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IMPROVEMENTS TO CHATTELS UNDER MISTAKE OF TITLE.

A moot Court was recently held in Gray's Inn Hall before Mr. Justice Bigham at which the following interesting point was discussed.

"B. steals a piece of canvas from A. B. sells the canvas to C., an artist, who paints a valuable picture upon it. A. sees the picture and recognizes his piece of canvas. He carries the picture away, and refuses on demand to return it to C. Has C. any remedy against A., and if so what?"

On behalf of C. it was claimed that he was entitled to the canvas on the terms of paying for its value, or in the alternative A. was entitled to retain it, on the terms of paying C. for the picture. On behalf of A. it was urged that notwithstanding the theft and the sale of the canvas to C. the property in the canvas remained in A. and he was entitled to keep it, and was under no obligation to pay for the picture.

Bigham, J., gave judgment in favour of A., holding that it was C.'s misfortune that he had painted the picture on A.'s canvas and was entitled to no relief. He says: "It is a principle of English law that if a man choose by design or mistake to improve the property of another he must be taken to do so for the owner's benefit."

No doubt the learned judge has stated correctly the principles of the common law applicable to the case, see Year Book 5 Hen. VII., p. 15, but we venture to doubt whether he took sufficiently into account the principles of equity.

The Roman law as is well known has furnished a basis for much of what is incorporated in our law as equity, and the Roman law appears to furnish a guide to a solution of this question, which seems preferable to that arrived at by Mr. Justice Bigham.

In the Institutes Lib. ii., Tit. 1, c. 33, it is laid down, "written characters although of gold accede to the paper or parchment on which they are written, just as whatever is built on, or sown in, the soil accedes to the soil. And therefore, if Titius has written a poem, a history, or an oration, on your paper or parchment, you and not Titius, will be the owner of the written paper. But if you claim your books or parchments from Titius and refuse to defray the cost of the writing, then Titius can defend himself by an exception of dolus malus; that is, if it was bonâ fide that he obtained possession of the papers."

And in c. 34, it is further laid down, "If a person has painted on the tablet of another, some think that the tablet accedes to the picture, others that the picture, of whatever quality it may be, accedes to the tablet. It seems to us the better opinion, that the tablet should accede to the picture; for it is ridiculous that a painting of Apelles or Parrhasius should be but the accessory of a thoroughly worthless tablet. But if the owner of the tablet is in possession of the picture, the painter should he claim it from him, but refuse to pay the value of the tablet, may be repelled by an exception of dolus malus. If the painter is in possession of the picture, the law permits the owner of the tablet to bring a utilis actio against him; and in this case if the owner of the tablet does not pay the cost of the picture, he may also be repelled by an exception of dolus malus; that is, if the painter obtained possession bonâ fide. For it is clear that if the tablet has been stolen, whether by the painter or any one else, the owner of the tablet may bring an action of theft."

The concluding words of c. 34, we take it, must mean that in case of theft of the tablet the knowledge of the theft must be in some way imputable to the painter in order to deprive him of the position of a bonâ fide possessor. It can hardly be intended to include a theft of which he was entirely ignorant. Assuming this to be so, then, in the case under consideration, we may lay aside the question of theft of which C. was admittedly innocent, and the case seems clearly reduced to that of C. having in good faith got possession of A.'s canvas, and, believing it to be his own, painted the picture thereon.

The case is, therefore, on all fours with the cases put in the passages from the Institutes above quoted, and according to Roman law C. would be entitled to get back the picture on paying for the canvas, unless A. chose to pay for the picture, in which case he would be entitled to retain his canvas.

Should such a case ever arise we should not be surprised if a British judge should declare that to be English law too—and hold that C. has a lien on the canvas for his work performed in such circumstances. But whether it be English law or not we have no hesitation whatever in saying if it is not, it ought to be.

We may observe that the principle of giving a man a lien for lasting improvements made by him on the land of another under a mistake that the land is his own has been affirmed by our statute law, R.S.O. c. 119, s. 30, and it would not be a very long step to say that the same rule equally applies in the case of chattels, especially when it is remembered that this statutory enactment was merely affirmatory of a previously well-established equitable right. The Act allowing improvements under a mistake of title was not passed until 1873, but many cases are to be found in which the Court of Chancery, prior to that date, had give effect to claims of that kind. The most familiar case is that of a trustee or person standing in a fiduciary character assuming to become the purchaser of the trust estate, there, though the Court would set aside such a purchase, it would, nevertheless, allow to the purchaser compensation for improvements made by him of a permanent and lasting character: see *Fox* v. *Mackreth*, 2 White & Tud. Lg. Cas. in Eq., p. 757; so also where a purchaser of land had gone into possession and made improvements and owing to defects in his vendor's title he was entitled to rescind the contract: see *Brunskill* v. *Clark*, 9 Gr. 430.

In the same volume, p. 255, there is a case of *Kilborn* v. *Workman*, where Spragge, V.C., refused the relief, basing himself on *McKinnon* v. *Burrows**, but in the later case of *Gummerson* v. *Banting*, 18 Gr. 516, the same judge granted the relief, remarking that the point decided in *McKinnon* v. *Bur-*

*The reporter omits to give any reference to the report where this case is to be found. It is probably that reported in 3 O.S. 590; 4 O.S. 7.

rows had since been otherwise decided in England in *Bunny* v. *Hopkinson*, 27 Beav. 565 (see 18 Gr., p. 522). In *Gummerson* v. *Banting* Spragge, C., discussed the question whether the equity was one which could only be raised by a defendant against a plaintiff seeking the aid of a Court of Equity as a condition of granting the plaintiff relief, or whether it is one which a party can enforce as plaintiff, and he then came to the conclusion that it was an equity which might be enforced by a party as plaintiff against the legal owner. He, however, in that case hesitated to declare that the claim constituted a lien on the land itself: see p. 521. In affirming the right of a party to come into Court as plaintiff to be compensated for improvements made in such circumstances he quotes with approval a dictum of Story, J., in *Bright* v. *Boyd*, 2 Story 605. "This is the clear result of the Roman law, and it has the most persuasive equity; and, I may add, common sense and justice for its foundation."

In *McLaren* v. *Fraser*, 18 Gr. 567, Strong, V.-C., declared persons who had improved land under a mistaken belief that they were the absolute owners, entitled to a charge on the land therefor, not apparently being troubled with the difficulty which Spragge, C., had on that point: see also *Carroll* v. *Robertson*, 15 Gr. 173; *Pegley* v. *Woods*, 14 Gr. 47; *Biehn* v. *Biehn*, 18 Gr. 497; *Morley* v. *Matthews*, 14 Gr. 551.

Such being the law with regard to improvements made on the land of another under a mistake of title, it is somewhat difficult to see why the same rule should not be equally applicable to improvements made in similar circumstances on chattels. May we not say with Mr. Justice Story, "This is the clear result of the Roman law, and it has the most persuasive equity and common sense and justice in its favour"?

In a very recent case in England it has been determined by the Court of Appeal that the equitable lien of a vendor for his purchase money applies to a sale of chattels: *Re Stucley, Stucley* v. *Kekewich* (1906) 1 Ch. 67, which seems to shew that there is no inherent reason why the rules of equity in the matter of improvement to land made under a mistake of title should not also apply to similar improvements made in chattels.

REVIEW OF CURRENT ENGLISH CASES.

SHIPPING—BILL OF LADING—UNTRUE STATEMENT AS TO CONDITION OF GOODS—"SHIPPED IN GOOD ORDER AND CONDITION"—CONTRACT—ESTOPPEL—MASTER'S AUTHORITY—LIABILITY OF SHIP OWNER.

Compania Naviera Vasconzada v. *Churchill* (1906) 1 K.B. 237 was an action by ship owners to recover freight in which the defendants counterclaimed for damages for not delivering the goods in good order and condition. This is one of those cases in which, in spite of all modern efforts to effectuate substantial justice, a judge finds himself under the necessity of doing what, in effect, appears to be an apparent injustice, as Channell, J., who tried the case, is compelled to admit. The goods for which the freight was claimed consisted of timber, for which the master of the plaintiffs' ship signed a bill of lading stating it to be "shipped in good order and condition." As a matter of fact, the timber was not shipped in good order and condition, and defendants, who were transferees of the bill of lading, had paid the full price of the timber, but in an arbitration with the shippers had obtained an award of £572 12 on the ground that the goods were not according to the contract; this, however, they had taken no steps to enforce, the shippers being a foreign firm, but it was not shewn that they were insolvent. The defendants rested their counterclaim on contract, or estoppel. Channell, J., however, held that the words "shipped in good order and condition" did not constitute a contract, but that they did constitute a representation which, notwithstanding it was untrue, was one within the master's authority to make, and was, therefore, binding on the plaintiffs, and although the learned judge thought it would be more satisfactory if the damages could be confined as against the shippers to those actually occasioned by the defendants acting on the erroneous statement, yet he felt compelled to hold that they were liable for the difference between the value of the goods in good condition and in the condition they were actually delivered. And though he confessed that "it hardly seems just" that the plaintiff should pay this damage where the shippers were really the persons who ought to pay, yet he felt constrained to so direct, and he also held that the defendants were entitled to interest on money paid for the goods, and increased

warehouse rent, during the delay occasioned in delivery owing to the bad condition of the timber. He suggests that possibly the ship owners might be entitled to recover over against the shippers on the principle laid down in *Moul* v. *Garrett* (1870) L.R. 5 Ex. 132; (1872) 7 Ex. 101, and cases there cited, but he does not determine that point and admits that it is open to doubt.

WRIT OF SUMMONS—SERVICE OUT OF THE JURISDICTION—CONTRACT "WHICH OUGHT TO BE PERFORMED WITHIN THE JURISDICTION"—BREACH WITHIN THE JURISDICTION—RULE 64(*e*) (ONT. RULE 162 (e)).

