Canada Law Journal.

VOL. XLIII. AUGUST. NO. 15 AND 16.

WAIVING THE BENEFIT OF STATUTES.

Quilibet potest renunciare juri pro se introducto is a well recognized maxim of the law, and there are many cases in which it has been held to enable a party to waive the benefit of statutory enactments intended for his protection. The benefit of Statutes of Limitations it is well known may be waived by a defendant, and though a statute says "no action shall be brought" after a specified time, it is perfectly plain that a defendant may neglect, or refuse to set up the defence that an action is not brought within the prescribed time, and that the Court will not in such a case regard the statute as any obstacle to the plaintiff succeeding. So also a defendant may waive the benefits of the provisions of the Statute of Frauds, though that statute also says "no action shall be brought" in certain cases. He may also waive the provisions of the Bills of Exchange Act requiring notice of protest. But in order that a person may waive the benefit of any statutory provision, its application to the particular case must be of such a character as to be intended merely for his own benefit and protection; if the statutory provision is intended not only for his protection, but also that of others, or is a matter in which the public have interest, he cannot waive it. For this reason a testator cannot dispense with the provisions of the Wills Act in regard to the execution of wills, because such provisions are not made merely for the benefit of testators only, but also for the protection of their heirs and next of kin.

There are some statutes passed for the protection of a particular class of people; for instance, the Workmen's Compensation Act for the benefit of workmen, or the Fatal Accidents Act, for the benefit of the representatives of persons killed in duels or through the negligence of others, in which the question has arisen how far contracts can be validly made to waive the benefit of their provisions. The possibility of such contracts being made

in reference to the Workmen's Compensation Act, R.S.O. c. 160, is clearly recognized by sec. 10, which regulates such contracts, and, but for that section, there would have been nothing whatever to prevent such a contract being made: see *Griffiths* v. *Dudley*, 9 Q.B.D. 357; *The Queen* v. *Grenier*, 30 S.C.R. 42.

By 4 Edw. VII. c. 31 (D.), an absolute prohibition is in effect made against railway companies and their employees making any bargain or agreement relieving railway companies from liability for damages for personal injuries to their employees. The constitutional validity of this Act was recently affirmed by the Judicial Committee of the Privy Council: *Grand Trunk Railway* v. *Attorney-General of Canada*, 1907, A.C. 65, 95 L.T. 131, and the Act was duly proclaimed to come into force on 1st April last; see *Can. Gazette*, 12 Jan., 1907, p. 1581, and this would seem to be one of those Acts which it is not possible for those for whose benefit it is intended to waive.

Recently the Legislature of Ontario passed a statute practically making null and void all agreements as to the place of trial of any action, subject to certain conditions: see 6 Edw. VII. c. 19, s. 22. In the case of *Shupe* v. *Young* recently before the Divisional Court, the plaintiff had sold certain chattels on credit and stipulated that in default of payment the action to recover the price might be brought in a specified Division Court and the purchaser expressly agreed to waive the provisions of the above mentioned statute.

The plaintiff having commenced the action in a Division Court pursuant to the agreement, the defendant applied for a prohibition on the ground that the cause of action had not arisen within the jurisdiction of that Court, and the defendant did not reside therein, and that the agreement as to venue was void. Falconbridge, C.J. K.B., granted a prohibition, holding that it was not possible for the defendant to waive the protection of the statute, and the Divisional Court (Boyd, C., and Magee and Mabee, JJ.) affirmed his decision.

The words of the statute in question are no doubt emphatic, viz.: "No proviso, condition, stipulation, agreement or statement

which provides for the place of trial of any action, matter or other proceeding shall, subject to the provisions hereinafter set out, be of any force or effect."

It was suggested in the course of argument that as the statute makes all agreements as to venue void the agreement to waive its provisions would not make good an agreement which the statute made void, but the answer to that proposition seems to be, that as it is only by virtue of the statute that the agreement is made void, if the provisions of the statute are waived, then they do not affect the particular agreement, and consequently it must be of the same validity as if there were no such statute. Furthermore, it may be remarked that the words of the statute in question are no more emphatic than those to be found in Statutes of Limitation or the Statute of Frauds, viz.: "No action shall be brought, etc.," and yet actions may not only be brought, but may succeed, if the defendant chooses to refrain from setting up the statute. And, notwithstanding the emphatic words of the statute in question in *Shupe* v. *Young*, it would have been possible for the defendant to have waived the benefit of the statute, by refraining from setting up the question of venue. That being so, the question naturally arises if he could waive it negatively by not claiming the benefit of its provisions, on what sound principle can it be said that he could not waive it affirmatively by express agreement? Are agreements as to venue of such a public nature that statutory provisions relating thereto cannot be waived? But for the decision we should have thought not. On the other hand, railway employees may possibly be regarded as exposed to peculiar risk as such to be protected by statutes whose provisions they cannot waive.

ASSIGNMENT OF DEBTS.

A learned correspondent for whose opinion we entertain the greatest respect thinks that our note in reference to *Mills* v. *Small* (ante p. 436) is wrong. He says that in the English case there referred to "the assignee was to collect the accounts, and,

after paying costs, to turn the amounts over to the assignor. Whereas, in *Mills* v. *Small*, the assignors were to pay costs. The assignee was not to collect the debts at all; he was not to pay costs, nor to pay anything to the assignors. The assignors were to pay the costs, and pay him. The assignee was not to sue or do anything, except to allow his name to be used."

With all deference we are unable to acquiesce in the subtle distinction which our correspondent draws.

In both cases the assignees had no beneficial interest in the debts assigned, in both cases the assignment was made for the purpose of enabling the action to be brought in the name of the assignee. In our view, the fact that in *Mills* v. *Small* the assignee was to put himself in the hands of the assignors and allow them to use his name, is a distinction without a difference. In both cases the assignee was substantially trustee for the assignor.

We can see no real distinction between an assignee who is to sue and one who is "to allow his name to be used" as plaintiff. In either case the assignee is actually and de facto the plaintiff; and to attempt to distinguish cases on such grounds is, it appears to us, to render the law needlessly difficult and incomprehensible.

We may refer to *Comfort* v. *Betts* (1891) 1 Q.B. 737 as shewing that the only question the Court has to be satisfied of is that the assignment is absolute in form.

INEFFECTUAL WILLS.

It is somewhat curious to observe how frequently testators are desirous not only of giving legacies, but also of preventing their legatees from acquiring dominion over such legacies until the legatees have reached a specified age exceeding twenty-one years, and it is a matter of further interest to the practitioner to observe how often such restrictions on the enjoyment of legacies are ineffectual. The testator or his draftsman too often fail to bear in mind that a simple bequest of a legacy to A., with an added direction to accumulate until A. attains twenty-five or thirty, as

the case may be, and an express direction to postpone payment until then, vests immediately, and the legatee upon attaining twenty-one is entitled to payment. The subject was dealt with by Lord Hatherley (when Vice-Chancellor Wood) in some observations that fell from his Lordship in the course of his judgment in the case of *Gosling* v. *Gosling* (Johns. 265). "The principle of this Court," said his Lordship, "has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it until they attain the age of twenty-five years." That doctrine was quite recently applied by Mr. Justice Joyce in a case of *Re Conturier, Conturier* v. *Shea* (noted 122 L.T. Jour. 464; (1907) 1 Ch. 470). There a testatrix desired and directed to set apart the sum of £200 for her grandson W., the sum of £150 for her grandson V., and the sum of £150 for her grandson D., the said sums to be free of duty, and to be paid respectively as to £50, part thereof, on their attaining the age of twenty-one years, and as to £50, part thereof, on their attaining the age of twenty-five years, and the testatrix directed that the balance £100 for her grandson W. be paid to him on his attaining the age of thirty years, and the balances of £50 for V. and D.

to be paid to them on their respectively attaining the age of thirty years. The will contained no disposition of the intermediate income or gift over of the principal. W. survived the testatrix, and on attaining twenty-one the sum of £50 was paid to him; but he died before attaining twenty-five. The question was whether notwithstanding W.'s death under the age of twenty-five, he was not entitled to the other sums of £50 and £100, and Mr. Justice Joyce held that W. was so entitled. "I consider," said his Lordship, "these bequests equivalent to a gift of a legacy to the legatee payable as to part at twenty-one, further part at twenty-five, and the balance at thirty. According to the principal of the decision in *Gosling* v. *Gosling*, I am, therefore, of opinion that each of these legatees upon attaining twenty-one is entitled to the payment of his legacy with the intermediate interest or income, and that the legal personal representative of any legatee who survived the testatrix and died before actual payment is entitled to the legacy or balance remaining unpaid of both income and principal."—*Law Times.*

We are pleased to record the knighthood conferred on Sir Charles Fitzpatrick, Chief Justice of the Supreme Court of Canada. It is right and proper that this honour should be conferred upon those who have been thought fit to occupy the high position of Chiefs of our Superior Courts and especially the Chief Justice of our Court of last resort in the Dominion. Personally the occupant of that high position is a worthy recipient of the honour, and we trust that he may live long to enjoy it.

