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COURTS FOR THE TRIAL OF MATRIMONIAL CAUSES.

At the recent meeting of the Ontario Bar Association, a paper was read by Mr. E. F. B. Johnston, K.C., advocating the establishment of a Divorce Court in this Province. There are not a few who appear to be rather adverse to this proposal, on the ground that the establishment of a Divorce Court would have a tendency to increase divorces, and gradually lead to a weakening of the marriage tie, a result not to be desired.

Mr. Johnston, however, dealt with the subject altogether from the standpoint of the desirability of changing the forum and simplifying procedure in divorce cases, in order to give the public greater facilities for procuring divorces. The application to the Dominion Parliament, now the only mode of obtaining the dissolution of marriage in some of the Provinces, is undoubtedly a remedy of which only the comparatively rich can avail themselves.

It would be well to remember, in considering the question of a Divorce Court for Canada, that there are other matrimonial causes besides divorce cases which need a proper tribunal for their disposition; and it is a question deserving of consideration as to whether, altogether apart from the question of divorce, duly constituted matrimonial courts are not now needed in each province of the Dominion.

That such a court has not been established before this in Ontario is due to the fact, that at the time of the first establishment of the Courts of Justice in that Province, matrimonial jurisdiction was, in England, administered in and by the Ecclesiastical Courts; and while the jurisdiction of the English Courts of law and equity was confined on the Provincial

Courts, only a limited part of the jurisdiction exercised in England by Ecclesiastical Courts was conferred on the Provincial Courts, viz., the jurisdiction to grant alimony, and the jurisdiction to grant probate of wills and administration of deceased persons' estates. It appears from the Quebec Act, 14 Geo. III. c. 83, s. 17, that the question of Ecclesiastical Courts was not lost sight of, and power was expressly reserved to create them in the future; but that power was never exercised.

The result is that there is no court in Ontario which has jurisdiction to pronounce a decree of nullity of marriage. Nullity of marriage, of course, differs from divorce. It is pronounced where there never was a lawful marriage; whereas a divorce is the judicial annulment, wholly or partially, of a legal marriage.

The establishment of a matrimonial court does not necessarily involve the granting to the court any power to grant divorces *à vinculo*, although, if such a court were established, it would be the natural repository of such a divorce jurisdiction, if any were granted. But the establishment of a matrimonial court appears to be necessary whether it be granted jurisdiction to grant divorces *à vinculo* or not.

At present, a de facto marriage may have been entered into, which, in law, is null and void; and yet there is no provincial tribunal to declare it null. People within prohibited degrees, or persons physically incompetent, or under duress, may have gone through the form of marriage, but such marriages cannot, at least in most of the Provinces, be legally annulled except by application to Parliament.

With regard to divorce no doubt opinions widely differ. Prior to the Reformation the rule of the Christian Church in the West was that marriage was indissoluble during the lifetime of the parties. The legal definition of Christian marriage is that it is the union of one man and one woman for life to the exclusion of all others; see *Re Bethell, Bethell* v. *Hildyard*, 58 L.T. 64; *Hyde* v. *Hyde*, L.R. 1 P.D. 130. Divorces à mensa et thoro only were allowed, but not divorces à vinculo. These divorces à mensa et thoro were merely a legal separation from

bed and board, and did not entitle either spouse to marry again in the lifetime of the other.

This view of the indissoluble character of marriage was based on two grounds; (1) the express declaration of our Saviour Himself, that they whom God had joined no man should put asunder, and (2) on the sacramental character of the marriage contract, as held by some bodies of Christians.

At the great upheaval of the Reformation, marriage, with every other religious question, came into controversy, and the sacramental character of marriage was contested. Those who professed to base themselves on scripture being the advocates, in this particular, for disregarding the words of scripture and the teaching of Christ Himself, and being foremost advocates for granting divorces for causes even more frivolous than any American legislature has as yet favoured. This lax view regarding matrimony which has come down to us from the Puritans of the 17th century still largely prevails among those who have inherited their religious principles.

The difference of opinion as to the sacramental character of matrimony, if the truth were known, was probably largely due to the fact that neither party to the controversy understood how it came to pass that matrimony had come to be called a "sacrament," or in what the sacrament of matrimony really consisted.

The word "sacrament" as everyone knows is not a scriptural term. None of the ordinances of religion are called "sacraments" in the New Testament. How, then, did it come to pass that the word "sacrament" was applied to matrimony, etc.? The word from which sacrament is derived seems to furnish a very plain and easy solution, *sacramentum* was the Roman soldiers' oath of fidelity, and it is easy to see that in the mutual promises of fidelity which the marriage contract expressly or impliedly involves we have the sacramentum: Now, this promise according to the word of Christ Himself involved a lifelong obligation, and was irrevocable. To violate it was not to violate an ordin-

ary, but a sacred, contract. Hence it was properly called a sacrament.

The indissoluble character of marriage continues to be theoretically the doctrine of both Anglicans and of the Church of Rome at the present time. But although the Romish view of matrimony is theoretically strict, it is practically lax, because it refuses to recognize as religiously valid, any marriage, which has not been solemnized by a priest of that denomination, with the result that any other marriage is regarded by Romanists as mere legalized concubinage and its dissolution not only a lawful but a meritorious act. The Anglican part of the Church, on the other hand regards all marriages between persons having the right to contract matrimony as indissoluble when solemnized before persons authorized by law to solemnize matrimony, irrespective of whether that person be a priest of the Church of Rome, a clergyman of the Church of England, or any Protestant minister, or even an ordinary layman duly authorized to perform the ceremony. These considerations cannot be lost sight of where matrimonial legislation is in question.

But it must be recognized as a fact, as Bishop Gore has recently said, "that the modern State cannot be assumed to be distinctly Christian." It has to legislate for all classes of people and it is bound by the principle of religious tolerance from which it will not depart. We cannot conceal from ourselves that there are those in our midst who do not adopt the view of Christ concerning matrimony, and they do not regard it as an indissoluble bond. The only question is therefore whether they are yet sufficiently numerous to justify the Parliament of Canada in giving effect to their opinions concerning divorce. But, after all, the question now brought prominently before the public by Mr. Johnston's very able paper is whether the present cumbersome, unsatisfactory and unfair procedure for obtaining a divorce should not be superseded.

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

By the Honourable Mr. Justice Riddell, LL.D., LL.D.

It is interesting to an Ontario practitioner to consider how the courts in his province have been conducted in the past.

I propose to give an account, incomplete as it must be—of the proceedings in Term of the Court of King's Bench in Upper Canada during the period covered by Term Book No. 9 at Osgoode Hall. This book has been selected almost at random as the preceeding books contain proceedings quite as interesting; but this particular Term book I have recently had occasion to consult to clear up an obscure point of our legal history.

The book covers the time from Easter Term, 5 George IV., April 19th, 1824, to Michaelmas Term, 8 George IV., Nov. 17, 1827. Until the end of Trinity Term, 6 George IV., July 2nd, 1825, the chief justice was William Dummer Powell, the two puisne justices were William Campbell and D'Arcy Boulton. Sometimes all three sat, sometimes only two, and sometimes one. In Michaelmas Term, 6 George IV., Oct. 24th, 1825, Campbell was sworn in as Chief Justice and Levius Peters Sherwood as junior puisne. Mr. Justice Boulton did not sit from Easter Term, 6 George IV., April 19th, 1825, until Michaelmas Term, 7 George IV., Nov. 6th, 1826. He sat during that Term and Hilary Term, 7 George IV., January 1st to 13th, 1827, but does not thereafter appear. He resigned, and Mr. Justice John Walpole Willis was sworn in, Michaelmas Term, 8 George IV., Nov. 5th, 1827; there was no further change during the period of Term Book No. 9.

The clerk of the Crown and Pleas who acted as registrar—from after Oct. 24th, 1824, was Charles Coxwell Small who has been called in the April previous—he is No. 80 on the Law Society's Roll. The clerk of the Crown and Pleas was of no slight importance—on Nov. 8th, 1827, the full court, Campbell, C.J., Sherwood, and Willis, JJ., announced as follows: "The court ordered that as no business could be done on account of

the illness of the clerk of the Crown, the time should be enlarged for four day rules until to-morrow" and then adjourned till the morrow at 10 o'clock on Nov. 9th, "the court being informed by letter from the clerk of the Crown, Mr. Small, that he is too much indisposed to attend the court and requesting Mr. Cawdell may act as his deputy in court. It is ordered that the said Mr. Cawdell* do act in that capacity till the court shall make further order respecting the matter and either approve or disapprove of Mr. Small's appointment of a deputy." As nothing further is heard of the matter, it may be assumed that Mr. Small came back to his post, and that his deputy was in the meantime satisfactory.

