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We are glad to see that the Attorney-General of Ontario has withdrawn his bill for increasing the County Courts' jurisdiction. In doing so he explained the reasons which influenced him. They were similar to the views expressed in these pages when speaking of this subject in our last issue. He did not consider it necessary or desirable to appoint a royal commission, but thought that possibly some Dominion legislation might be necessary to carry out parts of a general scheme which he would take time to consider. The profession is indebted to the Attorney-General for his courteous attention to their representations in this matter. There will now be ample time to see what, if any, change is desirable. The subject is a very large one, and any change, though it might seem simple in itself, would involve consequences in connection with other matters, and so would require careful consideration.

We publish elsewhere a list of the Benchers of the Law Society of Upper Canada recently elected. Those who have been left off, not speaking of vacancies caused by death, are Messrs. Bell, Edwards and McDougall. The new Benchers are Messrs. Glenn, White, Foy, McPherson, McKay and Lynch-Staunton. It will be seen therefore that very little change has been made in the old list. Quite apart from any question as to whether this list was a satisfactory one, it is undoubtedly true that there are many men not on that list who are quite as much, and more, entitled to the distinction than some who have been there. All this points to the desirability of giving a freer choice, by having nominations made, as we have already suggested. There should not be, as there is in fact now, a canvass made by the retiring Benchers for their re-election, by the very simple but effectual process of sending, as is now required, a list of the retiring Benchers to the whole profession. This should cease, and nominations should be sent in to the Secretary, who should then send to those entitled to vote the list of names on the nomination papers. This is what is done in connection with

elections for the Senate of the University, and other bodies where it is desired to secure the best representation. It must be admitted that this course would not prevent unseemly canvassing by the aspirants themselves; but that we suppose cannot be prevented. Those, however, who may be elected by their own exertions will know, as will the rest of us, that they have acquired the distinction without any honour attaching thereto, the tribute being to their own desire for notoriety, and not to their professional standing or eligibility for the position.

A curious attempt was recently madeto tie up property to the utmost time allowed by the Thellusson Act. The bequest was of a sum of £500, consols, to trustees upon trust to apply the dividends in maintaining and keeping in a proper state of repair the tomb of her late brother, "for the longest period allowed by law—that is to say, until the period of twenty-one years from the death of the last survivor *of all persons who shall be living at my death*," and subject thereto, the fund was to form part of the residuary estate. The difficulty of ascertaining where the last survivor of all the inhabitants of the world, living at the time of the testatrix's decease, died, is, of course, apparent; and although it was argued in support of the bequest that the onus would be on those claiming the benefit of it, to shew that some one of such survivors were still alive, yet Joyce, J., was unable to give effect to the testatrix's pious intention, and held the bequest to be altogether void for uncertainty, owing to the impossibility of determining when the period named for it to take effect had expired, without discussing the question of perpetuity: *In re Moore, Prior* v. *Moore*, 110 L. T. Jour. 495.

THE CRIMINAL CODE.

When the late Sir John Thompson undertook to place upon the statute book a measure so far reaching and comprehensive as the codification of the criminal law, we may be sure it was one that that able master of the subject had fully considered.

The attempt to reduce to a series of sections or paragraphs that which to a large extent had previously been the unwritten law of the land, was one that would have deterred most legislators from the undertaking. The chief danger to be anticipated was the

restriction of that expansiveness which the common law possessed —an expansiveness which has often proved of vast assistance to those entrusted with the administration of the criminal law.

The fact that in some countries not only a definite criminal code like that we now possess obtained, but also that a definite punishment for each particular offence was laid down, was to some extent no doubt, the raison d'etre of our Code. In the public, that is the ordinary lay mind, it was often decided that a system which appeared to give each particular judge carte blanche as to the punishment to be inflicted for a certain class of offence, was the occasion of much scandal.

While however, in order to some extent to do away with this, every particular offence was defined in the Code, and also the sentence to be passed in such case ; yet, though the limits of the punishment " not less than " " not more than " were also prescribed. it will be seen that the power to pass a sentence proportioned to the moral gravity of the offence remains in the hands of those entrusted with the administration of the criminal law. To that extent then the Code fails to satisfy those who do not make themselves acquainted with the facts connected with each particular case. In one case a heavy sentence is passed for an offence, while in another, a similar—or as far as the general public knows—an apparently similar case is visited with a very light sentence. In the one case, the offender may be hardened in crime, and often before convicted—in the other it may be a case of first offence, Where, say, both offenders plead guilty, an examination of the facts as appearing from the depositions will shew a great disparity in the moral gravity of the offence in the two cases, and thus the mind of the judge being enlightened by that which is not known to the public generally, he is enabled to discriminate in the punishment awarded—though to the general public he appears to be erratic and uncertain in his awards. That wise statesman, who was the author of the Code, refrained then from imposing any cast iron rule in dealing with the question of the punishment to be allotted.

The Code, as it first appears on the statute book, was found to contain many defects, which, likely enough, it was almost impossible to anticipate, and which only appeared when its measures came to be practically worked out. Each year, however, shews an effort on the part of our legislators to remedy these defects and to introduce necessary improvements. It would be an idle task, and one

altogether too lengthy to undertake, to touch even briefly upon the more important questions that arise out of this Act, but a consideration of one or two may be interesting, and in the end perhaps useful.

We often hear, and we continually read of the "suspended sentence" supposed to be introduced by the Code, but it will be found on examination that no such words appear in the Code. The section (971) that permits this line of action provides for an offender being "released on probation of good conduct, and in the margin of the original Act that is called a "conditional release." We are aware that, prior to the passing of this Act, many judges were in the habit of "suspending sentence," there being nothing either in the written or the unwritten law requiring an immediate sentence after conviction, nor incarceration till sentence passed.

The provision in the Code was no doubt intended to help those judges who had declined to act in this way without warrant, but who would have done so, had their wishes prevailed. The amendment to this section passed last year, by which in the sentence "regard being had to the youth, character, and antecedents of the offender," the word "age" is substituted for "youth," permits of a wider application of this benevolent and useful provision.

That most excellent measure "The Speedy Trials Act," by which the procedure in the County Judge's Criminal Court (or "Interim Sessions" as it sometimes, though improperly called), was established, has been incorporated in the Code. The words used are "the County *Court* Judge's Criminal Court" as in the original Act, though by c. 57 of the R.S.O. 1897, the local legislature in constituting the judge of the County Court a Court of Record styles it "the County Judge's Criminal Court."

The section (768) which empowers the judge in his discretion to remand all the prisoners for trial by jury, in a case where one of two or more prisoners charged with the same offence demands a trial by jury, is in the language of the original section. The words "in his discretion" have been the cause of two different procedures, as they *appear* to (though perhaps they do not) permit a judge either to try without a jury the prisoner so electing, or to remand him, with the other or others who do not so elect, for trial by jury

The following is a case where by the remand of all the prisoners for a jury, a great hardship was imposed upon one of them. A. & B. we will call them, were charged with the same offence. A.

elected a jury, B. wished to be tried by the judge. Both were remanded for trial by jury. Subsequently A. applied for and obtained bail, while B., unable to find sureties was compelled to remain in "durance vile." When A. was called at the trial, it was found that he had absconded, and the case being sent to the grand jury, they ignored the bill as against B., who, an innocent man (it may justly be presumed) was thus compelled to serve a term, because guilty A. was not willing to be tried by the judge as B. was.

The judge in this case inferred, perhaps, that, did he try one prisoner alone, his finding might have an effect on the other prisoner's case when it came before a jury, and wished to avoid the possibility of such an anomaly as one being convicted or acquitted by him—the contrary in the jury case. It would seem to be necessary that some definite course should be laid down, in a case of this kind lest the "discretion" of the judge should eventually prove injurious to an innocent man. Doubtless the Minister of Justice, desiring to give every attention to the suggestions of those who are entrusted with the carrying out of the Code, and whose practical familiarity with the working of its provisions enables them to speak as it were ex cathedra, will make provision for this difficulty.