It is scarcely necessary to say that the voice of the legal profession as well as that of every other thinking and intelligent person is entirely in accord with the sentence passed by Col. Denison, Police Magistrate of the City of Toronto, upon a baseball player named Flood, who brutally assaulted the umpire of the game in which he was playing. The only mistake the Police Magistrate made was in not giving him a month in

prison instead of a fortnight. Such an act is bad enough anywhere; but it is not expected from those who are engaged in manly and healthy sports. It was said by some newspaper (which by the way, spoke of this rowdy as though he were a very important person and a not unworthy public character), as being about to retire from sport. It is to be hoped so, for any man who cannot keep his temper and behave with ordinary decency in a game is not fit company for even "professional ball players," and many of them are low enough in all conscience.

In accordance with the prayer of a petition to the Department of Justice at Ottawa the pardon of this offender was recommended and he was released at the end of ten days. The petition was largely signed and of course there was no difficulty about that; but all law abiding citizens were surprised at seeing in the petition the names of men holding high positions of trust in the administration of public affairs. The only possible reason could be the blight of party politics. These representative men should not have signed the petition and this pardon should not have been recommended. It was a blow below the belt to manly games and an apotheosis of blackguardism.

Some theologians assert that an increase of lawlessness will be one of the signs of the closing up of the present dispensation. However, that may be, this spirit appears to be on the increase, and notably so in places where least expected. We have had occasion to refer to this sort of thing before (ante, page 87). On the present occasion the offenders were the chief magistrate and one of the controllers of a city of "over one hundred thousand inhabitants" (as the Ontario statutes describe the capital of that province). The former, being a lawyer, might have known better. The latter, being a newspaper man, did that which was not unnatural, for much of the press of Toronto has become notorious for its lawless utterances. The incident referred to was in connection with a procession in the streets of the city in question. This procession took possession of a thoroughfare

and stopped the running of street cars, which, with the public, have the legal right of way. The mayor and the controller are reported as having supported the processionists in their unlawful conduct and congratulated them on their having taught a lesson to the street railway authorities who had thus in the interest of the public presumed to exercise their legal rights to the annoyance of those who thus illegally obstructed the highway. Such an exhibition of lawlessness on the part of those in authority, if the speeches of the gentlemen referred to are correctly reported, is much to be deplored. There is but little use in passing laws if those appointed to enforce them not only neglect so to do, but actually commend those who break them.

One of the conditions on which the street railway operates in that city, and which, of course, was perfectly well-known both to the mayor and controller is as follows: "Cars to have right of way, and vehicles or persons not to obstruct or delay their operation." The railway had given due notice that it intended to insist on its rights, which, we may observe, are conferred on it for the benefit of the public, to whom the obstruction of the cars may involve serious inconveniences.

It might be thought open to doubt how far an agreement between the city and the street railway giving the latter the right of way would be binding on the public at large; but the general Street Railway Act, R.S.O. c. 208, s. 25(7) expressly empowers municipalities to pass by-laws, inter alia, "for preventing the obstructing or impeding of the ordinary traffic, and for compelling vehicles on the tracks to give place to the cars or other conveyances of the company." The condition above referred to is a part of a by-law, and it was conferred and declared to be valid and binding on the railway and the city by an Act of the provincial legislature. The words "for preventing the obstructing and impeding of the ordinary traffic" we take it must mean the ordinary traffic of the railway, not the ordinary traffic of the street; and it would seem that the right of way of the street railway is reasonably clear.

REVIEW OF CURRENT ENGLISH CASES.

SHIP—SALVAGE AGREEMENT—PRINCIPAL AND AGENT—MASTER.

The Crusader (1907) P. 196. This was an appeal from the judgment of Barnes, P.P.D. (1907) P. 15 (noted ante p. 280); and the Court of Appeal (Lord Alverstone, C.J., and Moulton and Kennedy, L.JJ.) have unanimously affirmed his decision.

ADMIRALTY—COLLISION—TOTAL LOSS—PAYMENT OF DAMAGES BY WRONG DOER—RIGHTS OF INSURED AND INSURER IN MONEY RECOVERED FROM WRONG DOER.

The Commonwealth (1907) P. 216 was an admiralty case involving a point of insurance law. A vessel had been run down in a collision and was a total loss. The value was assessed by the Court at £1,000 which amount was paid into Court by the wrong doers. The vessel had been insured for £1,000 under a policy stating the value to be £1,350. The underwriters having paid the owners the amount of the insurance thereupon claimed the £1,000 paid into Court, but Deane, J., held, and the Court of Appeal (Barnes, P.P.D., and Moulton and Kennedy, L.JJ.) agreed with him, that the owners were entitled to be treated as their own insurers for £350, and that the money in Court was therefore divisible $\frac{350}{1350}$ths to the owners, and the remaining $\frac{1000}{1350}$th to the underwriters.

LANDLORD AND TENANT—COVENANT BY LESSOR TO PAY "ALL RATES AND TAXES"—WATER RATES.

Bourne v. *Salmon* (1907) 1 Ch. 616 was a summary application to determine the simple question whether water rates were included in the expression "all rates and taxes." The plaintiff's were lessees of certain premises under a lease whereby the defendants, their lessors, covenanted to procure to be paid "all rates and taxes" payable in respect of the demised premises; nevertheless they had claimed that the plaintiffs were bound to pay a proportionate part of the water rates. Buckley, J., following *Direct Spanish Telegraph Co.* v. *Shepherd*, 13 Q.B.D. 202, but against his own personal conviction, held that water rates were included and that the defendants were liable therefor, and

the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Kennedy, L.J.) affirmed his decision, and declined to overrule the case he had followed.

COPYRIGHT—AGREEMENT FOR EXCLUSIVE PUBLICATION—AUTHOR AND PUBLISHER — ASSIGNMENT OF COPYRIGHT — COPYRIGHT ACT, 1842 (5-6 VICT. C. 45) SS. 2, 13.

Re Jude (1907) 1 Ch. 651 was an appeal from the decision of Kekewich, J. (1906) 2 Ch. 595 (noted ante p. 248), and the Court of Appeal (Lord Alverstone, C.J., and Moulton and Buckley, L.J.J.) have affirmed his decision.

ANCIENT LIGHTS—EASEMENT—ALTERATION OF DOMINANT TENEMENT—INCREASED BURDEN ON SERVIENT TENEMENT—DESTRUCTION OF EASEMENT—ACTION FOR DECLARATION THAT TENEMENT IS NOT SUBJECT TO EASEMENT.

In *Ankerson* v. *Connelly* (1907) 1 Ch. 678 the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have affirmed the judgment of Warrington, J. (1906) 2 Ch. 544 (noted ante p. 54), but have not adopted all his reasons.

MORTGAGE OF PROCEEDS OF SALE OF LAND—PAYMENT INTO COURT —RIGHTS OF MORTGAGEES IN FUND IN COURT—REAL PROPERTY LIMITATION ACT, 1833 (3-4 WM. IV. C. 27) S. 34—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. C. 57) S. 8—(R.S.O. C. 72, S. 1(*b*))—(R.S.O. C. 133, S. 23).

In re Hazeldine (1907) 1 Ch. 686, disposes of an important question under the Real Property Limitation Act (see R.S.O. c. 72, s. 1(*b*) and R.S.O. c. 133, s. 23). Certain persons who were entitled to a beneficial interest in lands vested in trustees with power to sell in 1889 mortgaged their shares in the land and in the proceeds thereof to the Union Deposit Bank. They also mortgaged their interest in the same property to other persons; the lands were sold by the trustees, and in consequence of the conflicting claims of the various mortgagees the shares of the mortgagors in the proceeds were in 1896 paid into Court. No payment or acknowledgment of right had since been given by the mortgagors to the bank, and the mortgagors now applied for payment out of the money to them, contending that the claim of the bank both on the covenant and as against the land was barred

by the Statutes of Limitations; but Warrington, J., held that although that was undoubtedly the case there was nothing in the statutes which had the effect of barring their claim on the moneys in Court and he therefore held that the mortgagors were not entitled to the money except upon the terms of their paying the mortgage debt with interest at 5% from the date of the mortgage.

