Canada Law Journal.

VOL. XLVIII. TORONTO, AUGUST. Nos. 14 & 15.

AN ELECTORAL ABUSE.

One of the worst features of our very imperfect electoral system is the way with which we deal with the vacancies constantly occurring in the representation of constituencies in the House of Commons. No sooner does a seat become vacant than the agents of both parties go to work to find suitable candidates, and the process is often one of difficulty. The party in power having control of the elective machinery, can, by the simple process of not appointing a returning officer, delay the election till their friends are ready for the contest, and till that time arrives, be it long or short, the constituency remains unrepresented, even though in the middle of a session when great issues are at stake. Thus, we have seen an important constituency unrepresented for nearly twelve months because the supporters of the party in power could not reconcile conflicting local or sectional differences. Both parties having been equally guilty in this respect, the tu quoque argument is mutually applied with great effect, but a worse use of it can hardly be imagined.

How different is the process in the Old Country, from which we have yet much to learn in the conduct of political affairs in spite of our conceit and self-confidence. No sooner does a seat in the British House of Commons become vacant than within a very short period, which never varies, an election is automatically held and the representation of the constituency restored. No time is given for the settlement of political cabals, or personal quarrels. The right of the electors to be represented in the great council of the nation is the first consideration, and to that everything else must give way.

In our own House of Commons there are now a number of vacancies. In a similar case in Great Britain they would all be filled in a fortnight or so; here they must remain vacant till

the whips of the party in office report that the time has come when the election may advantageously be held.

We have called attention to this subject before, but party exigencies before public or any other rights have hitherto been the principle upon which our affairs are conducted.

JUVENILE DELINQUENTS.

Alberta, the youngest province in Canada, is the first to comply with the conditions of the Dominion Act, respecting juvenile delinquents, which will come into operation as soon as possible after the order-in-council and the certificate of the provincial attorney-general are entered at Ottawa. Authorities on the subject of child-training, including Judge Lindsay, of Denver, Judge Mack, of Chicago and Judge Adams, of Cleveland, declare this will complete the best series of Acts for the rescue and protection of children in force anywhere on the American continent.

The Act, which was introduced into the Dominion parliament through the efforts of W. L. Scott, a barrister at Ottawa, and assented to in July, 1908, extends the principles that have been applied to the delinquent and neglected child in Alberta, since the adoption of the Children's Protection Act, passed by the provincial legislature.

The preamble of the Dominion Act fully sets forth the spirit of remedial legislation in the interest of children, as follows:

"It is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should, on the contrary, be guarded against association with crime and criminals and should be subjected to such care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts."

Disassociating the child offender from all criminal taint is the primary idea throughout the Act. The term "child" applies to a boy or girl apparently or actually under the age of 16 years. This designation permits those who have authority to enforce the Act to use their own discretion in regard to a child, which the

parents might maintain has reached its sixteenth year, but which may obviously be in need of such protection as the law gives, though it applies chiefly to children whose exact age cannot be determined.

The act provides for dealing with offending children summarily in courts where the proceedings are private. It is unlawful for any newspaper to publish the name of the child or parent or guardian without special leave. Courts shall not be held where adult offenders are being tried and the child awaiting trial must not be placed in a jail or other place where adults are or may be imprisoned.

The children's court may be divested of the customary majesty and rigid formality, which usually attend the administration of justice in the tribunals of record. A provision of the act, dealing with this point, says: "The procedings may, in the discretion of the judge, be as informal as the circumstances will permit." The testimony of a child may be received, though not given on oath, but such evidence, uncorroborated, is not sufficient to convict a person.

Several means are provided under the act for the child proved to be a juvenile delinquent, but the action taken must in every case be that which the court believes is for the child's own good and the best interests of the community. The offender may be fined. or placed under probation, either in its own home or with a suitable family, or committed to the charge of any duly organized children's aid society or the superintendent of neglected and dependent children.

It is also provided that a child over the age of 12 years may be committed to an industrial school, but it shall not be lawful to commit a child under 12 years, "unless and until," to quote from the act, "an attempt has been made to reform such child in its own home," or in the ways named in the foregoing paragraph.

Another section provides that the expense of maintaining a child in the industrial training school may be collected from the parent or guardian, in the event they are able to pay. The idea is to prevent any one from swearing his charge is intractable, in

the hope that the child will be sent to an institution to be fed, clothed and educated at the expense of the province. The penalty for an adult who, either wilfully or through neglect, contributes to a child's delinquency, is as high as $500 and a year in prison.

The judge of a juvenile court is given the powers of two justices of the peace or of a stipendiary magistrate. The position is an honorary one, and the selection will take into consideration the special qualifications of the person to be appointed for dealing with children. Probation officers have the same power as constables. The present system will be enlarged and improved, volunteer and paid probation officers being used more extensively than previously.

Arrangements are being made with two Protestant and Catholic institutions to care for girl delinquents, while as heretofore boy offenders will be sent to the industrial training school at Portage La Prairie, Man., with which the province has an agreement to handle its juvenile charges requiring reformation.

SOLICITOR ACTING FOR OPPONENT OF FORMER CLIENT.

In importance to solicitors, few decisions of late years can rank with that of the Court of Appeal in the recent case of *Rakusen* v. *Ellis, Munday, and Clarke,* 106 L.T.Rep. 556. For that court has given its sanction to a principle which is of no little value to the Profession, however occasional may be their desire or opportunity to have recourse to it: a solicitor who has acted for one party in a particular matter is not ipso facto debarred from subsequently acting for the opposite party in the same matter. The circumstances of each case have to be regarded. It was conceived by many that the result of the authorities was that a solicitor who had once been employed by a client could not afterwards act against him in the same matter; nor could his partner do so. And Mr. Justice Warrington unhesitatingly expressed his opinion to that effect in giving his judgment in the present case in the court of first instance. But as appears

from our report, the learned judges of the Court of Appeal unanimously reversed his decision, holding that, although there may be cases where the circumstances are such as to render a going over to the enemy highly improper, yet no general rule against that course exists. Each case has to be treated on its own facts, and any real mischief to be guarded against considered—*e.g.*, that the solicitor cannot clear his mind of confidential information obtained from his former client. What naturally enough gave rise to the notion which not unusually prevailed that some such general rule tied the hands of solicitors in this respect was the report of the case of *Earl of Cholmondeley* v. *Lord Clinton,* 19 Ves. 261. The unqualified nature of the marginal note to that report is quite a sufficient excuse for anyone being misled. It runs thus: "An attorney or solicitor cannot give up his client and act for the opposite party in any suits between them." That wide and general proposition of law would conduce to the supposition that the decision of Lord Eldon, L.C. there was not based on the particular facts of the case, but was of universal application. The authoritative explanations, however, of that decision which the learned Lord Chancellor vouchsafed in the subsequent cases of *Beer* v. *Ward,* Jac. 77, and *Bricheno* v. *Thorp,* Jac. 300, serve to demolish that justifiable first impression. What also was laid down by Vice-Chancellor Hall in *Little* v. *Kingswood Colleries Company,* 47 L. T. Rep. 323; 20 Ch. Div. 733, at p. 740, was with equal readiness capable of being disposed of. Although not formally reversed by the Court of Appeal when the case came before it, the decision of the learned Vice-Chancellor plainly did not meet with their approval. In the opinion of Sir George Jessel, M.R., indeed, he had gone further than had been done in any previous case. Two of them in Ireland were cited as instances—namely, *Hutchins* v. *Hutchins,* 1 Hogan 315, and *Biggs* v. *Head,* Sausse & Scully 335. With the decisions in *Earl Cholmondeley* v. *Lord Clinton* (*ubi sup.*) and *Little* v. *Kingswood Collieries Company* (*ubi sup.*) thus displaced from the position which they were believed to hold, the Court of Appeal in *Rakusen's* case (*ubi sup.*) had a clear course open for the conclusion at which

they thought proper to arrive. All the some, that conclusion does not prevent a solicitor being restrained from disclosing information confidentially obtained from a client; (see *Robinson* v. *Mullett*, 4 Price, 353; *Davies* v. *Clough*, 8 Sim. 262; and *Parratt* v. *Parratt*, 2 DeG. & Sm. 258). As we have already remarked, probably it is not very frequently that the privilege now made manifest will be taken advantage of. Most solicitors will doubtless prefer to avoid putting themselves in a situation that may possibly lead to trouble with a former client. But the removal of the imputation that they cannot be trusted to occupy that position is none the less of concern to them.—*Law Times.*

