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RIGHTS OF PARENTS TO THE CUSTODY OF MINOR CHILDREN.

Exception must be taken to the dictum of Judge Reynolds of the Circuit Court of the City of St. Louis, Missouri, to the effect that, other things being equal, a mother has just as much right as a father to the custody of a minor child. The mother claimed from the father the custody of their child, who was of what the law calls "tender years." The wife had left her husband without cause, and had taken the child with her.

Every lawyer is aware that by the common law the father has, subject to some well understood exceptions, a paramount right to the custody of his child, and this right has always been recognized and none of the statutory enactments for the benefit of married women have affected the principle that the father, as against the mother and the whole world, has the primary right to the care, control and education of his own offspring.

It is only where by improper or profligate habits a father has rendered himself unfit to have the custody of the child that he can be deprived of such custody. The tendency to weaken the supremacy of the father, which has exhibited itself of late years, however desirable in exceptional cases, is fraught with danger to the stability of the family as an institution. There are, of course, cases where neglected children must be legally protected The Children's Protection Act of Ontario, 1897, consolidating the law on the subject, contains ample provisions by which Children's Aid Societies may obtain the custody of the children of immoral or vicious parents.

But the view that, on some sentimental ground, a father should be deprived of the custody of his child, is really pernicious inasmuch as it tends to disrupt the family, and ignores the re-

sponsibility of the father for the maintenance, care and education of his offspring. This view is engendered by that spirit of "paternalism" which socialistic theorists would substitute for the stern, but noble, code of individual duty. To relieve a father from the obligation of supporting his child, and to make the latter, as it were, the "ward of the state" is a mistaken policy. Whilst it has been laid down that "the interests of the child" must be the guide to the judge in awarding the custody of the infant, the law rightly assumes that in the vast majority of cases the father will have at heart "the interests of his child." The duty cast upon him of supporting his family must accompany his right to the control and custody of his children. As on him rather than on his wife is cast the obligation to maintain the children, so must he have the primary right to their custody. We must, therefore, entirely dissent from the statement as to the law on this subject in the judgment referred to, and also record a note of warning against anything which may tend unduly to weaken family ties and responsibilities.

A protest against legislation of the tendency above referred to is given in a recent issue of the *Spectator*, and from a source which merits attention as it appears in the letter of a workingman published in that excellent periodical. After exposing the objectionable nature of the socialistic fad of feeding school children he makes some general observations worth recording. "The fact that our children are altogether dependent upon us is an extra incentive to effort and we are as a consequence better workmen and better citizens in every way. If the responsibility attendant upon the maintaining of children were removed slackness in every direction would be the inevitable result. Having had to provide for a family has been many a man's salvation. . . . I wish my children to be my own, not partly mine and partly the state's." He then refers to another socialistic fad, the old age pension and says: "Nothing better fits a man for leading a useful life than a sense of personal responsibility, and if that be removed demoralization quickly follows. . . . If only the working classes could be persuaded to do their own thinking

instead of listening to the clap-trap of irresponsible politicians there would be a change for the better. But so long as men are content to accept a ready-made political creed because it is easier than honestly thinking out one, the loud-mouthed clamour for such measures will continue."

The Chief Justice of the Common Pleas Division of the High Court for Ontario is reported in the public press as having declared in commenting on a certain order that it was useless "except as shewing the absolute rottenness of our judicial system." The reference was doubtless to that part of our judicial system which deals with questions of practice. We scarcely think that the report can correctly state what fell from the learned Chief Justice, for that very able judge would doubtless agree that it is a grave matter for him to cast wholesale contumely on our judicial system. If it is really "rotten" we would respectfully suggest that it would be more to the point for the Chief Justice to make an earnest effort to amend it either by representations to the Attorney-General, if the aid of the Legislature is required; or, as what was under discussion was a question of practice, by getting the judges together and passing some more rules, or replacing the "rotten" ones with sound material. It must be remembered that the judges are responsible for the Rules which regulate matters of practice and have the right at any time, and ought, from time to time, to make any necessary changes, to correct any faults and simplify procedure and so lessen cost of litigation. They have ample powers in the premises.

We most heartily congratulate the Chief Justice of Ontario upon the honour which has recently been conferred upon him. Not only is the position entitled to the distinction, but the profession will be pleased also that it should fall upon Sir Charles Moss, its most courteous and worthy occupant.

ONTARIO BAR ASSOCIATION.

Arrangements have been made by the executive of the Ontario Bar Association for a convention of the legal profession to be held at Osgoode Hall on the 29th inst. at 10 a.m. It is proposed to have a discussion on general matters of law reform; the administration of criminal law; the extension of the jurisdiction of inferior courts, and other matters of interest to the profession, who are invited to send in writing to the secretary No. 9 Toronto St., any views they may have on matters affecting the welfare of the profession.

The objects of the Association are: "To facilitate the administration of justice, to promote reform in the law and in procedure, to uphold the honour and dignity of the profession, to bring about united action by the profession, and to encourage interchange of ideas and social intercourse among the members of the profession in Ontario."

We are glad of this movement, and it is all the more necessary in these days when politicians are endeavouring for selfish or party purposes to make a football of professional matters, attempting to play a game, the rules and scope of which they are profoundly ignorant; and this is none the less hurtful as they appeal to a silly popular prejudice which affects the masses, who, in their turn, sway their representatives in the House of Assembly. It is very necessary in these days that the profession should get together and make felt their intelligent view of things, as well as their influence, which, if unitedly exercised, would be very great and very helpful to the public.

THE AMERICAN BAR ASSOCIATION.

The American Bar Association met in Portland, Maine, in the closing days of last August. That which would most interest our readers in this country was an address by Hon. James Bryce, who was the principal speaker. His subject was, "The

influence of national character and historical environments on the development of the common law." We regret that want of space prevents us giving this most interesting address in full; but it may be found in the *Green Bag* of last month. We quote however, some of the closing words of Mr. Bryce:—

"The life of every nation rests mainly on what may be called its fixed ideas, those ideas which have become axioms in the mind of every citizen. Now it was mainly by the common law that these fixed and fundamental ideas were moulded whereon the constitutional freedom of America, as of England, rests. One hundred and thirty-one years have now passed since the majestic current of the common law became divided into two streams which have ever since flowed in distinct channels. Many statutes have been enacted in England since 1776 and many more enacted here, but the broad character of the common law remains essentially the same and it forms the same mental habits in those who study and practice it. In nothing, perhaps, does the substantial identity of the two branches of the old stock appear so much as in the doctrine and practice of the law. It is a bond of sympathy, not least because it is a source of common pride. The law of a nation is not only an expression of its character, but a main factor in its greatness. What the bony skeleton is to the body, what her steel ribs are to a ship, that to a state is its law, holding all the parts fitly joined together so that each may retain its proper functions. The common law has done this for you and for us in such wise as to have helped form the mind and habits of the individual citizens as well as of the whole nation. It is all their own. They can remould it if they will. Where a system of law has been made by the people and for the people, where it conforms to their sentiments and breathes their spirit, it deserves and receives the confidence of the people. So may it ever be both in America and in England."

BAGGAGE AND PASSENGER ON DIFFERENT TRAINS.

The doctrine that baggage "implies a passenger who intends to go upon a train with his baggage, and receive it upon the arrival of the train at the end of the journey," has had some support from the Courts. It was declared in the case of *Marshall* v. *Pontiac*, O. & N. R. Co. 126 Mich. 45, 55 L.R.A. 650, 85 N.W. 242, where one who had brought a ticket for the sole purpose of checking his baggage, and did so, while he travelled by a private conveyance, was denied any claim against the carrier for the theft of the baggage unless the carrier was guilty of gross negligence, on the ground that the carrier was only a gratuitous bailee. In a note to this case as reported in 55 L.R. A. 650, the authorities touching the question were carefully reviewed, and the conclusion reached that this decision was based on a theory of the relation of baggage to the passenger which does not at all fit the modern practice of railroad transportation in this country, though consistent with the usages of carriers of earlier times. As we in March, 1902, said: "If this theory was ever true, it has certainly ceased to be true, for it is an every-day occurrence that railroad companies, either for their own convenience or for the convenience of a passenger by train, carry his trunk on an earlier or a later train. In fact, their time tables expressly say that certain trains which carry passengers will not take baggage, and that this must go by other trains." The Court in the case referred to said that, if the owner of the ticket had told the baggage master that he was not going on the train, he would have been refused a check for his trunk; but it is not easy to believe that any baggage master or any railroad official would decline to check a trunk on a ticket regularly purchased, merely because he knew that the company would not have to carry its owner also. When passenger transportation was chiefly by stage, and the baggage constantly under the passenger's eye, there might have been some reason in holding that the passenger must accompany his baggage; but in these days of railroads a trunk is beyond the passenger's reach even if he is on the same train. It is out-

side of his custody and beyond his authority. It can make no possible difference to the risk of carrying it, whether he is on the same train or some other train; and, in fact, in many instances he is not allowed to have it on the same train which carries him. This view of the subject is accepted by the recent Minnesota decision in *McKibbin* v. *Wisconsin C. R. Co.*, 100 Minn. 270, 8 L.R.A. (N.S.) 489, 110 N.W. 964. In this case the Court declines to accept the doctrine of the Michigan case above mentioned, and says: "In view of modern methods of checking baggage and the custom of regularly checking it on the presentation of a ticket at stations, general ticket offices, and the homes of passengers, we are of the opinion that there is now no good reason for the rule claimed, if ever there were, and hold that a railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage which it has regularly checked, if the passenger does not go on the same train with it." It was therefore held that a salesman who checked his baggage and sent it on a train, intending to follow it on a later train, could hold the carrier liable for its value when it was destroyed by fire while in the carrier's baggage room, through the carrier's negligence.

