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THE DEVOLUTION OF ESTATES ACT.

At the last session of the Ontario Legislature an Act was passed (6 Edw. VII. c. 23) making sume further amendments to the Devolution of Estates Act, which Act, by c. 19, s. 18, of the same session, was not to come into force until proclamation by the Lieutenant-Governor-in-Council. On September 22 last a proclamation of His Honour, dated September 14, was published in the Ontario *Gazette*, bringing the amending Act into operation on September 15, 1906. The Act is therefore now in force.

We have on former occasions in these columns expressed regret at the way in which the Devolution of Estates Act has been amended, and have shewn that the original intention of the Act has been more or less frustrated or defeated by the various amendments.

The object of the principal Act may be briefly stated to be, to do away, as far as possible, with the distinction between the mode of devolution of real and personal estate, and to establish one method of devolution for both classes of assets. The method of the devolution of personal estate was apparently considered the proper method to adopt, because it appears more effectively to provide not only for the rights of mere voluntary beneficiaries, if one may so term heirs and next of kin and devisees and legatees, but also other beneficiaries for value, so to speak, viz.: the creditors of the deceased person. But ever since the Act originally passed there has been a constant struggle to evade this principle and to combine with that established by the principal Act the old principle of the devolution of real estate. Hence every successive amendment has had the effect of introducing a patch upon the old and worn-out garment, which was formally cast off when the original Act passed.

The two systems are absolutely incongruous, and the Act is rapidly becoming equally so. Instead of having one clear and definite system of devolution of property on the death of an owner, applicable to all of his property, we are evolving a mongrel system. This, we think, is to be regretted, because we think the original Act aimed rightly at a uniform method of devolution of both real and personal estate, and every departure from, or infringement of, that uniformity, tends not to simplify, but to confuse a matter which ought to be as free from doubt as possible.

Under the Act as originally passed the title to the real estate of a deceased person must in all cases have come through his personal representative. In order to save a few pence which a formal transfer would cost, this principle was invaded, and unless the personal representative registered a caution, and from time to time renewed it, the real estate was made again to devolve as before the Act. For some unexplained reason personal representatives were by further amendments hampered in dealing with real estate, in a way in which they are not so hampered as regards personal estate.

One of the amendments made by the Act of last session seems equally retrograde in character and ill advised. The first section enables a mortgagee to foreclose a mortgage, where his mortgagor is dead, and no personal representative has been appointed, without making any person in whom the mortgagor's title is vested a party to the proceedings. It is to suffice if "the person beneficially entitled under the last will and testament, if any, of the deceased mortgagor, or under the provisions of this Act (the Devolution of Estates Act), to such land, or the proceeds thereof, be made defendant, and it shall not be necessary to have a personal representative before the Court unless the Court so orders." If, however, pending the action a personal representative is appointed, on whom the equity of redemption devolves, he must be made a party.

The amendment is, of course, a violation of the fundamental rule of equity procedure, that the person in whom the equity of redemption is vested must be made a party to proceedings for

sale or foreclosure instituted by a mortgagee, and substitutes for him a "beneficiary"—but what kind of a beneficiary does the Act contemplate? In the case, for instance, of an insolvent mortgagor, who is the beneficiary the Act contemplates, the devisee who has a nominal beneficial interest, but actually none, or the creditors who have the actual beneficial interest in the equity of redemption; or does it mean all persons entitled to participate in the deceased's estate?

The Act seems to afford no clue to the proper answer. It provides, moreover, a delightful pitfall for the unwary, for if pending the mortgagee's action, a personal representative should be appointed to the estate of the mortgagor, in whom the equity of redemption becomes vested, even though unknown to the plaintiff, then all his subsequent proceedings would be invalidated unless such personal representative were made a party, and the plaintiff might find, after completing his proceedings, that he had obtained a merely abortive judgment, as he may learn years after when deducing title under such proceedings.

While we cannot, therefore, think the first section an amendment in the right direction, we think the amendment of section 16 is to be approved as a return to the first principles of the Act. It restores the ample power of the personal representative to sell the land of the deceased, but with reasonable checks on his action.

Had the principle on which the original Act was based been carried out in the first section, it would, we think, have provided that in all cases of intestacy, until some other representative is appointed, some public officer should be ex officio the personal representative of the deceased, and that proceedings instituted against him should bind the estate. This official representative might well be the Official Guardian ad litem, who is already charged with certain duties under the Act, and we trust that some amendment in this line may yet be adopted, and that the first section of the late Act may be repealed, as also the provisions relating to cautions, for which we would substitute some short and easy method of transfer from the personal representative in every case.

BILLS OF EXCHANGE—SPECIAL ENDORSEMENT—TRANSFER BY DELIVERY.

A correspondent draws our attention to a case recently decided in Nova Scotia by Longley, J. (*Nova Scotia Carriage Co.* v. *Lockhart*, 1 E.L.R. 78), taking exception to the conclusion therein arrived at. His letter will be found in another place. The subject discussed was touched upon when we had occasion to criticise the judgment of the majority of the Court in *Sovereign Bank* v. *Condon*, 9 O.L.R. 146 (ante, p. 25). Street, J., dissented, and, in our view of the law, came to the right conclusion.

The bill of exchange in question in the case referred to was drawn payable to the order of the Union Bank of Halifax, which held the draft for collection for the drawer. It was dishonoured, and returned to the drawer by the payee, without endorsement. An action was brought upon the bill, the plaintiff claiming as "holder" of the draft.

Mr. Justice Longley, who gave the judgment, says:—"The contract on the acceptance of the note was that the defendant would pay the amount of the draft *at* the Union Bank of Halifax at Windsor." This partial statement of the contract created by the acceptance lies at the root of what must, we think, be regarded as an erroneous decision.

The contract contained a further condition, that the defendant should pay *to* the Union Bank of Halifax or order, and, indeed, the place of payment may not have been stated in the bill —apparently was not. The judgment proceeds:—"If he had paid it there he would have been free from further pursuit." This also would seem to be incorrect, if strictly construed, for if the acceptor had paid the bill at the Union Bank, but not to the holder, at maturity, the bill would still have been unsatisfied, and might subsequently have been enforced by the true owner. (Sec. 59.)

The learned judge further says:—"I think the drawer had a right to receive the bill from the bank as soon as it was dishonoured, and thereby became the lawful holder." This

must, it is submitted, be regarded as a partial statement only. The drawer had a right to the bill as its "owner" (Sec. 31), but not as its "holder."

The Bills of Exchange Act defines a "holder" as "the payee or endorsee of a bill who is in possession of it." The Act further says: "A bill payable to order is negotiated by the endorsement of the holder completed by delivery." The endorsement was wanting in this case, and the judge erred, apparently, in treating the delivery alone as sufficient to create the drawer (and owner) a lawful "holder."

The judgment also says: "The definition of a holder in the Bills of Exchange Act seems to refer to a third party, and not to apply to the original drawer, who has (when he has) simply made his draft payable to a bank for the purpose of collection." If, then, in the judge's opinion, "holder" does not include a "drawer," how could he sustain the drawer's right of action in this case, for the plaintiff sued as "holder"? The words he uses seem to be a clear decision by the judge that the drawer was at no time the "holder" of the draft in question. Clearly a drawer, as such, is not a "holder" at any time, but when payee or endorsee he is a holder in precisely the same manner as other persons would be.

The judgment further says: "He, the drawer, certainly could not be regarded as a 'holder' until a breach of the contract." Just preceding these words the learned judge had said that the word "holder" did not seem to apply to the original drawer. Just here he declares that the drawer becomes a "holder" by the failure of the acceptor to pay the draft.

The breach of the contract to pay the bill does not make the drawer a "holder," or give him a right of action on the bill as a matter of course, for he could only become the "holder" in the manner prescribed in the Bills of Exchange Act, by endorsement and delivery, but a right of action in respect of the bill would accrue to the drawer upon payment of the bill, by virtue of the provision of the Bills of Exchange Act: "Where a bill payable to the order of a third party is paid by the drawer, the

drawer may enforce payment thereof against the acceptor." (Sec. 59 (2*a*).)