On another page will be found a notice from which it appears that the Honourable Edward Blake has ceased to be a member of the firm of Blake, Lash & Cassels, with which he has been connected for over forty years. For a number of years owing to Mr. Blake's residence in London, England, his connection with the firm has been but nominal. Mr. Blake will continue by himself to practice before the Privy Council and elsewhere as he has done since he took up his residence in England. We understand that he may be communicated with either at his London address, 20 Kensington Gate, London, W., or through Blake, Lash & Cassels, who will act as his Toronto agents.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—TRADE UNION—ACTION BY, OR AGAINST.

In *The Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1901) 1 Q.B. 170, the Court of Appeal (Smith, Collins and Stirling, L.JJ.,) determined that in the absence of incorporation, or statutory authority in that behalf, a private association of persons, in this case a trade union, cannot be sued, in the registered name of such association. The mere fact that the Legislature authorizes the registration of such associations implies no right or liability to sue, or be sued, by the registered name. The name of the society was therefore ordered to be struck out, and an injunction which had been granted against it was dissolved.

GAMING—OFFICE USED FOR BETTING—"COUPON COMPETITION"—EVENTS RELATING TO HORSE RACES—BETTING ACT 1853, (16 & 17 VICT., C. 119, S. 1, (CR. CODE SS. 204, 205).

In *The Queen* v. *Stoddardt* (1901) 1 Q.B. 177, the defendant was prosecuted for keeping an office for the purpose of money being received by her and on her behalf as the consideration for undertakings to pay thereafter money on events relating to horse races. The modus operandi was as follows: The defendant was proprietor of a newspaper published weekly at her office. Each number of the paper contained a notice of what was called a "coupon competition," which was a promise by the defendant to pay a specified sum of money to such persons as should correctly guess the result of certain horse races about to be run, and should write their guesses on certain forms called "coupons" which were issued with each number of the paper and should return the coupons so filled up to the defendant's office together with a penny in respect of each guess. Several persons every week sent in to the defendant's office coupons and money. This was held to be an infraction of the Betting Act 1853 (16 & 17 Vict., c. 119) s. 1. It would also seem to come within the Cr. Code s. 204, although that section is not in the same terms as the English Act.

SOLICITOR—MISCONDUCT—AGREEMENT BETWEEN SOLICITORS REPRESENTING CONFLICTING INTERESTS TO SHARE PROFIT COSTS.

In re Four Solicitors (1901) 1 Q.B. 187; four solicitors were called on to answer affidavits in which it was charged that they had represented parties having different interests in an administration suit, and had entered into an agreement to share profit costs made in such suit. It appeared that some of the solicitors who were acting as solicitors for parties interested, had introduced other solicitors to act for parties having conflicting interests on a secret understanding that the solicitors so introduced should by way of "agency" share the profit costs made by them; this a Divisional Court (Lord Alverstone, C.J. and Kennedy, J.,) held to be misconduct subjecting the solicitors to punishment, and two of the older solicitors concerned were ordered to be suspended for three months and they with the others were ordered to pay the costs of the proceedings.

FIXTURES—MORTGAGOR AND MORTGAGEE—"DOG GRATES"—INTENTION TO IMPROVE INHERITANCE.

Monti v. *Barnes* (1901) 1 Q.B. 205. In this case the defendant a mortgagee, counter claimed for eleven "dog grates" wrongfully detained by the plaintiff, or their value. After the mortgage was made the plaintiff, the mortgagor, had taken out eleven fixed grates and substituted therefor eleven "dog grates" which were of considerable weight but not affixed in any way to the structure of the house. These grates he had subsequently removed without the mortgagee's consent. Bigham, J., who tried the case was of opinion that the "dog grates" were placed in the house for the improvment of the inheritance and with the intention that they should become part of the freehold and were therefore legally "fixtures," and he gave judgment in favour of the mortgagee which was affirmed by the Court of Appeal (Smith, Collins and Stirling, L.J.J.).

ADMINISTRATION—GRANT TO PERSON OTHER THAN NEXT OF KIN—RENUNCIATION BY SOLE NEXT OF KIN.

In the goods of Trigg (1901) P. 42, Barnes, J., following *In re Johnson*, 2 Sw. & Tr. 595 made a grant of administration in favour of an uncle of the deceased, his sister and sole next of kin renouncing her right to the grant and consenting to the same being made to the uncle.

WILL—EXECUTION—DISCREPANCY BETWEEN ATTESTATION CLAUSE AND AFFIDAVIT OF ATTESTING WITNESS.

In the goods of Moore (1901) P. 44, probate of a will was granted without citing the next of kin under the following circumstances. The will was holograph and the various bequests were written on the first page, at the foot of which there was a space. Over leaf on the second page was the signature of the testator and an attestation clause stating it was "signed and delivered" in the presence of witnesses. One of the attesting witnesses made affidavit that on the date of the will the testator called her and the other attesting witness into the room where he was, the will being on a table before him and the ink of his signature to the best of her belief still wet, and he said "I want both of you to sign this," which they did without seeing whether anything was written on the first page. Jeune, P.P.D., though doubting whether the next of kin ought not to be cited, nevertheless allowed probate to go.

WILL—CANCELLATION OF WILL UNDER ERRONEOUS IMPRESSION OF TESTATOR AS TO EFFECT OF AN EARLIER SETTLEMENT—PROBATE OF CANCELLED WILL.

In *Stamford* v. *White* (1901) P. 46, a testator on making a will in 1895 cancelled a previous will made in 1882, under the erroneous belief that funds comprised in a settlement would in the absence of certain provisions of the will of 1882 be equally divided amongst the children of his first marriage. The will of 1895 was revoked and a new will made in 1896 together with two codicils in which the settled funds were not mentioned. Under these circumstances Jeune, P.P.D., granted probate of the will and codicils of 1896 together with the will of 1882 as a subsisting testamentary document, notwithstanding its cancellation by mistake.

COMPANY—DIRECTORS—QUORUM—ARTICLES OF ASSOCIATION.

In re Bank of Syria (1901) 1 Ch. 115, the Court of Appeal (Lord Alverstone, C.J. and Rigby and Williams, L.JJ.,) have affirmed the decision of Wright, J., (noted ante vol. 36, p. 629), but have reversed him on a point not referred to in that note, viz., as to the right of one of the directors who had paid off a part of the debt to stand in the shoes of the creditor. Wright, J., held, that having notice of the irregularity in incurring the debt, he could not stand in the creditor's position, but the Court of Appeal held that he could.

PATENT—INFRINGEMENT—INFRINGING ARTICLES SENT ABROAD—USER—POSSESSION OF INFRINGING ARTICLES.

British Motor Syndicate v. *Taylor* (1900) 2 Ch. 122, was an appeal from the judgment of Stirling, J. (1900) 1 Ch. 577 (noted ante vol. 36, p. 412). The case was for infringement of a patent, the plaintiff had obtained judgment for assessment of damages, and on the reference it appeared that the defendants had purchased infringing articles in England, some of which they sold in England, and the rest they sent for sale to defendants' branch business house in Paris. Stirling, J., held, that the defendants were properly charged with all of the articles so purchased, and the Court of Appeal (Lord Alverstone, C.J., Rigby and Williams, L.JJ.) have affirmed his decision. In doing so the court discusses the question how far innocent possession of an infringing article is "user," and also whether transportation from place to place is necessarily a "user."

PRACTICE—ACTION OF DECEIT—INJUNCTION—EVIDENCE—VIEW BY JUDGE.

In *London General Omnibus Co.* v. *Lavell* (1901) 1 Ch. 135, the plaintiffs claimed an injunction to restrain the defendants from running omnibuses in such a manner as to prove a colourable imitation of the plaintiff's omnibuses. At the trial Farwell, J., proposed to view two rival omnibuses of the plaintiffs and defendant, and with the consent of the parties he made the view, and on returning to court stated that he was satisfied without any further evidence that the defendant's omnibus was so painted and lettered as to be calculated to deceive the casual passenger, and relying on this the plaintiffs gave no evidence of any person having been actually deceived, and judgment was given in their favour for a perpetual injunction. The defendant appealed, and the only question argued was whether, the action being for deceit, the injunction could be supported in the absence of evidence of actual deception, and the Court of Appeal (Lord Alverstone, C.J., and Rigby and Williams, L.JJ.,) held that it could not, and the action was dismissed, a new trial being refused.

