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## NEWFOUNDLAND AND HER FISHING RIGHTS.

It will be of interest at this present time to refer to the legal aspect of some of the matters connected with the dispute between Newfoundland, England and the United States as to fisheries, arising under the treaty of 1818.

By this treaty rights of fishery in a portion of the territorial waters of Newfoundland were granted to "the inhabitants of the United States of America." Until quite recently their use has not conflicted materially with the interests of the islanders, but of late the Legislature of the colony has enacted laws which raise questions as to the precise meaning of the treaty. Naturally enough, the Governments of the United States and of Newfoundland respectively do not adopt the same interpretation, and what threatened to be a somewhat serious crisis has only been averted by a temporary modus vivendi arranged by the Imperial Government with the Government of the United States.

Stripped of surplusage, the treaty words which have to be construed are these: "It is agreed that the inhabitants of the United States shall have forever, in common with the subjects of His Britannic Majesty, liberty to take fish of every kind, etc."

What is the scope of the liberty possessed by "the inhabitants of the United States?"; that is to say, is it a merely personal franchise, to be exercised by them with their own hands, or may they "take fish" by their agents; may a crew of a vessel, for instance, composed in whole or part by persons not "inhabitants of the United States" take fish by employing non-inhabitants of that great country; will it make any difference that the crew is composed of Newfoundlanders who have gone outside the colony to hire on board United States vessels.

The Government of Newfoundland seeks to place a narrow interpretation on the words of the treaty. It sets up the con-

tention that no person has any right to take fish except he is himself an "inhabitant of the United States," even though he be the servant of a person himself duly qualified, and therefore that members of the crews of American vessels who are not "inhabitants of the United States" can, if they fish in the waters of Newfoundland, be taken from on board such vessels, when within the territorial waters, and be punished by fine and imprisonment, and the vessels confiscated for employing men in violation of the laws of the colony by such improper fishing. The contention of the United States is, of course, that what one does by another he does by himself, and that the fishing of the servant is the fishing of the master, wherefore both master and servant are merely exercising a liberty granted by the treaty; and furthermore, that a grant of a right draws to it all that is necessary to the enjoyment of that right, wherefore the inhabitants of the United States may employ men to do their work in the exercise of their liberty to fish.

Another most interesting question which has arisen is this, can the Legislature of the colony pass laws from time to time, for the regulation of the fishery, which shall be binding on the inhabitants of the United States as well as on all others, in the prosecution of the fishery within the territorial waters of the colony. The colony, for instance, does not permit its own fishermen to use "purse seines" (immense nets), because they have been found destructive to the fishery. The inhabitants of the United States threaten to use these purse seines in their fishery, in treaty waters, being to some degree driven to their use, they contend, by difficulty in procuring cargoes without them, through other restrictions enacted by the Newfoundland Legislature.

Perhaps at the time the treaty was made (and certainly during after years) both parties used purse seines, but for many years their use has been illegal by Newfoundland law, and there can be no reasonable doubt that their renewed use would be a very real hardship to the Newfoundlanders and threatening to the very existence of the fishery.

As to the first point, the liberty granted is to be enjoyed

"in common" with British subjects. That means, probably, not to the exclusion of, but concurrently with, British subjects.

But the words may mean much more. They may have this sense, that the inhabitants of the United States should continue to enjoy the right of fishing which had been theirs before the Declaration of Independence, that is to say, as though they were still British subjects. If the people of the two nations have rights of fishery "in common," as before the War of Independence, it might be a fair measure of the rights of one to ask what are the rights of the other. May a British subject employ a foreigner in taking fish in the treaty waters? May a Newfoundlander, for instance, employ a Norwegian to catch fish for him? If he may, why may an inhabitant of the United States not do the same thing?

On the other hand, the Legislature of Newfoundland can undoubtedly pass a law binding on all Newfoundlanders that they shall not employ foreigners in any capacity in the fishery in the territorial water of the colony, though it is doubtful if such a law could be made binding on other British subjects fishing in these waters.

It was at all times essential that the inhabitants of the United States should exercise their treaty rights, if at all, by the use of vessels, with crews of hired men, and it is not probable that any thought as to the nationality of crews ever occurred to the treaty makers. It cannot be denied that Newfoundland may make it unlawful for her fishermen to employ on board American vessels, and may punish them for disobedience by fine and imprisonment, but her recent attempt to enact a law confiscating American vessels for allowing Newfoundlanders to fish as their crew is within treaty waters, when they had been hired outside these waters, is a very different matter.

It is contended by some that rules as to the kind and size of nets, etc., are merely police regulations, the power to make which is inherent in the authority possessed by the Sovereign power within the territory where the fishery is exercised. An obvious objection is that such rules could be so framed as to destroy in effect the liberty granted.

There is, also, the objection in the Newfoundland case that the rules are made by the Legislature of a colony, a merely subordinate body, not recognized by the Government of the United States. It is a very forcible contention that all matters not regulated by the treaty itself must subsequently be agreed to by both contracting powers in order to have binding force on the subjects of both countries, and that in the absence of such agreement, new regulations can only affect the subjects of the power which adopts them.

On the other hand, it is very cogently argued that the "inhabitants of the United States" are to exercise the liberty granted to them "in common with His Britannic Majesty's subjects," and that these words are wide enough to mean that the regulations binding on British subjects from time to time shall be equally binding upon American subjects exercising the granted liberty in British waters. In other words, it is contended that, while exercising the liberty granted, the American comes into hotchpot with the Britisher, and for the purpose of fishing in the prescribed water can act only as if he were for the time being a British subject. Why, it is asked, should foreigners, exercising a mere servitude, have greater freedom of action in the territorial waters of a country than the very subjects of the Sovereign power. It is said by those who thus reason that the liberty granted to the inhabitants of the United States is merely this—that he may do as British subjects do. Upon the whole the claim of the colony to the right to prohibit the use of nets, etc., is more strongly based and sounds better than the assertion that inhabitants of the United States may not employ foreign fishermen to do their work for them in the treaty waters.

Newfoundland has now a law—the Bait Act—under which it is made illegal to aid in the export of herrings and other bait fish, except under license, and it is said that the Government of the colony has decided to prosecute under this law those Newfoundlanders who ship on board American vessels and help take fish for them. But the Act in question expressly says that it shall not affect the treaty rights of any foreign country, and as taking herrings in treaty waters is not illegal for the American

master, it cannot be illegal for the Newfoundland servant of the American to aid in that export. The "Bait Act" can only be held to apply to a fishery not authorized by treaty. If not the Act would seriously, though indirectly, affect the treaty rights conceded in 1818. Besides, the recent modus vivendi stipulates that the Americans shall not be hindered from hiring Newfoundlanders outside the three-mile limit, and even the threat of the colonial Government to punish Newfoundlanders who do hire is a violation of that promise and a breach of good faith. The colonial Government should maintain the spirit of Imperial promises even at great sacrifices.

ALFRED B. MORINE.

Toronto..

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## *DISSENTING OPINIONS.*

We have more than once called attention to what we believe to be a serious mistake in the administration of justice, viz., the making known to litigants that there has been a difference of opinion amongst the members of a Court in cases coming before it for adjudication; and, in addition to other objections, there is great waste of time and money in publishing dissenting judgments. The evils of the present system grow in magnitude as we go from the lower to the higher Courts. That which is objectionable in Courts below becomes disastrous as the final Court of resort for the Dominion is reached. Should the case go to the Judicial Committee of the Privy Council there is a final adjudication, and as no dissenting judgments are ever given there, there is at last a feeling of certainty which must be very refreshing even to an unsuccessful litigant. We do not say that there should be no dissenting opinion published in the first Court where more than one judge sits, but certainly, after that, the opinion of the Court, as a whole, without any statement as to differing views, is all that should be promulgated.

