an entirely new face on the matter by replying that Ballam was indebted to the plaintiff and had agreed to give him his note therefor, which the plaintiff had agreed to accept provided the defendant would indorse it to secure the payment, and that it

was with this intent and purpose that the plaintiff had indorsed the note to the defendant without any consideration and the defendant had indorsed to the plaintiff. The objection of circuity of action was thus removed. Plaintiff could recover against defendant as indorser. The defendant could not, under these facts, recover against the plaintiff as a prior indorser, because the indorsement was not made for the purpose of transferring title, but as a matter of form merely and without any consideration. Lord Campbell therefore says, that "the action is by the holder against the second indorser. The plea shews that the plaintiff, the holder, was the first indorser, which was left uncertain on the declaration, and the plea assumes that the second indorser could recover against the first indorser. The replication confesses that the plaintiff was the first indorser and avoids by adding that such indorsement by him to the defendant was without consideration and gave no remedy against the first indorser."

The same point substantially had occurred a few years before on a bill of exchange and had been decided in the same way. In *Wilders* v. *Stevens*, 15 M. & W. 208, Wilders drew a bill on Heigham to their own order which they indorsed to Stevens, who indorsed back to Wilders, the intention being, as in the case last mentioned, that Stevens should be security to Wilders for Heigham. Stevens was sued on this indorsement and pleaded, as in the other case, the prior indorsement to himself by Wilders, raising the question of circuity of action. Parke, B., said: "The declaration shews a title to sue the defendant upon his indorsement, and the replication states circumstances sufficient to negative any right in him to sue defendant upon their indorsement to him. The objection, therefore, of circuity of action being removed, inasmuch as the defendants could not sue plaintiffs, the case is brought within those special circumstances which it was stated by the court in *Bishop* v. *Hayward* may exist and which entitle the plaintiff to recover against the defendant. Upon this state of the pleadings, therefore, it appears to me that the plaintiffs are entitled to our judgment."

It is in view of cases like this that Mr. Ames says "no one but a payee or subsequent holder can be an indorser. There is,

however, no insuperable difficulty in charging as indorser, one who puts his name on the back of a bill or note to give it credit with the payee. The payee as holder may obviously indorse the instrument to the surety without recourse and may also fill up the blank indorsement of the surety to himself. In this way the parties are placed in the same position as if the maker had in the first instance delivered the note to the payee, the payee had then indorsed it without recourse to the surety, and the surety had then indorsed it to the payee, as in *Wilders* v. *Stevens*. In both cases the payee, as second indorsee, charges the surety as second indorser." The surety cannot sue the payee as a first indorser because the instrument in the case put by Mr. Ames is without recourse and the same consequence follows if the payee, as in *Wilders* v. *Stevens* and *Morris* v. *Walker* is in a position to reply such facts as negative the right of the surety to have recourse to the payee.

In the case of *Peck* v. *Phippen*, 9 U.C.Q.B. 73, in Upper Canada, the principle of these cases was applied and carried a step further than it was necessary to carry it in those cases. The note was given to plaintiffs by one Kerr for a debt, and defendants wrote their names on the back as sureties. Plaintiffs indorsed it, writing their names under defendants' signature, and procured its discount. They retired it at maturity and then struck out their indorsement and wrote an indorsement above that of the defendant, "Peck B. & R. without recourse." This indorsement is assumed, in the judgment of Robinson, C.J., although not so stated in the case, to have been made after action was brought, and it was objected that the plaintiff had not proved —as in fact he could not prove, seeing it was not the fact —that the plaintiffs had indorsed the note to the defendant, and the defendant contended that when the note fell due he was not liable as indorser for want of a previous indorsement to him. But the Chief Justice took what seems to be a proper view of the matter. "The question is whether as the delivery or transfer of the note for value is the substance and the indorsement only the form, the name may not be written at any time. The de-

fendant, in this case, it is clear, indorsed this note expressly in order to make it a satisfactory note to Peck & Co., the payees, the note being made to them by their debtor, which is the natural order of the transaction. To make the defendants' endorsement available to them it is necessary in point of form, as they are the payees, that their indorsement should precede his. He must be supposed to have known this. As a person knowingly indorsing a note in blank is estopped from saying that it was not a perfect note when he signed it, we think on the same principle this defendant is estopped from denying that Peck & Co.'s name was put on when it ought to have been in order to make his indorsement effectual. If Peck & Co.'s indorsement had never been put on, the case would have been very different."

Not so very different after all. On the contrary, it would have been a very short step to take from holding that where the stranger to the note had written his name on the back for the purpose of being surety to the payee for the maker, the payee, after retiring the note and after action brought on the instrument, could make that indorsement available by simply writing his name above it and adding the words "without recourse," to go a little further and say that in such a case the proceeding which is a pure and unadulterated formality could be dispensed with and the defendant could be sued on the contract that he must have intended to enter into, and which must be assumed to be the contract he entered into if any meaning at all is to be attributed to his act. But this step has not been taken unless it is taken in the Bills of Exchange Act. On the contrary, the Ontario and New Brunswick courts have held distinctly that the party who so writes his name upon a promissory note cannot be liable as an indorser, and in *Jones* v. *Ashcroft*, 6 O.S. 154, it was further held that even an indorsement by the payee would not enable the plaintiff to recover. But this case must be considered, on this point, as clearly overruled.

In *Moffatt* v. *Rees*, 15 U.C.Q.B. 527, Robinson, C.J., held that the defendant, who put his name as indorser in blank on a note payable to the plaintiff's order did not thereby make himself

liable to be sued as an indorser of the note on the custom of merchants because the payees had never indorsed it and without their indorsement the indorsement of any third party would be merely nugatory." It is not surprising to find that when so much importance is attached to the formality of an indorsement by the payee, the anomalous indorser of a note which is not negotiable and therefore cannot be indorsed by the payee, cannot be held liable on his indorsement. This has been several times decided by the Ontario courts, notably in the case of *West* v. *Brown*, 3 3 U.C.Q.B. 290, in which Robinson, C.J., says: "It is impossible to hold that any right of action is stated in this declaration, unless one can hold that any one by indorsing a note not negotiable, made payable to another, makes himself liable to that other and may be sued as an indorser."

We may conclude that apart from the Bills of Exchange Act the person, stranger to the note, who puts his name on it, cannot, in the absence of a prior indorsement by the payee, be held liable to the payee as an indorser. Can he be considered as a maker? Where a note that is not negotiable is indorsed by a stranger there is good reason for holding the so-called indorser liable as a maker which does not exist in the case of a negotiable note. If his signature is to operate in any way at all it cannot operate in any other way. He cannot be an indorser for want of the previous indorsement of the payee, which there cannot be in the case of a non-negotiable note. In *McMurray* v. *Talbot*, 5 U.C.C.P. 157, Macaulay, C.J., shewed a strong disposition to hold the defendant so liable. "If the note had been made payable to order the late cases shew that the defendant might have been made liable to the plaintiff as an indorser to him for value after the plaintiff had indorsed to the defendant without value. But the note is not negotiable on the face of it. The predominant intention, however, was that the defendant should become surety to the plaintiffs for the due payment of the note as indorser if by law he might; but at all events, as a party to the instrument if by law he could. . . . Treated as a joint and several maker he might become such

surety, and could become such as a party to this note in no other way. I am, therefore, much disposed to think the defendant might be held liable as a maker. My learned brothers, however, are not disposed to take this view of the case, and without authority more express than any I have been able to find I do not feel justified in expressing a dissentient opinion, supported as my learned brothers are, by such weighty authorities, both in England and in our own courts. The intention in fact was to become liable as an indorser; and to hold the defendant liable as a joint maker would not be consistent with that intent."