Chief Justice Powell was born in Boston, Massachusetts, of an old Welsh family (Ap Howell). He was educated in England and called to the Bar of the Inner Temple. He took the loyalist side and went to Montreal some years before peace was declared in 1783. In that year, he took to London a petition signed by many of the English immigrants against having the French Canadian Civil law imposed upon them as has been done by the Quebec Act, 14 George III. c. 83 (1774). Returning to Canada he was employed by Lord Dorchester, the Governor-General, on several commissions, and was in 1789 appointed sole judge of the Court of Common Pleas which Dorchester had instituted for the District of Hesse. The headquarters of this court were at Detroit which till 1796 was part of Canada. The court also sat at L'Assomption which is now Sandwich, and the proceedings for a great part of the time the court was in existence are still at Osgoode Hall in the King's Bench vault. Powell was also made a member of the Land Board for Hesse, sitting at Detroit.

When in 1794, by 34 George III. c. 2, the Courts of Common Pleas were abolished and a Court of King's Bench was

*This, no doubt, is what is referred to in the index to Taylor's Reports, p. 530, "The court required that the appointment of deputy clerks of the Crown should be sanctioned by the court," Caldwell, ex parte. The decision nowhere appears in the body of the volume—and I have copied the official record, spelling and all.

created, Powell was made a justice of that court. William Osgoode was the first chief justice of Upper Canada, having come out in that capacity shortly after Simcoe, but he never sat in the King's Bench in Term. Powell sat either alone or with Hon. Peter Russell who received a commission more than once for a temporary period, until Elmsley was appointed chief justice in 1796. Allcock was in 1798 appointed a puisne justice, and thenceforward with short intervals the court was composed of a chief justice and two puisnes, until it was merged in the High Court of Justice in 1881. Although the full court was in theory three judges, two or even one of them exercised the powers of the full court. Powell was a diligent judge. Only one instance is known of his being absent from the Bench in Term for any protracted period: that was from July, 1806 till November, 1807, when he was in Spain in the successful attempt to secure the release from a Spanish-American prison of his son who had joined Miranda in his unsuccessful revolutionary incursion into Venezuela.* He was made chief justice in 1816 on the resignation of Chief Justice Scott, and was also appointed Speaker of the Legislative Council.

During the last few years of his judicial life he rather fell out of the good graces of the administration, and when he desired to resign upon a pension, the Executive Council reported against it. Notwithstanding this, he finally was granted a pension for life of £1,000 sterling. He lived the short remainder of his life—nine years—in Toronto, dying there in 1834.

D'Arcy Boulton was an Englishmar who came before the beginning of the last century to Upper Canada, arriving in York (Toronto) in 1807. He received a licence to practise in 1803 from the Administrator of the Government and became a member of the Law Society the same year (No. 22 of the Society's Roll). He became Solicitor-General in 1805. In 1810 sailing for England he was taken by a French privateer after being

*In the first Term after his return from Spain he took part with Scott, C.J., in discussing the only action of Scandalum Magnatum ever brought on this side of the Atlantic. The proceedings were taken by Mr. Justice Thorpe against Joseph Ryerson: "Thorpe qui tam. v. Ryerson."

wounded in a gallant resistance. He was kept a prisoner in France till the temporary peace of 1814. On his return to Upper Canada he was made Attorney-General, when John Beverley Robinson (afterwards, C.J.), who has acted as Attorney-General since the death at Queenston Heights of Col. John Macdonell, succeeded Boulton as Solicitor-General. Boulton was made puisne judge in 1818, when Robinson succeeded him as Attorney-General, and Henry John Boulton, his son, became Solicitor-General. Resigning in 1827, he survived for only three years, living all the time in York.

William Campbell was the first of our judges to be knighted. He was a Scotsman who came to this continent as a private soldier in a Highland regiment. He fought during the Revolutionary War, being taken prisoner at the surrender of Cornwallis; at the peace he went to Nova Scotia. Called to the Bar of Nova Scotia, he was in 1811 appointed to the King's Bench in Upper Canada. He became chief justice, as we have seen, in 1825, and resigned in 1829 to be succeeded by John Beverley Robinson. He, on his resignation, received the honour of knighthood.

Levius Peters Sherwood was Canadian born, the son of Mr. Justus Sherwood of Augusta (his name is sometimes given Mr. Justice Sherwood, leading to some confusion with his more celebrated son).

The future judge was called in 1803 (No. 19), became a member and Speaker of the House of Assembly, and an ardent supporter of the Government.* In 1841, he was called to the Legislative Council as Speaker and in 1825, appointed to the King's Bench. He survived till 1850.

John Walpole Willis deserves an article devoted to himself —I therefore say nothing of him at this time.

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*William Lyon MacKenzie speaks thus of him, p. 337 of his "Sketches of Canada and the United States."

"Levius Peters Sherwood was at one and the same time collector of customs at Brockville and at Johnstown; judge of the district court of the two counties; registrar of conveyances for Grenville court and for Carleton county; Surrogate judge, Johnstown district; M.P. for a county, and Speaker of the House of Assembly."

At the time now under consideration, the Law Society did not, as now, simply furnish to the court a certificate of fitness to be sworn in as an officer of the court for each aspirant to the position of attorney. The officers whom we now call solicitors were in the Common Law Courts called attorneys and in the Court of Chancery were called solicitors. Since the Judicature Act of 1881, the name attorney has not been in use. The Court of King's Bench being a common law court, its officers were attorneys.

One desiring to be sworn in and enrolled as an attorney appeared in court in Term with evidence of his having served the prescribed time as a clerk; his papers had to be regular—for example, July 17th, 1824, before Powell, C.J., Campbell, and Boulton, JJ., Mr. John Lyons was proposed by the Solicitor-General to be sworn in as an attorney. Upon producing his articles of clerkship, the certificate of his master appearing insufficient, the court refused to admit him. The Solicitor-General was Henry John Boulton, and it was he who was "his master," yet the court did not accede to the motion: *Ex parte Lyons* (1824), Tay. 171; *Ex parte Radenhurst* (1824), Tay. 138. Next Term, Nov. 13th, before the same court, "Mr. John Lyons, having produced his articles of clerkship to Henry John Boulton, Esquire, for the faithful service of upwards of three years and the additional affidavits from these produced on his last application the court ordered that he be sworn in as an attorney of this Honourable Court." Nov. 7th, 1826, "The treasurer of the Law Society presented A. Wilkinson, Esquire, and John Lyons, Esquire, as being admitted barristers"; and Nov. 18, they were sworn in as barristers accordingly.

Those desiring to be admitted as barristers were, in most instances, presented by the treasurer of the Law Society, and sworn in at once, as is the present practice; but this was not always the case; for example, in Michaelmas Term, 2 Geo. IV., Nov. 7th, 1821 (Prœs. Powell, C.J., Campbell, and Boulton, JJ.). "Mr. John Rolph having produced satisfactory evidence of his having been admitted to the English B[illegible]—he took the usual

oath and was admitted a barrister, and attorney of the honourable court." This was the well-known Dr. Rolph; he was admitted to the Law Society on the same evidence and is No. 64 on its roll.

In Michaelmas Term, 2 George IV., Nov. 1821 (Præs. Powell, C.J., Campbell, and Boulton, JJ.), Robert Berrie, Esquire, applied to be admitted to practise as a barrister, under the provision of 43 George III. passed March 5th, 1803, "and having produced proof to their satisfaction of his having been admitted to practice at the court of the sheriff's depute of Lanarkshire held at Glasgow, and also of his character and conduct it is considered by the judges that the said Robert Berrie be admitted to practice in this province as a barrister and the said Robert Berrie took the oaths required and is hereby admitted accordingly." He was also admitted to the Law Society and is No. 65 on the roll. Nothing like these cases occurs, however, during the period of Term Book No. 9.*

While the court was very careful as to whom they would admit as attorneys (or to use the traditional orthography, attornies), no one who had not been admitted was allowed to practise as an attorney on penalty of being attached for contempt.

Barnabas Bidwell, father of the better-known Marshall Spring Bidwell, was charged with practising as an attorney under the name of Daniel Washburn of Kingston, who had been struck off the roll for misconduct. The following are the entries: Easter Term, 8 George IV., April 24th (Præs. Campbell, C.J., and Sherwood, J.), "in the matter of Barnabas Bidwell, on the complaint of John McLean, Esquire, sheriff of the Midland District, motion for a rule to shew cause why an attachement should not issue against the said Barnabas Bidwell for a contempt for acting and practising as an attorney in the name of Daniel Washburn, Esquire, in a certain cause wherein Samuel Brock was plaintiff and John White defendant, on affidavit of John McLean, Esquire, and of the said Samuel

*See In re Macara, 2 U.C.R. 114. Mandamus. In re Lapenotière, 4 U.C.R. 472.