VENDOR AND PURCHASER—SETTLEMENT—POWER OF APPOINTMENT —TRUSTEES DIRECTED TO PAY AND TRANSFER—POWER OF SALE —OUTSTANDING LEGAL ESTATE—DEDUCING TITLE.

In re Adams & Frost (1907) 1 Ch. 695, two points were involved. By a marriage settlement the trustees were empowered on the death of the husband and wife "to pay and transfer" the trust estate pursuant to the will of the survivor. The settlement also contained a power for the trustees to sell the property. The husband died and by his will appointed the property to the trustees of his will with power to them to sell. They having sold the question was raised by the purchaser whether they or the trustees of the settlement had the power to sell and Warrington, J., held that as the trustees of the settlement were "to pay and transfer" the estate to the trustees of the will, the power of sale in the settlement was superseded and the trustees of the will were now the proper persons to sell and had a right to call for the conveyance of the legal estate. The second point arose on a condition of sale which provided that every deed or instrument which should be necessary for getting in any outstanding estate or interest for completing the vendors' title should be prepared by and at the expense of the purchaser, who should also bear the expense of doing every act needed for perfecting the assurance by all parties other than the vendors. This the vendors claimed threw upon the purchaser the expense of deducing title to the legal estate, but Warrington, J., held that it did not, that the vendors were bound to deduce the title, and having done so, the condition merely required the purchaser to bear the expense of any conveyance needed for getting it in.

HIGHWAY—DEDICATION—LESSEE—USE OF LAND BY SUB-LESSEES INCONSISTENT WITH DEDICATION.

In *Corsellis* v. *London County Council* (1907) 1 Ch. 704 the neat point decided by Neville, J., is that it is not possible for a lessee of land to make an effectual dedication of any part of the

demised premises for the purposes of a highway. In this case the land in question was a strip of three feet between the highway and certain shops, and as a condition of having the roadway up to the face of the shops, the municipal authority required the lessee of the premises to agree to dedicate the three feet for a footway. No agreement in writing was made, but the pavement was laid down, but the sub-lessees of the shops thereafter were accustomed to use the three feet for placing thereon their goods and show cases. The lessor was no party to the alleged dedication, nor was a mortgage of the lessee. It was held that there had been no binding dedication of the three feet.

WILL—CONSTRUCTION—ANNUITY—DIRECTION TO PAY OUT OF INCOME.

In re Bigge, Granville v. *Moore* (1907) 1 Ch. 714, a testatrix by her will gave her residuary estate to trustees upon trust out of the income thereof to pay certain annuities and, subject thereto, to pay the income to her sister Julia. The income proved insufficiently to pay the annuities which consequently fell in arrear. A summary application was therefore made to the Court to determine first whether the annuities were a charge on the corpus, and, secondly, if not a charge whether they were a continuing charge on the income until they should be satisfied. Neville, J., answered both questions in the negative. Whether an annuity is payable exclusively out of income, or out of current income, or charged upon the corpus of the estate, or whether it is payable out of accumulated income—in other words, whether the arrears of the annuity in any one year are payable out of the income of succeeding years—in his opinion must depend upon the words of the particular will, and such an intention cannot be imputed to a testator unless the words are clear; and in the present will be found no indication of any intention to provide for the case of the current income proving insufficient to pay the annuities. Consequently so far as it was insufficient he held the annuities failed.

PRACTICE—ADMINISTRATION—CREDITORS' ACTION—LEAVE TO CREDITOR NOT A PARTY TO ATTEND PROCEEDINGS.

In re Schwabacher, Stern v. *Schwabacher* (1907) 1 Ch. 719 was a creditor's administration action, and a creditor for £10,000, whose debt had been admitted, applied for leave to attend the

proceedings at his own expense, or that the defendant's solicitors might be directed to furnish him at his own expense with a copy of the list of claims and copies of affidavits relating thereto and to give him notice of all proceedings relating to claims against the estate. Parker, J., held that the applicant had no right under the rules to what he asked, and that it was purely a matter of discretion, and there being no suggestion that the plaintiff would not do his duty in contesting claims of creditors, the application for leave to attend was refused, but without prejudice to any further application as to any particular claim the applicant might desire to dispute. As to the copies of documents required, he held that they might properly be furnished him on his paying the costs thereof.

AUCTIONEER—SALE SUBJECT TO RESERVE BID—LOT KNOCKED DOWN AT LESS THAN RESERVED PRICE—RESERVED BID.

In *McManus* v. *Fortescue* (1907) 2 K.B. 1 the plaintiff sued an auctioneer for refusal to complete a sale at auction at which the plaintiff was the highest bidder. The sale in question was advertised as being subject to a reserved price, the plaintiff's bid was the highest, and the property was knocked down to him, but on the defendant discovering that the plaintiff's bid was less than the reserved price, he refused to complete the sale. Phillimore, J., who tried the action, dismissed it on the ground that there was no legal duty on the part of the defendant to sign the memorandum of sale or otherwise complete the sale; and the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.) affirmed his decision on the ground that the sale being subject to a reserved bid the offering of the property, and the acceptance of the plaintiff's bid, and the knocking down of the property to him, were all subject to the condition that his bid should exceed the reserved price, and it not doing so, he had no ground of action.

LANDLORD AND TENANT—LEASE—FORFEITURE FOR NON-PAYMENT OF RENT—UNDER-LESSEE—TENANT—RELIEF AGAINST FORFEITURE—C.L.P. ACT, 1852 (15-16 VICT. C. 76) S. 212—(R.S.O. C. 170, S. 25).

Moore v. *Smee* (1907) 2 K.B. 8 was an action of ejectment by landlord against tenant for non-payment of rent. The action

was brought against Smee, the original lessee, and Cornish, his under lessee. Smee had not been served with the writ, but upon Cornish being served he tendered the arrears of rent and costs which was refused by the plaintiff. Cornish thereupon applied under C. L. P. Act, s. 212, (R.S.O. c. 170, s. 25) to stay the proceedings. The plaintiff resisted the application on the ground that Cornish had failed to prove his title as under lessee and Ridley, J., dismissed it; but the Court of Appeal (Cozens-Hardy and Buckley, L.JJ.) reversed his decision, being of the opinion that on such an application it is not necessary for the applicant to deduce a regular chain of title, but it is sufficient if he shews he is de facto tenant in possession.

PRACTICE—HUSBAND AND WIFE—PERMANENT ALIMONY—ORDER FOR PAYMENT OF ALIMONY—ARREARS OF ALIMONY, ACTION TO RECOVER.

Robins v. *Robins* (1907) 2 K.B. 13 seems to shew that the decision of the Divisional Court in *Aldrich* v. *Aldrich*, 24 Ont. 124, was erroneous. The action was brought to recover arrears of alimony payable under an order of the Probate and Divorce Division, and Joyce, J., held that the order sued on was not a final or conclusive judgment upon which an action of debt could be maintained, because such a judgment or order is always subject to the control of the Divorce Division, which may vary it from time to time in its discretion even as to arrears. Since *Aldrich* v. *Aldrich* was decided we may note such actions as that are expressly prohibited by 61 Vict. c. 15, s. 9 (O.).

DISCOVERY—SEDUCTION—DISCLOSURE OF NAMES.

Hooton v. *Dalby* (1907) 2 K.B. 18 was an action for seduction of the plaintiff's daughter. The defendant by his defence traversed the allegation that he was the father of the daughter's child. The plaintiff for the purpose of discovery claimed an answer to the interrogatory—whether the defendant alleged that carnal knowledge had taken place between the daughter and any other male person, and if so asking for the name and address of such person. Ridley, J. disallowed it, and the Court of Appeal (Cozens-Hardy and Buckley, L.JJ.) held that it had been properly disallowed as being a fishing interrogatory for the purpose of finding out the names of the defendant's witnesses.

SOLICITOR AND CLIENT—DELIVERY OF UNSIGNED BILLS—BILLS AGREED TO BY CLIENT—TRUSTEE IN BANKRUPTCY—TAXATION OF COSTS.

In re Van Laun (1907) 2 K.B. 23, the Court of Appeal (Cozens-Hardy, M.R. and Williams, and Buckley, L.JJ.) have affirmed the judgment of Bigham, J. (1907) 1 K.B. 155 (noted ante p. 281), to the effect, that notwithstanding a client, prior to his bankruptcy, had agreed to his solicitor's bill of costs, it is nevertheless open to the trustee in bankruptcy to go behind the agreement, and require satisfactory evidence that the debt sought to be proved is a real debt.

