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HON. MR. JUSTICE KILLAM.

As we go to press the news comes of the death of the Chairman of the Board of Railway Commissioners. He passed away suddenly at Ottawa yesterday, March 1, from an attack of pneumonia.

The death of this eminent judge is a calamity, and especially so at the present time when the need of such a man is so great and the necessity for increased strength in the Commission has been recognized, and steps taken to increase it. There is no one on the Board who can fill his place; nor does there seem to be at present any man who would care to leave his practice at the Bar who could as well perform the difficult and onerous duties which fall upon the Chairman of such an important Court as the one over which Mr. Killam lately presided.

As to the loss which the country has sustained we may well quote the words of the Minister of Railways on hearing of Mr. Killam's death: "He was a man of many-sided genius and his great ability seemed to have found the proper sphere for its full exercise. As Chief of the Board of Railway Commissioners he was solving the problem of railway transportation difficulties in a manner at once acceptable to all concerned and in the interest of the whole country. I am simply appalled at the loss I have sustained as head of the Railway Department." To the duties of his position he brought an impartial and receptive mind stored with legal lore and a unique capacity for applying the law to the facts before him; to this was added a calm, courteous and dignified judicial demeanour which greatly facilitated business. It is said of him that he did not talk much while on the Bench, but, listening most attentively, nothing escaped him. In this respect he shewed an example which might well be followed by others.

Both as a man and as a judge it has been well said that "he was a credit to Canadian citizenship and an ornament to the Canadian Bar and Bench."

The deceased was a native of Yarmouth, N.S., where he was born in 1849. Coming to Toronto he took high honours at the University, and in that city commenced the study of law. He was called to the Bar of Ontario in 1877, and after practising there for a short time removed to Winnipeg, where he was raised to the Bench in 1885. Four years afterwards he became Chief Justice of the Court of King's Bench of the Province of Manitoba, and in 1903 was transferred to the Bench of the Supreme Court of Canada. From this comparatively easy and quiet position he was, early in 1905, called to a much more strenuous service in the Chairmanship of the Board of Railway Commissioners, a Court which has to discuss and cope with matters of the highest moment in great affairs connected with the commerce of a growing country, as well as to deal with a multitude of details, which to a less able mind would be simple overwhelming. He passes away at a time when he is most needed, and when the country has begun to recognize his commanding abilities and immense usefulness.

The Dominion Government is now confronted by a most responsible duty—none greater in the line of judicial appointments has ever fallen to their lot—in the selection of a judge to fill Mr. Killam's place. The people look to them to do their duty in this respect apart from party politics, or personal favours, or any such paltry considerations. The time has surely gone by for such modes of dealing with the great problems that confront the representatives of the people of this Dominion. We shall not now express any opinion as to the record of this Government in this respect in the past, even in the thought of their own political friends, but the whole country now looks to them to fulfill the sacred duty entrusted to them in this regard by the appointment of the best man to preside over this most important Court, and who shall be a worthy successor of the one who has unhappily been removed therefrom.

PROFESSIONAL ETHICS.

Vol. 32 of the reports of the American Bar Association has come to hand, and it we find an old and valued friend. Many years ago we read and pondered with pleasure and profit Judge Sharswood's Essay on Professional Ethics, which has now reached its fifth edition. It is incomparably the best thing that has been published on that most important subject; and there is no better reading for a law student or lawyer or for any professional man than this masterly essay.

The whole book is full of meat of the most nutritious kind for the development of the highest ideal of a lawyer. The nobility and purity of thought and the intelligent grasp and luminous expression of his views as to matters connected with all branches of professional ethics and business deportment come out on every page.

Whilst strongly recommending those of our readers who have not read this book to do so without delay, we cannot forbear from making some extracts at the present time.

Speaking of legislation and law reform, whilst he deprecates "rash innovation and unceasing experiment" he claims that "it is a province of legislation by slow and cautious steps to amend the laws;" but that there must be no "blind attachment to principles of jurisprudence or rules of law because they are ancient. True conservatism is gradualism—the movement onward by slow, cautious and firm steps—but still movement, and that onward. The world neither physically, intellectually, nor morally, was made to stand still. As in her daily revolutions on her own axis, as well as her annual orbit round the sun, she never returns precisely to the same point in space which she has ever before occupied. It would seem to be the lesson which the Great Author of all Being would most deeply impress upon mind as he has written it upon matter: 'By ceaseless motion all that is subsists.'"

It is difficult to make choice of an extract to shew the author's

view of what should be a lawyer's character. There are so many that might well be reproduced, but let us quote the following:—"That lawyer's case is truly pitiable upon the escutcheon of whose honesty or truth rests the slightest tarnish. Let it be remembered and treasured in the heart of every student that no man can ever be a truly great lawyer who is not in every sense of the word a good man. The strictest principles of integrity and honour are the only safety of the young professional man. There is no profession in which moral character is so soon fixed as in that of the law. There is none in which it is so subjected to the severe scrutiny of the public."

In another place he gives the following excellent advise:—"The anxiety of the young lawyer is a natural one at once to get business—as much business as he can. Throwing aside his books he resorts to the many means at hand of gaining notoriety and attracting public attention, with a view to bringing clients to his office. Such a one in time never fails to learn much by his mistakes, but at a sad expense of character, feeling and conscience. He at last finds that in law, as in every branch of knowledge, a little learning is a dangerous thing. No better advice can be given to a young practitioner than to confine himself generally to his office and books, even if this should require self-denial and privation, to map out for himself a course of regular studies, more or less extended according to circumstances."

We might take a lesson from the scholars of China, who go through a training immensely more difficult and laborious than those of any other country. They commit to memory vast quantities of literature, as a matter of mind training and as a treasure store-house for future use. If the contents of Mr. Sharswood's book could be treated in this way it would be better for all concerned.

AMENDMENT TO THE LAW REGARDING BRIBERY.

Attention was drawn in these columns (Vol. 42, p. 697) to the desirability of supplementing the laws against bribery by an enactment prohibiting attempts to influence voters by promises or threats regarding the expenditure of public money in any electoral district. We are glad to see that our proposal has at last borne fruit, and that a bill aimed at this extremely mischievous form of corruption has been introduced into the House of Commons. That this measure follows very closely the lines suggested in the article mentioned above is apparent from the following provision:—

"Every person who directly or indirectly, by himself or by any person on his behalf, before or during an election, in order to induce, or in such manner as might induce, any voter or class of voters, or the voters in a particular electoral district, to vote for or against any candidate, or to refrain from voting, by public speaking, by any writing, by any printed publication, or otherwise, offers or promises, or offers or promises to procure or to endeavour to procure, or suggests the probability of the expenditure of the public moneys of Canada, within an electoral district or districts, if and in case, only, such voter or voters procure or assist to procure the return of a particular candidate, or of a candidate, of a particular party, or, who, with the intent or manner aforesaid, threatens or promises to impede, delay, hinder, prevent or diminish such expenditure, is guilty of the indictable offence of bribery, and liable to imprisonment for a term not exceeding one year, and not less than six months, and shall also forfeit the sum of one thousand dollars to any person who sues therefor, with costs."

No one, we imagine, will contend that during the year which has elapsed since the publication of our own remarks on the subject the need of a statute of this description has decreased. It is sincerely to be hoped that the proposer, Mr. Alcorn, will succeed in inducing the House to ratify his praiseworthy endeavour to purify politics in this direction.

Those considerations of temporary advantage which will be recognized, though perhaps not openly urged, as reasons for

declining to surrender so effective an instrument for attracting and retaining voters may possibly prove to be an adverse influence too powerful to overcome. It remains to be seen whether the obvious propriety of this amendment of the law, and the reflection that its adoption would unquestionably subserve the ultimate interests of the predominant party, will supply motives sufficiently cogent to induce the majority to sanction Mr. Alcorn's bill.

LAW REFORM.

We are glad to note that the Attorney-General of Ontario has agreed to the suggestion that the subject of law reform should stand over until next session so that it may receive full consideration before any change is crystallized by statute.