A writer in the last number of the *Law Magazine and Re-*

*view* discusses this subject with much originality and vigour. We quote as follows:

"The aim of all judicial system should be the adjustment and maintenance of principles of law and procedure, and their proper application to the facts of given cases. The judiciary are the arbiters in the settlement of disputed questions of law, and it is through the judiciary that principles of inherent right and justice and equity are vindicated according to the new and fluctuating conditions of government and society; and it is this that has gained for the judiciary in all civilised countries public confidence and respect. Lawyers, it is well known, disagree. This is but natural, however, when one considers the personal motive and keen professional interest excited in behalf of one's client, for the lawyer is but the champion of the cause which he advocates. On the other hand a judge stands indifferent, raised aloof from the influence of party interest, as the arbiter of right and justice. His duty it is, irrespective of personal inclination or prejudice, or the shortcomings of any particular individual, to analyse principles of law in their primitive and fundamental aspect and apply those principles to the facts before him. It is the duty of judges to be so impartial as to be not only willing but ever ready to change an impression that may be erroneous; to be willing to be convinced that they may be wrong. It is the duty of judges to agree and not to disagree; it is their duty to be united and not disunited; it is their duty to be harmonious and not acrimonious; it is their duty to render judgments that the wisdom of the majority should make final and conclusive when the consensus of judicial authority outweighs their individual opinion. Judges should be independent, fearless and unbiassed, but they should not be obstinate. Tenacity of purpose and principle is one thing, but tenacity of will that blocks the wheels of justice and brings judicial learning and authority into contempt, is quite a different matter.

The tendency of dissenting opinions is to bring unrest and doubt not only in the minds of the legal profession but among the public. Certainty of the law is the life of the law, and where

principles are so unsettled and disputed as to enable the highest Courts to be almost equally divided, the tendency is to lessen the dignity and authority of judicial decision. Any system is wrong which permits the rendering of dissenting opinions and printing them in public reports of cases—in permitting anything more than the rendering of the judgment of the Court as a Court. What the individual judges think, the arguments they urge among themselves in their private chamber in discussing a case matters little to the legal profession, and certainly less to the public. What the public demands, and what the legal profession asks for is a united judgment either for or against the appellant: what they demand is the full weight and authority of a united Court; and where the minority are over-ruled by the majority, the minority should be suppressed and not permitted to vent their discontent in juridic analysis. The frequently delightful but yet purely academic discussion of the minority is like the wailing of a dog whose tail is caught in a trap—you hear it, but the dog is caught all the same. What possible good can result from a dissenting opinion? It certainly cannot control the majority, nor can it in any way affect the law as determined by them. It simply litters up pages of law reports with divergent views, the dissenting judge frequently posing as the champion of a lost cause. The better rule would seem to be to follow the course adopted by some Courts and to make it imperative that the opinion delivered shall be the judgment of the Court. The names of the individual judges who concur or dissent should be obliterated from the reports. What the legal profession wants are the judgments of its Courts as a united body and not the individual opinions of judges. When a Court decides an important question, its judgment should have the full weight, respect, dignity and authority, which a Court composed of able and distinguished judges is entitled to. As it is, it too frequently happens that judgments of Courts of final resort are but the judgments of one judge. for the Court is so evenly divided that the vote of one judge sways its final determination either to the right or to the left. This difference and confusion of judicial opinion among judges,

especially in Courts of final resort, is pernicious in its result; it tends to the decline of judicial authority, and weakens the confidence which the public should be encouraged to have in its highest Courts.

While there are in the different States of the Federal Union, Courts of Appeal, Supreme Courts and Courts of Errors, which are commonly supposed to be Courts of last resort, yet throughout the somewhat intricate judicial system of the forty-seven States and of the Federal Courts there is but one Court of last and final resort, that is to say, the Supreme Court of the United States. Under the Federal Constitution the judicial power of the United States is vested in one Supreme Court, and in such inferior Courts as the Congress may ordain and establish. It is evident, therefore, that what was in the minds of the framers of the Constitution was a Court as a concrete whole rather than a disintegrated number of judges. The judicial power of such a Court, pronouncing its judgment as such, would be unquestioned, whereas the purely academic opinions of a confused and dissenting number of judges leaves the matter in dispute still disputable. From the judgment of that Court there is no appeal. Its judgments comprise all that the rank, dignity and power of the word Supreme includes, for it is the one Court in the United States that is in fact and in law supreme over all others. The Supreme Court of the United States is what the House of Lords is in England and what the Cour de Cassation is in France, and it is but natural, therefore, that great weight and deference should be given to its judgments and final determinations.

Unfortunately, the public records of the judgments of some of the highest Courts in the United States do not carry out these ideas. American law reports are strewn throughout with dissenting opinions, and dissenting opinions have become so frequent that in almost any important case one is surprised not to find them; and, if fact, dissenting opinions are frequently much longer and more elaborate than the prevailing judgment of the Court, and even more logical and convincing.

On the other hand, in England, there seems to be a much greater unity of judicial opinion. Judges, pending the argument of appeals, may frequently make enquiries and interject views that on the final consideration of the case they abandon; but the judges appear to seek with greater tenacity of purpose harmonious and united results. When one does encounter a dissenting opinion it is usually not so drastic as those made in the American Courts, and the rarity with which dissenting opinions are found in England is one of the reassuring features of the greatness, stability, and learning of the English judiciary.

In the Law Reports, Appeal Cases for 1904, opinions were written in 157 cases, and in these there are only three cases in which any dissenting opinions were rendered. The principal case in which the Court was divided was the great case relating to the Scotch Church, a case which might very naturally involve a great deal of personal feeling and divergence of views, but in this case only two judges dissented; while in *Winans* v. *Attorney-General* one judge, Lord Lindley, differed with the majority, and in the third case, *Hunter* v. *Rex*, Lord James alone dissented. In L.R. [1904], 2 K.B. 227 cases are reported with only five dissents.

Imagine a Court composed of 100 judges with 51 voting one way and 49 the other. The result in such a case would be practically the same as though but one judge sat. If the propriety of the recording of judgments of almost equally divided Courts, or of Courts where the prevailing judgment is determined by the voice of one judge is admitted, we have precisely the same condition of things as though the case had been argued before and determined by a single judge. The idea of a numerous body or of a Court constituted of a number of judges is for the purpose of obtaining greater weight of judicial learning and authority in the determination of important questions. A fair illustration of what the Courts should strive to attain may be found in our prevailing jury system. A jury composed of 12 men is frequently at first equally divided. The system of trial by jury, however, does not permit of a verdict either pro or con except

upon the united voice of the jury as a composite body; it does not permit the recording of the vote of the majority, nor does it sanction the enrolling of the protest of the minority. It is the united voice—the weight of authority of the 12 jurors as a body, although composed of many individuals—that makes its verdict authoritative, final and convincing.

Why should not the judiciary follow this example? Why should they not, although frequently differing at first one from another, follow the laudatory example of a united jury and themselves be willing to be convinced by the arguments of the majority, so that their voice would be the voice of harmony and not of discord. Such expressions as 'I concur,' and 'all concurred,' should be eliminated from reports of cases. All question as to whether all the judges concurred or not should be removed from public criticism; of course they should all concur, and if they do not then they should be made to do so in the same way that an obstinate juror is brought to reason. No individual member of a Court has any more right to insist on his own personal opinion against that of the majority than a member of a jury has to unreasonably protest against the judgment of his fellow jurymen. Judges should concur in the same manner that jurors have to concur, a habit some of them might cultivate to the increased reputation of the Courts whose bench they adorn. Jurors are the arbitrators of all questions of fact, while judges determine all questions of law, each being supreme in their different functions. If Lord Coke discovered 'abundance of mystery' in the patriarchal and apostolical number of twelve of which the ordinary jury is composed, how much greater would be his surprise were he living to-day to contemplate the 'abundance of mystery' in the discordant and clashing judgments of the mystic nine, the number of judges comprising the Supreme Court of the United States?

'It has been wisely ordered,' says Judge Stephen, 'that the principles and axioms of law, which are general propositions flowing from abstracted reason and not accommodated to times or to men, should be deposited in the breasts of judges, to be

applied when occasion shall arise to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known.' This ideal no longer exists. The law has long since ceased to be well known: and this is due to a large extent to dissentient opinions. Until judges make up their minds to agree, and among themselves are willing to lay aside their own opinion when opposed to that of the majority of their brethren, the law will never be, in the words of Judge Stephen, 'well known,' nor will the judgments of Courts of final resort receive that respect, that veneration, to which they should be justly entitled.

No one can question the learning, the ability, and the indisputably untarnished character of the judiciary of the United States, but the custom of allowing dissenting opinions is, to say the least, unsatisfactory; it is pernicious in its result and tends to unsettle principles of law. Instead of quieting disputes and permanently defining the straight, board road of justice, they demonstrate the unstability of the law and how the 'House of the just is divided unto itself.' What humble layman can say he is right or wrong, when we daily behold the ablest jurists on the bench publicly disagreeing among themselves?