AUTHOR AND PUBLISHER—BANKRUPTCY OF PUBLISHER—SALE OF COPYRIGHT FOR ROYALTIES—TRUSTEE CARRYING ON BUSINESS—ROYALTIES—BREACH OF CONTRACT.

In re Richards (1907) 2 K.B. 33 was also a bankruptcy case in which the creditor, whose claim was in question, was an author who had sold to the publisher the copyright in a book, for certain royalties. The publisher having become bankrupt, the trustee continued to carry on his business, including the publication of the book in question. The author claimed that he should be paid in full the royalties which were payable in respect of the publication by the trustee, but Bigham, J., held that he was not so entitled, but that his rights were limited to proving a claim for damages sustained by breach of the contract.

FACTOR—MERCANTILE AGENT—AUTHORITY TO PLEDGE—FACTORS ACT, 1889 (52-53 VICT. C. 45) SS. 1, 2—(R.S.O. C. 150, S. 2)—GOODS OBTAINED BY FRAUD.

Oppenheimer v. *Frazer* (1907) 2 K.B. 50 is an appeal from the decision of Channell, J. (1907) 1 K.B. 579, which will be found noted ante p. 397. In this case a mercantile agent had obtained possession of goods by a trick and had delivered them to one Broadhurst to sell for him. Broadhurst, who, notwithstanding he had ground for suspecting the agent had improperly obtained possession, had then sold them to a firm who purchased them in good faith on the joint account of themselves and Broadhurst, with whom they divided the profits made on a re-sale. In these circumstances Bigham, J., held that the firm had acquired a good title, but the Court of Appeal (Barnes, P.P.D., and Moul-

ton, and Kennedy, L.JJ.) held that, their purchase being on joint account of themselves and Broadhurst, they were affected by the bad faith of Broadhurst, and that the Factors Act (52-53 Vict. c. 45), (R.S.O. c. 50), was consequently no protection to them.

ADULTERATION—SALE OF FOOD AND DRUGS ACT, 1875 (38-39 VICT. c. 63) s. 25—(R.S.C. c. 133, s. 33)—WANT OF KNOWLEDGE—MILK—WARRANTY—FUTURE SALES—WARRANTY IN WRITING.

Evans v. *Weatheritt* (1907) 2 K.B. 80 was a prosecution for selling milk from which 28 per cent. of the milk fat had been abstracted. The defendant set up want of knowledge, and purchase by him of the milk in question with a warranty of its purity. It was proved that by a contract in writing the defendant had agreed to purchase from a company the whole of the milk required for his dairy for twelve months from 1 October, 1905, and the contract contained a warranty by the vendors that all milk delivered should be pure. In June, 1906, milk was delivered by the vendors to the defendant under the contract accompanied by a delivery note which did not refer to the contract. Some of this milk was sold and was proved on analysis to have had 28 per cent. of milk fat abstracted from it. The defendant relied on the warranty, and 38 & 39 Vict. c. 63, s. 25 (R.S.C. c. 133, s. 33), and the Divisional Court (Lord Alverstone, C.J., and Darling and Lawrence, JJ.), held that the defence was made out; and the conviction which was based on the ground that there was nothing to connect the warranty with the particular consignment of goods in question, was quashed.

PRACTICE—SECURITY FOR COSTS—INHERENT JURISDICTION OF COURTS.

Billington v. *Billington* (1907) 2 K.B. 106 was an action which had been tried before an official referee, and judgment recovered in favour of the plaintiff. The defendant had become bankrupt, and he subsequently gave notice of appeal from the judgment; the plaintiff thereupon applied to the Divisional Court for an order requiring the defendant to give security for the costs of the appeal. The Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held that there was an inherent jurisdiction in the Court to order security to be given, and that it was proper to grant the application in the present case.

LANDLORD AND TENANT—LIABILITY OF LANDLORD TO THIRD PARTY FOR INJURY—LANDLORD UNDER NO CONTRACTUAL LIABILITY TO REPAIR—REPAIRS IN FACT MADE BY LANDLORD—NEGLIGENCE IN EXECUTING REPAIRS—NUISANCE.

In *Malone* v. *Laskey* (1907) 2 K.B. 141 the action was brought to recover damages for injuries sustained by the plaintiff in the following circumstances. The defendants were the owners of certain house property, part of which they let to Whitherby & Co., who sub-let a portion to the Script Shorthand Co., of which company the plaintiff's husband was manager. In that capacity he resided with his wife (the plaintiff) on the premises of the Script Shorthand Co. On adjoining premises also belonging to the defendant, they had a steam engine for the purpose of generating electricity which caused considerable vibration in the Script Shorthand Co.'s premises. The result of the vibration was to render a water tank in a lavatory on these premises insecure. The defendants were under no contractual obligation to repair, but on the matter being brought to their attention they sent men to remedy the defect, and for that purpose they placed an iron bracket under the tank. Three months afterwards the bracket fell on, and seriously injured the plaintiff. The jury found that the bracket had been negligently placed and its fall was caused by the vibration arising from the working of the engine on the adjoining premises which the jury found was a nuisance. The plaintiff sued for damages (1) for nuisance, and (2) for injuries occasioned by the falling of the bracket. The action was tried by Darling, J., who on the findings of the jury that the damage was caused by the vibration which amounted to a nuisance, and that the bracket was negligently put up—gave judgment for the plaintiff. The Court of Appeal (Barnes, P.P.D., and Moulton and Kennedy, L.JJ.) reversed his decision, on the ground that the plaintiff having no estate or interest in the premises where she lived was not entitled to complain of the nuisance; and that the defendants being under no contractual liability to the plaintiff to repair the premises in question, and owing no duty to the plaintiff, she had no right of action against them for the injury she had sustained through their negligence in putting up the bracket. The trap cases on which the plaintiff relied were held inapplicable because there was no invitation by the defendants to the plaintiff to use the premises.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O.] [March 4.

COPELAND-CHATTERSON COMPANY *v.* BUSINESS SYSTEMS, LIMITED.

Appeal—Stay of execution of injunction—Disobedience of injunction—Contempt of Court—Stay upon terms.

The rule that a party to an action guilty of contempt can take no step, is subject to several exceptions, and one of these is that the party is entitled to prosecute an appeal from the order or judgment which it is alleged he has been guilty of disobeying.

Upon an application by the defendants to a judge of the Court of Appeal, under Con. Rule 827 (1) (d), for an order staying the execution of an injunction awarded by a judgment of the High Court, pending an appeal from that judgment to the Court of Appeal, where it is alleged that the defendants are in contempt for disobedience of the judgment, but they have not been so adjudged, the judge will not determine whether a contempt has been committed.

Where the defendants were appealing in good faith, execution of the injunction was stayed, upon terms, pending the disposition of the appeal.

W. H. Irving, for defendants. *W. E. Raney*, for plaintiffs.

Full Court.] [March 14.

WALLINGFORD *v.* OTTAWA ELECTRIC RY. CO.

Street railways—Injury to passenger alighting from car—Contributory negligence—Crossing behind car—Duty to sound gong—Regulations—"Crossing"—Case for jury—Costs——Discretion—Appeal.

The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street

crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab driven swiftly towards him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was impossible to get out of the way of the car; he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants, validated by 57 Vict. c. 76 (O.), under which the defendants operated their cars on the city's highways, it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings and he expected it to be done when a car was approaching a crossing.

Held, that, even if the regulation had not the force of a statutory requirement, the proof of failure to comply with a precaution which the defendants had recognized as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury.

Semble, per Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street.

The Court declined to interfere with the direction of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial.

Order of a Divisional Court affirmed.

H. S. Osler, K.C., for defendants, appellants. *J. A. Ritchie*, for plaintiff.

Full Court.] JONES *v.* MORTON CO. [March 14.

Master and servant—Injury to servant—Employment of child under fourteen—Lease of part of building as factory—Use of elevator—Defective condition—Liability of owners of building—Implied invitation—Liability of employers—Common law—Workmen's Compensation Act—Factories Act—Jury.