Broc' J. J. Boulton, for plaintiff. Stands for to-morrow; H. J. Boulton files three papers and motions; W. W. Baldwin files two papers"; "April 25th, affidavit put in and filed by R. Baldwin"; May 5th, "Rule granted"; June 28th, "The court withholds giving an opinion on the present application at present, W. W. Baldwin, H. J. Boulton."

June 30th, "Rule discharged, W. W. B., Esq." Nothing is more certain than if Bidwell had been proved to be practising as an attorney, he would have been attached for contempt of court, fined and imprisoned.*

The court exercised strict discipline over its attornies. Many cases are found of motions against such officers. I give some of them. In Easter Term, 8 George IV., May 3rd, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "*In re Sam. Merrill*, one etc., motion for a rule to shew cause why an attachment should not issue against Samuel Merrill one of the attornies of this honourable court for a contempt on matters disclosed on affidavit, John B. Robinson, Attorney-General, granted." June 28th, "Attachment ordered, John B. Robinson, Attorney-General."

In Michaelmas Term, 7 George IV., Nov. 6th, 1826 (Præs. Campbell, C.J., Boulton, and Sherwood, JJ.), "The Solicitor-General handed into court (as public prosecutor) a presentment of the grand jury of the Newcastle district against Marcus Whitehead, Esquire, together with certain affidavits to support the same for having charged, in the course of his profession ex-

*See The King v. Bidwell, Tay. 487. Barnabas Bidwell was administrator of the estate of Washburn. His celebrated son, Marshall Spring Bidwell had been a clerk in Washburn's office. The whole trouble arose from the fact that the elder Bidwell being managing clerk for Washburn, had, as such, given in Washburn's name a direction to sheriff McLean to release a defendant from custody who had been in execution under a ca. sa. The plaintiff, one Brock denied the authority to give this order, and brought an action for an escape against the sheriff. The court held that Washburn had no authority to release the debtor, at least not without receiving payment of the debt; and Brock recovered judgment against the sheriff: Brock v. McLean, Tay. 310, 398. Thereupon McLean took these proceedings, with the object of compelling Bidwell to re-imburse him—but, as we have seen, failed.

cessive fees, and also for having charged and received monies under false pretence."

Nov. 18th, "In the matter of certain charges preferred by the grand jury at the last Assizes for the district of Newcastle and by the Solicitor-General laid before the Court of King's Bench against Marcus F. Whitehead and Thomas Ward Esq., the former as clerk and the latter as judge of the district court in the said district of Newcastle—*In re Whitehead.* The Attorney-General moves for a rule to shew cause why an attachment should not issue against the said Thomas Ward and Marcus F. Whitehead respecting the former for having taxed to the latter as attorney and the latter for having charged and received illegal costs in certain cases in the said district court in which John Wilder, Christopher Lightle, Festus Burr, Richard Wright, Ephraim Farren, Joseph Cuthbert Townsend, were parties, J. B. Robinson, Esquire, Attorney-General, granted."

Hilary Term, 7 George IV., Jan. 13th, 1827, same judges present, "Attachment ordered against both defendants" on motion of the Attorney-General. April 30th, "Defendants' answer put in and filed in this cause."

Trinity Term, 8 George IV., June 18th (Præs. Campbell. C.J., and Sherwood, J.), "Judgment of the court that M. F. Whitehead do pay a fine of fifty pounds and remain in custody till paid and that Thomas Ward, Esquire, judge of the district court of the district of Newcastle do pay a fine of five pounds": See *The King* v. *Whitehead and Ward*, Taylor 476.

Hilary Term, 7 George IV., Jan. 13th, 1827, "In the matter of complaint of Francis Beattie against M. F. Whitehead, one of etc., motion for a rule to shew cause why an attachment should not issue against M. F. Whitehead, one of the attornies of this court for exacting unauthorized and exorbitant fees of one Francis Beattie on account of costs alleged to be due him in a cause of the said Francis Beattie against one Kenneth Meriam in the district court of of the district of Newcastle in which

cause the said M. F. Whitehad was attorney for the said Frs. Beattie. J. B. Robinson, Attorney-General, granted."

On the same day, upon a motion of the Attorney-General, the same rule was granted against the same attorney on the complaint of Francis Parmentier, who had been sued in the same court by Adam Henry Meyers and had been represented by Whitehead as attorney. May 3rd, both rules were argued and "stand till next T.rm for judgment; J. B. Robinson, Esquire."

The same day a rule was granted against Whitehead at the instance of a suitor in the case of Henry Elliott v. John Badcock, in the same district court of the Newcastle district to shew cause why he "should not be fined the sum of three pounds illegally taken by him as an attorney in that cause . . . why an attachment should not issue against him. H. J. Boulton, for complainant."

These seem to have been dropped when Whitehead was punished. No doubt he repaid the costs improperly obtained.

There are several such motions. Sometimes the attorney satisfactorily explains the matter.* Sometimes the whole dispute is referred to arbitration.†

Easter Term, 8 George IV., May 3rd, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "In re F. X. Rocheleau, one of the attornies of this honourable court. Motion for a rule to shew cause why an attachment should not issue against Francois Xavier Rocheleau, one of the attornies of this honourable court, for a contempt on matters disclosed on affidavit; John B. Robinson, Attorney-General, granted." June 28th, "Enlarged rule."

On Nov. 7th, 1826, D. Bethune had obtained a rule against this attorney to shew cause why an attachment should not issue against him for not paying over monies collected by him as attorney for Robert Moore. But this rule, although taken out,

*As in Radcliffe v. Small, Taylor, 308, where the client had instructed the attorney to send the money by return of boat, and the attorney had sent it by a passenger of the boat who did not hand it over. The client was left to his common law remedy.

†As in Carruthers v. John Rolph (the celebrated Dr. Rolph), Taylor 243.

does not seem to have been pressed, probably the attorney paid the amount and costs.

Other officers did not escape, for example sheriffs.

An attachment having been granted against Rapalje, the sheriff of the London district, the following proceedings were had—on April 26th, 1826, a rule was procured by James E. Small in Rex v. Abraham A. Rapalje (sheriff) to George W. Whitehead, one of the coroners of the London district, to return the writ of attachment to him directed against Abraham A. Rapalje, sheriff of the said London district and returnable the first day of this term. On Nov. 10th, 1827, Abraham A. Rapalje, sheriff of the London district "entered into a recognizance with James Fitzgibbon and Enoch Moore as sureties to appear in the court and answer, etc. Michaelmas Term, 8 George IV., Nov. 16th, 1827 (Præs. Campbell, C.J., Sherwood, and Willis, JJ.), "Interrogatories and answers read by Attorney-General. Sentence of the court, "Mr. Rapalje to remain in custody till monev be paid."*

In Trinity Term, 8 George IV., June 30th, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "In the matter of John Spencer, Esquire, sheriff of the district of Newcastle. Motion for a rule to shew cause why an attachment should not issue against John Spencer, Esquire, sheriff of the district of Newcastle, for an abuse of his office in exacting excessive and illegal fees; John B. Robinson, Attorney-General."

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*The full story is that Rapalje had in his hand a writ of fi. fa. He was ordered by the court to return this writ into court with an account of what he had done under the writ—he omitted to do so. Then followed the next step. Michaelmas Term, 5 George IV., Nov. 18th, 1825 (Præs. Campbell, C.J., and Sherwood, J.), "John Secord and Elijah Secord v. Thomas Horner. Motion for an attachment against A. A. Rapalje, sheriff of the London district for not returning the writ of fi. fa. to him directed in this cause pursuant to a rule of the court on motion of Jas. E. Small, Esq., of counsel for the plaintiff. Granted and issued." This writ was, of course, directed to one of the coroners of the district, but the coroner, Mr. Whitehead, did not execute it. It therefore became necessary to move against him. Accordingly on June 30th, 1826, an attachment was issued directed to James Mitchell and ....., Esq., elisors, against George W. Whitehead, one of the coroners of the London district for neglecting to return the writ of attachment issued to him and returnable in Easter Term last. Then, and only then, the sheriff gave himself up and appeared in court.

Nov. 5th, 1827, "on application of Mr. George Boulton on behalf of the sheriff of the Newcastle district, the court, consented that the rule returnable against him this Term should stand over to the first of the next Term." Nothing more is heard of the matter, probably the matter was amicably settled. It is more than likely that the excessive fees were taken under a misunderstanding of the tariff; or it may be that the deputy sheriff was the real offender.