CANADIAN MARRIAGES.

A strong Board of the Judicial Committee of the Privy Council has now finally determined the difficult question that has arisen, with regard to marriages in Canada, as to the respective powers of the Federal and Provincial Legislatures. Under s. 91 of the British North America Act, 1867, the Dominion Parliament may make laws in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Provincial Legislatures, and it declares that the exclusive legislative authority of the Dominion Parliament extends (inter alia) to marriage and divorce. By s. 92, however, Provincial Legislatures may exclusively make laws as to the solemnization of marriage in the province. It has now been held that the jurisdiction of the Dominion Parliament, on the true construction of those sections, does not cover the whole field of validity, and that under s. 92 the power conferred on the Provincial Legislatures operates by way of exception to the powers conferred as to marriages by s. 91, and enables them to enact conditions as to solemnization which may affect the validity of the contract. The effect of this decision is to uphold the conclusions arrived at by the Supreme Court of Canada, and doubtless it will be sought to obtain an amendment of the Act of 1867 to enable the Dominion Parliament to pass a uniform marriage law through-

out the Dominion. Where religious questions are concerned. it is always a matter of great difficulty to frame an enactment that shall be fair and just to all, but, at the same time, the supreme authority in matters of marriage and divorce must be the entire State, and the interference by any particular church cannot be tolerated.—*Law Times.*

JUDICIAL APPOINTMENTS IN ENGLAND.

To fill the vacancy created by the retirement of Lord Robson, Lord Justice Fletcher Moulton has been appointed a Lord of Appeal in Ordinary. This appointment is unexceptionable, and the judicial strength of the House of Lords will receive a notable accession by the elevation to that House of the learned Lord Justice. Sir John Fletcher Moulton, who was appointed to the Court of Appeal in January, 1906, from the Inner Bar, has shewn that he is possessed of a peculiarly wide and extensive knowledge of law, and an equal capability of applying that knowledge to the facts of any particular case. The frequency with which the House of Lords have adopted his dissenting judgments in preference to those of the other members of the Court of Appeal is ample evidence of the weight and authority which attaches to his opinion. The vacancy in the Court of Appeal will be ably filled by the appointment of Mr. Justice Hamilton to be a Lord Justice. Although, perhaps, some surprise may be felt at the elevation of the learned judge over the heads of certain of his brethren senior in standing, no one can doubt the excellence of the choice which has been made. Mr. Justice Hamilton had the reputation when at the Bar, of being very learned in that branch of the law which is most frequently administered in the Commercial Court, and has shewn, since his appointment to the Bench in 1909, that his learning is not confined to any particular branch, but embraces a wide knowledge of the common law and the principles of equity. The appointment of Mr. Rowlatt to succeed Mr. Justice Hamilton will occasion no surprise. Mr. Rowlatt has for seven years acted as

"Attorney-General's devil," a position which has for a very long time past been regarded as a stepping-stone to the Bench. In doffing a stuff gown for the judicial robes, Mr. Rowlatt is following the example of a number of eminent lawyers who have filled the position he is now vacating. Apart from his work in his capacity as counsel to the Treasury, Mr. Rowlatt has enjoyed a considerable practice at the Junior Bar, which has kept him in touch with the ordinary practice of the courts, and should prove of service to him and to litigants who may appear before him. We shall await with some curiosity the announcement of the name of his successor.

Almost contemporaneous with the announcement of the foregoing appointments was that of the death of Sir Alfred Wills. The late judge, since he retired from his seat in the King's Bench Division in 1905, to which he was appointed so far back as the year 1884, occasionally sat as a member of the Judicial Committee of the Privy Council, but was otherwise but little seen in public. Occasional letters to the press, emanating from his pen, and principally in connection with the punishment of criminals, served to recall his memory. His death, as was his retirement, will be regretted universally by both sides of the profession, who will remember his invaluable kindliness of demeanour towards them, his sound common-sense and legal knowledge, and the quiet dignity with which he presided over his court. A well-known instance of this last characteristic of the late Sir Alfred Wills was his charge to the jury in the trial at bar of Lynch for treason in January, 1903.—*Law Times.*

THE "TITANIC" REPORT.

Lord Mersey's report on the loss of the "Titanic" is entirely what the profession expected it to be—practical, judicial, and impartial. The court finds that the loss of the ship was due to collision with an iceberg, brought about by the excessive speed at which she was being navigated, and, although in some quarters exception is taken to the form of the finding and it is suggested

that the speed was not the only factor that brought about the disaster, it is abundantly clear that it was the chief determining cause. Praise is accorded where due, and Lord Mersey is not sparing in censure when such is deserved; while certain unfounded aspersions that during the inquiry were cast on certain persons are described as unfounded. It is not surprising that the failure of the Board of Trade to revise their rules should be the subject of adverse criticism at the hands of the commissioner, while his recommendations with regard to boat drill, look-outs, and wireless telegraphy will commend themselves to everybody. The recommendation also that an international conference should be called to consider and, as far as possible, to agree upon a common line of conduct upon the main questions raised in this inquiry is a good one, and might do much to assist in reducing some of the dangers which exist as regards ships at sea.—*Law Times.*

ACCIDENT DUE TO WORKMAN'S DISOBEDIENCE.

But for judicial intervention, the provisions of sect. 1, subsect. 2 (*c*), of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58) would bear far more harshly and unfairly on employers of labour than in fact they do. Attention, therefore, cannot too frequently be called to instances where a corrective restraint has been enjoined by the courts. And the latest of them is furnished by the decision of the Court of Appeal in the recent case of *Parker* v. *Hambrook* (noted ante, p. 280). The effect of the subsection is that a workman, who has met with an accident and has thereby sustained an injury which is attributable to his "serious and wilful misconduct," becomes disentitled to compensation—"unless the injury results in death or serious and permanent disablement." It is seen, therefore, that, according to the Act, the graver the consequences of a workman's "misconduct" the more does the severity of the burden imposed on the employer manifest itself. But even where "death or serious and permanent disablement" results from the injury, mitigation is