The judgment proceeds: "After that (failure to pay) I think the draft properly belongs to the drawer, when returned by the bank which has failed to make the collection." The question was not—Did the draft belong to the plaintiff? (that is, Was he the rightful owner?) but, Was he the "holder" of the draft within the mearing of the Act, and as such entitled to sue the acceptor? Not only did the draft belong to the plaintiff, but he was entitled to have the bank's endorsement (Sec. 31 (4)), and upon securing this he would be a "holder," though not a "holder in due course." The plaintiff in this case might have sued on his original cause of action, and used the bill as evidence of the debt, but clearly his suit as holder could not be maintained on the bill of exchange without the endorsement of the bank.

The acceptor of a bill of exchange engages that he will pay "according to the tenor of his acceptance." In this case the drawer was to pay the Union Bank, or its order. The acceptor did not agree to pay any other person, and consequently had not agreed to pay the drawer. Payment to the drawer would not have discharged this bill. Until "payment in due course" a bill is not discharged. (Sec. 59.) "Payment in due course" means payment to the holder. (Sec. 59.) Holder means "a payee or endorsee in possession of the bill." (Sec. 2.)

A drawer obtaining by endorsement an accepted bill payable to a third party becomes the "holder" thereof, but a drawer paying after dishonour a bill payable to a third party, but not procuring the third party's endorsement thereon, does not become the holder, though he has a right of action *as drawer*. (Sec. 59 (2*a*).)

If the bill were accepted as payable to the drawer or order, and were endorsed and negotiated by the drawer, and were subsequently paid by the drawer himself, the drawer might re-endorse and re-issue the bill. (Sec. 59 (2*b*).) In the latter case he exercises the right of a payee, not of a "holder," and where he is not originally the payee, he cannot, upon paying the bill,

unless he procures a proper endorsement, exercise any of the rights incident to the position of a payee or holder, such as endorsing and negotiating the bill, but is restricted to the right to sue set forth in section 59. This distinction illustrates strikingly the divergent rights of a "holder" and a drawer after payment of the bill respectively.

The rights arising on a bill of exchange are very carefully and strictly defined by the Act, and should be strictly construed. A bill has certain peculiarities, based originally on the law merchant, and it is easy to confound rights of contract by common law with rights arising on a bill. This confusion is visible, we think, in the judgment under discussion, as well as in *Sovereign Bank* v. *Gordon*, discussed ante, p. 25.

J. B.

A correspondent makes the suggestion that reporters should suppress judgments intended to "fit particular cases," and wherein bad law is propounded. It is to be regretted that such judgments are occasionally delivered; and reporters often feel tempted to consign them to oblivion. The suggestion, however, is of ancient date; but the remedy for the acknowledged evil has not yet been found. Certainly the enormous volume of case law through which lawyers have to wade in these days should not, if possible, be added to by judgments of doubtful accuracy or which set forth bad law. But the difficulties in the way are many, as a moment's reflection will show, and we need not enlarge upon them. Some of the old English reporters exercise their discretion in the premises with a very good result; but so far no practicable solution of the difficulty, as it exists in these days, has been evolved. The person who discovers it will deserve well of his brethren.

The Toronto *Globe* recently assumed to lay upon our judges the responsibility for the "discourtesy and impudence of browbeating lawyers"; the writer spicing his article with expressions characterizing counsel with being "vulgar forensic bullies" and

"ruffians," and charged them with making "coarse and insulting innuendos," indulging in "indecent cross-examinations," and with "brow-beating honest witnesses," etc. We are not unaccustomed to such choice language on the part of a certain class of newspaper writers, and the profession can afford to ignore that feature of the article. We apprehend, however, that our judges are sufficiently alive to their duties to prevent any such unprofessional conduct when counsel are guilty of it; but as such breaches do not exist, except possibly in some isolated cases, they are not called upon to interfere. This is a sufficient answer to those baseless charges against a Bench and Bar which, as a whole, is justly entitled to the respect of the community. There is too much pandering in the daily press to silly prejudices which only please the lower stratum of their readers.

The text taken by the writer in the article referred to was a paper read at a recent police convention by one of the force, who stated that, in the detection and punishment of crime, the officers found it difficult to secure the testimony of self-respecting citizens, as they declined to submit themselves and their affairs to the insinuations and impertinences of counsel. We are rather inclined to think that the police officer would have been more accurate if he had stated that this difficulty arose mainly from the natural disinclination of citizens to spend, and too often waste, their time within the unpleasant and unsavoury precincts of a Police Court. We would venture, moreover, to suggest that the excellent police officer referred to would have been better employed in discussing the iniquities of the "sweat box" system, which has from time to time received severe criticism, both in the lay and legal press.

Speaking of these matters brings up a journalistic excrescence which may be worth referring to. Another newspaper writer recently, and properly enough, referred to some of the

scandals which are at present attracting public attention, characterizing them in appropriate language. The eighth commandment was, in these remarks, largely in evidence; but one could not help thinking as one read the article that it would have been well if the writer had paid some attention to another portion of the decalogue, which says: "Thou shalt not bear false witness against thy neighbour." Forgetfulness of the latter injunction is as common in certain sections of the lay press as breaches of the eighth commandment are in politics and business life. It is the old story of the mote and the beam exemplified.

STABILITY OF LEGAL ADMINISTRATION.

A very interesting address was recently delivered at the Minnesota State Bar Association by Hon. C. F. Amidon. With much intelligence, and with a frankness which is somewhat unusual with those who, like our neighbours to the south, are generally so well satisfied with their own institutions, the writer draws attention to what he considers the capital vices of American law, viz.:—"Its instability of administration and the frequent retrials of the same controversy." A careful investigation reveals the fact that in 1887 new trials were granted in the United States in forty-six per cent. of all causes pleaded under review in appellate Courts. It was further found that in sixty per cent. of these causes the appeal turned upon questions of pleading and practice. The writer further states that in the law reports of England for the period of time extending from 1890 to 1900 the new trials granted were in less than three and one-half per cent of the cases tried.

The paper refers in commendatory language to the fact that in England the High Court is authorized to regulate all matters of pleading and practice by rules, the Courts controlling all matters of procedure, whilst in the United States this is done by statutory enactment, resulting in innumerable amendments, wise and unwise, mainly the latter, so that there, there is not

what there is in England—a body of practice that is the result of the highest legal wisdom, not merely the thought of the judge or lawyer, but the steady growth of experience. The observations of the writer may well form a beacon light to warn legislators in this country off rocks which, it appears, have largely wrecked the satisfactory administration of law in the United States. For this purpose we quote the remainder of his article in full, without further comment.—

In 1873, in the first body of rules that was adopted (in England), is found this provision: "A new trial shall not be granted on the ground of the misdirection of the jury, or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial." The same provision had already been made in regard to matters of pleading. That simple provision has eliminated from the trial Courts and from the Courts of Appeal all those fine points of practice which cause the American trial often to resemble a fight instead of an investigation of the truth. Inasmuch as these small matters are unavailing anywhere in the course of justice, they are passed by. The cause at every stage is dealt with on its merits. This fact breathes from every page of the English reports at the present time, and I am informed by those who have seen the workings of the administration of justice in those Courts, that it is even more conspicuously manifest where one can see the trial in actual progress. What is the effect of this change? First, no cause has appeared for the second time in an appellate Court in England for more than thirty years. Such a thing is absolutely unknown there at the present time. Sir John McDonald, a special Master, who has, as part of his duties, the collecting of judicial statistics, reports the result of those statistics for the year 1904. Let me call attention to just one feature of it. During that year five hundred and fifty-five cases were brought before the Court of Appeals on review. Out of those appeals, three hundred and thirty-nine were dismissed, no substantial error being found in the proceed-

ings of the trial Court; in thirty-four of the cases the judgment of the trial Court was modified and affirmed; in one hundred and eighty-two of the cases fundamental error was found in the proceedings of the trial Court; in other words, it was found that the judgment was wrong. Now, what happened? Were those one hundred and eighty-two cases tumbled back upon the trial Court to be threshed over again? Not at all. In only seven out of the one hundred and eighty-two cases was it found necessary to send the case back to the trial Court. As to the rest, the appellate Court was able, upon the record before it, to enter the judgment which the merits and justice of the cause required. Is such judicial administration possible in America? Probably not to the full extent. The seventh amendment to the Federal Constitution and similar provisions in state constitutions forbid the re-examination of questions of fact in appellate Courts. It is possible, however, for Courts of Review in America to apply the English rule, that no judgment shall be reversed for error unless that error has resulted in a miscarriage of justice. And if such a practice were consistently adopted and applied, it would simplify the practice in our trial Courts and eliminate the great majority of new trials, which are now the bane of American law.