In Easter Term, 8 George IV., May 4th, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "In the matter of Ebenezer Perry, deputy sheriff of Newcastle. Motion for a rule to shew cause why an attachment should not issue against Ebenezer Perry, deputy sheriff of the district of Newcastle, for a contempt in taking illegal and extorsive fees in the following causes: John Nix v. Daniel Hendrick; Jabez Lynde v. John Pickle; Abraham Butterfield v. Thomas Spencer and Israel Ferguson; John Nix v. Benjamin Davidson; Henry Elliott v. John Badcock, and Elijah Burk v. Adam Scott, and James Waldron v. Adam Henry Meyers. H. J. Boulton, rule nisi, granted and issued," June 21st, "Attachment ordered." Michaelmas Term, 8 George IV., Nov. 12th, 1827, "Interrogatories filed by H. J. Boulton. Nov. 14th, "Mr. Perry's answers to the interrogatories sworn to, read and filed in court."

Nov. 15th, "The court ordered that the said Ebenezer Perry should pay a fine of two pounds and to stand committed till paid."

WILLIAM RENWICK RIDDELL.

THE LAW REFORM ACT, 1909—*ONTARIO*.

Now that the first part of this Act has come into force it has become apparent that it is defective in regard to details. Some matters necessary to the smooth working of the Act are left unprovided for, and some things which are provided for are in such a state that it is doubtful what is the real effect of the Act regarding them.

What the Act apparently aims at, is to blend the former Court of Appeal and High Court of Justice into one Court, the Supreme Court of Ontario, which court is to be divided into two Divisions, the Appellate Division, and the High Court Division. But in order to carry out this idea it would seem to be necessary to vest in the amalgamated court all the jurisdiction of the two pre-existing courts, but no such provision is to be found, and on the contrary the former courts are expressly continued under other names.

The Court of Appeal is hereafter to be known as the Appellate Division of the Supreme Court of Ontario and such Division is to be a continuation of the Court of Appeal, s. 5; and the "High Court," by which is probably meant the "High Court of Justice," is hereafter to be known as the "High Court Division of the Supreme Court of Ontario," and is to be a continuation of the "High Court" by which is probably meant the "High Court of Justice."

Thus the Act, though purporting to amalgamate the former courts, virtually leaves them existent, but under different names.

Assuming that the High Court Division is still the High Court of Justice under another name, and that the Appellate Division is the Court of Appeal under another anme, it becomes a matter of some moment to determine what is the exact status of the Second Divisional Court of the Appellate Division. That court is to be composed of judges of the High Court Division, it appears to be intended to exercise co-ordinate jurisdiction with the First Divisional Court of the Appellate Division, but the question will arise: is the second Divisional Court to be regarded as "the final Court of Appeal of the Province?" so that an appeal will lie therefrom to the Supreme Court. In other words does the fact of the Legislature giving to certain judges of the High Court of Justice appellate jurisdiction under the title of the Second Division of the Appellate Division, constitute the tribunal so composed, a final Court of Appeal, within the meaning of the Act relating to appeals to the Supreme Court of Canada? Until this question is affirmatively settled we should think it would hardly be wise to take cases in which a

further appeal might be desirable to the Second Divisional Court.*

If the Second Divisional Court is intended to be constituted a part of the "Court of Appeal" as it formerly existed, there is the difficulty that the judges who are to compose it have not been appointed nor sworn in as judges of that court, but as judges of a court of first instance, viz., the High Court of Justice.

Not only does this matter need to be cleared up, but so does the question of the titles of the various officials of the court whose former titles are not changed by the Act, and they therefore continue to bear titles of a vanished court, or titles which do not accord with the present name of the court.

It is no wonder that ordinary lay people find it difficult to keep track of the titles of judges and officers of the courts when even the Legislature itself is at fault.

Section 8, we notice speaks of the "present Chief Justices of Divisions," whereas, as a matter of fact, there was only one Chief Justice of a Division, viz., the Chief Justice of the Exchequer Division. The other Chief Justices of the King's Bench, and Common Pleas, not being Chief Justices of Divisions, but presidents of Divisions. The Chancellor is "President of the High Court of Justice" but that court or its name has disappeared, and he has not been made President of the High Court Division of the Supreme Court of Ontario, except inferentially on the supposition that the High Court of Justice and the High Court Division of the Supreme Court are identical courts.

THE LAW'S DELAY.

In a recent number of this journal we gave space for an expression of the gratification very properly felt at the prompt vindication of justice in the speedy trial, conviction and sentence of the policeman Becker for the murder of the gambler Rosenthal. In this case there was, with the exception of the difficulty

*Since the above was written we understand the Second Divisional Court has held that it is not a final Court of Appeal.

in finding a jury, no unavoidable delay, and the prosecuting attorney and his assistants are deserving of all praise for the skill and energy displayed in bringing the case to a satisfactory conclusion. It must also be remembered to their credit that in dealing with such a gang of cut-throats as they had to encount r the service was one of considerable danger. But under the American system of criminal procedure it is a far cry from sentence to execution, and though Becker has been tried, convicted and sentenced, his end is not yet. He has money and influential associates, and neither legal skill nor ready cash will be spared to take every advantage of any delay that the law will allow, and many months may, and indeed must, elapse before he can be seated in the fatal chair, which has taken the place of the proverbial gallows.

This trial, and many which have preceded it, are teaching the people of the United States that, in their desire to secure the utmost freedom to their citizens, they have made the authority which in every country is necessary to control the disorderly, protect the peaceful, and punish the criminal, so weak that it often fails to accomplish the object for which it was created.

The machinery of the courts of justice is so clogged with safeguards for persons accused that the wheels can scarcely revolve. At every turn a brake is applied, and time and opportunity given to devise fresh means of obstruction. At the very beginning of the trial difficulties arose. So careful is the law to secure an impartial tribunal that days and weeks are often spent in finding twelve men who can be trusted to well and truly try, and true deliverance make, upon the solemn question of the guilt or innocence of the party on trial, and all through the proceedings questions are raised—technical, philosophic, and sentimental, such as are never heard of in our courts, and each is debated at such length, and with such earnestness, that the minds of the jurors must be completely befogged before the real issue is presented to them. Then, when at last the wearisome business is at an end, and the judge has given his charge, generally at great length and particularity, the jury have given their verdict, and sentence has been pronounced, the law steps in to prevent

undue haste in coming to what would seem the inevitable conclusion. If the death penalty has been awarded, as in the recent trial of the policeman Becker for murder, the passing of the sentence is, as to time, but a form, for, of course, an appeal against it is lodged. For the hearing of this six months are allowed, and for cause even that period may be, and often has been, extended. The reason for this long delay lies in the complexity of the procedure, and the voluminous mass of papers made use of. We quote from the *New York World* as to the forms of procedure:—

"First, the defence condenses the record of the trial. The District-Attorney is served with this condensation and within ten days serves on the defence his amendments to the proposed appeal. Both papers are presented to the trial justice for allowances and disallowances; and the case as thus completed is filed. Within thirty days it must be printed. It is then filed with the Court of Appeals. Two or three months go to the preparation of briefs, five days to the District-Attorney's reply, ten days again for the defence in rebuttal.

"Now, the case goes on the calendar; there is not much delay here, for a capital appeal has preference. Sixteen days' notice of argument is required and some days are necessary for the review court to get at the case. If a new trial is refused, the Court of Appeals sets a time for carrying out the original sentence, usually in about six weeks. It would be possible, therefore, in the case of a murderer who is promptly tried, who appeals and fails to secure a retrial, to reach the exaction of the penalty within a year after the commission of the crime. But such comparative celerity is almost unknown."

After hearing the appeal the court must give judgment without regard to technical errors or exceptions, which do not affect the substantial rights of the parties.

What the work of the Court of Appeal may be, and the time required to dispose of the case before it may be gathered from the fact that Becker's counsel took 4,000 exceptions during the trial, though of these some may be dropped. If the verdict stands, and a new trial is refused it would appear from what is

stated above that a prisoner who has means to carry on the proceedings may be sure of the lapse of a year at least between sentence and execution.

If a new trial is granted the whole business is gone over again, and another twelve months may pass before anything is decided, and during that period many things may happen.

The paper from which we have quoted gives a number of cases to shew how this system of procrastination has worked out in practice. One of which we give as a specimen of how the law can delay the carrying out of its own behests.

"The revolting crime of Albert Wolter was expiated in 676 days. He was arrested at once, indicted in 6 days, tried in 28 days, sentenced in 33 days. The Court of Appeals took but 8 days to deny his final plea and he was then executed in little more than a month. But between came 582 days of delay, which was clearly against public policy. Six months were gained on a plea of 'destitution.' In seeking a retrial the counsel employed dilatory tactics which Judge Bartlett scored as inexcusable."

In contrast to the above, and many similar cases, reference is made to the trial in London of the poisoner, Dr. Crippen, who, including the time spent in pursuing him to New York, and in the proceedings for extradition, etc., was tried and executed four months and five days after the discovery of his crime, his trial having lasted only four days.