It is well to quote for the benefit of those concerned any suggestion which would seem to be helpful in the consideration of this important subject. To this end we make the following extract from the *Ottawa Citizen*. The writer evidently takes very much the same view as we have expressed in reference to the re-construction of the Court of Appeal. His words are as follows:—

"The Court of Appeal for Ontario is and has been for many years one of the most satisfactory in the Dominion, and it would not be in the public interest to substitute for it a Court without any continuity or cohesion, where personelle would vary from day to day, and from which uniformity of decision could not be expected. An alternative plan has been suggested by high authority, which it appears to the *Citizen* would be found to work much more satisfactorily. It is, in brief, as follows: Appeals from a High Court judge to the present Divisional Courts would be abolished, and the present Court of Appeal retained, but as it would be obviously impossible for the latter, as at present constituted, to deal with all of the work thus thrown upon it, three High Court judges would be assigned to it, to serve for a year, and then to be replaced by another three for a similar term. The Court would sit in two divisions, one

made up of the five regular appeal judges, and the other of the three acting appeal judges. The list of appeals inscribed for hearing would be gone over from time to time by the chief justice of Ontario, who would assign the cases to be heard by the division of five regular judges or by the division of three acting judges according to his view of their relative importance. The division of three might sit monthly, as do the present Divisional Courts, and the division of five either quarterly or monthly, as occasion might require. The present Divisional Courts would be retained for the limited purpose of hearing appeals from inferior tribunals, as proposed by Mr. Foy. This plan, while providing only one Appellate Court for the Province, would be free from the objections which we have pointed out as applicable to the plan proposed in the government's resolution. It is a question, however, whether the evils of the present system of appeals within the Province are not more apparent than real."

The most amusing reading for lawyers is not the legal Joe Millerisms, but the funny things said by newspaper writers, often in our best daily journals. We have given some of these, much to the amusement of our readers. The following is from the *Montreal Star*. The writer, not knowing how funny he is, but apparently in sober earnest, thus prints his meditations on the subject of law reform now so much under discussion:—

"The sort of law reform which the people want is to get the law so written that even a layman, though he be no wiser than a lawyer, shall not err therein. It ought to be possible for a man to have the law on some particular point read over to him; and for him then to know what the law means and what he must do. He ought not to have to go to a judge to find out—and often to find out to his heavy cost. The law should be simple enough for him to understand and clear enough to be interpreted without reference to the decisions of other judges. There is enough complexity about Parliament-made law without adding to the complexity of judgment-made law."

There is a charming simplicity about this which must appeal to all. He thinks this "would save more money than the cutting

off of all appeals—a species of law reform, by the way, which may not always make for justice." We regret that in this he is not able to concur with some of his learned brethren in the Province of Ontario who think that appeals should be almost, if not entirely, done away with. The writer is a curious combination of an optimist and a pessimist, and longs for the time when "the law can be codified in lay language, and then if procedure could be simplified so that an intelligent layman could take his own case before a lower Court, the cost of justice in this country would be tremendously reduced." He is apparently like Diogenes of old seeking with his lantern for the public man who would take up law reform in this spirit, and so become the most popular man in the country "outside of the law offices, yes, and inside the best of these, for the good lawyer does not make the most of his money out of litigation." The last remark indicates that the writer has some lucid intervals. But possibly we misjudge him, for, after all, he may be a man of infinite jest who thus seeks to instruct his less sensible brethren of the press.

SOME RECENT CRITICISMS ON REAL PROPERTY STATUTES.

There are some observations in Mr. Armour's interesting address before the Ontario Bar Association to which, if correctly reported, we think a demurrer might be entered. We say this, however, with some diffidence, as it is a bold thing to question a legal proposition laid down as such by Mr. Armour.

In taking exception to the wording of the Wills Act, R.S.O. c. 128, s. 10, he is reported as having referred to it as follows: "A man can make a will of anything that would devolve upon his executor. There could not be anything more absurd. It is a mere mistake, of course."

The section referred to reads as follows: "Every person may devise, bequeath or dispose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which

he may be entitled at the time of his death, and which, if not devised, bequeathed or disposed of, would devolve upon his heirs-at-law or upon his executor or administrator."

With great respect to so learned an authority we do not think that there is any mistake or absurdity whatever in the section. A person may make a will and appoint an executor whereby his property real and personal will devolve on his executor, although the testator may not have devised or bequeathed or disposed of any part of it to anybody.

The statute does not say, as was assumed, "and which if he made no will," but "which if not devised, bequeathed or disposed of." The statute simply provides that all such property which would so devolve in case no disposition were made, he may, by will, devise, bequeath and dispose of. The assumption that "to make a will" and "devise and bequeath and disposes of" are convertible terms, is, in our opinion, ill founded.

Mr. Armour is reported also to have said: "In the reign of Edward I. land was first made alienable." What does this mean? The statute Quia Emptores to which he refers seems to assume that sales were then quite common, and all that it attacked was the process of sub-infeudation which was then going on to the detriment of the chief lords. According to the translation of the statute in R.S.O. c. 330, s. 2, the statute opens with the words "Forasmuch as purchasers of land and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, etc." Of course there could not be "purchasers" unless there were also "sellers." No doubt there were restrictions on alienations, and the consent of the superior lord was necessary, and fines on alienation were payable to them; but surely it is a mistake to say that in the reign of Edward I. land was first made alienable in England. We think there must have been some mistake in the report on this point.

We are also disposed to think Mr. Armour was a little hypercritical in regard to s. 12 of the Devolution of Estates Act in regard to the provision made for a wife of an intestate, who, after payment of debts, funeral and testamentary expenses, is to

get $1,000. "Testamentary expenses" in this connection seem to be the solecism against which Mr. Armour's soul rebels; how can there be testamentaryexpenses when there is no will? Many words gradually acquire a meaning which their etymology does not warrant, e.g., it has been over and over again decided that succession duty is a "testamentary expense," although it has nothing to do with a will, and is payable equally whether there is a will or not. The use of the word "testamentary" in this section may, we think, be defended on the ground that when a deceased person makes no will the law by its provisions in regard to the devolution of his estate makes a will for him, and therefore, though the deceased may have made no will, his estate is nevertheless chargeable with testamentary expenses: see *Re Clemow* (1901) 2 Chy. 182, where it was decided that a direction to pay the "testamentary expenses" of the testator's widow included the cost of taking out administration to her estate, she having died intestate.

Mr. Armour's criticisms on the Landlord and Tenants Act, R.S.O. c. 170, ss. 14, 15, are interesting and possibly well founded. He suggests a somewhat curious condition of things in that the two sections are said to have been drawn, and submitted to the English Parliament, as alternative proposals; but that the Parliament by mistake enacted both. A perusal of the two sections does not seem to us to necessarily lead to the conclusion that they were ever intended as merely alternative modes of dealing with the same thing . Sec. 14 seems to deal with the case of total assignments of the demised premises, whereas s. 15 purports to deal with assignments of part of the demised premises, or of partial interest therein.

Mr. Hoyles, who was also a speaker on the same occasion, suggested that all lands should be legislatively converted into chattels real. This is, however, no new suggestion in this province. It was made over thirty years ago to that eminently conservative lawyer the late Sir Oliver Mowat; but he was afraid to accede to it. The abolition of dower was also a matter proposed to him, but he told the writer that on account of a

similar proposal the late John Hillyard Cameron lost his election in Peel, where the cry was made that he was trying to rob the farmers' wives of their dower. This is the way law reform sometimes suffers at the hand of politicians.

G. S. HOLMESTED.

MASTER AND SERVANT—A HIRING BY THE MONTH.

A point of law not often clearly defined is the question as to what constitutes a hiring by the month. The recent case of *The Pokanoket*, 156 Fed. Rep. 241, attempts to negatively limit the question by stating what does not constitute a hiring by the month, holding that a verbal contract between the owner of a vessel and a marine engineer for the service of the latter, in which his wages were fixed at a stated sum per month, but without any specified term of employment, constituted a hiring at will, and not by the month, and, in the absence of any established usage to the contrary, either party had the right to terminate the employment at any time without notice, and, upon the employee's discharge, he was entitled to wages only to the time of such discharge.

The testimony of the libelant in regard to the verbal contract of employment was as follows: "It was a verbal contract between Mr. Davis and me at Petersburg on the steamer Aurora, the steamer I was running on at the time, and he asked me if I would go to St. John and help him look at the boat, and if I would come down with her, and that my wages—he asked me what I would want a month and I gave him my price, $80 per month, to go chief, and I said I will go down and come with the boat, and he said the wages would be the same as when working on the Aurora, but the day she gets to Norfolk my pay would be $80 per month and start at that time. I was getting $70 per month on the Aurora." The Court, in holding this verbal agreement to constitute a hiring at will, said: "The chief point presented is the construction of the contract under which

the libelant was employed. He insists that it was by the month, and that it was a violation of its terms to discharge him except upon a month's notice. The District Court took this view and entered a decree for the libelant for $80, the full month's wages for July, 1906, and for costs. In this we think there was an error. The contract, which is fully set out in the testimony of the libelant as given above, has, in our opinion, the effect to determine the measure of compensation, but does not fix a definite period of employment. In other words, the contract constitutes nothing more, in law, than what is known as a hiring at will, which could be ended at any time, by either party, without notice. There was no evidence of any settled usage or custom of the port which would take the contract in this case out of the rule which governs such contracts generally. There is nothing in the contract of employment which can be construed to mean that the libelant was required to serve the employer for any specified time; nor is there anything to indicate that the employer was bound to retain him in service for a definite period. The continuance of the term of service was left discretionary with both parties, and either had a right to put an end to it at any time."

