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The long vacation has come and gone, and has proved, as usual, a welcome relief from the pressure of legal business. In England the periodical grumble is going the rounds of the law periodicals as to continuance of the long vacation there, but the pressure of business is not so great in this country that any appreciable sentiment can be said to exist either in favor of abolishing or shortening it. On the contrary no change is desired. Probably both clients and lawyers gain by the suspension of business during the dog-days. Should the long vacation ever be abolished it would not of course prevent the long-robed from taking their usual holidays, and the excuse which the constable made to the judge for the non-attendance of a certain county attorney for the conduct of business before the court would become a stereotyped form for accounting for the absence of lawyers—viz.,—"Please, my Lord, he's gone fishing."

A persecuted, tortured, but unoffending man, who has not only not been proved guilty, but who has been proved to be innocent, has a second time been wrongly and perversely condemned by the majority vote of a court composed of French officers. That this majority decided contrary to the evidence is manifest—that they voted as they did conscientiously can scarcely be credited. This astounding verdict has been received by France at large with satisfaction. *The Times* voices the thought of the rest of the civilized world when it says: "We do not hesitate to pronounce it the grossest and most appalling prostitution of justice the world has witnessed in modern times. All the outrageous scandals which marked the course of the trial pale into insignificance beside the crowning scandal of the verdict." It remains to be seen whether there will be any adequate effort to redeem the past, to repair as far as possible the wrong done to Dreyfus, and to free the republic from the pernicious rule of the army.

The case of *Walker* v. *Gurney-Tilden Co.* (post p. 536) applies old law to circumstances which are the outcome of modern commerce. The defendants held a policy in a guarantee company which indemnified the former against claims for compensation for personal injury caused to persons in their employment, one of the conditions of the policy being that if any legal proceedings should be taken to enforce a claim, as was done in this case, the guarantee company should, at their own cost, carry on the defence in the name, and on behalf of the employer. The defendants, through the solicitors of the guarantee company, defended the action, and were successful. The taxing officer allowed them their costs as against the plaintiff. Meredith, C.J., however, held that as there was no liability on the part of the defendants to these solicitors, the costs could not be recovered against the plaintiff. Probably contracts could be so worded as to get over a difficulty of this nature. However this may be, solicitors who have clients who indulge in the luxury of guarantee companies will not grieve much over the decision, which seems to be unassailable.

A Divisional Court has decided that the Court may (even in a case where no necessity exists beyond the convenience of the judge and jury) lawfully sit and give judgment on Good Friday, or any other day appointed by statute to be observed as a holiday, except Sunday; see ante, p. 444, *Foster* v. *Toronto Street Ry. Co.* This is to be regretted, as it will, of course, now be open to any judge, who is in a hurry to get home, to press counsel to go on with cases on days which are appointed by statute to be observed as holidays, and which counsel may have arranged to devote to other purposes. It would have been a better rule to lay down that holidays appointed by the legislature to be observed, shall be observed by the Court, and that only in cases of real necessity, and not for the personal convenience of judges or juries, shall a sitting of the Court take place on such days. The legislature has placed Sunday in exactly the same category as the other days named as public holidays; but the Court has discovered that by the common law, based on some ecclesiastical canons, the authority of which half the community repudiates, that day has acquired the sole and exclusive right to be dies non juridicus. The introduction of religious and ecclesiastical reasons for the legal obser-

vance of Sunday seems to us to be a mistake. Seventh-Day Baptists and Jews repudiate this supposed authority of canon or common law. The statutory authority appointing Sunday and Good Friday as holidays ought to be enough to secure their recognition by the Courts, and the judges would be better employed in finding reasons for complying with statutes than for violating them.

MR. RUSSELL SAGE AND HIS HUMAN SHIELD.

After an extraordinarily protracted litigation, extending over seven years, and involving four trials and three reviews by the intermediate tribunals of New York, the Court of Appeals has at last decided (*Laidlaw* v. *Sage*, 52 N.E. Rep. 679), that the clerk who had been seeking to recover damages from Mr. Russell Sage on the ground that the latter used him as a shield against the bomb exploded by Norcoss in the millionaire's office, cannot maintain his action. This ruling was placed on three grounds; (1) That, upon the weight of evidence, the defendant was entitled to the benefit of the principle that acts done under the perturbing influences of fear caused by a pressing and imminent danger are not wrongful, (*Scott* v. *Shepherd*, 2 W. Bl. 894; *Vandenburg* v. *Truax*, 4 Denio, 464); (2) That, even if the act of the defendant was wrongful, there was no sufficient legal proof that the plaintiff would not have suffered equal injury if he had not been moved by the defendant; (3) That the act of the defendant, even if wrongful, was not the proximate cause of the explosion, the physical event which produced the injuries complained of, since that act merely created the situation which existed at the moment when the injuries were inflicted, and the explosion would have happened, if the defendant had moved the plaintiff in the opposite direction or had not moved him at all.

Of these grounds the second, that the plaintiff had not shown that his damage was substantially greater by reason of the act of the defendant than it would have been if his movements had been left entirely free, strikes us as being the only satisfactory one. It was clearly a matter of mere conjecture whether an explosion which killed everybody within a certain radius except Mr. Sage and his clerk, would have inflicted a less serious injury upon the latter if the former had not laid hands upon him. The first ground is less

convincing. Apart from the fact of its being dependent upon the correctness of a very abstruse and much controverted metaphysico-legal theory, the true scope of which is by no means settled, and which, in our humble judgment, the court has carried considerably further than the precedents warrant, the report shows that the evidence was, to say the least, susceptible of the construction that the faculties of the defendant were not confused by terror to the extent of depriving him of the power of deliberation. He seems, indeed, to have exhibited a remarkable degree of coolness which, although it was doubtless very much to his credit, may fairly be regarded as depriving him of the right to rely on the rule of the Squib Case and others of that type. As to the third ground, the arguments of the court seem to us to be based on a wholly erroneous theory of proximate cause. Assuming for the moment that the act of the defendant was actually wrongful, and that it consisted, agreeably to what has always been the popular idea of the occurrence, in pulling the plaintiff's person into such a position as to intercept the fragments of the bomb, it is surely taking an extreme view of the distinction between a mere condition and a cause to lay it down that the necessary legal connection is not established because the act merely produced the situation which allowed the explosive to do its deadly work. The court, we suppose, would scarcely deny that, if one person pushes another in front of a moving locomotive, the former is liable for any injuries the latter may receive. Is there any real difference between such an act and that of pulling a person into the line of a shower of flying fragments of metal? If so, we should be glad to know wherein the difference consists. It is submitted that the essential question arising out of this aspect of the case is not, as the court assumes, whether the defendant's wrongful act produced the explosion, but whether it placed the plaintiff's body in such a position that, by reason of the wrongful act of a third party, in injury was inflicted which would not otherwise have been received. Upon the hypothesis that the interference with the plaintiff's movements did actually create this local relation between the plaintiff's person and the flying pieces of the bomb, we confess ourselves unable to see how Mr. Sage can be regarded in any other light than as a joint tortfeasor with the man who exploded the bomb, and therefore liable on familiar principles for the injury.