Mutzenbecher v. *La Aseguradora Espanola* (1906) 1 K.B. 254. This was an application to set aside an order for service of the writ of summons out of the jurisdiction. The plaintiffs carried on the business of insurance agents in England, the defendants were a Spanish insurance company, domiciled in the Canary Islands. An agreement in writing was entered into between the plaintiffs and defendants in the Canary Islands whereby the plaintiffs were appointed the defendants' sole agents in the United Kingdom and her colonies, and for certain countries in Europe, and also for the United States, for a period of five years. Before the term was up the defendants sent an agent to England who, by letter written in London and transmitted through the post office to the defendants, terminated the agreement, and the action was brought for breach of the contract. Phillimore, J., refused the application, and the Court of Appeal (Collins, M.R., and Barnes, P.P.D.,) sustained his decision holding that the action came within the terms of Rule 64 (*e*) (Ont. Rule 162 (*e*)) as being founded on a breach within the jurisdiction of a contract which, according to the terms thereof, was to be performed within the jurisdiction.

LICENSE TO SELL LIQUOR BY RETAIL—SOLICITING OR TAKING ORDER AT PLACE OTHER THAN THAT SPECIFIED IN LICENSE.

Elias v. *Dunlop* (1906) 1 K.B. 266. In view of a practice which prevails in Ontario this case deserves attention. The defendants were grocers and carried on business at two shops for one of which they held a license to sell liquor by retail. They were convicted for taking an order for liquor at the unlicensed premises, which they executed from the licensed premises, and the Divisional Court (Lawrance and Ridley, JJ.,) upheld the conviction.

SELLING LIQUOR WITHOUT A LICENSE—OFFENCE OF TRIFLING NATURE.

Barnard v. *Barton* (1906) 1 K.B. 357 is a cognate case which also merits notice. An incoming tenant of a public house undertook to carry on business of selling liquor for a period of nine days before getting any transfer of the license held by the previous occupant, his excuse being that during that period no sessions sat at which a temporary transfer of the license could be applied for. The defendant was indicted and the justices held that the offence committed was of "a trifling nature," and under the provisions of an Act enabling them so to do, dismissed the complaint. On a case stated, however, the Divisional Court (Kennedy and Ridley, JJ.,) held that the offence could not be properly considered of a "trifling nature," and that the defendant ought to have been convicted and the case was accordingly remitted to the justices.

EQUITABLE EXECUTION—RECEIVER—SPECIAL CIRCUMSTANCES—IMPEDIMENTS TO ORDINARY EXECUTION—DEFENDANTS OUT OF THE JURISDICTION—JUD. ACT., 1873, S. 25(8)—(ONT. JUD. ACT, S. 58 (9)).

Goldschmidt v. *Oberrheinische Metallwerke* (1906) 1 K.B. 373 shews that what the Court will not do in the case of a defendant resident within the jurisdiction, it may do where he is resident without. The plaintiffs had recovered judgment against the defendants, a firm carrying on business in Germany, and having been unable to recover the amount under execution in the ordinary way, applied for the appointment by way of equitable execution of a receiver of all debts due and owing to the defendants in England, so far as might be necessary to satisfy the plaintiff's claim. Channell, J., refused the application, but the Court of Appeal (Williams, Stirling and Moulton, L.JJ.,) however, overruled his decision.

NUISANCE—NOISY NEIGHBOURHOOD—INCREASE OF NOISE—RESIDENCE—INJUNCTION.

Rushmer v. *Polsue* (1906) 1 Ch. 234 was an action for an injunction to restrain a nuisance caused by carrying on a printing establishment. The neighbourhood was specially devoted to the printing and allied trades. It appeared from the evidence that prior to the establishment of the defendant's business, though in the daytime the plaintiff must have been subjected to noise from the working of machinery on the premises now occu-

pied by the defendants, yet no noisy machinery had been worked at night in that house; but near the plaintiff's house were other printing establishments in which the work had proceeded at night, but no disturbance was caused thereby to the plaintiff. Since the establishment of the defendant's business the noise therefrom at night had created annoyance to the plaintiff, and a serious disturbance to himself and family. Warrington, J., in these circumstances granted a perpetual injunction restraining the defendants from so carrying on their printing works as by reason of noise to cause a nuisance to the plaintiff or to his family or to persons resorting to his house. The defendants appealed, contending that the neighbourhood being one devoted to the printing trade, and the plaintiff's being the only residence there he could not insist on its being kept free from noise incidental to that trade, and that he had come to the nuisance and could not complain. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.,) although assenting to the proposition that a party residing in a district devoted to trade is not entitled to the same standard of comfort as persons residing elsewhere, held that, in the present case, the noise and discomfort created by the defendants' operations were in excess of what an ordinary person could reasonably be expected to put up with in the neighbourhood in question, and, therefore, that the injunction was rightly granted.

PATENT—COMBINATION—INFRINGEMENT—REPAIR OF PATENTED ARTICLE.

Sirdar Rubber Co. v. *Wallington* (1906) 1 Ch. 252. This was an action to restrain the infringement of plaintiffs' patent for a rim for holding a solid rubber tyre without pinching, and without wire or bands for securing it. The defendant had made and fitted a new tyre on one of the plaintiffs' rims to replace a worn out one. Eady, J., dismissed the action on two grounds, (1) that the act complained of was not an infringement and was nothing more than a repair; and, (2), because there was no patent for the tyre, and the combination of rim and tyre, was not a patentable combination (1905) 1 Ch. 451 (noted ante, vol. 41, p. 483). The Court of Appeal (Collins, M.R., Romer and Cozens-Hardy, L.JJ.,) affirmed the judgment solely on the latter ground, viz., that the patent was bad for insufficient specification, but on the point, whether the act complained of would be an infringement if the patent had been good, Cozens-Hardy, L.JJ., expressly disclaims concurrence with the view of Eady, J.

BUILDING SCHEME—PLAN—IMPLIED REPRESENTATION—POWER TO PERMIT VARIATION—BLOCKING UP ROAD—CUL-DE-SAC—DEDICATION—USER.

Whitehouse v. *Hugh* (1906) 1 Ch. 253 was an action to restrain the blocking up of a road. The plaintiff was the owner of a house built on a plot which formed part of an estate laid out by a building society in accordance with a scheme. On the side of the plaintiff's plot a vacant space was shewn on the plan, which, though not named as a road, had been roughly made up by the society as a road leading to a railway track over which the society had a private way to lands owned by it on the other side of the track. The society had released this right of way, and the road was in fact a cul-de-sac. All the plots on the building estate were sold subject to a condition reserving to the vendors power "of allowing a variation of the plans and conditions." The society sold the vacant space in question to the defendant, who proceeded to dig it up with a view to building. The plaintiff claimed to restrain the defendant from building on the vacant space or diverting it to other purposes than that of a road. Kekewich, J., held that there was nothing in the plan to indicate that the vacant space was reserved for a road and that the user of it as a road was not sufficient to constitute a dedication of it as a public highway, adopting in this respect what was said by Farwell, J., in *Attorney-General* v. *Antrobus*, viz., that in no case has mere user by the public been held sufficient to constitute a dedication to the public of a cul-de-sac: and he also held that the reservation of the power to the vendors to allow variations of the plans or conditions, qualified the plaintiff's rights under the building scheme and enabled the vendors to permit the defendants to use the vacant space as he proposed to do. The action was, therefore, dismissed.

ADMINISTRATION—STATUTE OF LIMITATIONS—"PRESENT RIGHT TO RECEIVE THE SAME"—RIGHT OF ACTION AT LAW—INCAPACITY TO SUE CO-EXECUTOR AT LAW—EQUITABLE RIGHT OF ACTION—LAW OF PROPERTY AMENDMENT ACT, 1860 (23 & 24 VICT. C. 38), S. 13—(R.S.O. C. 72, S. 9).

In re Pardoe, McLaughlin v. *Penny* (1906) 1 Ch. 265 shews that the distinction between law and equity is still of vital importance. In this case a sum of money to which three executors of a deceased person's estate were entitled was, in the year 1864, paid to two of the executors, one of these executors being entitled to a life estate in the fund, and the other being her husband. The husband died in 1884, having paid the whole fund

into his own private banking account and had never accounted or given any acknowledgment therefor. The third executor died in 1886, and the other executor and tenant for life of the fund died in 1903. The plaintiff, who claimed to be entitled to the fund in remainder, now sued the personal representatives of the husband and wife who had received the fund, who set up the defence of the Statute of Limitations (23 & 24 Vict. c. 38, s. 13), (see R.S.O. c. 72, s. 9), and Kekewich, J., held that it was not tenable, because the executors were entitled to receive the money and no action at law would have lain against them for the money, and that although by proceedings in equity they might have been required to secure the fund, yet that did not enable the Statute of Limitations to run in their favour, and, therefore, that so long as the two executors who received the money or the survivor of them lived, there was no present right to receive the money from them in any person capable of giving a discharge therefor, and, consequently, in their lifetime the statute never began to run.

COMPANY—DEBENTURE HOLDERS' ACTION—RECEIVER—COSTS—CHARGING ORDER—SOLICITOR AND CLIENT COSTS—"PROPERTY RECOVERED OR PRESERVED"—THE SOLICITORS ACT, 1860 (23 & 24 VICT. C. 127) S. 28—(ONT. RULE, 1129).