—*Case and Comment.*

A somewhat peculiar case recently came before the Court of Appeals of the State of New York. The plaintiff had applied for membership in a secret society called the Knights of the Maccabees of the World and in due course came up for initiation. During that ceremony, whilst standing in line with other applicants, he was suddenly seized from behind by the shoulders by a member appointed for that purpose and bent backwards, producing an injury to the spinal column for which he brought action. One can scarcely imagine any society allowing such a case to come into Court; but possibly it was supposed that the Court might follow a previous decision in another State where it was

held that when an applicant for membership in any fraternal organization agrees to be governed by the rules of the Order which provides that the applicant shall submit to its rites, the lodge is not responsible for personal injuries inflicted upon him during the initiation. But in the present case the Court held that the injured man might maintain his action notwithstanding a by-law permitting the childish and barbarous form of initiation prescribed; presumably for the purpose of impressing upon members the importance of the position which the initiation entitled them to. It is a good rule for people to wash their dirty linen at home.

The veracious press has told recently of a party of St. Louis lawyers who are touring England to study its judicial methods and machinery. One of these learned brothers is reported to have announced the result of his researches as follows: "The judges were too advanced in age and were apparently not men of the world. They seemed insufficiently experienced in every-day life and every-day business. They simply sit in judgment and lay down the law just as it was administered hundreds of years ago. A judge elected to the Bench in America is invariably a man of the world, with wide human knowledge, a man of modern life. Altogether, British legal machinery impressed one as insufficiently up to date." The New York *Nation* took the story seriously enough to be inspired to this sarcastic editorial: "It is obvious that these criticisms are well founded. English judges are still under the impression that a prisoner brought up for trial should be either condemned, or acquitted, instead of being allowed to die of the gout in jail while awaiting his fifth trial. The judges across the water are hundreds of years behind in their attitude towards triumphant science, for it is on record that they will actually interrupt an expert in the witness-chair even while he is engaged in making an ass of himself. With an utter lack of worldiness, English judges do not take a leading part in gigantic clambakes, beefsteak dinners, or potato races for fat men. And, worse than all, they are not up even on the rudiments of the Law of the Previous Fist, sometimes known as the unwritten law."—*Green Bag.*

REVIEW OF CURRENT ENGLISH CASES.

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ADMIRALTY—COLLISION—LOSS OF USE OF VESSEL—VESSEL WORKING AT A LOSS—DAMAGES—REMOTENESS.

The Bodlewell (1907) P. 286 was an admiralty action for damages for a collision. The vessel injured was working at a loss for the purpose of establishing a new trade; and the question for determination was what was the proper measure of damages. Deane, J., held that the contingent profit which might be earned when the trade should be established and rates had become remunerative, was too remote to be taken into consideration as special damage, and in such a case where no loss apart from the actual expense of repair can be shewn from the temporary loss of the use of the vessel, general damages are not recoverable from the vessel in fault.

ADMIRALTY—COLLISION—INDEMNITY—THIRD PARTY NOTICE.

The Kate (1907) P. 296 was also an admiralty action to recover damages for a collision. In this case a question arose as to the right to serve a third party notice in the following circumstances. A steamship was brought to a dock by two tugs, but was unable to get close to the quay owing to a barge attached to a buoy being in the way. The dockmaster sent a man from each of the tugs to loosen the barge and directed a third tug to tow the barge away; but in so doing the barge was, owing to the negligence of the men sent to loosen her from the buoy, allowed to come in contact with the propeller of the steamship, whereby she was injured and sank. The action was brought by the barge owners against the dock owners, who admitted liability, but claimed to bring in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the steamship from their yard to her berth at their own risk. By the towage contract the dock owners were to supply tugs, but the masters and crews were to cease to be under the contract of the dockowners and to be subject to the orders and control of the master or person in charge of the steamship. Deane, J., held that the steamship owners were not liable to indemnify the dock owners, and the Court of Appeal (Lord Alverstone,

C.J., and Moulton and Kennedy, L.JJ.), affirmed his decision on the ground that the vessel having been brought to the dock the towage contract was at an end, and the crews of the tugs had passed back to the service of the dock owners.

PARTNERSHIP—PARTNERSHIP ARTICLES—"PROFESSIONAL MISCONDUCT"—EVIDENCE—ORDER ERASING NAME OF PRACTITIONER—DENTISTS ACT 1878 (41-42 VICT. C. 33) SS. 13, 14, 15.

Hill v. *Clifford* (1907) 2 Ch. 236 was a case involving the same question as was in issue in *Clifford* v. *Timms*. (1907) 1 Ch. 420 (noted ante p. 395). Articles of partnership between dentists provided that the partnership might be dissolved in case any of the partners should be guilty of professional misconduct. The plaintiff in *Hill* v. *Clifford* and the defendant in *Clifford* v. *Timms* gave notice of dissolution, and the question to be determined in the action was whether the notice of dissolution had been properly given. At the trial of the actions, as proof of the alleged misconduct, there was tendered in evidence the order of the General Medical Council erasing the name of the Cliffords from the register of dentists for professional misconduct, and it appeared that on the hearing of the matter before the Council the Cliffords' counsel had admitted the alleged unprofessional conduct, and had refrained from offering any evidence. Warrington, J., held this not to be admissible evidence of misconduct, but the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Buckley, L.J.) held that the evidence tendered was prima facie evidence of the fact of professional misconduct, and being uncontradicted was sufficient, and that, even apart from the order, there was evidence of admissions by the Cliffords sufficient to establish the case. The Master of the Rolls further points out that the fact that the Cliffords had been disqualified from practising as dentists, had ipso facto the effect of making their further continuance as partners unlawful, even though their names did not appear in the style of firm. Buckley, L.J., points out the order was admissible (1) to shew that it had in fact been made, and (2) the grounds on which it had been made, and although not conclusive of the truth of the facts on which it was based, it was some evidence within proper limits as were also the admissions made before the Medical Council, which had been tendered and rejected by Warrington, J.

VENDOR AND PURCHASER—COMMERCIAL COMPANY—POWER TO ACQUIRE LAND—IMPLIED POWER OF SALE.

In re Kingsbury Collieries and Moore (1907) 2 Ch. 259 was an application under the Vendors and Purchasers Act for the purpose of obtaining the opinion of the Court whether the vendors had power to sell. The vendors were a colliery company and they had express power to acquire by purchase or lease coal mines and mineral lands for carrying on their business as colliers and coal merchants. There was no express power in their articles of association to sell any of the real estate thus acquired by them. Kekewich, J., held that a power to sell land it was authorized to acquire, was impliedly given the company by its constitution.

HUSBAND AND WIFE—INTESTACY OF HUSBAND—WIDOW—CONTINGENT INTEREST—INTESTATES' ESTATES ACT 1890 (53-54 VICT. C. 29) SS. 1, 5, 6—(R.S.O. C. 127, S. 12).

In re Heath, Heath v. *Widgeon* (1907) 2 Ch. 270 will be found a useful case in considering the effect of R.S.O. c. 127, s. 12, which entitles the widow of a deceased person to the whole of his estate where it does not exceed $1,000. Under the similar English enactment 53-54 Vict. c. 29, a widow is entitled to the estate if it does not exceed £500, and in the present case the husband had died leaving as his sole estate a contingent reversidiary interest which, at the time of his death in 1894, was of no market value. .. 1904 it fell into possession and was worth £3,500, and it was held by Kekewich, J., that the value of the husband's estate must be taken at the time of his death, and that the widow was therefore, entitled to the whole fund.