STATUTE OF LIMITATIONS—"CONCEALED FRAUD"—POSSESSION BY PERSON HAVING NO NOTICE OF FRAUD—REAL PROPERTY LIMITATION ACT, 1833, (3 & 4 W. 4, c. 27), s. 26—REAL PROPERTY LIMITATION ACT, 1874, (37 & 38 VICT., c. 57), s. 1—R.S.O. c. 133, s. 31.

In re McCallum, McCallum v. *McCallum* (1901) 1 Ch. 143, the Court of Appeal (Lord Alverstone, C.J., and Rigby and Williams,

L.JJ.) were unable to agree on the interpretation of the Real Property Limitation Act in reference to cases of "concealed fraud," (see R.S.O. c. 133, s. 31). Lord Alverstone, C.J., and Williams, L.J., being of opinion that "the concealed fraud" which will prevent the running of the statute against the rightful owner, must be the fraud of the person who sets up the statute of limitations, or of some one through whom he claims. Rigby, L.J., on the other hand, thought that the Act applied to every case of concealed fraud by whomsoever committed. In the present case the concealed fraud had been committed by a third party, who had concealed the existence of a deed in favour of the plaintiff, but the defendant in possession was ignorant of the existence of the deed, and was therefore held entitled to rely on the statute of limitations as a bar to the plaintiff's claim, notwithstanding the concealed fraud.

COMPANY—VOTING—FORFEITED SHARES—PURCHASER OF FORFEITED SHARES.

In *Randt Gold Mining Co.* v. *Wainwright* (1901) 1 Ch. 184, a question was raised as to whether a certain resolution had been carried by the requisite number of votes at a meeting of shareholders. This depended on whether the purchasers of certain shares forfeited for non-payment of calls, had a right to vote. The articles of association provided that after forfeiture of shares the directors of the company should be entitled to recover calls and other sums due in respect of the forfeited shares from the former owner, and that no member should be entitled to vote in respect of shares in respect of which calls were unpaid. The shares in question were forfeited and sold to another company. The certificate of the shares sold stated that the sum of 3s. 4d. per share had been paid, and that the remaining 1s. 8d. had been called up and is payable by the former owners, and the purchasers were to be deemed the owners discharged from all calls due prior to their purchase. The calls in default at the time of the forfeiture had not been paid and it was held that the purchasers were not entitled to vote as long as such prior calls remained unpaid, even though they were not liable therefor.

BANKER AND CUSTOMER—CLOSING ACCOUNT—MORTGAGE TO SECURE CURRENT ACCOUNT—POWER OF SALE—NOTICE BY CUSTOMER TO BANKER OF TRUSTEE FOR CREDITORS.

Berry v. *Halifax Commercial Banking Co.* (1901) 1 Ch. 188. In this case a customer had given the defendants a mortgage on a policy

of life assurance to secure the amount from time to time owing on the customer's current account. The mortgage provided that the statutory power of sale should be exercisable if (among other events) default should be made in payment of the balance due, within one calendar month after the account had been closed. On 19 November the customer notified the bank of a meeting of his creditors and that a trustee for creditors had been appointed. On 18 December following the bank sold the policy under the power of sale. Kekewich, J., held that the letter of 19 November was a closing of the account and that the sale was valid.

COMPANY - CONTRACT WITH PROMOTER—AGREEMENT TO ASSIGN CONTRACT BY PROMOTER OF A COMPANY TO THE COMPANY—CONTRACT—PRIVITY.

In *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Co.* (1901) 1 Ch. 196, the plaintiffs were owners of a patented invention and entered into a contract with one Phelps who was promoting the defendant company, whereby the plaintiff company agreed to give Phelps in consideration of an annual payment to be made by the defendant company when formed, the right to use the invention. This contract Phelps agreed to sell to a trustee for the intended company which was subsequently formed as the defendant company, and the defendant company, when formed, by an instrument under their seal adopted the agreement made by plaintiffs with Phelps and thereafter acted under it, under the belief that the defendant company was bound to the plaintiff company to perform the obligations. The license however was never actually assigned by Phelps to the defendant company. The present action was brought to restrain an alleged breach of the contract by the defendant company and it was held by Kekewich, J., that it would not lie against the defendant company as there was no privity of contract between them and the plaintiff company, following *In re Northumberland Avenue Hotel Co.* (1886) 33 Ch. D. 16 (noted ante vol. 22, p. 378.)

NUISANCE—NOXIOUS TRADE—INJUNCTION.

Attorney-General v. *Cole* (1901) 1 Ch. 205 was an action to restrain defendant from carrying on a noxious trade which was a nuisance to the public. The defendant's business was that of a fat melter and had been carried on by him for thirty years, but the neighborhood which was formerly open fields had been built over

to a large extent within the last five years. The defendant took reasonable precautions to prevent his business from being injurious to his neighbours, but, notwithstanding, noxious gases emanated from his works, and the evidence established that a public nuisance was created. Kekewich, J., considered the question to be can a man reasonably create a nuisance? And he held that he could not, and that if he created a nuisance, long user of the premises in the same way, or proof that they were reasonably used, is no answer, and he granted an injunction as prayed.

MORTGAGE—TRANSFER OF MORTGAGE WITHOUT NOTICE TO MORTGAGOR—ASSIGNEE OF MORTGAGE—PAYMENT OF MORTGAGE—FRAUD—ASSIGNEE OF CHOSE IN ACTION TAKES SUBJECT TO EQUITIES.

Turner v. *Smith* (1901) 1 Ch. 213 is a very striking illustration of the danger of taking an assignment of a mortgage without notice to the mortgagor. In this case the mortgagor had handed her solicitor the money to pay off the mortgage, he misappropriated the money, and for some time continued to pay interest to the mortgagee, subsequently he obtained a transfer of the mortgage to himself, and then assigned it to the defendant for £1500. Upon the defendant applying to the plaintiff, the mortgagor, for payment, the fraud was discovered, and the present action was then brought, the plaintiff claiming that the mortgage was satisfied; and it was held by Byrne, J., that as soon as the mortgage was transferred to the solicitor it was, as between the plaintiff and him, satisfied, and that his assignee the defendant could acquire no better right than the solicitor had, and therefore the plaintiff's contention prevailed.

ADMINISTRATOR—DISTRIBUTION OF ASSETS.

In re Rendell, Wood v. *Rendell* (1901) 1 Ch. 230, the point decided by Cozens-Hardy, J., is, that where a person obtained letters of administration as the attorney of the widow of a deceased person, and who was not legal personal representative of the deceased in any country, such administrator is responsible for the due distribution of the assets, and that his principal could not give a discharge that would relieve him of the liability.

SOLICITOR AND CLIENT—COSTS—TAXATION—THIRD PARTY—OBTAINING ORDER TO TAX—(R.S.O. c. 194, s. 47).

In re Gray (1901) 1 Ch. 239, decides that a third party obtaining an order for taxation of a bill of costs is not thereby precluded

from contesting his liability to pay certain charges in the bill, although such charges may properly be chargeable by the solicitor as against his client.

LEASE—SURRENDER BY OPERATION OF LAW—TITLE DEED, CUSTODY OF.

In *Knight* v. *Williams* (1901) 1 Ch. 256, Cozens-Hardy, J., also decided that upon the surrender of a lease by the acceptance of a new lease for a longer term to the same lessee, the lessee is entitled to retain the original lease, because the acceptance of a new term is only an implied surrender of the original lease, provided the new lease is good, and if it is not, the old lease remains in force, and therefore the lessee, notwithstanding the grant of the new lease, retained an interest in the lease surrendered.

PRINCIPAL AND AGENT—POWER OF ATTORNEY — CONSTRUCTION — EJUSDEM GENERIS—MONEY HAD AND RECEIVED.

In *Jacobs* v. *Morris* (1901) 1 Ch. 261, the plaintiff sought an injunction to restrain the negotiation of certain bills of exchange given by his attorney in alleged excess of his authority, and the defendants counterclaimed to recover the amount from the plaintiff for money had and received by him to the defendants' use. The plaintiff's case depended on the construction of a power of attorney which he had given to one Leslie Jacobs, and which empowered him to buy goods in connection with the plaintiff's business for cash or credit and "where necessary in connection with any purchase made on my behalf as aforesaid or in connection with my said business" to make, draw, sign, accept or indorse any bills of exchange, etc., which should be requisite in the premises, and to sign the plaintiff's or his trading name to cheques on his banking account. Leslie Jacob purporting to act under the power which he produced to the defendants, but which they did not read, borrowed £4,000 from the defendants ostensibly for the general purposes of the plaintiff's business, and accepted bills in the plaintiff's name for that amount. The £4,000 was paid into an account opened in the plaintiff's trading name of "Jacobs, Hart & Co.," and drawn out again by Leslie Jacobs without the plaintiff's knowledge. Farwell, J., held that the borrowing of money was not authorised by the power, and that the plaintiff was not liable for the money as money had and received to the defendants' use, because he did not know, and had no means of knowing, that it had been paid into his account until after it was drawn out.