In re Horne, Horne v. *Horne* (1906) 1 Ch. 271 was a debenture holders' action, in which a receiver had been appointed, the solicitor for the plaintiff acting also for the receiver. In the result property was realized by the receiver and the proceeds paid into Court, there being sufficient to satisfy the claims of the debenture holders and leaving a surplus for the liquidator of the company. The plaintiff's solicitor claimed a charge on the proceeds, for his costs as between solicitor and client, and also for his costs as between solicitor and client incurred on behalf of the receiver. Farwell, J., decided that the solicitor was entitled to a charging order upon so much of the fund as belonged to the debenture holders for the plaintiff's solicitor and client costs; and, also, on the residue of the fund payable to the liquidator for the costs incurred on behalf of the receiver.

WILL—CONSTRUCTION—GIFT TO CHILDREN AS A CLASS—SUBSTITUTIONAL GIFT TO ISSUE—ISSUE OF PARENT DEAD AT DATE OF WILL.

In re Gorringe, Gorringe v. *Gorringe* (1906) 1 Ch. 319. A testator gave legacies to the children of one of his sons whom he described as "my deceased son." He gave the residue of his estate in trust for all or any of his children who should be living

at his death, and attain 21 or marry, "provided that in case any one or more of my children shall predecease me leaving an child or children living at my death, then such child or children of my deceased child shall take their parents' share." The question to be determined was whether or not the children of the son, who was dead at the date of the will, were entitled to participate in the residue, and Joyce, J., held that they were not.

PRACTICE—DECLARATORY JUDGMENT—DECLARATION THAT EXPIRED PATENT WAS INVALID—RULE 289—(ONT. JUD. ACT, S. 57 (5)).

North Eastern M.E. Co. v. *Leeds Forge Co.* (1906) 1 Ch. 324 was an action to obtain a declaration that a patent for an invention owned by the defendants which had expired, was invalid, no consequent relief being asked. Joyce, J., held that in the exercise of a proper discretion, the declaration ought not to be granted, the case being in effect an attempt on the part of the plaintiffs to anticipate their defence in case the defendants should see fit to sue the plaintiffs for an infringement; and the action was, therefore, dismissed with costs.

COMPANY—VOTING—"PERSONALLY OR BY PROXY"—POLL—POLLING PAPERS—MANNER OF VOTING.

In *McMillan* v. *Le Roi Mining Co.* (1906) 1 Ch. 331 a somewhat novel method of taking the vote of shareholders was resorted to, the validity of which was called in question. The articles of the company provided in the ordinary way for the votes of shareholders being given either personally or by proxy, and that if a poll were demanded it should be taken "in such manner and at such time and place as the chairman of the meeting directs." At a general meeting a poll was demanded and the chairman directed that it should be taken by means of polling papers signed by the members and delivered at the offices of the company on or before a fixed day. This Joyce, J., held was neither voting personally nor by proxy, and was ultra vires of the chairman to direct.

VENDOR AND PURCHASER- OPEN CONTRACT—PARTY WALL NOTICE AND AWARD—LATENT DEFECT—MATERIAL FACT—DUTY OF VENDOR TO DISCLOSE FACT—RESCISSION.

Carlish v. *Salt* (1906) 1 Ch. 335 was an action by a purchaser to recover his deposit, and expenses of investigating the title to a parcel of land which he had contracted to buy from the defendants, but which contract had fallen through in the

following circumstances. Two days prior to the contract an award had been made pursuant to a statute requiring the defendants to pay half the costs of rebuilding a party wall on the premises in question. This award the defendants omitted to disclose to the plaintiffs, and the plaintiffs entered into the contract in complete ignorance of the proceedings in reference to the wall. Upon discovery of this award in the November following the plaintiffs refused to complete except upon receiving compensation. The plaintiffs treated the contract as at an end, but refused to return the deposit or pay the plaintiffs' costs of investigating the title. Joyce, J., who tried the case, determined that the award constituted a latent defect which the defendants were bound to disclose to the purchaser, and that the plaintiffs were entitled to the relief they claimed.

DECLARATORY JUDGMENT—TRESPASS—MUNICIPAL CORPORATION—RULE 289—(ONT. JUD. ACT, S. 57 (5)).

Offin v. *Rochford* (1906) 1 Ch. 342 is another case in which a merely declaratory judgment was sought. In this case the plaintiff owned lands abutting on a highway. The defendants, a municipal corporation, claimed that part of the plaintiff's land formed part of the highway and threw down a fence erected by the plaintiff to bound it from the highway. This was done more than six months prior to the commencement of the action. In so far as the action was founded on this alleged wrongful act the action was too late, not having been brought within six months of its commission as required by a statute in that behalf. Warrington, J., who tried the action, held that the mere claim of the municipal corporation that the land in question was a part of the highway gave the plaintiff no cause of action, and furnished no ground for making a declaratory judgment, and that the action being too late so far as based on the removal of the fence, it altogether failed, and he, therefore, dismissed it with costs.

COMPANY—WINDING UP ORDER—CONTRACT TO SELL ASSETS—OMISSION TO CONVEY—DISSOLUTION OF COMPANY—TRUSTEE ACT, 1893 (56 & 57 VICT. C. 53) SS. 25 (1), 26—(R.S.O. C. 336, S. 5).

Re No. 9 Bomore Road (1906) 1 Ch. 359. A limited company was the owner of the lease of premises for the residue of an unexpired term of 99 years; it went into liquidation and the leasehold was sold, but by an oversight no assignment of the lease was executed and the company had become automatically

dissolved. The purchasers of the lease now applied under the Trustee Relief Act, 1893—(see R.S.O. c. 336, s. 5) for the appointment of a new trustee and for vesting order. Warrington, J., made the order asked.

COMPANY—DEBENTURE HOLDERS' ACTION—RECEIVER AND MANAGER—ADVANCES TO RECEIVER—RECEIVER'S REMUNERATION—PRIORITY OF CLAIM OF RECEIVER.

In re Gladsir Copper Mines Co., English E. M. Co. v. *Gladsir Copper Mines Co.* (1906) 1 Ch. 365 was a debenture holders' action in which a receiver and manager had been appointed to carry on the business. For the purpose of carrying it on the receiver was from time to time authorized to borrow money which was secured by first charges on the assets. The money was advanced by the plaintiffs, and nothing was said in the orders authorizing such loans as to any reservation of the receiver's claim for remuneration and costs, but they expressly provided that the receiver was not to be personally liable for such loans. The receiver continued the business, which ultimately proved a failure and the assets of the concern were realized and proved insufficient to pay in full the receiver's remuneration and costs, and also the advances of the plaintiffs. Joyce, J., held, in these circumstances, that the receiver was entitled to priority of payment, though he thought it would have been otherwise if the advances had been made by a stranger to the litigation. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.,) affirmed his decision.

ADULTERATION—SAMPLE—PURCHASE FOR ANALYSIS—DIVISION OF SAMPLE—SALE OF FOOD & DRUGS ACT, 1875 (38 & 39 VICT. c. 63), s. 14—(R.S.C. c. 107, s. 9).

In *Lowery* v. *Hallard* (1906) 1 K.B. 398 a Divisional Court (Lord Alverstone, C.J., and Lawrance and Ridley, JJ.,) held, on a case stated by magistrates, that where a sample of goods is taken for analysis under the Food & Drugs Act, 1875, s. 14 (R.S.C. c. 107, s. 9), each of the three parts into which the sample is required to be divided must be sufficient to admit of an analysis being made thereof.

DISCOVERY—EXAMINATION FOR DISCOVERY—DEFAMATION—LIBEL IN PERIODICAL—DEFENCE OF FAIR COMMENT—INFORMATION ON WHICH ALLEGED LIBEL FOUNDED—NAMES OF INFORMANTS.

Plymouth Mutual Society v. *Traders Publishing Association* (1906) 1 K.B. 403 was an action for libel contained in a periodical published by the defendants. The defence was fair comment.

The plaintiffs applied to examine the defendants for discovery, (1) as to the information the defendants had when they published the alleged libel, and which induced them to believe in its truth, and whether they did in fact believe in its truth; and (2) the names of the persons from whom they received the information. The Court of Appeal (Williams, Stirling and Moulton, L.JJ.,) held affirming Sutton, J., that the first question must be answered; but overruled him as to the second, being of opinion that in actions against newspaper publishers for libels in newspapers, according to the general rule of practice, in the absence of any special circumstances, the defendants ought not to be compelled to answer the second question.

CONTRACT—LIQUIDATED DAMAGES AS PENALTY—DEPOSIT—FORFEITURE.

Pye v. *British Automobile Syndicate* (1906) 1 K.B. 425 is a case in which the somewhat difficult question was raised as to whether a sum agreed on to be forfeited, in the event of a breach of a contract, was to be regarded as a penalty, or liquidated damages. In this case the plaintiff entered into a contract to act as the defendants' agent for the sale of automobiles. The plaintiff as part of the agreement deposited with the defendants £300 as a deposit in respect of the goods, which sum was to be repaid upon payment by the plaintiff of the price of all the goods mentioned in a schedule to the agreement, which specified the automobiles to be sold, and it was provided that if the plaintiff refused to accept, or pay for any of the goods the defendants were to be at liberty to declare the deposit forfeited to the defendants "by way of liquidated and ascertained damages." The plaintiff committed a breach of the agreement and the defendants declared the deposit forfeited. The action was brought to recover the deposit, the plaintiff contending that the agreement for forfeiture was merely a stipulation by way of penalty, and that as it was made to take effect on the occurrence of one or more of several events, viz., the non-payment of the price of any one or more of the motor cars, notwithstanding the wording of the agreement, the deposit ought not to be construed as liquidated damages. Bigham, J., however, was of opinion that the deposit was, in this case, for liquidated damages and that, therefore, the plaintiff was not entitled to get back the £300. The fact that the plaintiff had actually paid over the money he regarded as an important circumstance, and he thought that the Court ought to give effect to the express words of the contract

unless it could be sure that the plain intention of the parties to be gathered from all the circumstances, was that the sum named was to be a penalty.