In a New Brunswick case, even where it was a negotiable note, indorsed by the defendant to give it credit with the payee, it was held on the authority of American cases and of English decisions in which the anomalous indorser of a bill of exchange was held liable to a drawer; that the indorser could be charged as a maker. We shall see presently that even if it be possible to hold the anomalous indorser of a bill chargeable as a drawer it does not follow that the anomalous indorser of a note can be held liable as a maker. The case of *Bell* v. *Moffatt*, 20 N.B. 121, in which this was held was spoken of by Patterson, J., in the Supreme Court of Canada without disrespect, but surely cannot possess much authority. There is more reason for respecting the case of *Piers* v. *Hall*, 18 N.B. 34, where the note was not negotiable, although that case is open to the remark that no one appeared to argue the case of the defendant, who was held liable as the maker of a promissory note, which he signed as an indorser, intending to be security for the borrower to the lender, who were respectively the maker and payee of the note, because he had said while handing the note to the plaintiff that it was a joint note, because if Yeomans (the borrower and maker) did not pay the note when it became due he (the defendant) was bound to do so. Unless it be for the reason that this was a non-negotiable note, it does not seem possible to reconcile it with the case of *Ayr American Plough Company* v. *Wallace*, 21 S.C.C. 256, in which Wallace had agreed to become surety for a debt and wrote his name across the back of a promissory note drawn

in favour of the creditors and signed by the debtor, and the court held that there was no evidence to go to the jury that the defendant intended to be liable as a maker. Patterson, J., however, states the effect of the cases on the subject to be that it is a question of fact whether the anomalous indorser of a note is a maker or not. "The report of *Bell* v. *Moffat* and the case of *Piers* v. *Hall* bear on the present discussion as shewing that a man may write his name on the back of a note and yet be liable as the maker of a note. That is a question of fact more than of law. The evidence in those cases proved the intention to be maker, while here the whole evidence is that he was to be indorser."

It is much to be regretted that countenance is here given to the view that one who signs in this way may be held to be a maker of a note. The question should be considered as having been set at rest by the decision in *Gwinnell* v. *Herbert*, 5 A. & E. 436, as it is in the very convincing judgment of Bliss, J., in *Morton* v. *Campbell*, Coch. N.S. 5, in Nova Scotia, where the note was made by Archibald Campbell in favour of the directors of the Liverpool Insurance Association for goods sold to the maker of the note. The document bore the indorsement of the three other defendants who were sued jointly with Campbell as maker. After comparing the case before the court with *Gwinnell* v. *Herbert* and shewing that the question was concluded by the authority of that case, Bliss, J., proceeded to say: "Independently, however, of this authority, so binding upon us, I should never have had, I confess, great doubts how far these indorsers could be considered as makers. It is said they ought to be so held, inasmuch as they cannot be liable as indorsers, for want of the previous indorsement of the payee and that as they obviously intended to make themselves liable in some way this is the only one by which that can be effected. Whether they can or cannot be held liable as indorsers, or would be estopped from contesting this I do not think it is necessary to inquire—for, admitting that they could not be sued as indorsers, I cannot think that a sufficient reason for treating

them as makers of the note. The maker of a note is one who signs it—that is who signs on the face of it. An indorser, as the word denotes, is one who puts his name on the back of the note. The signature in the two situations is obviously for different purposes, and the indorsement has thus acquired a well-known legal meaning and effect altogether different from signing. To transfer, then, the language of promise from the body of the note, where it is applicable to the signer of it, to the indorser, would be a confusion of terms, and, what is of still greater consequence, it would impose on the indorser a contract of a very different character—one of a more extensive obligation than that which the law affixes to his indorsement, and which he must be supposed to have intended by it."

Seeing the difficulty of holding an anomalous indorser liable as a maker and probably because the effect of so ruling is in nearly every one of the cases to frustrate the real intention of the parties, it has sometimes been decided that his position is that of a guarantor. The objections to this course are, in view of the Statute of Frauds, insuperable. There is no memorandum in writing of any agreement. The terms of the agreement are established by inferences supplied by the principles of the law merchant founded on mercantile usage. Moreover, in some jurisdictions, as Mr. Ames points out, where the Mercantile Law Amendment Act is not in force, the specific objection arises that no consideration is mentioned for the guarantee. None of these difficulties prevented MacMahon, J., in *McPhee* v. *McPhee*, 19 O.R. 603, from holding the indorser of a non-negotiable promissory note liable as a guarantor for the maker, the circumstances shewing that this was the nature of the obligation he intended to assume. Seeing, however, that the decision to this effect was recanted by the same judge in a later case we need not expend much energy upon it. "The case of *McPhee* v. *McPhee*, 19 O.R., was cited by Mr. Middleton. But that was a case where a partnership having borrowed money from the plaintiff for partnership purposes, one member of the firm gave to the plaintiff a non-negotiable promissory note upon

the back of which the other member of the firm signed his name. The proper legal interpretation to have put upon the transaction in that case was that the party putting his name on the back of the note, being liable on the consideration for which the note was given, might be treated as a joint maker: or it could be regarded as evidence of an account stated between the plaintiff, to whom the amount represented by the note was due, and the defendant who had put his name on the back thereof. Under some of the American authorities a person writing his name on the back of a non-negotiable note without more would be regarded as a guarantor: but I was in error in holding that under the English or Canadian authorities he could be so considered": *Robertson* v. *Lonsdale*, 21 O.R. 604.

The technical difficulty of holding the defendant in such cases liable where the note is not negotiable, or, being negotiable, has not been indorsed by the payee, does not arise in the case of a note made payable to bearer. Accordingly in *Ramsdell* v. *Telifer*, 5 U.C.Q.B. 508, it was referred to as a point that had several times been decided in the Queen's Bench, Upper Canada, that a person who indorses a note payable to A.B. or bearer may be sued as an indorser. A question seems to have been raised whether, where A. made a note payable to B. or bearer and C., to whom it was delivered, indorsed the note to D., he could or could not be sued on his indorsement, the objection suggested being that the note being payable to bearer, required no indorsement to transfer the title to D. to which the obvious answer was that, although it did not require indorsement to transfer the title, yet the party writing his name upon it could, consistently with that assume the obligations of an indorser: *Broth* v. *Barclay*, 6 U.C.Q.B. 215.

What has been said must be understood as applying to promissory notes and not necessarily bills of exchange. There is room for a distinction between a promissory note and a bill of exchange in this respect and a reason can be given, very technical and formal, it is true, but nevertheless sufficient to be the ground of a legal distinction, why the anomalous indorser of

a bill of exchange should be held liable while the anomalous indorser of a note should not be. The doctrine that lies at the foundation of this distinction is familiarly known as the doctrine of *Penny* v. *Innis*, 4 C.M. & R. 439. The bill was drawn by W. Wilson in favour of himself or order and was specially indorsed to Brooks and Penny who alone could therefore indorse and transfer it, but the defendant wrote a blank indorsement on the bill after which Brooks & Penny indorsed. Could Innis be sued on this indorsement? On the principle that none but the payee or subsequent holder could be the indorser, he could not be held liable, for he could not be the indorser, but Lord Lyndhurst, C.B., said: "The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to Brooks & Penny to strike out their own indorsement, and then the bill would have stood as a bill indorsed by the defendant in blank." It must be observed, by the way, that it is difficult to see how the striking out of the indorsement by Brooks & Penny would help to remove the difficulty that Innis could not be an indorser, not being a payee or subsequent holder, but this part of the judgment may have been misunderstood by the reporter. Parke, B., says: "Every indorser of a bill is a new drawer and it is part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him."

The effect of this case is very clear. The defendant who was a stranger to the bill, was made liable to the persons who had become payees by virtue of the special indorsement, and it is impossible to resist the logical conclusion that if the bill had been made payable on its face to Brooks & Penny and Innis had written his indorsement upon it, he would have been held liable to the payees as an indorser, because his indorsement operated as a new drawing of the bill. This is the logical consequence of what was held in *Penny* v. *Innis*, yet it was held in *Steele* v. *McKinley*, 5 App. Cas. 754, by the House of Lords that the party who wrote his name on the back of the bill under

such circumstances was not liable in any form to the payees. In that case William and Thomas McKinley requiring funds, commissioned their father James McKinley to obtain for them an advance of one thousand pounds. He communicated with John Walker, with the result that "Walker drew a bill for the amount addressed to William and Thomas McKinley, which he handed to their father. He sent it to his sons, who returned it duly accepted. He then wrote his own name on the back and handed it to Mr. Walker, who remitted its amount, less the discount, to the acceptors. So stated the transaction seems very plain, and it is identical with that in *Penny* v. *Innis*, except that in the latter case Innis put his name on the back after the bill had become payable to Brooks & Penny by virtue of a special indorsement to them, while here McKinley put his name on while the bill, on its face, was payable to Walker. All the essential conditions seem to be exactly the same. Moreover, in *Penny* v. *Innis*, the court had simply before it the fact of Innis having put his name on the bill. In *Steele* v. *McKinley*, they had the facts already stated along with others which induced Lord Blackburn to think it probable that Walker attached some importance to the signature of James McKinley, and advanced his money, in part at least, upon the faith of that signature being there.