As the result of this slow and easy way of dealing with murderers statistics of a very startling character are given, shewing how much greater is the prevalence of the crime of murder where this system prevails, as compared with England, where the crime is as quickly followed by punishment as the claims of justice will permit. Greater London had in 1909 nineteen murders and 27 cases of manslaughter. New York in 1911 could boast of 198 murders and only 13 executions. In many of the large cities of the Union the disproportion was still greater, and the number of executions in inverse ratio to the number of convictions. This prevalence of legal delays is now the subject

of comment in the American press, and is being regarded, as President Taft described it, as a disgrace to their civilization. A remedy will doubtless be found. In the meantime let us beware lest the allowing of appeals in criminal cases be attended with similar results.

"WITHOUT PREJUDICE."

Just as compromise is recognized as the essence of business, so the law has always favoured the attempt by parties to compose their differences without pressing their disputes to an issue in court. And it is with the object of facilitating such a result that the privilege has been granted to negotiations entered into "without prejudice" for the purpose of effecting settlements.

In order to understand the precise scope of the rules upon which it is based, it is important to appreciate the nature and object of the immunity enjoyed by the parties. Unless they were protected in submitting offers to each other, it would be impossible to frame the terms or to carry through anything by way of compromise of litigation. It is clearly most important that the door should not be shut against compromises, which would inevitably be the case if letters written or interviews held without prejudice for the purpose of suggesting methods of settlement were liable to be read subsequently to the prejudice of the writer. Complete freedom must be maintained subject to proper safeguards against abuse.

It will accordingly be observed that the privilege is limited to cases where the parties are really involved in a dispute and are in negotiation with one another for the purpose of agreeing terms of settlement. If these conditions are fulfilled, the protection is absolute, and parties will not be permitted, except by mutual consent, to waive the privilege. A decision to the contrary effect in *Williams* v. *Thomas*, 7 L.T. Rep. 184, was expressly disapproved by the Court of Appeal in the case of *Walker* v. *Wilsher*, 23 Q.B. Div. 335. The extent of the protection may be seen in the case of *Cory* v. *Bretton*, 4 C. & P. 462, where it was

proposed to read a letter from a debtor, written "without prejudice," in order to take the case out of the Statute of Limitations, and it was objected that the creditors had not assented to the stipulation. Chief Justice Tindal declined to admit the letter in evidence, and, with regard to the point as to the creditors' assent, he remarked that if they did not like the letter with the stipulation they might have sent it back. Another instance where the court adopted the same view is to be found in *Re River Steamer Company; Ex parte Mitchell,* 25 L.T. Rep. 319, L. Rep. 6 Ch. 822.

Privileged letters cannot be read subsequently in order to prejudice a party on the question of the costs of the action: *Walker* v. *Wilsher,* supra. The same rule applies whether the privileged negotiations are oral or contained in letters passing between the parties. When the basis of the negotiations is once privileged, the protection covers all subsequent communications. Thus, when an offer has been made "without prejudice," the letter in answer to such offer is privileged, and the protection thus afforded extends to all letters which follow: Cp. *Ex parte Harris; Re Harris,* 32 L.T. Rep. 417. It is not open to either party by his own act to limit the extent of the privilege. Thus, to head a letter in subsequent correspondence with the words "this is not written without prejudice" is, of course, wholly ineffectual to prevent the continuation of the existing privilege. If this were not so, it would be possible to incorporate in such later letters references to previous offers and thus destroy the efficacy of the protection. It must be remembered, however, that if the terms of an offer made "without prejudice" are accepted, there will be a concluded contract which can be enforced by action: *Walker* v. *Wilsher,* supra. Thus, in *Holdsworth* v. *Dimsdale,* 24 L.T. Rep. 360, where a defendant sued on a bill of exchange, in a letter headed "without prejudice" offered to waive the absence of notice of dishonour if the debt was accepted without costs, the plaintiff accepted the offer and discontinued his action. In the new action which he then commenced he was held entitled to rely on the waiver of the notice

of dishonour as being part of a new bargain between the parties.

The essence of the protection conferred is that, if the negotiations carried on by the letters do not result in an agreement, nothing in them is to be taken as an admission. If an agreement does result, the protection is gone. So in the case of *Re Leite; Leite* v. *Ferreira*, 72 L.T. Jour. 97, where letters written "without prejudice" contained an undertaking in terms which were agreed to by the other side and afterwards the parties giving the undertaking wished to introduce a fresh condition, the original undertaking was enforced by Mr. Justice Fry. Parties are thus enabled effectively to conclude agreements for the ending of disputes provided they arrive at a definite settlement of the terms.

It may be important in some cases to shew that negotiations have taken place, as, for instance, with a view to rebut a suggestion of laches, and if for this purpose it is necessary to refer to letters written "without prejudice" this may be done, but only to the extent of establishing the fact that the letters have passed and the negotiations have taken place, the actual terms of the offer and the manner of its reception being, of course, suppressed: Cp. *Walker* v. *Wilsher*, supra, at p. 338, per Lord Justice Bowen. The privilege covering the letters is, therefore, in no way infringed.

The courts have always been careful to prevent the privilege being abused, and have not permitted its illegitimate use as a cloak to cover acts which are wrongful independently of pending negotiations. Where in letters marked "private and confidential" a defendant threatened, while an action was pending, to publish the pleadings with comments derogatory to the plaintiff, he was restrained by the court from committing what would be a contempt of court. Mr. Justice Fry held that no person has any right by so marking his communications to impose upon the recipient, being already at arm's length with him, any condition as to the mode in which they may be used: *Kitcat* v. *Sharp*, 48 L.T. Rep. 64.

Another instance of letters which have been held not privi-

leged occurred in the case of *Kurtz and Co.* v. *Spence*, 58 L.T. Rep. 438. These letters contained threats of legal proceedings for infringement of a patent, and the plaintiff was permitted to put them in evidence for the purpose of establishing his right of action as a holder of a patent against a person so threatening under the provisions of s. 32 of the Patents Act, 1883. The mere use of the words "without prejudice" in the letters afforded no protection to the writer in the particular circumstances. The question was again fully considered and dealt with in the case of *Re Daintrey; Ex parte Holt*, 69 L.T. Rep. 257; (1893) 2 Q.B. 116. A debtor wrote to one of his creditors a letter headed "without prejudice," in which he offered to compound the debt owing on certain terms, and at the same time stated that unless these terms were accepted he would suspend payment of his debts. Such a notice to a creditor of an intention to suspend payment was a clear act of bankruptcy, and it was held that it could be proved in the bankruptcy proceedings which were thereupon instituted, the mere placing of the words at the head of the letter affording no protection to the writer. The court defined the conditions upon which the exclusion of privileged communications is based, and laid it down that a notice of an act of bankruptcy could not be given "without prejudice," because the document in question was one which from its character might prejudicially affect the creditor whether or not he accepted the terms offered.

It will thus be seen that the courts are jealous to prevent any abuse of a privilege which has its legitimate uses, but which might involve injustice if not strictly confined to the purpose for which it was instituted.—*Law Times.*

THE LAW OF BIGAMY.

A recent trial at the Old Bailey serves to illustrate the curious anomalies which appear to exist in the law relating to the offence of bigamy. A person charged with bigamy admitted that he had been married, and when his first wife was alive had gone through the ceremony of marriage with another woman, and subsequently, in the belief that his first wife was dead, had gone through the ceremony of marriage with a third woman, the prosecutrix. After a careful summing up upon the law and the facts by the learned judge who presided, the jury found that the prisoner believed his wife to be dead, but knew that the second supposed wife was alive when he went through the ceremony of marriage with the prosecutrix. The learned judge thereupon, rightly, entered a verdict of not guilty. Bigamy is generally classed in the text-books upon criminal law among the offences against public morals. It is curious, from the standpoint of public morality at any rate, that the law does not regard the transaction with the prosecutrix, in the case we are referring to, as being punishable equally with the offence in respect of the valid marriage. The various numerous decisions upon the offence of bigamy all go to prove that it is of the essence of the offence that the first marriage should be a marriage valid according to our law or according to the law of the country where it was celebrated, or, in some cases, according to the law of the place of domicile of the contracting parties.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

CONFLICT OF LAWS—FOREIGN SUBJECT—FOREIGN WILL—ENGLISH DOCUMENT—CONSTRUCTION—JURISDICTION.

In re Bonnefoi, Surrey v. *Perrin* (1912) P. 233. This was an action in the Probate Division. An Englishwoman domiciled in Italy, died leaving a letter, which according to Italian law, was a valid will. She left personalty in Italy and England, the larger part being in England. Her sisters brought the present action for administration, whereupon those claiming under the Italian will commenced proceedings in Italy, and applied to stay the present action, which application was granted by Evans, P.P.D.; but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), held that the action ought not to be stayed, because there was no doubt that the Italian law governed, and the only question was as to the meaning of the Italian will, which, being in English, an English court was better qualified to construe it than an Italian.