If we wish to avoid the decline of judicial authority we must avoid judicial dissension, judicial divergence of views, judicial discontent, judicial obstinacy; we must have a united Court and a united judgment. Judgments of the highest Courts should be their judgment pure and simple, in which all individuality of the members of the Court disappears and is absorbed in the united opinion of the Court pronounced by the judge who renders it. We might even draw a beneficent example from the highest Court in France, the Cour de Cassation, where the judges remain unknown to the public at large, and where the judgments of the Court the name of the individual members thereof never figure. The Cour de Cassation is a Court of last resort, of final appeal, but it is the Court itself which renders its final judgment, and for which the French people have the highest regard and esteem; it is not the individual

members of the Court who figure in its reported decisions. Such a Court has the weight of judicial authority. It is stamped with the dignity of a Court firmly built on the law of the land, and irrevocably established on principles of justice and equity, for unity is stability. Such should be the ambition of our Anglo-Saxon Courts of final resort. They should seek to establish their judicial power and dignity by becoming united, and the way to accomplish this is to do away once for all with dissenting opinions."

Some judges who might be named seem to have a craze for dissenting from the rest of the Court. We trust that the remarks of the writer in the conclusion of his article will not hurt any one's feelings and we venture to quote them:

"It is refreshing to turn to the principles relating to trial by jury as laid down by some distinguished text writers, and which make one almost wish that the same rules might be applied to Courts of final resort. Stephen, in mentioning some old customs, tells us that in addition to being kept together until unanimously agreed, if the jury eat or drink at all, or have any eatables about them without the consent of the Court and before verdict, they are finable. Not only this, but it is laid down in the books that if jurors do not agree in their verdict before judges are about to leave town, although they may not be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. How refreshing it would be, in case of our learned judges in Courts of final resort not agreeing on their final judgment, that they should not either have food or drink, but in addition should be coerced by being transported from town to town in a cart! Certainly such a spectacle, while it would not lend to the judicial dignity of the Court, might be a successful and speedy means of putting an end to dissenting opinions."

## *BILL OF EXCHANGE—TRANSFER BY DELIVERY—HOLDER.*

A distinguished correspondent dissents from our criticism of the judgment in *The Nova Scotia Carriage Company* v. *Lockhart*. (See post, p. 752). He, however, admits that ours is an "apparently literal construction of the statute," though to him it appears to be a "narrow and illiberal one"; and he says that "it would be unwise to hold that the statute intended to take away the obvious right of action of the drawer for a breach of contract made directly to himself." This, we respectfully submit, is arguing in a circle, for it is of the very essence of our argument that the drawer of a bill payable to th order of a third party has not and never had, as drawer, a right of action on the bill unless and until he has paid the bill, upon default by the acceptor. The statute was intended to remove doubts, and to establish a uniform practice, and it is essential that its provisions should be strictly construed.

Lord Chief Baron Eyre, in *Gibson* v. *Minet*, 1 H.Bl. 605, has thus expressed the peculiar character attached to a bill: "The title (of an endorsee) is by assignment, a title which the common law does not acknowledge, but which exists only by the custom of merchants. . . . Of necessity the custom must direct how it shall be assigned, and in respect of bills payable to order, the custom has directed that the assignment should be made by a writing on the bill called an endorsement. . . . The title of an indorsee appears by the indorsement itself. Everything which is necessary to be known . . . appears at once by bare inspection of the writing. . . . The party to whom such bill is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple interest demands that the simplicity of it should be protected, and that it never should be entangled in the infinitely complicated transactions of particular individuals into whose hands it may come."

Our learned correspondent says, "If this had been a contract in the ordinary form instead of a bill, etc." But it was not such

a contract, or an ordinary contract, but a special contract, in a special form, and with particular privileges and duties attached. Its peculiar distinguishing quality is its negotiability, and while it continues to be negotiable its "holder"—in the strict and literal sense of the word—is the only person who can enforce payment of it by action. After it has been paid, and thereby ceased to be negotiable, the drawer, if it is he who has paid it, can sue, but his suit is not as "holder."

The suggestion that the Court should have allowed the endorsement on the bill to be made at any stage of the trial is one we concur in, provided, of course, that the costs to that stage were paid by the plaintiff if the defendant thereupon confessed judgment. Our criticism was not directed at the plaintiff's success, but at the manner of it, and the Judge's reasoning.

It is impossible without further particulars to estimate the value as a precedent of the case our correspondent mentions as decided by the late Chief Justice Ritchie. It is not clear whether the plaintiff was payee or indorsee of the note; in either case his position would be different from that of the maker of a bill in respect of remedies. He had paid the note before action, and it is admitted that the drawer of a bill has an action thereon after he has paid the bill, no matter what endorsements are on the bill. Clearly, this case is not in point in this discussion.

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Reading the Declaration of Independence of the United States in parallel columns with one of the chapters in "Midshipman Easy" (where Marryatt introduces Equality Hall and the butler who told Jack that one man was as good as another, to which Jack demurred and knocked him down), makes it clear that the Declaration of Independence was written without the possibility of the fathers of their country consulting Marryatt's well-known novel. As we all know the Declaration of Independence lays down the broad proposition, "That all men are created equal. That they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." Our excellent contemporary the *Central Law Journal*, has an

article which takes this Declaration as a text for remarks under the heading of "Life, Liberty and Property." It certainly is surprising that a statement so utterly incorrect as that "all men are created equal" should so often be proudly paraded. It is manifestly false in fact. All men are not created equal. They are created unequal in all respects. No two men are alike, either in intellect, face or figure. The rest of the statement above quoted is all right, but the first part should be suppressed whenever possible. Carlyle in his own inimitable way speaks of this doctrine as to the equality of man as being: "In one brief word, which includes whatever palpable incredibility and delirious absurdity, universally believed, can be uttered or imagined on these points, 'the equality of men'; any man equal to any other; Quashee nigger to Socrates or Shakespeare Judas Iscariot to his Master—and Bedlam and Gehenna to the new Jerusalem, shall we say?" It is a proposition neither believed in nor acted upon in any one of the States which claim this Declaration as the magna charta of their country.

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At our approaching Parliaments in the Dominion and Provinces various schemes of "reform" in various departments of government and other matters of public concern will come up for discussion; and this brings to our mind another quotation of the same great man which will be of interest in these days of responsible government run to seed. He was writing as we all know of Disraeli's famous measure, which, at that time, took the wind out of the Liberal sails and kept the Conservative ship ahead in the race for power. The quotation, however, is an apt one even now: "Inexpressibly delirious seems to me, at present in my solitude, the puddle of Parliament and Public upon what it calls the 'Reform measure'; that is to say, the calling in of new supplies of blockheadism, gullibility, bribeability, amenability to beer and balderdash, by way of amending the woes we have had from our previous supplies of that bad article. The intellect of a man who believes in the possibility of 'improvement' by such a method is to me a finished-off and shut-up in-

tellect, with which I would not argue: mere waste of wind between us to exchange words on that class of topics. It is not Thought, this which my reforming brother utters to me with such emphasis and eloquence; it is mere 'reflex and reverberation,' repetition of what he has always heard others imagining to think, and repeating as orthodox, indisputable, and the gospel of our salvation in the world. Does not all Nature groan everywhere, and live in bondage, till you give it a Parliament? Is one a man at all unless one have a suffrage to Parliament?" Carlyle does not think things are improving by all this reform, for he continues: "Well, perhaps the sooner such a mass of hypocrisies, universal mismanagements and brutal platitudes and infidelities ends,—if not in some improvement, then in death and finis,—may it not be the better? The sum of our sins increasing steadily day by day, will, at least, be less, the sooner the settlement is."

# Correspondence.

## *BILL OF EXCHANGE—TRANSFER BY DELIVERY—HOLDER.*

To the *Editor* of THE CANADA LAW JOURNAL.

Sir,—With deference I would say that many lawyers will dissent from your and your correspondent's criticism of Judge Longley's judgment in *The Nova Scotia Carriage Company* v. *Lockhart*.