ADMINISTRATION—LEGACIES—GENERAL OR SPECIFIC—ABATEMENT OF LEGACIES—LEGACY IN SATISFACTION OF DEBT—FORGIVENESS OF DEBT.

In re Wedmore, Wedmore v. *Wedmore* (1907) 2 Ch. 277, Kekewich, J., determines two points (1) that a legacy given in satisfaction of a debt, if the legatee chooses to take under the will, must be regarded as a general legacy and liable to abatement in case of r insufficiency of assets to pay all legacies, but (2) that the forgiveness of a debt by a testator is a specific legacy and not subject to abatement in case of insufficiency of assets for paying legacies.

SHIP—SHARES IN SHIP—UNREGISTERED MORTGAGE OF SHARES—CONTRACT TO SELL SHARES TO PART OWNER—NOTICE—PRIORITY—MERCHANT SHIPPING ACT 1894 (57-58 VICT. C. 60) SS. 33, 56, 57.

In *Barclay* v. *Poole* (1907) 2 Ch. 284 the plaintiffs were mortgagees of 26 shares in a ship. The mortgagor was the managing owner, and at his request the mortgage was not registered. Subsequently he contracted to sell 20 of the shares to other part owners without notice of the mortgage, and the contract provided that the purchase money should be applied as far as necessary in discharge of debts owing by the vendor as managing owner to creditors of the ship, and the balance should be paid to the vendor. The vendor gave the purchasers a bill of sale which was duly registered, and the purchasers applied part of the purchase money in discharge of the ship's debts, after they received notice of the plaintiffs' claim. The plaintiffs contended that, having given notice of their claim before the purchase money was paid, they were entitled to have it all paid to them, their mortgage being greater than the whole amount of the purchase money. The purchasers on the other hand contended that the mortgagees were only entitled to the balance which was coming to the vendor after discharging the ship's debts, and Eady, J., so held, being of the opinion that the effect of the Merchant Shipping Act is to vest in the registered owner of shares an absolute right to dispose of them, and to give valid receipts for the purchase money, or to direct the mode of its application. That in this case the purchasers had a pecuniary interest in the purchase money being applied as agreed, and that was, therefore, an essential part of the contract which they had the right to have carried out in its entirety as against the plaintiffs of whose claim they had no notice when they purchased.

RECEIVER—PARTITION—SALE BY MORTGAGEE OUT OF COURT—PURCHASE BY RECEIVER WITHOUT SANCTION.

Nugent v. *Nugent* (1907) 2 Ch. 292 was a partition action. The plaintiffs were owners of an undivided three-fourths of the property and the defendant was entitled to the remaining undivided one-fourth. The defendant was appointed receiver in the action. The property was subject to a mortgage and pending the action the mortgagee obtained the leave of the Court to go

into possession and exercise his power of sale. The receiver was not discharged, nor did the mortgagee go into possession, but he put the property up for sale by auction, and the defendant without obtaining the consent of the plaintiffs or the leave of the Court, attended the sale and became the purchaser. In these circumstances Eady, J., held that the defendant, being receiver, had no right to purchase for her own benefit without first obtaining the sanction of the Court even at a sale out of Court, and that she must be deemed to have bought for the benefit of herself and the plaintiffs, subject to a lien in her favour for the purchase money and interest at four per cent.

WILL—CONSTRUCTION—TENANT FOR LIFE AND REMAINDERMAN—POWER TO POSTPONE CONVERSION—PROPERTY NOT ACTUALLY PRODUCING INCOME—PAYMENT OF INTEREST DEFERRED.

In re Lewis, Davies v. *Harrison* (1907) 2 Ch. 296 was a conflict between tenant for life and remainderman. A testator directed his trustees to sell his residuary real and personal estate and gave the income of his estate to his wife for life, and gave his trustees power to postpone conversion. Part of the residuary estate consisted of a mortgage respecting which the testator had agreed with the mortgagor that payment of the principal and interest should be deferred until the mortgagor's death, the mortgagor covenanting then to pay principal and interest. The testator died in 1901, his widow died in October, 1906. The mortgagor died in January, 1906. The mortgage had never been sold, and it was admitted that it would now be paid in full, and the question which Warrington, J., was asked to decide was, who was entitled to the interest which accrued on the mortgage from the time of the testator's death until the death of the mortgagor? and he held that the widow's representatives were the persons entitled to it.

ADMINISTRATION—REAL ESTATE—PARTITION—FUND IN COURT PROCEEDS OF REALTY—RIGHT OF CREDITORS TO ATTACH FUND BEFORE JUDGMENT.

In re Moon, Holmes v. *Holmes* (1907) 2 Ch. 304 was an administration action brought by creditors of a deceased person and, before judgment had been obtained in the action, the plaintiffs applied for an interim order to restrain the devisees of the deceased from obtaining out of Court in a partition action

brought by them moneys, proceeds of the realty, but Warrington, J., held that notwithstanding the statute making lands assets for the payment of debts, creditors, until judgment, have no lien or charge thereon, and he refused the motion.

TRADE NAME—NAME DESCRIPTIVE OF ARTICLE OR PROCESS—SIMILIARITY OF NAME—INJUNCTION.

British Vacuum Cleaner Co. v. *New Vacuum Cleaner Co.* (1907) 2 Ch. 312 was an action brought to restrain the defendant company from using as part of its name the words "Vacuum Cleaner." The facts were that the plaintiff company had been organized to purchase and operate a patent process for cleaning by means of suction, which was produced by the creation of a vacuum. The defendant company had also been organized to purchase and operate a subsequent invention for cleaning, also by means of a vacuum. There was no question as to the validity of the defendant's patent, or that the cleaning was effected under it by the creation of a vacuum so as to cause suction, but it was contended that the use of the words "vacuum cleaner" by the defendants was calculated to deceive the public, and lead them to mistake the defendant's business for that of the plaintiffs. It appeared that the plaintiffs had organized a number of subsidiary companies to whom they granted licenses to use their patent within certain specified areas, and that these companies included as part of their names the words "vacuum cleaner." Parker, J., in these circumstances, refused the injunction, holding that the words objected to were not mere fancy words, but words properly descriptive of the processes used by both companies, and he considered that the fact that the plaintiffs had themselves organized other companies which used the words as part of their designation militated against the plaintiffs' contention that their use was calculated to mislead the public as alleged.

ESTATE TAIL—DISENTAILING DEED—PROTECTOR OF SETTLEMENT—EXECUTION OF DISENTAILING DEED BY PROTECTOR AFTER DEATH OF TENANT IN TAIL—FINES & RECOVERIES ACT, 1833 3-4 WM. *IV.*, C. 75) SS. 15, 40, 42—(R.S.O. C. 122, SS. 3, 23, 31, 32, 35.)

Whitmore-Searle v. *Whitmore-Searle* (1907) 2 Ch. 332. This action was brought to obtain a declaration that an estate tail

had been effectually barred and converted into a fee simple. The facts were, that the tenant in tail had on 25th October, 1906, executed a disentailing deed. On the 3rd November, 1906, he died intestate, leaving the plaintiff his sole heir and next of kin. The plaintiff was protector of the settlement and as such on the 19th November, 1906, executed the disentailing deed for the purpose of testifying his consent thereto. The question therefore arose whether the consent of the protector could be validly given after the death of the tenant for life; and, secondly, whether the inrolment of the disentailing deed (in Ontario it would be the registration) can take place after the death of the tenant in tail. The second point was not contested and Kekewich, J., considered it to be settled by *In re Piers' Estate*, 14 Ir. Ch. 452, that inrolment after the death of the tenant in tail is valid. On the first point he held that, notwithstanding the statute provides that where the consent of the protector is given by a separate deed, such deed must, under s. 42 (R.S.O. c. 122, s. 31), be executed "either on, or at any time before, the day on which the assurance is made," it is not necessary where the consent is given by the disentailing deed itself that it should be executed before or at the time of its execution by the tenant in tail. The entail was herefore declared to have been validly barred.

PRESUMPTION OF DEATH WITHOUT ISSUE—EVIDENCE.