The plaintiff, a child under fourteen years of age, was injured by the fall of a goods elevator used by his employers in a building, the third floor of which they rented for the purpose of their business of manufacturing check books. By the lease to the employers, the lessors covenanted to give the use, together with other tenants in the building, to the lessees (the employers), their agents, clerks and tenants, of the elevator in said building for freight purposes only, in each day, and to keep the same in repair and good working order, with a right of way to and from the elevator, and provided that the lessors should not be liable for any damage or any accident to any member of said lessees or any of their employees through using or interfering with the elevator, but the lessors were to keep the elevator in proper running order, and repair on notice. The plaintiff was "helper" to I., a fellow employee, who told him to bring up a packing case from the basement; the plaintiff placed it on the elevator, which stuck on the way up; he returned to I. and reported, and I. told him to take the case off, and not to use that hoist, but another. The plaintiff went down the stairs, and I. heard nothing more of him until he was found lying on the elevator, injured. The evidence did not shew whether the packing case was on or off the elevator when the plaintiff was found. The elevator was out of order, and the inference was that it had fallen.

Held, 1. The plaintiff's rights as against the lessors wholly depended upon implied invitation, and any invitation to use the elevator must be regarded as cancelled when the plaintiff became aware that it was out of order and was told not to use it; and the plaintiff's action against the lessors to recover damages for his injuries failed.

2. The plaintiff's action against his employers also failed, so far as it was based upon the common law and the Workmen's Compensation for Injuries Act; upon the former, because, upon the undisputed evidence, he was not using the defective elevator as an elevator at the time of his injury, or, if he was, that he

was doing so in defiance of the order of I.; and upon the latter, because the jury had not made the necessary findings upon which to base a judgment in respect of the order given by I. But, by the Ontario Factories Act, R.S.O. 1897, c. 256, s. 3, the plaintiff's employment was wholly unlawful, and a primâ facie case under that Act was made simply by proof of his age, the employment, and the injury. To such primâ facie case no answer was made; there was no finding of contributory negligence; and the employers' premises were, within the meaning of the Act, a factory, of which the elevator formed part. The employers were, therefore, liable under the Factories Act to the extent of $1,500.

MEREDITH, J.A., dissented in part.

Judgment of ANGLIN, J., varied.

Hellmuth, K.C., and *Greer*, for appellants. *DuVernet* and *Knox*, for appellants. *Masten* and *J. H. Spence*, for plaintiffs.

HIGH COURT OF JUSTICE.

Mabee, J.] [March 8.

RE CLEARY AND TOWNSHIP OF NEPEAN.

Municipal corporations—Local option by-law—Adoption by electors—Three-fifths majority—Computation—Rejected or uncounted ballots—Illegal votes—Finding of Voters' Lists—Effect on by-law.

In computing the three-fifths majority of voters required for a local option by-law by 6 Edw. VII. c. 47, s. 24, s-s. 4 (O.), rejected or uncounted ballots are not to be considered.

Upon a motion to quash such a by-law the applicant may go behind the voters' lists and shew that illegal votes were cast; if he succeeds in shewing that, the illegal votes must be deducted from those favourable to the by-law; and if the result be that the majority is not sufficient, the by-law will be quashed.

Re Gerow and Township of Pickering (1906) 12 O.L.R. 545, and *Re Sinclair and Town of Owen Sound* (1906) ib. 488 followed.

Gordon Henderson and *D. H. McLean*, for applicant. *W. Greene*, for respondents.

Teetzel, J.] [April 2.

RE ROBERTSON AND GRAND TRUNK RY. CO.

Mandamus—Carriage of passengers—Rates and accommodation—Jurisdiction of Board of Railway Commissioners.

Two questions must be found in favour of the applicant before the writ of prerogative mandamus can issue; first, has the applicant a specific legal right to the performance of some duty by the respondent; and second, will the applicant without the benefit of the writ be left without effectual remedy?

Where the applicant sought a mandamus to compel the Grand Trunk Railway Company, pursuant to sec. 3 of their Act of incorporation, 16 Vict. c. 27 (C.), to run a train containing third-class carriages, and to permit the applicant to travel therein on payment of a fare not exceeding one penny a mile:—

Held, that the applicant had an adequate remedy under the provisions of the Dominion Railway Act, 1903, (ss. 8, 23, 25, 44, 214, 294, being specially referred to), and that that remedy could be more conveniently applied and executed under the direction and supervision of the Board of Railway Commissioners than by the Court; and the application was refused.

J. W. Curry, K.C., for applicant. *Wallace Nesbitt*, K.C., for respondents.

Falconbridge, C.J. K.B.] [April 3.

REX EX REL. ARMSTRONG v. GARRATT.

Municipal elections—Declaration of qualification to be filed by candidate after nomination—Declaration made before election—Duty of clerk of municipality—Objection taken after election—Irregularity not affecting result—Municipal Act, 1903, *ss.* 129(3*a*), 204.

The declaration of qualification required by s. 129(3*a*) of the Municipal Act, 1903, to be filed by a candidate for municipal office in certain cities, within (at the most) 48 hours after the hour of nomination, may be made and subscribed before the nomination. If the declaration tendered on behalf of a candidate be made after the final revision of the assessment roll, upon which the candidate must be qualified, if it avers the

possession of the necessary qualification, specifying the property, and if such averment be corroborated by the last revised assessment roll, the city clerk should file the declaration and place the candidate's name on the ballot paper, even if, as in this case, the declaration was made and subscribed 6 weeks before the nomination.

Semble, that, even if the declaration may not be made before the nomination, the objection cannot be taken after the election, and the declaration in this case having been made in good faith, as a compliance with s. 129(3*a*), and acted upon in good faith by the city clerk, there was at the worst an irregularity not affecting the result of the election: s. 204 of the Municipal Act, 1903.

Decision of MacBeth, Co. J., of Middlesex, affirmed.

Gibbons, for the relator. *DuVernet*, for defendant.

Boyd, C., Magee, J., Mabee, J.] [April 5.

BRADD *v.* WHITNEY.

Negligence—Death of person operating calcium light in theatre —Employment by playing company—Liability of owners—Partnership.

A theatrical company agreed to present a certain play at the defendants' theatre on a date specified, and the defendants agreed to furnish the theatre and all the properties contained in the theatre for the period of the engagement, and also to "furnish electric current for the company's calciums." It was agreed that there should be no other entertainment in the theatre during the engagement, and that the gross receipts should be shared so that 70 per cent. should go to the playing company. The plaintiff's son was employed by the company to operate and did operate a calcium light; he was under the charge and direction of their electrician; the company's servants had entire and sole control of the stage and its surroundings, including the place where the lamp was operated. The lamp was the property of the company. The plaintiff's son was killed by the action of electricity while operating the lamp:—

Held, that the effect of sharing the gross receipts was but another mode of paying rent for the premises, and did not in-

dicate that any partnership existed; and the defendants, having no right of control, were not jointly liable with the company, nor in any way liable, for the death of the plaintiff's son.

Lyon v. *Knowles* (1863), 3 B. & S. 556, 560 followed.

Flynn v. *Toronto Industrial Exhibition Association* (1905), 9 O.L.R. 582, and *Inder maur* v. *Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311, distinguished.

J. L. Counsell, for defendants. *J. W. Nesbitt*, K.C., for plaintiffs.

Riddell, J.] REX *v.* COLAHAN. [April 6.

Criminal law—Habeas corpus—Imprisonment in default of payment of fine and costs—Tender to deputy keeper of gaol—Reasonable time—Rule of prison as to hour of receipt of fine—Effect of—Discharge of prisoner.

A warrant of commitment commanded the keeper of a common gaol to receive the defendant into his custody in the common gaol, there to imprison him for 30 days unless the amount of a fine and costs were sooner paid to the keeper. The defendant was apprehended under this warrant and received by the gaoler on the 12th March. His agent, on the 14th March, at 10 minutes before 8 o'clock in the afternoon, tendered the proper amount of the fine and costs to the person in charge, the deputy keeper, who refused to receive the money, on the ground that there was a rule of the gaol that no person would or could be released, on payment of his fine after 5 o'clock in the forenoon, until the next morning:—

Held, that there was no power, statutory or common law, to make such a rule, and that the tender having been made at a reasonable time and to the proper person, the prisoner should have been released; and having been improperly detained after the tender, he was entitled to be discharged upon habeas corpus.

J. B. Mackenzie, for defendant. *T. L. Monahan*, for Crown.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [May 7.

RE RICKEY AND TOWNSHIP OF MARLBOROUGH.

Municipal Act—By-law—Publication—"Three successive weeks"—Non-compliance—Incurable as irregularity.