PRACTICE—PARTIES—CLASS ACTION—JOINDER OF PLAINTIFFS—JOINDER OF SEVERAL CAUSES OF ACTION—RULES 123, 131—(ONT. RULES 185, 200).

In *Bedford* v. *Ellis* (1901) A.C. 1, (known in the courts below, as *Ellis* v. *Bedford*) the House of Lords have affirmed the decision of the Court of Appeal (1899) 1 Ch. 494, (noted ante vol. 35 p. 404). The action was brought by several plaintiffs suing on behalf of themselves and all others the growers of fruits, flowers, vegetables, roots and herbs within the meaning of a certain statute relating to Covent Garden Market to enforce various preferential rights to stands in the market which they alleged to have been given to the class of growers by the Act, the defendant being the lord of the market. Their lordships held that, without prejudging the construction of the Act, the plaintiffs had an interest in common, and that the defendant was not entitled to have the action stayed either on the ground that the plaintiffs had no beneficial proprietary right, or that the joinder of plaintiffs claiming different rights under the Act both personally and as representing a class would embarrass or delay the trial. Lord Brampton however dissented, and thought the plaintiffs could not be joined as their rights were separate and distinct, and we may remark that there has been a conflict of judicial opinion on this point of practice; Romer, J., Williams, L.J., and Lord Brampton being of the opinion that there was a misjoinder, and Lindley, M.R., Rigby, L.J., and Lords Halsbury, L.C., Macnaghten, Morris, and Shand, being of the contrary opinion.

COMPANY SHARES CALLS PAID BY REGISTERED OWNER—INDEMNITY BENEFICIAL OWNER OF SHARES, LIABILITY OF.

Hardoon v. *Belilios* (1901) A.C. 118, was an appeal from the Supreme Court of Hong Kong. The question at issue was whether a beneficial owner of shares in a joint stock company is or is not liable to indemnify the registered owner for calls paid by him in respect of such shares. The Judicial Committee of the Privy Council (Lords Hobhouse, Robertson, Lindley and Sir F. Jeune and Sir F. North) answered this question in the affirmative, overruling the Colonial Court, and their lordships held it to be immaterial whether the beneficial owner creates the trust himself, or accepts a transfer of the beneficial ownership with knowledge of the trust.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] KEEFER *v.* PHŒNIX INSURANCE CO. [Feb. 19.

Insurance against fire—Insurable interest—Unpaid vendor.

An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited, if, when he effected the insurance, he intended to protect the interest of the vendee as well as his own.

The fact that the vendor is not the sole owner need not be stated in the policy nor disclosed to the insurer. Judgment of the Court of Appeal 26 O.A.R. 277; 35 C. L. J. 385, reversed, and that of the trial judge 29 O.R. 394, restored. Appeal allowed with costs.

Collier, for appellant. *Aylesworth*, K.C., for respondent.

Ont.] LAKE SIMCOE ICE & COLD STORAGE CO. *v.* MCDONALD. [Feb. 19.

Water courses—Navigable waters—Cutting ice—Trespass on water lots.

An Ice Company, in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses and for that purpose may cut a channel through private water lots through which to float the ice.

Judgment of the Court of Appeal, 26 O.A.R. 411, reversed, and that of MACMAHON, J. at the trial, 29 O.R., 247, restored, STRONG, C.J. and TASCHEREAU, J. dissenting. Appeal allowed with costs.

McPherson and *Campbell*, for appellant. *McDonald*, K.C., for respondent.

Ont.] BIGGS *v.* FREEHOLD LOAN & SAVINGS CO. [Feb. 19.

Mortgage—Rate of interest—Payment by instalments.

A mortgage given to secure payment of $20,000 with interest at nine per cent. payable half yearly, contained these provisos: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable. Provided that on default of payment of any of the instalments hereby secured, or insurance or any part thereof at the times provided, interest at

the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid."

Held, reversing the judgment of the Court of Appeal, 26 O. A. R. 232; 35 C.L.J. 388, that the principal sum of $20,000 becoming due for non-payment under the first of the above provisoes, was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of 9% per annum. Appeal allowed with costs.

Bicknell, for appellant. *Armour*, K.C., and *Bethune*, for respondent.

Ont.] CANADIAN PACIFIC RAILWAY COMPANY *v.* GUTHRIE. [Feb. 19.

Easement—Right of way—User—Prescription.

A railway line passed over the northern half of lots 32, 33 and 34 respectively of the eighth concession of North Dumfries having a trestle bridge over a ravine on 34 near the boundary of 33. G., the owner of lot 33, (except the part owned by the Railway Co.) for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34 over which he could pass to a villageon the west side, his predecessor in title, who owned all these lots, having also used the same route for the purpose. The Company having, filled up the ravine, G. applied for an injunction to have it opened.

Held, reversing the judgment of the Court of Appeal, 27 O. A. R. 64, that such user could never ripen into a title by prescription of the right of way nor entitle G to a farm crossing on lot 34. Appeal allowed with costs.

Armour, K.C., *Nesbitt*, K.C., and *MacMurchy*, for appellant. *Shepley*, K.C., for respondent.

Que.] LORD *v.* THE QUEEN. [Feb. 19.

Appeal—Expiration of time limit—Forfeiture of right—Waiver—Ouster of jurisdiction—Objection taken by Court.

The provisions of articles 1020 and 1209 of the Code of Civil Procedure of the Province of Quebec, limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon* v. *The Queen*, 23 S.C.R. 62, referred to. Art. 1220 C.C. applies to appeals in suits by Petition of Right. Appeal allowed with costs.

Robitaille, K.C., for appellant. *Fitzpatrick*, K.C., and *Cannon*, K.C. for respondent.

REPORTER'S NOTE.—Compare *Park Iron Gate Co.* v. *Coates*, L.R. 5 C.P. 634.

Que.] ST. JEAN BAPTISTE *v.* BRAULT. [March 8.

Appeal—Status of Supreme Court—B.N.A. Act, s. 101.

A motion was made to quash an appeal from the Court of Review on the ground that the Act 54-55 Vict., c. 25, authorizing such appeals was ultra vires, s. 101 of the B.N.A. Act only providing for the establishment of a Court of Appeal for the Dominion for the better administration of the laws of Canada, and that the right of appeal was a civil right with which parliament could not interfere.

Held, refusing the motion, that the power to establish a Court of Appeal for the Dominion was not so restricted; that the reference to the "better administration of the laws of Canada" in s. 101 B.N.A. Act had regard to the establishment of federal courts other than a general court of appeal; and that 54-55 Vict., c. 25, was intra vires.

The appeal was then heard on the merits and dismissed following the previous appeal between the same parties (30 S.C.R. 598). Appeal dismissed with costs

Belque, K.C., for appellant. *Belcourt*, K.C., for respondent.

N.S.] GREEN *v.* MILLER. [March 18.

Libel—Privileged communication—Malice—Charge to jury—Evidence.

On the trial of an action claiming damage for a libel alleged to be contained in a privileged communication, the judge charged the jury as to the privilege and added "if the defendant made the communication bona fide, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him."

Held, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him.

One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact.

Held, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration.

The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.

Judgment of the Supreme Court of Nova Scotia, 32 N.S. Rep. 129, affirmed.

W. B. A. Ritchie, K.C., for appellant. *Rescoe*, K.C., for respondent.

N.S.] MILLARD *v.* DARROW. [March 22.

Contract for sale—Action for price—Counterclaim—Specific performance—Costs.

In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into Court the amount of the purchase money and interest demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs including costs on the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the Court en banc.

Held, that as the defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed, and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the Court below en banc and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance.

Per GWYNNE, J. Defendant should have all costs subsequent to the payment into court. Appeal allowed with costs.