It is likewise true that the limitations of appellate Courts in the states are mainly of their own devising. The usual constitutional provision is that Supreme Courts shall "exercise appellate jurisdiction only." It was for those Courts to define what might properly be done under that power. The language excludes nothing necessary to an efficient administration of the law. But because it was easier and more expeditious to find error and presume prejudice than to examine the record as a whole to ascertain whether substantial justice had been done, and because they were greatly overcrowded with work, they have adopted the summary method of presuming prejudice whenever error is found. The result has been to make them in actions at law Courts simply for the correction of errors, bound to order retrials in the lower Courts until an infallible record is produced, or the litigants are worn out or dead. The hardship of

this practice becomes impressive indeed, when it is remembered that the unfortunate litigants are in no way blamable for the errors which bring upon them such disastrous results.

Gentlemen, what is the effect upon your profession of this doctrine that where error is found, prejudice will be presumed? In the first place, it puts every lawyer on the quest for error. In so far as I have been able to observe, there are two motives that animate each lawyer in the trial of a cause in our Courts; get a victory if you can, but under no circumstances fail to get error into the record. If these little matters are of equal importance in the Court of Review with the substantial matters of justice, of course they must receive in the mind of the lawyer the same attention. It has been one of the serious faults of the legal profession throughout its entire history, not only in America, but in England and in Rome, and wherever legal systems have been built up, to exalt matters of practice above matters of substance. Those points are so interesting, they lead us into such a delightful field of research! I have in mind now quite a distinguished lawyer who spent three months preparing himself to be properly surprised by an adverse ruling on a question of pleading. Now, I know how those points look. I have been in practice, too. You get one of them, and it is so accurate, it is so well defined, it doesn't lie out in those regions of discretion like matters of fact. The lawyer with one of those nice points spends weeks and months polishing it up and looking at it so closely that really at the end of that time it looks to him bigger than Pike's Peak, and when the judge at the trial simply brushes it aside he feels that the very pillars of the temple of justice have been torn down. In fact, it often occurs that that little point is all that he has, and when it is destroyed, he is left naked before his enemies.

I think, as a rule, gentlemen, you like the judge best who keeps his hands off—I have heard some of you say that. That is not the method of the English judges to whom I have referred. If you were to step into an English Court and see a cause in the progress of trial, the one thing that would impress you above

all others would be that the judge and the lawyers are all bent on getting at the substance of that cause. The fact that has impressed me most in keeping track of English decisions during the last twenty years is this: the skill and the zeal which the trial Court and the trial counsel display in putting the record in such shape that the cause may be disposed of in the appellate Court on the merits, provided the appellate Court takes a different view of the controversy from that taken by the trial Court.

What is the effect of this doctrine of error upon the trial judge? Instead of having his mind centered upon the substantial merits of the cause it will often happen that he is bewildered by a multitude of perplexing small questions of practice in which the cause is constantly embroiled. I remember talking with a distinguished federal judge in the West who, a few years ago, was travelling in England, and was invited by Lord Bramwell to take a seat with him on the bench while he was holding Court in Manchester. A personal injury case was on trial, and a witness was proceeding to give a somewhat informal, but really substantial and accurate account of how the accident occurred, when counsel for the defendant arose and objected to the evidence, and Lord Bramwell reprimanded him for interfering with the trial of the cause. A little later he thought the situation was growing more serious and he arose again to pray an exception. Lord Bramwell informed him that it was his duty to keep the trial of the cause within proper limits and that he considered himself capable of discharging this duty. A little later something more serious, in the mind of the lawyer, arose, and he again ventured to object, when he was sharply reprimanded by the presiding judge and told to take his seat, and informed that if he interrupted the trial again he would be fined for contempt.

Now, Lord Bramwell was old at that time and possibly arbitrary, and I do not commend the practice, but he did not forfeit the respect, I can assure you, of the English barristers who were engaged in the trial of that cause. They knew him to be one of the greatest judges that ever presided over any Court, and I will

say that even his arbitrary methods would be better than the petty wrangling over small points of evidence that consume so much of our time.

But, gentlemen will say, if we don't reverse these cases for error, what will become of our rules; what will become of the rules of pleading and the rules of evidence, if we don't reverse these cases for their violation? Again, I appeal to experience. What has happened in England? For more than a generation it has been impossible to base error on any matter of practice, pleading or evidence, unless it was fundamental to the cause. What has been the result? Are the rules of pleading thrown away in England? Are the rules of evidence disregarded in their Courts? By no means. It is the testimony of all who are familiar with English practice that the rules of pleading and the rules of evidence are much better observed there than they are with us. So the fact that causes are not reversed because of errors in matters of pleading or practice, or evidence, has nothing whatever to do with the observation of those rules. And yet, a distinguished Court before whom many of you have practised, recently reversed a case because the cross-examination of a witness was permitted to extend somewhat beyond the examination in chief, and the reason assigned was, what will become of the rules of evidence unless we enforce them by a reversal of the cause for their violation?

Some of you might say, as has sometimes been said, that this practice of English Courts cannot obtain here because with us trial by jury is secured by the constitution. Is the right of trial by jury any more sacred in America than it is in England? Was not the provision found in our constitutions securing that right taken from Magna Charta? Is it not as much a matter of constitutional law in England that a man with a proper cause shall have a trial by jury as it is here? Most certainly it is. Is there any provision in any constitution that you know anything about that secures to a man the right of several trials by jury? Is there any provision in any constitution that you know anything about that secures to any citizen an absolutely infallible trial by

jury? Trial by jury with us ought to mean just what it means in England—that a party shall have the right to have controverted questions of fact passed upon in the trial Court by a jury. It ought not to hamper the power of appellate Courts here to do justice any more than it does there. The verdict of a jury is a means and not an end, but with us it has become a final goal—and all our endeavour is directed to obtaining a verdict free from evidence which might possibly prejudice and from law which might possibly mislead. I shall never forget the remark of the most distinguished jurist that this state has ever produced; and one of the most distinguished jurists of this country, the late Judge Mitchell—on this subject of jury trials. He said to me once, when discussing it, "The English have had the good sense to keep trial by jury on earth as an instrument for doing justice between man and man here in this world; whereas we in America have worked it up into the thin air of presumption and metaphysics." The jury, like every other instrumentality for the trial of causes, exists for the purpose of justly settling controversies between man and man, and when the controversy has been settled justly, the litigation should end.

I remember reading recently a decision of the Court of Appeals of New York in a murder case in which an Italian was upon trial for a most cold-blooded murder of his wife. The Court of Appeals reviewed the evidence carefully, step by step, demonstrating its absolutely conclusive force, but upon the trial the defence of insanity had been interposed, and one of the errors assigned related to a hypothetical question that had been asked of a physician. This question was not in proper form. It was the last error examined by the Court. They sustained the error and reversed the cause and wound up the opinion with that apology with which we are so familiar, "We regret exceedingly to reverse this cause, for the record leave not the slightest room for doubt of the defendant's guilt, but the defendant was entitled to a trial by jury, and there is no telling what the jury would have done if this evidence had not been admitted." Well, while the Court was in the business of presumption, presuming prejudice from error, why not just presume that the jury would

have done its duty? That would have been a more rational presumption than to reach out into the region of speculation and presume that the jury would not have done its duty, when the record made plain, as the Court itself said, beyond the possibility of a doubt, what that duty was.