The publication of a proposed by-law in a paper "each week

for three successive weeks" required by sub-sec. 2 of sec. 338, of the Consolidated Municipal Act, 1903, is a publication once in each three successive periods of seven days, and

Where a by-law was published in a semi-weekly paper on Friday, the 14th, Tuesday, the 18th, and Tuesday, the 25th, of a certain month.

Held, that there had been two publications in the first week or seven day period, one in the second and none in the third, and that the statute had not been complied with.

Held, also that non-compliance with the provisions of sec. 338 could not be treated as a mere irregularity curable under sec. 204.

Cartwright v. *Town of Napanee*, 9 O.L.R. 69, at p. 71, followed.

F. B. Proctor, for the appeal. *J. T. White*, contra.

Mabee, J.] McCARTER *v.* YORK COUNTY LOAN CO. [June 6.

Lessor and lessee—Option in lease—Winding-up of lessor company—Liquidator—Sale by—Disregard of option—Damages.

The defendants leased a house property to the plaintiff by lease in writing containing a clause "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as on said offer." Subsequently an order for the winding-up of the company was made and a liquidator was appointed who sold the premises without giving the plaintiff an opportunity to exercise his option.

Held, that the winding-up order did not in any way cut down the rights of the plaintiff or change his position: that the liquidator was authorized to sell the premises, but only subject to the terms and conditions of the lease; that he was bound to submit to the plaintiff, who had not waived his rights, the offer received, and not having done so the company was liable in damages notwithstanding that the plaintiff was aware that the liquidator was making efforts to sell the premises and notwithstanding that the sale was made with the knowledge and consent and induced by the conduct of his wife which latter he denied any knowledge of.

Shilton, for plaintiff. *Johnston*, K.C., for defendant.

Riddell, J.] MARRIOTT *v.* BRENNAN. [June 6.

Contract to sell land—Agents commission.

The defendant employed the plaintiffs, real estate agents, to sell certain property at a certain price, agreeing to pay a commission to the one who procured a purchaser able and willing to pay the price, and submitted a written offer. On receipt of the offer, defendant, making no objection to it, said he wanted to look into the matter and used the offer as a lever to close a pending offer of his own to another party at the same price in order to save the commission.

Held, that plaintiffs had done all they were called upon to do when they obtained a purchaser ready and willing to purchase, and that they were entitled to their commission.

Gibbald v. *Bethlehem Iron Co.* (1881) 83 N.Y. 383 referred to.

Code, for plaintiffs. *Daly*, for defendant.

Riddell, J.] [June 6.

SOVEREIGN BANK *v.* INTERNATIONAL PORTLAND CEMENT CO.

Assignment to bank of moneys under a contract to secure advances—Subsequent judgment creditors of assignors—Equitable assignment—Notice.

A firm of contractors having a contract with a town desiring advances from a bank assigned "all or any money or moneys due or which may become due from the corporation of the town," and thereafter the cheques for all moneys coming to the contractors payable to their order were handed to the bank. The contractors executed an assignment as follows: "We hereby for and in consideration of advances heretofore made . . . assign, transfer and make over to (the same bank, another branch) as a general and continuing collateral security balance of the account against (the town) now assigned to (the bank)." The managers of both branches knew that there was but one contract upon which the contractors would be entitled to receive money from the town and admitted

that the assignments were simply taken as security for the advances made or to be made to the contractors. On an interpleader issue between the bank and subsequent judgment creditors of the contractors,

Held, that the assignments to the bank were good equitable assignments: that no notice of them to the town was necessary: and that a sum of money, part of moneys due by the town to the contractors, paid into the hands of the sheriff under s. 37 of the Creditors Relief Act, under a garnishing order obtained by the judgment creditors as well as any money to be so paid in, was the money of the bank.

Ritchie and *Foy*, for the bank. *Orde*, for company.

Riddell, J.] REX *v.* ROBINSON. [July 3.

Habeas corpus—Issue of two writs—Regularity of second—Prisoner allowed to give recognizance and go free after sentence—Arrest later—Time of commencement of sentence—Expiry—Escape—Release—Protective orders—Terms.

The prisoner was convicted of an offence on the 17th of January and sentenced to four months imprisonment, but instead of being imprisoned his recognizance was taken by the magistrate to appear when called upon and he was allowed to go free. On the 27th of March without any notice a warrant was issued and he was arrested and put in gaol. A writ of habeas corpus was granted and a motion for his discharge made on the 26th of April and refused, the papers being on their face regular; but leave was reserved to move for a new writ on the expiry of four months from the day of sentence. A new writ was granted on the 25th of June and motion made for his discharge on the 27th June.

Held, that there was a right to issue the second writ, the former one being premature and there having been no adjudication upon the matter; but that it should not issue upon any ground which could have been taken on the former.

Taylor v. *Scott* (1898) 30 A.R. 475 distinguished.

Held, also, that the term of imprisonment began on the day of passing sentence; that the full term had expired; that the magistrate had no power to take the recognizance; that the pris-

oner had not been guilty of an escape; that he was not "at large . . . without some lawful cause" and an order was made for his release.

Order for protection of magistrate made on terms.

J. B. Mackenzie, for the motion. *Cartwright,* K.C., Dep. Atty.-Gen., contra.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] [May 21.

FARRELL *v.* PORTLAND ROLLING MILLS COMPANY, LIMITED.

Company—Prospectus—Misrepresentation—Agent—Liability of directors—Rescission of contract to purchase shares—Delay—Competency of witness—Religious belief.

Where a broker employed by a company to sell shares in its capital stock, issues, though without the knowledge or authority of the company, a prospectus containing untrue material statements, on the strength of which shares are purchased, the purchase money being paid to the company, the purchaser may rescind the contract as against the company, the broker's statements being binding on his principal as made within the scope and course of his employment.

A broker employed by a company to sell shares in its capital stock, issued a prospectus stating, among other things, that while in the past the company's earnings had been applied to the improvement of its property, "henceforth it is the intention to declare regular half-yearly dividends as the net earnings of the business will warrant. In view of past results, and the very favourable prospects for increased earnings, shareholders can with confidence look forward to receiving satisfactory returns on their investments in the shape of dividends." No mention was made of the debts or assets of the company. It owed a large

sum to its bankers, but its assets considerably exceeded its liabilities:—

Held, that the statement amounting to no more than an announcement of policy, and which the directors were at liberty to pursue, a company having power, though in debt, to pay dividends out of profits, the failure to disclose the indebtedness to the bankers did not render the statement misleading, there also being no duty to disclose in the prospectus the assets and liabilities of the company.

Directors adopting a resolution to sell shares in the capital stock of the company and to employ a broker for the purpose held not responsible in damages for misrepresentation in a prospectus issued by a broker employed by them under the resolution, at the instance of a purchaser of shares who had purchased in reliance upon the prospectus, the prospectus having been issued without their knowledge or authority, and the broker being the agent of the company.

The plaintiff learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16, and on March 8, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13, the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following:—

Held, that the suit was barred by delay.

Where a person stated he believed in a Supreme Power—a God as defined by Christ's teachings; in heaven and hell, and in a future state of rewards and punishments, but, that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent to be sworn as a witness.

McInerney, K.C., and *Price*, for plaintiff. *Teed*, K.C., and *A. H. Hanington*, K.C., for defendants.

Barker, J.] TOOKE BROTHERS *v.* BROCK & PATTERSON. [May 31.

Debtor and creditor—Bill of sale—Agreement to give—Postponement of execution—Insolvency—Assignments and Preferences Act—Creditors—Amendment of parties.

A trader when in insolvent circumstances to the knowledge of

himself and the defendants executed to them a bill of sale of his stock in trade pursuant to an agreement made with them nearly four years previously to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit. Shortly after executing the bill of sale he made an assignment for the benefit of his creditors under c. 141, C. S. 1903:—

Held, 1. In a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon other creditors, and that the bill of sale should be set aside.

2. Delivery of the stock in trade by the trade to the defendants subsequently to the execution of the bill of sale, did not assist their title, s. 2 of c. 141, C.S. 1903, applying.

A preferential transaction falling within the provisions of c. 141, C. S. 1903, may be impeached at the instance of creditors, where the debtor has not made an assignment.

Where after the commencement of a suit by creditors to set aside a bill of sale, as constituting a fraudulent preference under c. 141, C.S. 1903, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff.

Teed, K.C., and *Tilley*, for plaintiffs. *Earle*, K.C., and *Kelley*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] DEAN *v.* LEHBERG. [June 9.

Executors and administrators—Remedy against estate for work done for administrator.