LIQUOR LICENSE—SALE AT UNAUTHORIZED PLACE—UNAUTHORIZED ACT OF SERVANT—MASTER AND SERVANT—SCOPE OF EMPLOYMENT—(R.S.O. c. 245, ss. 49, 50, 72).

Boyle v. *Smith* (1906) 1 K.B. 432 was a case stated by magistrates. The defendant was licensed to sell liquor by retail. He sent his servant to deliver beer to customers. The servant had no authority to sell, his sole duty was to deliver beer to customers who had previously given orders therefor to the defendant; and the servant had been expressly ordered not to sell or deliver beer to other persons, and to bring back beer he was unable to deliver. The servant in disobedience of his orders sold and delivered beer from his van in a street to persons who had not previously ordered it. The magistrate refused to convict the master for selling liquor in an unauthorized place, and the Divisional Court (Lord Alverstone, C.J., and Lawrance and Ridley, JJ.,) held that he was right, on the ground that the servant was himself responsible and not his master for his unauthorized act.

COSTS—WRIT OF POSSESSION—JUDGMENT FOR POSSESSION UNDER RULE 118—(ONT. RULE 604)—JUD. ACT. S. 5—(ONT. RULE 1130).

The Dartford Brewery Co. v. *Moseley* (1906) 1 K.B. 462 was an action for rent, and to recover possession of land. The plaintiff applied for and obtained judgment for possession of the land, under Rule 118 (Ont. Rule 604), the claim for rent standing over. The defendant having failed to deliver possession, a writ to compel delivery of possession was issued, and the plaintiff now applied for an order for the payment of the costs of the writ. Lawrance, J., made an order as asked and the Court of Appeal (Williams and Stirling, L.JJ.,) affirmed the order, holding that the costs were in the discretion of the Court under s. 5 of the Jud. Act. (Ont. Rule 1130). Under the combined effect of Ont. Rules 870, 871, it is possible such an application would be unnecessary in Ontario.

SLANDER—MAGISTRATE—"JUDGE"—CRIMINAL CHARGE — WITHDRAWAL OF CHARGE—DEFAMATORY WORDS AGAINST PROSECUTOR—MALICE—PRIVILEGE—STRIKING OUT PLEADING—RULE 288—(ONT. RULE 261).

In *Law* v. *Llewellyn* (1906) 1 K.B. 487 the defendant applied under Rule 288 (Ont. Rule 261) to strike out the statement of claim as shewing "no reasonable cause of action." The action was brought for slander, the defendant was a magistrate before whom the plaintiff had prosecuted a charge against two persons for obtaining money by false pretences. The charge was withdrawn and after its withdrawal the defendant had uttered the words complained of, alleging that he regarded the charge as a gross attempt to blackmail. Channell, J., held that the occasion was privileged and no cause of action was shewn and struck out the statement of claim accordingly, and his order was affirmed by the Court of Appeal (Romer and Cozens-Hardy, L.JJ.,) on the ground, first, that a magistrate is a judge as was settled in *Munster* v. *Lamb*, 11 Q.B.D. 588, and *Hodson* v. *Pare* (1899) 1 Q.B. 455, and, therefore, anything said by him in the course of his judicial duty was privileged and could not be made the subject of any action; and, secondly, because the charge could not have been withdrawn without the defendant's consent, and it was reasonable and proper for him in giving his consent to state that the reason he allowed the charge to be withdrawn was because he considered it to be utterly unfounded, and the action of the plaintiff in making it discreditable; and it would have made no difference if he had first given leave to withdraw the charge, and then proceeded to give his reasons for doing so; because it would be all part of one and the same transaction.

DIVORCE—ADULTEROUS PETITIONER.

Evans v. *Evans* (1906) P. 125, although a divorce case deserves attention. The petitioner in 1902 filed a petition for divorce from his wife on the ground of adultery, and a decree nisi was obtained. This decree was subsequently revoked at the instance of the King's Proctor on the ground that the petitioner had concealed from the Court that he had himself been living in adultery. After the revocation of the decree nisi and until the filing of the present petition in September, 1905, the petitioner had ceased his adulterous intercourse and claimed to have lived chastely, and claimed a divorce on the ground of the adultery of his wife in April, 1905, but Barnes, P.P.D., dismissed the petition, holding that the previous adulterous conduct of the petitioner debarred him from relief.

VENDOR AND PURCHASER—POSSESSORY TITLE—LAND SUBJECT TO RESTRICTIVE COVENANT—NOTICE—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 WM. IV. C. 27), S. 34—(R.S.O. C. 133, S. 15).

In re Nisbett & Pott (1906) 1 Ch. 386. When this case was before Farwell, J., (1905) 1 Ch. 391, we drew attention to its importance (ante vol. 41, p. 480). Now that his decision has been affirmed by the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.,) its authority and importance is still further enhanced. A too prevalent idea that a possessory title suffices to give an absolutely clear title to land is shewn to be erroneous. In this case the owner of the land in question in 1872, entered into restrictive covenants with his vendor as to building on the land and the user of buildings to be erected thereon. Nisbett, the present owner of the land, who claimed to have acquired title by possession for upwards of 28 years sold the land to Pott subject to a condition that the title should commence with a conveyance dated 11 August, 1890, which recited that one Headde and his father had been then in possession for thirteen years and upwards. After the contract to purchase was entered into, Pott was notified by the covenantees of the existence of the restrictive covenant. The vendor claimed that he was not bound by the covenant because he had purchased without notice, but it appeared that when he bought he accepted less than forty years' title and that if he had insisted on a forty years' title he would then have had notice of the covenant. The vendor also claimed that the effect of the Statute of Limitations being to extinguish the paper title, that it had also the effect of extinguishing all rights derived under that title. The following passage from the judgment of Cozens-Hardy, L.J., shews how the Court dealt with that contention: "The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement, not in any way capable of being affected by the provisions of the Statute of Limitations on which the squatter relies. The only rights extinguished for the benefit of the squatter under s. 34 are those of persons who might, during the statutory period, have brought, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because unless and until there is a breach of such a covenant, it is impossible for the person entitled to the benefit of it to bring an action." In Ontario, if a deed containing such a covenant is registered, it is

obvious that a purchaser relying on a possessory title would, nevertheless, be affected with notice of, and bound by, the covenant.

VENDOR AND PURCHASER—CONDITION OF SALE ALLOWING VENDOR TO RESCIND IF OBJECTION INSISTED ON — MISDESCRIPTION — ABSENCE OF TITLE TO MINERALS—COMPENSATION.

In re Jackson & Haden (1906) 1 Ch. 412. The Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.,) have affirmed the decision of Buckley, J., (1905) 1 Ch. 603 (noted ante, vol. 41, p. 532), but not on precisely the same grounds. The question was one between vendor and purchaser. Property had been sold subject inter alia to conditions of sale (1) providing that the vendors might rescind if the purchaser insisted on any objection which the vendors should "be unable to remove or comply with"; and (2) entitling the purchaser to compensation in the event of misdescription. The property consisted of a villa residence; the vendors had no title to the mines or minerals, but in offering the property for sale they did not except them. The purchaser required the vendors to make title to the minerals or in default claimed compensation. The vendors then claimed to rescind. Buckley, J., held that the condition entitling them to rescind did not apply because the objection in regard to the minerals was not "an objection to title," because the vendors had no title at all thereto, and, as he said, "you cannot object to that which has no existence." The Court of Appeal, on the other hand, held that the objection was "an objection to title," but it was, nevertheless, not open to the vendors to avail themselves of the condition for rescission, because such a condition cannot be relied on where the vendor has been guilty of fraud, dishonesty, or recklessness in entering into the contract: here the Court considered the vendors had been guilty of recklessness in describing the property so as to include the mines, to which they knew or ought to have known that they had no title; and, therefore, they were not entitled to rescind, but that the purchasers were entitled to performance with compensation for the misdescription.

VENDOR AND PURCHASER—SALE BY COURT—CONDITION FOR RESCISSION — MISREPRESENTATION — RESCISSION — PURCHASER'S COSTS RECOVERABLE ON RESCISSION—COSTS.

Holliwell v. *Seacombe* (1906) 1 Ch. 426 is a cognate case to the two preceding. Here the sale was had under the order of the Court subject to a condition entitling the vendor to apply to

rescind in the event of the purchaser making any requisition the vendor should be advised not to comply with, and stipulating that the return of the deposit should be accepted by the purchaser in discharge of all claims for costs or otherwise. The purchaser applied to rescind on the ground of misrepresentation and the Court granted the application, and the only point in dispute was as to whether the purchaser was entitled to any, and, if any, what costs. The vendor contended he was only entitled to get back his deposit without costs; but Kekewich, J., held that the costs were in the discretion of the Court and that the purchaser should get all costs of investigating the title and of the application to rescind together with the costs occasioned by his bidding and becoming the purchaser.

TRUSTEE—APPOINTMENT OF NEW TRUSTEE—STATUTORY POWER—DONEE APPOINTING HIMSELF TRUSTEE—TRUSTEE ACT, 1893 (56 & 57 VICT. c. 53), s. 10—(R.S.O. c. 129, s. 4).

In re Sampson, Sampson v. *Sampson* (1906) 1 Ch. 435. An application was made to Kekewich, J., to determine whether a new trustee, purported to be appointed under the provisions of the Trustee Act, 1893, s. 10 (R.S.O. c. 129, s. 4), had been duly appointed, the donee of the power, having appointed himself as the new trustee. The learned judge held that the Act did not authorize the appointment and that the words "any other person" in the Act excluded the donee.