By his acceptance the defendant promised the plaintiffs to pay to the Union Bank or order a sum of money and did not pay it. If this had been a contract in the ordinary form instead of a bill the plaintiff from whom the consideration moved would be the proper party to sue on it in case of breach, and his right would be facilitated rather than impaired by putting it into the shape of an accepted bill, so long as the bill was in his possession as owner. The bank was the nominal "holder" only, and only as the plaintiffs' agent, who were the real holders, as they

would be of a bill endorsed to them, but in the hands of their clerk or attorney, and there was no other "holder."

It would seem superfluous for the bank or any other agent to endorse back to the plaintiffs a bill which was always theirs. If by a narrow and illiberal, but apparently literal construction of the statute the drawer was not the holder under the facts proved, it would be unwise to hold that the statute intended to take away the obvious right of action of the drawer in such a case for a breach of a contract made directly to himself, and wise to give it if possible a construction which would avoid such an abnormal and unjust result: which is effected by the consideration that such right of action is not expressly taken away, and is therefore protected by s. 8 of the amending Act of 1891. Section 59, 2*a*, strengthens inferentially, rather than weakens this argument. If, however, the bank's endorsement were technically necessary, surely the Court would allow it to be made at any stage of the cause.

Long ago, when the late Chief Justice Ritchie was on the bench of New Brunswick, in a suit before him on a note which the plaintiff had retired from the hands of an endorsee the point was taken that the plaintiff's endorsement was still on the note, shewing title out of him, and that he was not the legal holder. The judge promptly over-ruled the objection, and passed the note to the plaintiff's counsel, telling him to erase his client's name then and there if he saw fit.

Nova Scotia, November 14th, 1906. RUSTICUS.

[We refer to the above letter of a valued correspondent in our editorial columns, see ante, p. 749.—Ed. C.L.J.]

# REPORTS AND NOTES OF CASES.

## England.

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present: Earl of Halsbury, Lord Macnaghten, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson, Sir Alfred Wills.

[July 18.

HARSHA *v.* UNITED STATES OF AMERICA.

*Extradition—Defect of proof on original enquiry—Discharge on habeas corpus—Enquiry before new extradition commissioner—Validity of.*

*Held*, affirming the judgment of the High Court of Justice of Ontario, Chancery Division (11 O.L.R. 457), that s. 5 of the Habeas Corpus Act is no bar to the production of further evidence on a new prosecution of an accused person after his discharge of habeas corpus by a competent Court for deficiency of proof on the first enquiry.

*Held*, also, controverting the opinion of the Chancery Division, that an extradition matter comes within the purview of the section in question equally with the case of an offence charged to have been connected in the home jurisdiction.

*J. B. MacKenzie* (with him, *J. W. F. Beaumont*), for Harsha. No one contra.

## Dominion of Canada.

### EXCHEQUER COURT.

Burbidge, J.] [Oct. 29.

MACDONALD *v.* THE KING.

*Public work—Negligence—Canals—Natural channels of rivers—Distinction between public property and public works.*

The natural channels of the St. Lawrence River, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.

By the 1st clause of the 3rd Schedule of The British North America Act, 1867, "Canals with land and water power connected therewith" (of which the Cornwall Canal is one), are enumerated as part of the "Provincial Public Works and Property," that in virtue of the 108th section of the Act became "the property of Canada."

*Held*, that this does not give the Dominion any proprietary rights in the River St. Lawrence from which the water is taken for the Cornwall Canal, beyond the right to take the water, nor make the river itself a public work of Canada.

By an order of His Excellency in Council of March 22, 1870, the St. Lawrence River to the head of Lake Superior, the Ottawa River, the St. Croix River, the Restigouche River, the St. John River and Lake Champlain are declared to be under the control of the Dominion Government.

*Held*, that this Order in Council did not have the effect of altering in any way the proprietary rights, if any, that the Government of Canada then had in the rivers and lakes mentioned or of making them or any parts of them public words of Canada.

*Belcourt*, K.C., and *J. A. Ritchie*, for suppliant. *Latchford*, K.C., for respondent.

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Burbidge, J.] [Nov. 12.

HILDRETH v. McCORMICK MANUFACTURING CO.

*Patent for invention—Manufacture and sale—Unconditional sale —License.*

The condition in s. 37 of the Patent Act that a patent shall become void if the patentee does not within two years of the date of the patent, or any authorized extension of such period, commence and after such commencement continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada should be construed to mean that the patentee must not only manufacture his invention in Canada but manufacture it in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price.

It is not a compliance with the above condition that a person who desires to buy or obtain an unconditional title to the patented

invention is put in a position to obtain the use of it at a reasonable rental.

*W. Cassels*, K.C., and *A. W. Anglin*, for plaintiff. *Gibbons*, K.C., and *Haverson*, and *G. S. Gibbons*, for defendants.

# Province of Ontario.

## COURT OF APPEAL.

Mabee, J.] [Oct. 22.

RE FARRELL—FARRELL *v.* FARRELL.

*Will—Lapsed devise—Residuary devise—Construction—Avoiding intestacy.*

By one clause of his will a testator devised and bequeathed all his real and personal estate, etc.: by another clause he provided that a sister should have certain lands owned by him, which devise lapsed: and by the last clause provided "all the rest and residue of my estate consisting of money promissory note or notes, vehicles and implements I give and bequeath to my brother."

*Held*, that the will might be construed to prevent an intestacy as to the lapsed devise and that the lands given to the sister passed to the brother.

*A. H. Clarke*, K.C., for applicants. *Harcourt*, for infants.

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Full Court.] [Nov. 3.

LESLIE *v.* TOWNSHIP OF MALAHIDE.

*Estoppel—Accounts of municipal treasurer—Recovery from municipality of moneys paid by treasurer out of his own pocket—Statements of account—Audit—Laches.*

In February, 1899, the defendants appointed the plaintiff treasurer pro tem and gave him an order expressed to be on "the treasurer of the township of Malahide" for $5,799.52, being the balance in the hands of the previous treasurer at the time of his death. The plaintiff carried forward in the old cash book the balance shewn on a previous page to be in the hands of the former treasurer, and then went on honouring orders upon him

drawn by the defendants. His statement of receipts and expenditures for the year 1899 was prepared and audited as if there had been no change in the treasurership, commencing with the balance on hand on January 1, 1899, and ending with the balance to the credit of the township in Dec. 31, 1899. The plaintiff acted in this way believing the estate of the deceased treasurer to be solvent, and anticipating an early liquidation of the debt due from it to the defendants; and although long before the end of 1899 the said estate proved to be insolvent, he continued from year to year pursuing the same course, rendering his yearly statements of receipts and expenditure, which were duly audited, shewing balances in favour of the township, which were non-existent, except upon the footing of his having actually received the whole amount of the late treasurer's indebtedness. During 1899 he proved the debt against the deceased treasurer's estate in the name of the defendants, and received two dividends in that year, and a third in 1901, amounting to $1481.56. He did not, however, bring the facts directly to the notice of the council or make any claim against the township until January, 1905, and the defendants apparently remained in ignorance of the facts until shortly before this action was brought to recover the balance due the plaintiff at the beginning of that year. The plaintiff explained his delay by saying that owing to the way he had behaved he had conceived the impression that he had made the debt his own and had lost the money.

*Held*, that the plaintiff was entitled to recover as he had never agreed to accept the order originally given him by the defendants as cash, and to account for it on that footing, and as there was no reason why after the end of his first year of office he could not have recovered the advances made during that year, notwithstanding the delivery of the statements of receipts and expenditure and their audit, and there had been no direct representation by him that the original order given him by the defendants had been paid. The advances during subsequent years should be treated on the same footing, as they were all made on orders given by the defendants in respect to the ordinary debts and expenditures of the township. The defendants moreover, had incurred so far as appeared, no debts or liabilities and had entered upon no expenditures or undertakings which they would not have done if they had received the clearest notice, at the earliest moment, that their late treasurer's estate was insolvent.

*Held*, however, that there must be a reference to the master

to report as to any damage or loss they may have sustained by the laches of the plaintiff in respect of what might have been recovered from the estate of the previous treasurer or from his sureties, or in respect of any payment which it might appear the plaintiff had improperly made to the representative of the said estate, and the amount for which the plaintiff was entitled to judgment should be reduced accordingly.

*Riddell*, K.C., and *E. A. Miller*, for defendants, appellants. *Gibbons*, K.C., and *W. E. Stevens*, for plaintiff, respondent.