The plaintiff's claim was for work and services performed at the request of the defendant on a farm belonging to the estate of Ada Louise Lehberg, deceased, of which her husband, the defendant, had taken out letters of administration. The services were all performed after the death of Mrs. Lehberg; but her

estate had the benefit and the plaintiff sued the defendant as administrator of her estate.

Held, on appeal from the verdict of the County Court judge in plaintiff's favour, that the plaintiff could not recover against the defendant in his representative capacity, and could only have judgment for the value of his services against defendant in his personal capacity.

Farhall v. *Farhall*, L.R. 7 Ch. 123 followed.

Costs of the action and appeal awarded to defendant to be set off against the judgment.

Turnbull, for plaintiff. *Conde*, for defendant.

Full Court.] [June 10.

SMITH *v.* AMERICAN ABELL ENGINE CO.

Conditional sales—Lien Notes Act, R.S.M., 1902, *c.* 99, *ss.* 4, 7—*Charge on land created by document separate from order for chattel—Caveat.*

Appeal from decision of MACDONALD, J., noted ante, p. 297, dismissed with costs.

Aikins, K.C., and *Fullerton*, for plaintiff. *A. B. Hudson*, for defendants.

KING'S BENCH.

Mathers, J.] DANIELS *v.* DICKSON. [May 2.

Practice—Adding third party—Rules 245-250—*Indorsee of promissory note against maker—Defence that payee guilty of fraud—Maker not entitled to bring in payee for the purpose of getting relief over.*

Action on a promissory note made by defendants to one Helgeson and by him indorsed to the plaintiff. The main defence was that Helgeson obtained the note by fraud and that the plaintiff was not a holder in due course. The defendants served Helgeson with a third party notice under Rule 246 of the King's Bench Act, when Helgeson moved to set the notice aside. The defendants then applied under Rule 245 for an order "joining

Helgeson as a party to the action." The two motions were argued together before Cumberland, Co. J., local judge at Brandon, who held that the third party notice provided for in Rules 245 and 246 is wholly inapplicable in such a case, being intended for use when the third party may be supposed to have some ground which he may be able to urge against the plaintiff's right to recover from the defendants, the object of giving the notice being that if he fails to come in and urge such ground it will not be open to him afterwards, when the defendant seeks indemnity or contribution or other relief over against him, to say that the plaintiff should not have been permitted to get his judgment against the defendant.

In the usual case the plaintiff is asserting something against the defendant and the latter is denying it. If the plaintiff succeeds, the defendant proposes to ask the third party for relief over, so he says to the third party: "Come in and help me fight this issue and be bound by the result."

Here the defendants are not asking the third party to come in and help them to contest any point.

If the defendants prove that the plaintiff is not a holder in due course, they will succeed in the action and will require no relief over against Helgeson; but, if the plaintiff is a holder in due course, he is entitled to judgment and should not be delayed in recovering it by what might be prolonged litigation between the defendants and Helgeson: *Bower* v. *Hartley*, 1 Q.B.D. 656, and King's Bench Act, Rule 250.

Helgeson's motion granted and that of the defendants refused with costs.

Held, on appeal that the discretion exercised by the local judge in making the orders should not be interfered with and that the appeal should be dismissed with costs.

Burbidge, for plaintiff. *Hough*, K.C., for defendants. *Pitblado*, for Helgeson.

Mathers, J.] SMITH *v.* VAN BUREN. [May 13.

Garnishment—Liability of purchaser of land after assignment of agreement to third party—Order as to payments still to fall due—King's Bench Act, Rule 764.

Before the commencement of this action the defendant had sold certain lands to one McInnes under an agreement whereby

McInnes convenanted to pay the balance of the purchase money in certain instalments none of which were due at the time of the service of a garnishing order in this action upon McInnes. This was a motion made after the due date of one of the instalments for an order for the garnishee to pay it over to the plaintiff who had in the meantime recovered judgment.

Held, 1. That the garnishee order covered the instalments although none of them were due and payable at the time of the service of it.

2. That a subsequent sale of his interest in the land by the garnishee to a third party, under an agreement, whereby this party assumed liability to the defendant for the remaining unpaid instalments, made no difference and could not deprive the plaintiff of his rights under his order.

3. The plaintiff was entitled, under Rule 764 of the ing's Bench Act, to an order for payment not only of the overdue instalment but also, when due, of those still to fall due until his judgment should be satisfied.

Fullerton, for plaintiff. *McPherson*, for garnishee.

Mathers, J.] [May 20.

LEVI *v.* PHŒNIX INSURANCE CO.

Practice—Joinder of defendants—Suit against two companies insuring same property—King's Bench Act, Rule 219.

Held, that Rule 219 of the King's Bench Act, R.S.M. 1902, c. 40, does not permit a plaintiff to proceed in one action against two separate insurance companies upon separate policies of insurance, although they cover the same goods destroyed by the same fire.

Foulds v. *Foulds*, 17 P. R. 480; *Hinds* v. *Barrie*, 6 O.L.R. 656, and *Andrews* v. *Forsythe*, 7 O.L.R. 188, followed.

Plaintiff was required to elect within five days which company she would proceed against in this action and to discontinue as against the other.

Burbidge, for plaintiff. *Anderson*, for Phœnix Ins. Co. *Stackpoole*, for Rochester German Ins. Co.

Phippen, J.A.] KING *v.* GAGE. [May 21.

Conspiracy in restraint of trade—Criminal combination—Criminal Code, s. 498—Grain Exchange, Rules and Regulations.

The defendants were indicted under sec. 498 of Crim. Code for conspiring and combining to restrain or injure trade or commerce in relation to wheat.

Held, 1. Notwithstanding the absence of the word "unduly" from sub-section (*b*) of that section and its presence in the other three sub-sections, it is only such combinations as unduly restrain or injure trade or commerce that are punishable criminally, and sub-section (*b*) relates only to those restraints which are not justified by any personal interest of the contracting parties, but which are mere malicious restraints unconnected with any business relations of the accused. *Gibbons* v. *Metcalfe*, 15 M.R. 583 followed.

2. None of the by-laws, rules and regulations following, although more or less in restraint of the trade in wheat, can be said to be undue restraints so as to render the parties criminally responsible. (*a*) A by-law providing that no member of the Exchange should pay a greater price for wheat than would allow a profit of one cent per bushel on selling to the miller or exporter. (*b*) An amendment of above by-law providing that no member should employ a buying agent at a country point when the business done would not justify paying the agent a salary of at least $50 per month. The object and purpose of this rule was to save expenses and loss of commissions to the members, and not to lessen the prices paid to the farmers, and such prices were not thereby in any way diminished. (*c*) An agreement that offers would not be made to buy wheat at country points during the market hours on the Exchange (9.30 a.m. to 1.15 p.m.), but that the closing prices should be immediately telegraphed to all points, on which basis track wheat might be bought at those points until the opening of the market on the following day. To avoid the expense of multiplying messages and to insure the prompt receipt of market quotations at country points, a member of the Exchange was employed to wire the prices at the close of the market. There was no doubt that this had been fairly done and that the prices wired were not only just, but were the highest that could then be paid for grain based on Fort William values. The farmer had other ways of selling his wheat even during market hours, and the agreement was no undue

restraint upon the freedom of trade in grain. (*d*) An agreement to make an average difference or spread of three cents and the fraction (whatever that might be) per bushel between the prices paid for track and street wheat. It was shewn that the average actual cost of maintaining the elevators was a little over three cents per bushel on the average wheat handled. (*e*) An agreement amongst the elevator companies that during a portion of each year towards the close of navigation, they would not have more than 5,000 bushels of purchased wheat in any one interior building at any one time. The reason for this was that owing to traffic conditions it was doubtful when street wheat could be actually sent forward on the cars. To be compelled to carry it until the following season, if bought on the basis of going forward during the purchasing season, meant a considerable loss. (*f*) That some of the elevator companies pooled receipts at certain points for a couple of seasons. From a variety of causes, many railway stations were left with too great elevator capacity, and the companies found it necessary either to cut down expenses or increase the elevator charges. The pooling was adopted because it reduced the expenses, and the public was not affected by the arrangement, nor were prices paid for grain thereby lessened.

On the whole case the learned judge came to the conclusion that the acts complained of, taken in connection with their surrounding conditions, made on the whole for a more stable market at the fullest values than if totally unregulated competition had prevailed, and so were for the public good. Defendants acquitted.

Bonnar, O'Connor & Blackwood, for the Crown. *Aikins*, K.C., and *Robinson*, for McHugh and Love. *A. J. Andrews* and *Burbidge*, for Gage.