ADMINISTRATION — MARSHALLING ASSETS — DEBTS CHARGED ON LANDS—LEGACIES—INSUFFICIENCY OF PERSONAL ESTATE.

In re Kempster, Kempster v. *Kempster* (1906) 1 Ch. 446. Kekewich, J., decided that although the Land Transfer Act of 1897 has put land of a deceased person on an equality with his personalty for payment of debts, and it is, therefore, no longer necessary that debts should be charged on the realty; yet where land is devised subject to the payment of debts and the personalty is exhausted in payment of debts, pecuniary legatees and specific devisees are still entitled to have the assets marshalled.

CLUB RULES—POWER TO ALTER RULES—FUNDAMENTAL OBJECTS OF CLUB—GENERAL MEETING—RESOLUTION—VALIDITY.

Thellusson v. *Valentia* (1906) 1 Ch. 480 was an action brought by a member of a recreation club to have a rule, passed at a general meeting, abolishing pigeon shooting, declared ultra vires. The plaintiff contended that as one of the rules provided

that the club was instituted for the purpose of providing a ground inter alia for pigeon shooting, this was one of the fundamental objects of the club, and that it could not be allowed, but Joyce, J., dismissed the action, holding that there was no fundamental rule that any particular sport should be provided, and that what had been done was within the power the club possessed of altering its rules; he being of the opinion that there is no rule of law requiring a company, or other association, to fulfil each and every separate purpose for which it was originally instituted.

RECEIVER AND MANAGER—RECEIVER BORROWING WITHOUT AUTHORITY—INDEMNITY.

In re British P. T. & L. Co., Halifax Banking Co. v. *British P. T. & L. Co.* (1906) 1 Ch. 497 was a debenture holders' action in which a receiver and manager had been appointed. Authority had been given to the receiver to borrow for the purpose of carrying on the business, a certain amount; he had exceeded the limit and borrowed additional sums without any authority from the Court. He had retired from his office and the plaintiffs in the action applied for a declaration that he was not entitled to any indemnity out of the assets in respect of moneys borrowed in excess of the amount authorized. Warrington, J., however, held that the receiver had not necessarily forfeited his right to indemnity by borrowing without authority, but that if he sought indemnity in respect of the excess it would be necessary for him to shew that having regard to all the circumstances he was justified in contracting the further loan or loans, but that it would not be enough for him to shew that such loan or loans had been contracted bonâ fide and in the ordinary course of business.

HUSBAND AND WIFE—POLICY OF ASSURANCE FOR BENEFIT OF WIDOW AND CHILDREN—DEATH OF WIFE—SECOND MARRIAGE—MARRIED WOMEN'S PROPERTY ACT, 1870, S. 10—(R.S.O. C. 203, S. 159 (1)).

In re Parker (1906) 1 Ch. 526 a husband effected an insurance on his own life in accordance with the Married Women's Property Act, 1870, s. 10 (see R.S.O. c. 203, s. 159 (1)), by which the policy moneys were expressly made payable to his widow and children, or some, or one of them, as he should by deed or will appoint. He had then a wife living; she died, and he married again, and he then by deed appointed the policy moneys to be paid to the second wife, if she should survive him. He died leaving the second wife and children of both marriages

surviving. Eady, J., held that an after-taken wife is within the Married Women's Property Act, 1870, s. 10 (see R.S.O. c. 203, s. 159 (1)), but that even if she were not within the Act the second wife would be entitled by virtue of the contract with the insurance company.

WILL—DEVISEE OF MORTGAGED ESTATE—EXONERATION—CONTRARY INTENTION—DIRECTION TO PAY DEBTS "EXCEPT MORTGAGE ON BLACKACRE"—LOCKE KING'S ACTS, REAL ESTATE CHARGES ACT, 1867 (30 & 31 VICT. C. 69) S. 1—(R.S.O. C. 128, S. 37).

In re Valpy, Valpy v. *Valpy* (1906) 1 Ch. 531. Eady, J., holds that where a testator directs his debts "except charges, if any, on Blackacre," to be paid out of his residuary estate, he having at his death two estates, Blackacre and White Acre, subject to mortgage, which he had specifically devised that the direction, excepting Blackacre was an indication of "a contrary intention" within the meaning of the Real Estate Charges Act, 1867, s. 1 (R.S.O. c. 128, s. 37), that the devisee of Whiteacre should take cum onere and therefore the mortgage on that estate must be paid out of the residue.

WILL—GIFT TO CHILDREN OF WOMAN—INDICATION OF INTENTION—ILLEGITIMATE CHILDREN—PUBLIC POLICY.

In re Loveland, Loveland v. *Loveland* (1906) 1 Ch. 542. A testator had in his lifetime gone through the form of marriage with his niece, the marriage being in fact invalid. Shortly after the marriage and while the niece was enceinte he went to the East alone, having first made his will, whereby he purported to bequeath his residuary estate to Daisy Dorcas Wootton (otherwise Loveland) for life and after her decease in trust for "all her children living at my decease." A child was born after the testator's departure and the testator died seven months afterwards, in Penang, without having seen the child. Eady, J., held that having regard to the surrounding circumstances there was a sufficient indication on the face of the will to shew that the testator used the word "children" as including illegitimate children, and that such a gift was not invalid on the ground of public policy and that though a gift to the illegitimate children of a man would be void for uncertainty the same rule did not apply to the illegitimate children of a woman, and as the will spoke from the time of the testator's death the bequest was not open to objection on the ground of its providing for future born illegitimate children.

Correspondence.

To the Editor,

CANADA LAW JOURNAL.

SIR,—It may be desirable to put the profession on their guard in reference to a neat swindle, of which I was the victim.

There came into my office recently, a respectable looking man who looked like a gentleman farmer. He said his name was A. B. Clarke, living near Strathroy and was on his way to visit a relative in Oil Springs and that while passing through he came in to get my opinion relative to some trouble he was having arising out of the sale of a horse. He said he had sold a horse to a man named Brent, living near Watford, for $220, Brent to have the horse on seven days' trial, and if satisfactory then to pay the money. Brent kept the horse for ten days and then returned him by his hired man, but when the horse was returned he was lame and my man refused to accept him, so he was returned to Brent's. Brent afterwards called on him and accused him of misrepresentation and fraud, and after a heated discussion he ordered Brent off his place. Brent had the horse; and I was asked my opinion as to whether or not he could be made to pay the $220. I asked him if Brent had made him any offer and he told me he had offered to pay $150 and keep the horse, but that he, Clarke, was not inclined to accept it. I pointed out to him the difficulties in his way and did not give him much encouragement in suing. He suggested that I write Brent a letter to Watford threatening action and he would call the latter part of the week on his return from Oil Springs and ascertain the result. I dictated a letter while he sat there and, and he suggested that as he had to pass the Post Office he would take the letter and drop it in the office; and I accordingly gave him the letter to mail. Two or three days afterwards I received a letter post marked Watford, purporting to be written by Brent in which he went into the details of the horse transaction and gave me his side of the story. He said he was anxious to avoid litigation, that he had already offered $150, leaving a difference of $70, that he was willing to split this difference, and he enclosed a cheque for $185 in full settlement which I was to accept or return. A day or so following the receipt of this letter from Brent my client came in. I told him he had better accept the cheque, to which he assented. The cheque from Brent being to my order, I endorsed it payable to the order of A. B. Clarke, and it was taken to a local bank and cashed. There is, I believe, a man named

A. B. Clarke, living near Strathroy, and there is also a George Brent living near Watford, but, of course, these parties never had any such transaction. The man took the letter I wrote and instead of posting it went to Watford and answered it himself.

SUBSCRIBER.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] RUTLAND RAILROAD CO. *v.* BEIQUE. [March 1.

Judicial sale of railways—Purchase by solicitor of party—Capacity to purchase—Art. 1481 C.C.—Special statute—Discretionary order—Appeal.

Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by art. 1484 C.C.

The Act 4 & 5 Edw. VII. c. 158 directed the sale of certain railways separately or together, as in the opinion of the Exchequer Court might be for the best interests of creditors, in such mode as that Court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec. The judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc* or for the purchase of each or any two of the lines of which they were constituted.

Held, that the judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system in preference to two separate tenders for the several lines at a slightly larger amount, and that his decision should not be disturbed on appeal.

Appeal dismissed with costs.

Chrysler, K.C., and *J. E. Martin*, K.C., for railroad company, appellants. *Beulac*, for appellant White. *Morgan*, appellant, in person. *Nesbitt*, K.C., and *Lafleur*, K.C., for respondent Beique. *Aimé Geoffrion*, K.C., for respondent Minister of Railways.

Bd. Ry. Comm.] [March 30.

OTTAWA ELECTRIC RAILWAY CO. *v.* CITY OF OTTAWA.

Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality.

The power of the Board of Railway Commissioners under s. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.

The application for such order may be made by the municipality as well as by the railway company.

The Board, on application by the City of Ottawa, ordered a subway to be made under the tracks of the Canada Atlantic Railway Co. where it crosses Bank Street the cost to be apportioned among the city, the A. C. Ry. Co. and the Ottawa Electric Ry. Co. By an agreement between the Electric Co. and the city, the company was given the right to run its cars along Bank Street and over the railway crossing, paying therefor a specified sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a street over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement.

Held, that the Electric Co. was a company "interested or affected" in or by the said work within the meaning of s. 47 of the said Railway Act, and could properly be ordered to contribute to the cost thereof.

Held, further, that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so to contribute. Appeal dismissed with costs.

G. F. Henderson, for appellants. *McVeity*, for City of Ottawa. *Chrysler*, K.C., for C. A. Ry. Co.

B.C.] LASELL *v.* HANNAH. [April 6.

Company—Transfer of shares—Illegal consideration—Fraud—Officers of company—Breach of trust.