conceded by the courts. The workman, or his dependants in the event of his death, cannot claim compensation if the risk that he took—conducing to his "serious and wilful misconduct," in short – was not necessary or reasonably incidental to the employment in which he was engaged. This important principle was enunciated with the utmost distinctness by the Court of Appeal in the two cases of *Harding* v. *Brynddu Colliery Company Limited* (105 L.T. Rep. 55; (1911) 2 K.B. 747) and *Rose* v. *Morrison and Mason Limited* (105 L.T. Rep. 2). What, however, is of much greater concern is that the principle met with the unequivocal approval of the House of Lords in *Barnes* v. *Nunnery Colliery Company* (105 L.T. Rep. 961). A further case, in which the same principle was discussed, was *Watkins* v. *Guest, Keen, and Nettlefolds Limited* (106 L.T. Rep. 818). In the first place, want of prudence and caution, or even infringement of rules, may be immaterial, in the view taken by the House of Lords in *Barnes'* case (ubi sup.). The workman in *Parker* v. *Hambrook* (ubi sup.) was undoubtedly imprudent. Also he did what was equivalent to disobeying a rule, even though it was no more than a safety order that he disregarded. But unquestionably he did imprudently or disobediently something different from that which he was required or expected to do in the course of his employment, and, moreover, was prohibited from doing. Thus, he came within the plain ruling in *Barnes'* case (ubi sup.). Because he could obtain flints, for which he was employed to dig, more rapidly and easily in a deep trench than in other parts of the hollow or quarry where he was working, he went there despite an express order to the contrary on account of the danger that existed of the soil falling in. His rate of remuneration depending on the quantity of flints that he secured, it was to his personal advantage to work in that dangerous trench—known by him to be so—notwithstanding the strict prohibition against his going there. The principle laid down by the Court of Appeal in *Harding's* case (ubi sup.) was not acted upon there, inasmuch as in the opinion of the majority of the Court it did not come into operation.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

EVIDENCE—WEIGHT TO BE GIVEN TO OPINION OF JUDGE AT TRIAL—COURT OF APPEAL—FINDING OF FACT.

Hob v. *Tong* (1912) A.C. 323 was an appeal from the Supreme Court of the Straits Settlements. The action was for the administration of a deceased person's estate and the right of the plaintiff depended on whether or not his mother was the adopted or natural daughter of the deceased. The evidence was conflicting, and upon the oral evidence there was plainly perjury on one side or the other. The judge who tried the action gave judgment in favour of the defendant, holding that the evidence established that the plaintiff's mother was an adopted daughter and therefore that the plaintiff was not of kin to the testator. The Supreme Court reversed his decision, and found that the plaintiff's mother was the natural daughter of the testator, born in wedlock. The Judicial Committee of the Privy Council (Lords Macnaghten, Mersey and Robson), after a careful review of the evidence, came to the conclusion that the finding of the judge at the trial ought not to have been disturbed, especially as his findings were consistent with the probabilities of the case.

SALE OF GOODS—PRICE TO INCLUDE COST, FREIGHT, AND INSURANCE—PAYMENT IN EXCHANGE OF SHIPPING DOCUMENTS—BILL OF LADING FOR PART ONLY OF TRANSIT—TENDER.

Landauer v. *Craven* (1912), 2 K.B. 94, was a case stated by arbitrators. The plaintiffs had contracted to buy a cargo of hemp from the defendants, the price to cover cost, freight, and insurance. By the terms of the contract the goods were to be shipped from a port in the Philippine Islands or from Hong Kong by steamer or steamers direct or indirect to London between October 1 and December 31, 1909. The defendants purchased the required quantity of goods and shipped them under bill of lading dated 28th December, 1909, to Hong Kong and they were there transhipped by steamer for London under bill of lading dated March 25th, 1910. In fulfilment of the contract the defendants tendered to the plaintiff the bill of lading from Hong Kong and the policy of insurance from Manilla to London. The question stated by the arbitrator was whether this was a sufficient tender to entitle the defendants to payment of the contract price; and Scrutton, J., held that it was not; be-

cause the plaintiffs were entitled to the benefit of a contract of affreightment for the entire voyage, and because according to the contract the shipment was to be made before 31st December, 1909, whereas the only bill of lading tendered shewed that the shipment was made after the stipulated date.

INSURANCE — CONCEALMENT — FLOATING DOCK—"SEAWORTHINESS ADMITTED"—UNSEAWORTHINESS.

Coutiere Meccarrico Brindisirio v. *Janson* (1912), 2 K.B. 112. This was an action brought on a policy of insurance of a floating dock. The policy was taken out to cover the voyage of the dock by sea in tow of a vessel. The dock was in sound condition, but in order to make it seaworthy it required to be strengthened, it was not in fact strengthened, the owners not believing that it was necessary. The policy contained the words "seaworthiness admitted." The defendants claimed that the omission to disclose that the dock had not been specially strengthened for the voyage was a concealment of a material fact which avoided the policy, but Scrutton, J., who tried the action was of the opinion that as the defendants knew that the subject of insurance was a floating dock and not an ordinary sea-going vessel, were by reason of their admission of its seaworthiness put upon inquiry as to its construction, and the owners were not bound to disclose the omission to strengthen it, for the purpose of the contemplated voyage.

MONEY-LENDER—REGISTERED NAME — MISDESCRIPTION OF NAME OF LENDER IN PROMISSORY NOTE TAKEN FOR A LOAN—BUSINESS CARRIED ON IN OTHER THAN REGISTERED NAME—MONEY-LENDERS' ACT, 1900 (63-64 VICT. C. 51), S. 2 (1)—2 GEO. V. C. 30, SS. 10, 12, ONT.

Peizer v. *Lefkourtz* (1912), 2 K.B. 235, The plaintiff was a registered money-lender being registered in the name of "Wentworth Loan and Discount Office"; she lent money to the defendant and took from him a promissory note payable to "S. Peizer of the Wentworth Loan and Discount Company." It was contended by the defendant that the substitution of the word "Company" for "Office" constituted a carrying on of business by the plaintiff otherwise than in her registered name. The objection was overruled by the County Court Judge who tried the action, and his decision was affirmed by Bankes and Lush, JJ., and their decision was affirmed by the Court of Appeal

(Williams, Farwell, and Kennedy, L.JJ.). The Court of Appeal held that the question of the materiality of a variance between the registered name and the name used is a question of law and not of fact, and that in their opinion the variance in question not being likely to mislead the borrower, was immaterial.

ADULTERATION—PURCHASE FOR ANALYSIS—NOTIFICATION TO SELLER—SALE OF FOOD AND DRUGS ACT, 1875 (38-39 VICT. C. 63), S. 14 (R.S.C. c. 143, s. 15; 6 EDW. VII. c. 4, s. 3 (D.)),

In *Davies* v. *Burrell* (1912), 2 K.B. 243, a Divisional Court (Lord Alverstone, C.J., and Avory, and Pickford, JJ.), decided that where an article of food is purchased for the purpose of analysis under the Food and Drugs Act, 1875 (see R.S.C. c. 143, s. 15, as amended by 6 Edw. VII. c. 4, s. 3), the notice of the intention to make an analysis "to the seller or his agent selling the article" need not be necessarily given to the agent of the vendor who sells the goods, but it will suffice if such notice is given to some other agent of the vendor.

WORKMEN'S COMPENSATION ACT, 1906 (6 EDW. VII. C. 58), S. 7—NON-APPLICABILITY OF ACT BEYOND TERRITORIAL JURISDICTION.