What is it that this rule that I am considering requires of the trial Court? Not justice, but infallibility. Now, consider the circumstances under which the trial is carried on. The primary duty of the trial judge is to proceed with the cause. If he stops to debate and investigate all the questions that will arise in the course of the trial, he is sure to fall into error. He has no time for the investigation. He must proceed with the cause on its merits, giving to these questions his best judgment as they arise, and if the appellate Court, having abundant leisure to investigate the matter, finds that the trial Court has fallen into error as to a matter of practice or pleading or evidence, then, unless that error causes, as the English rule puts it, a miscarriage of justice, the error should be disregarded.

I am not so uninformed as to contend for one moment that matters of practice or pleading are not important, for sometimes they go to the very foundation of the cause; but it is my observation, and I know it is the observation of most trial judges, that it is very seldom indeed that it is necessary to sacrifice substantial justice to these matters of procedure. There is no scourge in the hands of the strong against the weak like this scourge of new trials. It can wear out the strength and endurance of the weak, and it has been used for that purpose. It is not necessary as I have pointed out to you as a matter of actual experience, that it should continue.

The administration of the criminal law has nearly broken down in America under the application of this rule. After an experience of one hundred and twenty-five years, we have not that swiftness and certainty of legal action, that respect for law, which ought to characterize a civilized people; on the contrary, this principle has brought inefficiency in legal administration, a pestilence of refinements and new trials, and such a reign of dis-

regard of law among high and low, rich and poor, as has seldom been seen in civilized nations. What are we going to do about it? There is nothing which stands in the way of the adoption of the remedy which I have tried to point out. Among the remedies that have been suggested in this country is that recommended by one of our distinguished judges, that the right of appeal in criminal cases be abolished. That remedy can never be applied in America. The right of appeal has lasted too long and the possibilities of injustice are too great. Our people will never consent to abolish that right. But it is possible to say this: that when a jury has tried a man charged with crime, and found him guilty of the offence with which he is charged, that the judgment shall not be set aside for errors which do not go to the very substance of the cause. We can say, without robbing any man of any right, that if the judgment is just it shall stand. The criminal procedure which we have in our Courts to-day, instead of speaking to us of the present time, takes us back to the time of the Stuarts in England. We have abolished all the savagery of the old English common law of crime, but we have kept right along the procedure and refinement which the English judges devised to save men from the vengeance of that savage code. If we go back to the time of the Stuarts, the great body of crimes were political and religious and were mainly prosecuted for political ends. All that has been done away with. As a learned jurist lately said: "We have long since passed the time when it is possible to convict an innocent man, and the problem which confronts us to-day is whether we cannot convict a guilty man."

During the last seventy-five years nowhere in the British Empire has a man been snatched from the custody of the law and sacrificed to mob violence. That, gentlemen, is to me the sublimest legal fact of the past seventy-five years. Nowhere in the British Empire, including South Africa, Australia and British America, has a single human life been snatched from the custody of the law and sacrificed to mob violence. That is respect for law organized into human character. Let me place before you our own experience. Suppose what has repeatedly

happened in some of the older states of this Union, when a man under arrest, charged with crime, has been snatched from the custody of the law, taken to a public place, tied to a post, acid poured in his ears and eyes, his fingers and toes cut off as mementoes of the event, and women then applying the torch in his execution—suppose that had occurred in the Philippine Islands, what would we have said about the fitness of the Filipinos for self government?

I say that our administration of the criminal law has broken down. It is an unworkable machine. I know we convict men and send them to the penitentiary, but I state it here as a fair statement of the administration of the criminal law in America, that if a man has the means to employ able counsel, so as to make a fight, as we say, that in the great majority of cases he can escape punishment for crime. The trial can be so protracted and enmeshed in such a complication of pleading and evidence as to result, not in every case, oh, no, but in the majority of cases, in error which, under this pernicious doctrine of presumed prejudice, will nullify a conviction. I appeal from this practice to the practice that has obtained across the water. The main feature of that practice is not the doing away with the right of appeal, it is the other matter to which I have already pointed, viz., that only substantial error be regarded.

What have we met here together for? Surely not just to talk, or just to hear talk, and go away without its making any more impression than a Sunday dinner. Something ought to be done by the legal profession to correct this confessedly serious fault of American law. As one of the means for its rectification, a statute substantially like the following, which embodies the rule that has proven so beneficent in England for a generation, ought to find a place in all our codes of procedure, and, what is more important, in the mind and conscience of every American lawyer and judge:—

No judgment shall be set aside or new trial granted in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error

as to any matter of pleading or procedure, unless, in the opinion of the Court to which the application is made, after an examination of the entire cause, the error complained of has resulted in a miscarriage of justice.

SURFACE SUPPORT.

The right of owners of the surface of lands under which there are mines, to have the surface in its natural condition supported, was the subject of a recent case in West Virginia, wherein it was held that a grant of the coal underlying land, with the right to "excavate and remove all of said coal," left in the surface proprietors no right to claim subjacent support: *Griffin* v. *Fairmont Coal Co.*, 53 S.E. Rep. 24. The right to subjacent support was the subject of examination in the English House of Lords in May last in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-Op. Soc.* (1906), A.C. 3[illegible], 94 L.T. Rep. 795. The Lord Chancellor, Lord Loreburn, thus summarizes the rules of construction to be applied to deeds which are to convey away the right of support: "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights or other evidence clearly shews the contrary. In order to exclude a right of support the language used must convey unequivocally that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down. Illustrations are numerous in the reports. Words, however wide, that merely authorize the getting of all the minerals have been held not to authorize so getting them as to let down the surface.

Where power is given to get the minerals on paying compensation for damage done to the surface, the Court will still scrutinize the compensation clause. . . . If the compensation clause is capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done on the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Again, courts have asked whether the compensation is manifestly inadequate for such an injury as letting down the surface, and have commented upon the absence of any provision for compensation. Either of these circumstances has supplied judges with a reason for so cutting down wide language in a grant of minerals as to imply a condition that the surface shall be supported. The process of reasoning in such cases seems to be that parties must not be supposed to have intended what would be unreasonable and unjust."—*Law Notes.*

LYNCH LAW.

Press reports announce that a grand-jury investigation of the mob of April 14, at Springfield, Missouri, which hanged and burned some negroes, has found that the alleged assault by the negroes on the woman who complained of them was not committed, that the negroes charged with the crime could not possibly have been at the place of the alleged assault at the time, and that the sheriff and police department were negligent in the performance of their duty. Lapses into the savagery of mob lynchings, with their burning of human victims, have pilloried this nation, bearing its brand of indelible disgrace, before all the civilized nations of the earth. A lessening of these unspeakable horrors is shewn by recent statistics, but one in Ohio and another in Missouri have again illustrated the latent savagery that exists in the worst stratum of every populous community, though ordinarily restrained by the forces of law and order. Well-intentioned defenders of lynchings are beginning to learn

that savagery and brutality cannot be extinguished by turning the whole community into brutes and savages, and that a respect for law and order is not created by turning the whole community into a lawless mob. Hanging and burning men on general principles, without trial and on mere suspicion, do not tend to inspire respect for justice, or to build up a law-abiding community. If the press reports are correct, the mob at Springfield burned innocent men. In every such case the legal presumption of the innocence of the victim is offset only by the presumption of fairness and justice on the part of a frenzied mob. Fortunately there are indications that the best men of every community are beginning to set themselves firmly against these exhibitions of savagery, which disgrace not only the mob, but the community and the nation itself.—*Case and Comment*, U.S.

Mr. A. B. Morine, K.C., of St. John, Newfoundland, is seeking admission to the Bar of Ontario. It is understood that when the necessary time has elapsed he will become a member of the present firm of Bicknell & Bain. The profession will welcome to its ranks so capable a lawyer and one of such high personal character as Mr. Morine.

Charles Allen Stuart, of Calgary, and Norman Cooke Johnstone, of Regina, barristers at law, have been appointed puisne judges of the Supreme Court of the North-West Territories.

REVIEW OF CURRENT ENGLISH CASES.

CRIMINAL LAW — EVIDENCE — EVIDENCE OF OTHER CRIMINAL ACTS — ADMISSIBILITY.