Russell, K.C., and *Wade*, K.C., for appellant. *Jas. A. McLean*, K.C., for repondent.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] ROSS *v.* THE QUEEN. [April 1.

Succession Duty Act.

An appeal by the Crown from the judgment of ROSE, J., reported 32 O.R. 143; 36 C.L.J. 456, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., and at the conclusion of the argument was dismissed with costs, the Court agreeing with the reasoning of the judgment appealed from.

J. R. Cartwright, K.C., and *Frank Ford*, for appellant. *J. H. Macdonald*, K.C., and *H. L. Ebbels*, for respondents.

HIGH COURT OF JUSTICE.

Single Court, Boyd, C.] SMITH *v.* MASON. [March 26.

Evidence—Opinion—"Honestly and reasonably"—Liability of trustees.

The provisions of 62 Vict. (2) c. 15, s. 1, relieving trustees from the consequences of technical breaches of trust who have acted "honestly and reasonably" does not render competent as evidence the opinions of bankers or other financial men as to whether the trustee has so acted in the course he has taken or omitted to take. The general rule of evidence still applies that mere personal belief or opinion is not evidence, and that the test of reasonableness is that exhibited by the ordinary business men or the man of ordinary sense, knowledge and prudence in the conduct of his own affairs.

The nearest approach to a working rule is that in order to exercise a fair judgment with regard to the conduct of trustees at a particular time we must place ourselves in the position they occupied at that time and determine for ourselves what, having regard to the opinion prevalent at that time in the neighbourhood and concurrent with the transaction would have been considered the prudent course for them to have adopted. This is a different thing to asking the opinion of witnesses as to what would have been done, or what would have happened under stated circumstances several years ago, as was sought in this case.

H. D. Gamble, for the motion. *S. H. Blake*, K.C., and *J. H. Moss*, contra.

Boyd, C., Robertson, J.] [April 2.

IN RE RATCLIFFE *v.* CRESCENT HILL TIMBER CO.

Mandamus—Division Court—Jurisdiction—Evidence—Nonsuit—Appeal—Termination of action.

Appeal by the plaintiff from an order of LOUNT, J., in Chambers, dismissing a motion by the plaintiff for a mandamus to the Judge presiding in a Division Court to compel him to try an action in such Court, which he dismissed because, in his opinion, the amount involved was beyond the jurisdiction of a Division Court. The plaintiff claimed $212 for wages, and gave credit for a large sum thereon, suing for a balance of $58. The defendant, by counterclaim, alleged a large account of $744.58 (of which the $212 for wages was only an item), and claimed a balance in his favour of more than $100. The Judge entered a nonsuit after hearing the evidence of one witness who disclosed the nature of the account.

W. H. Bartram, for plaintiff, relied on *Stanley Piano Co.* v. *Thomson*, 32 O.R. 341. *J. B. McKillop*, for defendants, contended that mandamus

would not lie, and also that the plaintiff cold not give the Court jurisdiction by picking out one item of an account and suing for it,

Held, that the Judge at the trial having found that the evidence given shewed that the case was beyond the jurisdiction of the Court, and ruled that further evidence should not be given, and the plaintiff having submitted to this, and a judgment of nonsuit with cost having been entered, and the plaintiff having moved to set aside the nonsuit and for a new trial, which motion was refused, an application for a mandamus did not lie.

Kernot v. *Bailey*, 4 W.R. 608, *Kershaw* v. *Chantler*, 26 L.T.N.S. 474, *Fortescue* v. *Paton*, 3 L.T.N.S. 268 and *Ex p. Milner*, 15 Jur. 1037, followed.

Regina v. *Judge of Southampton County Court*, 65 L.T.N.S. 320, distinguished.

That the plaintiff had no right of appeal in this case under the Division Courts Act might be a defect of legislation, but it did not enlarge the remedy by mandamus.

Held, also, following *Williamson* v. *Bryans*, 12 C.P. 275, that mandamus does not lie where there is nothing pending before the Court below. Appeal dismissed with costs.

Boyd, C., Robertson, J.] IN RE REX *v.* BURNS. [April 2.

Police Magistrate—Summary trial—Perjury—Acquittal of defendant—Further prosecution—Indictment—Mandamus—Criminal Code ss. 595, 791.

Motion by the private prosecutor under C.S.U.C. c. 126, s. 6, for a rule nisi for a mandamus to the police magistrate for the city of London to compel him to bind the prosecutor over, under s. 595 of the Criminal Code, to prefer an indictment against the defendant for perjury, upon the ground that the magistrate had no jurisdiction to try the defendant summarily and acquit him, (he being a client of the County Crown Attorney, and the Crown not being represented), but should have committed the defendant for trial or have bound over the prosecutor as now desired.

Held, that it was now too late, if it was ever competent, to intervene and take such steps as would lead to prosecution by way of indictment under s. 595. It was left to the discretion of the magistrate to determine whether or not the case was one to be dealt with summarily upon the consent of the accused, and this he had to determine before the defence was made: s. 791. Defence was made, the case tried, and the charge dismissed. Sec. 595, which relates to the preliminary inquiry before the magistrate with a view to subsequent trial before another forum, has no pertinence to this concluded investigation. The magistrate had jurisdiction to try a case of perjury; if he had no jurisdiction, the defendant was never in jeopardy,

and might still be prosecuted without the assistance of this Court. Rule refused.

Bartram, for the motion.

Boyd, C., Robertson, J.] McCOLLUM *v.* CASTON. [April 2.

Action—Mortgage—Judgment—Subsequent settlement—Failure to carry out—Account—New day—Reference.

An appeal by the plaintiff from an order of LOUNT, J., affirming an order of the Master in Chambers dismissing an application by the plaintiff for an order for a new day and new account in a mortgage action, upon the ground that there was a settlement or compromise between the plaintiff and defendants which the plaintiff could not ignore, and which must be enforced or set aside in a new action. The plaintiff contended that there was no compromise, but merely an agreement made, which was not carried out.

Held, that the defendant mortgagor having made default in payments according to the agreement, the unmodified burden of the mortgage existed and was enforceable. Such an arrangement should be investigated in the Master's office, and not by independent litigation. In mortgage cases the Court has a general jurisdiction to deal with the accounts in such a manner as shall seem equitable. This is not a case of ordinary litigation; here the matter has passed into judgment, and the only matter between the contestants is one of account—how much is due and payable in respect of the mortgage, having regard to the arrangement manifested in the correspondence and dealings subsequent to the Master's report. It is foreign to the policy of the Judicature Act to contemplate new litigation in such a case as this: s. 57, sub-s. 12.

Keene v. *Biscoe*, 26 W.R. 552; 8 Ch. D. 201, *Brown* v. *Deacon*, 12 Gr. 198, and *Geldard* v. *Hornby*, 1 Ha. 251, referred to.

Appeal allowed, and order made directing a reference to take the subsequent account of what (if anything) is due upon the mortgage, having regard to the arrangement for reducing the interest and extending the time, and to dispose of the costs of the application. Costs of the appeal to the plaintiff in any event. If either party choose, further directions and costs (except costs of appeal) may be reserved.

W. E. Middleton, for plaintiff. *H. E. Caston*, for defendants.

Meredith, C.J.] IN RE GARNER. [April 2.

Lunatic—Death of—Confirmation of report—Discharge of committee.

Before the confirmation of the Master's report appointing a committee of the person and estate of a lunatic and propounding a scheme for her maintenance, the lunatic died.

Held, notwithstanding the death, that an order should be made (the executors of the deceased consenting) confirming the report and for the discharge of the committee and the surrender of his bond.

J. E. Jones, for all parties.

Meredith, C.J.] QUIGLEY *v.* WATERLOO MANUFACTURING CO. [April 3.

Parties—Addition of—Separate causes of action—Joinder—Rules 186, 192.

Where the plaintiff sought to join in one action the original and added defendants, in order that he might recover against the original defendants damages for breach of an alleged warranty of title and quiet enjoyment of the property in question, if it should appear that the added defendants rightfully dispossessed him of it, or, if it should appear that the latter were wrong-doers, that he might recover from them damages for the conversion of the property, his motion for an order to add them was refused.

Held, that the causes of action were entirely separate, and there was no right to join them even as alternative causes.