Schwartz v. *The India Rubber Co.* (1912), 2 K.B. 299, may be briefly noticed for the fact that the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), following *Tornabie* v. *Pearson* (1909), 2 K.B. 61, held that the Workmen's Compensation Act 1906, does not apply to workmen employed on British ships on the high seas, except in the case of seamen and others mentioned in s. 7 of the Act. In this case a workman was employed by the defendants to proceed in a British ship to Teneriffe to do work on electric cables there. The ship foundered in the Bay of Biscay and all on board were lost. The dependents of the workman claimed compensation against the employers under the Act, but it was held the Act did not apply to such a case.

MONEY-LENDER—SECURITY TAKEN BY UNREGISTERED MONEY-LENDER—"COURSE OF HIS BUSINESS"—COVENANT BY TRUSTEES "AS SUCH TRUSTEES BUT NOT OTHERWISE"—MONEY-LENDERS' ACT (63-64 VICT. C. 51), S. 2 (1)—(2 GEO. V. C. 30, S. 12, ONT.).

Re Robinson, Grant v. *Hobbs* (1912), 1 Ch. 717. This was an action to recover money secured by mortgage. The plaintiff

was an unregistered money-lender, but Warrington, J., held that he was entitled to recover because the mortgage was not taken in the usual course of his business but as a private investment, and that the mortgagors who were trustees and had covenanted "as such trustees but not otherwise" were personally liable under their covenant; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), disagreed with Warrington, J., as to his finding that the transaction was not in the ordinary course of the plaintiff's business; and being a money-lender and not registered as such they held that the mortgage was altogether void and illegal and therefore that the plaintiff could not recover on it, nor could he recover the money, but as money had and received. One of the trustees had omitted to set up the defence of the Act but the Court of Appeal held this to be immaterial and in any case an amendment would be allowed. Buckley, L.J., expresses the opinion that the covenant did not in any case bind the trustees personally, but only to pay out of the assets of the trust; but in view of the decision of the Court on the other point this may be considered *obiter*.

MORTGAGE — PRIORITY — MERGER.

In *Manks* v. *Whiteley* (1912), 1 Ch. 735, the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), have reversed the decision of Parker, J. (1911), 2 Ch. 448 (noted ante vol. 47, p. 762), on the question of priority. It may be remembered that the plaintiff was a second mortgagee and the defendant, Whiteley, having purchased the equity of redemption without notice of the plaintiff's mortgage paid off the first mortgage and then gave a mortgage to one Farrar to secure the amount borrowed from him to pay off the first mortgage. Parker, J., held that in these circumstances there was no intention to pay off the first mortgagee for the benefit of the plaintiff as second mortgagee, and therefore that Farrar was entitled to be subrogated to the rights of the first mortgagee. But the majority of the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.), held that the first mortgage was not kept alive, and that the plaintiff was entitled to priority. Moulton, L.J., however, dissented, and agreed with Parker, J., and it may be noted that the Master of the Rolls confesses that his opinion had varied and it was with hesitation he reached the conclusion he did. With all due respect to him the view of Moulton, L.J., appears to us the preferable one from an equitable standpoint, whereby

facts are considered not merely in the light of the form in which they are carried out, but in the light of their actual and substantial nature and effect; and on the facts of this case it was reasonably clear that it was the intention of all parties to the transaction that Farrar should stand in the shoes of the first mortgagee in respect of the loan which he made to pay him off, but through the bungling of the solicitor this object was not technically carried out as it should have been.

TENANT FOR LIFE—REMAINDERMAN — TRUST TO SELL AND CONVERT—DAMAGES RECOVERED FOR BREACH OF COVENANT IN LEASE—CAPITAL OR INCOME.

In re Pyke, Birnstingl v. *Birnstingl* (1912), 1 Ch. 770, In this case, trustees held certain residuary estate under a will upon trust to sell and convert and divide proceeds; but with power to suspend conversion; and by the will it was provided that until conversion, the residue was to be treated as money and that "the rents, dividends, and other produce thereof" should be deemed the annual income. Part of the estate consisted of a freehold theatre, subject to a lease, and prior to conversion the trustees sued and recovered damages from the lessees for breach of their covenant to repair. The question Warrington, J., was called on to determine was whether these damages were to be regarded as capital or income, and he determined that they must be treated as capital.

WILL — LEGACY — SPECIFIC BEQUEST OF SHARES—RE-CONSTRUCTION OF COMPANY—SHARES IN NEW COMPANY SUBSTITUTED FOR SHARES IN OLD COMPANY—ADEMPTION.

In re Leeming, Turner v. *Leeming* (1912), 1 Ch. 828. In this case the construction of a will was in question. The testator had given his ten £4 fully paid up shares in a company to one Nelson. After the date of the will but before the testator's death the company was re-constructed, and the testator received in place of his ten £4 shares two £5 fully paid preference shares and two £5 fully paid ordinary shares in the new company for every £4 ordinary share held by him in the old company, and these substituted shares were held by him at the time of his death. It was claimed that the legacy had been redeemed; but Warrington, J., held that there had been no redemption and that the legatee was entitled to the substituted shares in the new company.

SOLICITOR AND CLIENT—SOLICITOR DISCHARGED BY CLIENT ACTING FOR OPPOSITE PARTY—INJUNCTION.

Raknsen v. *Ellis* (1912), 1 Ch. 831. In this case the plaintiff had employed the defendants, a firm of solicitors, to act for him in reference to a claim he had against his employers for alleged wrongful dismissal. Subsequently the dispute was referred to arbitration and the plaintiff discharged the plaintiffs and employed another solicitor to act for him, whereupon the opposite party employed the defendants as their solicitor in the arbitration proceedings and the plaintiff thereupon brought the present action claiming an injunction to restrain the defendants from acting as solicitors for the opposite party in the arbitration proceedings. Warrington, J., granted the injunction, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), reversed his decision holding that when the client discharges his solicitor, there is no universal rule that the solicitor cannot act for his opponent, but that each case must depend on its own circumstances and though the client is entitled to be protected from his former solicitor disclosing to his adversary any confidential communications made to him in the course of his employment; yet the mere fact that he had formerly been in his employment, was, on his discharge, no bar to his accepting the retainer of his adversary, even in the same matter. Moulton, L.J., makes some observations on the fact that while one member of the firm had acted for the plaintiff it was another member of the firm who had had no previous knowledge of the matter who was acting for the plaintiff's adversary; which was a circumstance which appeared to satisfy him that no mischief would come of it to the plaintiff.

EMPLOYERS' LIABILITY ACT—NOTICE OF ACCIDENT—TWELVE MONTHS' DELAY—EMPLOYER PREJUDICED IN DEFENCE—"MISTAKE OR OTHER REASONABLE CAUSE"—LATENT INJURY—WORKMEN'S COMPENSATION ACT, 1906 (8 EDW. VII. c. 58) SEC. 2 (1)—R.S.O. c. 160, ss. 13, 14.