With a view to overcoming the financial difficulties of a mining company and securing control of its property the manager entered into a secret arrangement with the respondent whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for

a new company to be organized in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the insolvent company, and he agreed that he would not reveal this understanding to the other shareholders.

Held, affirming the judgment appealed from (11 B.C. Rep. 406), SEDGEWICK, J., dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded. Appeal dismissed with costs.

Wilson, K.C., for appellant. *Ewart*, K.C., and *Morphy*, for respondent.

Ex. C. Adm.] SHIP "NORTH" *v.* THE KING. [April 6.

Constitutional law—Illegal fishing—Three-mile limit—Legislative jurisdiction—Continuous chase—Capture on high seas.

The Dominion cruiser "Kestrel" sighted the American schooner "North" on the fishing grounds in Quatsino Sound within the three-mile limit off the coast of British Columbia, having four dories out and evidently engaged in fishing for halibut contrary to the provisions of the Act, R.S.C. c. 94. On being chased by the cruiser the schooner picked up two of her dories and stood out to sea. The cruiser kept up a continuous chase (picking up one of the dories on the way), overhauled and seized the schooner on the high seas, some distance outside the three-mile limit, and towed her into port at Winter Harbour, B.C., where she was properly attached and libelled in the Exchequer Court of Canada. At the time of seizure freshly caught halibut were lying upon the deck of the schooner and there were other evidences present shewing that she had been recently engaged in fishing.

Held, affirming the judgment appealed from (11 B.C. Rep. 473), GIROUARD, J., dissenting, that the Parliament of Canada, under the provisions of the British North America Act, 1867, has exclusive jurisdiction to legislate with respect to fisheries within the three-mile limit off the coast of Canada; that the cruiser had the right to immediately pursue the schooner sighted within the three-mile limit beyond that limit on to the high seas for the infraction of a municipal regulation of Canada; and that the seizure there made was justified by the rules of international law. Appeal dismissed with costs.

Chas. Wilson, K.C., for appellant. *Newcombe*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX v. BLAIS. [March 12.

Criminal law—Rape—Trial of one co-offender only—Evidence—Right of comment as to other co-offender not giving evidence.

The prisoner and one F. were jointly indicted for committing rape on the prosecutrix, and a true bill was found. The indictment was then traversed to the next sittings, and at such sittings the prisoner was tried alone, the indictment as to F. being again traversed to the next sittings.

Held, that F. was not a "person charged" under Canada Evidence Act, 1893, 56 Vict. c. 31, s. 4, for that section only refers to the person actually on trial; and therefore the judge did not contravene that section in commenting on the fact that F. had not been called as a witness.

Reg. v. *Payne* (1872) 1 C.C.R. 349, and *Reg.* v. *Gosselin* (1903) 33 S.C.R. 255, commented on.

E. Mahon, for the prisoner. *Cartwright*, K.C., for the Crown

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Full Court.] [March 31.

REX v. BROOKS.

Evidence—Depositions on another trial—Reception of—Consent of counsel—New trial.

Even if a mistake is made by counsel at a trial, that does not relieve the judge in a criminal case from the duty to see that proper evidence only is before the jury.

At the trial of a prisoner, the prosecuting counsel put in a letter addressed to the Crown Attorney from the counsel who had been retained to act for the prisoner as follows: "I find that I will be unable to go on with this trial on 23th Dec. . . Would you kindly see the judge and ask him if e can take it on Saturday, the 6th January. . . I am quite willing to accept the evidence of the family, in particular those who gave evidence at the H. trial, so that it would not be necessary for you to call them." The trial did not stand over until January 6, but was proceeded with on Dec. 29, when the prisoner was represented by

another counsel, when in addition to the letter, the depositions of two witnesses taken at the H. trial, who were not members of the family, were put in without the consent of or objection on the part of the prisoner's counsel.

Held, that even assuming that the consent in the letter, which seemed to be a concession for the proposed postponement of the trial, was wide enough to authorize the admission of the specified depositions, the depositions of the two witnesses, not members of the family were improperly received and a new trial was granted.

Cartwright, K.C., for Crown. *Johnston*, K.C., for prisoner.

HIGH COURT OF JUSTICE.

Mulock, C.J., Ex.] KERSTEIN *v.* COHEN. [Feb. 16.

Trade mark—Infringement—Coined word—Similarity—Colourable imitation—Costs.

The coined word "Sta-Zon," adopted by the defendants as a trade mark or name for their eye glasses, is not so similar to the coined word "Sur-On," adopted by the plaintiffs and registered as a trade mark to distinguish their eye glasses of very similar appearance, as to mislead ordinary persons, exercising ordinary caution, into purchasing the defendants' goods by mistake for those of the plaintiffs.

There can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception.

Where there is no reliable evidence of persons having been actually misled, it is for the Court to determine the question by consideration of the words themselves.

The plaintiffs in advertising their goods used in connection with the word "Sur-On" such words as "On to stay on," "An eye glass that stays on," etc.

Held, that, although the defendants had adopted the trade mark "Sta-Zon" because of the plaintiffs having so described their goods, and with the object of acquiring the benefit of the market which the plaintiffs had developed, the plaintiffs had acquired no exclusive right in the words used in their advertisements other than "Sur-On"; but on account of the defendants' conduct, the dismissal of the plaintiffs' action for infringement should be without costs.

J. A. Macintosh, for plaintiffs. *J. H. Moss*, for defendants.

Boyd, C., Street and Mabee, JJ.] [Feb. 23.

RE HARSHA.

Extradition—Habeas corpus—Re-arrest for same offence after discharge under—Res judicata—Affidavit on information and belief only.

On an application for a habeas corpus on the grounds (1) that the prisoner was arrested a second time for the same offence after his release on habeas corpus. (2) That the matter was res judicata. (3) That the complaint against him was on information and belief only. (4) That no evidence was received by the judge, and (5) that neither information and complaint nor the warrant was transmitted to the Minister of Justice.

Held, that although the prisoner had been discharged from custody on the ground that there was no proper evidence of the commission of the alleged offence or identifying the alleged forged document he could be re-arrested when further and new evidence had been discovered and was forthcoming to supply the deficiencies.

That the doctrine of res judicata or of former jeopardy or of autrefois acquit was inapplicable to such an enquiry.

That 31 Charles II. c. 2, s. 6, does not apply to extradition proceedings.

That the affidavit upon which the arrest was made being on information and belief was sufficient.

That the other objections should not be investigated as the enquiry was still pending and was to be prosecuted before the judge.

Quære, whether the Divisional Court would have acted as on an appeal if objection had been taken.

J. B. McKenzie, for the application. *J. W. Curry*, K.C., contra.

Falconbridge, C.J.K.B., Street, J., Clute, J.] [Feb. 24.

LOVELL *v.* LOVELL.

Husband and wife—Alimony—Wife leaving husband—Justification—Cruelty—Apprehension of violence.

Where a husband's persistent course of harsh conduct towards his wife created mental distress sufficient to impair her health, and did in fact injure it appreciably during the married life together, and where his language of threat and menace and

his habitual demeanour were such as to create a well-founded apprehension that she would suffer worse and more injurious treatment and hardship if she did not submit implicitly and submissively to anything he might choose to do or say,

Held, STREET, J., dissenting, that this conduct and the cumulation of circumstances detailed in the evidence amounted to matrimonial cruelty, although no bodily violence was inflicted: and the wife was justified in leaving her husband, and was entitled to alimony.

Judgment of BOYD, C., affirmed.

King, K.C., for plaintiff. *Watson*, K.C., for defendant

Boyd, C.] REX v. PHILLIPS. March 16.

Prohibition—Conspiracy—Particulars—Preliminary investigation before magistrate—Scope of enquiry.

Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings sought to be prohibited.

The defendant having been arrested and brought before a police magistrate charged with conspiracy under s. 394 of the Criminal Code objected to the sufficiency of the charge and asked for particulars of the deceit, etc., with dates and names. The magistrate overruled the objection and refused the particulars on the ground that the proceeding before him was an investigation.

On an application to the High Court for prohibition,

Held, that the magistrate having jurisdiction over the offence in regard to which he could compel the attendance of the accused for the purpose of preliminary enquiry in order to form an opinion as to whether the evidence was sufficient to put him on his trial he should not be fettered in the proceedings before him by having limitations imposed by means of particulars which necessarily restrict the enquiry, but the whole range of relevant facts left him to be availed of at his discretion.

J. E. Jones, for the motion.

Province of New Brunswck.

SUPREME COURT.

McLeod, J.] [October 9, 1905.

CUMBERLAND RAILWAY & COAL CO. v. THE SAINT JOHN PILOT COMMISSIONERS.

Pilotage Act—"Ships"—"Ships propelled wholly or in part by steam"—Liability of Pilot Commissioners to be sued in corporate capacity—Government officers.

The plaintiff's barges were engaged in carrying coal between ports in New Brunswick and Nova Scotia. These barges were built after the model of a three-masted schooner of four hundred tons, but carried sails of only four hundred yards area, whereas if rigged as schooners they would carry some twenty-eight hundred yards of sail. They were, in fact, always towed from port to port by tugs, though evidence was given that they could be navigated under their own sail. The plaintiffs paid pilotage fees on these barges to the defendant from April 4th, 1893, to May 4th, 1904, and action was brought to recover $15,680.08, the amount so paid.

Held, 1. These barges were not "ships" under the Pilotage Act since they had not sufficient motive power in themselves for the purposes of navigation and were in fact always propelled by a tug.

2. Even if these barges were "ships" under the Act, they were exempt from payment of pilotage fees under s. 59 (e) as "ships propelled wholly or in part by steam." It is not necessary under this section that the steam propelling power should be in or on the ships themselves.

