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It is with extreme regret that we have to record the untimely death on the 19th ultimo of the Honourable John Edward Rose, one of the Judges of the High Court of Justice for Ontario. The news came with a sudden shock, as only ten days previously he was presiding at the Criminal Sittings in Toronto, and a few evenings before that many of us heard his eloquent and patriotic utterances on an occasion yet fresh in the memory of those present. The country can ill afford to lose so upright and so just a judge, so good a lawyer, and so estimable a citizen. The Bar, who knew him best, respected him as an able, painstaking, courteous and thoroughly competent judge, before whom it was a satisfaction to appear; whilst to the juniors and students, with whom he was a prime favourite, his loss will be very great.

Mr. Rose was, at the time of his death, in the prime of life, and it is therefore with the more regret that we think of his loss to the Bench, especially at this time, for, instead of being less useful day by day, as must sometimes be the case, he was in a marked degree maturing in learning and judgment, and growing in the favour and estimation of the profession. A marked feature of his character as a judge was his strong sense of responsibility and the conscientious discharge of his important duties—no shrinking from doing what seemed to him to be his duty. If he thought a case should be tried without a jury, he did not hesitate to undertake the burden. In his rulings at nisi prius he was prompt and generally right. In criminal cases, though strictly just and resolute in enforcing the law, no judge ever took more pains to ascertain what meed of punishment would seem most advisable to be visited upon the confirmed evil doer, or how best to apportion sentences when it seemed desirable to be lenient towards those for whom hope of reclamation might be entertained.

His death will be regretted and his loss be felt in every part of the Province of Ontario, where he was so long and so favourably known.

We publish in this number a letter from the Attorney-General of Ontario, addressed to the Law Associations and others, bringing to their attention some difficulties, with suggestions for remedies, in the administration of justice in this province. As will be seen, reference is made to the jurisdiction of Division Courts. As to these an increase is suggested, also an increase in the jurisdiction of County Courts, or else the merger of these Courts in the High Courts. It also refers to a suggestion for legalising agreements between solicitors and their clients as to payment of services. The Law Association of the County of Simcoe has expressed its views in a memorandum, the benefit of which we also give to our readers. We agree in the main with these views, but have some doubts as to whether the objections to solicitors and clients being permitted to make agreements respecting the amount and manner of payment for services are as great as this memorandum seems to think. That such arrangements are of every day occurrence at present cannot be denied, and, being contrary to the etiquette of the profession, we deplore them. It is suggested that it would be better to put all practitioners on the same footing, on the supposition that the suggested practice is only malum prohibitum and not malum in se. If such a change would have the objectionable result of lowering the dignity and standing of the profession it certainly should be rejected at any cost, but there are those who do not fear such a result. As a matter of fact it is said that practitioners of high standing do not make such agreements and are seldom asked to make them, whilst those of a different class make them, as we have already said, without the sanction of the law. The Attorney-General is wise in thus seeking for light from the profession before introducing legislation on the subject. A full discussion is most desirable, and our columns are open. We shall hope to be able to assist the Attorney-General in his laudable effort for help in the matter, and to this end we would ask those of our readers, who think they can throw light on the subject, to give us their views as fully and as promptly as possible.

We are glad to notice that the protests we have from time to time made against appointments to the Bench, based upon considerations other than fitness for the office, which views have been re-echoed in several strongly written letters to the public press, recently took concrete form by the presentation to the Minister of Justice of a memorial signed by a large number of the Toronto

Bar. This memorial commences by alleging that in the past, judicial "appointments to the High Court Bench in the Province of Ontario have been merited by previous distinction at the Bar, and without regard to any consideration other than the public interests." Whilst we doubt whether this statement can be said to be entirely accurate, it is, in the main, correct; and as it was a politic introduction to the petition of the memorial we do not quarrel with it. The memorial then proceeds as follows:

"Your signatories wish to express to you, as First Minister among his Excellency's advisers, their hope and trust that when the present or other vacancies upon the Ontario Bench come to be filled, the Government will not depart from the traditions surrounding this high office in the past, but will continue to deserve the confidence of the people by selecting for such exalted positions men of standing and of eminence in the profession, without attaching any weight to other considerations which may be urged."