Applying the doctrine of *Penny* v. *Innis*, it is difficult to see why the court did not say as in that case that the indorsement of the bill by James McKinley was a new drawing. Consistently with the case of *Penny* v. *Innis*, they should have said, in the language of Parke, B., "every indorser of a bill is a new drawer, and it is part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him." . . . . "It is urged that the defendant when he indorsed the bill had no property in it; but that is not necessary in order to render him liable to be sued upon the bill." This was the reasoning applied in the case of *Penny* v. *Innis*. It was not adopted by the House of Lords in this case. Lord Blackburn admitted that there might be an indorsement by a person not the holder

of the bill, who puts his name upon it to facilitate the transfer to a holder, and it is in this connection that he makes a reference to the law regarding avals. He seems to consider that the signature of James McKinley should be treated as that of an aval for the drawer. "Such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently." He does not say that this was the intention with which the signature was put there, and we may confidently assume that whatever else either James McKinley or Walker had in his mind, this was the last thing that either of them would have thought of. The applicability of *Penny* v. *Innis* is disposed of by the suggestion that "In *Penny* v. *Innis* it appeared that Innis (who as I think we must understand the facts) had agreed with the plaintiff to become inderser in the nature of an aval for Wilson, the drawer of the bill, who was about to transfer the bill to the plaintiff, did not actually write his name on the bill till after Wilson, the drawer, had written his, and it was decided that the order in which the names were written was immaterial."

Before this explanation was given there was no difficulty in understanding the case of *Penny* v. *Innis* or in applying the doctrine of the case. It was applied in the case of *Mathews* v. *Bloxome*. Joseph Bloxome had written his name on a blank bill stamp, intending to be surety to Mathew & Peake for Richard Bloxome, and the method apparently adopted by the parties was that of a draft by Mathews & Peake payable to their own order on Richard Bloxome as drawee, which was accepted. Joseph Bloxome was sued on his indorsement, and defended, as Innis did, in *Penny* v. *Innis*, and James McKinley's executor in *Steele* v. *McKinley* on the ground that he could not be an indorser, not being the payee. Lord Blackburn treated the case as being precisely the same as if Joseph Bloxome had put his name on the bill after it had been drawn and applied the doctrine of *Penny* v. *Innis*, which he understood to be that "a person who puts his name on the back of a bill, under circumstances like the present, may be treated as a new drawer,

inasmuch as every indorser of a bill is at all events in the position of a new drawer as far as guaranteeing payment." The defendant he ruled, had therefore made himself liable by his indorsement, either as the drawer of a bill payable to bearer, or according to the tenor and effect of the bill itself, as a bill payable to the plaintiff's order." Cockburn, C.J., considered the question of the defendant's liability as settled by the case of *Penny* v. *Innis*. "In that case it is laid down as a general proposition that every indorser may be taken as the drawer of a fresh bill, according to the tenor and effect of the bill on which he puts his indorsement. There a stranger—that is, a person not party to a bill—intervened and wrote his name on the back of the bill and he was held liable as a drawer, and the whole doctrine amounts to this, that a man who puts his name in this way, as indorser, although not in legal acceptance an indorser, does what an indorser does, he guarantees the payment by the acceptor at maturity. In that sense he does what a drawer does and so, although he cannot be an indorser, he may be treated as a drawer. And this is consistent with sound common sense and justice. Whether we look at the effect of the bill as a mercantile instrument or at the intention of the parties, the result is the same." It was sound sense and justice to hold Joseph Bloxome in this case liable as surety for his brother. It would also have been sound sense and justice to have held James McKinley liable to Walker as surety for his sons on the bill on which he put his name and procured the loan of £1,000, for the sons. But it was not law. It was law as established by the Exchequer Court in *Penny* v. *Innis* and the Queen's Bench in *Mathews* v. *Bloxome*, and it continued to be law till the House of Lords said it was not in *Steele* v. *McKinley*, by which the case of *Mathews* v. *Bloxome* is considered to have been overruled. How much of *Penny* v. *Innis* the House of Lords left standing, it is difficult to say. If anything of it is left we must be careful to note that the doctrine which it was supposed to have established does not apply to a promissory note. An attempt was made to so apply it in the case of *Gwinnell* v. *Her-*

bert, 5 Ad. & Ec. 436, where the note was made by Herbert Herbert, to William Gwinnell, the plaintiff and indorsed by Edward Herbert, the defendant. He received no notice of dishonour and it was contended that none was requisite, as he was himself a maker, according to the doctrine of *Penny* v. *Innis* that every indorser is a new drawer. The under sheriff directed the jury to this effect, but Lord Denman said this was all wrong. "The under sheriff had acted upon a misapplication of *Penny* v. *Innis*. The law there laid down as to the effect of an indorsement might be correct as to a bill of exchange, but does not apply to a promissory note." Patteson, J.: "There is no conflict between the cases on this subject. The whole question turns on the distinction between a bill and a note. On a bill each indorser is a new drawer as was stated in *Penny* v. *Innis*, but the drawer of a bill is liable only on default made by the acceptor. The maker of a note is liable in the first instance and if each indorser became a maker he would be also liable in the first instance. There is a difficulty, therefore, in the case of a note which does not exist in the case of a bill. Some confusion has arisen in many of the cases from not attending to the distinction between a bill and a note."

The Bills of Exchange Act in s. 56 (now 131) said that: "Where a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers." The question that presents itself is whether this section is intended to codify or amend the law, McLaren, J., takes it for granted that the corresponding section of the Imperial Act was framed in accordance with the doctrine laid down in *Steele* v. *McKinley*, Maclaren on Bills (2 ed.) 319, where it was held that a person who put his name on the back of the bill was not liable on the bill to the drawer." Both Lord Blackburn and Lord Watson lay it down in that case that the anomalous indorser is not liable to any but subsequent parties. Chief Justice Strong evidently differs from Maclaren, J., holding that since the passing of the Act the person who puts his

name on the back of a note or bill becomes liable to the payee, but he arrives at this conclusion by a route which it is difficult to follow. He considers that the section was not intended to enact new law but merely to declare and codify the law as it stood when the Act was passed: *Ayr American Plough Co.* v. *Wallace*, 21 S.C.C. 260. If this were the object of the section the consequence would be that the anomalous indorser, the defendant in the case then before the court, could not have been held liable to the plaintiff as he was not a subsequent party to the bill any more than McKinley, the defendant in the case of *Steele* v. *McKinley*, could be held liable to the drawer or payee in that case. If we accept the chief justice's conclusion as sound it will only be because we cannot agree with his reasons. The Act does not merely codify the law. There is no presumption that it does: per Lord Herschell in *Vagliano's Case*. It must be supposed to mean exactly what it says. It enacts that the person who signs otherwise than as a drawer or an acceptor incurs the liabilities of an indorser to a holder in due course, that is to any holder in due course. There is no reason for excluding from the benefit of this section the payee of the note simply because he is not a subsequent party to the bill or note. On the other hand, there are the best of reasons for reading the Act in such a manner as to correct the injustice that must have been occasioned in following the decision in *Steele* v. *McKinley*, and which must, under that case, be done in every instance where the facts are such as occurred in *Mathews* v. *Bloxome*, the "just and sensible" decision in which case, to use the words of Lord Cockburn, the House of Lords overruled. There can be no more reason for adding to this section the words "providing such holder is a subsequent party to the bill," than there was in *Vagliano's Case* for adding to the section, the words, "to the knowledge of the acceptor." In *Vagliano's Case* these words would have had to be added to the clause to reproduce the law as it stood before the Act. The House of Lords declined to add them. The words just suggested would have to be added to the clause

to reproduce the effect of *Steele* v. *McKinley*. There is no reason why they should be. It is far more probable that the Act was passed to correct the mistake made in that case and restore the principle of *Penny* v. *Innis* as it was understood by everybody until *Steele* v. *McKinley* was decided.

