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THE PREVALENCE OF PERJURY.

"While thousands, careless of the damning sin,
Kiss the Book's outside, who ne'er look'd within."

—*Cowper.*

In a recent address to a grand jury in Ontario, Mr. Justice Mabee said: "There is undoubtedly a great deal of perjury in our Courts of law. I mean wilfully false statements. If there is any way of preventing the evil there will be a much better administration of justice than now."

The prevalence of perjury in civil and criminal cases has also been the subject of comment by judges and Crown prosecutors in other Provinces of Canada. In the United States perjury seems to be alarmingly on the increase. Not long ago the President of a Bar Association in that country, after declaring that perjury was increasing, quoted communications from judges in various States of the Union in support of his statement. He also said: "In short, with reference to the prevalence of perjury, the time has come when, in the words of another, justice must wear a veil, not that she may be impartial, but that she may hide her face for shame. Some tell us that the crime is committed mostly in the police and petty Courts, where as a rule the witnesses belong to the vicious classes. But the fact remains that it is committed in other Courts and by men professing high station in society, church and state."

While such strong language could not fairly be applied to conditions in Canada, it is nevertheless apparent that even here some better provision is required to suppress the evil, by facilitating the punishment of persons guilty of perjury. Our Code has improved the law on this subject by abolishing some technicalities, which previously caused confusion and doubt, and some-

times afforded loopholes by which prejurers when prosecuted could escape punishment, but, while our law defining this offence is satisfactory, there is a manifest weakness in connection with the machinery relied upon to enforce this law effectively. The best preventive of this offence against public justice is the certainty of prompt punishment if the crime be committed. But at the present time the crime is often committed because it is felt that there is not much danger of a prosecution. Whenever other crimes are committed there is usually some one injured in person or property who is bent on prosecuting the criminal, but where perjury is committed in a Court of law, there is generally no inclination on the part of the individual wronged, to institute legal proceedings even where the perjurer has caused miscarriage of justice. In the many cases where the false oath is not credited and no prejudice is caused to the opposite party, that individual has no disposition to go to the trouble of prosecuting the offender, as the offence is a difficult one to prove. While legally it is immaterial whether the false oath was credited or not, or whether the party against whom it is given was prejudiced thereby, as the prosecution is grounded not on damage to the party but on the abuse of public justice, yet, practically, if the perjurer has not been successful in his attempt to thwart the ends of justice he is likely to leave the Court house unmolested and perhaps may repeat his offence with impunity, and more successfully on some subsequent occasion. A person contemplating the commission of another crime, as, for instance, theft, knows that the owner of the goods will promptly start a prosecution when it is discovered that the goods are stolen, and the fear of such prosecution and punishment often acts as a deterring force and prevents theft. But a person committing perjury generally feels before-hand that he can safely take the risk, without fear of temporal punishment. The purpose of the oath is not primarily for those who under any circumstances would tell the truth, but for those of dull conscience, and others who might have a motive to testify falsely,—the fear of temporal and eternal punishment being

expected to influence the minds of such witnesses. If the fear of temporal punishment ceases to exist in the mind of a witness who has a motive in testifying falsely, then one great counteracting influence to the motive to testify falsely is lost. The effect of the fear of eternal punishment will be considered later in this article. As a rule, however, an unscrupulous witness has his mind directed more towards winning the suit than saving his soul, and, if influenced by fear at all, would be apt, at the moment of testifying, to fear a present penitentiary more than a future hell.

It may, perhaps, be said that the disinclination of a private suitor to initiate a prosecution for perjury has been recognized by our law-makers, and that the difficulty has been met by enacting s. 4 of c. 154 of the Revised Statutes of Canada, which section has been continued in force by the Code. That section which was adapted from s. 19 of the Imperial statute, 14 & 15 Vict., c. 100, provides, in substance, that any judge before whom any trial is held may, "if it appears to him that any person has been guilty of wilful and corrupt perjury," in any evidence given before him, direct such person to be prosecuted for such perjury, "if there appears to such judge a reasonable cause for such prosecution," and may commit such person.

It is a significant fact, however, that the power conferred by this section has been rarely, if ever, exercised in England or in Canada, and the provision must be considered as having failed in its purpose. A commitment under this section by a judge would be almost as damaging to the character of a witness as an actual conviction, and there will always be a disinclination to exercise such a dangerous power unless the perjury of the witness is absolutely conclusive and unmistakable, and this can rarely be conclusively determined by the judge, in trying another issue. It is possible that what may appear to be a false oath, taken malo animo, can be shewn ultimately to be the result of honest mistake, due to that treacherous faculty the memory, or to the imperfect understanding of the witness, or to a reprehensible lack of taking pains to be exact, rather than to a deliberate intent to lie.

Some years ago a judge in one of the County Courts in England became satisfied that the plaintiff in a civil case tried before him had committed perjury, but the judge shrank from committing the witness for perjury and took the course of sending a copy of the evidence to the director of public prosecutions with a representation that in his opinion the plaintiff had committed perjury during the hearing of the case. In doing so the judge stated that although the statute empowered him to commit the plaintiff for trial at the next assizes without the necessity of any examination before a magistrate, yet it would be far more satisfactory to him that the criminal charge should be investigated by an independent tribunal in the ordinary way and he did not therefore exercise this power.

Other English judges are inclined to follow this course rather than resort to the extreme power conferred by the statute. Moreover it might be found on a thorough investigation, that even if perjury had been committed, a conviction could not be obtained, and this important fact, the ascertaining of which would save an expensive and abortive trial, could more readily and more appropriately be ascertained by a director of public prosecutions or an Attorney-General than by one of the judiciary, who, while considering that there was "a reasonable cause for such prosecution" upon the evidence before him, would also know that such evidence would usually require to be greatly strengthened by corroborative evidence in order to secure a conviction Would it not be better to add to the section in question a provision which would direct the judge at his option or upon request of either party to take the alternative course of sending the evidence to the Attorney-General so that the Crown might institute a thorough investigation and assume the responsibility and expense of any prosecution, from its initiation?

But while the fear of legal punishment for perjury is in many cases a better security for truth than the fear of punishment in the next world, there are, nevertheless, many witnesses who are influenced by the latter consideration. An eminent authority has stated that the design of the oath is not to call the

attention of God to man, but the attention of man to God; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so. The ceremony of the oath is not intended primarily for persons who have an active conscience, a high regard for truth and an abiding sense of the presence of God everywhere in this world. In the words of Hudibras—

"Oaths were not purpos'd more than law
To keep the Good and Just in awe."

The oath was not intended on the other hand for very bad men who would violate it at all times. For very good men, it is unnecessary; for very bad men it is useless. The judicial oath, however, is expected to serve a useful purpose in dealing with a stratum lower in morality than the best citizens and higher than the worst. The utility of oaths has been justified in the following words by Archbishop Secker, as quoted in Ram on Facts, p. 222.

"It must be owned great numbers will certainly speak truth without an oath, and too many will not speak it with one. But the generality of mankind are of a middle sort, neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned as to violate a more solemn engagement. Accordingly we find by experience that many will verbally say what they will by no means venture to swear; and the difference which they make between these two things is often indeed much greater than they should; but still it shews the need of insisting on the strongest security."

The oath is calculated to influence witnesses possessing a dull conscience. While the oath will not generate a conscience it will quicken a dull one. Some witnesses, indeed, never consider themselves bound to tell the truth on the witness stand unless they actually kiss the book, or unless their bare hand touches the book, which presumably is the reason why the ungloved hand must be used. They often try to kiss their thumbs instead of the book, thereby hoping to avoid eternal punishment for perjury by omitting what they

always will consider a part of the oath essential to obtain a hold upon their consciences. Their consciences are as peculiar as those possessed by certain other witnesses who commit perjury (but think they do not), by swearing to a statement which in one sense is true, but which in the sense intended to be conveyed by the witness is false. Such witnesses appear to consider that so long as their statement is true in one sense they can keep within the law and deliberately mislead the Court for the purpose of procuring a miscarriage of justice. They have a 'legal" conscience such as Freeman, the historian, ascribed to Henry VIII. because that monarch always wished his murders to be done by act of parliament. But, dull as such consciences must be, the oath often has still some hold upon them, if properly administered.

One of the reasons why the oath is losing its moral efficacy is because it is often administered without any reverent sense of the presence of a Supreme, All-Ruling Deity and without any appreciation of the significance of the ceremony and the responsibility of the witness hereafter for what he is about to say. Inasmuch as the words of the oath are not well adapted to impress its obligations, it is most important that the ceremony attached to the administration of it should recognize the solemn character and obligations of the oath. The careless and flippant manner in which the oath is sometimes administered has a tendency to diminish its effect upon the dull conscience of an ignorant, indifferent or unscrupulous person. An official in administering the oath is sometimes heard to mumble something like this,—

"Thevidenshu . . . . 'shulgivthecourt—shulbethetruth . . . . tholetruth—annuthinbutthetruth—takyergluvoff—shelpugod—Kiss the book."