Macdonald, J.] DYCK *v.* GRAENING. [June 4.

Chattel mortgage—Affidavit of bonâ fides—Jurat—Meaning of "sworn."

Plaintiff claimed damages for the seizure by defendants of a team of mules under a chattel mortgage which he contended was invalid by reason of the objections indicated by the following holdings of the trial judge.

Held, 1. The affidavit of bonâ fides on a chattel mortgage is sufficient, although it purports to be the joint affidavit of two

mortgagees and the jurat does not shew that they were severally sworn: *Moyer* v. *Davidson*, 7 U.C.C.P. 521.

2. The insertion in the affidavit of a clause reading "That I am the duly authorized agent of the mortgagee" was an apparent mistake and did not vitiate it.

3. The fact that it was stated in the jurat that the affidavit had been "sworn," whereas the deponents had affirmed, was not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly."

4. The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 5, does not require that the occupation of the mortgagee should be stated in he affidavit of bonâ fides.

Brodie v. *Ruttan*, 16 U.C.R. 207 followed.

Action dismissed with costs.

Lemon, for plaintiff. *Bowen*, for defendants.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] [May 28.

WILLIAMS *v.* CANADIAN BANK OF COMMERCE.

Banks and banking—Interest—Agreement to pay more than statutory rate.

Section 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than seven per cent., and if, under such a contract, interest is paid in excess of such a rate, it cannot be recovered back. *Massue* v. *Dansereau* (1865) 10 L.C.J. 179 followed.

Donaghy, for plaintiff. *Davis*, K.C., for defendant bank.

Hunter C.J.] [May 28.

DE LAVAL SEPARATOR COMPANY *v.* WALWORTH.

Company—Statute—Construction of—Contract with extra-provincial company—Jurisdiction.

The failure of an extra-provincial company to register in

accordance with the provisions of the Companies Act, 1897, does not avoid contracts entered into within the jurisdiction, although it penalizes the carrying on of business by such non-registered companies.

Semble. The forwarding of goods to an agent, to be sold by him in his own name, is not a transaction within the prohibition of section 123.

Quære, whether the creating within the jurisdiction of an obligation which is to be performed without the jurisdiction is carrying on business within the jurisdiction.

Davis, K.C., and *Marshall,* for plaintiff company. *Craig,* for defendant.

Book Reviews.

The Principle of German Civil Law, by ERNEST J. SCHUSTER, LL.D., of Lincolns Inn, Barrister-at-law. Oxford at the Clarendon Press. London and New York, Henry Frowde, and Stevents & Sons, Limited, London. 1907. 684 pages. Price, $3.50.

The preface says, "This book is intended (1) to assist the study of English law from a comparative point of view; (2) to give an insight into the latest and most perfect attempt to systematize the whole of the private law of a country; (3) to give some practical help to the increasing number of practitioners who in the course of their daily work have to deal with questions of foreign and private international law. The drafting of the German civil code was started in 1874, and came into force January 1, 1900, accompanied by various explanatory statutes. The expansion of international commercial dealings and frequent changes of domicil in these days largely increases the number of the occasions in which lawyers have to deal with foreign law, hence the advantage of such a work as that before us, especially when the writer has endeavoured and apparently largely succeeded in clothing the information given with an English dress. It goes without saying that the knowledge of German law must be of much interest to those of the Anglo-Saxon race, their parentage being so largely the same.

A Treatise on the Law, Privileges, Proceedings and Usage of Parliament, by SIR THOMAS ERSKINE M..., K.C.B., D.C.L., Clerk of the House of Commons. Eleventh edition. Edited by T. Lonsdale Webster and William E. Gray, London. William Clowes & Sons, Limited, 7 Fleet Street. 1907.

The first edition of this standard work was published in 1884, since which time it has been, as every one knows, the hand book of all parliamentarians, and a mine of information on all matters connected with parliamentary law and procedure. It is unnecessary to say more than that this edition in all respects is up to the high standard attained by the publishers.

The Law of Private Property in War, by NORMAN BENTWHICH, London. Sweet & Maxwell, Chancery Lane. 1907.

This book of 151 pages is the Yorke prize essay for 1906, and contains also a chapter on conquest. It brings the subject down to the present time, necessarily referring to the interesting events which took place in connection with this subject during the war in South Africa and that between Russia and Japan.

Flotsam and Jetsam.

We have received a lengthy report of a gathering of the friends of Mr. John Crawford, of Aylmer, who has recently left for Red Deer, Alberta. Mr. Crawford was the oldest practitioner in the County of Elgin, and that he was held in high esteem by his brethren is quite evident from the complimentary addresses on the occasion referred to. His friends wish him success in his new sphere of labour.

A learned judge in one of the appellate Courts in the United States recently read to the New York University Law School Alumni Association a "last will," which he said "was the most remarkable document that ever came into his posses-

sion." The tostator was almost unknown beyond his own circle, and had but little of this world's goods; but he has bequeathed something better than money in the beautiful thoughts in the exquisite conceit we reproduce. Some said he was weak of intellect. If so, we only wish there were more afflicted in the same way. Our readers will thank us for giving them this as good reading in a midsummer number:—

"Item: I give to good fathers and mothers, in trust for their children, all good little words of praise and encouragement, and all quaint pet names and endearments, and I charge said parents to use them justly and generously, as the needs of their children may require.

"Item: I leave to children inclusively, but only for the term of their childhood, all and every the flowers of the fields and the blossoms of the woods, with the right to play among them freely according to the customs of children, warning them at the same time against thistles and thorns. And I devise to children the banks of the brooks and the golden sands beneath the waters thereof, and the odors of the willows that dip therein, and the white clouds that float high over the giant trees. And I leave the children the long, long days to be merry in, in a thousand ways, and the night and the moon and the train of the Milky Way to wonder at, but subject, nevertheless to the rights hereinafter given to lovers.

"Item: I devise to boys jointly all the useful idle fields and commons where ball may be played; all pleasant waters where one may swim; all snow-clad hills where one may coast, and all streams and ponds where one may fish; or where, when grim winter comes, one may skate; to have and to hold the same for the period of their boyhood. And all meadows with the clover blossoms and butterflies thereof, the woods and their appurtenances, the squirrels and birds, and echoes of the strange noises, and all distant places which may be visited, together with the adventures there found. And I give to said boys each his own place at the fireside at night, with all pictures that may be seen in the burning wood, to enjoy without let or hindrance and without any incumbrance or care.

"Item. To lovers I devise their imaginary world, with whatever they may need, as the stars of the sky, the red roses by the wall, the bloom of the hawthorn, the sweet strains of music, and aught else by which they may desire to figure to each other the lastingness and beauty of their love."

A disciple of Coke, in Charleton, S. Car., when asked by a "brudder" to explain the Latin terms de facto and de jure replied: "Dey means dat you must prove de facts to de satisfaction ob de jury."

The second day drew to its close with the twelfth juryman unconvinced.

"Well, gentlemen," said the Court officer, entering quietly, "shall I, as usual, order twelve dinners?"

"Make it," said the foreman, "eleven dinners and a bale of hay."—New York Press.

UNITED STATES DECISIONS.

NEGLIGENCE.—That it is not negligence, as matter of law, for one approaching a bridge crossing a railroad track to fail to stop, look, and listen, is held, in *Heinmiller* v. *Winston* (Iowa), 6 L.R.A. (N.S.) 150.

Personal discomfort to neighbouring property owners because of the location and operation, without negligence, of railroad tracks, depots, and side tracks under legislative authority is held, in *St. Louis, S. F. & T. R. Co.* v. *Shaw* (Tex.), 6 L.R.A. (N. S.) 245, to give them no right of action against the railroad company.

The right of persons in charge of a railway train to presume that a child on the track will appreciate the danger and get out of the way of the train is denied in *Southern R. Co.* v. *Chatham* (Ga.), 6 L.R.A. (N.S.) 283.

The Living Age, Boston, U.S.A.

Two subjects of large current interest are discussed in the shorter papers in The Living Age, for June 8: The Rights of Subject Races, in an article from the London Nation; and President Roosevelt and the American People, from The Spectator. The Control of the P blic Purse, reprinted in The Living Age for June 22, from the Monthly Review, is one of Michael MacDonagh's pleasantly informing articles touching English governmental relations and methods. Harmless Beverages in Relation to Health, in The Living Age for June 22, gives some highly important suggestions on certain much-discussed points with the authority of an expert and the charm of a clever essayist.