Rex v. *Bond* (1906) 2 K.B. 389 is a case of considerable importance, and gave rise to much difference of opinion. The defendant was indicted for feloniously using instruments on one Jones for the purpose of procuring a miscarriage. Evidence was given by another woman that the defendant had used instruments on her for the like purpose nine months before the act laid in the indictment, and had then told her that he had done the same thing for dozens of girls. The Court for Crown Cases Reserved (Lord Alverstone, C.J., and Kennedy, Darling, Bray, Lawrence and Ridley, JJ.) held that the evidence was admissible for the purpose of shewing that the act of which the prisoner was accused was not innocent, but was done with felonious intent. Lord Alverstone, C.J., and Ridley, J., however, dissented from this conclusion, and considered the evidence inadmissible, because prima facie there was no necessary connection between the act charged and the act alleged in the evidence admitted, and they considered that the fact that the evidence in question might establish a system or course of conduct on the part of the accused, which might lead to the inference that he had committed the offence charged, was not in their opinion sufficient ground for admitting the evidence objected to.

SOLICITOR — COSTS — DELIVERY OF AMENDED BILL FOR LARGER AMOUNT — REFERENCE — SOLICITORS' ACT, 1843 (6 & 7 VICT. 3. 73), s. 37—(R.S.O. c. 174, s. 37).

Lumsden v. *Shipcote Land Co.* (1906) 2 K.B. 433 was an action by a solicitor to recover the amount of a bill of costs. It appeared that the plaintiff had delivered a bill to the defendants, and afterwards, on their refusing to pay it, and denying all liability, had, without leave, delivered a second bill for the same services, but for a larger amount, which was the bill sued on in the action. The defendants, besides denying all liability, also contested the plaintiff's right to deliver a second bill without the leave of the Court. Ridley, J., who tried the action, gave judgment for the plaintiff for the amount to be found due on the tax-

ation of the first bill. The plaintiff appealed, and the Court of Appeal (Williams, Stirling and Moulton, L.JJ.) held that the plaintiff was not bound by the first bill delivered, and that although the defendants might, notwithstanding its delivery, have under the statute obtained an order for the taxation of the paid bill, which would have involved an admission of liability for the amount found due on the taxation, they were now, after verdict, under section 37 of the Solicitors' Act, 1843 (R.S.O. c. 174, s. 37), precluded from getting a reference under the statute, except on shewing special circumstances, which they had not done. Nevertheless, the Court, under its inherent jurisdiction, had power to refer the bill to the Master, and they considered that the proper judgment in such a case was one for the amount which should be found due by a Master on taxation, and that in ascertaining the amount for which judgment should be entered the Master would be entitled to take both bills into consideration.

BILL OF LADING—INCORPORATION OF CONDITIONS OF CHARTER-PARTY BY REFERENCE.

The Northumbria (1906) P. 292 was an action in the Admiralty Court by the plaintiff under a bill of lading to recover for damages to cargo. The bill of lading incorporated all the conditions of the charter-party, including negligence, as conditions on which the goods in question were carried. The charter-party provided that "the steamer is in no way liable for the consequences of . . . perils of the sea . . . unseaworthiness, or latent defect in hull, machinery or appurtenances, whether existing or not before or after the commencement of the voyage, not resulting from the want of due diligence by the owners of the steamer or by the ship's husband or manager," and by a further clause in the charter-party, the above clause was to be embodied in the bill of lading. It appeared by the evidence that rough weather was met with during the voyage sufficient to cause a crack in one of the deck plates; and that by reason of such crack the water entered and damaged the plaintiff's goods. The Divisional Court (Barnes, P.P.D., and Deane, J.) held, reversing the Court below, that in these circumstances a prima facie case of perils of the sea had been made out by defendants, and not rebutted by the plaintiff, and, moreover, that the bill of lading incorporated the clause in the charter-party as to exemption from liability for unseaworthiness, and therefore

on both grounds the plaintiff's action failed, there being no evidence of negligence on the defendants' part.

EXPROPRIATION OF LAND—STATUTORY POWER—DIVERSION OF EXPROPRIATED LAND TO OTHER THAN AUTHORIZED PURPOSES.

In *Attorney-General* v. *Pontypridd* (1906) 2 Ch. 257 the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) have affirmed the judgment of Farewell, J. (1905) 2 Ch. 441, noted ante, p. 102.

ADMINISTRATION — PERSONAL ESTATE — INTESTACY—ADVANCES OUT OF LUNATIC'S ESTATE ON CONDITION OF THEIR BEING BROUGHT INTO HOTCHPOT—STATUTE OF DISTRIBUTIONS (22 & 23 CAR. II. C. 10) SS. 6, 7—(R.S.O. C. 335, S. 2).

In *Re Gist, Gist* v. *Timbrill* (1906) 2 Ch. 280 the Court of Appeal (Williams, Romer and Moulton, L.JJ.) have affirmed the decision of Eady, J. (1906) 1 Ch. 58 (noted ante, p. 226).

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

In *Whitehouse* v. *Hugh* (1906) 2 Ch. 283 the Court of Appeal (Williams, Romer and Moulton, L.JJ.) have affirmed the decision of Kekewich, J. (1906) 1 Ch. 253 (noted ante, p. 337).

SETTLEMENT — POWER — APPOINTMENT — PERPETUITY—ELECTION.

In re Wright, Whitworth v. *Wright* (1906) 1 Ch. 288. The rule against perpetuities was here successfully invoked. By a settlement made in 1871, and another made in 1882, Mary Whitworth was given power of testamentary appointment over certain property amongst her children, her children taking in default of appointment. She had also unsettled separate property of her own. By her will she gave both the settled and unsettled properties to trustees upon trust for her son and three daughters; the son's share to be payable on his attaining 25, and the share of each daughter being given in trust for her life, with remainder to her children. All the children were born after 1871 and before 1882. Buckley, J., held that so far as the property included in the settlement of 1871 was concerned, the ap-

pointment to the son at 25, and to the grandchildren in remainder, were void as infringing the rule against perpetuity, and that the children of the testatrix were not bound to elect between what was invalidly appointed, and the interests validly given them by the will.

LUNACY — ORDERS IN LUNACY — DEATH OF LUNATIC — ADMINISTRATION — CREDITORS OF LUNATIC — PRIORITY.

In re Hunt, Silicate Paint Co. v. *Hunt* (1906) 2 Ch. 295 was an administration suit. The deceased had been a lunatic, and during his lunacy orders had been made directing his committee to pay his creditors a dividend of 6s. in the pound on their debts. This dividend was paid before a firm of Brown, Janson & Co. had sent in their claim; they subsequently applied in lunacy for leave to prove their claim, which was granted, and the order provided that they should be paid in priority to the other creditors until they also had received 6s. in the pound on their claim. Before they were paid this dividend the lunatic died, and his estate was ordered to be administered, and the question then arose whether the order in lunacy gave Brown, Janson & Co. any priority in the administration proceedings, and Buckley, J., held that it did not, and that its operative force ceased with the death of the lunatic, and that on his death the then existing debts must be paid in the ordinary course of administration without reference to the order in lunacy.

WILL — CONSTRUCTION — LEGACY EXPRESSED TO MAKE UP CERTAIN AMOUNT — MISCALCULATION — LEGATEE.

In re Segelcke, Ziegler v. *Nicol* (1906) 2 Ch. 301. A testator gave a legacy of £1,000 to be equally divided between certain of his god-children therein described. By a codicil he gave £50 additional to each of his god-children as named in his will, "so that each receives £100 each." At his death there were only nine god-children entitled, and the question was whether, as the £1,000 was more than sufficient to give them £100 each, they were nevertheless also entitled to the £50 additional bequeathed by the codicil. and Joyce, J., held that the bequest in the codicil was a clear gift of £50 additional to each of the god-children; and that the subsequent words were of doubtful import and could not be construed as cutting it down, and consequently that each god-child was also entitled to the £50 additional.

WILL — CONSTRUCTION — DEVISE OF REAL ESTATE — TESTATOR NOT ENTITLED TO REALTY, BUT ENTITLED TO PROCEEDS OF SALE OF REALTY — INTENTION — EXTRINSIC EVIDENCE — ADMISSIBILITY.