3. The Saint John Pilot Commissioners are a body corporate created by the Pilotage Act and may be sued in their corporate capacity though no express authority is given in the Act. The liability to be sued is necessarily implied.

4. The Saint John Pilot Commissioners are not part of the Dominion civil service though they take instructions from the Minister of Marine and Fisheries. The act of the Commission-

ers is not the act of the Government and a petition of right against the Crown is therefore not a proper remedy in this case. Any instructions by the Minister regarding the liability of these barges to pay the pilotage fees would be merely an opinion regarding the interpretation of the Pilotage Act.

McLean, K.C., for plaintiff. *Coster*, K.C., and *Skinner*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Full Court.] [Feb. 10.

HINMAN v. WINNIPEG STREET RY. CO.

Negligence—Electric street railway—Trolley wires having telephone wires crossing above.

The plaintiff's horse, being driven along a street in the City of Winnipeg during a thunderstorm, was killed by coming into contact with a wire of the defendants, the Bell Telephone Company, which had just been blown down and had fallen across a trolley wire of the Street Railway Company and so had become charged with a very strong current of electricity. The plaintiff obtained a verdict in the County Court for $200 against both companies, each to pay $100, and the defendants appealed to this Court, contending that there was no evidence of negligence on its part. Evidence had been given to shew that it was possible to guard against such accidents by fixing a guard or cradle wire over the trolley wire whenever it is crossed by another wire so that, if the latter should break, it would not come into contact with the trolley wire, and such had been done at one specially dangerous place in Ottawa, but it was not shewn that such a device was in use elsewhere in Canada, although it was in quite common use in the United States.

Held, per DUBUC, C.J., that defendants were not bound to anticipate such an accident as had happened or to provide against the possibility of it, and that there was no evidence of negligence on the part of that company to warrant the jury in finding the verdict rendered. *Albany* v. *Watervliet, etc., Co.*, 83 N.Y. State R. 136; *Hawtayne* v. *Bourne*, 7 M. & W. 598, and *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. at p. 784, followed.

Held, per MATHERS, J., that the absence of any precaution

against the happening of such an accident, which should have been foreseen and could have been guarded against, was evidence of negligence on the part of the Street Railway Company to go to the jury, and that their verdict should be sustained. Negligence is the absence of care according to the circumstances, as stated by WILLS, J., in *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. at p. 688, and the greater the danger the higher is the degree of care and diligence demanded. If the danger is great the degree of care required may rise to the grade of a very exact and unremitting attention.

McKay v. *Southern Bell Telephone Co.*, 19 S.R. 695; *Benck* v. *Milwaukee*, 61 N.W.R. 1101; and *Royal Electric Co.* v. *Hevé*, 32 S.C.R. 462, followed.

The Court being equally divided the appeal was dismissed with costs.

Potts, for plaintiff. *Munson*, K.C., and *Laird*, for defendants.

Perdue, J.] MARTEL v. MITCHELL. [Feb. 22.

Parties to action—Pleading—Joinder of causes of action—Striking out parts of statement of claim in which some of the defendants not interested.

Motion by the defendant Mitchell to compel the plaintiffs to elect whether they would proceed with the causes of action against all five defendants set out in one part of the statement of claim or with those set out in the remaining part which only affected Mitchell and one other defendant, a company, the complaint against them being that they had conspired together to issue and had issued a pretended and illegal mortgage to Mitchell upon all the assets of the company to the injury of the plaintiffs as shareholders in the company.

Held, on appeal from the referee, that, if the motion had been made by any of the three other defendants, it should have succeeded, as none of them were interested in the matters complained of against Mitchell and the company, following *Gower* v. *Couldridge* (1898) 1 Q.B. 348, and *Sadler* v. *G. W. Ry.* (1896) A.C. 450; but that Mitchell could not succeed on the motion as both sets of causes of action concerned him.

As incidental to the matters which led up to the main cause of action against all the defendants, the plaintiffs asked in the statement of claim for judgment for a sum of money alleged to be due to them by the company.

Held, that this did not constitute a separate and distinct cause of action against the company alone so as to bring the case with-

in the principle of the above cited authorities. *Kent Coal Co.* v. *Martin*, 16 T.L.R. 486, and *Frankenburg* v. *Great Horseless Carriage Co.* (1900) 1 Q.B. 504 followed.

There was a still further claim made by the plaintiffs against the defendant company alone for damages for failure to carry out an alleged agreement to indemnify the plaintiffs against loss in connection with the pledge of certain shares to a bank as security for a loan to the company.

Held, that this was a distinct cause of action against the company in which none of the other defendants were interested so far as appeared from the statement of claim, and that the paragraph referring to this claim should be struck out on Mitchell's application.

Noble, for plaintiffs. *Hoskin*, for Mitchell.

Full Court.] [March 3.

FIRST NATIONAL BANK *v.* MCLEAN.

Promissory note—Holder for value without notice—Delivery on condition of signature by another joint maker—Rescission of contract—Election to affirm.

Appeal from verdict of Dubuc, C.J., noted vol. 41, p. 663, dismissed with costs on the ground that defendants had, by their acts and conduct after they became aware of the misrepresentations on which they relied, elected to affirm their purchase, and so lost any right which they might have had to rescind it.

Munson, K.C., and *Haffner*, for plaintiffs. *Wilson* and *J. F. Fisher*, for defendants.

Richards, J.] RE LISGAR ELECTION. [March 7.

Election petition—Dominion Controverted Elections Act, s. 2 (f) and s. 7—Preliminary objections—Corrupt practice—Returning officer as party respondent to petition.

Hearing of preliminary objections to an election petition against both the successful candidate and the returning officer.

The petition alleged, among other things, that the returning officer, acting in collusion with the elected member, unlawfully established different polling divisions from those arranged by the Provincial authorities for Provincial elections and, instead of supplying the deputy returning officers with the copies of the voters' lists received from the Clerk of the Crown in Chan-

cery, made changes and erasures therein and removed therefrom the names of many persons entitled to vote and so prevented such electors from voting at the election, also that he had given copies of the voters' lists so improperly made out to his co-respondent and refrained from furnishing such copies to the opposing candidate and concealed these matters entirely from the latter, and that all this was done in furtherance of a design previously arranged between the respondents of embarrassing and hindering those opposed to the election of the elected member; also that the returning officer had signed a large number of certificates in blank to enable voters to vote at polling places for which their names did not appear, and that the respondents had in these and other ways conspired to impede and interfere with the free exercise of the franchise of many voters.

Held, 1. That the acts complained of might constitute corrupt practices within the meaning of sub-s. (*f*) of s. 2, R.S.C. c. 9, for, although they were not so declared by the Dominion Elections Act, or by any other Act of the Parliament of Canada, yet they were infringements on subsequent statutory provisions as to the conduct of elections and may amount to corrupt practices within the common law of Parliament, as they might be of such extent that the constituency had not had a fair and free opportunity of electing the candidate whom the majority might prefer, this being the test applied by Lord Coleridge, C.J., in *Woodward* v. *Sarsons*, L.R. 10 C.P., at p. 743, and, therefore, the paragraphs of the petitions setting forth such acts should not be struck out on preliminary objections.

2. The conduct of the returning officer in connection with the election being complained of, he was properly made a respondent to the petition under s. 7 of the Act.

3. An allegation in the petition that the returning officer, with the knowledge and consent of the elected member, in many ways improperly aided and assisted in the election of the latter is too vague and should be struck out.

Wilson and *A. J. Andrews*, for petitioner. *Howell*, K.C., and *Phippen*, for respondents.

Richards, J.] TURNER *v.* SNIDER. [April 16.

Negligence—Infant—Liability of father for infant's tort.

The plaintiff's claim was against a father and son for the recovery of damages for the loss of grain and hay by a prairie fire started by the son negligently firing off a gun with the muzzle in such close proximity to long dry grass that it immedi-

ately took fire. The boy, who was only fourteen years old, was lying down in the long dry grass watching for some prairie chickens and, on seeing one, fired at it without rising.

The father had carefully trained the boy in the use of a gun, and the boy ordinarily exercised great care in handling it.

Held, that the son was liable for the amount of the loss, as he had been guilty of negligence, and a verdict should be entered against him, but that the father was not liable.

A. Meighen, for plaintiff. *E. Anderson* and *F. G. Taylor*, for defendant.

Dubuc, J.] LUMNER *v.* DOBLIN. [April 11.

Breach of warranty—Measure of damages—Sale of Goods Act, R.S.M. 1902, c. 152, s. 52 (d.).

This was an action to recover damages for breach of a warranty given by defendant on the sale of a second-hand engine to the plaintiff that the engine was in a good state of repair and in good working order. The learned trial judge found on the evidence that such warranty had been given and that the engine was not in good working order when sold, and

Held, that, under sub-s. (*d*) of s. 52 of the Sale of Goods Act, R.S.M. 1902, c. 152, the proper measure of damages to be allowed should be the amount, which at the time of the sale it would be necessary to expend in order to remove defects which constituted the breach of warranty, but not including cost of repairs necessitated by wear and tear or accidents after the plaintiff began to use the engine, *Cook* v. *Thompson*, 6 M.R. 286, followed.

E. L. Howell, for plaintiff. *J. K. Sparling*, for defendant.

Richards, J.] MCDOUGALL *v.* GAGNON. [April 16.

Infant—Judgment—Devolution of Estates Act—Parties.

The plaintiff, having recovered a judgment against the defendant for $2,178.82, registered a certificate of the judgment in the proper office and brought this action for a sale of the defendant's interest in certain land as the sole heir of his wife, who died entitled to a two-thirds interest in the land belonging to her deceased father's estate. The defendant was a minor. The wife was an only child and had died intestate without issue. Her mother had taken out letters of administration to her father's estate, but no administrator had been appointed to the daughter's estate.