In *Egerton* v. *Moore* (1912) 2 K.B. 308, the plaintiff sought to recover compensation against his employer under the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58). The injury occurred on July 21, 1910, when the plaintiff, who was a navvy, fell into a trench. After ten minutes' rest he was able to resume work but on the next day and for a few days afterwards he was unable to work and so informed the defendant to

whom he shewed a swelling on . . . chest, but he made no claim and did not then know that he could do so. The swelling abated and the plaintiff resumed work on 27th July, with another employer. After this the plaintiff had no trouble except tenderness and intermittent pain, until February or March, 1911, when the swelling again commenced and a tubercular abscess formed. In February he thought it sufficiently serious to put down the date of the accident so that he could remember it. The plaintiff worked on and off for different employers earning full wages until May 25, 1911, when, after consulting a doctor he underwent an operation in August, 1911. In June, 1911, he told the defendant he had been ordered into a hospital but even then made no claim, and it was not till July 18, 1911, that a claim for compensation was made by the plaintiff's solicitor, and liability was denied. The County Court Judge held that notice of the injury was not given "as soon as practical after the happening thereof," and that the plaintiff had failed to shew that the defendant was not prejudiced in his defence by such want of notice and that the failure to give such notice or make a claim was not occasioned by "mistake or other reasonable cause," and he therefore dismissed the claim; and this judgment was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), the Court of Appeal holding that where notice has not been given as required by the Act the onus is on the plaintiff to shew that the defendant has not been prejudiced or if he has been prejudiced then the omission was occasioned by "mistake or other reasonable cause." That the mistake referred to in the section in question is one of fact and not of law. Some observations of Lord Adam in the case of *Rankine* v. *Alloa Coal Co.*, 41 Sc. L.R. 306, in which a wider meaning is given to the word mistake are adversely criticised, and dissented from.

EMPLOYERS' LIABILITY ACT—EVIDENCE — STATEMENTS BY DECEASED WORKMAN AS TO CAUSE OF INJURY—DECLARATION AGAINST INTEREST.

Tucker v. *Oldbury* (1912) 2 K.B. 317. This action was brought to recover damages for the death of a deceased workman. The Judge of a County Court who tried the action rejected evidence offered of statements made by the deceased as to the nature and cause of an injury to his thumb which ultimately resulted in his death. The evidence was to the effect that the deceased had told the defendants' manager when asked what

was the matter with his thumb, that he had a whitlow, and in reply to a further question whether he had been hammering his thumb, he had said "No." The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) held that this evidence was properly rejected, and in arriving at that conclusion the Court held the evidence was not admissible as admissions by the deceased as against the plaintiffs, inasmuch as they, as defendants, had a direct statutory right against the employers under the Act, 6 Edw. VII. c. 58; and the deceased was not a party to the litigation, and the plaintiffs did not derive their title to compensation through him. The Court also held that the statements were inadmissible as declarations against interest, because it was not shewn that, to the knowledge of the deceased, they were, when made, against his pecuniary interest; they having been made when no claim had been put forward, nor was there any reason to believe that the workman knew that he ever would be able to make a claim. They also thought that the statements were not necessarily against the interests of the deceased, as neither of them was inimical to, or would mitigate against the success of a claim, if he had lived to make one, inasmuch as the condition of the thumb might have arisen from some other cause than hammering.

AUCTIONEER—ACTION FOR PRICE OF GOODS SOLD—DEBT DUE FROM OWNER TO PURCHASER—SET-OFF.

Manley v. *Berkett* (1912) 2 K.B. 329. In this case the plaintiffs were auctioneers and sued to recover for the price of goods belonging to one Ford, sold by them at auction in which the defendant claimed to set-off against the purchase money a debt due by Ford to him. The facts were as follows: Ford, a farmer, employed the plaintiffs to sell cattle for him, and being pressed by creditors, Ford directed the plaintiffs, out of the proceeds of the intended sale, to pay the debts, amounting to £804 11s. 8d. Pending the sale, the plaintiffs lent money to, and did work for Ford upon the terms that they should repay themselves £62 11s. 6d. also out of the proceeds of the sale. The plaintiffs' commission and charges amounted to £34 13s. 0d. For the purposes of the sale Ford bought on credit from the defendant certain cattle at the price of £164 4s. 0d., and at the sale Ford induced the defendant to bid and buy cattle for the price of £195, on the terms that he should be at liberty to set-off the £164 4s. 0d. against the £195. The plaintiffs had no notice of this arrangement. The action was to recover the £195, and the

defendant as to £30 16s. 0d. pleaded payment, and as to the balance set-off £164 4s. 0d. for the price of the cattle. Bankes, J., who tried the action, held that in the circumstances of the case, the plaintiffs could not be bound to pay to Ford more than £27 16s. 4d. being the difference between the amount realized and the amount of the claims of the creditors and the plaintiffs' own debt and charges, and therefore as to that sum the set-off was good, but that it was bad as to the residue being in the nature equitable, and subject to the prior equitable claims upon the fund.

LANDLORD AND TENANT—DISTRESS — PURCHASE BY LANDLORD OF GOODS DISTRAINED—USER OF GOODS DISTRAINED BY LANDLORD —CONVERSION—DISTRESS FOR RENT ACT, 1737 (11 GEO. II. C. 19), S. 19—(1 GEO. V. C. 37, S. 53 (ONT.)).

The *Plasycoed Collieries* v. *Partridge* (1912) 2 K.B. 345. In this case the plaintiffs were lessees of a coal mine, the royalties, payable under the lease to the defendants the lessors being in arrear, the defendants distrained therefor certain ponies of the plaintiffs and certain wagons which they had hired from a wagon company, the goods distrained, and the defendants purported to buy them at the appraised value. The wagons they delivered up to the wagon company from whom they had been hired at their demand, although no sum was due for the hire of the wagons; the ponies the defendants used for their own purposes. The action was brought by the plaintiffs for conversion of the ponies and wagons, the sale to the defendants being invalid, and the defendants relied on s. 19 of the Distress Act, 1737 (see 1 Geo. V. c. 37, s. 53 (Ont.)) as relieving them from liability for conversion, and limiting their liability to the special damage, if any, sustained by the plaintiffs, and the Judge of the County Court, who tried the action, gave effect to that contention, but the Divisional Court (Hamilton and Lush, JJ.), held that the Act did not apply, as the acts complained of, were not done by defendants in their capacity of distrainors, nor in the course of the distress, but in their supposed capacity as owners of the goods by purchase and after completion of the distress.

JUSTICES—SUMMARY CONVICTION—UNSWORN TESTIMONY — REHEARING — JURISDICTION.

Rex v. *Marsham* (1912) 2 K.B. 362. This was a motion to quash a conviction in the following circumstances. The defen-

dant was convicted by a magistrate for assaulting a police constable in the execution of his duty, and by inadvertence the constable, who was assaulted, gave his evidence without being sworn. Upon the attention of the magistrate being called to the mistake, he later, on the same day, reheard the case, all the evidence being then given upon oath, and again convicted the defendant, and the motion was to quash this second conviction, upon the ground, inter alia, that at the time of the conviction, the defendant had been previously put in peril in respect of the same offence, but the Divisional Court (Lord Alverstone, C.J., and Pickford, and Avory, JJ.) overruled the objection, holding that the first conviction was invalid, and that the magistrate, notwithstanding it, had jurisdiction to rehear the case upon proper evidence.

VENDOR AND PURCHASER—SALE OF LAND—CONTRACT IN WRITING —SIGNATURE BY PURCHASER—CORRESPONDENCE REFERRING TO PARTICULARS—PARTICULARS AND CONDITIONS OF SALE—DEPOSIT NOT PAID—MEASURE OF DAMAGES—STATUTE OF FRAUDS—EVIDENCE.