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From Falconbridge, C.J.K.B.] [Nov. 3.

RE CANADIAN TIN PLATE DECORATING CO.
MORTON'S CASE.

*Company—Winding-up—Contributories—Application for shares—Withdrawal—Absence of allotment and notice—Notice of call.*

An agent of the company canvassed the respondents to subscribe for shares and took them to the company's office, where they signed and handed to the manager an application, not under seal, by which they subscribed for 25 shares of the common stock of the company, at the par value of $100 per share for which they agreed to pay upon the delivery of the regular stock certificate. In the stock ledger of the company, under the names of the respondents and the heading "common stock," of the same date as the application, an entry was made, "Allotted bought Dr. 25 shares, amount $2,500, balance 25 shares, Dr. $2,500." On the same day the respondents gave the canvassing agent a cheque for $100 on account of the payment for the shares, but on the following morning they determined to withdraw from the application, and stopped payment of the cheque, which had been already presented and payment refused for want of funds. On the same day they told the agent that they would have nothing more to do with the stock they had applied for, but they gave no written or other notice of withdrawal. The company's minute book contained no note or entry nor was any evidence given of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them, and a formal notice of allotment was not sent. No attempt was made to enforce payment of their cheque, and they received no further communication on the subject of the shares until three months later, when the company's manager sent them notice of a call and

demanded payment. There were two subsequent calls, of which notices were also sent to the respondents, and these were authorized by resolutions of the directors.

*Held,* that there had been no allotment or appropriation of specific shares to the respondents; the entry of their names in the stock ledger was not conclusive; the resolutions authorizing the calls, dealing with stock which had been already allotted, could not be regarded as equivalent to an allotment; the fact that notices of calls were sent to the respondents amounted to nothing if the stock had not been already allotted to them by the directors; and they, therefore, never became shareholders, and were properly struck off the list of contributories in a winding-up.

*Quaere,* per OSLER, J.A., whether notice of a call can be regarded as equivalent to notice of allotment.

*Semble,* also, per OSLER, J.A., that on the evidence the respondents, as they had a right to do, withdrew their application, and that this came to the notice of the company on the day after the application was signed, which would be another answer to the liquidator's demand.

Order of Falconbridge, C.J.K.B., affirmed.

*J. M. McEvoy,* for appellant. *Middleton,* for respondents.

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From Denison, P.M.] [Nov. 3.

REX *v.* SAUNDERS.

*Criminal law—Keeping common betting house—Betting booth on race course of incorporated association—Movable structure—"House, office, room or other place"—Criminal Code, ss.* 197, 198, 204.

A wooden box or booth, moved about on castors from one part to another of the grounds of an incorporated racing association during the progress of a race meeting, and used by bookmakers for the purpose of making and recording bets with the public, is an "office" or "place" within the meaning of s. 197 of the Criminal Code.

*Shaw* v. *Morley* (1868), L.R. 3 Ex. 137, followed.

*Held,* also, GARROW and MEREDITH, JJ.A., dissenting, that the provisions of sub-s. 2 of s. 204 of the Criminal Code do not apply to the offence of keeping a common betting house contrary to ss. 197 and 198, and a conviction may properly be made under these latter sections for keeping a common betting house upon

the race course of an incorporated racing association, even where the betting is confined to the races then in progress upon that race course.

*Rex* v. *Hanrahan* (1902), 3 O.L.R. 659, followed.

Conviction by the senior police magistrate for the city of Toronto affirmed.

*J. M. Godfrey*, for defendants. *Cartwright*, K.C., for the Crown.

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Full Court.] [Nov. 3.

GOODWIN *v.* CITY OF OTTAWA.

*Leave to appeal from order of Divisional Court—Special grounds—Assessment and taxes.*

Leave to appeal from the order of a Divisional Court, 12 O.L.R., was refused by the Court of Appeal, the amount in question being about $425 only, and the matter in dispute, viz., whether the plaintiff was liable to assessment and taxation in respect of income derived from dividends upon the stock of the Ottawa Electric Railway Company, not being one affecting the rights of the whole body of shareholders.

*H. S. Osler*, K.C., for plaintiff. *Middleton*, for defendants.

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## HIGH COURT OF JUSTICE.

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Boyd, C., Trial.] McINTOSH *v.* LECKIE. [Oct. 29.

*Lease of oil lands—Forfeiture clause—Contract—Lease or license—Profit a prendre.*

The defendant by lease gave the plaintiff the exclusive right to drill for petroleum and natural gas on certain lands for five years from Dec. 16th, 1903. The lease contained the following clause: "This lease to be null and void and no longer binding upon either party if a well is not commenced on the premises within six months from this date, unless the lessee shall thereafter pay yearly to the lessor fifty dollars per year for delay." No well had been begun by June 16th, 1904, when the first six months expired. On July 8th, 1904, the plaintiff paid the defendant $50 by cheque which the defendant cashed on August 10th, 1904, and gave a receipt for it as "received on account of delay in beginning operations under the lease." In August,

1905, the plaintiff tendered the second yearly payment of $50 which the defendant refused, having made another lease of the premises to his co-defendant on July 28th, 1905.

*Held,* that the second payment of $50 was in time, and might have been validly made at any time during the second year which did not terminate until Dec. 16th, 1905.

The legal effect of the instrument in question was more than a license: it conferred a profit a prendre, an incorporeal right to be exercised in the land comprised in it.

*J. Cowan,* K.C., for the plaintiff. *Hanna,* for the defendant Leckie. *A. Weir,* and *Greenizen,* for the other defendants.

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Boyd, C., Trial.] [Oct. 29.

McGREGOR *v.* TOWNSHIP OF WATFORD.

*Highway—Dedication—Plan—Registration before incorporation —R.S.O.* (1897), *c.* 152, *s.* 62.

A plan shewing the locus in quo as a street was made and filed before but practically contemporaneously with the locality being set apart as an incorporated village, the former being on June 3rd, 1873, the latter on June 25th, 1873. The lots were first sold under the plan in 1876. Subsequent legislation which was retro-active declared that allowances for roads laid out in cities, towns, and villages, and fronting upon which lots had been sold, should be public highways.

*Held,* that the road in question was a public highway and subject to the jurisdiction of the municipality.

*Meredith,* for plaintiff. *J. Cowan,* K.C., for Township. *Hanna,* for defendants Kelly.

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Boyd, C., Trial.] [Oct. 29.

CANADIAN OIL FIELDS *v.* OIL SPRINGS.

*Assessment and taxes—Mineral lands—Buildings on.*

The Assessment Act (1904), s. 36, sub-s. 3 enacts as to mineral lands that their value and that of the buildings thereon shall be estimated at the value of other lands in the neighbourhood for agricultural purposes.

*Held,* that this does not mean that the value of the mineral lands and buildings is to be estimated as if there were no buildings thereon. Just as agricultural buildings are to be valued

and assessed if the land is improved thereby, so are structures on mineral lands to be valued and assessed. The scheme of the Act is to put mineral lands and buildings on the footing of farming lands and buildings, but not to give mineral lands any further benefit.

*A. Weir*, for plaintiff. *Towers*, for defendant.

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Boyd, C.] DRIFFIL *v.* OUGH. [Nov. 1.

*Creditors' suits—Settlement of plaintiff's debt—Addition of new creditor as co-plaintiff—Con. Rules* 206, 313.

A simple contract creditor who had brought this action on behalf of himself and all other simple contract creditors to avoid a transfer of property alleged to be in fraud of creditors, had been settled with as to his debt, but not as to his costs, and was willing that the action should proceed with another unpaid creditor added as co-plaintiff, and this motion was made accordingly.

Motion dismissed, the proper course being for the present action to be settled as between the parties, and for the creditor now seeking to intervene, to begin an independent action. Con. Rules 206, 313, as to the substitution and addition of parties do not cover such an application as the present one.

*Middleton*, for plaintiff. *Scanlon*, for defendant.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Nov. 12.

SOVEREEN MITT, GLOVE AND ROBE CO. *v.* WHITESIDE.