If a visitor from another planet were present on such an occasion, and were informed that this mystic performance was intended to put the witness in a frame of mind calculated to speak only the truth, and to call his attention to the existence and presence of a God who will punish all false swearing, the visitor would

feel that this ceremony was not well contrived to accomplish such a solemn purpose and would be almost as impressive if, instead, the official had made a casual comment on the weather.

This criticism, however, is not of general application. An eminent authority on evidence (Wigmore, s. 1827), says: "The class of persons whose belief makes them capable of being influenced by the prospect implied in an oath is decidedly the immense mass of the community. Furthermore in practice these persons are apparently, for the most part, actually influenced for the better in their mental operations on the witness stand, by the imposition of the oath, and where experience looks to the contrary the result has been due to the deplorable irreverence and trivality shewn in the administration of the formality rather than in the inherent inefficacy of the oath itself."

There is another reason which may account in part for the fact that the oath is losing its moral efficacy and as a consequence that perjury is increasing. The fundamental idea of the judicial oath was to call to the mind of the witness the existence of an Omniscient and Supreme Being, who in the words of one of the old judgments is—"the Rewarder of Truth and the Avenger of Falsehood." But the existence of a Supreme Being who will avenge falsehood is denied by increasing numbers on this continent, and the sacred volume itself (the kissing of which, according to Gladstone, was originally an import of the acceptance of the Divine Revelation) is now the subject of persistent and most demoralizing criticism.

There is, we fear, too much truth in the statement that civilisation without religion is not raising the moral tone of the community; rather must it be said that the tendency is downward.

Parliament can neither make men moral nor can it implant the fear of eternal punishment in the hearts of individuals or restore the moral efficacy of the oath, but it can do something to restore the fear of temporal punishment, by legislation which will make that punishment swift and certain whenever perjury is committed.

Halifax, N.S. W. B. WALLACE.

The Minister of Justice used some very plain language in reference to certain members of the Bench in the discussion on the second reading of Mr. Lennox's bill respecting the judges of provincial Courts. This bill is intended to prevent judges acting as arbitrators and follows logically the legislation of last session, which was as follows: "No judge mentioned in this Act shall either directly or indirectly, as director or manager of any corporation or firm or in any other manner whatever, for himself or others, engage in any action or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties." The Minister of Justice in referring to this section is reported in Hansard as saying: "I have, up to the present, construed the Act that we passed last session very strictly and once or twice judges have applied to me to know whether or not on the construction of the statute it would be permissible for them to act as arbitrators in disputes between private parties. The answer that I invariably have given to them is that it is not competent for them to do so, and to-night I regret that I am obliged to deliberately say that the judges of this country have not observed the law passed by Parliament, and that they have not certainly given that example of obedience to the law which we are entitled to expect of them." He also stated that he had intended himself introducing a bill for the purpose of giving effective sanction to the legislation of last session and suggested that Mr. Lennox should allow his bill to stand over, that they might together prepare the necessary provisions.

Newspaper enterprise, which recently received such a rude jolt in Ontario by the alleged theft by a reporter of private papers, has also been in evidence in the United States, and is referred to in *Case and Comment* as "Newspaper conspiracy." It appears that the Pennsylvania Railroad Company withdrew its passes and free transportation for newspaper men, who retaliated by passing a resolution that "hereafter no railroad official of the Pennsylvania Railroad shall receive a favourable mention

in the daily papers. Railroad news must be restricted to reports of such news as will benefit the public. In handling all news the copy must be edited so as to eliminate all favourable mention of the railroad, but, wherever possible, the news must be so written that the public side alone is printed." We are glad to see that a leading newspaper says: "What a confession as to past methods! Have compliments hitherto been apportioned to free rides, and have accidents been hushed up or smoothed down? That is the natural inference from this dispatch. If you do not carry us free, we will give the facts when you have an accident!" It is manifestly an attempt by newspaper men to use the great power of the public press to extort free rides on the railroad for themselves. Hereafter anyone reading an account of a railroad accident will be interested to know whether or not the company on whose line the accident occurred gives free passes to newspaper men.

Another "newspaper conspiracy" appears in a bill to amend the New York libel law so as to give a newspaper a practical immunity for any libel, however atrocious, provided the victim is unable to prove, as he rarely could prove, actual malice. As the writer says: "Reckless publication of anything that would make a sensational news item, however infamous the wrong might be, could be made without any risk. All that would be necessary to exonerate the newspaper would be to publish an explanation or correction. In this way the newspaper would have two interesting items of news, instead of one. It would enjoy a practical license to ruin the character of any person whom sensational gossip might cruelly attack. Retraction of the libel, after it is published, is as efficacious to undo the wrong as would be the extraction of a bullet from the heart of a man who had been shot. Against these pitiful exhibitions of a low order of newspaper trade unionism, it is time for honourable journalists to speak in no uncertain terms, as one of them, above quoted, has already spoken concerning the brazenness of one newspaper association in its fight to preserve the petty graft of free rides on the railroads."

Of course one does not expect legislation affecting the legal profession to be treated with ordinary fairness by the average newspaper penny-a-liner. The temptation which assails him for a stale cheap joke is too great to be resisted; and, as he knows nothing of the subject, he could not be expected to treat it with intelligence. But one does expect something thoughtful and intelligent from one of the leading daily journals, perhaps the best of them. Were it not for the sneers at the members of a profession which has a larger percentage of high minded and honorable men than any other calling in the community, newspaper men included, the sentence we quote might be supposed to be an extract from Mark Twain. This sentence is as follows: "Good conveyancing is not so much a matter of legal skill or knowledge as of personal character and moral fibre." Could anything be funnier! The proposition is so manifestly absurd, and so curiously expressed, that any analysis is superfluous. But what *does* this remarkable journalist mean by "personal character?" Does he refer to moral character or immoral character, or strong character or weak character, or what? Every man on earth has some sort of a "personal character"; but no man is born with an intimate knowledge of the law of real property. A child may draw in "moral fibre" with his mother's milk, and may grow up to rival Joseph in morality, but one fails to see that this has anything more to do with skill in conveyancing than the colour of his hair. The writer once heard an excited Scotch farmer at a political meeting hurl this indignant question at his opponent: "Wad ye doot the ver-racity of the *Glob*, mon!" We fear we shall have to do so on this occasion, and to say that in our opinion "Good conveyancing *is* a matter of skill and knowledge, and *not* of personal character or moral fibre;" and every sane man will say so too. Ex uno disce omnes.

A novel point has recently been decided in a Kentucky Circuit Court which is of interest to the "horsey" community as well as to Humane Societies. An action was brought for

work done by the plaintiff for a customer who wanted his carriage horse made fashionable by docking his tail. The defendant counterclaimed for damages on account of the alleged unskilful manner in which the operation was performed. Kentucky is famous for its horses, and the Legislature has not forgotten to enact a statute prohibiting cruelty to animals in general, neither did the Court in question forget the traditions of the state in its care for the noble "houyhnhnmn" in particular, for we note that the presiding judge held that the action could not be maintained as the contract was in violation of the statute. He said: "The statute is both just and humane. That docking is a work of unnecessary cruelty there can be no room for doubt, unless the alleged style customary among fashionable horse owners and approved by them, can be held to justify it. The Court is unwilling to hold that a statute may be repealed by a fad. That it was violated by both plaintiff and defendant seems clear. The horse's tail, as every one knows, is of immense value to him. It is for many purposes his only means of defence. The act of cutting, or docking, is cruel in itself and still more cruel in its consequences. It is too well settled to need citation of authorities that a right of action cannot accrue to a party out of his violation of the law. It is also well settled that where both parties have violated the law the Court leaves them where it finds them, and refuses to give either relief. The case will be dismissed when placed on the trial docket."

Judging from the last issue of the *Canada Gazette* the morals of the Dominion in respect of the seventh Commandment do not seem to be in a very healthy condition. It contains eight notices of applications for bills of divorce, five by women and three by men. This would not be many in comparison with many other countries, but it is an increasing number, and in a country which boasts of its moral tone, where there is no Divorce Court, and where the proceedings are still troublesome and expensive, even though they have been greatly simplified and methodized by the labour and skill of Sir James Gowan, K.C.M.G., Chairman of the Committee of the Senate which has charge of such matters.

REVIEW OF CURRENT ENGLISH CASES.

PUBLIC HEALTH—INFECTIOUS DISEASE—HOSPITAL—DISCHARGE OF PATIENT WHILE STILL INFECTIOUS—LIABILITY OF MUNICIPALITY.