In re Glassington, Glassington v. *Follett* (1906) 2 Ch. 305. A testator devised all her real estate to trustees upon certain trusts. The testatrix was not beneficially entitled to any real estate at the date of the will, or at her death, but she was beneficially entitled to a share of the proceeds of certain freehold property which was subject to a trust for sale. There had been no election by the testatrix to take the freehold property unconverted. In these circumstances, Joyce, J., held that the devise passed all the testatrix's interest in the proceeds of the real estate to which she was entitled, and that this was a case in which extrinsic evidence was admissible for the purpose of construing the will.

WILL — CONSTRUCTION — TESTATOR ILLEGITIMATE—BEQUEST BY ILLEGITIMATE TESTATOR TO "ALL MY NEPHEWS AND NIECES."

In re Corsellis, Freeborn v. *Napper* (1906) 2 Ch. 316. The testator whose will was in question in this case was illegitimate. He had lived with his parents and natural brothers and sisters as one family, and treated them as his lawful relatives. By his will he referred by name to all of his living natural brothers and sisters as his brothers and sisters, and to some of their children as his nephews and nieces, but he did not mention a deceased natural sister or her children, and there was no evidence that he knew of their existence. He made a bequest in favour of "all my nephews and nieces living" at a certain specified period, and the question at issue was whether the children of the deceased natural sister were entitled to participate. Eady, J., held that they were, and that the bequest was not confined to the children of the brothers and sisters actually named in the will.

WILL — ELECTION — COMPENSATION — BENEFITS UNDER WILL, HOW ESTIMATED.

In re Booth, Booth v. *Robinson* (1906) 2 Ch. 321. A testator by his will purported to dispose of property comprised in a settlement under which he took a life interest only, without any power of disposition. He also disposed of his own property. Some of the persons entitled under the settlement took other

benefits under the will. They all elected to take against the will, which had the effect of depriving some of them of shares of the settled property purported to be given them by the will, and the question Eady, J., had to consider was whether or not the persons electing to take against the will were bound to make compensation to other persons so electing, as well as those who took under the will only, for any disappointment occasioned by the election, to the extent of the benefits received under the will by the persons electing to take against it; and he held that they were, and that in estimating such benefits, any compensation which the electing persons themselves receive by way of compensation must be taken to be part of the benefits received by them under the will.

Correspondence.

JUDGES AND REPORTERS.

Editor of THE CANADA LAW JOURNAL,

Sir,—There are some decisions that a wise reporter will allow to be forgotten. I have known one case at least where the Court evidently suggested to the reporter that the decision was made to fit the particular case, and was not intended to be an exposition of the law bearing upon the facts involved. That case was not reported. There are other cases where the Court apparently is not aware of the difference between the decisions of the Court and the law of the land. In such cases the reporter should, if he is competent for his important duties, exercise his discretion and suppress the report, both for the sake of the Court and the profession.

The Eastern Law Reporter and the Nova Scotia Reporter recently publishel a decision by Longley, J., of the Supreme Court of Nova Scotia, that should have been allowed to rest undisturbed among the files of the Court. The case is that of *Nova Scotia Carriage Co.* v. *Lockhart,* E.L.R., p. 78; 7 N.S.R., No. 8. The decision is in effect that a draft drawn and accepted payable to a named bank or order need not be indorsed by the bank in order to be sued on by the drawer, and that the drawer is the holder without any indorsement by the bank.

The judge says in his written decision, "I think that the mere placing on the draft the statement, 'Pay to the order of the Union Bank of Halifax,' does not necessitate the indorsement of

the Union Bank so far as the original drawers are concerned, when it was handed over to the bank merely for collection. I think the drawers had a right to receive the bill from the bank as soon as it was dishonoured, and thereby became the lawful holders and entitled to take action against the acceptors."

One would have thought that the Dominion Parliament had settled the matter in the Bills of Exchange Act, when it enacted, in s. 2, sub-s. (*g*), that "the expression 'holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." Judge Longley gets around this definition of "holder" by saying it "seems to me to refer to a third party and not to apply to the original drawer who has simply made his draft payable to a bank for the purpose of collection." He admits that the drawer "certainly could not be regarded as a holder until a breach of the contract" (created by the acceptance). What difference could the acceptor's breach make in the drawer's status in relation to the bank and the bill?

Notwithstanding this decision and the fact that it is in print, it is still law, as laid down by Chalmers, art. 142, that, subject to the rules as to transmission by act of law, "when a bill is payable to a particular person or persons, or to his or their order, an action thereon must be brought in the name of such person or persons.

Yours,

BARRISTER.

[We refer to the above letter in our Editorial columns.— ED., C.L.J.]

We note a sturdy independence as well as a self-satisfied stupidity highly characteristic of a certain class of Englishmen in the following item taken from the *Daily Mail* of Sept. 10: "Five out of thirteen jurymen at an inquest at Southwark on Saturday were unable to sign their names, and one of them said he did not believe in such "new-fangled notions."

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [June 16.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.
PRESTON *v.* KENNEDY.

Corrupt practices — Agency — Scrutineer — Burden of proof — Common law of Parliament — Irregularities — Saving clause — Scrutiny — Disqualification of voter — Crown land agent — Persons voting on transfer certificates — Agent — Names not on voters' list in poll book — Certificates issued in blank by returning officer and afterwards filled in — Constables — Telegraphed certificates — Demand for tendered ballot.

A. was found guilty of corrupt acts at H., a polling place, on polling day. Before that day his sole connection with the respondent was that, being a livery stable keeper, he had driven the respondent, on a day before the nomination, from one place in the electoral division to another. The respondent on that occasion canvassed A. for his vote, but A. made no promise, and the respondent did not ask him to vote for him. On the day before the polling, A. and one G. drove to H., arriving there in the evening. The trip was undertaken at the instance of G., who was not shewn to be an agent of the respondent. In order to persuade A. to go to H., G. said he would procure a transfer of A.'s vote to H., and he afterwards brought and handed to A. a printed paper, signed by the respondent, apparently one of a number of scrutineer appointments which the respondent had signed in blank and left with one B., his agent. A.'s name was not inserted by the respondent, and there was no evidence to shew by whom it was filled in. The number of the polling place was left blank, and never was filled in. G. was not examined as a witness, and there was no proof of the means by which he became possessed of this paper.

Held, MEREDITH, J.A., dissenting, that the petitioner had failed to establish that A. was an agent for whose acts the respondent was responsible.

It was contended that the election should be set aside under the common law of Parliament because of the corrupt acts of A. and G., and of a number of irregularities in the conduct of the election by the officials, among which were the appointment of a non-voter as deputy returning officer at one poll and of a clergyman at another, contrary to the statute. The operations of A. and G. were, however, confined to a small portion of the electoral district; A. was the only person found by the trial judges to have been guilty of corrupt practices, and they also found that there was no reason to suppose that corrupt practices extensively prevailed at the election.

Held, that if, in such circumstances, an election could be avoided, it should be only on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair and free opportunity to the electors of exercising their franchise and electing the candidate they wished to represent them; and that all irregularities of the kind indicated, not affecting the result, were cured by s. 214 of R.S.O. 1897, c. 9.

In respect of votes attacked upon a scrutiny,

Held, that a Crown land agent under the Free Grants and Homesteads Act, authorized to take entries and make locations for free homesteads, but not to sell or to receive moneys for the sale of public lands, was not disqualified as a voter by s. 4 of the Ontario Election Act.

2. An elector engaged by a deputy returning officer to drive voters to the poll is not an agent, within the meaning of s. 94(1) and (4) of the Act, who is entitled to the certificate of the returning officer enabling him to vote at a polling place other than the one where by law he is otherwise entitled to vote.

3. The votes of agents who voted on transfer certificates, but whose names were not in fact on the poll books of the polling sub-divisions from which they purported to be transferred, were improperly received; the right to vote was disproved by the production of the poll book, and the petitioner was not bound to shew that the names were not on the original voters' list.

4. The votes of persons voting at a polling place other than that at which they were entitled to vote, without a transfer certificate enabling them to vote at the polling place at which they did vote, were improperly received, being in violation of s. 78 of the Election Act; except in the case of a tendered vote under s. 108, or a vote polled upon a transfer certificate under s.