In case of *The Pacific*, 18 Fed. Rep. 703, an engineer was employed on a steam tug about a harbour at a certain rate per month, but without any agreement as to the duration of his service. Held, in the absence of proof of any settled usage, that he could be discharged at any time without previous notice, and could recover only for the time actually served. The learned judge (Morris), in delivering the opinion in this case, said: "Unless the verbal contract proved is controlled by usage or custom, or some presumption of law or fact, it must be held to be a general or indefinite hiring, and, I take it, the law as to such a contract is correctly stated in Wood, Master & Servant, 272."

The quotation from Mr. Wood's treatise in the preceding citation is as follows: "With us the rule (different from the English rule) is inflexible that a general or indefinite hiring is primâ facie a hiring at will, and, if the servant seeks to make it out a

yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the fixed rate for whatever time the party may serve. It is competent for either party to shew what the mutual understanding of the parties was in reference to the matter, but, unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. . . . Thus it will be seen that the fact that compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but in all such cases the contract may be put an end to by either party at any time, unless the time is fixed and a recovery had at the rate fixed for the service actually rendered."—*Central Law Journal.*

By the death of the late Judge of the Exchequer Court of Canada the country loses an able and a conscientious judge, and Ottawa a good citizen. Grown up with the Court over which he presided, he had a thorough knowledge of its scope, procedure and requirements, while, by his judgments, he had obtained the general confidence both of the Bar and of the Government. That his decisions were but infrequently reversed on appeal indicates the correctness of his law and the maturity of his judgment. In the prime of his life and in the midst of his usefulness he was compelled to cease temporarily—as it was hoped—from his labour; then, when informed of the incurable nature of his disease, and knowing that his days were numbered, he methodically completed his judgments, arranged his affairs, and calmly awaited the inevitable summons. The late judge was born at Cornwallis, Nova Scotia, on Feb. 6, 1847. He was called to the Bar of that province in 1872, made Deputy Minister of Justice in 1882, and, five years later, was appointed Judge of the Exchequer Court of Canada.

REVIEW OF CURRENT ENGLISH CASES.

DEED—MISREPRESENTATION AS TO CONTENTS—PLEA OF NON EST FACTUM.

Howatson v. *Webb* (1908) 1 Ch. 1. It is not surprising to find that the judgment of Warrington, J., (1907) 1 Ch. 537 (noted ante, vol. 43, p. 441) has been affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.). The case turns upon a defence of non est factum set up in the following circumstances. The defendant was formerly a managing clerk to one Hooper, a solicitor, and acted as Hooper's nominee in a building speculation, and certain lands were conveyed to him as such nominee. Shortly after leaving Hooper's employment Hooper requested him to execute certain deeds, and on his asking what they were, he was told they were deeds transferring the lands above referred to, and without further inquiry he executed the deeds. One of the deeds turned out to be a mortgage in favour of the plaintiff and contained a covenant by the defendant for payment of the mortgage debt, to enforce which the present action was brought. The defendant set up that the mortgage was not his deed by reason of the misrepresentation of Hooper; but the Court of Appeal agreed with Warrington, J., that the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the defence failed. Farwell, L.J., suggests that the old cases on the effect of misrepresentation as to the contents of a deed were based on the illiterate character of the persons to whom the deed was presented for execution, and that an illiterate person was treated as a blind man, and doubts whether in the present day an educated person, who is not blind, is not estopped from setting up non est factum against a person who innocently acts upon the faith of the deed being valid. With which suggestion the Master of the Rolls concurred. The appellants contended that though the conveyance of the land might be valid, yet that the covenant to pay was not a necessary part of the mortgage and the defence of non est factum was separable and was valid as to that, but this contention failed.

WILL — CONSTRUCTION — BEQUEST TO CHILDREN "BORN" PREVIOUSLY TO DATE OF WILL—CHILD EN VENTRE SA MERE.

In re Salaman, De Pass v. *Sonnenthal* (1908) 1 Ch. 4. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have reversed the decision of Kekewich, J., (1907) 2 Ch. 46 (noted ante, vol, 43, p. 691). The Court holding that there is a general rule of construction that in the absence of a contrary intention a gift by a will to children "living" or "born" at a given period, includes a child en ventre sa mère at that date, and born alive afterwards. In this case the gift was of £500, to the testator's great nephews and great nieces "born previously to the date of this my will"—at the date of the will there was a great niece en ventre sa mère subsequently born alive, and she was held entitled to participate in the gift.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT—COVENANT BY LESSEE TO LIVE ON DEMISED PREMISES AND CONDUCT BUSINESS—ASSIGNMENT TO LIMITED COMPANY—OBJECTION NOT TAKEN IN COURT BELOW—COSTS.

In Jenkins v. *Price* (1908) 1 Ch. 10 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have reversed the decision of Eady, J., (1907) 2 Ch. 229 (noted ante, vol. 43, p. 649) on a ground not taken in the Court below. The plaintiff was a lessee of a public house, the lease contained a covenant not to assign without leave of the lessor, such leave not to be unreasonably withheld. It also contained a covenant by the lessee to live on the premises and personally conduct the business of a licensed victualler. The plaintiff proposed to assign the premises to a limited company and the plaintiff declined to consent except upon the terms of the proposed assignees agreeing to pay an increased rent and to extend the term from twelve to twenty-one years. The plaintiff claimed that these terms were unreasonable and he prayed a declaration that he was entitled to assign without leave which Eady, J., granted. On the appeal the defendant took the ground that a limited company could not perform the covenant as to personal residence, and on this ground the appeal was allowed, because, as the Court of Appeal held, that covenant amounted to a covenant not to assign to a limited company, but although allowing the appeal and dismissing the action no costs were given to the defendant because the ground on which he had succeeded had not been taken in the Court below.

HIGHWAY—DEDICATION—LESSEE.

Corsellis v. *London County Council* (1908) 1 Ch. 13. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed that part of the decision of Neville, J., (1907) 1 Ch. 704 (noted ante, vol. 43, p. 523) to the effect that a sub-lessee of premises cannot make an effectual dedication of part of the demised premises as a highway, so as to bind his lessor. One point is brought out on appeal which was not mentioned in the former note of the case, viz., that after the alleged dedication by the sub-lessee, his lessor assigned to him the head-lease under which the lessor held, with a proviso against merger of the under-lease. This head-lease was subsequently reassigned by the under-lessee to his lessor for value without notice of the alleged dedication, and the Court of Appeal held the lessor was a purchaser for value without notice of any claim for dedication.

ESTATE TAIL — PROTECTORS OF SETTLEMENT — SURVIVORSHIP — PROVISION FOR FILLING VACANCY IN CASE OF DEATH OF ONE OF SEVERAL PROTECTORS—FINES AND RECOVERIES ACT 1833 (2-3 WM. IV. C. 74) SS. 22, 23—(R.S.O. C. 122, S. 20.)

In re Bailey—Worthington & Cohen (1908) 1 Ch. 26. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) affirming Neville, J., hold that where by a settlement three persons are appointed protectors of the settlement, accompanied by a provision for appointing persons to fill the vacancy in case any of them die, that unless and until such power is exercised, in the case of death of any one or more of the protectors, the protectorship survives in the survivors or survivor, whose consent alone would be sufficient to give effect to a disentailing deed.

STATUTE OF LIMITATIONS—MORTGAGE OF PROCEEDS OF LAND—PAYMENT INTO COURT BY TRUSTEE OF MORTGAGED ESTATE—PAYMENT OUT—RES JUDICATA — MORTGAGEE — REAL PROPERTY LIMITATION ACT 1833 (3-4 WM. IV. C. 27) S. 34— REAL PROPERTY LIMITATION ACT 1874 (37-38 VICT. C. 57) S. 8—(R.S.O. 133, S. 22: IB. C. 72, S. 1(1) *b. h.*).

In re Hazeldine (1908) 1 Ch. 34. Here the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.)

have been unable to agree with the decision of Warrington, J., (1907) 1 Ch. 686 (noted ante, vol. 43, p. 522. The facts were that persons entitled to the proceeds of land vested in trustees mortgaged their interest to the Union Deposit Bank and subsequently to other persons. The land was sold by the trustees and the proceeds were paid by them into Court in 1896. No payment had since been made or acknowledgment given by the mortgagors to the bank, and the mortgagors now applied for payment out of Court, contending that the claim of the bank both on the land and under the covenant in their mortgage was barred by the Statute of Limitations. Warrington, J., although admitting this, held that the statutes had not the effect of barring the claim of the mortgagees as to the moneys in Court, but there was one point which he neglected to take into consideration, viz., that the mortgagees had previously applied for payment out of Court of the amount of their claim which application had been dismissed, and no appeal was brought from that dismissal, the Court of Appeal therefore held the case was res judicata and the claim of the bank failed on that ground. The Court of Appeal, moreover, do not seem to think there was any legal foundation for the ground on which Warrington, J., proceeded.