*Company—Directors—Filling vacancies in Board—Quorum—Special meeting of shareholders.*

Where the by-laws of a company provide that there shall be seven directors, and that four shall be a quorum, if, on account of four of them ceasing to be directors by reason of their selling and transferring their shares, only three are left, those three have not the power, under s. 43 (3) of the Ontario Companies Act, R.S.O. 1897, c. 191, to fill the vacancies, notwithstanding that by s. 40 the board might consist of only three; and the directors not having the power, and therefore failing, to fill the vacancies, the shareholders can do so at a special meeting called for the purpose.

Decision of MACMAHON, J., affirmed.

*J. Bicknell*, K.C., for plaintiffs. *Kilmer*, and *Stephens*, for defendants.

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Cartwright, Master.] [Nov. 20.

GERMAN AMERICAN BANK *v.* KEYSTONE SUGAR COMPANY.

*Summary judgment—Motion for—Delay.*

The intention of Con. Rule 603 was that a motion for summary judgment should be made within a reasonable time after the appearance of the defendant: and a motion for such judgment in an action in which the writ was issued on June 20th, the appearance entered on July 10th, but the motion not launched until November 20th—the delay not being explained—was refused.

*McLardy* v. *Slateum* (1890), 24 Q.B.D. 504, followed.

*Gwynne*, for the motion. *Geo. Bell*, contra.

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## DIVISION COURTS.

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### FIRST DIVISION COURT, COUNTY OF LAMBTON.

Taylor, J.J.] LUCAS *v.* SHAVER. [Oct. 29.

*Conditional sale—Manufactured goods other than household furniture—Exchange subject to lien.*

*Held*, 1. Following *Coulthard* v. *Pe..*, 29 C.L.J. (1893), 269, that the Act respecting conditional sales applies only to manufactured goods other than household furniture and that other chattels, such as horses, etc., are not within these provisions.

2. Upon a conditional sale, when both vendor and purchaser agree to an exchange with a third party, of the articles sold, on the understanding that the article taken in exchange is to take the place of the chattel originally sold, and be subject to the terms of the conditional sale, the property in the article so got in exchange is in the original vendor of the first article, subject to the terms of the conditional sale by him, and that the property in it does not pass to the purchaser until the terms of the original conditional sale have been fulfilled.

The second point above decided is a new one in this Province.

No Canadian or English case bearing on it was cited or found. The decision follows: *Kelsey* v. *Kendall*, 48 Vt. Rep. 24, and *Murphy* v. *American Soda Fountain Co.*, 39 S. Rep. 100, cited for the plaintiff.

The following cases were also cited: *Coulthard* v. *Parr*, 29 C.J.L. (1893) 269; *Walker* v. *Hyman*, 1 Ont. App. 345; *Tuff's* v. *Mottashed*, 29 C.P. 539; *Smith* v. *Hobson*, 16 W. C.R. 368; *Forristal* v. *MacDonald*, 9 S.C.R. 12: *Banque D'Hochelaga* v. *Waterour Engine Co.*, 27 S.C.R. 406.

*A. Weir*, for plaintiff. *Towers* and *Burnham*, for defendants.

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## FOURTH DIVISION COURT, COUNTY OF PRINCE EDWARD.

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Morrison, Co. J.] [Nov. 1.

### Township of Ameliasburg *v.* Pitcher and Wife.

*Public Health Act—R.S.O. 1897, c. 248—Parent and child—Medical attendance—Necessaries.*

The defendants were husband and wife, parents of a boy under sixteen years of age, who while absent from home attending school in Belleville was taken ill. A doctor there was consulted, and, suspecting smallpox, sent the boy home, and notified the health authorities of the plaintiffs. A resolution was passed by the Board of Health authorizing a doctor under s. 85, sub-s. 2, of the Public Health Act to take charge of the case as medical health officer and exercise all the authority and powers necessary for the preservation of the safety and good health of the public generally. The fees for the doctor to be $10.00 a day, exclusive of any other expense he might find necessary. The malady proved to be smallpox. The boy recovered. The plaintiffs paid the doctor the amount of his claim, $420.00, and they sought in this action to recoup themselves $100.00 thereof, as a reasonable proportion which the defendants should bear. This claim was based on s. 93 of the Act, which provides that under such circumstances a local Board of Health may provide nurses and other assistance and necessaries for the patient at his own cost and charge, or at the cost of his parents or other persons liable for his support, if able to pay the same. There was judgment for plaintiffs for $100.00. The defendants applied for a new trial.

*Held*, that the word "necessaries" covers medical attendance

and treatment by a doctor provided by Board of Health under the above circumstances.

It appeared that the father had no means whereby to pay the amount of the judgment, but the mother, owning the farm on which the family lived, had ample means.

*Held*, that the mother is by the statute on the same plane in respect of the liability thereunder as the father, each being liable if able to pay. Judgment was therefore entered for the plaintiffs against the mother with costs for $100.00, and in favour of the father, without costs.

*Held*, further, that the sum of $100.00 was a reasonable sum for the plaintiffs to ask the defendants to pay as their proportion of the amount which the plaintiffs had been called upon to pay their medical health officer.

Reference made to *Rex* v. *Lewis*, 6 O.L.R. 132, and *Renwick* v. *Galt P. & H. Ry. Co.*, 12 O.L.R. 35.

## Province of Nova Scotia.

### SUPREME COURT.

Graham, E.J.] STARRATT *v.* BENJAMIN. [Oct. 21.

*Action on account—Plea of set-off—Costs.*

In the settlement of an action on an account plaintiff's claim was reduced by set-off from $707.73 to $50.

*Held*, that plaintiff was entitled to costs on the higher scale, but the parties having settled the action on the basis that the question should be decided by the Court whether plaintiff was entitled to costs on the lower scale or whether he should be deprived of costs altogether because he had not given credits, costs were given on the lower scale and no costs of the subsequent proceedings were allowed.

*Bill*, for plaintiff. *Bigelow*, for defendant.

Graham, E.J.] REX *v.* REYNOLDS. [Oct. 24.

*Highway—Obstruction—Defects in—Judicial notice.*

Defendant was indicted for having at certain times men-

tioned unlawfully and injuriously obstructed the highway "the same being a public highway of the district of the municipality of East Hants" by erecting a fence across the same and thereby unlawfully committed and continued to commit a common nuisance endangering the comfort of the public, "and which common nuisance did at Tennycape aforesaid . . . occasion actual injury to S. and others."

*Held,* 1. The offence charged was not one within the Code s. 192 it not being alleged that injury was occasioned to the person of any individual. But *semble* if such injury had been alleged the count would have been bad as charging two offences, one a criminal offence under the Code and one otherwise.

2. The indictment was not sufficient at common law because it did not close with the words "to the common nuisance of etc." Also, 2. Not sufficiently certain, not indicating in what way the obstruction interfered with the comfort of the public—whether to those passing along, or living near it or otherwise.

3. Nor was the locality of the obstruction described with sufficient certainty.

4. Assuming that judicial notice could be taken of the fact that the municipality of East Hants is within the county of Hants where the indictment was preferred, the same could not be said of Tennycape where the prosecutor and others were alleged to have been injured.

*Christie*, K.C., for prosecution. *Sangster,* for defendant.

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Longley, J.] LANGILLE *v.* ERNST. [Oct. 29.

*Maritime law—Collision—Damages.*

Defendant's vessel collided with plaintiff's vessel while the latter was lying at anchor in port at night. It being shewn that defendant's vessel was at fault and that plaintiff's vessel had complied with all the requirements to be observed by a vessel of her class,

*Held,* that plaintiff was entitled to recover damages, but that these must be confined to the cost of making repairs and could not include a claim for loss of fishing during the season there being no data to enable the Court to fix a sum for such loss.

*McLean*, K.C., and *Freeman*, for plaintiff. *Roberts,* for defendant.

Townshend, J.] DAVISON *v.* ARMSTRONG. [Nov. 6.

*Bribery at election—Suit for penalty.*

The Nova Scotia Election Act (R.S. 1900, c. 5, s. 91), enacts that the following persons shall be guilty of bribery (describing them). It then proceeds: "And every person so offending shall be liable to forfeit the sum of four hundred dollars to any person who sues for the same costs, etc." In an action by plaintiff to recover the amount named defendant admitted the act, but contended that it was discretionary with the Court to impose any amount not exceeding $400.

*Held*, that to enable the Court to exercise a discretion the statute must expressly say so and that in the absence of such words, the action being in the nature of an action for debt, there was no option, and judgment must be given for plaintiff for the full amount sued for with costs.