Evans v. *Mayor of Liverpool* (1906) 1 K.B. 160 was an action brought against a municipality to recover damages occasioned by the physician in charge of an infectious hospital provided by the defendant municipality, discharging a patient before such patient was free from infection, by reason whereof three children of the plaintiff became infected and the plaintiff was put to expense. The action was tried by Walton, J., who held that the legal obligation of the defendants only extended to providing reasonably skilled and competent medical attendance for the patients, and there was no implied undertaking or obligation on their part that no patient would be discharged until he was free from infection.

HIGHWAY—TRACTION ENGINE—EXCESSIVE WEIGHT—INJURY TO WATER MAIN.

Chichester v. *Foster* (1906) 1 K.B. 167 was an action by a municipality to recover damages for injury to their water main caused by the defendants driving along the highway a traction engine and trucks weighing upwards of ten tons. A County Court judge who tried the action held that the injury was caused by the excessive weight of the engine, and that the defendants were liable; and the Divisional Court (Lord Alverstone, C.J., and Darling, J.,) affirmed his decision.

POST OFFICE—POSTMASTER-GENERAL—SUBORDINATE POST OFFICE OFFICIAL—NEGLIGENCE OF SUBORDINATE PUBLIC OFFICIAL.

Banbridge v. *The Postmaster-General* (1906) 1 K.B. 178. This was an action against the Postmaster-General for damages occasioned to the plaintiffs by the negligence of a subordinate official of the Post Office Department in filling up an excavation which had been made for the purpose of laying a telegraph cable. The Postmaster-General applied to have his name struck out on the ground that the writ disclosed no liability on his part. Walton, J., refused the application, but gave leave to appeal. The Court of Appeal (Collins, M.R., and Matth[illegible], L.J.,) granted

the application on the ground that the Postmaster-General cannot be sued in his official capacity for the negligent acts of the subordinate officials of the Post Office Department, because subordinate public officers are also officers of the Crown, and do not stand in the relation of servants to their superior officers.

VENDOR'S LIEN—UNPAID PURCHASE MONEY—SALE OF PERSONAL ESTATE—REVERSIONARY INTEREST—PURCHASE BY TRUSTEE—INTEREST—ARREARS OF INTEREST, RECOVERY OF—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 WM. IV., C. 27) S. 42—(R.S.O. C. 133, S. 17).

In re Stucley, Stucley v. *Kekewich* (1906) 1 Ch. 67 was an appeal from Farwell, J. The facts were as follows. In 1874 the plaintiff being entitled to the reversion upon the death of his father to a trust legacy of £5,000 under a will of which his father was sole surviving executor and trustee, sold and assigned his reversionary interest in the legacy to his father for £1,500. The deed was expressed to be made in consideration of £1,500 and a receipt for that sum was indorsed, but it was never paid, in fact. In 1900 the father died, whereupon the plaintiff brought the action claiming a vendor's lien on the legacy for the £1,500 and interest thereon from the date of sale. Farwell, J., who tried the action, found that the £1,500 had not been paid, and held that that sum must be applied in reduction of a debt due by the plaintiff to his father at the date of the transfer, but further than that he refused to give the plaintiff relief. It may be observed that the point that the plaintiff was entitled to a vendor's lien for both principal and interest does not seem to have been insisted on before Farwell, J., but that point was urged on appeal to the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.,) and that Court held that the appellant was so entitled, that the doctrine of vendor's lien applied to sales of personalty and that there was no Statute of Limitations affecting the plaintiff's right to recover arrears of interest and, therefore, that the plaintiff was not only entitled to a lien for the principal money, but also for the arrears of interest from the date of sale which were ordered to be paid to him accordingly.

PRACTICE—BREACH OF TRUST—FORM OF JUDGMENT AGAINST TRUSTEE—JUDGMENT FOR RECOVERY OF MONEY—SUPPLEMENTAL ORDER—ATTACHMENT—RULES 573, 580—(ONT. RULE 837).

In re Oddy, Major v. *Harness* (1906) 1 Ch. 93 a judgment in the ordinary form that the plaintiff do recover against the

defendant certain moneys had been obtained. The defendant was a trustee and the moneys referred to in the judgment were due in respect of the trust estate; in order to enforce the judgment by attachment of the person of the defendant the plaintiff procured an order directing the defendant personally to pay the amount in four days. Buckley, J., who granted the order was subsequently applied to by the defendant to rescind it, which he declined to do, but the Court of Appeal (Williams, Stirling, Cozens-Hardy, L.JJ.,) held that the order was wrong, and ought not to have been made, and that the plaintiff having taken judgment in the form he had, could not enforce it by process of attachment, and that where a party seeks to proceed against a trustee by attachment he must be careful to take his order against the trustee in the form which was formerly used in Chancery in such cases.

COPYRIGHT—PROPRIETORSHIP OF COPYRIGHT—LETTER—RIGHT TO PREVENT PUBLICATION OF LETTER—COPYRIGHT ACT, 1842 (5 & 6 VICT., C. 45) S. 3.

Macmillan v. *Dent* (1906) 1 Ch. 101 was an action concerning the right to the copyright in certain letters written by Charles Lamb between the years 1798 and 1810. In 1895 these letters were in the possession of a Mr. and Mrs. Steeds who in that year sold the copyright therein to the plaintiffs, Smith, Elder & Co., who published them, and in May, 1899, sold the right to publish an edition thereof to their co-plaintiffs, Macmillan & Co. In 1903 the defendant discovered the original letters in question were in the market for sale, and purchased them from the Steeds for £250; the Steeds having previously informed the defendant of the sale of the copyright in the letters to Smith, Elder & Co. The defendant also claimed as assignee of all rights in the letters from the administrator of the estate of Charles Lamb, the writer thereof. In the year 1903 the defendant brought out an edition of Lamb's letters, including those in question, which he copied from the original manuscripts in his possession. The plaintiffs, Smith, Elder & Co., claimed that this was an infringement of their copyright, and they and their co-plaintiffs claimed an injunction and an account of profits and the delivery up of letter press in defendant's possession containing the letters in question. By the Copyright Act, 1842, s. 3, "the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of

the author's manuscript from which such book shall be first published and his assigns." Kekewich, J., held that under this section the copyright in the letters was in the Steeds, and that they had validly assigned it to the plaintiffs, Smith, Elder & Co.

PARTNERSHIP—SURVIVING PARTNER—PARTNERSHIP REAL ESTATE—MORTGAGE OF PARTNERSHIP REAL ESTATE BY SURVIVING PARTNER—LIEN OF REPRESENTATIVE OF DECEASED PARTNER.

In re Bourne, Bourne v. *Bourne* (1906) 1 Ch. 113. A sole surviving partner of a firm had mortgaged certain partnership real estate belonging to the firm by way of equitable mortgage, and the question raised before Farwell, J., by the representatives of the deceased partner was whether it was competent for the surviving partner to create a valid mortgage of the partnership realty, so as to give the mortgage priority against the representatives of the deceased partner, and he held that he could and that the mortgagee is not bound to see to the application of the money unless he has notice that it is going to be used for an improper purpose. In this case it appeared that the mortgage moneys had been duly applied to partnership purposes.

WILL—CONSTRUCTION—POWER TO INVEST IN "STOCKS, FUNDS AND SECURITIES OF ANY CORPORATION OR COMPANY, MUNICIPAL, COMMERCIAL OR OTHERWISE."

In re Stanley, Tennant v. *Stanley* (1906) 1 Ch. 131 gives the construction of a will. The trustees were empowered to invest in the stocks, funds and securities "of any corporation or company, municipal, commercial or otherwise." On the part of an infant beneficiary it was contended that this power applied only to corporations or companies formed or registered in the United Kingdom, but Buckley, J., held that it extended to foreign corporations and companies of the kind indicated.

WILL—CONSTRUCTION—GIFT OF "MONEYS OWING TO ME AT THE TIME OF MY DECEASE"—MONEY ON DEPOSIT AT BANKS.

In re Derbyshire, Webb v. *Derbyshire* (1906) 1 Ch. 135. Buckley, J., decided that under a gift of "moneys owing to me at the time of my decease" contained in a will, all money standing on deposit to the testator's credit in banks passed to the legatee, whether notice of withdrawal was or was not required.

COMPANY—QUALIFICATION OF DIRECTORS—SHARES "HELD IN HIS OWN RIGHT"—GENERAL MEETING CONVENED BY DE FACTO DIRECTORS—VALIDITY OF RESOLUTION—NOTICE OF MEETING—SPECIAL BUSINESS.