HEARING IN CAMERA—PUBLICATION BY ONE OF THE PARTIES OF EVIDENCE TAKEN IN CAMERA—CONTEMPT OF COURT—APPEAL—CRIMINAL CAUSE OR MATTER.

Scott v. *Scott* (1912), P. 241. This was an action for nullity of marriage which had been ordered by the court to be heard *in camera*. After the conclusion of the hearing the plaintiff's solicitor, by her instructions, procured copies of the evidence which he sent for the plaintiff's justification to the father and sister of the respondent. An application was then made by the respondent to commit the plaintiff and her solicitor for contempt of court in thus publishing the evidence taken *in camera*. On the return of the motion the petitioner and her solicitor apologised, but were ordered to pay the costs of the motion. From this order they appealed, but the Court of Appeal (Cozens-Hardy, M.R., Williams, Moulton, Farwell, Buckley, and Kennedy, L.JJ.) held that the order to hear the cause *in camera* was made to assist the court in the administration of justice, not to affect the civil rights of the parties, and that the breach of it was criminal in its nature and the order in appeal was a judgment in a criminal cause or matter and therefore not appeal-

able. Williams, and Moulton, L.JJ., dissented and state the grounds of their dissention in very forcible and vigorous judgments. It is unfortunate that the real merits of the case were thus prevented from being discussed, inasmuch as the action of the plaintiff and her solicitor seems to have been, in the circumstances, perfectly justifiable and not in any real sense an improper interference with the due administration of justice.

UNQUALIFIED PERSON ACTING AS SOLICITOR—MONEY IN POSSESSION OF UNQUALIFIED PERSON ACTING AS SOLICITOR—SUMMARY JURIDICTION OVER SOLICITORS—MOTION FOR PAYMENT INTO COURT—ESTOPPEL.

In re Hurst and Middleton (1912) 2 Ch. 520. This was a summary application against a person not a solicitor to compel him to pay money into court which he had obtained possession of in the following circumstances. A debenture holder's action was brought against a limited company in which the property covered by the debentures was sold under an order which directed the purchase money to be paid into court. The purchase money was received by one Jones as agent for Evans, the plaintiff's solicitor. Jones was associated in business with Evans, who paid him for the use of his offices and shared with him the profits of business introduced by him; Jones paying the necessary disbursements. Among the business introduced by Jones was the debenture holder's action. All payments and receipts including the money in question, passed through Jones' banking account, on which Evans had no authority to draw. Proceedings to recover the purchase money from Evans having proved abortive, a summary application was made against Jones to compel him to pay it into court. On the hearing of the motion it was objected that the court had no summary jurisdiction over Jones. Eve, J., held that as he had assumed the privileges of a solicitor, and carried on business as an officer of the court, he was amenable to its summary jurisdiction; but the Court of Appeal (Farwell and Kennedy, L.JJ.), reversed his order, holding that Jones not having obtained possession of the money in question by representing himself to be a solicitor, he was not liable to the summary jurisdiction; that a general acting as a solicitor was not sufficient to found jurisdiction. *In re Hulm* v. *Lewis* (1892), 2 Q.B. 261, was distinguished, because there the party had obtained the money in question by representing himself to be a solicitor; as to whether that case was correctly decided the court seems to indicate some doubt.

DEBT—RELEASE — DEDUCTION OF DEBT FROM LEGACY—ENTRIES IN TESTATOR'S LEDGER—APPOINTMENT OF DEBTOR AS EXECUTOR.

In re Pink, Pink v. *Pink* (1912) 2 Ch. 528. This was an appeal from the decision of Eve, J. (1912), 2 Ch. 498 (noted ante vol. 48, p. 301). The facts were that a testator during his lifetime advanced his son-in-law Moore £9,800. He subsequently, about 1907, entered in his ledger that £5,000 had been given off the debt for an object arranged with Moore's wife, and there was also a further entry, in June, 1909: "This debt is absolutely cancelled from this date, viz., £4,800 and interest. Edward Pink." By his will made in March, 1908, the testator appointed Moore to be one of his executors and settled a sum of £20,000 and one fourth of his residue upon Moore's wife and children and directed that if Moore's wife should die within seven years of his (the testator's) death any sum due from Moore should be absolutely extinguished and that any loss sustained by the indebtedness of Moore should be deducted from the £20,000 legacy. Eve, J., held that, notwithstanding the entries in the ledger there was not sufficient evidence of the testator's intention to make a gift and even if there were such intention, or an imperfect gift, it was not perfected by making Moore an executor, consequently he held that the whole £9,800 was still due. The Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), agreed with Eve, J., that as to the £5,000 there had been an imperfect gift which had not been carried out, and as to that there was not a valid release, and therefore that sum was still due; but as to the £4,800, they held that the entry in the ledger, coupled with the appointment of Moore as executor, was a good release in equity of that part of the debt.

WILL — CONSTRUCTION — GIFT TO CLASS AFTER LIFE ESTATE — GIFT OVER TO "SURVIVORS" — SURVIVORSHIP REFERRING TO PERIOD OF DISTRIBUTION.

In re Poultney, Poultney v. *Poultney* (1912) 2 Ch. 541. This was an appeal from Joyce, J. (1912), 1 Ch. 245, on the construction of a will whereby the testator devised and bequeathed his real and personal estate in trust for his wife for life "and from and after her decease upon trust to divide my trust estate equally between my children" (naming eight). The last clause of the will further provided, "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." The eight

children survived the testator, one of them died in the widow's lifetime leaving children, and the question to be decided was whether or not these children were entitled to their deceased parent's share. Joyce, J., decided in their favour, holding that the gift over on death of any one of the testator's children meant death in the lifetime of the testator. The Court of Appeal (Cozens-Hardy, M.R. and Farwell, and Kennedy, L.JJ.), however, reversed his decision, being of the opinion that the gift was a gift to a class ascertainable at the death of the testator and that it would therefore be impossible to give any effect to the gift over except by holding that the death therein referred to is a death of any of the children before the period of distribution; the children of the deceased child were, therefore, declared to have no interest in their deceased parent's share.

CHARTER PARTY—LUMP SUM FOR FREIGHT—LOSS OF SHIP BY EXCEPTED PERIL—DELIVERY OF PART OF CARGO—RIGHT OF SHIPOWNER TO FREIGHT.

Harrowing Steamship Co. v. *Thomas* (1912) 3 K.B. 321. This was an action to recover a lump sum agreed to be paid for freight. By the charter-party the plaintiffs chartered their ship to the defendants to load a cargo of timber and carry it to a named port for a specified lump sum, which was payable on right delivery of the cargo. The charter party contained the usual exception of certain perils. The ship arrived with cargo on board outside the port of discharge, when, owing to heavy weather, she was driven ashore and became a total loss. Part of the cargo was washed ashore, collected and deposited on the dock premises, the rest was lost, the loss being due to one of the excepted perils. In these circumstances the plaintiff claimed to recover the full amount of freight and it was held by Pickford, J., that they were entitled to do so, as they had delivered so much of the cargo as they were not excused by the excepted perils from not delivering, and had thus performed their contract, notwithstanding that the ship had not completed her voyage and the delivery of the part of the cargo had been made otherwise than stipulated for.

CRIMINAL LAW—INDECENT ASSAULT ON GIRL UNDER THIRTEEN—ABSENCE OF AVERMENT OF AGE—INDICTMENT.

Rex v. *Stephenson* (1912) 3 K.B. 341. This was a prosecution for an indecent assault on a girl, who was under thirteen years of age. The indictment contained no averment as to the

age of the girl. The defendant was found guilty, and appealed on the ground of the omission in the indictment of any averment as to the age. The Court of Criminal Appeal (Darling, Phillimore, and Hamilton, JJ.), held that though the omission deprives the prosecution of the benefit of certain statutory presumptions, it does not render the indictment bad, inasmuch as the Criminal Law Amendment Act, 1880, s. 2, which deprives the defendant of the defence of consent where the girl assaulted is under 13, does not thereby create any new offence.

EXTRADITION—HABEAS CORPUS—SECOND ARREST—"TRIAL AND DISCHARGE"—OBTAINING MONEY BY FALSE PRETENCES—CHEATING AT CARDS—EXTRADITION TREATY WITH GERMANY, 1872, ARTS. 2, 4, 15—HABEAS CORPUS ACT (31 CAN. 2, C. 2), S. 6.