Dewar v. *Mintoft* (1912) 2 K.B. 373. This was an action to recover damages for breach of contract to purchase land. The contract for sale provided that on failure to carry out the contract the deposit required by the conditions of sale should be forfeited, and that the vendor might re-sell. The defendant became the purchaser, but before paying the required deposit he repudiated the contract and the land was re-sold at a loss, but the loss was less than the amount that the defendant would have deposited had he carried out his contract. Horridge, J., held that in these circumstances, the measure of damages was not the actual loss on the re-sale, but the amount of the deposit which the defendant ought to have paid. The judgment also discusses the question as to the sufficiency of the contract, under the Statute of Frauds, and determines that the contract may be, and was in this case, sufficiently evidenced under the statute by a letter in which the purchaser sought to repudiate his contract, but which letter contained an explicit admission of its terms and referred to the particulars of sale, though not the conditions, but which the learned Judge held were also included because when the particulars were produced it appeared that they and the conditions of sale formed but one document.

PRACTICE—MOTION FOR JUDGMENT UNDER ORD. 14 (ONT. RULE 603)—UNCONDITIONAL LEAVE TO DEFEND—ORDER FOR TRIAL BY JUDGE WITHOUT JURY—APPLICATION FOR TRIAL BY JURY.

In *Kelsey* v. *Dounc* (1912) 2 K.B. 482, the plaintiff moved for judgment on a specially indorsed writ, and on the motion, leave was granted to the defendant to defend unconditionally, and the trial was ordered to be had before a judge. This order was affirmed on appeal to a judge in chambers, but was not further appealed against. The defendant subsequently applied for a trial with a jury, but it was held by the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) that the provision in the above-mentioned order for trial before a judge, not having been appealed against, precluded the granting of a jury.

VENDOR AND PURCHASER—CONTRACT — TITLE—ABSTRACT SHEWING OUSTER OF TRUE OWNER IN 1874—POSSESSORY TITLE.

In re Atkinson and Horsell (1912) 2 Ch. 1. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), have affirmed the decision of Eady, J. (1912) 1 Ch. 2 (noted ante, p. 100), holding that, notwithstanding the contract of sale provided that the title was to commence with a devise under a will of a testator who died in 1842, and it appeared by the abstract that the true owner under the will had been ousted by a person under whom the vendor claimed in 1874, and that the title of the vendor was really possessory, the title might nevertheless be forced on an unwilling purchaser. Moulton, L.J., seems to think that if the purchaser, when the vendor failed to shew a title under the will, had rescinded the contract, he could validly have done so, but that by applying under the Vendors and Purchasers Act he had precluded himself from the right to rescind, and the question was simply then whether or not a good title could be made.

PRACTICE—WRIT OF SUMMONS—SERVICE OUT OF JURISDICTION—ACTION TO PERPETUATE TESTIMONY—SUBJECT-MATTER OF ACTION—RULE 64 (ONT. RULE 162).

Slingsby v. *Slingsby* (1912) 2 Ch. 21. This was an action to perpetuate testimony to be used in a future action relative to the title to land in England. The plaintiff applied for leave to serve the writ out of the jurisdiction, but Warrington, J., refused the application and the Court of Appeal (Cozens-Hardy,

M.R., and Moulton, and Buckley, L.JJ.) affirmed his decision, the contention that the subject-matter of the action was land within the jurisdiction was held not to be tenable.

COMPANY—DEBENTURES—FLOATING CHARGE ON PRESENT AND FUTURE PROPERTY—PURCHASE OF PROPERTY—LOAN TO EFFECT PURCHASE—EQUITABLE CHARGE OF LENDER ON PROPERTY PURCHASED—DEPOSIT OF TITLE DEEDS—PRIORITY.

In re Connolly, Wood v. *The Company* (1912) 2 Ch. 25. In this case a company issued debentures creating a floating charge upon their undertaking and all their property present and future, one of the conditions being that the company should not be at liberty to create any other charge or mortgage in priority to the debentures. The company being desirous of purchasing a property agreed with Mrs. O'Reilly, that if she would advance the principal part of the purchase money she should have a lien on the property purchased for the amount advanced. The property was purchased by the company for £1,100, of which £1,000 was advanced by Mrs. O'Reilly; the same solicitor acted for the company and Mrs. O'Reilly and on the completion of the purchase money he received the title deeds on her behalf. A week later the company executed in favour of Mrs. O'Reilly an equitable charge for the amount of her advance. In these circumstances the debenture holders claimed priority over Mrs. O'Reilly in respect of the property so purchased, but Warrington, J., held that all the company had acquired in the property purchased was the equity of redemption subject to the equitable charge of Mrs. O'Reilly, who was therefore entitled to priority over the debenture holders, and this decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R. and Buckley, L.J.).

TRADEMARK—SURNAME.

In re Lea (1912) 2 Ch. 32. An application was made to register as a trademark the surname of an individual, and Joyce, J., held that though a surname is adapted to distinguish the goods of all persons taken collectively who bear that surname from the goods of persons bearing other surnames, it is not adapted to distinguish the goods of an applicant, even though the surname be unusual from those of other persons, and that therefore it ought not to be registered as a trademark.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS—COVENANT REQUIRING BUILDING PLANS TO BE APPROVED BY SURVEYOR—COSTS OF APPROVAL.

Reading Industrial Society v. *Patmer* (1912) 2 Ch. 42. In this case the plaintiff had purchased from the defendant part of a building estate and had covenanted that the plans of any buildings to be erected on the premises should be first approved by the defendants' surveyor. Nothing was said as to the payment of the expenses of the surveyor for examining and approving of the plans, the plaintiff claimed that these expenses were payable by the defendant. Eady, J., held that there being nothing in the covenant imposing on the plaintiffs a liability to pay the surveyor, who was employed solely by the defendant, and therefore that the defendant himself must pay his fees, without any right over against the plaintiffs therefor.

EASEMENT—IMPLIED GRANT OF RIGHT OF WAY—PLAN ON LEASE—ALTERATION OF LEASE BY AGREEMENT AFTER EXECUTION—ESTOPPEL.

Rudd v. *Bowles* (1912) 2 Ch. 60. In this case the plaintiff claimed to be entitled to an implied grant of a right-of-way over a lane in the following circumstances. Bowles was the owner of a parcel of land and granted to one Glock separate leases of four lots on which Glock, under a building agreement, had erected four houses. The leases were executed in 1903, but at the time the leases were executed the houses were not completed, and the back fences were not erected, but in 1904 the fences were erected and gates were placed therein opening on to a strip of land in the rear. This strip had since been used by the tenants of the houses, but was not mentioned in, or any rights over it given by the lease, except that on each lease was a plan of the demised premises which indicated the strip in the rear and which suggested that it was intended to give access to the rear of the lots. The plaintiff became mortgagee of the four leases and claimed a declaration that he, and those claiming under him, were entitled to a right-of-way over the strip in the rear, and Neville, J., held that he was so entitled; with regard the alteration in the leases after execution, he also held that it having been made by consent it did not invalidate the leases, but that the parties were estopped from disputing that the altered date was the true date of the leases.

WILL—DEVISE OF MORTGAGED PROPERTY—TRUST FOR SALE SUBJECT TO RENT CHARGES TO BE CREATED FOR BENEFIT OF DAUGHTERS OF SETTLOR—MARSHALLING — LIABILITY OF RESIDUARY ESTATE—REAL ESTATE CHARGES ACT, 1854 (17-18 VICT. C. 113), S. 1 (10 EDW. VII. C. 57, SEC. 38 (ONT.)).