The reasoning of the court therefore, in regard to the first and

third of the grounds on which the judgment is rendered is decidedly open to criticism. From a merely judicial standpoint, however, the fact that the correctness of the rulings on these aspects of the case are of very questionable soundness is of slight importance, as the second of the grounds assigned is amply sufficient to warrant the rejection of the plaintiff's claim to anything more than nominal damages. But while so much may be conceded, we cannot refrain from adding that, from a purely ethical and social standpoint, the defendant's position seems to be about as weak as it could well be. By standing upon his strictly technical rights he has, perhaps, succeeded in adding another to the list of "hard cases" which, as the stern old adage has it, "make bad law," if the decision really does merit that description. But in taking this course he has chosen the reverse of "the good part," and earned the contempt of every just-thinking, liberal-minded man. Upon any view of the evidence this much at least is certain—that, whether he did or did not interfere with the movements of the plaintiff, the interposition of the latter's person did really save him from terrible injuries. Under these circumstances the catastrophe laid him under a moral obligation of the strongest kind to use a reasonable portion of his immense wealth for the purpose of indemnifying the plaintiff, not merely for the terrible sufferings which were the immediate consequence of the accident, but for the physical ruin of his life.

A favourite task of the humourists who earn a laborious living by concocting items for the funny columns of the American newspapers has been the invention of various situations which are supposed to exhibit the principal actor in the character of the "meanest man on earth." The decision before us proves once more how easily the figments of the most fertile brain may be dwarfed by actual occurrence. For the future this particular type of joke will doubtless take a new shape. The ideal "meanest man" having been found at last in the person of a New York millionaire, it will henceforth be a case of "Eclipse first and the rest nowhere," and comic journalists will humbly content themselves with drawing comparisons between Mr. Sage and the paltry creations of their fancy, and estimating precisely how far they fall behind their matchless living antitype.

C. B. LABATT.

THE AUTHORITY OF AMERICAN DECISIONS IN CANADIAN AND ENGLISH COURTS.

An interesting question for the practitioner is, how far the decisions of American Courts are authorities in our courts. English decisions are controlling by virtue of an express statutory provision, which makes the common law of England the law of Ontario. R.S.O., 1897, c. 111, s. 1, reads as follows: "In all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the said 15th day of October, 1792, as the rule for the decision of the same. . . ."

In theory the common law of England does not change; the courts in England and Ontario only discover what that law is, and apply the principles of it from time to time to different sets of circumstances. And since courts may err in declaring what the law is, although the law itself never varies, it may happen that in order to give due effect to the above statute, the actual law of England, as it stood in 1792, must be sought in a decision of an English court of the present year, which overrules and supersedes a case decided prior to 1792. But it cannot be said that the modern courts of the United States of America are in this sense authoritative exponents of the law of England as it stood in 1792.

The law of most of the States of the American Union it is true is founded on the common law of England, but the decisions of American courts have never been accepted as authorities either in England or in Canada. Recourse is had to them merely for the sake of the reasoning which is taken as a guide by our courts when the facts of the cited cases are similar to those of the case under consideration, the arguments themselves being weighed, and rejected or accepted, according as the court think proper.

The following extracts from recent reports will show the attitude of the courts of England and Canada upon this subject.

"An American case, the *Home Insurance Co.* v. *Holway*, 39 Am. Rep. 179, although of course not an authority in any way binding on us, is well worthy of consideration. The circumstances there were very similar to those in the appeal before us, and the numerous American authorities to the same effect cited in the judgment give it great weight." Per Strong, C. J. in *Niagara District Fruit Growers' Stock Co.* v. *Walker* (1896) 26 S.C.R. at p. 639.

"We do not accept foreign judgments as binding, but they are valuable to us from their well considered reasoning on the same facts now before us." Per Hagarty, C.J.O. in *Itter* v. *Howe* (1896) 23 A.R. 275.

"We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own courts is wrong. Among other things it involves an inquiry, which often is not an easy one, whether the law of America on the subject on which the point arises is the same as our own." Per Lord Halsbury, L.C. *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321 (at p. 330).

"Though they" (American cases) "are not authorities in our courts, the opinions and reasoning of the learned Judges of courts in the United States have always been regarded with respectful consideration, and have often afforded valuable assistance." Per Lord Herschell, in *Gas Float* v. *Whitton* (No. 2), (1897) 66 L.J.P. p. 102.

"The case before us presents itself, therefore, so far as our courts are concerned, as one of the first impression on which we have to declare, or perhaps I may say, practically to make the law. I am glad to think that in so doing, we have the advantage of the assistance afforded to us by the decisions of the American courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And although the decisions of the American courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law, a law, except so far as altered by statutory enactment, derived from a common source with our own, entitle their decisions to the utmost respect and confidence on our part." Per Cockburn, C.J., in *Scaramanga* v. *Stamp* (1880) 5 C.P.D. 295, p. 303.

"I cannot construe that as a decision of the Irish Court, even if that would be binding on me—which of course it would not. There are decisions in the American courts entitled to great respect, but, at the same time, not binding on me, and one cannot be too careful in the application of American decisions when they arise out of the laws of different states, because there are many circumstances affecting questions arising between the different states which might

or might not be applicable to questions arising here." Per Kekewich, J., in *Re DeNicols* (1898) 67 L. J. Ch., p. 277.

"American decisions which, like the Apocrypha, though not to be applied to establish any doctrine, as Vice-Chancellor Bacon once observed, may be read for edification only." *London Financial Assn.* v. *Kelk*, The Times, Feb. 7, 1884.

LEX.

SURVIVORSHIP.

Owing to the number of frightful disasters during the last few months, involving, in some instances, several members of the same family, the law governing survivorship in a common disaster has in many cases become a question of interest in determining the right of property. For instance, should a testator and a beneficiary under his will, both perish in the same disaster it becomes of the first importance to ascertain whether the will becomes operative or not.

The laws of most countries differ to some extent in this respect. According to Roman Law the presumption of survivorship obtained. For instance if father and son were in a common disaster and the son was above the age of puberty the presumption was that the son was the stronger and had survived the father. The Code Napoleon set down precise rules to govern in each case, and this code with modifications has been adopted by several countries including several of the individual states of the United States of America. In England and in Canada the common law is still in force. Each case is determined as it arises upon its own particular set of circumstances and there is no presumption either of survivorship or otherwise. The onus being upon the person claiming the benefit of survivorship. At one time it appears to have been presumed, in the absence of proof, that those involved died at the same moment but this presumption could be displaced, however, and sometimes upon very slight evidence as appears by the old English case of *Broughton* v. *Randall*, in which father and son, joint tenants, were hanged from the same cart, at the same time, the son was held to have survived as appeared from some signs, viz., "his shaking his legs," and his wife who claimed dower was held entitled to succeed.

In the leading case *Underwood* v. *Wing*, 4 De G. M. & W. the husband and wife were swept off the deck of a vessel by the same

wave and were not afterwards seen, and it was necessary, in order to give effect to the husband's will that proof that the wife pre-deceased her husband should be adduced. In the absence of such proof the heir-at-law took. Expert evidence was submitted to the court in this case as to the probabilities, but the Lord Chancellor said, referring to the expert testimony "to take what they say, calculating and reasoning a priori, for that is all it comes to, as to which of two people may have breathed a few seconds longer at the bottom of the sea, as establishing the fact, seems to me to be quite misunderstanding the nature of human testimony." The law as laid down in this case has been since followed in England. See *In re Greens Settlement*, L. R. 1 Equity 288; *Woolaston* v. *Berkeley*, L. R. 2 Ch. D. 213; *Re Alston*, L. R. Prob. D. (1892) 142, and in several of the United States.