Rex v. *Governor of Brixton Prison* (1912) 3 K.B. 424. In this case a German subject had been arrested in India for the purpose of being extradited, on the charge of having obtained money under false pretences; an order for his committal for extradition had been made but, on the prisoner's application, it had been declared to be invalid, and he was ordered to be set at liberty, on the ground that the committing magistrate had refused him an opportunity of adducing evidence in his defence. The prisoner subsequently went to England, where he was again arrested for extradition on the identical charge on which he had been arrested in India and on identical evidence. On the prisoner's behalf it was contended that he could not be again charged with the same offence as that is contrary to the Habeas Corpus Act (1679), s. 6. The magistrate committed him for extradition, and the court (Lord Alverstone, C.J., Darling, and Phillimore, JJ.), held that the proceedings in India did not constitute a trial and discharge of the prisoner within the Habeas Corpus Act, s. 6. The evidence disclosed the commission of an act which, if committed in England, would be a violation of the Gaming Act, 1845, s. 7, and the court held that it constituted evidence upon which the prisoner could properly be charged with obtaining money and goods by false pretences, and that as that crime was within the extradition treaty with Germany an order for his extradition to Germany could be made.

INSURANCE—FLOATING DOCK — "SEAWORTHINESS ADMITTED" — NON-DISCLOSURE OF MATERIAL FACT.

Cantiere Meccanico Brindisina v. *Janson* (1912), 3 K.B. 452. This was an action on a policy of marine insurance, the subject

of the insurance being a floating dock. The policy contained the words "seaworthiness admitted" and the question to be decided was whether or not the policy was void for non-disclosure by the insured of a "material fact," the fact being that the dock had not been specially strengthened for a vayoge. It was not in fact so strengthened, the insurers honestly believing that such strengthening was unnecessary and that it might be safely towed to its destination without it. But as the event proved, the dock did require strengthening and for want of it, was lost on the voyage. Scrutton, J., who tried the case, held that, inasmuch as the Marine Insurance Act, s. 18(3) provides, "In the absence of inquiry, the following circumstances need not be disclosed . . . (*d*) any circumstance which it is superfluous to disclose by reason of any express or implied warranty," that as the fact of seaworthiness was admitted by the insurers, it was unnecessary for the insured to volunteer any information as to whether or not the dock had been strengthened, but that the insurers, on being asked for that warranty were put upon inquiry as to the actual construction of the subject-matter of the proposed insurance, and with this the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.), agreed.

CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENCES—THREE CARD TRICK—GAMING ACT, 1845 (8-9 VICT. C. 109), S. 17—(CR. CODE, SS. 404, 405, 442).

The King v. *Governor of Brixton Prison* (1912) 3 K.B. 568. In this case the prisoners, two confederates engaged in what is known as the three card trick, a game in which a player having shewn three cards places them face downwards on a table, in such a way as to confuse the eye of the opposite party as to their relative positions, and the opposite player has then to indicate the position of a particular card. The prisoners pretended to be strangers and one of them was to point out the particular card and win with the view of inducing the prosecutor to join in the game. The Divisional Court (Lord Alverstone, C.J., and Channell, and Avory, JJ.), held that this was not "a fraud or unlawful device or ill practice in playing at or with cards" within the meaning of the Gaming Act (8-9 Vict. c. 109), s. 17, (see Cr. Code, s. 442), and therefore would not warrant the conviction of the prisoners for obtaining money by false pretences. The words of the Code, it may be noticed, are more general and include all cheating at any game, and see Cr. Code, ss. 404, 405.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Riddell, J.] [Nov. 13, 1912.

KELLY *v.* NEPIGON CONSTRUCTION CO.

Evidence — Written contract—Parol evidence.

Though terms cannot be imported into a written contract to vary it, evidence of circumstances surrounding the making of the contract or contemporaneous with its performance in whole or in part, may be taken into consideration in determining the amount of damages for breach of the contract.

H. Cassels, K.C., for defendants. *Glyn Osler*, for plaintiffs.

Falconbridge, C.J.K.B., Britton, and Sutherland, JJ.] [Nov. 25, 1912.

RICE *v.* SOCKETT.

Evidence—Expert witnesses, who are.

An "expert" is one who, by experience, has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation.

Potter v. *Campbell*, 16 U.C.R. 109, and *State* v. *Davis*, 33 S.E. 449, 55 S.C. 339, referred to.

R. L. McKinnon, for the plaintiff. *C. L. Dunbar*, for the defendant.

Middleton, J.] RE HUNTER. [Dec. 11, 1912.

Execution—Mode and sufficiency of levy—Seizure of cash — Lien—Trustee Act.

Held, 1. Where an execution creditor duly placed his execution in the hands of the sheriff, who instead of proceeding re-

gularly to sell under the execution the effects of a liquor business belonging to the execution debtor, placed his bailiff in possession of the business itself with directions to take over the daily receipts thereof as a going concern, and where such receipts were actually turned over by the cashier every day to the sheriff, the legal construction of the daily taking over of the money by the sheriff is that each such taking over was a levy thereon under the execution.

2. Where the sheriff seizes, under an execution, certain moneys belonging to the execution debtor, the execution creditor thereby acquires a lien upon the moneys so received, and such lien is protected on the execution debtor subsequently dying insolvent, and the administratrix of his estate is not entitled to delivery up of the moneys so seized for distribution *pari passu* under sec. 52 Trustee Act (Ont.), the saving clause of which section declares, in effect, that the statutory direction for distribution *pari passu* shall not prejudice "any lien existing in the lifetime of the debtor on any of his real or personal property." Trustee Act, 1 Geo. V. (Ont.) ch. 26, sec. 52, construed.

W. R. Smyth, K.C., for the Dominion Brewery. *H. E. Rose*, K.C., for the administratrix.

Province of Nova Scotia.

SUPREME COURT.

[Dec. 14, 1912.

McDONALD *v.* THE CITY OF SYDNEY.

Evidence—Presumption as to negligence of municipal corporation—Unguarded excavation in highway—Absence of direct evidence.

In the absence of direct evidence to shew that the deceased walked into the unprotected portion of an excavation in the street, which was being made by the municipal corporation and which was left with a partial protection only so that as to the remainder it constituted a dangerous trap, an inference to that effect may be drawn from the position in which his body was found and from the fact that deceased had left his house

in a hurry to catch a car and that the trench was on his direct route to do so.

F. McDonald, K.C., for appeal. *H. Mellish*, K.C., *contra*.

Full Court.] [Dec. 14, 1912.

THE KING *v.* GRAVES ET AL. (No. 1).

Criminal law—Murder—Indirect cause of death—Existence of malice or ill-will—Instructions to jury—Refusal of trial judge to reserve case—Appeal allowed.

The prisoners, while in a partly intoxicated condition invaded the lawn in front of deceased's house and used profane and abusive language acting in a disorderly manner. Deceased requested them several times to leave and on their refusal to do so produced a loaded gun and said he would give them one more chance to go or he would fire. The prisoners thereupon made a rush at deceased who reversed the gun and struck one of them a blow on the head with the butt of the gun, which caused the gun to be discharged, inflicting a severe wound upon deceased, which, in connection with subsequent ill-usage on the part of the prisoners, produced a condition of shock resulting in his death. The jury found the prisoners guilty of murder. A reserved case was applied for and refused.

Held (by the majority of the court), allowing defendants' appeal.

1. That the prisoners would not be responsible for the discharge of the gun in the hands of deceased unless he was induced by fear to handle it as he did, and that the existence or non-existence of such fear was an essential point for submission to the jury.

2. That the prisoners were entitled to have submitted the question whether, at the time they did any act which resulted in deceased producing the gun, they, as reasonable men, contemplated that death or grievous bodily harm was likely to result.

3. That the injury caused by the gunshot wound should have been distinguished from those caused by the subsequent ill usage.

4. That the prisoners were entitled to have submitted the question whether the production of the gun by deceased constituted provocation, and, in that connection, the intoxication

of the prisoners as rendering them more likely to give way to passion.

5. That the use of the words "malice or ill-will" throughout the charge, in relation to the reason which led the prisoners to act as they did, was prejudicial to the prisoners, being calculated to give the impression to the jury that any grudge which the prisoners bore to the deceased was equivalent to "malice" which would make the crime murder rather than manslaughter.

Roscoe, K.C., for the prisoners. *Jenks,* K.C., Deputy Attorney-General, and *Wickivire,* K.C., for the Crown.

Full Court.] [Dec. 20, 1912.

BALL *v.* SYDNEY AND LOUISBURG RY. CO.

Railway—Interference with access to spring—Rights of licensee.

Defendant company in constructing their line of railway and fencing in their right-of-way, which they had a statutory right to do, interfered with the plaintiff's access to a spring on land of the Intercolonial Railway which he was permitted to use as a mere licensee.

Held, that no damages were recoverable for such interference.

Mellish, K.C., for appellant. *J. P. Ralston,* and *C. McKenzie, contra.*

Full Court.] DOREY *v.* DOREY. [Dec. 20, 1912.

Alimony—Special jurisdiction conferred on Supreme Court—Not extended beyond terms of statute—Procedure of divorce court—Not applicable to Supreme Court.