The case of *Jenkins* v. *Coomber* (1898), 2 Q.B. 168, which was followed by Boyd, C., in *Clappeton et al.* v. *Mutchmoor*, 30 O.R. 595, and by a Divisional Court in Ontario in *Canadian Bank of Commerce* v. *Perran*, 31 O.R. 116, is unfortunately opposed to this view. In this case the plaintiffs made a draft payable to their own order upon Arthur Coomber for fifty-seven pounds and the draft was accepted by the drawee; Alfred Coomber wrote his name on the back for the purpose of guaranteeing payment by the acceptor. The Court of Queen's Bench in England held that the statute did not impose upon Alfred Coomber the liabilities of an indorser to the plaintiffs because they were not holders in due course. They were not holders in due course because the statute defines such a holder to be one who takes a bill complete and regular upon the face of it and the indorsement in this case was not regular. It would be difficult to crowd into the same space more fallacies than those by means of which the court arrived at this conclusion. We may be certain that the proposition that the plaintiffs were not holders in due course would never have been arrived at except as a step towards the conclusion that Alfred Coomber could not be charged upon his indorsement. They certainly were holders in due course of the bill, whether they could charge Alfred Coomber upon his anomalous indorsement or not. It might well be that his indorsement was valueless but it is an altogether different thing to hold that in addition to being merely valueless it operated to prevent the holders who had given value for the bill, and against whom there were no equities of any kind from being holders in due course. They were certainly bona fide holders for value without notice of any defect of title. In fact there were no defects in the title to prevent their being holders in due course. The bill was complete and

regular upon the face of it—none the less so because there appeared on the back of it an indorsement which might be of no value and the worth or valuelessness of which was the very question to be decided. Moreover, as the question in controversy was whether the statute was meant to cure the irregularity in this indorsement by Alfred Coomber it seems illogical to invoke this very irregularity as the reason why the statute should not apply. On the whole the decision in *Jenkins* v. *Coomber* is very unsatisfactory and it is fortunate that it has not been followed in the latest case on the subject in this country.

Robinson v. *Mann*, 31 S.C.C. 484, it is true, is not precisely the same case as *Jenkins* v. *Coomber*. It was the case of a promissory note made by W. Mann & Co., to the Molsons Bank and indorsed by George T. Mann. We have seen that there is a difficulty in applying the doctrine of *Penny* v. *Innis* to the case of a promissory note which does not exist in the case of a bill of exchange. Yet the Supreme Court held that George T. Mann was liable on his indorsement to the Molsons Bank although he was neither the payee nor a subsequent holder. He was an anomalous indorser and could not be held liable except by virtue of the statute. Strong, C.J., speaking for the Supreme Court, held that the statute made him liable to the bank, the latter being the holder in due course, and the defendant having signed the bill otherwise than as a drawer or acceptor. This is the clear common sense of the matter and the same principle should have governed the case of *Jenkins* v. *Coomber*. It is of course still open to the Supreme Court to distinguish between the cases and say that the Molsons Bank were the holders of this note in due course because they were the payees while the plaintiffs in *Jenkins* v. *Coomber* were not holders in due course not being the payees but the transferees of a note bearing an anomalous indorsement. But the distinction is unsubstantial. The presence of the anomalous indorsement did not vitiate the title of the Molsons Bank, the payees, in *Robinson* v. *Mann*, and it should not have been held to vitiate the title of the plaintiffs indorsees, in *Jenkins* v. *Coomber*. The case of *Robinson* v.

Mann has been followed by a Divisional Court in Ontario and in *Slater* v. *Laboree;* 10 O.L.R. 648, and it is, therefore, greatly to be hoped that in this country it will be held that the statute applies to all cases of anomalous indorsements, whether of bills or of notes and whether the operation is invoked in favour of one who is a party to the instrument at the time the indorsement is made or of one who has become so by a subsequent negotiation. By so applying the statute the obvious intention of the parties will be carried out and injustice such as was perpetrated by the decisions in *Steele* v. *McKinley* and *Jenkins* v. *Coomber* will for the future be obviated.

B. RUSSELL.

Halifax, N.S.

While the form of oath taken in Scottish Law Courts is probably the simplest, the quaintest still in use is that taken by the High Court judges in the Isle of Man the terms of which are as follows:—"By this Book and the contents thereof, and by the wonderful works that God hath miraculously wrought in the heaven above and the earth beneath in six days and six nights, I do swear that I will, without respect of favour and friendship, loss or gain, consanguinity or affinity, envy or malice, execute the laws of this Isle justly as between party and party as indifferently as the herring back bone doth lie in the midst of the fish. So help me God and the contents of this Book."

REVIEW OF CURRENT ENGLISH CASES.

WILL—DESTRUCTION OF WILL IN TESTATOR'S PRESENCE WITHOUT HIS AUTHORITY—SUBSEQUENT RATIFICATION INADMISSIBLE—WORDS MISSING FROM WILL—PROBATE.

Gill v. *Gill* (1909) P. 157 was an action for a grant of probate of a will which had been torn in pieces in the presence of the testator, but without his authority; the pieces had been kept and again put together but some few words were missing. Deane, J., granted probate with a memorandum annexed stating what the missing words were proved to have been. Notwithstanding the tearing of the will in pieces, the testator treated and referred to it as still existing, and the learned judge states that no subsequent ratification of an act done originally without authority would be effectual; but that it would still be necessary for the testator to formally revoke the will in the manner provided for by the Wills Act if he wished to revoke it.

CHARITABLE BEQUEST—"CHARITABLE, RELIGIOUS OR OTHER OBJECTS IN CONNECTION WITH THE ROMAN CATHOLIC FAITH"—UNCERTAINTY.

In re Davidson, Minty v. *Bourne* (1909) 1 Ch. 567. By his will a testator bequeathed his residuary estate "in trust for the Roman Catholic Archbishop of Westminister for the time being, to be distributed and given by him at his absolute discretion between such charitable, religious or other societies, institutions, persons or objects in connection with the Roman Catholic faith in England as he in his absolute discretion shall think fit." On a summary application to Eady, J., he held the gift was not a good charitable gift and was void for uncertainty. The Court of Appeal (Cozens-Hardy, M.R. and Farwell and Kennedy, L.JJ.) considered that under the words giving the trustee absolute discretion to distribute the fund "between such charitable, religious or other societies, persons or objects in connection with the Roman Catholic faith" it would be competent for the trustee to apply the fund to purposes neither religious nor charitable, and therefore the bequest failed for uncertainty, e.g., as Farwell, L.J., points out the money might be applied to a merely contem-

plative order of religious persons, which would not come within the legal definition of a "charity."

SETTLEMENT—CONSTRUCTION—ILLEGITIMATE CHILD — MARRIAGE WITH DECEASED SISTER'S HUSBAND.

Ebbern v. *Fowler* (1909) 1 Ch. 578 was an action for the construction of a settlement, made by a mother as to one-third of a fund in question upon trust to pay the dividends "unto Elizabeth Kinder (her daughter) wife of John Kinder during her life for her sole and separate use independently of the said John Kinder or any future husband . . . and after her death . . . in trust for the child or children of the said Elizabeth Kinder," etc. Elizabeth had, shortly before the date of the settlement, gone through the form of marriage with her deceased sister's husband, by whom she left one child of whom she was enceinte at the date of the settlement. The question was whether this child, a son and the plaintiff in the action, was entitled to take under the settlement, being illegitimate. Joyce, J., following *In re Shaw* (1894) 2 Ch. 573, held that he was not entitled to take; but the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Buckley, L.JJ.) overruled *In re Shaw* and held that he was entitled on the ground that it was apparent on the face of the deed that the settlor intended to treat the children of her daughter Elizabeth whether by John Kinder or not, as persons entitled to the benefit of the trust, and that the plaintiff was in law a person in esse at the date of the settlement, and was entitled to stand on the same footing as if he had been actually born at the date of the settlement.

MARRIAGE SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—GIFT FROM HUSBAND.

In re Ellis, Ellis v. *Ellis* (1909) 1 Ch. 618. The question for decision was whether a gift by husband to wife comes within the scope of a covenant in their marriage settlement by the wife to settle after acquired property. It was argued on the part of the wife, that such gifts were not within the covenant. Eady, J., came to the conclusion that there is no general rule of construction of covenants in marriage settlements to settle after acquired property, that a gift by the husband to the wife during coverture is to be excluded from such covenant, he therefore held that the gift in question was bound by the wife's covenant.