In the case of *Re Alston* above mentioned Captain Alston on March 15th, 1886, made his will in which he appointed his wife sole executrix and gave her all his real and personal property, providing, however, that in case his wife pre-deceased him his property should go to his sisters. On the same date his wife made an identical will appointing her husband universal legatee and sole executer. Captain Alston and wife sailed by the sailing vessel Roman Empire from Liverpool for Peru in 1890. Nothing more was heard of this vessel after having been spoken with by another vessel on the 6th of September of that year. The court in each case, as the best way out of the difficulty, granted letters of administration, with will annexed, and leave to swear to the death as having occurred on or after September 6th, 1890. Counsel for the application argued that as there was no evidence of survivorship the result was an intestacy.

J. D. MONTGOMERY.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—DIRECTOR—QUALIFICATION SHARES—REMUNERATION.

In *Salton* v. *New Beeston Cycle Co.* (1899) 1 Ch. 775, the plaintiff claimed as assignee the moneys payable to Lord Norreys for remuneration as a director of the defendant company. The company was incorporated in June, 1896, and by the articles of association it was provided that the qualification of a director should be the holding of £250 of shares; that a first director might act before acquiring his qualification, but should, in any case, acquire the same within a month; and, unless he should do so, should be deemed to have agreed to take the shares from the company, and the same were to be allotted to him accordingly. It was also thereby provided that the board of directors were to receive £5,000 each year for remuneration. Such amount to be divided as agreed by the directors, and, in default of agreement, equally. Also, that the office of director should be vacated if he ceased to hold the due qualification. Lord Norreys was one of the first directors, and acted as such from June, 1896, to November, 1897, when the company went into liquidation. He did not acquire any shares within a month of his appointment, but acquired £250 of shares from the promoters, which was held not to be in compliance with the articles. The directors agreed that £100 should be paid to one of the directors for services, but made no agreement as to the division of the rest of the £5,000; and the rest of the directors, except Lord Norreys, resolved not to claim remuneration. Cosens-Hardy, J., held that the provision in the articles as to a director vacating office, if he ceased to hold the due qualification, did not apply to Norreys, who never had the qualification; he also held that the provisions as to the qualification and remuneration of directors were cross contracts, and not interdependent contracts, consequently, though not qualified, Lord Norreys was nevertheless entitled to remuneration as a director. He, however, held that his claim to remuneration might be offset, pro tanto, by his liability on his contract to take £250 shares, and that the plaintiff, as his assignee, was only entitled to judgment

for the balance remaining due after such set-off; the share of the remuneration to which the plaintiff, as Lord Norreys' assignee, was held entitled being one-sixth of the £4,900, the balance of the £5,000 after deducting the £100 already paid thereout.

GAMING—PLACE USED FOR BETTING—INCLOSURE ON RACECOURSE—BETTING ACT, 1853 (16 & 17 VICT., C. 119), SS. 1, 3—(CR. CODE, SS. 197, 204, S-S. 2).

Powell v. *Kingston Park Racecourse Co.* (1899) A.C. 143 is the case which is supposed to have overruled the case of *Hawke* v. *Dunn* (1897) 1 Q.B. 570 (noted ante, vol. 33, p. 518). A careful consideration of the [illegible] may, we think, lead possibly to the conclusion that the cases are not really in conflict at all, although it must be conceded that in the head note of the report, and in some of the judgments delivered, both in the House of Lords and Court of Appeal, that is assumed to be the effect of the decision in this case. The present case, when in the Court of Appeal (1897) 2 Q.B. 242, was noted ante, vol. 33, p. 762. It may be remarked, at the outset, that there was a notable distinction between the two cases. *Hawke* v. *Dunn* was a criminal prosecution of the defendant for an infraction of the Betting Act, 1853 (16 & 17 Vict., c. 119), for using the betting ring of a racecourse as a place for betting, with other persons resorting thereto. The Court for Crown Cases reserved unanimously held that the defendant had been guilty of a violation of the Act, and might properly be convicted. The defendant in that case had no control whatever over the inclosure. In view of that decision, and probably for the purpose of obtaining a different decision, the present action of *Powell* v. *Kingston Park Racecourse Co.* was instituted by a shareholder of the company, praying an injunction to restrain the company from opening or keeping open the inclosure for the purpose of persons using the same for betting with persons resorting thereto, or paying or receiving money for bets made on horse races, and from knowingly and wilfully permitting the inclosure to be used for such purposes, and from otherwise carrying on its business contrary to the Betting Act. It was not alleged that the defendants took any part in the betting, or derived any benefit or advantage therefrom, directly or indirectly. All that appeared was that the plaintiffs admitted the public on payment of a sum of money to the inclosure, and that professional bookmakers, along with other members of the public, thus obtained admission to the

inclosure, and, while there, they indulged freely and openly in betting. According to the facts presented to the Court, the defendants used this inclosure innocently for the purpose of admitting the public to view races, and some of the public, when there used the opportunity of being there for betting. The real question, therefore, in the present case, was whether there was any legal duty on the part of the defendants to prevent persons lawfully resorting to the inclosure from betting while there. The defendants did not keep the inclosure or use it for betting. Their only fault, if fault it was, was in not taking steps to prevent those whom they admitted to it from using it for the purpose of betting. As the Lord Chancellor points out, to hold that there is any such duty would, in effect, be laying down that everyone who admits others to his field or garden to view a boat race would be committing an offence if any of the persons so admitted should use it for the purpose of betting. The majority of the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, Shand and James) affirmed the judgment of the Court of Appeal, dismissing the action. Lords Hobhouse and Davey dissented, basing their conclusion, apparently, on the ground that the inclosure was "a place" within the meaning of the Act; but the fallacy of that reasoning appears to lie in the fact that it fails to draw any distinction between an owner who uses his property lawfully, and without any invasion of the Act, and another who actually uses "the place" whether it be his own or somebody else's unlawfully and contrary to the Act, for while it may be "a place" for betting as regards those who so use it, it may not be "a place" for betting as regards those who do not so use it, directly or indirectly, even though others do. As we have already pointed out, it would seem that, even in such a case as *Hawke* v. *Dunn*, there would be no offence in Canada, as the Cr. Code, s. 204, s.s. 2, appears to recognize the lawfulness of betting on a racecourse.

MONEY PAID UNDER PROTEST—RECOVERY OF MONEY PAID UNDER PROTEST—DELAY.

In *Broughton* v. *Commissioner of Stamp Duties* (1899) A.C. 251, moneys were paid by the appellant for probate duties in 1886 under protest, it being arranged that, if a case then pending were decided against the Crown, the respondent should refund the difference between 5 and 1 per cent., notwithstanding the time for

appealing should have passed. The case referred to was decided in 1888 against the Crown, and in 1891 another case was decided by the Privy Council which determined that no duty at all was payable. An application was made in 1897 by the appellant for a mandamus to the respondent to state a case, setting forth the circumstances under which the duty had been paid, and raising the question whether the same had been properly paid or not. The Supreme Court of New South Wales refused the motion on the ground of delay, and the Judicial Committee of the Privy Council upheld the decision.

APPEAL—INTERLOCUTORY INJUNCTION TO RESTRAIN TRESPASS.

Croudace v. *Zobel* (1899) A.C. 258, was an appeal by a defendant against an interim injunction, restraining him from trespassing on certain mining lands until the trial of the action. The respondent did not appear; but, notwithstanding the appeal was undefended, the Judicial Committee (Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch) refused to interfere with the order appealed from, and intimated that such appeals will not be encouraged.

CANADA RAILWAY ACT (51 VICT., C. 29), S. 262, S.SS. 3, 4—RAILWAY COMMITTEE—PACKING OF FROGS.