Thompson v. *London County Council* (1899) 1 Q.B. 840, and *Frankenburg* v. *Great Horseless Carriage Co.* (1900) 1 Q.B. at p. 512, followed.

D. J. Donahue, for plaintiff. *J. C. Haight*, for defendants. *Grayson Smith*, for proposed defendants.

COUNTY COURT—NORTHUMBERLAND AND DURHAM.

R. *v.* LIGHTBURNE.

Liquor License Act, R.S.O. c. 245, s. 53—Unincorporated and unlicensed club—Consumption of liquor in premises—Conclusive evidence of sale.

An unincorporated, unlicensed whist club had a room where its members met. The members contributed to a fund wherewith the defendant, the president of the club, procured supplies of liquor, which he kept in the club room. This liquor was furnished by the defendant, who had no license, to the members, and was consumed by them in the club room.

Held, that the defendant was guilty of a violation of s. 50 of The Liquor License Act, as defined by s. 53; and that proof of such consumption of liquor in the club premises by members of the club must be taken as conclusive evidence of sale as against the defendant.

[Cobourg, March 27th.—BENSON, Co. J.

This was an appeal under s. 118, sub-s (6), of the Liquor License Act, R.S.O. c. 245, by the direction of the Attorney-General, by a License Inspector, against an order made by the Police Magistrate at Cobourg, dismissing an information made by the appellant against the respondent, for a contravention of the provisions of the Act by unlawfully keeping in his premises, (known as the "Horton Block") liquor for sale without the

license therefore by-law required. The prosecution was under s. 53 of the Act relating to clubs.

The material facts of the case, as proved by admissions and evidence, were that the respondent was, at the time of the alleged contravention of the law, the president and member of a club, association or society called "The Cobourg Whist Club," which consisted of thirteen members. The club rented a room in the Horton Block from the respondent as agent of his wife, (who was the owner), and used this room for the purposes of its meetings. No person except members of the club had any right to use the room. Each member upon joining was furnished with a key to the room, and so had access to it. There were no rules or regulations in writing, but on the formation of the club it was agreed between the members that all should contribute to a fund for the purchase of spirituous liquors and ale and cigars, and that out of that fund the respondent, as president, should procure and keep in the room a supply of liquors, ale and cigars for use and consumption by the members, and that he should have the care and control of these supplies. These contributions were made, and the respondent procured a supply of liquors, ale and cigars, which was kept by him in the club's room. The members who chose to do so used these supplies. There was evidence that each member could help himself and pay for what he used, and other evidence was that the money contributed by those who used the supplies was to go to the fund for the purchase of renewal supplies. The club was not incorporated, and neither the club nor any member of it was licensed under the Act. It was clear that on the occasion of the alleged contravention liquor was kept by the respondent, as president of the club, in the club's room for intended consumption by the members of the club, and was in fact consumed by members of the club, and that some members put money in the place appointed for its reception as their contributions to the liquor fund.

Armstrong, for the respondent. There was no keeping of liquor in the room for sale or barter, and so no violation of the Act; and there could be no sale, as the liquor belonged to the club, and one member could not sell to another. *Graff* v. *Evans*, L.R. 8 Q.B.D. 373, and *Newell* v. *Hemmingway*, 58 L.J.N.S.M.C. 47, are relied on.

McColl and *Keith*, for the appellant, contra.

BENSON, Co. J.—I have not been referred to, nor have I found any case decided upon the provisions of s. 53 of the Act, as they now exist. *Reg.* v. *Austin*, 17 O.R. 743 was a decision under sub-s. 1 of s. 53 in its old form, when its application was to a club formed or carried on specially or chiefly for the purpose of enabling it to sell liquor to its members or to others without a license, and so as by means of such organization to evade the operation of the Act; and the magistrate having found that the club was formed or carried on specially or chiefly for the

purpose mentioned, the Court refused to disturb the conviction. In this case MACMAHON, J. refers to the cases of *Graff* v. *Evans* and *Newell* v. *Hemmingway*, and says they are of little value in determining the question to be decided under the special enactment of s. 53. The defendant in that case was the secretary and treasurer of the club (which was incorporated), and was found in the club-room when the inspector who laid the information visited them and found there a counter with glasses, botties and a large quantity of beer, lager beer, whiskey, gin, etc. MACMAHON, J. thought there was ample proof of "intended consumption" of liquor in such premises" by members of the club, so as to make the defendant liable as a member of the club to be held "to be the person who has or keeps therein such liquor for sale or barter" within the meaning of sub-s. 3 of s. 53. In the case I am considering it is clear that there was both "consumption" and "intended consumption" of liquor in such premises by the members of the club.

Reg. v. *Hughes*, 29 O.R. 179 does not afford assistance in this case, as it proceeded on the ground that the defendant, though steward of the club, was really keeping liquor on his own account, as the club was prohibited from selling by its charter. It is important here, though, as shewing that the word "keeping" does not necessarily imply property, but may signify share of government or control: per BOYD C. at p. 184. *Reg.* v. *Slattery*, 26 O.R. 148, is not an authority here, as the club in that case, of which the defendant was manager, was incorporated under the Ontario Joint Stock Companies Letters Patent Act, and the provisions of s. 53 of the Liquor License Act, then R.S.O. (1887) c. 194, were not applicable to such a club. Nor is *Reg.* v. *Charles*, 24 O.R. 432, in point for the same reason. I have therefore, to dispose of this appeal without the aid of any direct authority.

Sec. 53 of the Liquor License Act R.S.O. c. 245, applies to any unincorporated society, association or club, and therefore to the Cobourg Whist Club. The second [illegible] of s. 53 makes the keeping or having in any room or place occupied or controlled by such club, association or society, or any members or member thereof, or by any person resorting thereto, of any liquor for sale or barter a violation of s. 50 of the Act. Then sub-s. 3 enacts that "proof of consumption or intended consumption of liquor in such premises by any member of such club, association or society, or person who resorts thereto, shall be conclusive evidence of sale of such liquor, and the occupants of such premises or any member of the club, association or society, or person who resorts thereto shall be taken conclusively to be the person who has or keeps therein such liquor for sale or barter."

It was contended on behalf of the defendant that, though there was proof of consumption of liquor in the premises by members of the club on the occasion complained of, it was still open to the defendant to shew that the liquor was not kept there for sale or barter, and that he, though a member of the club, did not have or keep liquor therein for sale or barter,

and that under the facts as proved there was in fact no sale or barter of the liquor. In my opinion he is not at liberty to shew this in the face of the enactment contained in these sub-sections. Under them proof of consumption of liquor in the premises of the club by a member of the club is made conclusive evidence of the sale of the liquor, and the defendant as a member of the club must be taken conclusively to be the person who keeps therein the liquor for sale. There seems to me to be no escape from this conclusion, and I do not think it open to the defendant to controvert it. "Conclusive evidence" is thus defined in Stroud's Judicial Dictionary: "Anything which is duly prescribed as 'conclusive evidence' of a fact, is absolute evidence of such fact, as well criminally as civilly for all purposes for which it is so made evidence;" and in support of this definition are cited the cases of *Reg.* v. *Levi*, 34 L.J.M.C. 174, and *Reg.* v. *Robinson*, L.R. 1 C.C. 80.

These are both cases under the Bankruptcy Act, 12 & 13 Vict., c. 106, s. 233, which enacted that the *Gazette* containing the advertisement of the adjudication of bankruptcy should be conclusive evidence in all cases against the bankruptcy of the adjudication. The Courts held that, notwithstanding any irregularities there might have been which otherwise would have invalidated the adjudication, the advertisement in the *Gazette* concluded the matter.

In the case of *Re Brynmawr Coal Co.*, W.N. (1877) 45, it was held that, as s. 51 of the Companies Act 1862 made the declaration of the chairman that the voluntary resolution of the company for liquidation had been duly passed conclusive evidence of the fact, it could not be shewn (though the fact was so) that there was not a majority, in accordance with the statute, of votes present. It was so held also in the *Gold Company's Case*, 11 Ch. D. 701, more fully reported in 48 L.J.N.S. Ch. 281, and in the case of *In re Hadleigh Castle Gold Mines*, (1900) 2 Ch. 419.