The occasion of the presentation of this memorial was opportune, as the Premier had, during his recent visit to Toronto, at the dinner of the Osgoode Legal Literary Society, been saying highly complimentary things of the Bench and Bar of Ontario, evincing a knowledge that there is no dearth of good material in this Province to fill vacancies on the Bench. In his reply, the Minister said that he and his Government heartily assented to the principles laid down in the memorial, and that there would be no departure from the practice of the past. There may be those who doubt whether the few courteous remarks expressed in Sir Wilfrid Laurier's peculiarly happy and captivating manner really mean very much, or whether his own desire in the matter may not be over-borne by the supposed necessities of party politics. So far as we are concerned, however, we shall loyally hold to the hope, and shall expect, that the promise thus given, will be redeemed in a manner satisfactory both to the Bar and to the country.

MARRIED WOMEN'S PROPERTY.

Barrett v. *Howard*, 83 L.T. 301, recently decided by the English Court of Appeal, reveals an apparent defect in the English Married Women's Property Act, 1893. That Act was apparently p.. ed to advance the rights of creditors against married women. By section 1 it provided "that every contract thereafter entered into

by a married woman, otherwise than as agent, (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her property, whether she is or is not possessed of or entitled to any separate property at the time she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of, and entitled to; and (*c*) shall be enforceable by process of law against *all property which she may thereafter while discovert be possessed of or entitled to*;" but it goes on to limit these provisions in the following manner, and that is how the difficulty arose. "Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which *at that time* or *thereafter* she is restrained from anticipating."

Sentence (*c*) appears to give the creditor substantial rights, but the proviso carefully takes them away again.

This may be illustrated by the facts in Mrs. Howard's case. She, being a married woman, in 1896 gave Mr. Barrett certain acceptances. She was entitled to the income of certain trust property which she was restrained from anticipating. In January, 1900, a decree absolutely divorcing her from her husband was pronounced. In June, 1900, Barrett recovered judgment against her for £261, and in the same month he attached, by garnishee proceedings, a balance standing to the defendant's credit at her bankers. This balance consisted of income of the aforementioned trust funds, which had partly accrued due before and partly after the making of the decree absolute for divorce. The Court of Appeal (Smith and Williams, L.JJ.) held that the proviso above referred to protected all property which at the time of the contract, or thereafter, the defendant was restrained from anticipating. That it was not limited to the period "during coverture," but referred to all separate property which "at the time or thereafter" the woman might be entitled to. In the present case the defendant was "at that time," i.e., when the contract was made, restrained from anticipating the property sought to be attached, and therefore it was within the proviso, and not available to satisfy the plaintiff's judgment.

The Ontario adaptation of the English Act of 1893 is not in exactly the same terms, and the version of the proviso above referred to, as found in R.S.O. c. 163, s. 4 (2), is as follows:

"Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property *which she is restrained from anticipating.*"

It will be seen that there is room for argument that the absence of the words "at that time or thereafter" before the words "restrained from anticipating," would enable an Ontario Court to say that the proviso is limited in its operation to property, which *at the time it is sought to be made available under execution* against the married woman, she is *then* restrained from anticipating, and that it would not exonerate property from liability to execution, which she at one time was restrained from anticipating, but which has subsequently, by reason of her becoming discovert, become freed from such restraint, and is so freed at the time it is sought to be made available.

MARRIED WOMEN AS NEXT FRIENDS.

The Ontario Act respecting infants furnishes rather a melancholy example of the effect of putting new cloth upon old garments. The amendments of recent years have mostly been made with the view of keeping the law abreast of the constantly expanding rights of married women, with the result, as has happened elsewhere, that married women's rights have in some respects outstripped those of their husbands. Thus the act as it stands in the last revision provides that the Court "may appoint the father of an infant to be guardian." Elsewhere in the act the right of the father to appoint a guardian is assumed, and the right of the mother to appoint a guardian as expressly conferred; in neither of these latter cases does the act require security from the appointee. Moreover, under the act, upon the death of the father the mother becomes ipso facto guardian of her children without security. But if the father is appointed under the act he must furnish a bond in a "penal sum with such security as the Judge directs and approves." The act gives the guardian, whether appointed or constituted, very wide powers. He is "authorized to act for and on behalf of the ward," to "prosecute or defend any action," and to "have the charge and management of his or her estate." One can understand the need for security for the proper performance of such duties, but why should it be exacted from the father and not from his appointee or from the mother or her appointee?