In *Grand Trunk Ry. Co.* v. *Washington* (1899) A.C. 275, the question at issue was the proper construction of the Dominion Railway Act, 51 Vict., c. 29, s. 262, s.ss. 3, 4, which imposes the duty on railways of packing frogs and other spaces. The action was brought in the High Court of Justice for Ontario, and was based on the alleged negligence of the railway company in omitting to pack a frog in which the plaintiff's foot had been caught. The plaintiff succeeded at the trial; but the Court of Appeal set aside the judgment in his favour on the ground that the Railway Committee, under statutory authority, had exonerated the company from packing the frogs from December to April, during which time the accident to the plaintiff occurred. The Supreme Court reversed the Court of Appeal, on the ground that the Railway Committee had no power to make the dispensing order, and that its authority to dispense with packing only applied to the spaces referred to in sub-s. 4 above referred to, and that under sub-s. 3 frogs must be packed throughout the year, and there is no power to exonerate the company from this duty. The Judicial Committee

of the Privy Council (Lords Macnaghten and Morris, and Sir H. Strong) agreed with the Supreme Court, and dismissed the appeal from its decision.

BANKER AND CUSTOMER—CERTIFYING CHEQUE, EFFECT OF—USAGE—CREDITING CUSTOMER WITH AMOUNT OF CHEQUE DEPOSITED.

In *Gaden* v. *The Newfoundland Savings Bank* (1899) A.C. 281, the Judicial Committee (Lords Watson, Hobhouse and Davey, and Sir H. Strong) have had to consider the legal effect of the custom of banker's certifying cheques. In the present case, the plaintiff deposited with the defendant bank a cheque certified by the bank on which it was drawn, and the amount of the cheque was placed to the credit of the plaintiff in the defendants' books. Subsequently, the bank on which the cheque was drawn stopped payment, and the cheque was dishonoured, and the amount was then debited by the defendants to the plaintiff. The plaintiff claimed the right to recover the amount of the cheque from the defendant bank with which it had been deposited; but the committee agreed with the Court below that the defendants must be deemed merely to have accepted the cheque as the depositor's agent for the purpose of getting it cashed, and, in the absence of any agreement to that effect, could not be deemed to have acquired title to it in consideration of the credit entry.

DECEIT—RIGHT OF ACTION—PERSON INDUCED BY MISREPRESENTATION TO COMMIT CRIME—FOREIGN ENLISTMENT ACT, 1870 (33 & 34 VICT., C. 90), S. 11.

Burrows v. *Rhodes* (1899) 1 Q.B. 816, is a case arising out of the famous Jameson raid in the Transvaal. The plaintiff in the action sued the defendant Rhodes as the managing director of the British South African Company, and Dr. Jameson, the leader of the raid, for damages incurred through the plaintiff having taken part in the raid, on the ground that he had been induced by the defendants to take part in the affair of the raid on the false representation that it was being carried out in co-operation with Her Majesty's forces, and with the sanction and support of Her Majesty's Government. The plaintiff claimed £3,000, the loss of a leg being among other items of damages. The defendants, by their defence, contended that the statement of claim disclosed no cause of action, and the point of law was argued before Grantham and Kennedy, JJ.; and on the part of the defendents it was argued

that the raid, being a breach of the Foreign Enlistment Act, the defendant, as particeps criminis, could have no cause of action against the defendants as being a joint tort feasor with them. The Court, however, overruled this contention, and held that the claim, which for the purposes of the demurrer must be taken to be true, disclosed a sufficient ground of action for deceit, in inducing the plaintiff by misrepresentations of fact to take part in an illegal act, and that, in such a case, the illegality of the act which the defendants have thus induced constitutes no defence to the action. Grantham, J., gives a very novel interpretation of the doctrine in pari delictu potior est conditio defendentis, when he says that the defendants, by demurring, put themselves in the position of plaintiffs, and therefore could not rely on that maxim of law.

LANDLORD AND TENANT—COVENANT NOT TO SUBLET—BREACH OF COVENANT—MISTAKE—RELIEF AGAINST FORFEITURE.

In *Eastern Telegraph Company* v. *Dent* (1899) 1 Q.B. 835, the action was by landlords against their tenants to recover possession of the demised premises for breach of a covenant on the part of the defendants not to sublet without the consent of the plaintiffs. The defendants established that the sub-lease had been made in forgetfulness of the covenant; that the sub-tenants were desirable tenants, and the plaintiffs' consent could not have been reasonably withheld; and notwithstanding *Barrow* v. *Isaacs* (1891) 1 Q.B. 417, they claimed that they should be relieved from the forfeiture. The Court of Appeal (Smith, Collins and Romer, L.JJ.), however, sustained the judgment of Kennedy, J., at the trial in favour of the plaintiffs, holding that the decision in *Barrow* v. *Isaacs* governed the case, and that mere forgetfulness or mistake is no ground for relief from forfeiture in such a case.

PRACTICE—PARTIES—DEFENDANTS, JOINDER OF—SEPARATE CAUSE OF ACTION—RULES 126, 127, 129—(ONT. RULES 186, 187, 192).

Thompson v. *London County Council* (1899) 1 Q.B. 840, deals with an ever-recurring point of practice, viz, the joinder of parties. In this case the action was brought by the plaintiffs against the defendants for damages caused by their negligently excavating near the plaintiffs' house, and thereby injuring it. The defendants denied liability, and attributed the damage, wholly or in part, to the negligence of a water company in having their water main

insufficiently stopped. The plaintiffs thereupon applied to add the water company as defendants. Bigham, J., granted the application; and from this order the County Council appealed, contending that the plaintiffs' cause of action, if any, against the water company, was separate and distinct from the cause of action against the County Council, and, therefore, that they could not be joined in the same action, and with this contention the Court of Appeal (Smith, Collins and Romer, L.JJ.) agreed, and reversed the order of Bigham, J. The appellants relied on *Bennetts* v. *McIlwraith* (1896) 2 Q.B. 164 (noted ante, vol. 33, p. 106), but the Court distinguished that case from the present on the ground that that was a case of alternative relief, there being but one contract on which one or the other defendant was liable. Here, if the water company was liable, it was for a distinct and separate tort for which the County Council had no liability.

MUNICIPAL ELECTION—DISQUALIFIED PERSON NOMINATED—RIGHT OF DISQUALIFIED CANDIDATE TO CONTEST ELECTION—MUNICIPAL CORPORATIONS ACT, 1882 (45 & 46 VICT., C. 50), SS. 77, 88—(R.S.O., C. 223, SS. 80, 219).

Harford v. *Linskey* (1899) 1 Q.B. 852, was a controverted municipal election proceeding, in which the simple point for adjudication was whether a person disqualified by reason of his interest in a contract with the municipality from being elected to the office of councillor, but who, notwithstanding such disqualification, had in fact been nominated as a candidate for election, could as a "candidate" contest the election. The Municipal Corporations Act, 1882, s. 77, defines a "candidate" as "a person elected or having been nominated, or having declared himself a candidate for election." Wright and Bruce, JJ., held that although the petitioner was disqualified for election, yet as he had been de facto nominated he was a candidate within the meaning of s. 77, and entitled to contest the election. The Ontario Municipal Act (R.S.O., c. 223) also authorizes a candidate to contest an election, and probably under that Act a de facto candidate would have the necessary status, although that Act does not contain the English definition of "candidate."

STATUTE OF LIMITATIONS—MONEY CHARGED ON LAND—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57), S. 8—(R.S.C., C. 133, S. 23)—21 JAC. 1, C. 16, S. 3.