In *Boschoek Co.* v. *Fuke* (1906) 1 Ch. 148 two or three points are decided by Eady, J., which may be noticed. First, that where the qualification of a director is the holding of 250 shares "in his own right," a liquidator of a company who is registered as the holder of 500 shares as "F., liquidator of the H. company," is not qualified. Second, that the resolutions passed at a meeting convened by the de facto directors of a company are not invalidated by any irregularity in the constitution of the board. Third, that where the articles of association fix the remuneration of directors, it is not competent for the company to ratify an act of the directors in contravention of such articles, without first passing a special resolution altering the articles, and Fourth, that a notice convening a general meeting of shareholders which stated that it was called for the purpose of receiving the directors' report, and the election of directors and auditors, and which was accompanied by a copy of the directors' report which mentioned as special business to be considered, not referred to in the notice, viz., the ratification of the board's previous election of one R. as a director, was sufficient notice of such special business.

MORTGAGOR AND MORTGAGEE—REDEMPTION ACTION—MORTGAGEE IN POSSESSION—RECEIPT OF RENTS AND PROFITS AVAILABLE FOR PAYMENT OF INTEREST—COMPOUND INTEREST.

In *Wrigley* v. *Gill* (1906) 1 Ch. 165 the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.,) have affirmed the decision of Warrington, J. (1905) 1 Ch. 241 (noted ante, vol. 41, p. 368), but as the editor advises us in a foot note, p. 168, the affirmation does not extend to all the details of the formal order of Warrington, J., as drawn up. The action was for a redemption, the defendant being a mortgagee in possession, and his mortgage providing for the payment of interest on interest in arrear for 21 days. So far as the point discussed in the Court of Appeal is concerned Warrington, J., held that the mortgagee could not claim interest on interest in arrear except to the extent to which the rents and profits in his hands were insufficient to satisfy such interest. The Court of Appeal affirmed that proposition, but subject to this qualification, that the rents and profits on hand must be sufficient to satisfy the whole gale of

interest due, and the mortgagee cannot be required to apply the rents to the satisfaction of his interest in arrear in driblets; and see *Anisworth* v. *Wilding* (1905) 1 Ch. 435 (also noted ante, vol. 31, 483, 559).

CONTRACT—PERFORMANCE OF CONTRACT IMPOSSIBLE—PAYMENT "ON ACCOUNT OF" CONTRACT—PROVISION IN THE EVENT OF NO EXPENSE BEING INCURRED.

Elliott v. *Crutchley* (1906) A.C. 7 one of the many cases arising in consequence of the unfortunate postponement of His Majesty's Coronation has at last reached the House of Lords. In this case the plaintiff, a caterer, agreed to supply refreshments at a fixed price to the defendants on the occasion of the naval review appointed to be held on a named day, "£300 to be paid to the caterer on account of the refreshments on the Monday previous to the review day." By an express stipulation in the contract it was provided that in the event of a cancellation of the review before any expense was incurred by the caterer there should be no liability on the part of defendants. A few days before the day named for the review it was known that it would not be held. The plaintiff had spent £20 in crockery, etc., but had incurred no expense in providing refreshments. The plaintiff, however, was given a cheque for the £300, payment of which was stopped on the cancellation of the review, and the present action was brought to recover the amount of that cheque. The Court of Appeal decided (1904) 1 K.B. 565 (noted ante, vol. 40, p. 337) that the plaintiff could not recover because on a true construction of the contract in the event of a cancellation of the review the defendants were only liable to reimburse the plaintiff for any expense then incurred by him. This decision the House of Lords (Lord Halsbury, L.C., and Lords Robertson and Lindley) now affirm.

MINING LEASE—CONSTRUCTION—COVENANT TO WIN WORK AND GET, ETC., THE WHOLE OF THE COAL—WORK UNPROFITABLE—LESSOR AND LESSEE.

Watson v. *Charlesworth* (1906) A.C. 14 was known in the Court below as *Charlesworth* v. *Watson* (1905) 1 K.B. 74 (and was noted ante, vol. 41, p. 362). The action was brought on a covenant contained in the lease of a coal mine wherein the defendants covenanted "to win, work and get fairly, duly and honestly the whole of the coal." The rent being £100 per acre as

soon as the defendants began to work the coal and £5 an acre in the meantime. The defendants found that owing to faults in the ground the coal could only be got at a loss, and they then desisted from any attempt to mine it. The Court of Appeal held that they had broken their covenant and the plaintiffs were entitled to damages to the amount which they would probably have been entitled to receive if the coal had been mined, and this decision is now affirmed by the House of Lords (Lord Halsbury, L.C., and Lords Robertson and Lindley).

COMPANY—PROSPECTUS—NON-DISCLOSURE OF CONTRACT IN PROSPECTUS — DIRECTORS' LIABILITY — "KNOWINGLY ISSUED" — IGNORANCE—COMPANIES ACT, 1897 (30 & 31 VICT. c. 131), s. 28—(2 EDW. VII. c. 15, s. 34 (D.)).

Macleay v. *Tait* (1906) A.C. 24 was the action known as *Tait* v. *Macleay* in the Court below, and was an action brought by a shareholder of a company against a director to recover damages for the non-disclosure of certain contracts in a prospectus of the company issued with the defendant's authority. The defendant set up that he had forgotten the contracts in question, but it appeared that at a meeting of directors at which he was present and at which the prospectus was approved, the minutes of the various meetings at which the contracts were considered, were read and confirmed; and that the defendant had a general knowledge of the existence of contracts which might fall within s. 38 of the Companies Act, 1897, (see 2 Edw. VII. c. 5. s. 34 D.). In these circumstances the Court of Appeal held that the defendant must be deemed to have knowingly issued the prospectus and was liable for the omission (1904) 2 Ch. 631 (noted ante, vol. 41, p. 253), but the House of Lords (Lord Halsbury, L.C., and Lords Robertson and Lindley) have reversed that decision on two grounds, first, that in order to recover damages under s. 38 a plaintiff must shew that he has sustained damage by reason of the non-disclosure, and that if he had known of the undisclosed contract he would not have become a shareholder, and this the plaintiff had not done, and, secondly, that where there is no fraud and the non-disclosure is due to an honest mistake, a subscriber for shares, who has agreed (as the plaintiff had done in the present case) to waive any fuller compliance with s. 38 than was contained in the prospectus, cannot maintain an action for damages under that section. The waiver was contained in the application for shares, and thereby the applicants agreed "to waive any fuller compliance with s. 38 of the Companies Act,

1867, than is contained in the said prospectus." As to this Lord Halsbury says: "Where a clause of that sort has been inserted as part of the machinery for fraud, it will, of course, afford no protection to those who have contrived it; but where, as in this case, it is a perfectly honest slip, why should not that slip be cured by the waiver clause? I know no reason."

Correspondence.

JUDGES DOING OUTSIDE WORK.

To the Editor, APRIL 12, 1906.

CANADA LAW JOURNAL,

SIR,—The old time respect for the Bench has not increased, but much the reverse in the last few years. The remarks of the Minister of Justice as reported in the daily papers do not seem any more severe than necessary. I see it stated that some of the judges who continue to hold positions as directors contrary to the Act of last session claim that when they undertook duties outside their judicial work there was no law to the contrary. It would seem sufficient that there now *is* a law to the contrary. Those of the judges in Ontario who held such positions have with, we understand, two exceptions, given them up. Section 138 of the Criminal Code seems in point. It provides that "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law." Whether this section is applicable or not, it is most unseemly that a judge of the land should ignore a statute because in his opinion it is unfair and retroactive or unconstitutional, or because there is no penalty provided for the breach. The profession will applaud the stand taken by the Minister of Justice.

BARRISTER.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] THE ALBANO v. THE PARISIAN. [March 5.

Maritime law—Collision—Crossing ships—Admiralty rule 19 (1897).

The SS. Parisian making for Halifax harbour, came along the western shore sailing almost due north to a pilot station, on reaching which she slowed down, finally stopping her engines. The Albano, a German steamship for the same port, approached some miles to the eastward sailing first, by error, to the north-east and then changing her course to the southwest, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a mile from the Parisian she slowed down, and on coming within eight or nine ship's lengths gave three blasts of her whistle, indicating that she would go full speed astern. The Parisian then, seeing that a collision was inevitable, went ahead full speed for some 200 feet when she was struck on the starboard quarter and had to make for the dock to avoid sinking outside. The Parisian's engines were stopped about six minutes before the collision and a boat from the pilot cutter was rowing up to her when she was struck. At the time of the collision, about 5 p.m., the wind was light, weather fine and clear, there was no sea running and no perceptible tide.

Held, IDINGTON J., dissenting, that the captain of the Albano had no right to regard the Parisian as a crossing ship within the meaning of rule 19 of the Admiralty Rules, 1897; and that the Parisian having properly stopped to take a pilot on board, and being practically in the act of doing so at the time, the Albano was bound to avoid her and was alone to blame for the collision. Appeal dismissed with costs.