The Courts, on the other hand, seem loth to admit married women to full equality with their husbands in matters of guardianship. In *Mastin* v. *Mastin*, 15 P.R. 177, it was held that a married woman ought not to be appointed by the Court to the office of next friend or guardian ad litem "because she cannot be made answerable in costs." In so deciding the Court followed *Thynne* v. *St. Maur*, 34 Chy. D. 465. In delivering judgment in that case Chitty J. said: "Before the passing of the Married Women's Property Act, 1882, it was the established practice that a married woman could not fill the office of next friend or guardian ad litem and the rule appears to have been founded on the incompetence of married women to sue and to be sued, and to be answerable in costs. Now the Married Women's Property Act has not made a married woman a feme sole for all purposes, but has rendered her capable of suing and being sued in matters relating to her personally. To grant the application would be a dangerous innovation, as a married woman, as far as I can see, would not be responsible for the costs of an improper action or liable to pay those of an improper defence, or at most would only be responsible for such costs to the extent of her separate estate."

In re McQueen, 23 Gr. 191, a mother, being a widow, had by her will attempted to appoint her sister, a married woman, to be the guardian of her infant children. On an issue between the aunt and the paternal grandfather of the infants, Proudfoot, V.C., followed *Re Kaye*, L R. Chy. 387, in which the appointment of a married woman by the Surrogate Court was reversed on the sole ground that "the appointment of a married woman raised a difficulty in the the way of supporting the order that was insurmountable." No authorities were cited either by counsel or by the Court in *Re Kaye*.

In view of the fact that the Ontario Legislature has gone about as far as it is possible for language to go in the direction of relieving married women from disabilities, it is rather anomalous that the Courts should refuse to appoint her to an office for which she must often be better qualified than a stranger in blood. This being the case it is worth while to analyze the four cases upon which the present interpretation of the law in Ontario is founded.

The *McQueen* case and the *Mastin* case simply followed the English cases cited, so that, subject to any distinction which may be drawn between our Married Women's Property Act and that of England, nothing further need be said about the Ontario authorities referred to. As to the *Kaye* case there can be no doubt that it

correctly stated the law as it stood before the legislation to remove the disabilities of married women. As to *Thynne* v. *St. Maur*, it will be observed that the ratio decidendi was the incompetence of married woman to sue and be sued personally and to be answerable in costs. But a married woman may be executrix or trustee or even, it would seem, testamentary guardian, and in case a woman having children marries a second time, she of course remains the guardian of her children as she was under the act before her second marriage. In all these cases she may sue and be sued personally.

Moreover even if a married woman were not answerable for costs it would appear not to be a sufficient disqualification. In *Scott* v. *Niagara Navigation Co.*, 15 P.R. 409, Boyd C. said: "The primary object of a next friend is not that the defendants may have security for costs, but that there may be some one before the Court to answer for the propriety of the action, and through whom the Court may compel obedience to its orders. So that when the natural guardian of the infant is a pauper or in an insolvent condition the Court will sanction such a person undertaking the conduct of the litigation on behalf of the infant, lest any other rule may amount to denial of justice to the children of poor persons."

The attitude of the Court in *Thynne* v. *St. Maur* is the more remarkable as the Courts have generally given a liberal construction to legislation for the relief of married women. For instance, it is well settled practice that a married woman suing for an injunction will only be required to give the ordinary undertaking as to damages and her undertaking will be accepted even though she possesses no property at all. In such an undertaking she will be dealt with as a feme sole.

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PROVOCATION AS A DEFENCE IN HOMICIDE CASES.

Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature; 1 East's Pleas of the Crown, 218; Roscoe's Criminal Evidence, 12th ed., 620. Murder is unlawful

homicide *with* malice aforethought; manslaughter is unlawful homicide *without* malice aforethought: *R g.* v. *Doherty* (1887) 16 Cox C.C. 306.

Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or upon sudden combat, it will be manslaughter; if there be no such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder: 2 East's Pleas of the Crown, 232; Foster 313; Roscoe's Crim. Evid. 620. Where the provocation is sought by the prisoner it cannot furnish any defence against the charge of murder: 1 East P.C. 239. The provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed: Russell on Crimes, III. 38; Foster 315. As a general rule, no provocation *of words* will reduce the crime of murder to that of manslaughter: Foster's Crown Law, 290; but under special circumstances there may be such a provocation of words as will have that effect: Russell on Crimes (1896) III. 38. Blackburn, J., in summing up to the jury in *Reg.* v. *Rothwell* (1871) 12 Cox C.C. 145, said that what they would have to consider was, whether the words which were spoken just previous to the blows amounted to such a provocation as would, in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify the prisoner in striking as he did the person who used the words.

Where, however, there are no blows there must be a provocation at least as great as blows; for instance, a man who discovers his wife in the act of adultery and thereupon kills the adulterer is only guilty of manslaughter: Blackburn, J., in *Reg.* v. *Bothwell* (1871) 12 Cox C.C. 145, 147. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity: 1 East P.C. 232; Russell on Crimes III. 38. In the United States it has been held that words may give character to acts of menace and so may make an act, otherwise without meaning, an act of provocation which will reduce the subsequent killing to manslaughter: *Watson* v. *State*, 82 Ala. 10; *State* v. *Keene*, 50 Mo. 357; *Pridgen* v. *State*, 31 Tex. 420.

If there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, it may be regarded as reducing the crime to that of manslaughter: *Reg.* v. *Sherwood*, 1 C. & K. 556; *Reg.* v. *Smith*, 4 F. & F. 1066.

If on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him: 4 Black. Com. 199, *Holloway's Case*, Cro. Car. 131. Slight provocations have been considered in some cases as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice; but in such cases it must appear that the punishment was not administered with brutal violence, and was not greatly disproportionate to the offence, and the instrument must not be such as, from its nature, was likely to endanger life: Foster's Crown Law 291; Russell on Crimes III. 47.

In *Reg.* v. *McDowell* (1865) 25 U.C.Q.B. 108, the rule was stated as follows by the Court of Queen's Bench of Upper Canada (Draper, C.J., Hagarty, J., and Morrison, J.):

"Mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person will not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear or had struck him with a stick or other weapon *not likely to kill*, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter:" *Ib.* page 112.

But in the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder.

All questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law: *Reg.* v. *McDowell* (1865) 25 U.C.Q.B. 108, 115.

If the circumstances of the case shew that the blow causing the death was given in the heat of passion arising on a sudden

provocation and before the passion had time to cool, the inference of malice is rebutted: *Reg.* v. *Eagle* (1862), 2 F. & F. 827. As it may be matter of law that a blow is not sufficient to *excuse* homicide, so it may be matter of law that a blow is not sufficient to reduce the defence to manslaughter; or it may be matter of law that it *may* be so, supposing the jury find as a matter of fact that it did produce a passion which, as a matter of law, it was legally sufficient to provoke: 2 F. & F. note (*b*) pages 831, 832.

Although by the Criminal Code of Canada, sec. 229 (3), no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury, and not for the judge, to determine any preliminary question of fact upon which the alleged legal right depends. So where the facts shewn were that the prisoner had called at the house of the deceased and, on being forcibly ejected by the latter, drew a revolver and shot him, the jury have to consider whether the deceased before laying hands on the prisoner ordered him to leave the house, and gave him time to leave, and whether, if such were done, the violence used by the deceased in ejecting the prisoner was greater than was necessary for that purpose. It is misdirection for the trial judge in such a case to charge that the deceased had a legal right to eject the prisoner as he did, and that therefore there was no provocation to reduce the crime from murder to manslaughter, and such a direction is a withdrawal from the jury of the questions of fact involved in the determination of the question of legal right, and entitles the prisoner to a new trial: *Reg.* v. *Brennan* (1896) 27 Ont. R. 659.