I am of opinion that the defendant must be convicted of a violation of sec. 50 of the Liquor License Act. I am unable to agree with the contention on the part of the defendant that the provisions of the sub-s. of sec. 53 are ultra vires of the Legislature of Ontario. They are not, in my judgment, any greater interferences with, or restrictions upon the liberty of the subject than many other provisions of the law which have been held to be intra vires.

It was argued that the penalty applicable to this case is that prescribed by s. 72 of the Act; but I do not think so. The penalties under that section are not applicable to violations of s. 50, but are confined to violations of s. 49, the selling of liquor. Sec. 86 provides the penalty for such a case as this, and that penalty is directed to be for the first offence, not less than $20, besides costs, and not more than $50, besides costs.

As I believe that the defendant had no intention of violating the law, and acted in ignorance that he was doing so, I think that I should impose the lowest penalty, and so I direct he shall forfeit and pay a penalty of $20, besides costs.

Province of Manitoba.

KING'S BENCH.

Full Court.] ROBLIN *v.* JACKSON. [March 6.

Money had and received—Recovery of one cestui que trust of proceeds of his property received from trustee by another—Mixing of goods.

County Court Appeal. Defendant shipped a quantity of wheat in a car from Blake Siding, in Manitoba, to Duluth with instructions that the wheat was to be unloaded at Roland and cleaned and dried at the plaintiff's elevator there. This was done and the wheat was thereby reduced in bulk to about 573 bushels. The plaintiff's employees, in reloading it into the car, supposing it to be the plaintiff's wheat, added about 260 bushels of plaintiff's own wheat and forwarded the car to its destination. Defendant had obtained an advance of money from one Brown, the repayment of which he secured by transferring to Brown the bill of lading for the wheat, with the agreement that Brown should sell it and, after deducting the amount of the loan, pay the balance to the defendant. Brown afterwards sold all the wheat in the car including plaintiff's 260 bushels, received the proceeds, paid himself and accounted to defendant for the balance. So far as appeared neither Brown nor defendant knew until afterwards that any of the wheat so sold belonged to plaintiff. Plaintiff had a verdict in the County Court for the amount realized by defendant for the 260 bushels and defendant appealed, contending that there was no contract or privity express or implied between plaintiff and himself as to plaintiff's wheat or its proceeds; that defendant had not received the price of the wheat; that the payment, if any, by Brown to defendant was voluntary; and that in any case a demand was unnecessary to be made before action on defendant for a return of the wheat or payment of its value or proceeds; and that it was necessary to shew that the money received by defendant was the identical money that Brown had received for plaintiff's wheat.

Held, that Brown, as regards the wheat in question, stood in fiduciary relation towards both plaintiff and defendant, and that the proceeds of property sold by a trustee without the consent of the owner can, in equity, when traceable, be followed as fully as the property itself, if unconverted, could have been: *In re Hallett, Knatchbull* v. *Hallett*, 13 Chy. D. 696; and that, so long as such money can be definitely traced, it makes no difference that it has been mixed with other money, and this rule applies not only in the case of a trustee in the narrow and technical sense but to any person in any kind of a fiduciary position to others. There was a mixture of goods by accident, and the owners became tenants in common

of the whole in the proportions which they have severally contributed to it.

Held, also, following *Harris* v. *Harris*, 29 Beav. 110, that a cestui que trust whose property is wrongly converted by the trustee can recover by suit the proceeds of such property from another cestui que trust to whom such proceeds have been improperly, though mistakenly, paid by the trustee; that an equitable claim like the plaintiff's in this action can now be entertained by a County Court; that no demand and refusal was necessary before action; and that the plaintiff was entitled to hold his verdict. Appeal dismissed with costs.

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

Full Court.] IN RE "THE LIQUOR ACT." [Feb. 23.

Prohibitory liquor legislation—B. N. A. Act, ss. 91 and 92—Powers of Provincial Legislatures—Ultra vires.

This was a reference to the Full Court of King's Bench for their opinion on the constitutionality of "The Liquor Act," chapter 22 of the Statutes of Manitoba passed in 1900. The reference was made under R. S. Man. c. 28, by order of the Lieutenant Governor in Council, and counsel were heard both in support of the validity of the Act and against it. The judgment of the Court was unanimous in holding that the Act as a whole was beyond the power of a Provincial Legislature as set forth in B. N. A. Act, s. 92, for the following reasons:

1. Legislation having for its object the prohibition of the liquor traffic with a view to diminish the evils of intemperance does not come within the class "Property and Civil Rights" assigned to the Provincial Legislatures by section 92 of the British North America Act.

2. Such legislation by a Provincial Legislature if permissible at all must come under the class "Matters of a merely local or private nature within the Province," referred to in said section.

3. The Liquor Act consists chiefly of provisions for licensing druggists, wholesale and retail, to sell liquor for medicinal, sacramental, mechanical and scientific purposes only, or to those who are to use it for those purposes, and for prohibiting all sales by others in the Province than such licensees for consumption therein, except by manufacturers and wholesale dealers to such licensees. It therefore prohibits manufacturers from selling to the dealers who have warehouses in the Province for export trade, and such dealers cannot sell to parties in the Province for export or who are licensed by the Dominion Government to carry on the business of compounders here. It may be questionable whether the Act forbids a person resident out of the Province to sell through an agent in the Province and deliver here, but it certainly seems to forbid a non-resident himself, while temporarily in the Province, from selling, importing and delivering here even to the manufacturer, the compounder, the wholesale dealer, the exporter or

the licensee. Whilst no distinction can be made between wholesale and retail trade in themselves as far as regards the power of a Provincial Legislature to prohibit them, in the natural course of business certain localities become centres from which trade branches out into other provinces and into foreign countries, and a statute which assumes to put an end to a large portion of such traffic, though for a local purpose, is not justified by the power to legislate upon "matters of a merely local or private nature within the Province."

4. The Legislature seems to have considered it necessary, for the purpose of rendering its enactment effective, to lay its hand upon the manufacturer as well as the export dealer and make them submit to regulations, which in some views may or may not be allowable, and in attempting to suppress the greater part of the whole trade in liquors within the Province has gone further than merely dealing with matters of a local nature in the Province and has assumed to make a law that interfers with matters of trade and commerce over which the Parliament of Canada has exclusive jurisdiction.

The following are extracts from the concluding portion of the judgment delivered by the Chief Justice: "I have endeavored in vain to put in any concise form of words which might not be subject to mis-conception, or which might not in some new aspect require to be modified, a statement of the particulars and respects in which I consider the Legislature to have exceeded its powers in enacting the legislation now in question. The only answer which I can suggest for the first question is that the Legislature of Manitoba has exceeded its powers in enacting The Liquor Act as a whole. The second and third questions proposed relate to enact special sections of the Liquor Act. When we examine these provisions we find that they are all indissolubly connected with the Act as a whole. Each of them would be wholly or partially unintelligible in itself. For this reason I would answer these two questions thus: 'Not as part of the Liquor Act.' The fourth question also relates to special provisions of the Act, many of which would be unintelligible by themselves, and for that reason my answer would be, 'Not as part of the Liquor Act.' The next five questions are of an abstract nature and relate to the power of the Provincial Legislature to enact certain suggested legislation. As abstract questions they raise points of difficulty upon which I am not able to pronounce an opinion at present. They have not been specifically discussed by counsel apart from the main question. The impossibility of answering such questions categorically, apart from circumstances and statutory surroundings, has been pointed out by the Judicial Committee of the Privy Council, and is made more apparent by what I have already said. The answer which I would propose to each of these is: 'Not as part of the Liquor Act.'"

The Attorney General, J. A. M. Aikins, K.C., *W. R. Mulock*, K.C., and *E. L. Taylor*, for the Government of Manitoba. *H. M. Howell*, K.C., and *F. H. Phiffen*, contra.

Province of British Columbia.

SUPREME COURT.

Martin, J.] DUVAL *v.* MAXWELL: BURRARD ELECTION CASE. [Feb. 23.

Election petition—Preliminary objection—English rules—Copy of petition—When to be filed—R.S.C. 1886, c. 9, s. 9.

On the hearing of preliminary objections against an election petition it was

Held, dismissing the petition, that in order to have due presentation of an election petition under the Dominion Election Act, a petitioner must at the same time he files his petition, leave with the clerk of the Court a copy of the petition to be sent to the Returning Officer.