TRUSTEES—OPEN BRICKFIELD—IMPLIED POWER TO LET FROM YEAR TO YEAR—TENANT FOR LIFE AND REMAINDERMAN—ROYALTIES.

In re North, Garton v. *Cumberland* (1909) 1 Ch. 625. This was a summary application by trustees under a will for the purposes of determining the rights of beneficiaries. Part of the testator's consisted of an open brickfield which at the time of his death was being worked under a lease granted by him at a royalty. This was devised to the trustees upon trust "to pay the rents, issues and profits" to certain persons for their lives, with remainders over. The will contained a trust for sale on the death of the surviving tenant for life, and a direction that until sale the trustees should cause the real estate to be kept "in good and tenentable order and repair." The lease in existence at the testator's death expired in 1870 and thereafter the trustees let the field from year to year from 1871 to 1899 at a fixed minimum rent and royalties, and during this period they paid the minimum rent to the tenants for life, but accumulated the royalties, and retained them in their hands. The application was to determine the right to these royalties. On behalf of the remaindermen it was contended that the trustees had no power to lease, and that an application for leave to lease under the Settled Estates Act should have been made, in which case part of the royalties would have been ordered to be accumulated for the remaindermen. Eady, J., however held that the fact that the trustees were empowered to keep the real estate in good and tenantable repair gave them an implied power to lease the brickfield from year to year as they had done; but he held that according to the will the tenants for life were entitled to the rents, issues and profits and therefore they were entitled to all of the royalties which had been received and accumulated by the trustees.

WILL—TRUST FOR SALE—POWER TO POSTPONE—SHARE VESTED IN POSSESSION—RIGHT OF BENEFICIARY TO INSIST ON SALE.

In re Horsnaill, Womersley v. *Horsnaill* (1909) 1 Ch. 631. In this case land had been devised to trustees for sale, with a discretionary power of postponement, and the proceeds of the sale were settled in trust for various beneficiaries. The share of one of the beneficiaries had become vested in possession, and he claimed to be entitled to insist on the trustees proceeding to an immediate sale of the entirety, or to a conveyance of an undivided share in the land. But Eady, J., held that he had no such right.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—NON-COMPLETION AT APPOINTED DAY—UNTENABLE OBJECTION TO TITLE BY PURCHASER—DEFAULT OF PURCHASER.

In re Bayley-Worthington and Cohen (1909) 1 Ch. 648. By a contract for the sale of land it was provided that if the purchase should not be completed at the time appointed the purchaser should pay interest on the remainder of his purchase money at 5 per cent. per annum until paid. The purchaser took an objection to the title which Neville, J., sustained, but which the Court of Appeal and subsequently the House of Lords held to be untenable by reason whereof delay occurred in completion. On Sept. 4, 1907, the day after the decision of Neville, J., the purchaser paid the balance of his purchase money into a bank and gave notice to the vendors. Subsequently on Feb. 28, 1908, it was paid into court under order. The purchaser claimed to be relieved from paying any interest beyond that allowed by the bank for the period the money was in the bank; but Parker, J., held that the delay must be deemed to have been occasioned by himself, even though the objection raised by him was not unreasonable, and he was therefore bound to pay interest as provided by the contract at 5 per cent.

MINES—TENANTS IN COMMON—WORKING OF PART OF MINE BY ONE CO-OWNER—CONSTRUCTIVE POSSESSION—PRESUMPTION—TRESPASSER—REAL PROPERTY LIMITATION ACT, 1833 (3-4 WM. IV. C. 27) SS. 12, 34—(R.S.O. C. 133, SS. 11, 15.)

In *Glyn* v. *Howell* (1909) 1 Ch. 666, the defendant a tenant in common of a coal mine who was entitled to an undivided one-sixth share had been in possession of a part of the mine for twelve years under licenses from the owners of other four-sixths, and had worked the coal for an area of about two acres. The action was brought by the owners of the remaining one-sixth share for an account of the profits realized by the defendant from the mine and the plaintiffs also claimed a declaration of their title. The mine consisted of 92 acres and the defendant claimed that his possession of the two acres was a constructive possession of the whole mine and that the plaintiffs were therefore bound by the Statute of Limitations. But Eve, J., held that the defendant's possession of the two acres though sufficient to bar the plaintiffs in that part of the mine, was not a constructive possession of the rest of the mine, and he therefore granted the plaintiffs an account except as to the coal taken from the two acres limited to six years before action brought.

RESTRICTIVE COVENANT—COVENANT FOR "HIMSELF, HIS EXECUTORS, ADMINISTRATORS AND ASSIGNS"—BREACH BY ASSIGN—COVENANT RUNNING WITH LAND CONTINUING BREACH.

Powell v. *Heneslay* (1900) 1 Ch. 680. This was an action to restrain the breach of a covenant running with the land. The covenant was contained in a deed of conveyance of part of a building estate, and thereby the defendant (the grantee) covenanted "for himself, his executors, administrators and assigns" with one Ball (the owner of the estate) his heirs and assigns that he would (inter alia) erect on the land conveyed priv te residences only with suitable outbuildings in the rear, and that before commencement of the erection of buildings he would submit plans to the covenantee. The defendant subsequently demised his land to lessees subject to the covenant above mentioned and his lessees entered into similar covenants with him. Ball had conveyed to Bond and the lessees of the defendant commenced to build a house without having submitted plans to Bond or obtained his approval and they also erected a water closet attached to the front of the house and not accessible from the inside of the house. Bond took objection and the lessees stopped building, subsequently the trustee in bankruptcy of the lessees disclaimed the lease and the defendant reentered on the land with the unfinished house upon it. Bond then conveyed his land to the plaintiff who commenced this action to compel the defendant to remove the building, alleging depreciation in the value of the plaintiff's property by reason of the proximity of the unsightly and unfinished house being visible from all the principal rooms of the plaintiff's residence. Eve, J., who tried the action, held that the covenant to submit plans involved a negative covenant that no building should be commenced until plans had been submitted and approved by the covenantee, his heirs and assigns, and that the erection of the house was a breach of the covenant, also that the erection of the water closet was an outbuilding within the meaning of the covenant and that its erection in the circumstances was also a breach of the covenant. But he held that the defendant was not liable to pull down the building, (1) because there was no continuing breach of the covenant, it having been broken once and for all when the house was erected; (2) because the breach was committed not by defendant but by his assigns and the defendant had not by his conduct rendered himself personally liable for the violation of the covenant, and (3) because the words in the covenant "for himself, his executors, administrators and assigns" were used to indicate that the covenant ran

with the land, but not to impose on the covenantor liability for the acts of his assigns. He further was of the opinion that strictly under the covenant it was the defendant's duty to submit plans, but that in an action founded on that breach the damages would only be nominal. The action was therefore dismissed with costs. We may note that with regard to the form of the covenant the learned judge says: "The form of covenant is a covenant by the purchaser for himself, his executors, administrators and assigns that he will not do a particular act. Is such a covenant —as the plaintiff argues it is—equivalent to a covenant by the purchaser for himself, his executors, administrators and assigns, that he, his executors, administrators and assigns will or will not do the particular act? I do not think it is," but he goes on to say that he could find no authority upon the point.

TRUSTEES—GIFT TO PERSONS UPON TRUST WITHOUT ADDING "AND THEIR TERMS"—INABILITY OF EXECUTOR OF LAST SURVIVING TRUSTEE TO EXECUTE TRUST — CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44-45 VICT. C. 41) S. 30—(R.S.O. C. 127, SS. 3, 4.

In re Crunden and Meux (1909) 1 Ch. 690. This was an application under the Vendors & Purchasers Act for the purpose of determining whether the vendors were competent to convey the land in question. The property was part of the freehold estate of a testator who died in 1883, and by his will he had devised it to three trustees without adding the words "and their heirs" upon trust for sale, as if they were absolute owners; all of the trustees were dead, and the vendors were the executors of the last surviving trustee. Parker, J., held that for want of the words "and their heirs" in the will the executors of the last surviving trustee were not competent to execute the trust, and were therefore not able to make title.