FERRY—BRIDGE—TRAFFIC DIVERTED—DISTURBANCE OF FERRY.

Dibden v. *Skirrow* (1908) 1 Ch. 41 is authority for the proposition that the erection of a bridge over a river over which a person has the franchise of a ferry, is not a disturbance of the ferry; the franchise of a ferry not conferring an exclusive right to carry by any means whatever, but only the exclusive right to carry by means of a ferry. So Neville, J., held and the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.) affirmed his decision.

DISTRESS—GOODS OF UNDER-LESSEE—DISTRESS FOR RENT DUE FROM HEAD-LESSEE—EXEMPTIONS FROM DISTRESS—PROPRIETARY CLUB—PICTURES ON DEMISED PREMISES FOR EXHIBITION OR SALE—PRIVILEGE FROM DISTRESS.

In *Challoner* v. *Robinson* (1908) 1 Ch. 49 the plaintiff was proprietor of the United Arts Club and was tenant from year of the club premises as under-lessee. He undertook all the liabilities of the club and received all the profits. One of the

objects of the club was to hold exhibitions of pictures sent in by members, mostly for sale on commission, the plaintiff receiving ten per cent. commission on all sales as his profit. The club was managed by a committee of which the plaintiff was a member, and the exhibitions were managed by a picture committee. The exhibitions were not open to the public but only to members or persons introduced by members. The defendants as superior landlords put in a distress for rent under which certain pictures so sent for exhibition and sale were seized. The action was brought to restrain proceedings on the distress. Neville, J., held the pictures were liable to distress and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) affirmed his decision, on the ground that the pictures were not sent to the plaintiff, but to the picture committee and even if delivered to plaintiff they were not delivered to him "to be managed in the way of his trade" which was that of a club proprietor and not that of a picture dealer, and the case was not, therefore, within *Simpson* v. *Hartopp* (1744), Willes 512, 1 Sm. L.C. 437 (11th ed.).

COMPANY—DIRECTOR—QUALIFICATION SHARES OF DIRECTOR HELD IN TRUST—RIGHT OF CESTUI QUE TRUST OF SHARES TO CLAIM RENUMERATION RECEIVED BY THEIR TRUSTEE AS DIRECTOR.

In re Dover Coalfield Extension (1908) 1 Ch. 65. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Warrington, J., (1907) 2 Ch. 76 (noted ante, vol. 43, p. 617), to the effect that the cestuis que trust of shares in a limited company has no right to call on his trustee to account for remuneration received by him as a director of the company, although the shares held by him in trust constitute his qualification as a director.

WILL—EXPRESS TRUST OF RESIDUE—PARTIAL FAILURE OF BENEFICIAL INTEREST—NEXT OF KIN—ADVANCES BY TESTATOR TO CHILDREN—HOTCHPOT—STATUTE OF DISTRIBUTION (22-23 CHAS. II. C. 10) S. 5—(R.S.O. C. 335, S. 2) EXECUTORS' ACT 1830 (11 GEO. IV. & 1 WM. IV. C. 40) S. 1.

In re Roby, Howlett v. *Newington* (1908) 1 Ch. 71. In this case a testator had bequeathed his residue to his executors in trust as to £1,500 to invest and pay the income to his daughter for life, and after her death to divide the capital amongst her

issue, there was no gift over of the £1,500. The daughter died without issue, there was, consequently, an intestacy as to the £1,500, which passed to the next of kin who were four daughters and some grandchildren of the testator. Advances had been made to some of these daughters by the testator, and if they were brought into hotchpot the whole of the £1,500 would go to the grandchildren. Neville, J., (1907) 2 Ch. 84 (noted ante, vol. 43, p. 691) held, that there being only a partial intestacy, the provisions of the Statute of Distribution as to hotchpot did not apply. Also that the Executors' Act, 1830, did not apply because the £1,500 was held by the executors not as executors but as trustees. This decision the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have now affirmed.

COMPANY—SHAREHOLDERS—GENERAL MEETING—NOTICE OF BUSINESS TO BE TRANSACTED AT MEETING—SUFFICIENCY OF NOTICE —ULTRA VIRES—ACTION BY SHAREHOLDERS.

Normandy v. *Ind., Coope & Co.* (1908) 1 Ch. 84. This was an action by the plaintiffs as shareholders of a limited company on behalf of themselves and all other shareholders claiming a declaration that certain extraordinary general meetings of the shareholders had not been duly convened and that certain resolutions adopted thereat were not duly passed; and an injunction to restrain the company and directors from carrying such resolutions into effect; and a declaration that an agreement to give a retiring director a pension was not binding on the company, and a declaration that the directors were liable to refund to the company extra remuneration beyond what was authorized by the articles of association which had been paid them under the alleged invalid resolutions. Kekewich, J., held that a notice to shareholders informing them that the particulars of the business to be transacted could be seen by inspection of a paper in the company's office, was not a sufficient compliance with the articles of association which required "the general nature" of the business to be transacted to be stated in the notice convening meetings, and therefore that the resolutions were not duly passed. He also held that as the articles of association fixed the remuneration of shareholders which could only be increased by general meeting of the shareholders, an agreement to give a retiring director a pension was ultra vires of the directors, unless and until confirmed by a general meeting: but he was of the opinion that although what was complained of was

unwarranted, yet that it might, nevertheless, be all ratified and confirmed by the company at a meeting duly called, and therefore that the plaintiffs had no locus standi, and that their only remedy was to appeal to a meeting of the company. Though dismissing the action, however, he gave no costs.

WILL—"PERSONS WHO ARE THE TRUSTEES OF THE WILL OF A."—EXECUTORS OF LAST SURVIVING TRUSTEE—CONVEYANCING AND PROPERTY ACT 1881 (44-45 VICT. C. 41) S. 30—(R.S.O. C. 127, S. 3).

In re Waidanis, Rivers v. *Waidanis* (1908) 1 Ch. 123. A testatrix by her will devised and bequeathed property to the person or persons who should at her death be trustees of her father's will. At that time all the trustees named in her father's will, and all the trustees who had been appointed in their place were dead. The executors of the last surviving trustee of her father's will, had acted in the trusts of her father's will, and these executors, Eady, J., held, were the duly appointed trustees of the will of the testatrix.

CHARITY—GIFT FOR CHARITABLE OR EMIGRATION USES—UNCERTAINTY.

In re Sidney, Hingeston v. *Sidney* (1908) 1 Ch. 126. Eady, J., held that a gift of personalty for "such charitable uses, or for such emigration uses, or partly for such charitable uses, and partly for such emigration uses" as the trustees shall think fit, is not a good charitable gift, and is void for uncertainty; because where a gift includes purposes which may or may not be charitable, and a discretion is vested in trustees, the whole gift is void for uncertainty. In the present instance emigration purposes was not necessarily confined to the assisting of poor persons.

WILL—TESTAMENTARY EXPENSES—LEGACIES CHARGED ON LAND—ESTATE DUTY.

In re Cooper, Poe v. *Cooper* (1908) 1 Ch. 130. Eady, J., held that where a legacy is given out of a mixed fund or residue, it is thereby charged rateably on the portions attributable to realty and personalty and that notwithstanding a direction to pay "testamentary expenses" out of the mixed fund, the estate duty in respect of the share of the legacy payable out of the realty, must be borne by the legacy.

ESTATE DUTY—EXERCISE OF TESTAMENTARY POWER OF APPOINTMENT—NO DIRECTION TO PAY TESTAMENTARY EXPENSES.

In re Orlebar, Wynter v. *Orlebar* (1908) 1 Ch. 136. Neville, J., in this case holds that where a testator by his will in the exercise of a general testamentary power, appoints personal property, the estate duty in respect of the appointed property is payable not out of that property, but out of the testator's general personal estate—following in this respect, Buckley, and Eady, JJ., in preference to Kekewich, Byrne and Warrington, JJ.

COMPANY — WINDING-UP — CONTRIBUTORY — ASSIGNMENT OF SHARES TO ESCAPE LIABILITY.

In re Discoverers Finance Corporation (1908) 1 Ch. 141 was an application by the liquidators of a company being wound up to rectify the list of contributors, by placing on it the name of the transferor of certain shares in lieu of that of his transferee to whom they had been transferred for the purpose of escaping liability, the shares not being fully paid. Parker, J., on the facts being satisfied that the transfer was not bona fide, gave the relief asked.