In re Jackson, Jackson v. *Ward* (1907) 2 Ch. 354. Kekewich, J., held that the presumption of death which arises after an absence of seven years without being heard of, after reasonable inquiry does not also involve any presumption that such person also died without issue, but, on the contrary, that it is a matter to be established by evidence such as would enable a jury to find it as a fact: and he held that evidence of the following kind was sufficient to warrant the inference, viz.: "That the person in question had left England between the years 1860 and 1866 (there was no direct evidence that he was then unmarried): that he had written two letters to a member of his family, one undated, in which he expressed a wish to see his family before he died, and said, "for I feel certain my life is nearly done on earth," and therein he desired his sister to send him the likeness of a lady, and said he was poor and in bad health. In the other letter, dated April, 1866 (and apparently written after the previous letter), he said he was worth £8,000, and also referred to

the lady before mentioned in affectionate terms and expressed a wish that he could marry her. Nothing was heard of him since the year 1871. In 1890 advertisements were issued. No reply thereto was received. This was considered sufficient evidence to warrant the inference that the absentee had died unmarried and without issue.

RAILWAY COMPANY—PURCHASE OF LAND FOR RAILWAY—RESTRICTIVE COVENANT AS TO USER OF LAND BY RAILWAY—ULTRA VIRES—RESALE OF LAND NOT REQUIRED BY RAILWAY.

In re South Eastern Railway Co. and Wiffin (1907) 2 Ch. 366. A railway company had under its statutory powers purchased a parcel of land for the purposes of its railway and covenanted with the vendor that they and their assigns would use the land for a passenger station "and for no other purpose whatever." Part of the land was not required by the company and they contracted to sell it, and the purchaser thereupon required the company to obtain a release of the covenant as to user; but Neville, J., held that the covenant was ultra vires of the company and that they were entitled to sell free from the restrictions contained in it according to the decision of the House of Lords in *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623 (noted ante, vol. 20, p. 4).

COMPANY—DIRECTOR—RESIGNATION OF OFFICE BY DIRECTOR—WITHDRAWAL OF RESIGNATION BEFORE ACCEPTANCE.

Glossop v. *Glossop* (1907) 2 Ch. 370. The articles of association of a limited company provided that a director might resign his office by notice in writing, but that the resignation should not take effect unless the directors should pass a resolution that he had vacated his office within six months from the happening of the event whereby such director had vacated his office. A director wrote to the company resigning his office, but before any resolution was passed by the directors he wrote withdrawing his resignation. The directors subsequently and within the six months passed a resolution declaring that he had vacated his office, and Neville, J., held that it was valid, and that in the absence of any provision in the articles enabling him so to do, it was not competent for the director after tendering his resignation to withdraw it without the consent of the company.

MORTGAGE—PRIORITY—EQUITIES EQUAL—CONVEYANCE CONTAINING RECEIPT FOR MONEY NEVER PAID—EQUITABLE MORTGAGEE WITHOUT NOTICE.

Capell v. *Winter* (1907) 2 Ch. 376 is one of those hard cases which are constantly arising where through the fraud of a third person it becomes a question which of two innocent persons is to suffer loss. Land was by will vested in two trustees upon trust to sell and divide proceeds among testator's four children (including Capell, one of the trustees). Capell and another owed one Melsome £2,000. Capell had become sole surviving trustee and he and Melsome, in fraud of the other beneficiaries under the will arranged that the £2,000 should be secured on part of the trust estate, and in order to carry out the scheme Capell executed a deed to Melsome purporting to convey the part of the trust estate in question to Melsome in consideration of £2,000, the receipt of which was duly acknowledged in the deed, but no money was in fact paid. Melsome then took this deed to the defendant and deposited it with him by way of equitable mortgage to secure £1,000 advanced and the defendant made the advance bonâ fide and without notice of the fraud or breach of trust or of the fact that the alleged consideration for the deed had not in fact been paid. Parker, J., on this state of facts held that the deed to Melsome did not amount to a contract of sale and therefore there was no vendor's lien for purchase money, but that the beneficiaries under the will had an equity under the will to have the property sold and the proceeds divided and that they were not in any way estopped by the receipt from saying that the money had not been paid, and as the defendant had only an equitable title, and the equities of the beneficiaries and the defendant being equal, the beneficiaries, as being prior in point of time, were entitled to prevail.

PARTIES—ATTORNEY-GENERAL—INJURY TO LIMITED SECTION OF PUBLIC—RELATOR—ACTION BROUGHT BY WRONG PARTIES—COSTS—AMENDMENT.

Attorney-General v. *Garner* (1907) 2 K.B. 480 is a useful case on the subject of parties. On the facts as found by the judge it appeared that under an award the grass and herbage growing in a private road was to be let yearly by the surveyor of highways or such other persons as the parishioners in vestry assembled should appoint, and the rental was to be applied in

the repair of roads within the parish—and in the opinion of Channell, J., this had the effect of vesting in the parish council the property in the grass and herbage. The defendants had caused damage by wrongfully permitting cattle to graze on the road. The action was brought by the Attorney-General on the relation of the District Council, and also by the District Council, for an injunction and damages. The defendants took issue on the wrongful user of the road, and the greater part of the costs at the trial were occasioned by that issue which was found against the defendants, and a verdict for £5 damages was given by the jury; the case was adjourned at the trial for further consideration, and upon argument of the case on the question of parties, Channell, J., found that the action was not maintainable by the District Council because the property in the herbage was in the Parish Council, neither could the Attorney-General either alone, or upon the relation of the District Council, maintain the action, because the injury complained of was not an injury to any right of the public at large, but merely to a limited section of the public, namely, the parishioners. He therefore dismissed the action, but as the greater part of the costs of the trial had been occasioned by the issue on which the defendants had failed, he refused to give the defendants costs, except the costs of the argument on further consideration, and as no application had been made to amend by adding the proper parties at the trial, he refused to direct an amendment.

MAINTENANCE OF ACTION—COSTS—COMMON RELIGIOUS INTEREST IN SUBJECT OF ACTION.

In *Holden* v. *Thompson* (1907) 2 K.B. 489 the plaintiff, a firm of solicitors, sued the defendants, who were nine members of a committee known as the Kensit Crusade Committee, to recover costs incurred in the following circumstances. Two persons named Davis and Wright had child relatives in an institution known as "All Saints' Home." They disapproved of the religious instruction given in the Home and removed the children. The authorities of the Home took legal proceedings to recover the custody of the children. Davis and Wright applied to the plaintiffs to act in these proceedings, which they did for a month. At the end of that time the matter was brought before the defendants' committee, and they being in sympathy with the religious views of the relatives of the child-

ren who were poor, resolved that the plaintiffs should continue to act on their behalf and so instructed them. The action was brought to recover the costs thus incurred. The defendants contended that the agreement was invalid and illegal, being within the rule against maintenance, but Phillimore and Bray, JJ., held that the case was within the exception to the rule, and that the aid in question being given out of charity and religious sympathy was not illegal.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT—PAYMENT FOR LEAVE TO ASSIGN—"FINE"—CONVEYANCING ACT 1892 (55-56 VICT. C. 13), S. 3.

Andrew v. *Bridgman* (1907) 2 K.B. 494 seems to have some bearing on a subject recently discussed in these columns, viz., the waiving of the benefit of statutes (see ante p. 513). By the Conveyancing Act 1892, s. 3, it is provided that every covenant in a lease not to assign without consent, "unless the lease contains an expressed provision to the contrary," is to be deemed to be subject to a proviso that no fine or sum of money in the nature of a fine is to be payable in respect of such consent. The lease in question contained "no expressed provision to the contrary," but on the landlord being applied to, to consent to an assignment he refused to do so except on the terms of being paid £45. The plaintiff paid the £45 in order to obtain the consent, and brought the present action to recover the money from the defendant on the ground that it had been illegally demanded and paid under duress. Channell, J., however, held that there was nothing in the Act to prevent the parties making a bargain for the payment of a fine even though it had not been stipulated for in the lease, and the respondent having paid the money voluntarily could not recover it back.

BILL OF EXCHANGE—INDORSEMENT BY WAY OF SECURITY—BILL NOT COMPLETE OR REGULAR ON ITS FACE—RIGHT OF PRIOR INDORSER TO SUE SUBSEQUENT INDORSER.

Glenie v. *Bruce Smith* (1907) 2 K.B. 507 was an action on a bill of exchange which had been made and indorsed in the following circumstances. Glenie the plaintiff agreed to sell some pigs to one Tucker on the defendant Bruce Smith agreeing to guarantee payment of the price. Tucker accepted the

bill of exchange now sued on in blank, and Bruce Smith indorsed it, and in this state it was handed to the plaintiff who thereupon signed it as drawer and made it payable to himself and also indorsed it. In view of the agreement between the parties, Lawrance, J., held that the plaintiff must be presumed to have indorsed the bill without consideration to Smith, who then reindorsed it to the plaintiff who was entitled to recover against the defendant as indorser, and that the defendant could not set up the defence that the plaintiff was a prior indorser, or that, at the time the defendant indorsed the bill it was not complete and regular on its face.