In *Barnes* v. *Glenton* (1899) 1 Q.B. 885, the Court of Appeal (Smith, Collins and Romer, L.JJ.) have reversed the decision of Lord Russell, C.J. (1898) 2 Q.B. 223, (noted ante, vol. 34, p. 687.) It may be remembered that he decided in effect that, where a simple contract debt is charged on land, there the twelve years' limitation of the Real Property Limitation Act applies, and not the six-year limitation of the statute of James. When noting the decision of the Chief Justice, we expressed a doubt whether it would be followed in Ontario, and now it seems it is not good law in England.

GAMING—BETTING—PLACE WHERE BETTING CARRIED ON—BETTING ACT, 1853 (16 & 17 VICT., C. 119), SS. 1, 3—(CR. CODE, S. 197).

Brown v. *Patch* (1899) 1 Q.B. 892, is another decision on the question of what is "a place" where betting is carried on within the meaning of the Betting Act, 1853 (16 & 17 Vict., c. 119). In this case the defendant was a bookmaker who, with his clerk, entered an inclosure where horse races were carried on, and erected a cane structure about 5 ft. high, with four legs or supports, and having on top a board with the words "Bob Patch" (the defendant's name), "London. All in race or not; pay first past the post." Before each race, the odds offered by the defendant on the various horses running were written on a board. He stood on a box placed close to the structure, and invited people to bet with him, and, assisted by his clerks, made bets with others on each race. The question was whether the defendant had used "a place for the purpose of betting with persons resorting thereto." Darling and Channell, JJ., answered the question in the affirmative. See Cr. Code, s. 197, under which possibly the same conclusion might be arrived at; but see Cr. Code, s. 204 (2), which validates betting on a racecourse of an incorporated association during the actual progress of a race meeting.

ERRATA:—p. 483, 2nd line, for "after" read "at her"; p. 484, 9th line for "permits" read "prevents"; p. 486, 27th line, for "accumulation" read "acceleration."

Correspondence.

WANTED, A DIVORCE COURT.

To the Editor of the CANADA LAW JOURNAL.

SIR,—Ontario practitioners are frequently consulted in a matter in which th y are compelled to advise that there is practically no remedy for a great wrong, notwithstanding the legal maxim to the contrary. A man or woman may be the victim of a cruel wrong in their matrimonial relations for which the courts of the country afford no redress, and to which they must submit with what grace or patience they can muster, unless, perchance, they possess a thousand dollars or so with which to promote a bill of divorce in the Senate, or abjure their country and take up their residence in the neighboring republic, where they can in the course of time obtain a remedy far from satisfactory and complete. It is scarcely necessary to say that I refer to the circumstances that we have not in Ontario (and some of the other provinces as well), any Divorce Court or other legal tribunal empowered to grant divorces.

The most curious feature about this state of affairs is that it should exist at all. One is at loss to know why we should have not years ago adopted the law of the mother country in this, as we have done in most other matters. Or if it was not desirable to institute a Court for Divorce and Matrimonial Causes the ordinary courts of the land could and should have been empowered to grant relief against wrongs of this description as they do in all others.

It is abundantly clear that the present state of affairs promotes immorality, while a cheap divorce, grantable only for adultery would check it. The immoral husband or wife knows that he or she can sin with practical impunity, and is unrestricted in his or her evil tendencies. The injured one generally suffers in silence knowing there is no remedy without a very long purse. Sometimes a separation is insisted on. But this is as far as they can go. Neither is at liberty to contract another matrimonial connection, and each is subject to the increased temptations of the situation. Not infrequently this results in the formation of irregular and adulterous connections.

It is illogical too that the right to divorce should be acknowledged to exist in favor of the wealthy while it is virtually denied to

people of moderate means. Are the latter less liable to require it or less deserving of the right? The reason is past finding out. When a similar condition of things existed in England, prior to the establishment of the Court for Divorce and Matrimonial Causes, its absurdity was well put by the learned judge who was called upon to pass sentence upon a man who was tried before him for bigamy. This man was a poor laborer whose wife had deserted him and gone off with another man, leaving her husband with a family of small children. He found it necessary to get a housekeeper, and, thinking in his ignorance and simplicity that, his wife having deserted him, he was justified in getting another to be a mother to his little ones, he illegally went through the form of marriage with another woman. His lordship in passing sentence remarked with fine irony that it was the proud boast of Englishmen that there was but one law for rich and poor alike, that the prisoner had failed to recollect this important fact, that he shou' have first sued his wife's paramour in the Common Law courts for damages for the alienation of her affections, and tried the issue before a jury. Having recovered a verdict at a cost of £500 or so, he should then have presented his case in due form to the House of Lords, and having obtained a decree of divorce at a further expense of £1,000, he would then put himself into a position to marry again. It was useless for him to say that he could not command the necessary funds for the carrying out of these little formalities, these were the requirements of the law, and because of his neglect to comply with them, it became necessary to sentence him to a term of imprisonment. It is needless to say it was not a long one.

It seems to your correspondent that this is a matter in which lawyers should interest themselves, and that the public interest would be well served by an agitation in favor of some sort of a measure which might remedy the existing evil.

G.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ont.] CASTON *v.* CONSOLIDATED PLATE GLASS CO. [June 5.

Master and servant—Hiring of servant by third party—Control over service—Negligence.

A plate glass company hired by the day the general servant and horse and wagon of another company for use in its business, and while so hired the servant knocked a man down and seriously injured him.

Held, reversing the judgment of the Court of Appeal 26 O.A.R., 63 ante, p. 165, that the plate glass company was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired and not that of the plate glass company. Appeal allowed with costs.

Ritchie, Q.C., for appellants. *McCullough* and *Roche* for respondent.

Ont.] HYDE *v.* LINDSAY. [June 5.

Purchase of insolvent estate—Refusal to complete—Action by curator—Completion after judgment in—Subsequent action for special damages—Res judicata.

A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery.

Held, reversing the judgment of the Court of Appeal, that under the law of Quebec, by which the case was governed, the curator was entitled to recover the expenses and disbursements which, as a prudent administrator, he was obliged to make for the safe keeping of the property.

Held, also, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec Courts and the right to recover them was not res judicata by the judgment in that action. Appeal allowed with costs.

Belcourt for appellant. *Aylesworth*, Q.C., and *Pratt* for respondent.

N.S.] MARGESON *v.* COMMERCIAL UNION ASSURANCE CO. [June 5.

Fire insurance—Construction of contract—"Until"—Condition precedent —Waiver—Estoppel—Authority of agent or adjuster.

Certain conditions of a policy of fire insurance required proofs, etc., within fourteen days after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced, no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid.

Held, that the condition as to the production of proofs within fourteen days was a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission of such proofs within the time specified, the effect of postponing recovery merely until after their production; and that the clause as to the forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.

Neither the local agents for soliciting risks, nor an adjuster sent for the purpose of investigating a loss under a policy of fire insurance, can be considered as persons having authority from an insurer, either by their acts or words, to waive compliance with conditions precedent to the insurer's liability or to extend the prescribed time thereby limited for the fulfillment of their requirements, and as the policy in question specially required it, there could be no waiver except by indorsement in writing upon the policy signed by an officer of the company having authority for that purpose. *Atlas Assurance Co.* v. *Brownell*, 29 S.C.R., followed.

Drysdale, Q.C., for the appellant. *Borden*, Q.C., for the respondents.

Ont.] [June 5.

CARROLL *v.* ERIE COMPANY AND PROVINCIAL NATURAL GAS CO.

Res judicata—Damages—Rectification.

In an action relating to the construction of a deed the plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein.

Held, that the subject matter of the second action was not res judicata by the previous judgment. Appeal allowed with costs.

The plaintiff in an action to reform an agreement may be awarded damages.