Newcombe, K.C., and *Morrison*, for appellants. *W. Nesbitt*, K.C., and *W. B. A. Ritchie*, K.C., for respondents.

B.C.] JACKSON *v.* DRAKE. [March 13.

Account stated—Admission of liability—Promise to pay—Evidence to vary—Admissibility.

On the dissolution of a partnership the partners signed a statement shewing an amount as due to the plaintiff as his share and containing a declaration that "for the sake of peace and quiet and to avoid friction and bother" the plaintiff was willing to waive investigation of the firm's books and to agree that the balance as stated should be deemed to be the amount payable by the defendants to the plaintiff.

Held, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability which the parties had so signed.

In an action on the account stated the defendants alleged that the plaintiff had agreed not to sue upon it and that the document was merely intended to shew the amount which would be payable to the plaintiff at such time as collections might be made of outstanding debts due to the firm.

Held, that these contentions tended to contradict, vary and annul the terms of the written instrument and, consequently, did not constitute collateral agreements in respect of which parol evidence would be admissible.

Appeal allowed with costs.

W. J. Taylor, K.C., for appellant. *F. Peters*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [Dec. 12, 1905.

BOGART *v.* ROBERTSON.

Bills of exchange and promissory notes—Joint and several note—Release of co-maker—Reservation of rights—Knowledge and consent—Subsequent deed—Ratification.

One of the five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note, and there was no reservation

of rights against the other makers, but the holder sought to recover against one of them, the defendant.

Held, upon the construction of the release and a subsequent instrument under seal, to which the maker who had been released was not a party, that the rights of the holder against the defendant had been effectively preserved.

Decision of a Divisional Court, 8 O.L.R. 261, reversed.

Per Moss, C.J.O.:—The whole arrangement of which the release formed part was come to and carried out with the knowledge and consent of the defendant, and that knowledge and consent were sufficient to prevent the release of his co-maker operating as a discharge of his liability.

Per Osler, J.A.:—Even if the release did in law operate from the moment of its execution as a discharge of the defendant, there was nothing to prevent the latter, after its execution, from acknowledging and ratifying, by a proper instrument, his continuing liability to pay, just as a surety may do so who has been discharged by time given to his principal or by the release of a co-surety. Co-contractors and co-debtors stand in these respects in the same position as co-sureties. The release of one operates in general as a release of all, but the legal operation of such a release may be restrained by the express terms of the instrument, or the co-debtors may re-affirm and ratify their liability notwithstanding the release.

J. Bicknell, K.C., for plaintiff, appellant. *DuVernet*, for defendant Tench.

[Jan. 22.

BANKS v. SHEDDEN FORWARDING CO.

Negligence—Injury to infant in highway—Careless driving—Evidence for jury—Damages—Right of infant's father to recover for expenses—Objection not taken at trial.

The infant plaintiff, while playing in a city street, was run over by a dray of the defendants, which, according to some of the evidence, was being driven at a great rate of speed, at a corner which the dray turned, taking the left side of the roadway.

Held, that there was evidence of negligence which could not be withdrawn from the jury.

The infant plaintiff's father was joined with him as a plaintiff claiming to recover the expenses which he had incurred on

account of the infant's injuries. The infant was seven years old and lived at home with and under the charge of the father.

Held, that the father was obliged to supply the infant with the necessaries of life, including medical attendance, and if the burden of that duty was increased by the wrongful acts of the defendants, the father was entitled to recover as damages the amount of such increase.

Wilson v. *Boulter*, 26 A.R. 184, distinguished.

No objection was taken by the defendants to the right of the father to recover until the argument before the Court of Appeal.

Held, per OSLER, J.A., that the objection was open, unless it was possible for the plaintiffs' case to have been bettered by the introduction of further evidence at the trial, which did not appear to be the case; but per G..ROW, J.A., that it was too late to take the objection.

Judgment of a Divisional Court affirmed.

DuVernet, for defendants, appellants. *Hellmuth*, K.C., and *Cattanach*, for plaintiffs, respondents.

Full Court.] REX *v.* GOODFELLOW. [Jan. 22.

Criminal law—Conspir y—Indictment.

The defendants were indicted fo unlawfully conspiring and agreeing together and with each other to deprive one W.G. of the necessaries of life, to wit, proper medical care and nursing, whereby his death was caused.

Held, that this count did not charge the defendants with a conspiracy to commit any indictable offence known to the law, and should have been quashed.

Ruling of MAGEE, J., reversed.

A second count charged that the defendants did unlawfully conspire and agree together and with each other to effect the cure o W.G. of a sickness endangering life, by unlawful and improper means, thereby causing the death of the said W.G.

Held, that this count was equally bad, and was properly quashed.

Ruli of MAGEE, J., affirmed.

Per OSLER, J.A.:—The second count, being quashed before the trial of the defendants on the f st count, was not properly before the Court of Appeal upon a stated case.

H. Cassels, K.C., and *Robinette*, K.C., for defendants. *Cartwright*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Meredith, C.J., Teetzel, J., Mabee, J.] [Dec. 8, 1905.

REX v. MEIKLEHAM.

Constitutional law—Ontario Liquor License Act s. 10—Selling liquor on vessel—Territorial limits of province—Offence committed on Great Lakes—Jurisdiction—Admiralty—International law—Foreign vessel—Conviction—Police magistrate—Place where offence committed—Unlawfully allowing liquor to be sold—Master of ship—"Occupant"—Amendment of conviction.

The Province of Ontario extends to the middle line of Lake Huron as defined in the treaties of Paris and Ghent, and the British North America Act, in fixing the electoral divisions of the province, recognizes the territorial sub-divisions provided for by the statute which is now R.S.O. 1897, c. 3, by which the limits of the counties and townships bordering on Lake Huron extend to the boundary of the province. Within the territorial limits of the province, as to the subjects of legislation assigned by the British North America Act to the provinces, the legislative authority of the province is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow. The regulation of the traffic in intoxicating liquors within the limits of the provinces by a license law is one of the subjects assigned by the British North America Act to the Provincial Legislatures; and, therefore, the Ontario Legislature had authority to enact s. 10 of the Liquor License Act, which provides that no license shall be issued for the sale of liquor nor shall any liquor be sold or kept for sale in any room or place on any vessel navigating any of the great lakes, etc.; notwithstanding the contention that the only jurisdiction over the Great Lakes is in the Admiralty Courts.

Regina v. *Keyn* (1876) 13 Cox C.C. 403, and *Regina* v. *Sharp* (1869) 5 P.R. 135 distinguished.

The defendant, the master of the steamer "Greyhound," was convicted before a police magistrate having jurisdiction over the whole County of Huron, for that he (the defendant), Canadian waters adjacent to the harbour of the Town of Goderich, in the said County of Huron, did "unlawfully allow liquors to be sold" on the steamer "Greyhound," of the City of Detroit, in the State of Michigan, "without a license therefor by law required."

Held, upon the evidence, that the vessel, although a foreign vessel, was not when the offence was committed proceeding from one foreign part to another, but was being used for an excursion which went out from the port of Goderich for a few miles and returned to that port, and, therefore, the rule of international law forbidding interference with persons on board a foreign vessel navigating the high seas or the Great Lakes, was not applicable.

Semble, that where it is plain that the legislature has intended to disregard or interfere with a rule of international law, the Courts are bound to give effect to its enactments.

Held, that the conviction was not invalid merely because the place in the county where the offence was committed was not stated with more particularity than as above cited.

Held, that the conviction disclosed no offence, unlawfully allowing liquor to be sold not being an offence created by the Liquor License Act, but the conviction should be amended so as to make it for an offence under sub-s. 1 of s. 49 of the Act, viz., the selling or bartering of liquors without the license required by law. MEREDITH, C.J., doubting whether the defendant was an "occupant" within the meaning of s. 111, whether the words "house, shop, room, or other place," included a vessel, and whether the offence of selling liquor without a license was of the nature of the offence alleged in the conviction: Criminal Code, s. 889.

J. B. Mackenzie, for defendant. *Cartwright*, K.C., for the convicting magistrate and the Attorney-General for Ontario.

Mulock, C.J.] DOVAN *v.* HOLCADORE. [Jan. 11.

Trade-Mark—Infringement—Visual resemblance—Idem sonans.

In deciding whether a trade-mark so resembles another as to be calculated to deceive visual resemblance is not necessarily the only thing to be considered: the possibility of confusion to the ear may also be an element.

The letter "B" stamped on buttons of braces manufactured by the defendants in the same manner as the plaintiffs' trade-mark—the letter "D"—was stamped on the buttons of braces manufactured by them was held to be an infringement.

Riddell, K.C., *Rose*, and *Alex. Fraser*, for plaintiffs. *J. E. Jones*, and *J. J. Weir*, for defendants.

[Jan. 22.