SHERIFF—EXECUTION—AGREEMENT FOR LIEN—PRIORITY.

Byford v. *Russell* (1907) 2 K.B. 522. This was an interpleader issue between an execution creditor and the claimant of a lien on the goods seized. The execution debtor was a builder who had entered into a contract with the claimant to erect a building, and whereby it was provided that if the builder failed to proceed with the contract with reasonable despatch after notice in writing from the claimant, that he should not be at liberty to remove from the premises any plant belonging to him placed there for the purpose of the works, and that the claimant should have a lien thereon until the notice was complied with. A judgment was recovered against the builder and execution placed in the sheriff's hands under which he seized the plant. The claimant subsequently, and while the plant was still on the premises, gave notice in writing to the builder, who had not proceeded with due diligence, to proceed with the work, and claimed under the agreement a lien on his plant as against the execution creditor. The County Court judge who tried the issue gave judgment in favour of the execution creditor and the Divisional Court (Phillimore and Bray, JJ.), affirmed his decision, being of the opinion that until the notice was given the claimant had no lien, and by the prior seizure the creditor had obtained priority.

MASTER AND SERVANT—COMMON EMPLOYMENT—INFANT—DANGEROUS EMPLOYMENT—DUTY OF MASTER TO INSTRUCT INFANT AS TO DANGERS OF EMPLOYMENT—DELEGATION OF DUTY—FOREMAN—NEGLECT OF FOREMAN.

Cribb v. *Kynoch* (1907) 2 K.B. 548 was an action based solely on the common law liability of the defendants as employ-

ers, to recover damages for injury sustained by the plaintiff as the defendants' servant. The plaintiff was an infant employed by the defendants in their cartridge factory. The employment was dangerous, and it was the duty of the defendants' foreman to instruct the plaintiff as to the mode of working so as to avoid dangers to be apprehended. The foreman neglected to give the plaintiff proper instructions, and, owing thereto, the plaintiff caused a cartridge to explode, whereby she was injured. In these circumstances judgment was given in the County Court in favour of the plaintiff; but the Divisional Court (Bray and Ridley, JJ.) held that the action was not maintainable, and that although it was the duty of the defendants to give the plaintiff proper instructions, yet such duty might properly be delegated to a foreman, and that the neglect of the foreman to give the necessary instructions is a risk which, under the doctrine of common employment, a fellow servant, even though an infant, takes upon himself. This case has since been approved and followed by the Court of Appeal in *Young* v. *Hoffman Mfg. Co.* (1907), 2 K.B. 646, hereafter to be noted.

COMPENSATION FOR LOSS OF OFFICE—"OFFICE"—"PLACE, SITUATION OR EMPLOYMENT"—SOLICITOR.

In re Carpenter and Bristol (1907) 2 K. B. 617. A statute dissolving the union between certain municipal bodies provided that compensation should be made to officers who thereby should suffer any direct pecuniary loss by reason of loss of office, and the Act provided that the expression "office" includes "any place, situation and employment." A firm of solicitors had been employed for about twenty-six years by the united bodies, receiving the usual professional costs and during that period no other solicitor was employed. They claimed to be entitled to compensation, but on a case stated by an arbitrator the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), held that the solicitors were not "officers" within the meaning of the Act, though they might have been, had they been employed at a salary.

PRACTICE — DISCOVERY — LIBEL — FAIR COMMENT — EXPRESS MALICE.

Lever v. *Associated Newspapers* (1907) 2 K.B. 626 was an action for libel. The defendant pleaded a defence of justification

and fair comment, and on the examination for discovery they asked the plaintiff: "Do you intend to set up that the defendants in publishing the words complained of, were actuated by express malice towards the plaintiff? If yea, state generally the facts and circumstances on which the plaintiffs rely as shewing express malice," and it was held by Jelf, J., that the question was admissible, but the Court of Appeal (Moulton and Buckley, L.JJ.), held that it was not, as being an inquiry as to the plaintiff's evidence.

HIGHWAY—DITCH ALONGSIDE ROAD—WHETHER DITCH PART OF HIGHWAY—DEDICATION.

In Chorley v. *Nightingale* (1907) 2 K.B. 637 the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), have affirmed the decision of Kennedy and Lawrence, JJ. (1906) 2 K.B. 612 (noted ante vol. 42, p. 710), to the effect that a ditch running alongside a highway between the road and the fence may be dedicated as part of a highway, though it is no part of the roadway and cannot be used by the public for the purpose of passage; and consequently when such a ditch was filled up and used as a part of the roadway, it was not to be regarded as a widening of the highway.

MASTER AND SERVANT—DANGEROUS MACHINERY—INFANT WORKMAN—DUTY OF EMPLOYER TO INSTRUCT WORKMAN—DELEGATION OF DUTY TO FOREMAN—NEGLIGENCE OF FOREMAN—COMMON EMPLOYMENT.

In *Young* v. *Hoffman Mfg. Co.* (1907) 2 K.B. 646 the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Kennedy, L.J.) have approved and followed the case of *Cribb* v. *Lynoch* (1907) 2 K.B. 548 (noted ante, p. 732). The action was at common law and the plaintiff an infant claimed damages for an injury sustained while in the defendant's employment, on the ground of the alleged negligence of the defendant in not properly instructing him in the use of the machine which caused the injury. It appeared that the defendant had employed a competent foreman whose duty it was to have instructed the plaintiff, but that he was guilty of negligence in so doing; but the Court held that the defendant was not responsible for that neglect and that the doctrine of common employment applied; and with regard to the infancy of the plaintiff, the Court held that that fact made no difference.

Correspondence.

THE SOVEREIGNTY OF PARLIAMENT.

To the Editor, Canada Law Journal,

Sir:—

The Law Times, of London, England, in a recent issue says that Lord Lindley has done an important public service in directing attention in the *Times* newspaper to the great fundamental principle of the sovereignty of Parliament, and to the fact that there can be no conflict between the law of the Church and canon law on the one hand, and the common law and statute law on the other. I do not wish to underrate this service, and I agree that so far as the laws of the Church are made by merely ecclesiastical courts they cannot be allowed to prevail if they are contrary to the law of the land. But it may be well to remember that there are some laws of the Church which it does not profess to have made, but to have received by Divine revelation in Holy Scriptures, and these laws cannot be altered or annulled by Parliament *in foro conscientiæ*; Parliament may refuse to impose any punishment for their disobedience, but they still remain the law of the Church, which it is its duty to uphold. For instance we may take the decalogue. The Church did not make these laws, yet it is its duty to uphold them and persuade people to obey them, even though no temporal punishment is imposed for disobedience. At one time the laws of England imposed the most severe punishment for adultery, but such laws are no longer in force. But it is none the less the duty of the Church to uphold and to persuade people to observe the seventh commandment. The Christian Church holds that the law of marriage is regulated by Holy Scriptures, and the law therein laid down has, by Parliament itself, been declared to be "God's law." Parliament has seen fit to abolish all temporal punishments or disabilities for breach of one of its provisions, but because it has seen fit to do so, I fail to see that it has imposed on the Church any obligation or duty to recognize such breaches of "God's law" as being lawful, from a Christian standpoint. As the repeal of penal statutes against adultery has not made that act lawful, so cannot the repeal of penal laws against the marriage with a deceased wife's sister make such unions lawful for those who believe that they are contrary to the law of God.

Churchman.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Mabee, J.] RE DRINKWATER & KERR. [Sept. 24.

Mortgage—Costs of sale—Taxation—Proper taxing officer—Local master—Local registrar—County judge.

A local registrar is not one of "the taxing officers of the Supreme Court of Judicature" mentioned in R.S.O. 1897, c. 121, s. 30, and therefore has no jurisdiction to tax mortgagees' costs under that section.

Quære, as to the authority of a county judge to make an order for such taxation under R.S.O. 1897, c. 174, s. 36.

A. C. McMaster, for the appeal. *F. M. Field*, contra.

Mabee, J.] [Sept. 25.

DOMINION EXPRESS CO *v.* TOWN OF NIAGARA.

Assessment—"Business assessment"—Land occupied mainly for the business of the party assessed—4 Edw. VII. c. 23, s. 10(O.).

The plaintiffs, an express company, agreed with a navigation company which carried passengers, mails and all kinds of freight and had wharf accommodation, that the agent of the latter should act as agent of the former during the summer months and paid part of the salary of the agent and his clerk and used the wharf and premises of the latter which were assessed to the navigation company.