INSURANCE (MARINE) — "PIRATES," MEANING OF IN POLICY — SEIZURE OF GOODS BY POLITICAL MALCONTENTS—"WARRANTED FREE OF CAPTURE, SEIZURE AND DETENTION, PIRACY EXCEPTED" —EJUSDEM GENERIS.

Bolivia v. *Indemnity Mutual Marine Assurance Co.* (1909) 1 K.B. 785. This was an action on a policy of marine insurance on goods. The goods were shipped on a vessel for carriage from a place at the mouth of the Amazon to a place far inland upon a tributary of a tributary of that river, at a place in Bolivia

on the boundary between that country and Brazil. Among the risks insured against was "piracy" and "all other perils," but the policy contained the following clause:—"Warranted free of capture, seizure and detention and the consequences thereof, or any attempt thereat, piracy excepted, and also from the consequences of risks, civil commotions, hostilities or warlike operations, whether before or after declaration of war." At the place of delivery certain malcontents, mostly Brazilians, were desirous that the authority of Bolivia should not be established in the territory and had fitted out armed vessels which ascended the Amazon for the purpose of resisting the Bolivian troops and establishing a republic. The goods in question were intended for the Bolivian Government and were seized by the ships of the malcontents. On the part of the plaintiff it was contended that this was an act of "piracy" and therefore within the losses insured against, and, if not, it would be included under the words "all other perils" according to the ejusdem generis rule of construction. Pickford J., who tried the action, held that even if the seizure of the goods came within the legal definition of piracy for some purposes, the word "pirates" in the policy must nevertheless be construed according to its popular sense, and that in that sense it meant persons who plunder indiscriminately for private gain, and not persons who are operating against the property of a particular state for political purposes, and therefore he held the loss was not covered by the policy. The Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) affirmed his decision that the act in question was not piracy but rather came within the term of civil commotions which were expressly excepted, and they also held that the ejusdem generis rule could not be invoked so as to bring within the losses insured against any of those which by the terms of the policy were expressly excepted.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] WENGER *v.* LAMONT. [May 6.

Appeal—Amount in controversy—Reference to assess damages—Final judgment.

In 1905, L. and others purchased from W. his creameries on the faith of a statement purporting to be made up from the books and shewing a greater output for the years 1904-5 was equal to that of 1903. Having discovered that this statement was untrue, they brought action for rescission of the contract to purchase, and damages for the loss in operating during 1906. The judgment at the trial dismissing the action was affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment, directed that a verdict be entered for plaintiffs, and ordered a reference to assess the damages. On appeal to the Supreme Court of Canada,

Held, GIROUARD, J., dissenting, that as it cannot be ascertained from the record what the amount in controversy on the appeal was, or whether or not it is within the appealable limit, the appeal does not lie.

Per IDINGTON, J.:—The judgment appealed against is not a final judgment.

Per GIROUARD, J., dissenting:—It is established by the evidence at the trial, published on the record, and admitted by the respective counsel for the parties, that the amount in dispute exceeds $1,000. The court, therefore, has jurisdiction to hear the appeal.

Appeal dismissed with costs.

Watson, K.C., for appellant. *J. G. Wallace*, K.C., for respondents.

Sask.] RESER *v.* YATES. [April 5.

Sale of lands—Conditions—Deposit of price—Compliance with instructions—Vendor refusing to complete—Broker's commission.

A broker instructed to sell lands for a price to be deposited in a bank pending arrival of clear title, procured a purchaser who

made the deposit to his own credit without appropriating it to any special purpose. On refusal by the vendor to complete the bargain, the broker sued him for a commission or remuneration for the services rendered.

Held, reversing the judgment appealed from (1 Sask. L.R. 247), IDINGTON, J., dissenting, that there had not been such compliance with the terms of the instructions as would entitle the broker to recover commission or remuneration for his services in procuring a purchaser. Appeal allowed with costs.

Ewart, K.C., for appellant. *G. F. Henderson*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] RE WILSON *v.* DURHAM. [April 28.

Division Courts—Order for committal of judgment debtor—Power to rescind—Mandamus.

A judge of a Division Court has no power, under any of the provisions of the Division Courts Act, or otherwise, to rescind an order made by him under s. 247 of the Act committing a judgment debtor to gaol, on the ground that it appeared to the judge that the debtor had incurred the debt for which judgment had been recovered, by means of fraud. A mandamus to the judge to hear an application to rescind was refused.

Monahan, for judgment debtor. *C. A. Moss*, for plaintiff.

Meredith, C.J.C.P.] [April 28.

TWIN CITY OIL CO. *v.* CHRISTIE.

Company — Shares — Application — Allotment — Directors — Delegation of authority—Withdrawal of application—By-laws—Number of directors.

At a general meeting of the shareholders of the plaintiff company, incorporated under the Ontario Companies Act, it was resolved that a board of three directors should be elected to manage the affairs of the company, and three of the five provisional directors were elected as directors. The three directors

met and adopted by-laws, one of which provided that the affairs of the company should be managed by a board of five directors, and another provided for the terms upon which stock subscriptions should be received. About ten months later, a document in the form of an agreement to purchase stock was signed by the plaintiff and the words "accepted by" written at the foot over the signature of one of the three directors, who had been elected president and general manager; and at a meeting of the directors a resolution was passed giving to the president full power to deal with the defendant's "application." On the following day the president wrote to the defendant notifying him that calls had been made upon the shares subscribed for by him, "which have this day been allotted to you by by-law of this company." Nothing further was done in the way of allotting shares to the defendant, and his name did not appear in the register of shareholders. About two weeks after the receipt of the president's letter, the defendant wrote to the company withdrawing and cancelling his application.

Held, in an action for the amount of calls alleged to be due, that the directors had no power to delegate to the president their authority as to the allotment of shares or their authority to accept the offer of the defendant; there was, therefore, no valid allotment, and the withdrawal was effectual.

Semble, that the fact that the by-laws passed by the directors provided for a board of five directors, while a board of only three assumed to manage the affairs of the company, would be a bar to the plaintiff's success in the action.

DuVernet, K.C., for plaintiffs. *McAndrew*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] ANGLE *v.* MUSGRAVE. [May 1.

Ejectment—Mesne profits—Expenditures—Set-off—Evidence of title.

In an action claiming possession of land and mense profits plaintiff as part of his title put in evidence a certified copy of the last will of G. J. B. executed in Montreal under the hand and seal of two notaries and certified by the registrar.

Held, receivable under the Witnesses and Evidence Act, R.S.N.S. (1900) c. 163.

Plaintiff's title being established,

Held, that he was entitled to the order for possession and for mesne profits as claimed, but that defendant, in the absence of evidence to the contrary was entitled to be recouped expenditures upon the property, alleged to have been made under authority of the owner, but that as the only evidence in support of his claim was his own, it should be received with caution.

McMillan, for plaintiff. *Archibald*, for defendant.

Longley, J.] LAFFIN *v.* ELLSWORTH. [May 7.

Trespass—Evidence of possession—Admissions—Entry.

Where the deed from a man in possession of land to another is clearly established the disposition of the court is to be satisfied with very slight evidence of possession.

It appeared that defendants, sons of the grantor, up to within a year or two before action fenced up to the line of the land in dispute, which had been conveyed by their father to the parties under whom plaintiffs claimed, leaving the latter land outside of their holding and unfenced. Also that both verbally and in writing they had made admissions inconsistent with ownership of the land in dispute.

Held, 1. Distinguishing the case from *Cunard* v. *Irvine*, 2 N.S.R. 31, that in the absence of evidence of adverse possession by defendants, the lot in dispute having been unfenced and unoccupied since the date of the deed under which plaintiffs claimed, plaintiffs were entitled to recover.

2. Drawing the attention of one of the defendants to a violation of a right of way reserved in the deed and the denial of his right to interfere with the terms of the deed or to interfere with the enjoyment of plaintiffs' possession of the lot could be regarded as an entry.

Carroll, for plaintiff. *Cameron*, for defendant.

Longley, J.] [May 7.

ST. MARY'S BENEVOLENT SOCIETY *v.* ALBEE.

Landlord and tenant—Construction of lease—Provision as to payment of taxes.