Aylesworth, Q.C., for appellants. *Douglas* for respondent Erie Co. *Cowper* for respondent Provincial Natural Gas Co.

N.B.] MOORE *v.* WOODSTOCK WOOLLEN MILLS CO. [June 5.

Highway—Dedication—User—Evidence.

In order to establish the existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway, but also that the public accepted such dedication by user thereof as a public highway.

In a case where the evidence as to the user was conflicting and the jury found that there had been no public user of the way in question, the trial judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the Full Court.

Held, that as such decision did not take into account the necessity of establishing public user of the locus it could not stand. Judgment of the Supreme Court of New Brunswick reversed. Appeal allowed with costs.

Gregory, Q.C., for the appellants. *Stockton*, Q.C., and *Connell*, Q.C., for the respondent.

Ont.] IN RE LAZIER. [June 5.

Appeal—Habeas corpus—Extradition—Motion to quash—Necessity for motion.

L. having been ordered to be extradited to the United States on charges of forgery and other offences obtained a writ of habeas corpus and applied to MEREDITH, C.J., for his discharge, which was refused, (*In re Lazier*, 30 O.R., 419, ante, p. 380). The Court of Appeal having affirmed the judgment of MEREDITH, C.J., the prisoner sought to appeal to the Supreme Court of Canada, and on June 7th, 1899, the May session of the court being about to come to an end, application was made to have Friday, June 10th, or some later day, named for hearing a motion to quash such appeal, notice of motion having been given for the last named day.

Held, refusing the application, that there was no necessity for a motion to quash as the matter was coram non judice, sec. 31 of the Supreme and Exchequer Courts Act having expressly taken away the jurisdiction of the court to hear such appeals.

A. F. May for the application.

Ont.] HENDERSON *v.* CANADA ATLANTIC RAILWAY CO. [June 5.

Railway—Approach to crossing—Warning by ringing bell or whistling—Shunting—Negligence.

H. while driving along a street in Ottawa came to a railway crossing and had reached the outer rail when an engine and cars engaged in shunting came along on another track nearer the opposite side. H. tried

to turn his horse which became frightened and threw him out causing injuries for which he brought an action against the railway company.

Held, affirming the judgment of the Court of Appeal, 25 Ont. App. R. 437, 34 C.L.J. 783, that the evidence showed that no bell was rung or whistle blown or other warning given as the engine approached the crossing and the want of such warning was the proximate cause of the injury to H.

Held, further, that sec. 256 of the Railway Act, requiring warning to be given at least 80 rods from a crossing, applies in case of shunting or other temporary movements as well as in the general traffic. Appeal dismissed with costs.

Chrysler, Q.C., and *Bethune* for appellants. *Wallace Nesbitt* and *Macfarlane* for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, J. A., in Chambers.] RICE *v.* RICE. [July 26.

Appeal—Court of Appeal—Stay of proceedings—Removal of—Security for money directed to be paid into Court.—Special circumstances.

Motion by the plaintiff for an order that execution be not stayed unless and until the defendants should have given security for $1,700 directed by the judge of a Divisional Court, now in appeal to this Court, to be paid into Court to the credit of this action. The action was brought to recover the amount of a promissory note made by the defendant, T. G. Rice, in favor of the plaintiff, and to set aside a transfer of a farm by that defendant to the other defendant, his wife, and a transfer of the sum of $1,700 by him to her. The action was dismissed at the trial, but the plaintiff succeeded on appeal to a Divisional Court, and a decree was made declaring the conveyance of the farm void against creditors, and directing payment of $1,700 into Court. The defendants launched an appeal to the Court of Appeal and gave security for the costs of such appeal, whereupon there was a stay, which the plaintiff now sought to have removed.

Held, that there were not in this case any special circumstances distinguishing it from the case of *Wintermute* v. *Brotherhood of Railway Trainmen*, or taking it out of the general rule followed in that and other cases. No such case of pressing necessity for removing the stay of execution pending the appeal as is called for in order to overcome the governing principle had been made out.

Motion refused with costs to the defendants in any event of the appeal.

A. W. Mickle, for the plaintiff. *Heighington*, for the defendants.

HIGH COURT OF JUSTICE.

Meredith, C.J.] WALKER *v.* GURNEY-TILDEN CO. [June 28.

Costs—Recovery against opposite party—Liability to solicitor—Indemnity.

If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party. *Jarvis* v. *Great Western R. W. Co.* 8 C.P. 280, *Meriden Britannia Co.* v. *Braden*, 17 P.R. 77, followed.

This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors, where the defending solicitors continued to act upon the retainer of the guarantee company.

Washington, for plaintiff's solicitors. *J. H. Denton*, for defendants.

Boyd, C., Ferguson, J., Robertson, J.] [June 21.

TORONTO AUER LIGHT CO. *v.* COLLINS.

Patent for invention—Process and product—Purchaser of articles infringing—Profits and damages—Keeping accounts—No justification of sale of infringing articles—High Court—Final Court of Appeal—Deference to other Courts—Onus of proof.

A patent granting the exclusive right of making, constructing, using and selling to others to be used an invention described in the specifications setting forth and claiming the method of manufacture protects not only the process but the thing produced by that process and an action will lie against any person purchasing and using articles made in derogation of the patent no matter where they come from, and although the plaintiff cannot have both an account of profits and also damages against the same defendant, he may have both remedies as against different persons (e.g. maker and purchaser) in respect of the same article.

A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles, it is only an expedient to preserve the rights of all parties to the close of the litigation.

As the infringing articles were manufactured in the States and brought into Canada for sale, there was sufficient evidence given that they were made according to the plaintiff's process to throw the onus on the defendants of showing the contrary.

Although the High Court may be a final Court of Appeal it is its duty to defer to previous cases decided and affirming the validity of a patent and

follow the example of the Court of Appeal in refusing to disturb a decision in the Exchequer Court.

Earlier and later American cases commented on and contrasted.

Judgment of the County Court of the County of York varied.

Cassels, Q.C., and *Du Vernet* for the appeal. *Aylesworth*, Q.C., and *Hilton*, contra.

Boyd, C., Robertson, J., Falconbridge, J.] [July 4.

ROBERTS *v.* TAYLOR.

Factories' Act—Child labor—Accident—R.S.O., c. 256, ss. 5, 7, 8, 9.

Held, that the employment of a child under 14 years of age in a factory at work other than of the kinds specified in section 5 of the Factories' Act, R.S.O., c. 256, as proper for children, though it subjects the employer to a penalty, does not give rise to an action for damages unless there be evidence to connect the violation of the Factories' Act with the accident.

Wilkie, for plaintiff. *McKay*, for defendants.

MacMahon, J.] MEEK *v.* PARSONS. [July 5.

Free grant and homestead lands—Alienation—Indirect—By agreement—Restraint on alienation—Crown grantor—Mistake of title—Violation of statute—R.S.O. (1887), c. 25.

One object of the Free Grants and Homestead Act, R.S.O. (1887), c. 25, is to conserve the interest of a wife from being sacrificed by a husband, and alienation of free grant land by the locatee before the issue of the patent being prohibited by the statute cannot be accomplished indirectly by entering into an agreement to complete the settlement duties and after the patent is issued to convey.

The doctrine that when the fee is in the grantee there can be no restraint upon alienation does not apply when the grant is from the Crown.

There could be no mistake of title where the contract of sale was obtained from a locatee in the face of and in direct violation of an express statutory provision.

F. H. Keefer, for plaintiff. *F. R. Morris*, for defendant.

Meredith, C.J.] [July 14.

IN RE CONFEDERATION LIFE ASSOCIATION AND CORDINGLY.