Held, 1. The land was not used by the express company "mainly for the purpose of their business" and that they were not liable to be assessed for a "business assessment" under the provision of 4 Edw. VII. c. 23, s. 10(O.).

2. The question whether the amount of the assessment was excessive could not be raised in this action, but was for the Court of Revision.

Shirley Denison, for plaintiffs. *A. C. Kingstone*, for defendant.

Divisional Court, Ch.D.] [Oct. 10.

SIMPSON v. T. EATON CO.

Easement—Light—Obstruction to access of light to windows—Claim under grant—Distinction between grant and ancient lights — Injunction — Waiver — Damages — Reference to Master.

The rules settled by the Courts in case of the interference with ancient lights are not applicable to a case where the plaintiffs rights are dependent upon a conveyance from the common owner of the plaintiffs lot and the adjoining one, now owned by the defendant, in which case the plaintiff's windows are to receive such access of light as they had at the time the severance of the plaintiff's lot from that now owned by the defendants.

Held, however, MABEE, J., dissenting, that the plaintiff had by his inertness in insisting on his rights, while the defendants' building complained of was in course of construction, disentitled him to a mandatory injunction for the removal thereof, his remedy being limited to an award of damages, with a reference to the Master therefore, if a sum of $300 assessed by the trial Judge were not accepted as sufficient.

Held, also, that the existence at the time the grant to the plaintiff's predecessor in title of an outstanding mortgage, but which was subsequently discharged, was not material.

Marsh, K.C., and *K. F. MacKenzie*, for appellants. *Shepley*, K.C., for defendants.

Divisional Court, Ch.D.] [Oct. 11.

DEACON v. KENT MANURE SPREADING CO.

Winding-up order—Appeal to Court of Appeal—Jurisdiction of High Court.

Where a winding-up order under the Ontario Winding-up Act is made in violation of the provisions of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder prejudicially affected may obtain redress, either by direct application to the County Court Judge, if the order has bee nmade by him, ex parte, or, if made by

him after notice, then by way of appeal to the Court of Appeal. There is no jurisdiction in the High Court to intervene in the matter.

Watson, K.C., for plaintiff. *W. H. Blake*, K.C., and *H. E. Rose*, for defendants.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 15.

FALLIS *v.* WILSON.

Fraudulent conveyance—Marriage settlement—Action to set aside letter accepting proposal of marriage on condition of property being settled—Bonâ fides—Suspicious circumstances.

On the 31st October, 1906, the plaintiff obtained a verdict for $1,000 damages against the defendant G. H. W. in an action for breach of promise of marriage; there was an appeal, which was dismissed by consent on the 25th January, 1907; judgment was entered for the plaintiff on the 26th January, and execution placed in the sheriff's hands on the 6th February.

Early in October, 1906, G. H. W. had proposed marriage to Miss C.; she took time to consider, and on the 16th January, 1907 (never having seen him in the meantime), wrote him a letter in which she alluded to the "trouble" he was in (meaning the action), and accepted his proposal on condition that he should settle upon her and her children (if any) $2,500 in money or property. On the 28th January he instructed a solicitor to prepare a marriage settlement, which he did, and this was executed at the solicitor's office, where G. H. W., Miss C., and the trustees named in the instrument, his brother and sister-in-law (whom Miss C. had never seen before and whose home was in a distant province) met, on the following day. The property of G. H. W. included in the settlement was $1,000 in money and an equity in land of the value of $800, being practically the whole of his property. The marriage took place on the same day. In an action against G. H. W., his wife, and the trustees, to declare the settlement fraudulent and void,

Held, that there were circumstances of grave suspicion surrounding the transaction; if the letter were part of a scheme, the fact that G. H. W. was in difficulty, and that the action was pending against him, and that the effect of making the trans-

fer of the property would be to prevent recovery by the plaintiff upon her judgment, would make the transaction void under the Statute of Elizabeth; but, the trial judge having found that there was an honest offer of marriage, that the letter was genuine, and the wife (then Miss C.) honest in her statement of the condition upon which she would accept the offer, the plaintiff could not succeed. *Bulmer* v. *Hunter*, L.R. 8 Eq. 46, distinguished.

Judgment of MABEE, J., affirmed.

B. N. Davis, for plaintiff. *Holman*, K.C., for defendant, A. E. Wilson.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 18.

RE HALLADAY AND CITY OF OTTAWA.

Municipal corporations—Early closing by-law—Ontario Shops Regulation Act, R.S.O. 1897, ch. 257—Non-compliance with by council—Delegation of duty to clerk.

The decision of BRITTON, J., 14 O.L.R. 458, quashing a by-law passed by the council of the City of Ottawa providing for the early closing by a class of tradesmen of their shops in the city, was affirmed, upon the ground that the council had failed to comply with the provisions of the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, having contrary to its requirements, delegated to the clerk the duty of ascertaining whether the petition for the by-law was properly signed.

McVeity, for appellants, the city. *J. R. Code*, for respondent, the applicant.

Master in Chambers.] LEROUX v. SCHNUPP. [Oct. 21.

Evidence—Admitted seduction—Discovery as to promise of marriage—Admissibility.

In an action for seduction, questions as to promise of marriage made by the defendant who admits the seduction are not admissible in an examination for discovery.

D. Henderson, for the motion. *H. M. Mowat*, K.C., contra.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] SMITH *v.* MCDONALD. [Oct. 25.

Costs—Application to strike out paragraphs of defence—Where properly refused—Counterclaim—Plea in abatement—Action for conversion.

Where an application to strike out paragraphs of the defence was dismissed because the matters were proper to be tried, but the defences subsequently proved unsound,

Held, that plaintiff was not entitled to costs of an application which was properly refused.

Where defendant was considered entitled to recover on his counterclaim for conversion of his sheep and to nominal damages, the issue having been clearly put before the jury and the jury having found that plaintiff dealt with defendant's sheep as his own,

Held, that plaintiff's agreement to deliver the sheep or to pay a fixed sum for them would not be an answer to defendant's claim for conversion until the amount offered by plaintiff was actually paid, and,

Quære, whether it would cancel the conversion even if paid, although defendant could not be allowed the value of his sheep twice.

Held, also, that the pendency of another action in an inferior court would not be ground for a plea in abatement before the Judicature Act and the dismissal of such an action for supposed want of jurisdiction would not prevent the defendant from counterclaiming for the value of the sheep in this action.

Also, that in the taxation of costs no items should be allowed on the counterclaim that were common to both the action and the counterclaim, the whole matter being one issue and no evidence having been given on the counterclaim that was not equally relevant to the defence.

Mellish, K.C., for plaintiff. *W. B. A. Ritchie*, K.C., for defendant.

Drysdale, J.] [Oct. 29.

HACKETT *v.* CHINA MUTUAL INSURANCE CO.

Marine insurance—Prohibited waters—Breach of warranty.

A policy of insurance issued by defendant company on plaintiff's vessel, contained a clause prohibiting the use of certain waters including Cape Breton, between December 1st and May 1st. On the face of the policy the following words were written in: "Permission is granted to use Cape Breton ports until January 1st, 1906."

Held, that these words were merely an extension of the prohibitory clause and that the two clauses read together, ought to be interpreted as a prohibition of the waters named between December 1st and May 1st, and of the Cape Breton waters between January 1st and May 1st, and that so construed, the use of Cape Breton ports after January 1st was a breach of a plain term inserted in the policy and a breach of warranty which avoided the policy before loss.

Lovett, K.C., and *Burchell*, for plaintiff. *MacIlreith*, for defendant.

Drysdale, J.] LAWSON *v.* TOWN OF GLACE BAY. [Oct. 29.

Municipal corporation—Annual appointment—vacancy—Unexpired term.

Under the provisions of the Liquor License Act, R.S. c. 100, s. 181, the council of every municipality in which the Canada Temperance Act is in force, shall annually appoint one or more inspectors for the purpose of enforcing such Act, and if the council fails to act, such inspector may be appointed by the Governor in Council and any person appointed under the section shall hold office for one year. On March 6th, 1906, the town council appointed M. as inspector for the town, and on Aug. 28th, 1906, M. having resigned they appointed C. in his stead. C. left the country and in November following, the vacancy was filled by the appointment of plaintiff.

Held, 1. The appointment of plaintiff only gave him the unexpired balance of M.'s term, and that without re-appointment his term of office would expire on March 5th, 1907.

2. The appointment being an annual one, the power of the council, except as to the power of removal and the power to fill

vacancies, ceased when they dealt with the office in making the appointment of M. in March, 1906. Even if otherwise the appointments first of C. and then of plaintiff were mere appointments in the place or stead of M.