In re Fry, Fry v. *Fry* (1912) 1 Ch. 86. The testator whose property was in question in this case, devised real estate which was subject to mortgages at the date of his will and death, to trustees on trust to sell, but directing that rent charges of specified amounts for the benefit of his daughters should be created and reserved thereout. The property was insufficient for the creation of the rent charges and the payment of the mortgage debts. There was no "contrary or other intention" signified by the testator within the meaning of Locke King's Act (17-18 Viet. c. 113) (see 10 Edw. VII. c. 57, s. 38 (Ont.)), Joyce, J., held, notwithstanding the provisions of that Act, that, on the principle of marshalling, the rent chargees were entitled to have the property sold subject to their charges, and to have the deficiency made good for the payment of the mortgage debts out of the general personal estate, and, if that proved insufficient, then any balance would have to be raised by mortgage of the rent charges.

TAXED LAND—POWER TO LEASE LAND—UNOPENED MINES—WILL—CONSTRUCTION.

In re Daniels, Weeks v. *Daniels* (1912) 2 Ch. 90. Two or three points of interest are decided by Eady, J. First, that a power in a will given to trustees to lease land, does not authorize them to make a lease of unopened mines, and second, where under such a will the trustees and cestuis que trust have made a lease of unopened mines, which though unauthorized by the will could have been authorized under the Settled Land Acts, the lease will be treated as if made under the Act, and three-fourths of the rents and royalties must be set aside as capital, and, third, that a direction in a will to pay the rents of unopened mines to a tenant for life, is not an expression of a contrary intention within the meaning of s. 11 of the Settled Land Act of 1882, which would interfere with that mode of applying the rents and royalties.

SOLICITOR—TAXATION BETWEEN SOLICITOR AND CLIENT—COSTS INCURRED ON SPECIAL INSTRUCTIONS—MUNICIPAL AUTHORITY—PROPRIETY OF EXPENDITURE AS REGARDS RATEPAYERS.

In re Porter (1912) 2 Ch. 98. Eady, J., decided that upon a taxation between solicitor and client, where the client is a municipal authority, the solicitor is entitled to have allowed to him costs incurred on special instructions of his client, even though such costs may not be recoverable by the municipal authority as against ratepayers.

MORTGAGE—LEASEHOLDS — FIRST AND SECOND MORTGAGES—PAYMENT OF SECOND MORTGAGE—SURRENDER OF TERM.

In re Moor and Hulm (1912) 2 Ch. 105 was an application under the Vendors and Purchasers Act. The facts were that a leasehold had been mortgaged by sub-demise for the residue of the term less one day, and afterwards a second mortgage had been made also by sub-demise of the residue of the term less one day subject to the first mortgage. The second mortgage had been paid off, but no surrender or re-conveyance had been made to the mortgagor. The mortgagor having contracted to sell his interest subject to the first mortgage, it was objected by the purchaser that a surrender by the second mortgagee was necessary to complete the title. It was contended that the second mortgagee merely took an equitable interest, but Joyce, J., held that the second mortgagee had acquired a legal reversion upon the term created by the first mortgage and therefore a surrender was necessary. He also held that the second mortgage on being paid off did not become a satisfied term within the Satisfied Terms Act, 1845.

HIGHWAY — DEDICATION — RAILWAY COMPANY — LAND OF RAILWAY COMPANY—POWER OF RAILWAY TO DEDICATE HIGHWAY—ULTRA VIRES—COMPULSORY POWERS—LAND ACQUIRED BY AGREEMENT.

Great Central Railway v. *Balby* (1912) 2 Ch. 110. In this case a railway company was empowered by special Act (incorporating the Land Clauses Consolidation Act) to enter upon and take and use for the purposes of its undertaking certain land which was subject to public rights-of-way; and by the special Act it was provided that "all rights-of-way over any of the lands which shall under the compulsory powers of this Act be purchased or acquired shall be and the same are hereby

extinguished." The company acquired by agreement, from the respective owners, without any notice to treat land which was subject to public rights-of-way over it, and they also acquired, under the special Act, a certain other parcel over which public rights of way existed which by the Act were expressly extinguished. As to the latter parcel it was claimed that since its acquisition by the company the public had been permitted to use the way and that there had been a dedication by the railway company, but Joyce, J., held that the railway had no power to grant land acquired for the purposes of its undertaking as a highway and therefore it had no power to dedicate it. And as to the parcel acquired by agreement he held that the clause in the special Act, providing for the extinguishment of rights-of-way only applied to land acquired compulsorily, and therefore, as to that parcel there was no extinguishment of the public right-of-way.

COMPANY — DEBENTURES — TRUST DEED—GENERAL MEETING—EXTRAORDINARY RESOLUTION — MODIFICATION OF RIGHTS OF DEBENTURE HOLDERS—POWER OF MAJORITY TO BIND MINORITY —CONVERSION OF REDEEMABLE DEBENTURES.

Northern Assurance Co. v. *Farnham United Breweries* (1912) 2 Ch. 125. In this case the effect of a trust deed to secure debentures was in question. By the deed, power was conferred at a general meeting of debenture holders by extraordinary resolution passed by a majority of not less than three-fourths of the persons voting thereat, to sanction any modification or compromise of the rights of the debenture holders against the company or its property, whether arising under the debentures or the trust deed, or otherwise; and it further provided that an extraordinary resolution duly passed should bind all the debenture holders. Under these provisions a general meeting was called and one extraordinary resolution was passed by the required majority of those present authorising the conversion of the debentures which were redeemable into irredeemable or perpetual debentures and the question was whether this was such a modification of the rights of the debentures as was within the meaning of the provision above referred to, so as to bind a dissentient minority, and Joyce, J., determined that it was. In a note to the case there is also a report of a decision of Eve, J., in *Re Stocks, Willey* v. *Stocks*, in which he discusses in a similar action the difference between redeemable debentures and irredeemable debenture stock.

SOLICITOR AND CLIENT—COSTS—TAXATION—BILL OF COSTS DELIVERED BY COMPANY—WINDING-UP—RETAINER OF AMOUNT —DELIVERY OF BILL.

In re Foss (1912) 2 Ch. 161. In this case a solicitor of a company delivered his bill to the company within twelve months before the company was ordered to be wound up. The amount of the bill had been deducted from moneys received by the solicitor for the company, but there had been no settlement of accounts between the solicitor and the company. The liquidator claimed to have the bill taxed. The application was opposed by the solicitor as to two of the bills in question because more than twelve months had elapsed from their delivery to the company. It was also contended, that if ordered, the taxation must be ordered under the general jurisdiction of the Court and not under the Solicitors Act, and that the solicitor was entitled to add the costs of taxation to his claim. Neville, J., held that the twelve months not having elapsed before the winding-up order, the subsequent expiry of the twelve months did not bar the liquidator's right to a taxation and that the retainer of moneys was not payment in the absence of any settlement of accounts. He, therefore, ordered a taxation, but agreed with the solicitor that the order should be made under the general jurisdiction of the Court and not under the Solicitors Act and that the solicitor was entitled to add the costs of the taxation to his claim.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

CITY OF ST. JOHN *v.* GORDON.

N.B.] CITY OF ST. JOHN *v.* QUINLAN. [May 7.

Lease—Covenant to pay for improvements—Buildings and erections—Foundation—Piling and filling in—Intention of lessee.

The City of St. John leased certain mud flats, the lease containing a covenant that if the lessees should "put up any buildings and erections for manufacturing purposes' thereon the same at the expiration of the term, should be appraised in the manner provided and the city should have the option of paying the appraised value or renewing the lease. On expiration of a term the city elected to pay.