ELGIN LOAN AND SAVINGS CO. *v.* LONDON GUARANTEE CO.

Guarantee—Application—False answers—Basis of contract—Materiality—Evidence.

Judgment of Divisional Court reported in 9 O.L.R. 569; 41 C.L.J. 335, affirmed.

W. F. Cameron, for appellant. *J. B. Clarke*, K.C., and *Swabey*, for respondents.

Divisional Court, Ex.] [Feb. 1.

REX *v.* MORNING STAR.

Justice of the peace—Order for payment of costs without any conviction having been made and in absence of accused—Order quashed on condition of no action against magistrate.

After a magistrate had entered upon the hearing of a complaint for having used insulting and abusing language to the complainant, the charge, at the complainant's instance, actuated apparently by compassion for the accused, was withdrawn, the accused to pay the costs. Subsequently, such costs not having been paid, the magistrate, in the absence of the accused, and without convicting accused of any offence, made an order directing the payment by the accused of the costs; and in default of payment directed the same should be levied by distress, in default of sufficient distress, directed imprisonment. The costs were then paid by the accused, but before launching this application were tendered back to accused and refused.

Held, that the order was invalid and was directed to be quashed without costs, but conditionally, under ss. 889 to 896 of the Criminal Code made applicable by 1 Edw. VII. c. 13, s. 1 (O), that no action should be brought against the magistrate, etc., otherwise the motion was to be dismissed with costs. The costs paid by the accused to be repaid her.

J. B. McKenzie, for the motion. *A. G. Slaght*, for magistrate. *J. W. St. John*, for complainant.

Magee, J.] RE MARTIN AND DAGNEAU. [Feb. 7.

Vendor and purchaser—Restraint on alienation.

A testator by his will after directing payment of his debts, funeral and testamentary expenses, devised to his son W.M.

certain land "subject to the following conditions, reservations, limitations, therein (setting out the payment of two sums of money) to have and to hold the same unto the said W.M., his heirs, executors, administrators and assigns forever"; and after making four other devises of other lands to four other sons provided as follows: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement, the executors will see that the same will remain in the M. (devisor's surname) estate"—W.M. was one of the executors named in the will.

The sons became indebted and neither they nor the daughters nor the widow nor the executors were in a position to purchase the lands and W.M. agreed to sell his. On an application under the Vendors and Purchasers Act, R.S.O. 1897, c. 134,

Held, that the restraint on alienation was valid and that he could not make title.

In re Macleay (1875) L.R. 20 Eq. 186 followed. *In re Rosher* (1884) Ch. D. 801 not followed.

Walker, K.C., for vendor. *Stone*, for purchaser.

[Meredith, C.J.C.P., Anglin, J., Clute, J.] [Feb. 20.

WICKE v. TOWNSHIP OF ELLICE.

Ditches and Watercourses Act—Expenses—Charge on land—Subsequent transferee.

Held, that on the proper construction of ss. 29, 30 of the Ditches and Watercourses Act, R.S.O. 1897, c. 285, the amount paid by a municipality for the cost of the construction of a drain under that Act is made a charge upon the land on which the work is done, whether the same be in the same hands as owned it when the proceedings were commenced, or in those of a subsequent transferee.

E. Sydney Smith, K.C., for defendants. *R. S. Robertson*, for municipality.

Teetzel, J.] [Feb. 21.

IN RE VILLAGE OF BEAMSVILLE & FIELD-MARSHALL.

Arbitration and award—Municipal corporation — Appeal — Municipal Act—Arbitration Act.

The plaintiff corporation and the defendant entered into an agreement of submission to arbitration of the question of what damages the defendant was entitled to in respect of land taken or injuriously affected by the corporation, "including all damages occasioned by or resulting from any trespass by the said municipal corporation or their servants to or upon the lands of the defendant; and also damages claimed by the defendant for breach of contract." The corporation now desired to appeal from the award.

Held, that, since the submission covered other matters than damages by reason of the land having been injuriously affected, —which latter alone come with the jurisdiction of arbitrators appointed under the Municipal Act, s. 451,—the right to appeal from the award did not depend on the provisions of that Act, but upon the terms of the submission, and was governed by the Arbitration Act, R.S.O. 1897, c. 62; and that as there was no provision for an appeal in the submission, the parties were limited to moving to set aside the award under s. 12 of the Arbitration Act, or for any objections thereto at common law, but were not entitled to have the Court review the award on the merits.

Lynch-Staunton, K.C., for corporation. *Armour*, K.C., and *Pettitt*, for defendant.

Teetzel, J.] IN RE TURNBULL ESTATE. [Feb. 22.

Will—Construction—Life interest with absolute control—Intestacy—Mortgage.

By his will a testator provided: "If I predecease my wife I give and bequeath to her the whole control of my real and personal estate as long as she lives." He made no further disposition of his personal estate, except the stock and implements appertaining to his farm; and the will contained no residuary clause. The testator, however, left a mortgage of $900. The widow survived only a few days and made no disposition of the mortgage.

Held, that the widow had only a life interest in the mortgage with power of control during her life; and even if this gave her absolute power of disposal, she had in fact made no disposition of it; and therefore it fell into the testator's undisposed of estate.

Held, also, that notwithstanding her life interest in the mortgage, the widow was entitled to take her share under the statute of distributions; and her next of kin would now take the moiety to which she was entitled.

H. J. Martin, for executors. *Evans-Lewis*, for next of kin.

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tzel, J.] [Feb. 23.

REX EX REL. MARTIN v. WATSON.

Quo warranto—Municipal corporations—Elections—Election of alderman—Property qualification—Declaration before nomination.

Where a candidate for the office of alderman, though in fact he possessed the necessary property qualification for the office, misstated his qualification in his declaration made pursuant to the Municipal Act, 1903, s. 129, sub-s. 3 (*c*), as amended, 4 Edw. VII. c. 22, s. 4 (O.), which, in fact, as there set out, was insufficient. This declaration, however, he supplemented by a declaration of his qualification before taking the office, as required by s. 311, in which he shewed sufficient property qualification.

Held, that it was too late, after the election, to contend that the misstatement regarding the qualifying property mentioned in his declaration was ground for setting aside his election, otherwise free from objection.

Douglas, K.C., for relator, appellant. *D. L. McCarthy*, for respondent.

Mulock, C.J., Ex., Maclaren, J.A., Clute, J.] [March 20.

RE MEDBURY. LOTHROP v. MEDBURY.

Probate—Ancillary grant—Resignation of executors—Domicil.

Executors named in the will of a testatrix, who died domiciled in Wayne County, Michigan, were granted probate there in June, 1900. Afterwards certain creditors in Michigan petitioned there for their removal, and in 1903 they, the executors, filed their

resignation of the position of executors in the Probate Court of Wayne County, and requested the appointment of the Union Trust Co., of Detroit as administrators de bonis non with the will annexed. They stated in their resignation that it was not intended as a resignation of the trusts imposed on them by the will, but only of their position as executors. The Probate Court accordingly appointed the Union Trust Co. administrators de bonis non with the will annexed. Meanwhile, the executors had filed an application for ancillary probate in the Surrogate Court of the County of Essex, where there was considerable real estate, in July, 1900, but the matter had not been proceeded with; and in July, 1904, the beneficiaries under the will of the Canadian estate, filed a caveat against the grant to the executors, and asked to have letters of administration de bonis non granted to the Union Trust Co. in their place. The Surrogate judge of Essex County in January, 1906, allowed the claim of the beneficiaries, and granted letters of administration, as asked, to the Union Trust Co. The executors now appealed from this decree.

Held, that the Surrogate judge of Essex County was right both as a matter of discretion and of law. The Court here could not look into the circumstances which led up to the resignation of the executors filed in the Probate Court in Michigan. The Court here must follow the Michigan grant, being the grant made in the place of domicil of the deceased.

A. St. George Ellis, for the executors named in the will. *R. F. Sutherland*, K.C., for the beneficiaries.

Muloek, C.J., Ex., Anglin, J., Clute, J.] [March 20.

ARTHUR *v.* CENTRAL ONTARIO R.W. CO.

Railways—Cattle at large—Intersection of railroad and highway—Negligence—Liability.

Held, that on the proper construction of s. 327, sub-s. 4 of the Railway Act, 1903, 3 Edw. VII. c. 58, while it is unlawful for the owner of cattle to permit them to be at large within the prescribed limits, and while if found within those limits, the cattle are liable to be impounded, and if killed at the intersection of the railroad and highway, the railway is exempt from liability—if by reason of the failure of the company to comply with the statutory requirements as to fencing, construction of cattle

yards, etc., the cattle reach the line of railway and are killed or injured, the company must pay for the injury unless they can establish affirmatively that the owner was guilty of negligence. The mere fact that the cattle were at large or the fact that they were not in charge of a competent person is not to prevent the plaintiff's recovery.