INSURANCE — RE-INSURANCE — RECOVERY BY INSURED OF LOSS FROM THIRD PARTY—SUBROGATION—EXPENSES OF RECOVERY FROM THIRD PARTY.

Assicuriazioni Generali de Trieste v. *Empress Assurance Corporation* (1907) 2 K.B. 814. In this case the plaintiffs had entered into a contract of reinsurance with the defendants, and a loss having occurred the plaintiffs paid the amount of the policy £1,354 4s. 10d. to the defendants. Subsequently the defendants, by action of deceit against third persons, recovered the moneys which they had paid on the policy of insurance granted by themselves as having been obtained by means of fraudulent representations. The amount so recovered by the defendants included the £1,354 4s. 10d. for which they had been reinsured by the plaintiffs. The plaintiffs claimed that they were entitled to be subrogated to the rights of the plaintiffs in respect of this sum and claimed to recover it in this action as money had received to the use of the plaintiffs. Pickford, J., who tried the action held that upon the principles laid down by Brett and

Bowen, L.JJ., in *Castellain* v. *Preston* (1883) 11 Q.B.D. 380, the plaintiffs were entitled to succeed, but that the defendants were entitled to deduct from the amount recovered from the third parties their reasonable expenses of recovering the same.

INTERPLEADER—EXECUTION—GOODS BELONGING NEITHER TO EXECUTION CREDITOR NOR CLAIMANT—MONEY PAID INTO COURT—DETERMINATION OF ISSUE IN FAVOUR OF EXECUTION CREDITOR—NOTICE BY CLAIMANT WHOSE RIGHTS ARE ADMITTED.

In *Wells* v. *Hughes* (1907) 2 K.B. 845, the Court of Appeal regretfully felt compelled to reverse what appeared to be an equitable decision of a Divisional Court (Ridley and Darling, JJ.), and yet for the reasons given by the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), it is hard to see how any other result could follow. Goods were seized in execution, they were claimed by the District Loan Co. under a chattel mortgage made by the execution debtor. The sheriff applied for an interpleaded order, whereupon the Loan Co. paid into Court the amount of the judgment debt, costs and execution fee, to abide the result of an interpleader issue which was ordered to be tried between the execution creditor and the Loan Co. Afterwards a firm of Davies & Co. made a claim to part of the goods which had been seized by the sheriff as lessors under a hire purchase agreement. Notice of this claim was given to both the execution creditor and the Loan Co., and both parties refused to contest the claim. On the determination of the issue the execution creditor claimed to be paid the whole amount of the money in Court, but it was contended that a proportionate part of the money in Court as representing the goods claimed by Davies & Co. should be paid to them. This was so ordered in the County Court, and the decision was affirmed by the Divisional Court; but the Court of Appeal pointed out that what was paid into Court was not the value of the goods seized but merely the amount of the execution creditor's claim, and that his admission of Davies & Co.'s claim was immaterial, as the sheriff had withdrawn from possession.

CRIMINAL LAW—RIOT—WANTON INJURY TO PROPERTY BY BOYS.

Field v. *The Receiver of Metropolitan Police* (1907) 2 K.B. 853 was an action brought under an English statute to recover for damages done to the plaintiff's property in what was alleged

to be a riot. The facts were that about nine o'clock in the evening a number of boys met together on the pavement adjoining a nine inch wall on the plaintiff's property and that some of them ran against the wall with their hands extended and by their joint efforts a portion of the wall was thrown down to the extent of about twelve feet. As soon as it fell the caretaker came out into the street and the boys ran away in different directions. The Divisional Court (Phillimore and Bray, JJ.), held that this did not constitute a riot and therefore that the plaintiff could not recover. The Court held that to constitute a riot five things must concur: (1) an assembly of persons not less than three, (2) a common purpose, (3) execution or inception of common purpose, (4) intent to help one another by force, if necessary, against any person who may oppose them in the execution of their common purpose, (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage —we presume it is to be understood that the common purpose must be an unlawful one.

EXTRADITION—DISCHARGE OF CRIMINAL—EXEMPTION FROM PUNISHMENT BY LAPSE OF TIME.

The King v. *Governor of Brixton Prison* (1907) 2 K.B. 861. This was an application for the extradition of a criminal by the German Government, under the Extradition Treaty between that country and Great Britain. By that treaty it is provided that extradition shall not take place if the person claimed has already been tried and discharged, nor if exemption from prosecution has been acquired by lapse of time according to the laws of the state applied to. The prisoner had been convicted of an extraditable offence in Germany and sentenced to four years' imprisonment. After he had served a part of his sentence he was discharged on the ground that imprisonment would endanger his life, but according to the laws of Germany the discharge was not an absolute discharge from punishment, but a prisoner so discharged is liable, on recovering his health, to be called on to complete his sentence. The prisoner had recovered his health and had been ordered by the Court to surrender himself to prison in order to complete his sentence, but had refused to do so, and escaped to England. A Divisional Court (Lord Alverstone, C.J. and

Darling, and Phillimore, JJ.) held that the prisoner had not been "discharged" within the meaning of the treaty; nor had exemption from punishment been acquired by lapse of time according to the laws of England. His extradition was therefore ordered.

REVENUE — SUCCESSION DUTY — PROPERTY SITUATE ABROAD — TRUST FOR CONVERSION—LIABILITY TO DUTY.

In *Attorney-General* v. *Johnson* (1907) 2 K.B. 885 an information was filed by the Attorney-General for the recovery of succession duty in the following circumstances. A testator domiciled in England by his will left the residue of his real and personal estate which included a tea plantation in India, to trustees upon trust to sell and pay certain annuities and subject thereto and until the death of the last surviving annuitant to pay the surplus income to certain persons in equal shares and to the survivor or survivors of them. There was no gift over, either of the income or corpus. The trustees were authorized to postpone conversion and in the meantime to work the tea estate as long as they thought fit, and it was provided that in the meantime the income of that estate should be applied in the same manner as if it were income arising from the proceeds of conversion. The will was proved in England and the trustees resided there; no sale had been effected when two of the persons entitled to share in the income died. The duty was claimed in respect of the amount by which the shares of the surviving cestuis que trustent had been increased by such death. The principal point in controversy was whether, until conversion, the proceeds of the Indian estate were liable to duty. It being contended that as that estate was situate out of England no succession duty was payable in respect of the income thereof; but Bray, J., while conceding that but for the intervention of the trustees and the special directions and powers given to them the income of the Indian estate would not have been dutiable, yet held that the trust for sale given to English trustees had the effect of making the property liable as personal estate would be in their hands, and their postponement of conversion did not alter the case and therefore that the duty was payable as claimed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Dec. 31, 1907.

ATTORNEY-GENERAL FOR ONTARIO *v.* WOODRUFF.

Revenue—Succession duty—Property transfered in lifetime of person domiciled in Ontario—Foreign bonds—Foreign situs —Anticipation of death—Settlements—Succession Duty Act and amendments.

The plaintiff claimed for the Crown succession duty upon moneys and securities, the subjects of two settlements made respectively in 1894 and 1902 by a testator who died in October, 1904, domiciled in Ontario.

In 1894 the testator had a quantity of debentures of municipal corporations in the United States, which had always been retained and managed for him in the United States by his agents there. The documents had been kept by the testator in a leased vault in New York. The testator procured each of his four sons to execute a trust deed in favour of a New York trust company whereby these debentures were transferred (in four portions) to the company in trust to manage, invest, etc., and to pay over the income to each son during his life, and upon his death in trust for his children. The testator went to New York, obtained the debentures from the vault, separated them into four parcels, and delivered them with the trust deeds to the company. The interest was from time to time remitted by the company to the sons, and the sons transferred the cheques therefor to the testator, who gave each of the sons $750 half-yearly, and retained the balance.

Held, MEREDITH, J.A., dissenting, that the effect of this first settlement, made in the State of New York, of property then locally there, where it had ever since remained, the testator having completely parted with the legal title to the property, which

thereupon became at once, and remained, vested in the trustees residing there, where the trusts were and were intended to be carried into execution, was to give the property settled a permanent foreign situs, to remove it completely from the control of the law of the domicile of the testator, and to render it in future subject only to the law of the State of New York; and for this reason, and for the additional reason that the Succession Duty Act, as it stood when that settlement was made, did not include or affect such a settlement, the property settled was not subject to succession duty.