W. R. Tobin and *Douglas*, for plaintiff. *J. J. Ritchie*, K.C., and *Carroll*, for defendant.

Drysdale, J.] ROSS *v.* COADE. [Oct. 29.

Canada Temperance Act—Illicit purpose—Evidence of knowledge.

Action to recover a balance claimed to be due for two lots of goods (intoxicating liquors) sold and delivered by plaintiff to defendant.

Held, a sufficient defence that the goods were sold and delivered for the purpose of illicit sale and Bridgetown in Annapolis county where the Canada Temperance Act was in force to the knowledge of plaintiff at the time the goods were shipped.

Plaintiff's agent, who took the order for one lot of goods, was informed by defendant of the Act being in force and of defendant's method of doing business.

Held, under the circumstances that the knowledge of the agent must be held to be the knowledge of the principal.

In connection with the sale of a previous lot of goods, it appeared that plaintiff had been doing business with defendant's predecessor in the hotel business at Bridgetown, that the goods shipped were in warehouse at Halifax and that prior to their shipment the warehouseman, in whose custody they were, informed plaintiff that he had written defendant to ask him whether he wished the goods (thirty-seven cases of whisky) shipped to him in barrels in view of Bridgetown being a Scott Act town.

Held, that this was sufficient evidence of plaintiff's knowledge of the illicit purpose, and that plaintiff was a party to an illegal contract in connection with the sale of this as well as the subsequent lot of goods.

H. Ross and *Livingstone*, for plaintiff. *J. J. Ritchie*, K.C., for defendant.

Drysdale, J.] [Oct. 29.

COHEN *v.* SYDNEY LAND & LOAN CO.

Contract relating to land—Fraudulent misrepresentation—Rescission.

Plaintiff was induced to enter into a contract for the purchase of a house and lot of land, the property of the defendant company, by representations made by defendant's agent that the house was situated on defendant's land, and was so situated as to give a driveway between the house and the eastern line of the lot.

After the deed passed and a portion of the purchase money had been paid and a mortgage given for the balance, the lines were run and it was found, not only that there was no driveway as represented, but that a material portion of the house was upon the land of the adjoining owner.

Held, that plaintiff was entitled to a decree rescinding the contract as induced by false representations, and setting aside the deed and mortgage, and restoring the parties to their original position.

Held, further, that if the contract was made under a mutual mistake and misapprehension as to the relative and respective rights of the parties, the agreement would be liable to be set aside as having proceeded on a common mistake.

Gunn, for plaintiff. *Gillies,* K.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] [Oct. 11.

PATRICK *v.* EMPIRE COAL AND TRAMWAY CO.

Company—Sale of assets—Dissenting shareholder—Injunction.

The holders of the majority of the shares in the capital stock of a company authorized the selling of its property in order to pay its debts, cannot be enjoined from so doing at the instance of a dissentient shareholder.

M. G. Teed, K.C., for plaintiff. *H. A. Powell*, K.C., for defendants.

Barker, J.] RANDOLPH *v.* RANDOLPH. [Oct. 18.

Landlord and tenant—Covenant to leave premises in repair—Lien upon lessee's machinery—Insurance by lessee—Fire—Re-instatement of premises—Application of insurance money—Insolvency — Unliquidated damages — Admission of to proof—Advances upon security of logs—Bank Act—Sale of lumber to be manufactured—Advances by purchaser—Lien on logs.

A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were, also, that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach. Under a deed of assignment for the benefit of the lessee's creditors, the lease became vested in the trustees. A fire subsequently occurring which destroyed the buildings and machinery, insurance on the latter was paid to the trustees. The lessor demanded of the trustees that the insurance be applied in re-instating the buildings or the machinery. By 14 Geo. III. c. 78, s. 83, insurance companies are authorized and required upon request of a person interested in or entitled unto a house or other building which may be burnt down or damaged by fire to cause the insurance money to be laid out and expended towards rebuilding, re-instating, or repairing such house or buildings.

Held, 1. Without deciding whether the Act was in force in this province, that the lessor was not entitled to the benefit of it, the Act not applying to machinery which belonged to the lessee, and the lessor not having made a request upon the insurance company as provided by the Act.

2. Even had the insurance been upon the buildings, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit.

3. The lessor was not entitled to prove for damages against the estate, no breach of the lessee's covenants being possible

until the expiry of the term, but even had breach arisen the claim being for unliquidated damages would not be admissible.

A bank made advances to a lumber operator upon the security of an agreement between him and a trustee that he should sell and deliver a specified quantity of logs to be cut by him, to the trustee, who should, have the property therein as from the stump, and who should, upon delivery, pay for the same by, inter alia, paying the bank amount of its loans.

Held, that the security was void under s. 76 of the Bank Act, c. 29, R.S.C.

By agreement by which E. agreed to sell a specified quantity of lumber to be manufactured by him, to M., it was provided that the latter should have a lien thereon, and upon the logs for the same, for all advances on account made by him. Advances were made under the agreement, when E. assigned for the benefit of his creditors. None of the lumber had then been manufactured, and while E. had in stream or in booms his season's cut of logs, none had been set apart in order to carry out the agreement.

Held, that M. had not a lien upon the logs for his advances.

Barry, K.C., *Earle*, K.C., *Trueman*, K.C., *White*, K.C., and *McCready*, for various parties.

Barker, J.] BROWN v. BATHURST ELECTRIC CO. [Oct. 18.

River—Riparian owner—Use of water—Prescriptive title—Mill dam—Interruption of water—Statutory powers—Remedies—Injunction—Ex post facto legislation—Construction.

A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; and to use it for all ordinary and domestic purposes; he has also a right to the reasonable use of it for commercial or other extraordinary purposes incident to the enjoyment of his property, provided he does not cause material injury or annoyance to other riparian owners.

A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has

made no use of the water different from that to which he was entitled as a riparian owner.

Defendants, an electric lighting company, owning lands on both sides of a river, and having power by their Act of incorporation to build and maintain dams on the river, erected a dam thereon in connection with their power house. Plaintiff is the owner of a water, grist and carding mill situate lower down on the same river. Defendants ran their machinery at night time, and in the morning it was their practice without having regard to the length of time required for the purpose to store the water until the dam was again full. In consequence the plaintiff was deprived of water and his mills were forced to shut down for a long number of days at a time.

Held, 1. Defendants' use of the water was unreasonable and should be restrained.

2. The statutory power conferred upon the defendants to build the dam for the purposes of their business did not authorize them to make an unreasonable use of the water to the injury of the plaintiff, in the absence of proof, the onus of establishing which was upon the defendants, that their business could not be carried on except with that result.

3. A provision in defendants' Act that they should be liable to pay damages to any owner of property injured by the construction of their dams or works did not apply to damages resulting from an unreasonable use of the water; that the loss sustained by the plaintiff in the enjoyment of his property was continuous and substantial and that under the circumstances he was entitled to relief by injunction.

Defendants were empowered by Act to build a dam upon complying with certain formalities, including the filing of a plan thereof with and obtaining approval of the same by the Governor in Council. A plan was filed with the Governor in Council, but owing to misapprehension its approval was not obtained. The dam having been built, an Act was passed "approving of the dam and providing that the approval should have the same force and effect as if given by Order in Council of the date of the filing of the plan."

Held, that the Act as ex post facto legislation was not to be constructed as legalizing the dam.

Geo. Gilbert and *J. M. Price*, for plaintiff. *M. G. Teed*, K.C., and *N. A. Landry*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] LACHAPPELLE *v.* LEMAY. [Oct. 8.

Amendment—Statute of Limitations—New trial—County Court action—Dispute note filed too late—Costs.

County Court appeal. The defendant was personally served with the writ of summons on 31st May. He consulted a solicitor who prepared a dispute note setting up the plea of never indebted and the Statute of Limitations and defendant swore to this on 2nd June.

Having learned from the County Court clerk that it had not been filed, defendant himself prepared another dispute note setting up never indebted only and filed same on the 9th June. The solicitor afterwards sent the first dispute note to the clerk, but it only reached the clerk on 16th June. At the trial, the judge struck out the dispute note last filed and refused to allow an amendment of the other dispute note setting up the Statute of Limitations and entered a verdict for plaintiff for the amount claimed.

Held, that the dispute note filed on 16th June was irregular and was properly struck out, but that an amendment of the other dispute note raising the Statute of Limitations and a new trial should be allowed under the circumstances, upon the defendant paying all costs to date in the Court below, except those of issuing and serving the writ, and the costs of the appeal within ten days after taxation. Otherwise the appeal to be dismissed with costs and the judgment to stand.

Philion, for plaintiff. *Affleck*, for defendant.