Middleton, for defendants. No one for plaintiffs.

Boyd, C.] RE STEWART v. EDWARDS. [Jan. 4.

Division courts—Judgment debtor—Married woman—Committal.

The committal of a judgment debtor in a Division Court for wilful default in appearing to be examined is in the nature of process to coerce payment, rather than of a punitive character, as for contempt; and there is no jurisdiction to make an order for the committal of a married woman judgment debtor who refuses to attend for examination upon a judgment summons, even though her non-attendance amounts to wilful misconduct.

Ex p. Dakins (1855) 16 C.B. 77 followed.

W. H. Barry, for the defendant. *A. C. Hill*, for the plaintiff.

Meredith, C.J., Street, J., Teetzel, J.] [Jan. 4.

KENNEDY v. FOXWELL.

Mortgage—Foreclosure—Parties—Final order—Decease of infant defendant—Right of representatives to redeem—Revivor—Account—New day.

An action upon a mortgage for foreclosure was begun in 1898, and the usual judgment was pronounced on the 30th January, 1899. One of the mortgagor's defendants died on the 20th June, 1899, an infant, unmarried, and intestate. On the 2nd May, 1900, a final order of foreclosure was granted, no notice being taken of the death of the infant, and he and not his personal representatives or those claiming under him being declared to stand absolutely debarred and foreclosed:—

Held, that the final order was irregular and was not binding on the infant's mother, who was not a party to the action, and in whom an undivided interest in the estate of her deceased son vested at the expiration of a year from his death; and that she was entitled to redeem and to be added as a defendant upon her own application.

Campbell v. *Holyland* (1877) 7 Ch. D. 166 followed.

An order was made adding her as a defendant, and directing that the action be carried on between the plaintiff and the continuing defendants and new defendant, and that it stand in the same plight and condition in which it was at the time of the infant's death.

The effect would be to require a new account to be taken and a new day fixed for redemption, of which all the defendants would be entitled to avail themselves.

W. Proudfoot, K.C.; *J. B. Clarke,* K.C.; *Cartwright,* K.C.; *Harcourt, Middleton* and *Hollinrake,* for the various parties.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] JOHNSTON *v.* HAZEN. [Aug. 15, 1905.

Evidence—Marriage registry—Legitimacy—Pedigree — Declaration by deceased parent.

A. was married at St. Paul's Church, Halifax, in 1809. In the entry of the marriage in the church's marriage registry his name appears with the addition "batr.," a contraction for bachelor. There was nothing to shew by whom the entry of the addition was made or that it was made in pursuance of a duty prescribed by statute.

Held, that the registry while admissible in proof of the marriage could not be received as evidence that A. had previously not been married.

To prove that C. was the legitimate son of A. by an alleged previous marriage it was shewn that he resided for two or three years at A.'s home, previous to departing to learn a trade, and at a subsequent time for a few months; that he addressed him as "father," was treated as a member of the family, was treated by A.'s wife as his son and by children by her as their brother; that after his removal to the United States he wrote letters to A. in one of which he informed him of his (C.'s) marriage; that subsequently to his death D., a son of A., corresponded with a son of C. during which he referred to C. as a half-brother; and that in an oral declaration by A. in the hearing of a witness, who was a neighbour of the family, he referred to the Christian name of his former wife, and to her personal appearance.

Held, that C.'s legitimacy had been proved.

A. O. Earle, K.C., and *J. R. Campbell*, for plaintiffs. *C. N. Skinner*, K.C., *S. Alward*, K.C., *L. A. Currey*, K.C., *J. R. Armstrong*, K.C., and *W. B. Naylor* (of the Wisconsin Bar), for the various parties.

Barker, J.] GAULT v. MORRELL. [Aug. 17, 1905.

Practice—Parties—Striking out and adding names—Assignment for creditors.

Where after a suit was brought for a declaration that stock-in-trade in possession of defendants belonged to plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities in full, the names of the defendants were ordered to be struck out and that of the assignee added.

M. G. Teed, K.C., for plaintiffs. *J. B. M. Baxter*, for defendants.

Province of Manitoba.

KING'S BENCH

Mathers, J.] LEE v. GALLAGHER [Oct. 31, 1905.

Pleading—Statement of claim—Amendment—Parties—Joinder of causes of action—Specific performance—Recovery of land.

Appeal from the referee's order.

The defendants Pepler and Macdonell entered into a contract for the sale of the land in question to the defendant Gallagher who assigned the same to the plaintiffs O'Shaughnessy and Armstrong, and they in turn sold the lands to the plaintiff Lee. Lee paid to Pepler and Macdonell the balance due them under the contract and received from them a transfer of the land under the Real Property Act. He then discovered that the defendant Langley was in possession of part of the land and claimed title to same by prescription. This prevented Lee from getting his transfer registered and he brought this action for recovery of possession of the land from the defendant Langley, joining, by leave of a judge obtained under Rule 258 of "The King's Bench Act," a claim for specific performance of the agreement as

against defendant Gallagher and damages by way of compensation or otherwise. The plaintiffs afterwards applied for leave to amend their statement of claim by adding a claim against the defendants Pepler and Macdonell for specific performance of the contract alleged to have been made by them directly with the plaintiff Lee when he paid his money to them and they gave him the transfer or for compensation in default. The referee refused to allow such amendment.

Held, that the amendments asked for should be allowed.

It is the policy of the King's Bench Act that all questions between the parties should as far as possible be determined in the one action "and all multiplicity of legal proceedings concerning any such matters avoided." King's Bench Act, s. 38, s-s. (*k*); *Krutz* v. *Spence*, 36 Ch. D. 770.

The test as to whether an amendment ought to be allowed is whether or not the other party would be placed in such a position that he could not be compensated by an allowance for costs or otherwise: *Stewart* v. *Metropolitan Tramway Co.*, 16 Q.B.D. 180; Annual Practice, 1905, p. 350.

The amendment asked for setting up a new cause of action is not of itself a sufficient ground for refusing to allow it: *Budding* v. *Murdock*, 1 Ch. D. 42; *Hubbock* v. *Helms*, 56 L.J. Ch. 539.

The contention that leave to join another cause of action with one for the recovery of land can only be granted before the commencement of the action is not supported by the authorities, which shew that such leave is granted whenever the Court thinks it reasonable to do so: *Rushbrooke* v. *Farley*, 52 L.T. 572; *Hunt* v. *Tensham*, 28 Sol. J. 253, and *White* v. *Ramsay*, 12 P.R. 526.

Pitcher v. *Hinds*, 11 Ch. D. 905; *Musgrove* v. *Stevens*, 1881, W.N. 163, *McIlhergey* v. *McGinnis*, 9 P.R. 157, and *Clark* v. *Wray*, 31 Ch. D. 68, distinguished.

Daly, K.C., for plaintiffs. *Hough*, K.C., for Gallagher. *Aikins*, K.C., for Pepler. *Machray*, for Macdonell. *McKercher*, for Langley.

Full Court.] IN RE BENNETT. [Feb. 10.

Surrogate Courts Act—Transfer of contentious matter to King's Bench—Notice of application—Practice—Appeal to Full Court.

One Bennett having died intestate, Alice Maud Bennett claimed to be his widow and took out letters of administration.

There was a surviving son. Afterwards a sister of the deceased petitioned the Surrogate Court to have the letters revoked, alleging that Alice Maud Bennett was not the deceased's lawful widow. The petition being contested, the petitioner applied, under R.S.M. 1902, c. 41, s. 63, to have the proceedings removed to the Court of King's Bench, and gave notice of the application to the administratrix, but not to the son, who was a minor. The application was granted and the order made. The widow appealed to the Full Court, when the appeal was reached the official guardian on the son's behalf asked and was granted leave to interview as an appellant.

Held, that the son was a party concerned, and as s. 63 says that reasonable notice of the application for removal "shall be given to the other parties concerned," and no notice had been given to the son, the order appealed from was made without jurisdiction and must be set aside.

Held, also, that, under s. 58 of the King's Bench Act the order, having been made by a judge of this Court, was one from which an appeal lies to this Court in banc.

Doll v. *Howard,* 11 M.R. 21, distinguished.

Appeal allowed with costs to the official guardian, but not to the administratrix, who had not raised the point on which it turned before the judge who had made the order.

Haggart, K.C., for the administratrix. *Mulock,* K.C., and *Phippen,* for respondent. *H. J. Macdonald,* K.C., for infant.

Full Court.] BARRETT *v.* C.P.R. Co. [Feb. 10.

Railway Act, 1888, ss. 90, 92, 146—Action for damages in running trial line—When remedy limited to arbitration—Damages resulting from exercise of statutory powers.