Interpleader—Summary application—Rule 1103 (a)—Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction—Rule 162 (3).

Certain moneys were payable by an insurance company under several life policies in favor of the assured, his executors, administrators or

assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order.

Held, that they were entitled to avail themselves of the provisions of Rule 1103 (*a*), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons.

Held also, that under the wide provisions of Rule 162 (3) there was jurisdiction to allow service out of Ontario of the company's notice of motion for the interpleader order.

But, semble, that such notice was intended to be the foundation of proceedings substituted for an action, and by which the Court's jurisdiction over the persons served was asserted, and *quære* as to what might happen on the return of the motion if the claimants did not appear and submit to the jurisdiction.

Maclaren, Q.C., for Langridge. *Snow*, for the Association.

Meredith, C.J.] IN RE ONTARIO INSURANCE ACT. [July 20.

Benevolent societies—Incorporation—By-laws—Liability to pay assessments—Withdrawal from membership—R.S.O. 1877, c. 167—R.S.O. 1897, c. 211.

A benevolent society, incorporated under R.S.O. 1877, c. 167, attached to the declaration, which they filed under s. 2, a printed book stated to contain a copy of the constitution and by-laws by which the said society was to be governed.

Held, that the constitution and by-laws thus included in the declaration became by virtue of s. 2 (1) (R.S.O. 1897, c. 211, s. 3 [1]) a part of the organic law of the society, and changes made in the by-laws in accordance with the provisions of such constitution were valid and binding.

Held, also, that the mere fact of a person being a member of such a society, so constituted, or of its beneficiary department, raises no implied contract that he will pay the dues and assessments which according to the rules of the society afterwards become due, and that in the absence of a contract on his part to do so there is no obligation to pay for breach of which an action against him will lie. No such contract is implied in an agreement by an applicant for a beneficiary certificate, contained in his application, that compliance with all the law, regulations, and requirements, which were or might be thereafter enacted by the order, was the express condition on which he was to be entitled to participate in the beneficiary fund.

Held, also, that a suspended member is none the less a member of the

society, and where there is a personal liability on his part to pay dues or assessments that liability continues notwithstanding the suspension, not only as to dues and assessments payable at the time of the suspension, but also as to those which become payable during the suspension and before, and by the operation of the rules his default results in his ceasing to be a member.

Held, also, that all conditions prescribed by the constitution in order to withdrawal from membership must be rigorously observed.

W. R. Riddell, *Davis*, *Elliott*, and *Grant* for various appellants. *Hunter*, the Registrar of Friendly Societies, in person. *McWatt* for the receiver.

Province of Nova Scotia.

SUPREME COURT.

Ritchie, J.] IN RE GRANT. [Aug. 2

Collection Act — Payment by instalments — Default — Arrest — Previous irregularity.

The prisoner was examined under the provisions of the Collection Act, 1894, a judgment having been recorded against him in the Magistrates' Court. An order for payment by instalments was made and upon default in payment an execution was issued under which defendant was arrested. He applied for his discharge under c. 117, R.S.N.S., 5th series.

RITCHIE, J.—The return of the Deputy Sheriff shows that he is detained by virtue of an execution which is perfectly good on its face, in accordance with the provisions of the Collection Act, 1894. But Mr. Grant's counsel contends that the order under which this execution issued should not have been made because a previous order for the payment of the judgment by instalments was irregular and bad inasmuch as it did not show the jurisdiction of the Stipendiary Magistrate who made it. Both these orders were subject to appeal under the provisions of the Collection Act and no appeal has been asserted. I am of opinion that I cannot try their validity now in these proceedings. The truth of the return is not denied, and the execution under which Mr. Grant is held is a complete justification for his detention. The motion must be refused.

F. F. Mathers, for prisoner. *J. A. Chisholm*, contra.

Ritchie, J., in Chambers.] CROWE *v.* CABOT. [July 26

Ancient light—Right to, in City of Halifax—Unity of possession—Balance of convenience—Application for injunction dismissed.

Application for injunction to restrain defendant from erecting a building on land adjoining plaintiff's building which would block up plaintiff's

windows. There had been unity of possession and ownership of the two lots from 1834 till 17th March, 1840. On the latter date the common owner sold one lot to the person from whom defendant subsequently purchased and on the 25th March, 1841, he sold the other lot to the person from whom plaintiff subsequently purchased.

Under the provisions of chapter 44 of the Acts of 1860 (N.S.) as extended by c. 39 of the Acts of 1863, no person or corporate body shall be restricted or prevented from building to any height he or they may judge necessary by any right acquired by any adjacent proprietor by reason of any lights, windows, etc. But no rights of ancient lights acquired prior to the passage of the Act (12th May, 1860) were destroyed or diminished thereby.

Held, 1. It was not sufficient for plaintiff to show that he had enjoyed the easement of light for 20 years prior to May 12th, 1860, but that any inference that might be drawn from the continuous enjoyment of such an easement for 20 years could be rebutted and disproved.

2. It having been shown that there was unity of possession and ownership in 1840, that defendant had rebutted and disproved any inference to be drawn in plaintiff's favor by the twenty years enjoyment, and that plaintiff therefore had not shewn a prescriptive right. *Cross* v. *Lewis* 2 B. & C. 686, *Bright* v. *Walker* 1 C.M. & R. 211, *Mounsey* v. *Ismay* 3 H. & C. 486, 496, *Norfolk* v. *Arbuthnot* L.R. 5 C.P.D. 390, *Dalton* v. *Angus* 6 App. Cas. 740, *DeLaWarr* v. *Miles* L.R. 17 Ch. D. 590, *Bass* v. *Gregory* L.R. 25 Q.B.D. 481, *Wheaton* v. *Maple* (1893) 3 Ch. D. 48.

3. The Court would, under the evidence, not infer a lost grant, and there being a doubt whether the windows at the time of the application occupied the same position as in 1840, (without deciding that the plaintiff had no easement) that the balance of convenience was in favor of allowing the erection of the building to proceed. Injunction refused.

H. McInnes, for plaintiff. *R. E. Harris*, Q.C., for defendant.

Province of New Brunswick.

YORK COUNTY COURT.

Wilson, J.] TURNER *v.* CONNELLY. [July 3

Arrest for medical services—Affidavit to hold to bail.

Defendant was arrested on a capias for services performed and medicines supplied by the plaintiff as physician, surgeon and apothecary.

Held, that the affidavit on which the capias was founded was insufficient for not alleging that the plaintiff was a duly registered physician.

Arthur R. Slipp, for plaintiff. *J. D. Phinney*, Q.C., for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Killam, C. J.] IN RE BUCHANAN. [July 29

Real Property Act, R.S.M., ss. 127, 128—60 Vict., c. 21, s. 1, (M. 1897) —61 Vict., c. 33, ss. 8-10—Cancelling certificate of title issued in error —Jurisdiction of Court to order cancellation without fraud being shown —Title to lands bought at tax sale.