The settlement of 1902 comprised certain cash on hand in New York and other property of a character similar to that in the previous settlement, locally situated wholly in the United States. The debentures were kept in the same vault, of which the testator had the key. When about to make this settlement, the testator wrote to his New York agents authorizing them to transfer his account from his name to the names of three of his sons, adding, "I wish to have my affairs in good shape, as I have not been feeling very well of late"; and shortly afterwards executed a document whereby he purported to transfer to his four sons the cash and debentures, in trust for his wife, and after her death to be divided equally between the four sons, subject to a charge for the education of two grandchildren. This settlement was made at a city in Ontario, where the testator, his wife, and three of his sons resided. The agents transferred the account to the names of the three sons, and notified them and the testator that they had done so; and it was arranged that access to the vault in which the debentures were kept could be secured only by the three sons and the wife, and thereafter the annual receipts for the rent of the vault were given in the name of the wife. No remittance of income to Ontario was ever made by the New York agents under the second settlement, nor any other definite action of any kind taken by the trustees to realize or get in the trust property in the lifetime of the testator.

Held, that the property settled was subject to succession duty.

Construction of the Succession Duty Act and amendments.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed as to the first settlement and reversed as to the second.

DuVernet and *Ingersoll*, for plaintiff. *W. Nesbitt*, K.C., and *Collier*, K.C., for adult defendants. *Frank Ford*, for infant defendants.

Full Court.] [Dec. 31, 1907.

LUMSDEN *v.* TEMISKAMING, ETC., RAILWAY COMMISSION.

Railway—Damages "sustained by reason of the railway"—Timber cut for construction—Trespass—Limitation of actions—Plans not filed.

The defendants were incorporated by 2 Edw. VII. c. 9 (O.), which provides that they shall have in respect of the railway all the powers, rights, remedies and immunities conferred upon any railway company by the Railway Act of Ontario. The latter Act, R.S.O. 1897, c. 207, s. 42, provides that "all actions for indemnity for damages or injury sustained *by reason of the railway*, shall be instituted within six months next after the time of the supposed damage sustained." The defendants (the railway commission and a contractor under them), before the filing of the plans of the railway, and in the course of constructing it, entered upon the timber limits of the plaintiffs and cut timber for construction purposes. These acts ceased much more than six months before the commencement of this action, brought to recover damages for the trespass and for the value of the timber.

Held, following *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1888-90) 15 O.R. 733, 17 A.R. 86, that the plaintiffs' claim was for damages sustained by reason of the railway, and was barred by the statute; and it made no difference that the commission had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected.

Judgment of RIDDELL, J., affirmed.

G. F. Henderson, for plaintiffs, appellants. *D. E. Thomson*, K.C., for Railway Commission. *J. H. Moss*, for defendant Macdonnell.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon, J., Anglin, J.] [Jan. 2.

LABELLE *v.* O'CONNOR.

Vendor and purchaser—Contract—Purchase money payable by instalments—Time of essence—Default—Waiver—Rescission—Notice—Specific performance—Return of money paid—Deposit—Forfeiture.

By an agreement in writing made between the parties on the

25th May, 1905, the defendants agreed to sell land to the plaintiff for the price of $290; the purchase money was to be paid in three instalments, the first of $100, which was to be (and was) paid down; the second of $75, which was to be paid in five months and three weeks, and the third, of $115, in eleven months and three weeks, and the latter two instalments were to bear interest at six per cent. until paid. The plaintiff was to be entitled to possession until default, and was to pay the taxes after the date of the agreement. The agreement was on a printed form, and one of its printed provisions was: "And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the time and in the manner above mentioned, the defendants are to be at liberty to resell the said lands." The plaintiff was given the privilege of paying the residue of the purchase money at any time, and the defendants were to convey when the whole purchase money should be paid. According to the evidence, the time for the payment of the plaintiff's purchase money was arranged to correspond with the time when the defendants were required to make payments to one R., from whom they had purchased the land, with the object that they should be able to pay R. with the money which the plaintiff should have paid them. The second instalment of the plaintiff's purchase money fell due on the 15th November, 1905, and was not paid. In the following December the plaintiff asked O'Connor, the husband of one of the defendants, for a delay of two or three weeks, saying that at the end of that time he would pay the purchase money in full. O'Connor said that it would be necessary to consult the other defendant, and that he would let the plaintiff know by mail whether they would accede to his request. Not having received any word from O'Connor, the plaintiff waited until February, 1906, when he wrote to the defendants asking for his deed and telling them that he was ready to pay the purchase money in full with interest. To this and to two subsequent letters no reply was received. In April the plaintiff saw O'Connor, who said that the plaintiff would have to lose the $100, and that the defendants would "stick to the lots and the money as well." A formal tender was made and refused on the 23rd April, and this action for specific performance was begun on the 23rd May:—

Held, MEREDITH, C.J.C.P., dissenting, that, in the absence of fraud, accident or mistake, the provision that time should be of the essence was binding upon the plaintiff, and had not been waived by the defendants; that the latter had the right to rescind upon default in payment of the second instalment; that no formal notice of rescission was necessary; and that the plaintiff was not entitled to specific performance. *Barclay* v. *Messenger* (1874), 22 W.R. 522, 43 L. J. Ch. 449.

In re Dagenham Dock Co. (1873), L.R. 8 Ch. 1022, and *Cornwall* v. *Henson*, (1899) 2 Ch. 710, (1900) 2 Ch. 298, followed.

Held, also, that the $100 paid by the plaintiff, not being a deposit, but an instalment of the purchase money, was not forfeited, but was returnable to the plaintiff upon rescission, and he should be allowed credit for it upon the costs ordered to be paid by him.

Judgment of TEETZEL, J., reversed.

Gamble for defendants. *J. Bicknell*, K.C., and *A. B. Morine*, K.C., for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Jan. 20.

IN RE WILSON AND TORONTO GENERAL TRUSTS CORPORATION.

Executors and trustees—Accounts—Surrogate Court—Approval by judge—Fraud or mistake—Items of overcharge—Application to re-open accounts—Re-opening limited to items proved—Refusal to re-open generally—Surrogate Courts Act—Jurisdiction—Costs.

A petition by the cestui que trust to the judge of a Surrogate Court to set aside an order made by him upon the passing of the accounts of the trustees and to re-open the accounts, was dismissed with costs, subject to the petitioner being allowed to surcharge the accounts of the trustees upon two items, viz., premiums paid by the trustees for fire insurance, from which they should have deducted rebates or commissions allowed to them by the insurance companies, and an overcharge of one cent a share upon a purchase of 3,000 shares of mining stock by the trustees:—

Held, affirming the judgment of the judge of the Surrogate Court (York), that he had properly refused to open up the accounts in regard to the purchase of the mining stock referred to, in regard to an alleged overcharge of interest, in regard to the sale of a property without notice to the petitioner, in regard to certain mortgage accounts, and in regard to other matters.

It was contended for the petitioner that the non-disclosure of the fact that the rebates had been allowed amounted to fraud on the part of the trustees entitling the petitioner to have the accounts re-opened and taken de novo, and that, at all events, coupled with the overcharge as to the mining stock, she was so entitled.

The accounts approved by the Judge were brought before him under the provisions of section 72 of the Surrogate Courts Act, as amended by 2 Edw. VII. c. 12, s. 11, and 5 Edw. VII. c. 14, s. 1:—

Held, that, under that section, it is only *so far as* mistake or fraud is shewn, and not where mistake or fraud is shewn, that the binding effect of the approval is taken away; and the language of the section plainly indicates that it was not intended that the whole account should be opened up, but that the account should be opened up so as to remove from it anything which, owing to fraud or mistake, had not been charged or had been allowed to the accounting party. The principle applicable to the opening of an ordinary stated account, and the consequences of such an account being opened, do not apply to an account taken by the Court in the presence of the parties, where the persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account.

While the failure to credit the rebates was not due to a mere accidental omission of them from the account, the intentional retention of the small sum not credited, apparently under the mistaken idea that the trustees were entitled to it, did not amount to fraud, or at all events, not to such fraud as would entitle the petitioner to the relief which she claimed or to any further relief than that given to her by the order of the judge.

The petitioner should not have been ordered to pay all the costs of the trustees in the Court below, as she had succeeded to a trifling extent. No costs of the appeal were allowed to either party, but without prejudice to the trustees' right to

claim their costs as proper disbursements in accounting thereafter to the petitioner.

F. E. Hodgins, K.C., and *D. T. Symons,* for the appellant, the petitioner. *G. F. Shepley,* K.C., and *J. H. Moss,* for the respondents, the trustees.

Meredith, C.J., MacMahon, J., Teetzel, J.] [Jan. 21.

RE TOWNSHIP OF WILLIAMSBURG AND UNITED COUNTIES OF STORMONT, DUNDAS AND GLENGARRY.

Municipal corporation—Bridge—Maintenance.