*J. J. Ritchie*, K.C., for plaintiff. *Roscoe*, K.C., and *Daniels*, for defendant.

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Townshend, J.] FORREST *v.* SUTHERLAND. [Nov. 7.

*Trustee—Priorities — Principal and agent — Knowledge of agent imputed to principal—Costs.*

In an action by plaintiff to determine the priority of claims against a fund of which he was trustee it appeared that on February 19th, 1901, plaintiff received notice of an assignment made by the beneficiary to S., and that on May 27th, 1902, he received notice of a prior assignment of the same fund made by the beneficiary to G. The trial judge found that the agent of S. had notice of the prior assignment.

*Held*, that the knowledge of the agent must be imputed to and held to bind the principals; that although the principals had no direct knowledge of the assignment to G. they must be bound by all that their agent did within the scope of his authority.

Costs refused to plaintiff as between solicitor and client, but he was allowed the general costs of the action and trial. Costs were allowed to claimants in separate interests to be paid out of the fund. The Court refused to direct that solicitors' costs should be a first charge on the fund except as to the costs of plaintiff's

solicitor. As to others they were ordered to be added to the amounts due to the respective claimants and paid in the order specified.

*McInnes*, *J. A. McDonald*, *J. J. Ritchie*, K.C., and *W. B. A. Ritchie*, K.C., for various parties.

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Townshend, J.] THOMPSON *v.* CORBIN. [Nov. 8.

*Sale of goods—Boiler and engine—Warranty as to condition—Damages for breach.*

In an action for the price of a boiler and engine sold by plaintiffs to defendant, defendant claimed damages for breach of contract on the part of plaintiffs in respect to the condition of the machinery at the time it was received. The machinery purchased was a mill for the manufacture of laths and was guaranteed by plaintiffs at the time of purchase to be "everything in running order." When the engine was set up on or about Nov. 16th it was found that it would not work. After several ineffectual attempts to repair it on the spot it was removed to Truro for repairs and was not set up, and in working order until January 16th. There was evidence that there was a large and profitable demand for laths during this time the benefit of which defendant wholly lost. It was also shewn that he had a number of workmen on the ground for the purpose of carrying on his business, and that they were idle in consequence of the failure to get the engine at work. Also that it would have been inexpedient under the circumstances to have discharged the men and to have taken the risk of re-engaging them or securing others when the mill was ready, but that they were given as much work as possible with a view to reducing the amount of loss.

*Held*, that defendant was entitled to recover for loss of the mill wages of the men and other expenses resulting from plaintiffs' breach of contract aggregating $427.11.

*W. B. A. Ritchie*, K.C., and *T. R. Robertson*, for plaintiffs. *W. F. O'Connor*, and *T. J. N. Meagher*, for defendant.

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Townshend, J.] IN RE BERRIGAN. [Nov. 10.

*Fisheries Act—Violation by canning or curing lobsters without license—Distress not a preliminary to imprisonment—Excessive fees—Remedy.*

Defendant was convicted for canning or curing lobsters with-

out license in violation of 57 & 58 Vict. c. 51(D), s. 3, and 61 Vict. c. 39(D), s. 3, and was fined $20 and $10.65 costs, and was adjudged in default of payment forthwith to be imprisoned in the common jail for 30 days. His discharge was applied for on the grounds; (1) That before a warrant for his imprisonment could issue and be executed a warrant of distress must be issued and returned, and (2) That the sum placed in the warrant for costs and charges of conveying defendant to goal, $25, was excessive.

*Held*, 1. It was competent for the justice to issue the warrant for imprisonment in the first instance without resorting to distress and that it was not imperative in construing the statute (c. 39, s. 3, sub-s. 18), to read the word "may" as "must."

2. If excessive fees were charged the defendant's remedy was by action and he should not be discharged from goal on that ground.

*A. A. Mackay*, for the prisoner.

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Full Court.] BENT *v.* MORIN. [Nov. 16.

*Absconding debtor—Affidavit for arrest—Form.*

An affidavit for order for arrest which contains allegations setting out a good cause of action in respect to the amount for which the defendant is held to bail is sufficient even though it may be somewhat unusual in form.

*Mellish*, K.C., for appellant. *O'Connor*, for respondent.

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## Province of New Brunswick.

### SUPREME COURT.

Full Court.] [Nov. 16.

THE KING *v.* KAY.

*Canada Temperance Act—Fine exceeding $50.00 for first offence.*

This was an application to quash a conviction under the above Act on the ground that the fine was excessive, and beyond the power of the magistrate. The appellant had been fined $200 for a first offence, under the C.T.A., which enacts that the fine for the first offence shall not be less than $50.00.

*Held*, that the magistrate had power to fine $200, and he acted within his rights, as long as the amount was not less than $50.00. There might be a case (*e.g.*, where the fine was, say, $1,000), which the Court should interfere as being exorbitant, but this is not such a case and the application was refused.

*Trueman*, K.C., for appellants. *Chandler*, K.C., contra.

## Province of Manitoba.

### COURT OF APPEAL

Full Court.] [Oct. 22.

CARRUTHERS *v.* CANADIAN PACIFIC RY. CO.

*Railway—Obligation to fence for the protection of others than the lawful occupants of adjoining lands.*

The plaintiff had a verdict for the killing, by a train of the defendants, of four horses, which, without any negligence on his part, escaped from his enclosed pasture into a highway, thence into the field of a neighbour adjoining the defendants' right of way, and thence through an opening in the fence along the right of way on to the railway track. The defendants had neglected for two years to place a gate at such opening.

*Held*, PHIPPEN, J.A., dissenting, that, under ss. 199 and 237 of the Railway Act, 1903, the obligation of a railway company to fence their right of way is a duty which it owes to the public at large, and is not imposed upon it solely for the benefit of the occupants of the lands adjoining the right of way, and that the plaintiff was entitled to recover. *Fenson* v. *C.P.R.*, 8 O.L.R. 688, and *Bacon* v. *G.T R.*, 7 O.W.R. 753, followed. *Ferris* v. *C.P. Ry. Co.*, 9. M.R. 510, not followed.

*O'Connor* and *Barrett*, for plaintiff. *Aikins*, K.C., for defendants.

Full Court.] [Oct. 22.

COSENTINO *v.* DOMINION EXPRESS CO.

*Bailment—Negligence—Involuntary bailee.*

Judgment of Richards, J., noted ante, p. 364, reversed, Perdue, J., dissenting.

Per HOWELL, C.J.:—Defendants did not know that the envelope containing the money was the property of another. They thought it was their own property and treated it exactly in the same way as they treated their own registered letters, and it disappeared. The defendants owed no duty to the plaintiff to take care of the letter. Nor can the plaintiff complain of any negligence of the defendants. They thought the letter was theirs, and they had a right to do with their own as they chose.

Per PHIPPEN, J.:—The loss of the money was the consequence of the plaintiff's taking and using one of the company's envelopes which he had no right to do. The contingency of persons causing large sums of money to come into its clerks' possession on other than the company's business was not one which the company was bound to contemplate when selecting its clerks and determining their fitness for the position they were appointed to fill.

*Hoskin*, for plaintiff. *Robson* and *Coyne*, for defendants.

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Full Court.] BANK OF OTTAWA *v.* NEWTON. [Oct. 22.

*Insolvency—Assignments Act, R.S.M. 1902, c. 8, s. 29—Rights of second creditor after valuation of his security.*

Judgment of RICHARDS, J., noted ante, p. 401, reversed on appeal.

*Held*, that, when the assignee has failed within a reasonable time to exercise his right of election to take over the securities at ten per cent. above the valuation, the creditor has the right to collect what he can from the securities, and rank for dividends as a creditor for the full amount of the difference between his claim and the valuation, although he may have collected from the securities more than the amount of his valuation, provided he shall not receive in all more than 100 cents in the dillar; also, that the creditor cannot be called upon to re-value his securities.

*Robson*, for plaintiff. *Hoskin*, for defendant.

---

Full Court.] McDOUGALL *v.* GAGNON. [Oct. 22.

*Registered judgment—Judgments Act—Devolution of Estates Act—Interest of heir in lands of intestate before letters of administration granted—Parties to action.*

Judgment of RICHARDS, J., noted, ante, p. 363, reversed.