Macdonell, for respondent. *Wilson*, K.C., for petitioner.

Full Court.] MACKENZIE *v.* CUNNINGHAM. [March 6.

Libel—Publication—New trial.

Defendant took a copy of an alleged libellous resolution to the editor of a newspaper who dictated it to his stenographer and handed defendant's copy back to her. Before the stenographer extended his notes another copy of resolution was found in the office and from it the printer set up the type.

Held, (reversing, IRVING, J., who dismissed the action on the ground that it was not shewn that defendant was the cause of publication), that there should be a new trial.

Davis, K.C., and *A. D. Taylor*, for appellant. *Wilson*, K.C., and *Reid*, for respondents.

Full Court.] BRYCE *v.* JENKINS. [March 22.

Practice—Adding parties—Contract for sale of land to different purchasers—Order XVI., rule 11.

Appeal from an order of DRAKE, J., dated March 2, 1901, dismissing an application of H. E. Levy to be added as a defendant.

Where the owner of property authorized two agents to make a sale for him, and each of the agents entered into a contract for sale,

Held, (reversing DRAKE J.), that in a suit by one purchaser for specific performance, the other person had a right on his own application to be added as a party defendant.

Higgins, for appellant. *Bradburn*, for respondent.

Book Reviews.

Practical Statutes, being a collection of statutes of practical utility in force in Ontario, with notes on the construction and operation thereof, by JAMES BICKNELL, of Osgoode Hall, Barrister-at-Law, and ARTHUR JAMES KAPPELE, of Osgoode Hall, Barrister-at-Law, and of the British Columbia Bar. Toronto: Canada Law Book Company, Law Booksellers and Publishers, 1911.

This is a book of great practical utility, which can only be thoroughly appreciated by one who has used it for a considerable time in office practice. It has been submitted to the test and has not been found wanting.

The statutes included in the work consist of those which have been selected by the authorities of the Law School at Osgoode Hall as being worthy of the special attention of the students of that school. It is therefore a very convenient book for law students; but over and beyond that it is essentially a practitioner's hand book. No law office in this Province can afford to be without it.

It includes the greater portion of the Acts of practical importance which are comprised in the R.S.O. in addition to which it includes the British North America Act, the Canada Evidence Act, the Dominion Act limiting the right of appeal to the Supreme Court of Canada, the Dominion Act relating to Bills of Lading, the Bill of Exchange Act, relating to Banks and Banking.

All of these statutes are judiciously annotated. The notes are full, in the sense that they contain numerous citations; they are concise and clear, and do not contain a trace of padding.

Books of the general character of this book are not uncommonly made with scissors and paste; this book is made with brains.

The Living Age, Boston, U. S.—This excellent publication comes as usual. The articles for the number issued on April 20th are of special interest, the leading one being from the *Fortnightly Review*, entitled "Queen Victoria as a statesman." From the *Pall Mall* is taken a dissertation on novel making in the nineteenth century. The "Making and reading of newspapers" from the *Contemporary Review* will, in these newspaper days, be read with interest. In lighter literature there is a continuation of Mr. Greer's "Warden of the Marches;" a story from the Sunday Magazine; Slang and its uses; Military dialogues, taken from *Punch*, etc. We are just as well pleased to see nothing from continental sources, and are glad that the rubbishy love-letters of an Englishwoman have come to an end. The subscription price is $6.00 a year, and the publication being a weekly one more is given for the money than any other publication we know of.

Flotsam and Local Items.

The following may be a valuable suggestion to Police Magistrates who desire, like His Worship of the metropolitan City of Toronto, to get through their work without unnecessary delay. We have yet to learn that the gallant Colonel who presides at Toronto has as yet got things down quite as fine as a Police Magistrate of San Francisco, who, as we are told in the *American Law Review*, deals out judgment to malefactors in such doses as the following: "Five and Five!" meaning five dollars fine, and five days in the workhouse. The writer also speaks of the record of sentence in the case of a girl who had been arrested on the charge of vagrancy. The Police Magistrate after making enquiries as to her antecedents and parentage, and receiving her promise that she would stay with her parents and behave herself properly, released her on good behaviour, and ordered the clerk to note his finding accordingly, whereupon the clerk in loud tones roared out for the edification of the Court, "G. B.—Next case."

THE appalling extent to which the crime of homicide prevails in the United States is well exhibited by the investigations of the *Chicago Times-Herald*, which has recently compiled a table shewing the average number of murders committed in the several States of the Union during the last decade. It is as follows:

South Carolina...221	Georgia.....381	Florida.....157
Ohio.....332	Indiana.....228	Illinois.....315
Michigan.....205	Wisconsin.....154	Iowa.....202
Missouri 362	North Dakota 29	South Dakota.... 45
Nebraska.....168	Kansas.....235	Maine..... 18
New Hampshire.. 9	Vermont..... 6	Massachussetts... 96
Rhode Island.... 52	Connecticut..... 73	New York.....512
New Jersey.....120	Pennsylvania.....312	Delaware..... 48
Maryland.....280	Dist. of Columbia. 24	Virginia.....305
West Virginia.... 87	North Carolina....285	Kentucky.....398
Tennessee.....408	Alabama.....461	Mississippi.....317
Louisiana.....358	Texas.....1,021	Arkansas.....305
Montana 90	Wyoming..... 22	Colorado.....252
New Mexico..... 58	Arizona 43	Utah 57
Nevada 39	Idaho..... 27	Washington 102
Oregon..... 79	California 422	

That New York, with its population of approximately seven millions, should be second in the list is not surprising, but that so sparsely a settled State as Texas should shew nearly twice the number of homicides that the Empire State has had during the past decade is an eloquent proof of the insecurity of human life in the Lone Star State.—*Albany Law Journal.*

It does not appear whether the above is intended to include what are known in this country as cases of manslaughter. In Canada there were during the last decade 217 persons charged with murder and 72 of them convicted.

LAW SOCIETY OF UPPER CANADA.

The following is the official return of the votes cast (as to those receiving 100 votes or over) on the recent election for Benchers. The first thirty with the ex-officio members compose the governing body for the next five years:—

1	A. B. Aylesworth, Toronto	1,009
2	H. H. Strathy, Barrie	924
3	W. Douglas, Chatham	863
4	J. Hoskin, Toronto	834
5	C. Robinson, Toronto	833
6	D. B. Maclennan, Cornwall	824
7	A. H. Clarke, Windsor	823
8	G. C. Gibbons, London	823
9	G. F. Shepley, Toronto	813
10	F. H. Chrysler, Ottawa	776
11	C. H. Ritchie, Toronto	776
12	J. Idington, Stratford	756
13	J. M. Glenn, St. Thomas	745
14	E. Martin, Hamilton	739
15	G. H. Watson, Toronto	735
16	R. Bayly, London	726
17	W. D. Hogg, Ottawa	723
18	J. V. Teetzel, Hamilton	718
19	B. M. Britton, Kingston	714
20	W. Barwick, Toronto	696
21	A. Bruce, Hamilton	681
22	D. Guthrie, Guelph	680
23	W. Kerr, Cobourg	678
24	W. R. Riddell, Toronto	661
25	W. R. White, Pembroke	615
26	J. J. Foy, Toronto	606
27	Z. A. Lash, Toronto	594
28	W. D. McPherson, Toronto	573
29	S. G. McKay, Woodstock	556
30	G. Lynch-Staunton, Hamilton	534
31	A. J. Wilkes, Brantford	531
32	D. E. Thomson, Brantford	515
33	J. Bicknell, Toronto	502
34	J. E. Farewell, Whitby	497
35	E. B. Edwards, Peterboro'	450
36	J. Bell, Belleville	444
37	J. T. Garrow, Goderich	431
38	C. A. Masten, Toronto	387
39	W. H. McFadden, Brampton	387
40	F. Arnoldi, Toronto	366
41	G. Edmison, Peterboro'	359
42	H. O'Leary, Lindsay	335
43	F. H. Keefer, Port Arthur	314
44	J. B. C'arke, Toronto	305
45	E. F. B. Johnston, Toronto	257
46	W. Steers, Lindsay	209
47	A. J. R. Snow, Toronto	206
48	F. R. Latchford, Ottawa	164
49	M. Wilson, Chatham	110