Plaintiff under its act of incorporation was entitled to exemption from taxation in respect of all parts of its building used

exclusively for the purposes of the society, but for 1907 was assessed the sum of $1,000 and paid taxes in respect of such assessment upon a portion of the building rented for various purposes as a public hall. In September, 1907, plaintiffs leased the latter portion of the building to defendants for a rental of $2,500 per annum, payable monthly. The lease contained a clause whereby the lessee agreed to pay "all license fees, taxes or other rates or assessments which may be payable to the city of H. or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees . . . the lessor agreeing to continue to pay as heretofore all the regular and ordinary taxes, etc., levied upon or with respect to said premises." After the making of the lease the city increased the assessment upon the hall to $10,000 and plaintiffs sought to recover the difference between the amount paid upon that and the previous assessment.

Held, 1. The 1908 assessment was a regular assessment within the plain meaning of the covenant in the lease for which plaintiff was liable and could not be included in the special provisions for license fees, etc., levied or imposed by reason of the manner in which the premises were occupied by the lessees.

2. The principle adopted by the chief assessor when he increased the taxes in 1908 because the defendants were paying a larger rental and the plaintiffs were in receipt of a larger revenue was inconsistent with the law governing the imposition of assessments (City Charter, s. 343) which requires all real property in the city to be valued by the assessors at the cash value at the time of valuation so far as the same can be ascertained.

O'Connor, for plaintiff. *Mellish*, K.C., for defendants.

Longley, J.] GREENWELL *v.* MCKAY. [May 7.

Landlord and tenant—Distress—Abandonment of and fresh levy —Assignment by tenant to official assignee—Effect of.

Defendant issued a warrant of distress against the goods of his tenant, B., before any rent was due, and under this warrant defendant's bailiff entered and took possession of the premises.

On the day following B. made an assignment to plaintiff, official assignee for the county, under the provisions of the Nova Scotia Assignments Act. Defendant thereupon abandoned his levy and notified plaintiff to come and take possession, which he did. Defendant then issued a new warrant for one month's

rent, which had become due in the meantime, and also, for three months' rent in advance under a clause in the lease providing that in the event of the lessee making an assignment the current rent and the next three months' rent should at once become due and payable.

Held, 1. Except as to one month's rent which was due when plaintiff came to take possession, the second warrant was not effective against the assignee and that the latter was entitled to recover the value of the goods.

2. The valuation by sworn appraisers was a fairer guide than the proceeds at a forced sale.

W. R. Tobin, for plaintiff. *Carroll*, for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] ATKIN *v.* C. P. R. Co. [May 5.

Railway—Obligation to fence right of way—Animal getting on track through open gate at farm crossing—Nonsuit.

If a gate in the fence at a farm crossing of a railway is left open by the person for whose use the crossing is provided or any of his servants or by a stranger or by any person other than an employee of the company, the company is relieved by s. 295 of the Railway Act, R.S.C. 1906, c. 37, from the liability imposed by sub-s. 4 of s. 294 to compensate the owner for the loss of an animal at large without his negligence or wilful act or omission getting upon the railway track through such gate and killed by a train. *Fluelling* v. *Grand Trunk Ry. Co.*, 6 Can. Ry. Cases 47, followed.

Per PERDUE, J.A.:—Some negligence or breach of statutory duty on the part of the railway company in respect of such gate would have to be shewn to render the company liable in such a case.

Per HOWELL, C.J.A.:—If railway fences or gates are torn down or get open by the action of the elements or by some accident or defect not caused by the act of man, and an animal thereby gets upon the track and is killed, none of the exceptions in s. 295 would apply and the company would be liable under sub-s. 4 of s. 294.

Nonsuit ordered, reserving right to plaintiff to bring another action.

O'Connor, for plaintiff. *Curle*, for defendants.

Full Court.] HARDING *v.* JOHNSTON. [May 5.

Lien on horse for stabling and feed.

A livery stable keeper has no lien on a horse for its stabling and keep as against the real owner, when the horse was stolen and placed with him by the thief.

Sec. 2 of the Stable Keepers Act, R.S.M. 1902, c. 159, which gives a livery stable keeper a lien on animals for stabling and feeding them and the same rights and privileges for exercising and enforcing such lien as hotel keepers may have or possess in virtue of the Hotel Keepers Act, R.S.M. 1902, c. 75, does not give the livery stable keeper the same right of lien which a hotel keeper has at common law in respect of goods or animals left in his charge by a guest who may have stolen the same, as the latter Act in its terms gives only a lien on the property of persons who may be indebted to the hotel keeper for board or lodging, whatever may be his rights independently of the Act.

Foley, for plaintiff. *McLeod*, for defendant.

Full Court.] VANDERWOORT *v.* HALL. [May 17.

Vendors and purchasers—Specific performance—Delivery of deed in escrow—Part performance—Statute of Frauds.

Appeal from judgment of CAMERON, J. noted ante, p. 175, dismissed with costs.

Full Court.] [May 17.

BRANDON STEAM LAUNDRY CO. *v.* HANNA.

Vendor and purchaser—Agreement for sale of land—Specific performance—Incumbrances.

Appeal from judgment of MATHERS, J., noted ante, p. 88, dismissed with costs.

Full Court.] [May 19.

DECARIE MANUFACTURING CO. *v.* CITY OF WINNIPEG.

Practice—Interrogatories—Order for further particulars.

The plaintiffs' claim was for the price of an incinerating machine bought by the defendants who refused payment on the

ground that the machine would not do the work contracted for. In preparing for trial the plaintiffs, believing it to be necessary to procure information as to the quantities of the different classes of refuse to be consumed by the machine, delivered interrogatories, the answers to which did not satisfy plaintiffs. On appeal to this court from the order of MATHERS, J., sustaining an order of the referee dismissing the plaintiffs' application for further details of information to be given by defendants in answer to the interrogatories.

Held, per HOWELL, C.J.A., and RICHARDS, J.A., that plaintiffs were not entitled on the appeal to an order requiring the city to furnish estimates or opinions of its officers as to the quantity of manure produced throughout the city, although such officers had means of forming such opinions.

Per PERDUE and CAMERON, JJ.A., that such information should be furnished.

The court being equally divided, the appeal was dismissed without costs.

Aikins, K.C., and *Wilson*, K.C., for plaintiffs. *T. A. Hunt*, and *Auld*, for defendants.

Full Court.] ST. VITAL *v.* MAGER. [May 21.

Highway—Width of great highways in Manitoba—R.S.C. 1906, *c.* 19, *s.* 9—*Survey of road.*

Appeal from judgment of MACDONALD, J., noted vol. 44, p. 746, dismissed with costs.

KING'S BENCH.

Mathers, J.] [May 5.

IN RE IDEAL HOUSE FURNISHINGS AND CITY OF WINNIPEG.

Winnipeg charter—Business tax—Charge on goods in premises for business tax imposed—Distress—Winding-up—Liquidator—Assessments, when taken to be made—Taxes when due—Mistake in name of party assessed.

1. A liquidator appointed to wind up a company, under chapter 144 of the R.S.C. 1906, is not an assignee for the benefit of creditors within the meaning of s. 382 of the Winnipeg charter, 1 and 2 Edw. VII, c. 77, so that there is no priority

under that section in favour of the city for the business tax imposed upon the company as against other debts.

2. Notwithstanding s. 387 of the charter, taxes imposed by the city are not due and payable so as to entitle the city to sue for them until after the preparation of the tax roll. *Chamberlain* v. *Turner*, 31 U.C.C.P. 460, followed.

3. The assessment for the business tax can be deemed to be made only after notice thereof has been given. *Devanney* v. *Dorr*, 4 O.R. 206, and if, at that time, the company assessed is no longer in possession of the premises and the goods, though still on the premises, are in the hands of a purchaser from the liquidator, there is nothing in the charter which preserves to the city the lien on the goods for the taxes created by s. 313, for that section only gives the city a first charge during the occupancy on all goods in the premises for which the occupant has been assessed.

4. The statutory right given to the city by s. 369 to distrain for such taxes upon any goods and chattels found on the premises in respect of which the taxes have been levied, although such goods and chattels may be the property, and in the possession of, any other occupant of the premises, is not equivalent to a lien or charge on the goods for such taxes; and, when the liquidator of a company assessed for business tax had, prior to the assessment, given up the occupancy of the premises and sold the goods therein, it was held that the city had no right to be paid the taxes in full out of the funds in the hands of the liquidator, but had the right to rank with other creditors of the company for the same under s. 328B. added to the charter by the Act of 1907.