Held, 1. Although the defendant was an infant, any lands in which he had an interest would be bound by the judgment under

s. 3 of R.S.M. 1902, c. 91, and sub-s. (*f*) of s. 2 defining the meaning of the word "lands" by a fair interpretation of the words "as though charged in writing by the judgment debtor under his hand and seal," which should be read as implying such a charge as an adult could create.

Re South, 9 Ch. Ap. 369, distinguished on the ground that the wording of the corresponding English enactment, s. 13 of 1 & 2 Vict. c. 110, requires that the judgment debtor should have "had power to charge" the land.

2. Notwithstanding the provision in s. 21 of R.S.M. 1902, c. 48, that the land should "go to the personal representative" of the defendant's deceased wife, and no such representative had yet been appointed, yet the defendant had the beneficial interest in the lands owned by the wife which was such an interest as would be bound by the registered judgment subject to any debts that might be proved against either of the estates. *Martin* v. *Magee*, 19 O.R., at p. 713, and 18 A.R., at p. 389, followed.

3. In the absence of an administrator to the estate of the defendant's wife, the plaintiff could not have any order for a conveyance by the administratrix of the wife's father's estate of her daughter's interest therein, and, therefore, such administratrix was neither a necessary nor a proper party to the action and should not have been joined as a defendant.

Wilson and *Hartley*, for plaintiff. *Royal*, for defendant.

Richards, J.] [April 16.

COSENTINO v. DOMINION EXPRESS CO.

Bailment—Negligence—Involuntary bailee.

The plaintiff's claim for $1,010 was based on the following facts. Wishing to send that amount to his brother in Toronto he procured at the office of the defendants an envelope such as they use in forwarding money by express, enclosed the bank notes, to the amount of $1,010, and mailed the letter and registered it. The letter reached Toronto, but was not delivered, owing to its being defectively addressed. The officials of the Dead Letter department at Toronto, guided by the printed matter on the outside of the envelope, enclosed the letter in one of their envelopes used for returning such letters, addressed it and sent it by registered mail to the defendants at Winnipeg. In due course it was delivered to the defendant's cashier, who received it in a protected cage or pen in which he performed his duties. After receiving the package the cashier, in ignorance of its contents, laid it unopened on the chief clerk's desk, which

stood open to the public and to all of the defendants' officials. The chief clerk was not at his desk when the package was placed there and said he never saw it and there was nothing to shew what became of it afterwards. The defendants' Winnipeg office had never before, apparently, received a registered dead letter.

Defendants claimed that they received the package, supposing it to have come in the ordinary course of their business; that they never knew, till after its loss, that it was of any special value; that they never assumed or were under any special obligation as to it; that they in fact took such care of it as was reasonable considering their ignorance of its value; and that, without negligence on their part, it was lost or was stolen by some one not in defendants' employ.

Held, that even if it could be assumed that the package had been lost or had been stolen by a stranger, the defendants were guilty of such negligence as to the package as to make them liable for its loss.

Though the defendants received the package without intending to become parties of it, they were under as great an obligation to take care of it as a finder of lost goods is under after he has voluntarily taken them up; and, according to Storey on Bailments, s. 85, such finder is bound to take the same reasonable care of them as any voluntary bailee by agreement. See also s. 83 (*a*) as to the liability of a riparian owner in respect of property cast upon his land by a river.

Hoskin, for plaintiff. *Robson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Irving, J.] MacLean v. City of Fernie. [March 14.

Municipal law—By-law—Majority of three-fifths—Persons entitled to quash.

Certain persons not qualified, and others not authorized, having voted on a city by-law granting electric light and water franchises,

Held, 1. The by-law was defective and must be quashed.

2. Under s. 88 of the Municipal Clauses Act, as enacted by s. 24 of c. 52, 1902, only the applicant and the corporation have a status before the Court on proceedings to quash.

J. A. Macdonald, K.C., for the motion. *A. E. McPhillips*, K.C., contra.

Irving, J.] LEVY *v.* LEVY. [March 20.

Divorce—Practice—Affidavit of documents—Discovery tending to shew adultery.

In a petition for dissolution of marriage, the respondent applied for an affidavit of documents.

Held, on the authority of *Redfern* v. *Redfern* (1891) P. 139, that discovery will not be ordered of a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery; but that, on respondent filing an affidavit shewing that discovery is not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in questions, other than the misconduct of the petitioner, discovery will be ordered.

Walls, for petitioner. *Helmcken*, K.C., for respondent.

North-West Territories.

SUPREME COURT.

Sifton, C.J.] RE LATIMER. [Jan. 25.

Extradition—Evidence to justify—Offence under both foreign and Canadian law—Analogy to committal for trial for similar offence in Canada—Extradition Act, R.S.C. 1886, c. 142, s. 11.

The duty of an extradition judge in hearing an information for an extraditable offence is to order extradition if the evidence adduced, in the absence of contradiction, is such that a magistrate holding a preliminary enquiry in a similar case should commit for trial.

Semble, the extradition judge must be satisfied that the offence disclosed in the information is criminal both under Canadian law and under the law of the demanding country and that it is within the extradition treaty.

James Short, for State of Pennsylvania. *W. L. Walsh*, K.C., *M. S. McCarthy*, and *P. J. Nolan*, for W. H. Latimer.

LAW SOCIETY OF UPPER CANADA.

The following shews the result of the recent election of Benchers:—H. H. Strathy, 822; G. F. Shepley, 793; M. Wilson, 769; A. B. Aylesworth, 747; G. Lynch-Staunton, 715; A. H. Clarke, 714; C. H. Ritchie, 708; D. B. Maclennan, 701; J. M. Glenn, 699; Donald Guthrie, 689; G. C. Gibbons, 683; F. H. Chrysler, 685; S. G. McKay, 674; Alex. Bruce, 635; John Hoskin, 634; W. Kerr, 624; W. R. White, 603; Walter Barwick, 602; E. S. Smith, 600; W. D. Hogg, 599; W. R. Riddell, 586; W. D. McPherson, 578; Jas. Bicknell, 575. G. H. Watson, 571; W. B. Northrup, 568; R. M. Dennistoun, 556; A. C. McMaster, 533; Z. A. Lash, 533; J. W. Nesbitt, 517; J. E. Farewell, 510.

UNITED STATES DECISIONS.

NEGLIGENCE—MASTER AND SERVANT:—Negligence or error of judgment, of a competent foreman having authority to hire and discharge the men, in refusing to permit the selection, from a store of rope, of a piece sufficient for the use intended, and insisting upon the use of a piece which proves to be insufficient, is held, in *Vogel* v. *American Bridge Co.* (N.Y.) 70 L.R.A. 725, not to render the master liable for a resulting injury to a workman, since the risk of injury from such fault is assumed by the men as incidental to the execution of the work in its details.

A mason contractor is held, in *Mooney* v. *Beattie* (Mass.) 70 L.R.A. 831, to owe no duty to his employees to inspect stone received from the quarry to ascertain if it is free from explosives used to blast it from the quarry bed. The duty of a master to inspect materials upon which a servant is to work is the subject of a note to this case.

SALE BY SAMPLE.—A manufacturer who sells goods by sample is held, in *Nixa Canning Co.* v. *Lehmann-Higginson Grocer Co.* (Kan.) 70 L.R.A. 653, impliedly to warrant that they are free from any latent defect that could not be discovered upon ordinary examination of the sample. Warranty on sale of goods by sample is the subject of a note to this case.

BANKING:—A bank sends to another bank, which is its regular correspondent, for collection, a draft indorsed for collection and credit is held, in *Garrison* v. *Union Trust Co.* (Mich.) 70 L.R.A. 615, to have no right to assert its title against the lien upon the proceeds to which a third bank, to which the draft is forwarded for collection, is entitled in the ordinary course of business to balance its account against the intermediate bank.

RAILWAYS:—The refusal of the agent at the intermediate terminal to indorse a return-trip ticket, which indorsement, according to the terms of the ticket, is necessary to validate it, is held, in *Texas & P. R. Co.* v. *Payne* (Tex.) 70 L.R.A. 946, not to be a final breach of its contract, by the carrier, so as to preclude recovery by the passenger of any damages that may subsequently accrue; and, where the passenger is ejected from the train when attempting to use the ticket, under circumstances of humiliation, it is held that he may recover damages therefor.

That it is not negligence, as matter of law, [illegible] a passenger who is upon a train so crowded that he cannot find a seat, and becomes sick because of lack of proper ventilation, and tobacco smoke, to seek relief upon a platform when unable to reach a window, is declared in *Morgan* v. *Lake Shore & M. S. R. Co.* (Mich.) 70 L.R.A. 609.

CHRISTIAN SCIENCE:—A statute making it a misdemeanour to give Christian Science treatment for a fee is held, in *State* v. *Marble* (Ohio) 70 L.R.A. 835, not to be an interference with the rights of conscience and of worship.

OLD FOLKS' HOMES:—An agreement by an applicant for admission to an old folks' home to deliver to it all property which he may subsequently become the owner of, in consideration of maintenance during life, is held, in *Baltimore Humane Soc.* v. *Pierce* (Md.) 70 L.R.A. 485, to be void as against public policy. The question of validity of agreement to transfer future-acquired property in consideration of maintenance is treated in a note to this case.

MUNICIPAL LAW:—Knowledge of a policeman concerning a defect in a street is held, in *Cleveland* v. *Payne* (Ohio) 70 L.R.A. 841, not to be such notice to the municipality as to make it responsible for damages resulting from the defect, in the absence of any statute or ordinance charging policemen with the duty of repairing or looking after the streets.