In running a trial line for a proposed branch of the defendants' railway, their surveyors entered on the plaintiff's land and cut down a number of the trees on the course of the line where it passed through a grove near his dwelling house.

The plaintiff sued in the County Court for damages and the findings of law and fact by the trial judge were that the defendants had a right under their charter and the Railway Act to enter upon the plaintiff's land to run the line; that, if it was necessary to cut through the grove for that purpose, the defen-

dants had done no unnecessary damage, and that an action at law for damages necessarily done in running the line would not lie, the plaintiff's only remedy being under the compensation clauses of the Railway Act. The plaintiff was nonsuited and appealed to this Court. The possibility of running the trial line through the grove without cutting down the trees by making a rectangular detour around it was not raised at the trial, and the trial judge did not pass upon it.

Held that, if it would have been possible to run the line by making such detour, it should have been done and the defendants would be liable in this action for damages for cutting down the trees unnecessarily, and that there should be a new trial to determine the question if plaintiff desired it.

If damage results from the exercise of statutory powers and there is no negligence in the mode of exercising such powers, then the person injuriously affected must either find in the Act some provision for compensation or he is entitled to none: *Ray* v. *C.P.R. Co.* (1902) A.C. 220, and *Bennett* v. *G.T.R. Co.*, 2 O.L.R. 425. But if there is negligence in such exercise of statutory powers or damages are unnecessarily inflicted, then an action will lie and the complainant is not limited to the remedy given by the arbitration clauses of the Act.

O'Connor, for plaintiff. *Bond*, for defendants.

Full Court.] [Feb. 10.

SAVAGE v. CANADIAN PACIFIC RY. CO.

Discovery—Examination—Production of documents—Privilege —Reports of officials to company respecting accidents.

Decision of PERDUE, J., noted vol. 41, p. 670, affirmed with costs.

Held, also, 1. The fact that certain documents come into existence after the accident is not a ground of privilege: *Wooley* v. *North London Ry. Co.*, L.R. 4 C.P. 602.

2. When the officer who made the affidavit on production was cross-examined upon it and as a result he made a second affidavit producing a number of documents for which he had claimed privilege in the first affidavit, the examination on the first affidavit may be used to contradict the statements in the second, although there was no further examination.

An affidavit on production cannot be contradicted by a controversial affidavit; but, if from any source an admission of its incorrectness can be gathered, the affidavit cannot stand.

3. The fact that the reports withheld were written on forms all headed, "For the information of the solicitor of the company and his advice thereon," is not sufficient of itself to protect them from production.

Hunter v. *G.T.R. Co.*, 16 P.R. 385, distinguished.

O'Connor, for plaintiff. *Coyne*, for defendants.

Province of British Columbia.

SUPREME COURT.

ADMIRALTY DISTRICT.

Martin, Local Judge.] [Dec. 29, 1905.

KENNEDY v. THE "SURREY."

Collision—Public rights in navigable waters—Booming and transportation of logs—R.S.C. c. 92, s. 2—Negligence—Laches—Limitation of time.

The statutory provision limiting to one year the bringing of actions against a municipality does not apply to actions in rem in the Admiralty Court.

Held, on the facts, that the tying of a boom of logs to piles driven on the bank of a navigable river is not an interference with navigation when done in a reasonable manner, for a reasonable period, and at such places as are open to the owner of the boom to do so.

Joseph Martin, K.C., and *Cassidy*, K.C., for the ship. *Davis*, K.C., for plaintiff.

Full Court.] [Jan. 10.

VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY v. SAM KEE.

Statutes, construction of—Supreme Court Act 1904, s. 100—Railway Act, 1903 (Dominion), ss. 162 and 168—"Event" read distributively—"Issue" as distinguished from "event"—Costs of and incidental to arbitration—Costs of appeal.

Sam Kee, having obtained an award from arbitrators ap-

pointed under the Railway Act, 1903 (D.), which award, by reason of s. 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the railway company appealed to the Full Court, advancing several distinct grounds of appeal, on all of which the exception of the rate of interest allowed by the arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent. to five per cent.

Held (IRVING, J., dissenting), 1. The word "event" in s. 100 of the Supreme Court Act, 1904, may be read distributively.

2. Sec. 162 of the Railway Act, 1903 (D.), does not apply to costs of appeals to the Full Court from the award of arbitrators, but such appeal is an independent proceeding, and, therefore, governed by s. 100 of the Supreme Court Act, 1904.

3. The success of the appellant company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken.

Hunter, C.J.] [March 30.

PROTESTANT ORPHANS' HOME v. DAYKIN.

Practice—Issuing writ in name of firm of solicitors.

It is not necessary that a writ should be issued in the name of one solicitor. It is permissible to issue it in the name of a firm. The English practice followed.

A. E. McPhillips, K.C., for plaintiff. *R. T. Elliott*, for defendants.

Book Reviews.

Stone's Justices Manual, being the yearly Justices' Practice for 1906, 38th edition, edited by J. R. ROBERTS, Solicitor, Clerk to the Justices, etc. London, Butterworth & Co., 1906. Canada Law Book Co., Toronto, agents. 1,309 pages.

As this book is so well known to the whole profession it is unnecessary to refer to it, except to say that the value of this edition is enhanced by an entirely new index. The table of cases cited in the work (an enormous number of them) gives a reference to the various volumes wherein they are reported or noted.

Notable Scottish Trials. The Trial of Madeleine Smith, edited by A. DUNCAN SMITH, F.S.A. (Scot.), Advocate. Also, in a separate volume. the Trial of the City of Glasgow Bank Directors, edited by WILLIAM WALLACE, M.A., Advocate: Canada Law Book Company, Toronto.

Nearly fifty years ago one of the most remarkable and interesting criminal trials of modern times took place in Edinburgh, the memory of which has not yet passed away. The introductory chapter refers to it as follows: "A strangely fascinating cloud of mystery envelops the tragic and romantic story unfolded in the trial of Madeleine Smith; and to that story, in all its peculiar and distinctive features, it would be difficult to discover a parallel in the annals of our criminal jurisprudence. No criminal cause of modern times has more deeply absorbed the interest and attention of a whole empire; and day by day, during its nine days' progress, the public excitement, throughout Scotland in particular, was intensified, and the fate of the engaging and accomplished girl of one and twenty, whose life hung in the balance, formed the central if not the exclusive topic of current popular speculation."

It is this story that is given us by the Canada Law Book Company in the volume before us.

The other volume above referred to is the Trial of the City of Glasgow Bank Directors. Not so fascinating possibly as the trial of Madeleine Smith, but one which ranks in the estimation of laymen as well as lawyers, as probably the most important trial which ever took place in reference to financial frauds. The magnitude of the crisis brought about by the failure of the bank, the number of homes ruined thereby, the social standing of the directors, and the startling nature of the evidence of the rascality and recklessnes of men of social position and religious pretension invested the trial with especial interest.

The disclosures now being made in the United States in connection with some of their insurance companies as well as some unsavoury evidence in a loan company enquiry in this country seem but a faint echo of the ghastly story of the Glasgow Bank failure nearly thirty years ago.

In these two volumes the Canada Law Book Company give most interesting reading for an idle hour or for Vacation. Of this the profession of the Dominion will, we doubt not, largely avail themselves.

The A. B. C. of Parliamentary Procedure, a handbook for use and public debatement by Freeman & Abbott, London, Butterworth & Co., London; Canada Law Book Company, Toronto, 1906.

The authors collate into a concise and accessible form the principal facts and features of parliamentary procedure, and produce a book which will be of assistance not only to members of parliament, but to all concerned in the management of public meetings and to those interested in debating societies. This little work comes to this country appropriately at the present time.

Flotsam and Jetsam.

THE CLERGYMAN AND THE LAWYER.—At a dinner party the other evening a well-known minister sat opposite one of the leading legal lights of Washington. During a lull which often occurs on such occasions, the minister casually asked the jurist what he thought would be the outcome of Mayor Harrison's arrest in Chicago in connection with the Iroquois Theatre disaster.

"I can't express an opinion without a retainer," promptly replied the lawyer.

"Ah!" exclaimed the dominie, "I left my pocketbook at home."

"I left my opinion at home," was the quick response.

"I don't believe you have an opinion, anyhow," said the minister.

"I don't believe you have any pocketbook," was the final rejoinder and then everybody laughed.

"I am reminded," said the lawyer, "of a retort courteous that rather knocked me out in Court one day. I made a remark which rather nettled the opposing counsel, and he replied, looking intently at my rather conspicuous bald head, 'That is a very bald statement,' with the accent on the bald.

"'Well,' said I, 'my barber remarked yesterday that some men have hair and some have brains,' and then I looked pityingly at his heavy mane.

"'Yes,' was the quick reply, 'and some men have neither,' and he looked me right in the eye."—*Washington Star.*