Appeal from an order made by the senior judge of the County Court of the United Counties. The question was whether the bridge under discussion was a bridge over 300 feet in length within the meaning of section 617 of the Con. Mun. Act 1903; and whether enough of the travelled road east and west of the structure, 44 feet in length to make up 300 feet, formed part of the bridge.

Held, that the travelled road being above rather than for the purpose of bridging the stream it was not to be considered as part of the bridge, (see *Re Mudlake Bridge,* 12 O.L.R. pp 161-2). The general law casts upon local municipalities the duty of maintaining roads and bridges within their limits, and the respondents do not bring themselves within the exception.

Appeal allowed.

Macintosh, for appellants. *Hilliard,* for respondents.

Anglin, J.] FOX *v.* CORNWALL STREET RAILWAY CO. [Jan. 21.

Street railways—Duty as to highways—Wearing down—Liability of municipality.

Plaintiff claimed damages for injury sustained by being thrown from his waggon, the front wheel of which came in contact with the rails of the defendants, due to the wearing down of the adjacent portion of the highway.

Held, that the rails must be taken to have been properly laid in the first instance, in compliance with s. 20 of R.S.O.,

1897, c. 208, as nearly as possible flush with the street so as to cause least possible impediment to ordinary public traffic. Having ceased to meet this requirement by natural means,—the right of maintaining and repairing highways is by statute and by the common law incumbent upon the municipality, and not on the defendants.

Action dismissed with costs.

Gogo and *Harkness*, for plaintiff. *Maclennan*, K.C., and *Cline*, for defendants.

Boyd, C., Anglin, J., Mabee, J.] [Jan. 23.

BARKER *v.* FERGUSON.

Landlord and tenant—Partial lease—Injury to tenant's goods.

This was an appeal by plaintiff from the judgment of the District Court judge of Nipissing, dismissing an action for damages for injury to goods caused by the non-repair of premises demised to plaintiff, on which goods were placed.

Held, that a landlord incurs no liability to a tenant for any defects or accident unless he has contracted to keep the premises in repair.

Kilmer, for plaintiff. *J. M. Ferguson*, for defendant.

Anglin, J.] REX EX REL. BECK V. SHARP. [Feb. 27.

Practice—Examination—Municipal election—Quo warranto—Cross-examination on affidavit—Master in Chambers—No jurisdiction to order examinations before anyone but himself.

This was an appeal by the defendant from the Master in Chambers who ordered the defendant and another to attend before the local registrar at Brampton to submit to cross-examination upon their affidavits filed in answer to application to unseat the defendant as a member of the Brampton Town Council.

Without obtaining any direction in that behalf from the Master, the solicitor for the relators procured from the local

registrar an appointment to cross-examine the deponents, proceeding under Con. Rules 490, 492:—

Held, having regard to the provisions of section 232 of Mun. Act, 1903, that, notwithstanding the broad language of Rule 490, it should not be held applicable to proceedings to contest the validity of municipal electors. Section 232 contemplates that whatever oral testimony is taken, whether it be evidence of witnesses who have not made affidavits, or cross-examination of affiants, it should be taken before the judicial officer who is to determine the validity of the election. There was no right on the part of the relators to issue an appointment for this cross-examination without leave of the Master in Chambers first obtained; and the Master had no authority to direct cross-examination of affiants to be taken before any officer other than himself.

Appeal allowed.

T. J. Blain, for appellant. *W. E. Middleton*, K.C., for the relators.

Boyd, C., Anglin, J., Mabee, J.] [Jan 31.

WILLIAMS v. CRAWFORD TUG CO.

Company—Power of to give guarantee—Implied powers.

The owner of a tug employed by the defendants requiring a new boiler obtained one from the plaintiffs on the faith of a guarantee given by the defendants for the price of the boiler. An action being brought upon the guarantee in the 8th Division Court of the County of Bruce the county judge held that the contract was ultra vires of the company and dismissed the action.

Held, per BOYD, C.:—"Giving a guarantee by a joint stock company incorporated to do defined things, to answer for the debt of a person who does work for them, if not within the general or special powers of the company, must be justified on the ground that it is incidental to the main purposes—that there is a potential necessity for entering into the guarantee, and that therefore there is a reasonable implication of power to do it. I use expressions drawn from the language of Lord Selborne in *Small* v. *Smith*, 10 App. Cas. pp. 123. See also *Brettel* v. *Williams*, 4 Ex. 632."

Middleton, for plaintiffs. *Jennings*, for defendant.

COUNTY COURT—HALDIMAND.

DOUGLAS *v.* GRAND TRUNK RY. CO.

Railway—Cattle on track—Liability—Fences.

The plaintiff's heifer, while escaping from the stable of an hotel adjoining the defendants' railway, got on to the railway track through a hole in defendants' fence, and finally reached a bridge, and, in its attempt to cross over, fell from it and had to be slaughtered.

Held, following *Young* v. *Erie & Huron Ry. Co.*, 27 O.R. 530, that damages were not recoverable as any neglect or non-observance by the railway is provided for by 53 Vict. c. 28, s. 2(D.), and is limited to injury caused to animals by the company's trains and engines; and, further, that there being no common law liability to fence, the obligation is to be measured by the language of the statute. See *James* v. *Grand Trunk Ry. Co.*, 10 O.L.R. 127. Judgment for defendants, but without costs.

[Cayuga, Jan. 14—Douglas, Co. J.

The facts of the case are sufficiently set forth above.

Arrell, for plaintiff. The defendants were negligent in not maintaining their fence as required by law, and were therefore responsible in damages under the provisions of section 427 of the Railway Act. See, also, sections 4, 254, 294 and 295.

W. E. Foster (now of Montreal), for defendants. Section 427 does not apply, because the remedy is provided by the special Act, 16 Vict. c. 37, s. 2.

DOUGLAS, Co. J.:—At the time that *Young* v. *Erie & Huron Ry. Co.*, 27 O.R. 530 was decided, there was a provision in the Railway Act similar to section 427 of the present Railway Act, and I feel that I am bound by the decision of the Chancellor in this case. His Lordship says: "As to damages found by the jury in respect of the trouble incurred in watching cattle on account of the bad state of the fences, I do not think these are recoverable as a consequence of the neglect on the part of the company to observe the directions of the statute. The penalty that follows non-observance is given by the statute 53 Vict, c. 28, s. 2(D.), and it is limited to injury caused to animals by the company's trains and engines. There is no common law liability to fence, and the obligation being imposed by statute, the responsibility is to be measured by the language of the statute." Osler, J., seems to agree with this view in *James* v. *Grand Trunk Ry. Co.*, 10 O.L.R. 127.

Then has the Railway Act since that time been so changed as to increase the responsibility of railway companies in this respect? I cannot find such a change in the Railway Act, although no doubt their responsibilities have been made greater by reason of the present provision as to cattle at large, and as to cattle guards at highway crossings. I cannot give effect to the argument of counsel for defendants when he argues that the plaintiff's servant negligently allowed the animal to escape from the hotel stable. Had it not been for his admission that the defendants would have been liable if the heifer had been killed by the defendants' trains or engines, I would have submitted the whole of the questions involved to the jury.

I think, therefore, the plaintiff must fail in his action, but, under the circumstances, without costs.

DIVISION COURT—ELGIN.

COLLINS *v.* SMITH.

CAMPBELL *v.* MCWILLIAMS.

Master and Servant—Verbal contract—Statute of Frauds—Desertion—Wages.

The question was whether a servant who abandoned a special contract which was unenforceable under the Statute of Frauds could maintain suit on a quantum meruit to recover the value of his services for part of the term during which he had served. Both defendants pleaded breach of contract by the plaintiffs as a complete defence.

Held, A yearly servant wrongfully quitting his master's service forfeits all claim for wages for that part of the current year during which he has served.

[St. Thomas, Feb. 3—Ermatinger, Co. J.

The question presented on the evidence was whether a servant who abandoned a special contract which was unenforceable under the Statute of Frauds could maintain a suit on a quantum meruit to recover the value of his services for the part of the term during which he had served.

Faulds and *Duncan*, for plaintiffs. *Crothers*, K.C., and *Leitch*, for defendants.

ERMATINGER, Co. J.:—The doctrine laid down by the English decisions is that the contract, though unenforceable by reason of the statute is still a subsisting contract. Though an action cannot be brought upon the contract, it still exists, with the result that no new contract can be implied from Acts done in pursuance of it: Smith on Master and Servant, 5th ed., p. 31.