Application by District Registrar to cancel certificate of title issued to James Buchanan under "The Real Property Act," R.S.M., c. 133. Under ss. 126, 127 of the Act, if it appears to the satisfaction of the District Registrar that any certificate of title or other instrument has been issued in error or fraudulently or wrongfully obtained, he may take proceedings for summoning before a Judge of the Queen's Bench the person holding the certificate or other instrument and for the cancellation of the same by order of the judge. By s. 128, "In any proceeding respecting land . . . . or in respect of any instrument . . . . affecting land, it shall be lawful for a Judge in Chambers by decree or order to direct the District Registrar to cancel, correct, substitute or issue any certificate of title, or make any memorial or entry in the register, or otherwise to do every such act and make every such entry as may be necessary to give effect to the judgment, decree or order of the Court. (*a*) Provided that no certificate of title shall be cancelled or set aside save in the cases specially excepted in the 57th section of this Act. By 57, as amended by 55 Vict., c. 38, s. 4, a certificate of title is made conclusive evidence of the title certified to, subject to the right of any person to show that the land described is subject to any of certain exceptions or reservations (which could have no application in this case), or to show fraud; and it was contended that the effect of the above proviso to section 128 is that it is necessary to show fraud to which the holder of the certificate was a party, before a Judge can direct cancellation of it under section 127.

Held, that the proviso referred to in no way affects or qualifies the powers given by s. 127, and a certificate issued through an error on the part of the District Registrar may be ordered to be cancelled without showing fraud on the part of the holder.

Under 60 Vict., c. 21, s. 1, as amended by 61 Vict., c. 33, ss. 8-10, regulating the proceedings to obtain title to lands purchased at a sale for arrears of taxes, it was error in law for the District Registrar to issue the certificate of title within six months from the date of the application, although he had the consent of the only person who to his knowledge had a right to oppose the issue. When he issued the certificate he was not

aware that other parties were interested in the land who should have been served with notice, and this was error in point of fact. Order for cancellation of certificate of title and payment of costs by the holder of the certificate, who had opposed the application.

Metcalf, for District Registrar. *Howell*, Q.C., for Buchanan.

Province of British Columbia.

SUPREME COURT.

Martin, J.] CALLAHAN *v.* COPLEN. [April 17.

Mineral claim—Location of posts—Points of compass—Defective marking—Waiver—Priority.

MARTIN, J.—On the 24th day of May, 1892, the defendant located, and subsequently recorded, the Cube Lode mineral claim on the divide between Cody and Sandon creeks in the Slocan mining district. Over four years afterwards the plaintiff located, on August 3rd, 1896, the Cody Fraction mineral claim, and on the 27th of September, 1896, the Joker Fraction mineral claim, and duly recorded them. The Cube Lode claim as now surveyed, would occupy most of the ground claimed as that of the Cody and Joker Fractions. It is contended on behalf of the plaintiff, first, that the present situation of the Cube Lode is not according to its original location, or, in other words, the defendant has fraudulently "swung" the posts of the Cube Lode so as to place it practically on the wrong (eastern) side of the divide. This, of course, is an allegation of a very serious character, and to substantiate it I must be satisfied beyond doubt that the defendant has deliberately committed what is tantamount to a criminal offence. In view of the positive assertion of the defendant that the location line at the top of the divide, which the plaintiff took to be that of the Cube Lode, was really that of the Summit claim, also located by the defendant on the same day as the Cube Lode, and that someone has changed the name of the claim and the name of the locator, and the corroborative testimony as to the original location of the Cube Lode, I feel I would not be justified in giving prepondering weight to the evidence offered on behalf of the plaintiff on this point, though without explanation it was a strong case of circumstantial evidence. I might say here that it was a pleasant feature of this case that I had no reason to believe from anything in the demeanor of the principal parties concerned that there was any intention to deceive the Court, or that anything other than a straight story was being told; there is practically no direct conflict of evidence. Second, the plaintiff contends that in any event the present location of the Cube Lode is invalid, because

upon No. 1 post, the initial post, the "approximate compass bearing" of No. 2 post is not given as required by the Act. On his cross-examination the defendant admitted that the compass bearing, "south-easterly," which is written on No. 1 post, does not give the true direction, and said that instead of being south-easterly the bearing should be a "little north of east." While admitting that the compass bearing is misleading, he states that it would be very easy to find the location line because of the reference in the record to the adjoining Freddy Lee claim. He explains his mistake by saying that he had no compass at the time. The answer to that is that he should have had one. The plaintiff contends that the proper bearing is "north-easterly," and according to the evidence of Mr. Heyland, P.L.S., who made the survey for the defendant, the compass bearing, that is magnetic, (under which he states surveys according to the Mineral Act are always made) would have been N. 74 degrees, 9 minutes east. I have come to the conclusion that south-easterly is not the "approximate compass bearing" within the contemplation of the Act, and it is quiet clear that the plaintiff in this case was misled by that description. Further, I do not think that where an approximate compass bearing is not given this plain requirement of the Act can be cured by a reference in the record to another claim. But the defendant claims the benefit of s-s. (*g*) of s. 16 as amended by the Mineral Act Amendment Act of 1898. Assuming for the moment that the defendant is otherwise entitled to the benefit of this section, so as to cure his non-observance of the formalities required, I am of opinion that in this particular case he does not come within the scope of the section, because I find the non-observance was "of a character calculated to mislead other persons desiring to locate in the vicinity," and did in fact mislead them. But he also claims the protection of section 28 as curing the irregularity. This section is as follows: "28. Upon any dispute as to the title to any mineral claim no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit by the attorney-general based upon fraud." It is shown on the part of the defendant that for several years before the plaintiff located his claim, he, the defendant, had recorded certificates of work and has continued to do so up to the present time. The plaintiff has also duly recorded his certificates of work, and he likewise claims that this section places him in as good a position as the defendant. As pointed out by Mr. Justice Drake in *Fero* v. *Hall* (unreported), July 26th, 1898, the position is one of difficulty, and I reserved judgment largely on this ground. On mature reflection I have, with some diffidence, come to the conclusion that the defendant is entitled to the benefit of the section. If effect is to be given to it at all, the irregularity complained of was cured by his recording his last certificate of work, for I am directed in positive terms by the statute to "assume that up to that date the title to such claim was perfect;" nothing could be stronger. The same remarks apply to the plaintiff's case, but

with this exception, that other things being equal the defendant has the prior location (now cured of all irregularity) by over four years. As Mr. Justice Drake said in *Pero* v. *Hall*, under such circumstances "the Court has to fall back upon prior location and record," and I feel this is the only safe rule to be guided by. It is in accord with the legal maxim "Qui prior est in tempore, potior est in jure," which seems particularly applicable to mining titles. The action will be dismissed with costs.

[A note of this case appeared ante p. 471, but it was thought desirable to give the judgment in full.]

Full Court at Vancouver. [June 30.

WOOD *v.* CANADIAN PACIFIC RAILWAY COMPANY.

Railway—Master and servant—Personal injuries—Action for negligence —Precautions against accident—Fellow-servant.

The plaintiff, a conductor in employ of defendant company was injured while uncoupling cars on a side track, the accident being caused by the plaintiff's foot becoming entangled in the long grass which had been allowed to grow on the track. The company had a sectionman and road-master whose duties were to keep the road in order.

Held, (affirming the judgment of IRVING, J.,) in a common law action for damages, that the company was not liable. A railway company is not liable for personal injuries sustained by an employee by reason of a defect in the track, provided the track was properly constructed and competent workmen were employed to keep it in order.

Martin, Q.C., Attorney-General, for appellant. *Davis*, Q.C., for respondent.

Flotsam and Jetsam.

A legal contemporary has had some good stories connected with legal history, which are vouched for as being true. The following has a fine Irish flavor. Mr. Power, a Baron of the Exchequer Court, was proved by the Lord Chancellor Clare to have embezzled public funds. Determining to be revenged upon the Chancellor, he called at his house for the purpose of assassinating him, but as he was not at home, the judge drove to the mouth of the Liffey, sent his coachman home, and with an umbrella over his head—it was raining at the time—leaped into the river and was drowned. Surely it would occur to none but an Irishman to keep his head dry to the last moment.