Chapter 64 of the Acts of the Province of Nova Scotia as amended by c. 35 of the Acts of 1904, conferring upon the Supreme Court the right to grant alimony in certain cases and upon the happening of certain circumstances cannot be extended to the granting of alimony *pendente lite,* the jurisdiction conferred being a statutory one and that power not being specifically mentioned. The provisions and procedure of the Divorce Court are not applicable to the Supreme Court.

Roscoe, K.C., and *Russell,* for plaintiff, applicant. *Mellish,* K.C., *contra.*

Full Court.] INGRAHAM *v.* MCKAY. [Dec. 20, 1912.

Landlord and tenant—Sale of tenant's goods under execution—Purchase by landlord—Right of off-set claim for rent—Consent to sale.

Where the goods of a tenant are sold under execution the sheriff, in order to give a good title must first apply the proceeds in satisfaction of the landlord's claim for rent.

Where the sale, with the assent of the landlord, is held upon the demised premises, the landlord himself becoming the purchaser, he is entitled, notwithstanding such assent, to off-set his claim for rent against the claim for the purchase price of the goods, and is not driven to an action on the case against the sheriff. *Green* v. *Austin*, 3 Camp. 258, where the sheriff sold tortiously, distinguished.

J. L. Ralston, for appellant. *McIlish*, K.C., for respondent.

Province of Saskatchewan.

SUPREME COURT.

Newlands, J.] PIGEON *v.* PRESTON. [Dec. 27, 1912.

Landlord and tenant—Breach of covenant not to assign—Remedy for—Notice to quit—Re-entry—Waiver.

Held, 1. If a lease contains a covenant not to assign the lease without the lessor's consent (and that in such event the lessor could re-enter) and such covenant is violated by the lessee, the proper remedy for the lessor is to enter and terminate the lease; and notice to quit at a future date and a distraint made for the rent cannot be said to be evidence of a re-entry, as the lessee was thus recognised as a tenant by the lessor.

2. Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and

makes no re-entry, the breach of the covenant not to assign is waived.

Woodfall on Landlord and Tenant, 15th ed., 337, referred to.

J. Munro, for plaintiffs. *H. V. Bigelow,* for defendant. *E. M. Bill,* K.C., for Starland, Limited.

Province of British Columbia

COURT OF APPEAL.

Full Court.] [Nov. 5, 1912.

POWELL v. CITY OF VANCOUVER.

Trusts—Resulting trusts—Conveyance of land as city hall site —Agreement to "maintain" city hall there.

Where the owner of several parcels of land conveys certain of them to a city corporation under a stipulation that the grantee shall "maintain," on the site so granted, its city hall, and where the deed of conveyance makes no provision that the city hall shall be maintained there "for all time" or to any such effect, and where it may reasonably be inferred that the grantor in executing the deed contemplated that a city hall so located near his remaining lots for a limited time would meet his purposes by enhancing the value of his adjacent property, there is no resulting trust in favour of the grantor, in the event of the grantee (owing to rapid city expansion) building a new city hall on a different site, approved by the ratepayers of the city.

Smith v. *Cooke,* [1891] A.C. 297, followed.

Bodwell, K.C., and *Mayers,* for plaintiff. *W. A. Macdonald,* K.C., for respondent.

COUNTY COURT, VICTORIA.

Lampman Co.J.] [Dec. 28, 1912.

B.N.A. AGENCY *v.* FISH ISLAND SYNDICATE.

Insolvent—When debtor to be deemed insolvent.

Held, that the mere fact that a debtor has difficulty in raising money, and allows judgments to go against him, does not in itself warrant his being declared an insolvent, unless his assets are insufficient to cover his liabilities. *Warnock* v. *Kloepfer* (1887), 14 Ont. 288, affirmed 18 S.C.R. 701, distinguished.

H. B. Robertson, for plaintiffs. *Alexis Martin,* for defendants.

Book Reviews.

A Study of the Law of Mortgages. By CHARLES H. S. STEVENSON. Second edition, revised. London: Effingham Wilson, 54 Threadneedle Street. 1912.

This book of 208 pages was originally prepared for students of the law, the author being an expert in all matters connected with the preparation of students of law degrees and solicitors' final examinations, etc. It is at the same time a handy book for practitioners, giving an excellent sketch of questions ordinarily arising on the subject of mortgages. We commend it to students as well as to practitioners who desire a short summary on this most important and practical subject.

The New Competition. By ARTHUR JEROME EDDY, author of The Law of Combinations, etc. D. Appleton & Co. London and New York. 1912.

This, as its name would indicate is more theoretical than practical. It is an examination of the conditions underlying the radical change which is taking place in the commercial and industrial world, a change from the competitive to a co-operative basis. The conclusions are based upon the operations of a number of Open Price Associations, which claim to have accomplished results which were once considered visionary and unattainable.

Bench and Bar.

ONTARIO BAR ASSOCIATION.

There was a large attendance of members at Osgoode Hall, Toronto, at the annual meeting of this Association on December 27th, 1912.

The president, W. C. Mikel, K.C., having delivered his annual address, a paper was read by Mr. James Bicknell, K.C., on "Bankruptcy law," reviewing the subject from a historical point of view, then dealing with the present condition of the Insolvency laws, and concluding with some valuable suggestions for its improvement. We shall, as soon as space permits, publish this paper. The reading of it was followed by an interest-

ing discussion in connection with this matter, a number of members taking part. It was suggested that the best way to bring about action on the matter would be to draw the attention of Boards of Trade and other commercial bodies to the subject. In connection with this subject the advisability of assimulating, as far as possible, our laws to those of Great Britain was discussed, and a committee was appointed to take action towards the promotion of insolvency legislation.

On the same day, Mr. E. F. B. Johnston, K.C., read his paper on the subject of divorce which has already appeared in this journal (page 1). As might have been expected an animated discussion followed the reading of this paper, various views being advocated; some thinking that there should be no divorce law whatever, but others taking the ground that as there was a divorce law in existence, the duty of the hour was as far as possible to improve it.

Reports were also read upon the subjects of legislation and law reform, dealing with the question of fees and tariffs, consolidation of the rules, execution against goods with reference to shares in a company, the right of action for breach of promise of marriage, etc.

Towards the close of the meeting a very important suggestion was made to the effect that the Bar should have some voice in appointments to the Bench. The present plan of making appointments, too often the result of political exigencies, is unfair to the Bar, lowers the Bench, and is injurious to the public. This matter was referred to the council for further discussion.

It will be remembered that a Dominion Bar Association was formed some years ago, but, owing to practical difficulties in its working, it died a natural death. The subject was again brought up at this meeting by a motion erferring its consideration to the council, and suggesting correspondence with Bar associations in other provinces to obtain their views on the subject.

The question of the advisability of appointing a committee to take up the question of the uniformity of laws in section 91 of the B.N.A. Act was also referred to the council.

The following gentlemen were appointed to office:—Honorary President, Sir Alan Aylesworth; President, M. H. Ludwig, K.C.; Vice-Presidents, F. M. Field, K.C., W. J. McWhinney, K.C., and George C. Campbell; Recording Secretary, C. A. Moss, K.C.; Corresponding Secretary, R. J. Maclennan; Treas-

urer, R. McLean Macdonnell, K.C.; Historian and Archivist, Col. Fenton, K.C.

We wish this association every success. As we have often said the profession does not wield, either for its own protection and advancement or for the good of the country, the influence it should. To develop and strengthen this influence these associations should be more in evidence and those who spend time and labour upon them should be encouraged and helped by their brethren.

HAMILTON LAW ASSOCIATION.

TRUSTEES' THIRTY-THIRD ANNUAL REPORT.

The membership of the Association at the date of the last annual report was 74, and the present membership is 78.

The number of bound volumes in the library, exclusive of sessional papers and Government reports, is 4,982, of which 125 volumes have been added during the year.

The Trustees, to the extent of the funds at their disposal, have kept the library supplied with all the latest appropriate legal publications, and the library is kept insured for the sum of $8,800.

The Trustees report with regret the resignation of Miss Counsell, she having filled the office of librarian for many years, with unfailing devotion, great knowledge and skill, but are gratified also to report the appointment of Miss M. E. Mackay as librarian, who has occupied the position now for about a year to the entire satisfaction of the Trustees, and the profession generally.

The Trustees report with regret the deaths of Mr. Charles Lenon and Mr. P. D. Crerar, K.C., the former of whom was a member of this Board and treasurer for many years, and the latter was a distinguished member of the profession, and has occupied the position of Trustee of this Association..

The officers and Trustees elected at annual meeting, Jan. 14, 1913, were: President, S. F. Lazier, K.C.; Vice-President, Wm. Bell, K.C.; Treasurer, W. A. Logie; Secretary, W. T. Evans; Trustees, Geo. Lynch-Stanton, K.C., S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, K.C., Geo. S. Kerr, K.C.

Jan. 16, 1913.