An action cannot be maintained by a master against a servant for quitting his service, nor by a servant against his master for wrongful dismissal, where the requirements of the statute have not been complied with, because such actions would be based upon the contract which the statute declares unenforceable: See *Snelling* v. *Huntingfield*, 1 C. M. & R. 19; *Harper* v. *Davies*, 45 U.C.Q.B. 442. An action may, however, it seems, be maintained by the servant against the master in case of wrongful dismissal of the former, for his services as upon a quantum meruit: *Snelling* v. *Huntingfield*; *Brittain* v. *Rossiter*, 11 Q.B.D., at p. 133; Leake, 4th ed., 200. It is when we come to consider the case of the servant quitting his service without justifiable cause that there would appear to be a dearth of authority both here and in England in favour of the enforcement of a claim for services rendered under a contract unenforceable by reason of the Statute of Frauds.

As already said no new contract may be implied when there is already an existing though unenforceable contract: *Brittain* v. *Rossiter*; *Harper* v. *Davies*, ante. From that point of view it is rather hard to see the distinction between cases where the servant has been dismissed and where he has voluntarily abandoned the service under the unenforceable contract. It was even suggested on the argument that Lord Lyndhurst's dictum in *Snelling* v. *Huntingfield* does not bear out the dictum of Thesiger, L.J., in *Brittain* v. *Rossiter*, and statements of text writers, in favour of a servant's right to recover in the former case.

It seems, however, to be assumed to be the law in England that where the servant has been wrongfully dismissed or where illness prevents his completing his term of service, he may recover for the services rendered, notwithstanding the statute. But no English or Canadian case has, though counsel have searched diligently, been found to authorize his recovering for his services where he has abandoned his employment voluntarily under a contract unenforceable under the statute.

Though there is apparently a lack of authority in our own and the English Courts upon this latter question, the same cannot be

said of American Courts, though the decisions in several States seem very conflicting. The authors of the 9th American edition of Smith's Leading Cases, at page 602 (vol. 1), say: "Though no action could be brought on the oral contract not to be performed within a year, has this sufficient vitality to constitute a valid defence? In accordance with the "void" theory of the Statute of Frauds it has been decided in Maine, Massachusetts and Connecticut that such an oral contract constitutes no defence. The Statute is held to be a bar even to its indirect enforcement. Thus in *Comes* v. *Lawson,* 16 Conn. 246, where the plaintiff by oral agreement bound himself to serve the defendant for a term longer than one year, for a consideration to be paid at the end of that time, and, having repudiated the contract, and quitted his employer at the end of six months, brought his action to recover the value of the services so rendered, the Court held that he could recover and that the defendant could not set up the verbal agreement in defence: *Clark* v. *Terry,* 25 Conn. 395; *King* v. *Welcome,* 5 Gray 41; *Freeman* v. *Fiske,* 145 Mass. 361 (1887); *Bernier* v. *Cabot Mfg. Co.,* 71 Me. 506. But see *Mack* v. *Bragg,* 30 Vt. 571; *Swanzey* v. *Moore,* 22 Ill. 63, contra." (See also Browne on the Statute of Frauds, 5th ed., pp. 145-6, 150-1.)

The case last cited was very similar in its facts to the cases before me.

[The learned judge then quoted from the American and English Encyclopedia (2nd ed., vol. 29, sub nom. "Verbal Agreements," p. 836) which summarizes the result of the decisions, from *Swanzey* v. *Moore* (Ill), already referred to, remarking that the reasoning in the latter case commends itself rather than that contained in the judgments of the other State Courts already referred to. The Illinois case seems based on common sense, upon which the law is said to be founded, and to conform to the well-known maxim that a man may not take advantage of his own wrong.]

If the English Courts have been silent on the point it may perhaps be urged that that is evidence that the principle was too plain to be called in question.

Harper v. *Davies,* 45 U.C.Q.B. 442, is the only case in our own Courts that was cited which touches the point in question here. Though it was urged that Armour, C.J., had decided there would be no recovery for services in a case within the statute, he appears to have based his decision on *Brittain* v. *Rossiter* in which Thesiger, L.J., recognizes the right of a servant wrongfully dismissed to recover for services rendered, though not for

the wrongful dismissal. In *Harper* v. *Davies* the right to recover on the common counts, which included a claim for work and labour, seems to have been recognized. It is probable, however, that the learned Chief Justice would have explictly denied the right to recovery by a plaintiff who was in default, had such a case been before him.

It was contended the plaintiff in the latter of the two cases before me had the right to terminate this contract, if it existed, by a month's notice, according to the well-known rule applicable to domestic servants, and if that were the case the deduction of a month's wages might be made in lieu of the month's notice which was not given. Apart from the question as to whether a farm labourer is a domestic servant (as to which see note (*b*) to *Snelling* v. *Huntingfield*, 1 C. M. & R.), this contention fails for another reason. The law is thus stated in Smith's Master and Servant, 5th ed., p. 65, after a statement of the rule as to the month's warning by domestic servants. "But it is conceived to be perfectly clear, notwithstanding a notion to the contrary, which is believed to be not uncommon, that a domestic or other yearly servant wrongfully quitting his master's service forfeits all claim for wages for that part of the current year during which he has served and cannot, after having wilfully violated the contract according to which he was hired, claim the sum for which his wages would have amounted had he kept his contract, merely deducting therefrom one month's wages." A passage follows as to the injustice which would result from a contrary rule, as to which see also *Blake* v. *Shaw*, 10 U.C.Q.B. 180.

Judgment will be entered for the defendant in both cases with costs.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE KING *v.* ROMANS. [Feb. 8.

Criminal law—Code s. 212—*Seduction under promise of marriage.*

Defendant who had entered into an engagement to marry E., some time afterward seduced her. The engagement to marry was referred to at the time, and the promise to marry repeated, and

defendant further promised that in the event of E. getting into trouble he would marry her before anyone knew about it.

Held, reversing the decision of the County Court judge for District No. 3, that the promise of marriage was a continuing one until the event took place, and that the existence of the promise, renewed by the defendant as an inducement to E., came within the meaning of the Code s. 212.

J. J. Power, K.C., for the Crown. Nem con.

Province of British Columbia.

COUNTY COURT.

Howay, Co. J.] McLEAN *v.* DOVE. [Jan. 4.

County Court—Practice — Costs — Review of taxation — Scales "over $10 to $25" and "over $250 to $500"—Amount recovered by means of the action.

Plaintiff claimed $333.19 for certain cattle sold to defendant, who pleaded tender of $300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for plaintiff was given for $250. The taxing officer allowed costs on the scale "over $250 to $500."

Held, on review of the taxing officer's ruling, that the amount recovered by means of the action being only $20, the costs should have been taxed on the scale "over $10 to $25."

Reid, for the application. *Bole*, K.C., contra.

Book Reviews.

Manual of the Law of Evidence for the use of Students. By SYDNEY L. PHIPPSON. London: Stevens & Haynes, Bell Yard, 1908.

This volume of 208 pages is an abridgement of the 4th edition of the author's general treatise upon the same subject. It is a concise compendium of the law and will be useful not only to students but to practitioners also. The name of the author is a sufficient recommendation.

Students' Guide to Roman Law (Justinian and Gaius). By DALZIEL CHALMERS and L. H. BARNES. London: Butterworth & Co., Bell Yard, 1907.

The authors have apparently satisfactorily complied with what they express to be their belief that there is a need for a concise and simply worded text book which will serve as an introduction to the standard authorities on the subject of Roman law. For those who desire a general view of this great system of law they cannot do better than read this book, which, by the way, is in the best style of workmanship of this well-known publishing house.

A New Guide to the Bar. By LL.B., Barrister-at-law. 3rd ed. London: Sweet & Maxwell, Ltd., 3 Chancery Lane, 1908.

This volume contains the most recent regulations and examination papers of the Inns of Court, with a critical essay on the present condition of the Bar of England. A very useful compendium for law students in the British Isles; and some of its chapters are interesting to Colonial students.

Martin's Mining and Water Cases of British Columbia, with Statutes. Toronto, Canada: Carswell Co., Ltd., 1908.

We are in receipt of part 2 of the 2nd volume of these reports, edited by Hon. Mr. Justice Martin, one of the judges of the Supreme Court of British Columbia, and Judge of the Admiralty for that Province. This series of reports gives the decisions on mining cases and cases under the Consolidation Act of British Columbia from the earliest times up to January 1, 1908, in all the Courts and from the trial up to the Privy Council. The statutes affecting the subjects discussed in this judgment are to be found in this volume. The whole makes a full compendium of the law on matters necessarily much in evidence in our Pacific Province.

Principles of Company Law. By ALFRED TOPHAM, Barrister-at-law. Second Edition. London: Butterworth & Co., Bell Yard.

This book is a useful one doubtless to those who have to deal with the Company Law of the British Isles; especially as it puts the practitioner on the right track as to the many ramifications of this important branch of law by reference to the sections of the statutes and the leading cases. Our statute law is so different in this country that Mr. Topham's book is not of so much value here, but one written on the same lines here would be very useful.