5. Taxes imposed before the winding-up of a company has commenced can only rank as ordinary debts in the absence of any statutory lien or charge, but taxes imposed after the commencement of the winding-up must be paid in full, as part of the expenses of the winding-up, if the liquidator has remained in possession and such possession has been "a beneficial occupation." *In re National Arms Co.*, 28 Ch.D. 474.

6. The assessment of the company under the name "Ideal Furniture Company" instead of "Ideal House Furnishers, Limited" was sufficient under the circumstances.

Booth v. *Raymond*, 61 N.E.R. 129, followed.

Dennistoun, K.C., for liquidator. *Hoskin*, K.C., for creditors. *Hunt*, for city.

Mathers, J.] REX EX REL. TUTTLE *v.* QUESNEL. [May 7.

Quo warranto—Qualification of relator—Relator put forward by real prosecutor.

An application for leave to exhibit an information by way of quo warranto to unseat a person as school trustee should be dismissed if the relator is a person not really interested in the matter complained of but merely put forward as a nominal relator by the real prosecutor because of the latter's want of qualification to be such relator. Shortt on Informations, p. 155; *Rex* v. *Dawes*, 4 Burr. 2120; *King* v. *Parry*, 6 A. & E. 810, and *Reg ex rel. Stuart* v. *Standish*, 6 O.R. 408, followed.

A member of the board who voted for payment of the account of a brother member for wood supplied for the school would not be qualified to be relator in proceedings to unseat the latter by reason of such payment.

Curran, for applicant. *F. M. Burbidge*, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] PIPER *v.* BURNETT. [April 29.

Practice—Security for costs of appeal—Order LVIII, r. 15a—Discretion.

Held, on appeal (see p. 336) that the order made was within the discretion of the judge below, and should not be interfered with. *Ward* v. *Clark* (1896) 4 B.C. 501 overruled.

Hannington, for appellant. *Woods*, for respondent.

Full C[illegible] [April 29.

IMPERIAL TIMBER & TRADING CO. *v.* HENDERSON.

Ship—Mortgage—Registration — Priority — Right of execution creditor against holder of an unregistered mortgage.

Ships being specially exempted from the operation of the Bills of Sale Acts, and there being no provision in the Merchants Shipping Act penalizing neglect to register a mortgage against a ship, an execution creditor cannot seize and sell in priority to an unregistered mortgage.

Taylor, K.C., for appellant. *Craig*, for respondent.

SUPREME COURT.

Clement, J.] WHITLOW *v.* STIMSON. [May 6.

Mortgage—Deed as security—Mortgagee or owner—Redemption —Evidence—Corroboration.

Held, in order to convince the court that a deed absolute in form was, in fact, delivered to and accepted by the grantee as a mortgage security merely, the evidence must be so positive and cogent as to clear up all doubts but that the grantee held the property as mortgagee only and not as owner in fee beneficially entitled, particularly when the claim is to be made good against the devisee of the grantee after the grantee's death.

MacNeill, K.C., for plaintiff. *Sir C. H. Tupper,* K.C., for defendant.

Clement, J.] LAW *v.* MUMFORD. [May 6.

Attachment—Issue—Mechanics' lien—Object of fund.

Held, under the Mechanics' Lien Act and Amendments that a lien cannot be a charge upon the fund of money arising from the sale of ore but can only be a charge on the mine itself.

Quaere, whether ore severed but still lying on the mine property is part of the mine or not.

Griffin, for the plaintiff. *Hart-McHarg,* for defendant and assignees.

Clement, J.] LAW *v.* MUMFORD. [May 6.

Mechanics' lien—Charge against a mine—Assignment of proceeds of ore extracted—Mechanics' Lien Act, Amendment Act, 1900, *s.* 12.

On an application for summary disposition, by consent, under s. 15 of the Attachment of Debts Act, 1904, of the claims of certain parties to a fund paid into court under an attaching order,

Held, that a lien upon a mine, as provided in s. 8 of the Mechanics' Lien Act, R.S.B.S. 1897, c. 132 (as enacted by s. 12, c. 20, 1900) refers to the mine itself and not to a fund arising from ore extracted from the mine.

Griffin, for plaintiff. *McHarg,* for defendant and applicants.

Book Reviews.

The Law of Fire Insurance in Canada, with a complete analysis of the jurisprudence and of the statute law of the Dominion. By EDWARD ROBERT CAMERON, K.C., Registrar of the Supreme Court of Canada. Montreal: Wilson & Lafleur, law publishers, 17 and 19 St. James St. 1909.

Insurance men and those of the profession interested in insurance law owe a debt of pratitude to Mr. Cameron for a work which offers valuable, practical assistance to those who may be called upon to consider the rights of parties in connection with this subject.

In a very interesting preface the special difficulties confronting the practitioner are set forth. The statute law differs widely in the various provinces and the decision of one Province cited in another necessitates a careful consideration and comparison of the language used by the legislature in the two provinces. Little assistance moreover can owing to various circumstances be obtained either from English or American cases. The author has therefore attempted only to expound the law of fire insurance as determined by the decision of the Canadian courts, citing English and American cases where they illustrate such decisions. No table of contents is given. This is inconvenient, but can be remedied in a subsequent edition.

Chapter I. is introductory and sets forth the jurisdiction of the Federal Court, the other chapters deal with the following subjects:—The contract, insurable interest, the insured, waiver and estoppel, agency, warranties and conditions, statutory conditions, mutual insurance, Quebec Insurance Act.

Even a hasty review of the incongruities and anomalies which are pointed out emphasize, as the learned author says, the desirability of having some uniform legislative enactment which shall control the relationship between the insurer and the insured, and almost warrants his contention that the law on this subject should be codified in the same as that applicable to bills of exchange and promissory notes.

The time limit on Actions, being a treatise on the Statute of Limitations. By JOHN M. LIGHTWOOD, M.A., Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, law publishers. 1909.

This is one of the books of the day, gathering together in convenient form scattered material as to limitation of actions. We regret that that part applicable to the doctrine of laches is disappointingly brief.

This work is founded in a less important volume on the possession of land, published in 1894. The author now fills in the outline there suggested including other statutes of limitation. For the use of the practitioner in this Dominion it is necessary to remember the points of difference in legislation here and in England.

The contents of the book may be summarized as follows:—Land and rent charges, money charged on land, judgment and legacies, arrears of dower, rent and interest, actions of contract and tort, claims in equity including a summary of the doctrine of laches, extension of period of limitations, stopping the statute, public authorities protection, criminal and crown proceedings and proceedings before magistrates. The appendix gives the statutes applicable to the subject. It is an excellent work reflecting great credit on both author and publishers.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Jeremiah H. Barry, of the City of Fredericton, N.B., to be a puisne judge of the Supreme Court for the Province of New Brunswick, vice Hon. Daniel Lionel Hannington, deceased. (June 5.)

Harrison A. McKeown, of the City of St. John, N.B., to be a puisne judge of the Supreme Court of the Province of New Brunswick, and a judge of the Court of Divorce and Matrimonial Causes in the said province, vice Hon. George Frederick Gregory, resigned. (June 5.)

J. Herbert Denton, of the City of Toronto, Ontario, Barrister-at-law, to be a junior judge of the County Court of the County of York, in the Province of Ontario. (June 5.)

C. J. Mickle, of the Town of Birtle, Manitoba, Barrister-at-law, to be County Court judge for the Northern Judicial District of the Province of Manitoba. (June 5.)

James F. Maclean, of Yorkton, Saskatchewan, Barrister-at-law, to be judge of the District Court of the Judicial District of Battleford in the Province of Saskatchewan. (June 5.)

George M. Rogers, of the City of Peterborough, Ontario, Barrister-at-law, to be junior judge of the County Court of the United Counties of Northumberland and Durham, in the Province of Ontario, vice His Honour J. Ketchum, deceased. (June 5.)

Clarence Russell Fitch, of the Village of Stouffville, Ontario, Barrister-at-law, to be judge of the District Court of the Provisional Judicial District of Rainy River, in the Province of Ontario. (June 5.)