KING'S BENCH.

Mathers, J.] LONDON GUARANTEE *v.* CORNISH. [May 13.

Contract—Counter bond of guaranty—Authority of manager for Canada of English insurance company to bind company by indorsement on bond—Consideration.

Plaintiffs had given a bond to the municipal commissioner, dated 1st May, 1904, to insure the faithfulness and honesty of

the defendant Cornish as treasurer of the rural municipality of Brokenhead for a term of three years in the sum of $3,000, and the premium for the three years' insurance was paid in advance. On March 3rd, 1905, the company gave notice, in accordance with a provision in the bond, cancelling the guarantee at the expiration of three months, whereby the liability of the company was confined to any defalcations of Cornish prior to June 3rd, 1905. This action necessitated the vacating by Cornish of his position as treasurer; but, on it being intimated to the council that the company would re-instate Cornish on the bond if they got a satisfactory counter security bond, the other defendants argued to give such security, and the council voted to re-appoint Cornish. The manager of the company for Canada, Mr. Alexander, then had prepared a form of counter security bond for the defendants to sign and, after it was returned to him signed, he sent to the municipal commissioner a document signed by himself purporting to be an indorsement on the original bond re-instating Cornish for a guarantee of $3,000 dating from June 3rd, 1905, to May 1st, 1907. The defendants were not asked to secure the company by their counter bond against past defalcations and did not know that there were any such, and the wording of their counter bond did not clearly shew that it was intended to secure the company against past defalcations of Cornish. Shortly afterwards the company was obliged to pay the amount of its original bond to the municipal commissioner in respect of defalcations of Cornish committed prior to 3rd June, 1905. They then sued defendants upon the counter bond.

Held, that, under all the circumstances, defendants were not liable, as their bond should be held to have relation only to the liability of the company under its re-instating contract, and not to that under the cancelled bond.

Held, also, that, as there was no evidence that Mr. Alexander had authority from the company to make the indorsement he gave, the plaintiffs had failed to establish that they had continued the guarantee bond previously in existence, and consequently there was a total failure of consideration for the defendants' counter bond, and for that reason also they were not liable upon it.

Campbell, A.-G., K.C., for plaintiffs. *Ferguson, Machray, Fullerton and Manahan*, for defendants.

Mathers, J.] MAWHINNEY *v.* PORTEOUS. [Sept. 25.

Breach of warranty—Damages—Measure of damages—Evidence to prove liability for commission.

Action to recover the price of a threshing outfit consisting of a new separator and a second-hand engine sold to the defendant. The engine had been warranted to be in first-class repair and in good running order. The trial judge found as a fact that it was not in first-class repair when delivered to the defendant, but that he nevertheless accepted it. The chief question to be decided, therefore, was the amount of damages to be allowed for the breach of warranty. The defendant discovered nearly all of the defects complained of before he started using the machine and the others almost at once after starting; but, instead of proceeding at once to have the missing parts supplied, he continued to operate the machine in its defective condition without complaining to the plaintiff of anything but the friction.

Held, following *Crompton* v. *Haffner*, 5 O.L.R. 554, that there could be no recovery for damage which might have been prevented by reasonable efforts on the defendant's part. The defendant was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them and cannot recover anything for damages beyond what he would have sustained had he pursued that course. The measure of the defendant's damage is the amount that it would have cost to put the engine in the condition it was warranted to be in plus his loss of profits or from delays during the time that would necessarily elapse before these repairs could be made had he acted promptly after discovering them. Upon these principles, defendant was allowed $30.00 for cost of necessary repairs and $50.00 for loss of profits or from delays during such time.

On defendant's default in payment the plaintiff had repossessed and resold the outfit and sought to deduct from the proceeds of the sale the sum of $250.00 which he said he had had to pay by way of commision on the resale. There was no evidence that the sale had been made through an agent or, if it was, what the proper commission should be.

Held, that the plaintiff had not sufficiently established his right to charge such commission against the defendant and that it should not be allowed to him.

Anderson, for plaintiff. *Hudson* and *Meighen*, for defendant.

Province of British Columbia.

SUPREME COURT.

Clement, J.] [Sept. 27.

IN RE VANCOUVER, VICTORIA AND EASTERN RY. CO.

Practice—Costs of application for warrant for possession—Railway Act, 1903 (*Dom.*) *ss.* 193, 217, 219, *sub-s.* 1.

Where a railway company under its powers to expropriate land, obtains a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount previously offered by the company, the costs of obtaining the warrant for possession shall be borne by the owner.

Brydone-Jack, for owner. *Reid*, for company.

Full Court.] POWER ET AL. *v.* JACKSON MINES. [Oct. 31.

Attachment of debts—Moneys due to judgment debtor under mining contract—Attachment by judgment creditors—Mechanics' liens—Liability of garnishees to lien-holders.

On service of garnishee orders under the Attachment of Debts Act, 1904, the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics' lien-holders claiming the fund. Thereupon an order was made directing the garnishees to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed and proceeded upon their liens against the property.

Held, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders.

R. M. Macdonald, for appellants. *S. S. Taylor*, K.C., for respondents.

Full Court.] [Oct. 31.

B.C. LAND & INVESTMENT AGENCY *v.* FEATHERSTONE.

Assessment—Flat rate—Authority of Dyking Commissioners to fix—Compliance with statute—Drainage, Dyking and Irrigation Act, R.S.B.C., 1897, *ch.* 64.

In assessing certain lands under the provisions of the Drainage, Dyking and Irrigation Act, the Commissioners fixed upon a flat rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, and without making a personal inspection.

Held, (HUNTER, C.J., dissenting), that the assessment so made was good. Decision of MORRISON, J., affirmed.

L. G. McPhillips, K.C. and *Heisterman*, for appellants, plaintiffs. *J. A. Russell*, for respondents.

Book Reviews.

The Law Quarterly Review, edited by SIR FREDERICK POLLOCK, BART., D.C.L., LL.D. October, 1907. London: Stevens & Sons, Ltd., 119-120 Chancery Lane.

This number contains the editor's interesting notes on recent cases, books and current topics. The articles are: The Privy Council and the Australian Constitution, which discusses the first case in which the Privy Council determined the constitutional relations between the Commonwealth and the States established by the Federal Constitution of 1900. This will be read with much interest in this country. *Young* v. *Grote*, a discussion of the rights and liabilities of bankers and their customers; Administration of justice in Egypt: Le jury a Rome et en Angleterre: Contractual obligations attaching to land: The barristers' roll; The trial of peers: The legal profession in the fourteenth and fifteenth centuries. It is a very interesting number and completes vol. 23.

Shavings, a semi-legal medley. Part I., by J. J. GODFREY, of Osgoode Hall, Barrister-at-law, and of the Bar of British Columbia. Toronto: Arthur Poole & Co. Price $1.00.

Part II. of this brochure will never appear, as the author died suddenly in his office, a short time ago; and Part I. is be-

ing sold in the interest of his widow. It contains some excellent hits at some of the eccentricities and inconsistencies of judicial decisions, etc. We trust it will have a large sale.

Bench and Bar.

Judicial Appointments.

Hon. Charles James Townshend, a puisne judge of the Supreme Court of Nova Scotia, to be Chief Justice of that Court in the room of the Hon. R. L. Weatherbe, resigned.

Frederick Andrew Laurence, of Truro, N.S., K.C., to be a puisne judge of the Supreme Court of Nova Scotia in the room of the Hon. C. J. Townshend. (November 2.)

Election of Benchers.

The following is the result of the election of Benchers of the Law Society of the Province of Alberta: James Muir, K.C., Calgary, 90; C. F. P. Conybeare, K.C., Lethbridge, 79; W. L. Walsh, K.C., Calgary, 72; J. C. F. Bown, Edmonton, 64; D. G. White, Medicine Hat, 58; Hon. J. A. Lougheed, K.C., Calgary, 55; H. C. Taylor, Edmonton, 51; G. W. Greene, Red Deer, 40; O. M. Biggar, Edmonton, 39.

Flotsam and Jetsam.

One night recently, one Joseph Mirandau was walking down a street in the east end of Montreal when he came across a drunken man attempting to drag across the street a girl who screamed and resisted him. Mirandau promptly came to her rescue and therein found it necesary to handle the ruffian with some vigour. The latter the next day summoned him before the Recorder's Court. Mr. Dupuis, the recorder, approved of the prisoner's action, but sentenced him to $1.00 and costs, remarking, "The law is here and I must not ignore it." He certainly should not have ignored it. It was not an occasion on which he should have done so. If he had known a little law he would not have done so.