Under s. 21 of "The Devolution of Estates Act," R.S.M. 1902, c. 48, land of a deceased intestate vests in the administrator who has power to sell it for payment of debts. If sold, any surplus goes to the next of kin as if it were personal estate. But before an administrator is appointed it is impossible to say whether the next of kin will ever have any interest in the land as land, so that the next of kin has no interest in the land which can be bound by the registration of a certificate of judgment under s. 3 of "The Judgments Act," R.S.M. 1902, c. 91. In the present case, the defendant's interest sought to be sold was only that of sole lien to his wife—who had died childless and intestate —and the wife's interest in the land in question was as an heir of her father, the owner of the land, who had died intestate. Letters of administration of the father's estate had been granted to the widow, but she had neither sold the land nor conveyed any interest in it to the defendant's wife. No administration of the wife's estate had been appointed. There was, therefore, a double uncertainty whether the defendant would ever have any interest in the land.

*Held,* also, that an administrator of the estate of the defendant's wife was a necessary party to any proceedings affecting her estate or the defendant's interest in it. *Re Sheppard,* 43 Ch. D. 131, followed.

*Semble,* even if the estate of the defendant's wife had been represented in the action, it would have to be held that the defendant, while the land remained vested in the administrator, had no interest in it which would be bound by the judgment: *Thomas* v. *Cross,* 2 Dr. & Sm. 423.

Sec. 3 of "The Judgments Act," with the interpretation of the word "land" given in sub-s. (*f*) of s. 2, refers to a present existing interest in land, and does not cover an interest which may come to him as real estate or may come to him as money according to the actions of the administrator and the unknown exigencies of the administration. The defendant may have an interest in his wife's estate which the plaintiff might reach by proper proceedings such as the appointment of a receiver, but he has no interest which can now be sold as land under a judgment and conveyed as land by the Court to a purchaser.

*Wilson* and *Hartley,* for plaintiff. *Hudson* and *Marlatt,* for defendant.

## KING'S BENCH.

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Mathers, J.] VANDERLIP *v.* PETERSON. [Oct. 16.

*Contract—Acceptance of offer—Option to purchase land—Specific performance.*

Defendant gave plaintiff an option to purchase land. The day before the option was to expire, plaintiff tendered defendant his wife's marked cheque for a deposit of $100 on account of the purchase money and desired him to sign a document evidencing a sale of the land to the plaintiff's wife on terms named and acknowledging the receipt of the $100. Defendant objected to sign the document on the ground that it shewed a sale to the plaintiff's wife and not to himself, but said he would retain the cheque in the meantime until he could consult his solicitor. Plaintiff then told him to make the receipt satisfactory, and that all he wanted was a receipt for the $100. The defendant did not see his solicitor for a couple of days, but after having seen him he decided not to sell and sent back the cheque to the plaintiff. Several days after the option had expired the plaintiff tendered the full amount of the cash payment, $1,000, and, upon the defendant refusing to accept it, brought this action for specific performance.

*Held*, that the plaintiff had not, within the time limited, notified the defendant of his acceptance of the latter's offer and could not, therefore, succeed in the action. Instead of accepting the offer himself, he tendered his wife as the purchaser and was not bound to accept as purchaser any person other than the plaintiff, who did not accept the option on his own behalf until after the expiration of the time limited.

*Haggart* and *Whitla,* for plaintiff. *Monkman* and *Morley,* for defendant.

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Dubuc, C.J.] [Oct. 22.

UNION BANK OF CANADA *v.* DOMINION BANK.

*Bank cheque—Forgery—Indorsement of cheque—Liability as between banks for loss of money paid on forged cheque.*

The Provincial Treasurer having mailed a cheque on the

plaintiff bank for $6, an employee of the payee erased the name and the amount, substituted his own name and $1,000, indorsed the altered cheque and deposited it to his credit with the defendant bank. The defendants refused to advance more than $25 on the cheque until they should learn that plaintiffs would pay it. The defendants stamped the name of their bank on the back of the cheque and put it through the clearing house in the usual way, after which it was paid by the plaintiffs. Defendants then honoured the cheques of the forger for $800 more, after which the forgery was discovered. Either bank, before paying the cheque, might easily have ascertained the forgery by communicating by telephone or otherwise with the Provincial Treasurer's office.

*Held*, following *Rex* v. *Bank of Montreal*, 11 O.L.R. 595, that the plaintiffs could only recover from the defendants the balance of $175 still in their hands, which, in their statement of defence, they had offered to pay, and that the stamping of the name of the defendant bank on the back of the cheque was not, under the circumstances, an indorsement of it but was only for the purpose of identification and to indicate that the cheque was the defendants' property.

*Wilson* and *Frank Fisher*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

## Province of British Columbia.

### SUPREME COURT.

Irving, J.] REX *v.* JIMMY SPUZZUM. [Oct. 23.

*Criminal law—Evidence, admissibility of—Complaint in case of rape—Questions put to complainant by her aunt the following day.*

In a trial on an indictment for rape, the Crown offered as a witness an aunt of the complainant, who went to the latter's house on the afternoon of the day after the alleged rape, and put to the complainant certain questions.

*Held*, (overruling an objection that what complainant said in answer to questions was in the nature of conversation and not

complaint, and following *Rex* v. *Osborne*, (1905) 74 L.J. K.B. 311, and it not appearing that the questions were of a leading or suggestive character, that the evidence was admissible.

*McQuarrie*, for the Crown. *Myers Gray*, for accused.

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Full Court.] [Nov. 10.

STAR MINING AND MILLING CO. v. B. N. WHITE CO. (Foreign).

*Practice—Appeal—Trial—Security for costs.*

The action proceeded to judgment and plaintiffs duly appealed, but the appeal was stood over several sessions of the appeal Court for want of a competent quorum. Defendants then applied under s. 114 of the Companies Act, 1897, for security for costs of the action and of the appeal.

*Held,* affirming the decision of HUNTER, C.J., that by s. 101 of the Supreme Court Act, as amended by c. 15 of the statutes of 1905, the legislature intended that all appellants should be placed on the same footing as regards the limit of security.

*Bodwell,* K.C., and *Lennie*, for appellants. *Davis,* K.C., and *S. S. Taylor*, K.C., for respondents.

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## Book Reviews.

***The Law of the Domestic Relations, including Husband and Wife: Parent and Child: Guardian and Ward; Infants, and Master and Servant***, by WILLIAM PINDER EVERSLEY, B.C.L., M.A., of the Inner Temple, Barrister-at-law (third edition), London: Stevens and Haynes, law publishers, Bell Yard, Temple Bar. And Toronto: Canada Law Book Co., 32 Toronto Street, 1906.

An excellent work, scientific in arrangement and clear in expression. The prefaces of the present third edition, and the second edition (published ten years ago) set forth the develop-

ment and changes which have taken place, and are taking place in the two great relations in life: husband and wife and parent and child. The former in the direction of the separation of husband and wife in regard to business relations, which, however, as the author points out, gives opportunities for frauds, too frequently noticed in cases recently before the Courts, and which those who have occasion to deal with husbands and their wives as traders have found to their cost. The struggle which has taken place between the legislature and judges in regard to the relation of husband and wife ought to be and surely might be put an end to by some sweeping legislative enactment, which would both prevent such frauds, and at the same time give wives proper freedom as to property.

As to infants, the tendency to interference, both by the legislature and the Courts, with parental and tutorial control of young persons is very marked. This has been a boon to those unfortunates whose parents realize nothing of their responsibility to their prodigy, but it is a tendency which has its dangers, and some of the necessary results of this are being seen, and may be looked upon as one of the signs of the times.

The bulk of the work is taken up with these two subjects. The law of Master and Servant is not treated at any length; nor is there any need when we have the great work of Mr. Labatt on that subject to refer to, a work which covers the whole ground, and is as remarkable for its accuracy as for its industry and research.

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*Digest of cases determined in the Ontario Courts, Supreme and Exchequer Courts of Canada, and Canadian appeals to the Judicial Committee of the Privy Council.*

This is the first quinquennial supplement to the digest of Ontario case law, and has been prepared by Edwin Bell, LL.B., Barrister-at-law, under the instructions and by the authority of the Law Society of Upper Canada. The work seems to have been done with the care and intelligence that Mr. Bell gives to his legal literary work. Toronto, Canada Law Book Co., Limited, 32 Toronto Street.

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