94, no person is entitled to be admitted to vote unless his name appears on the list in the poll book.

5. The votes of persons voting on certificates issued in blank by the returning officer, whose names were afterwards filled in by the election clerk or other person, were improperly received, being against the provisions of s. 94.

6 and 7. Certificates given to constables and certificates sent by telegraph are not properly granted under s. 94, and cannot support votes received by virtue of them.

8. Upon the evidence W., an elector, did not tender his vote to the deputy returning officer at the proper polling place, and did not demand or receive a tendered ballot in the manner required by s. 108; and, even if there had been a proper demand and an improper refusal, there was nothing more than an irregularity; MEREDITH, J.A., dissenting.

Judgment of MACLENNAN, J.A., and TEETZEL, J., at the trial, varied.

Hellmuth, K.C., *Keefer*, and *Elliott*, for petitioner, appellant. *Aylesworth*, K.C., and *McBrady*, for respondent.

Full Court.] [June 16.

GLOSTER *v.* TORONTO ELECTRIC LIGHT CO.

Nuisance—Electric wire—Proximity to highway—Injury to infant—Neglect of duty—Evidence for jury.

The wires of the defendant company were strung upon poles across a ravine parallel and at least fourteen inches from a bridge forming a highway. The plaintiff, a boy of eight years, who was crossing the bridge or playing thereon, pushed his arm through an opening in the lattice work of the railing of the bridge, and touched a wire. The insulation being imperfect, the boy's hand, where it had touched the wire, and his head, which touched part of the iron work of the railing, were burnt. The wire was at such a distance that it could not be touched accidentally by any one merely passing over or standing on the bridge or at the railing, or who was looking through or over the railing, or without intending to touch it, or without deliberately reaching out through the railing as far as the wire, and there was no evidence that there was anything of a character likely to entice or induce children to play with it or put their hands upon it.

Held, that there was no evidence upon which the jury could reasonably have found that the electric wire was a nuisance to those lawfully using the highway, or that there was any neglect of duty on the part of the defendant company to the public which could render them liable to the plaintiff.

Judgment of TEETZEL, J., reversed.

Riddell, K.C., and *R. H. Greer*, for defendant company, appellants. *W. N. Ferguson*, for plaintiffs.

Full Court.] [June 29.

CITY OF TORONTO *v.* TORONTO RAILWAY CO.

Street railway—Streets in newly annexed territory—Extension of road into—Stopping places—Right to fix—Determination of engineer.

Section 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Vict., c. 99(O), whereby the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be, from time to time, recommended by the city engineer and approved by the city council does not apply to territory which was not within the limits of the city at the date of the agreement; but had subsequently been annexed to and became part thereof. *Toronto R.W. Co.* v. *City of Toronto*, 37 S.C.R. 430, reversing the *City of Toronto* v. *The Toronto R.W. Co.*, 10 O.L.R. 657, followed.

By s. 26 of the agreement the speed and service necessary on any main line, part of same, or branch is to be determined by the city engineer and approved by the city council; and by s. 39 the cars should only be stopped clear of cross streets and midway between streets, where the distance exceeds six hundred feet.

Held, subject to the limitations of clause 39, the regulating of the places at which cars should be stopped came within s. 29 relating to the speed and service and was therefore to be determined by the city engineer and approved of by the council.

The engineer's report to the council recommended that cars should be required to stop at certain specified points, which was adopted by resolution of the council.

Held, that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer and that the adoption by resolution was sufficient, it not being essential that such adoption should be by by-law.

Held, also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except they were run in accordance with the determination of the engineer as to the stopping places.

Laidlaw, K.C., and *W. Nesbitt*, K.C., for appellants. *Fullerton*, K.C., and *W. Johnston*, for respondents.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 1.

MAHONEY v. CANADA FOUNDRY CO.

Procedure—Third-party notice—Multiplicity of actions—Unreasonably delaying plaintiff.

Appeal from judgment of Boyd, C., whereby he reversed an order of the Master in Chambers, setting aside an ex parte order giving leave to serve a third-party notice in this action.

The action was brought by the personal representative of a person killed while in the employment of the defendants as a conductor upon a train employed by the latter in the erection of a bridge on the line of a railway in course of construction. The plaintiff alleged various acts of negligence on the part of the defendants, but not in respect to the condition of the track for which the defendants were in no way responsible. The defendants averred that the whole cause of the accident was the condition of the track and wished to serve a third-party notice on the railway company, to which the plaintiff objected.

Held, that this was not a proper case for a third-party notice, because—(1) according to the defendants the accident was caused by the subsiding of the track which was outside of their control, and so they were not liable. (2) Besides this action there were two other pending actions on behalf of other workmen killed or injured in the same accident, and it would be improper that the third party should be subject to have any damages for which they were liable for breach of any warranty or undertaking on their part to provide a safe and sufficient track, assessed piecemeal. (3) The plaintiff would be prejudiced and unnecessarily delayed in this case, if the third-party notice were allowed.

Denison, for railway company. *Patterson*, K.C., for defendants. *Phelan*, for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 3.

SECORD *v.* MOWAT.

Creditors' Relief Act—Filing sheriff's certificate—Necessity for.

Where a prior creditor has filed a sheriff's certificate under s. 7 of the Creditors' Relief Act, it is not necessary for subsequent creditors to do so.

Semble, that the provisions of s. 7 as to filing a sheriff's certificate are directory only, and not imperative.

Arnoldi, K.C., for claimant. *Snow*, for a disputing creditor.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] IN RE MCGIVERY. [June 25.

Lunatic—Repairs to estate—Collection of rents—Agent.

Committee of the estate of a lunatic empowered to make needed repairs to the estate and to employ an agent at a fixed salary to collect rents.

Mullin, K.C., for petitioner.

Barker, J.] BEATON *v.* WILBUR. [Aug. 24.

Mortgage—Absolute conveyance—Mortgage or deed.

Land of the plaintiff worth $1,500, subject to a mortgage for $900 and other charges for $300, was conveyed to the defendant in consideration of his paying $140 due for instalments under the mortgage, for the recovery of which an action had been brought. The costs of the action were paid by the plaintiff. The Court finding under the evidence that the deed though absolute in form was intended as a mortgage, allowed the plaintiff to redeem.

Teed, K.C., and *Hewson*, for plaintiff. *Chandler*, K.C., for defendant.

Barker, J.] PARTINGTON v. CUSHING. [Aug. 28.

Practice—Dismissal of bill—Want of prosecution—Form of motion.

An objection on a motion to dismiss for want of prosecution a bill by a shareholder and the company which subsequently to the commencement of the suit went into liquidation, that the motion should have been for an order that unless the plaintiff obtained leave to proceed within a limited time, the bill should stand dismissed, overruled.

Barnhill, K.C., for application. *Teed*, K.C., contra. *Hazen*, K.C., for liquidators.

Barker, J.] SIMINDS v. COSTER. [Sept. 21.

Agent — Failure to account — Interest —Costs of preparing inventory of estate — Costs of suit.

An agent refusing to give an account and pay over balance is chargeable with interest.

Costs disallowed to an estate agent of preparing a receipt containing a schedule of leases and securities delivered up to the principal.

Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit.

Mullin, K.C., for plaintiff. *Earle*, K.C., for defendant.

Barker, J.] PETROPOULOS v. F. E. WILLIAMS CO. [Sept. 21.

Chattel mortgage — Coercion — Sale of chattels — Warranty — Breach — Executory contract — Return of chattel.

A lease of store premises was obtained by plaintiffs through a guarantee of payment of the rent by defendant. Subsequently at plaintiffs' request defendant took out in his own name a lease of the premises for a further term of four years upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano. The purchase price was $750, upon which a payment of $100 was to be made. The cash payment subsequently was waived and notes for the full amount of the purchase money given. After the purchase, plaintiffs incurred an additional indebtedness to defendant of about $400. This amount, together with the notes,

some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease. This the defendant demurred to giving, desiring to retain the lease as security. The plaintiffs then, but against the defendant's advice, executed a chattel mortgage of their stock-in-trade to him, whereupon he made over the lease to them,

Held, that the chattel mortgage should not be set aside on the ground of having been obtained by coercion.