Held, that the lessees were entitled to be paid the value of piling and filling in on said lots to form a foundation for buildings erected and in existence at the expiration of the lease, but not for such piling and filling in at a place where no buildings existed but on which buildings were intended to be erected for manufactures.

Appeal allowed with costs.

Baxter, K.C., for appellant. *Teed*, K.C., for respondents.

Ont.] [May 7.

STECHER LITHOGRAPHIC CO. *v.* ONTARIO SEED CO.

Assignments and preferences — Chattel mortgage—Hindering and delaying creditors—Assignment of book debts—Surety.

The Ontario Seed Co. owed a bank some $8,000 for which J. was surety by bond and indorsement or notes for all but $500. The bank also held as further security an assignment of the company's book debts. The company gave to A., a brother of J., a chattel mortgage of all its personal property and agreed to assign to him the books debts. A. then gave to the company

an amount sufficient to pay the bank's claim, J. having supplied him with funds for the purpose and the company gave its own cheque to the bank with a direction to assign the book debts to A. which was done.

Held, that the evidence justified the finding at the trial that the chattel mortgage was given for the benefit of J. who was aware at the time it was given that the company was insolvent, and that it was void under the provisions of the Assignments and Preferences Act and should be set aside.

After the assignment of the book debts to A. the company was allowed to go on collecting them.

Held, that such assignment was valid, but that the assignee could retain the value of what had been collected out of the proceeds of the property covered by the chattel mortgage.

Judgment of the Court of Appeal, 24 Ont. L.R. 503, reversed and that of the Divisional Court, 22 Ont. L.R. 577, restored.

Secord, K.C., for appellant. *Gibbons,* K.C., and *Sims,* for respondent.

Full Court.] IN RE MARRIAGE ACT. [June 27.

Constitutional law—Marriage and divorce—Solemnization of marriage—Jurisdiction of Parliament—Jurisdiction of legislatures—Federal Validating Act—Religious belief—Civil rights—B.N.A. Act, 1867, *ss.* 91 *and* 92—*Arts.* 127 *et seq. C.C.*

This was a reference by the Governor-General-in-Council to the Supreme Court.

Held, 1. The Parliament of Canada has no authority to enact a bill in the following form:—"1. The Marriage Act, c. 105 of the Revised Statutes, 1906, is amended by adding thereto the following section: '3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any difference in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony. (2) The rights and duties as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to in-

validate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.'"

Per IDINGTON, J.:—The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and legislatures confirming past marriages which, probably, neither effectively can do. The prospective part, so far as possible to make it an effective prohibition of religious tests, may be good, but doubtful, and the probable purpose can be reached by a better bill.

Per DAVIES, IDINGTON, and DUFF, JJ.:—The law of the Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage, in such province between Roman Catholics that would otherwise be binding. ANGLIN, J., contra. FITZPATRICK, C.J., expressing no opinion.

2. The law of Quebec does not render void, unless contracted before a Roman Catholic priest, a marriage otherwise valid where one party only is a Roman Catholic.

3. The Parliament of Canada has no authority to enact that a marriage between Roman Catholics, or a mixed marriage, not contracted before a Roman Catholic priest and whether heretofore or hereafter solemnized shall be valid and binding.

Per IDINGTON, J.:—Parliament has power to declare valid such a marriage heretofore solemnized to be concurred in by the legislature of the province concerned, and the like power as to a marriage hereafter to be solemnized if and when the province fails to provide adequate means of solemnization.

Nesbitt, K.C., and *Lafleur*, K.C., supported the bill. *Mignault*, K.C., and *Hellmuth*, K.C., opposed the bill. *Bayley*, K.C., for Attorney-General for Ontario. *R. C. Smith*, K.C., and *Aimé Geoffrion*, K.C., for Attorney-General for Quebec. *Newcombe*, K.C., for Attorney-General for Canada.

NOTE:—This reference was appealed to the Judicial Committee of the Privy Council. The result of the deliberations of that Board are given on p. 446, ante.

Bench and Bar.

APPOINTMENTS TO OFFICE.

Henry Lumley Drayton, of the city of Toronto, Ontario, to be Chief Commissioner of the Board of Railway Commissioners for Canada, vice James Pitt Mabee, deceased. (July 1).

Hon. Charles Peers Davidson, puisne judge of the Superi r Court of Quebec to be Chief Justice of that court, vice Sir Melbourne Tait resigned. (June 13).

Campbell Lane, of the city of Quebec, Province of Quebec, to be a puisne judge of the Superior Court for the Province of Quebec, vice Charles Peers Davidson. (June 26).

David John Nesbitt, of the village of Brighton, County of Northumberland, to be sheriff of the United Counties of Northumberland and Durham, vice I. O. Proctor resigned. (Aug. 3).

William F. McRae, of the town of Gore Bay, Manitoulin, to be Crown Attorney and Clerk of the Peace for the provisional judicial district of Manitoulin, vice A. G. Murray, removed from office. (June 8).

Flotsam and Jetsam.

A FIRM JUDGE.—"I never sat in the trial of a case in which I cared two cents which side gained it," once said a judge, boasting of his impartiality. "Old Ben Wade" was not that sort of a judge, while administering justice in five Ohio counties. He saw at once the right of a case, and made the jury discern the real issue. Once when trying a case his rulings made the prosecuting attorney snarl out: "I have always understood that it was the province of the jury to decide the facts; the court has nothing to do with them." "Gentlemen," replied the unmoved judge, "the attorney for the state is correct; it is your province to decide the facts. The court has nothing directly to do with them—if it had it would not take long." The retort prompted the jury to return a verdict of acquittal after a few minutes' consideration.

Few of Wade's rulings were reversed by the Supreme Court, but there was one notable exception. A difficult case which he

had decided after much consideration was reversed by the higher court and sent back to be tried again. At the second trial Judge Wade adhered to his former decision. "But, your Honour, the Supreme Court reversed your former judgment," exclaimed the surprised counsel. "Yes, so I have heard; I will give them a chance to get right," he quietly replied. The case was again taken to the Supreme Court, which reversed its own judgment and affirmed Wade's decision.—*Green Bag.*

JOINDER OF ISSUE.—Judge Gary tells the story of a Missourian who came in the circuit clerk's office, in response to a summons, and getting out the old common-law courts from the pigeon-hole in the clerk's desk, sat down behind the stove to read them. When he got through he asked the clerk what he must do. The clerk said:

"You will have to get a lawyer."

"I haven't any money to hire one, can't I do something?"

"Well, you have got to join issue."

"Well, but I don't know how to do that."

"Well, you have got to deny, of course, everything that is said there."

So the old gentleman took out his spectacles, and went back and sat down at a table and wrote at the bottom of the declaration, "The above are a damned lie." And thus was issue joined.—*Central Law Journal.*

The *Green Bag makes* the following interesting contribution to the law of evidence:—

At a term of the circuit court in Iowa not long ago a "horse case" was on trial, and a well-known horseman was called as a witness.

"You saw this horse?" asked counsel for the defendant.

"Yes, sir, I —"

"What did you do?"

"I opened his mouth to ascertain his age, and I said to him, 'Old sport, there's a lot of life in you yet.'"

Whereupon counsel for the other side entered a vigorous protest. "Stop!" he cried. "Your honor, I object to any conversation carried on between the witness and the horse when the plaintiff was not present!"