While the rule that in the absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in such case where the vendee in addition to keeping the article a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor.

Allen, K.C., for plaintiffs. *Trueman*, for defendants.

Province of Manitoba.

KING'S BENCH.

Richards, J.] [August 24.

NEW HAMBURG MANUFACTURING COMPANY, LIMITED v. SHIELDS.

Foreign judgment — Contract — Estoppel — Presumption of jurisdiction of foreign Court—Consent to jurisdiction—Defences to original cause of action—Sale of Goods Act, R.S. M. 1902, c. 152, s. 16(*a*).

The plaintiffs sued on a judgment recovered in Ontario upon notes given by defendants for a threshing engine. The defendants were residents in Manitoba and there signed the order for the engine, which was delivered to them in Manitoba. They did not defend the action in Ontario, but were allowed, under s. 38(*l*) of the King's Bench Act, to plead in answer to the judgment the same defence that they might have set up in the Ontario action. These were that the engine supplied was useless for the purpose for which, to the knowledge of the plaintiffs, the defendants had ordered it, and that it was a condition specially written on the order that the engine should be satisfactory to them, and that it was not satisfactory, and that they had returned it to the plaintiffs. The defendants also counterclaimed

for damages suffered by them in consequence of the engine being useless for the purpose required, and for the value of a second-hand engine which they had delivered to the plaintiffs in part payment.

The trial judge found in defendants' favour on the merits, and gave them judgment on their counterclaim and ordered the notes given for the engine to be delivered up and cancelled.

Points of law arising at the trial were also decided as follows:—

1. Effect should be given to the provision specially written on the order by the plaintiffs' agent, that the engine should be satisfactory to the purchasers, notwithstanding the printed provision containing the usual warranty and ending with the words, "No agent has any authority to add to, abridge or change this warranty in any manner," for the plaintiffs supplied the engine after seeing the order and must be taken to have ratified the special warranty given by their agent, and, besides, such was not, in strictness, an addition to or an abridgement or change of the printed warranty.

2. Apart from the actual representations of the agent, as the plaintiffs, by their agent, knew the purpose for which the engine was required, and that the buyers were relying on the sellers' skill and judgment, and the engine was something which it was in the course of their business to supply, there was, under s. 16(*a*) of the Sale of Goods Act, R.S.M. 1902, c. 152, an implied condition that the engine should be reasonably fit for such purpose.

3. The plaintiffs made a prima facie case by putting in an exemplification of the Ontario judgment, without proving that the Ontario Court had jurisdiction, as such will be presumed: *Robertson* v. *Struth*, 5 A. & E.N.S. 941.

4. The defendants had not pleaded want of jurisdiction in the Ontario Court, but if they had, and if the other facts would have, under *Sirdar* v. *Rajah* (1894) A.C. 670, entitled them to succeed on such plea, the additional fact that, on the face of each of the notes sued on, was a provision that, in case of default, suit might be "immediately entered, tried and finally disposed of . . . in the Court having jurisdiction where the office of the plaintiffs is located," rendered the success of such a defence doubtful, and, it being unnecessary for the defence, the plea should not be allowed to be added.

Howell, K.C., and *Matheson*, for plaintiffs. *Coldwell*, K.C., and *Wilson*, for defendants.

Richards, J.] [August 25.

VULCAN IRON WORKS, LIMITED *v.* WINNIPEG LODGE, NO. 122, INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL.

Pleading — Demurrer — Trade unions — Abstract declaration as to hypothetical rights of workmen on strike—King's Bench Act, s. 38(c)—Criminal Code, 1892, s. 523.

The statement of claim alleged that the plaintiffs were ironmongers and manufacturers employing a large number of workmen; that the defendants, being certain unregistered trade unions and individuals, with a view to compel the plaintiffs to carry on their business in a manner required by the defendants or some of them, conspired to induce workmen to leave the plaintiffs' employ, and to prevent others from entering it, and, in order to carry out those objects, conspired to beset and did beset the plaintiffs' place of business, and by threats and otherwise induced workmen to leave the plaintiffs' employ and hindered others from entering it.

In defence the individual defendants pleaded in part:

1. That they had not been guilty of any improper conduct.

2. That they were workmen and had entered into a trade combination with other workmen in the same trade for regulating and altering the relations between such workmen and their employers, and claimed the right to participate in a strike for the furtherance of such interests, so long as it did not involve the breach of any contract, and that, during the continuance of such strike, they might take such steps as are reasonable to ascertain how such strike was affecting the employers, the quantity of work turned out, and the number of men employed, including attending in the vicinity of the place of business of such employers merely for such purpose and also for the purpose of ascertaining if their fellow-members are faithful to the objects of the combination.

3. That they had the right to call at the homes of other workmen of the same craft to endeavour to persuade them to join the union, so long as it is done peaceably and without doing anything to interfere with the perfect exercise of free will on the part of such other workmen, and even though a strike had been declared against the employers of such other men.

4. That they desired a declaration by the Court as to their rights above claimed, "understanding that the plaintiffs herein deny that such rights exist. In asking such declaration, such

defendant is not to be taken as admitting the truth of any allegation in the statement of claim."

Held, that those portions of the statement of defence should be struck out, as they were neither set up by way of traverse of the plaintiffs' charges, nor by way of confession and avoidance, nor as denials that the plaintiffs' charges, even if true, shewed a good cause of action in law.

The first paragraph does not directly traverse the plaintiffs' charges and is too general. The other paragraphs are merely argumentative claims of right to do certain things which the defendants do not admit having done, and which, so far as the pleadings shew, may not be the acts charged against them. They are only an anticipatory outlining of an argument which may or may not be necessary to the defence at the trial according to the nature of the evidence adduced, but which is out of place in the written pleadings necessary to define the issues to be tried.

Held, also, that the paragraphs in question could not be supported, under sub-section (*e*) of section 38 of the King's Bench Act, as seeking a declaration as to the meaning of section 523 of the Criminal Code, for that sub-section could, in any event, go no further than to confer authority to interpret a Provincial statute.

O'Connor, for plaintiffs. *Wilson* and *Hartley*, for defendants.

Province of British Columbia.

SUPREME COURT.

Duff, J.] [Sept. 25.

BELYEA *v.* WILLIAMS: RICHARD'S GARNISHEE.

Attachment of debts—Judgment obtained in Supreme Court sought to be attached in the County Court—Jurisdiction.

On proceedings under the Attachment of Debts Act, in the County Court, to attach a debt due on a judgment obtained in the Supreme Court, an order absolute attaching the said debt was made. On an application for a writ of prohibition to the County Court judge prohibiting him from dealing with the said Supreme Court judgment,

Held, that where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot be applied.

W. J. Taylor, K.C., for the application. *Morphy*, contra.

Henderson, Co. J.] REX v. THICKENS. [Oct. 5.

Criminal law—Perjury—Crim. Code, s. 145—Crime alleged to have been committed on examination for discovery on a civil suit—Criminal Code.

Motion in the County Court Judge's Criminal Court to quash a charge for perjury alleged to have been committed on an examination for discovery before the Registrar in a civil suit; heard before Henderson, Co. J., at Vancouver.

The accused having been charged with perjury committed on his examination for discovery before the Registrar in a civil suit, elected to take a speedy trial. On his election, his counsel took the objection that perjury could not be assigned on examination for discovery.

Held, that as every statement made upon oath by the person examined during his examination for discovery, forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of section 145 of the Criminal Code.

Wintermute, for the Crown.. *A. E. McPhillips*, K.C., for accused.

The Living Age, one of the very best of serials, giving, as it does, articles of varied interest, comes with unfailing regularity. Whoever makes the selections is thoroughly in sympathy with the needs of the literary public. The number for October 6 contains an article on the Powers of Darkness which will serve as a wholesome corrective of the complacency which is too often the character of current discussion, and in a measure supports the view of those who deny that the world is gradually getting better. He shows that the vices of the civilized world of the present day are strangely like those which preceded the fall of the Roman Empire. The number for October 13 opens with an article on the Triumph of the Russian Autocracy, which gives new thoughts on this engrossing subject.