Toronto. W. J. TREMEEAR.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—UNAUTHORIZED ACT OF SERVANT CAUSING DAMAGE—ONUS OF PROVING AUTHORITY.

In *Beard* v. *London General Omnibus Co.* (1900) 2 Q.B. 530, the plaintiff, while riding a bicycle, was run into by an omnibus of the

defendant company. Unfortunately, the plaintiff opened his case to the jury that the omnibus was being driven by the conductor, but he failed to give any evidence to shew that the conductor had any authority to drive the omnibus in the absence of the driver, and, at the close of the plaintiff's case, Lawrance, J., directed judgment to be entered for the defendants, and rightly so, in the opinion of the Court of Appeal (Smith, Romer and Williams, L.JJ.) The Court of Appeal, however, conceded that if the defendants' omnibus is driven in the ordinary way by a person who appears to be the driver, the presumption is, that the driver is authorized by the defendants, and the onus is on the defendants to shew that he was not authorized; but in this case they considered that the presumption was rebutted by the plaintiff's own evidence, which shewed that the defendants' driver was the conductor, and, therefore, prima facie not the person authorised to drive, and thus the onus of shewing some special authority was cast upon the plaintiff, which he had failed to discharge. Williams, L.J., though agreeing in the result, yet expresses the view, that where a driver and conductor are sent in charge of an omnibus, and a complaint is made of some act done by the conductor, it should be left to the jury to say whether the act complained of was within the authority given to the conductor; but in this case, as the plaintiff's own evidence shewed that the omnibus was driven down-hill at the rate of eight miles an hour, he thought that, on the evidence of what was actually done, the onus of proof lay on the plaintiff to shew that such an act was within the authority of the conductor. This seems to be rather a non sequitur.

LANDLORD AND TENANT—MORTGAGOR IN POSSESSION SUBJECT TO A LEASE—EJECTMENT FOR BREACH OF COVENANT—FORFEITURE RIGHT OF MORTGAGOR TO ENFORCE—JUDICATURE ACT 1873, S. 25, SUB-S. 5—(ONT. JUD. ACT, S. 58 (4)—R.S.O. C. 170, S. 13).

Matthews v. *Usher* (1900) 2 Q.B. 535, deals with a neat question of law, the point in the case being, whether or not, where the equity of redemption of leasehold premises is in a mortgagor, he can take proceedings to enforce a forfeiture for breach of the covenants contained in the lease. The plaintiff relied on the provisions of the Judicature Act, s. 25, sub-s. 5 (Ont. Jud. Act, s. 58 (4)), which enables a mortgagor in possession or receipt of the rents, as to which no notice of his intention to take possession or to enter

into the receipts of the rents and profits, has been given by the mortgagee, to sue for the possession, etc. Notice of forfeiture had been given by the mortgagor, under the Conveyancing Act (see R.S.O. c. 170, s. 13), and the mortgagee was joined as co-plaintiff at the trial, and Ridley, J., gave judgment in favour of the plaintiffs. On appeal, however, it was contended that the original plaintiffs, not being legal owners of the reversion, were not entitled to exercise the powers of re-entry in the lease, and were in no better position by joining the mortgagee, because the notice under the Conveyancing Act was not given by him, and the Court of Appeal (Smith, Williams and Romer, L.JJ.,) held that this contention was sound. This is probably another instance of the difficulty which the legislature continually experiences in framing laws with sufficient technical precision to accomplish their real intent. Doubtless the Act in question was intended to enable a mortgagor not in default to assert the same rights over the mortgaged property as if he still held the legal estate, but in the opinion of the Court of Appeal it has failed to say so, and according to the construction placed on the section by the present case it would seem that the statute has really accomplished very little. It enables a mortgagor entitled to possession to sue for possession, but so long as the mortgage is subsisting the mortgagor has no power to terminate a subsisting lease. He may probably be entitled to oust a wrongdoer, and that would appear to be about the limit of his power under the section in question.

CRIMINAL LAW – FALSE PRETENCES – ATHLETIC SPORTS – COMPETITOR IN HANDICAP—FALSE STATEMENTS AS TO NAME AND PERFORMANCES—ATTEMPT TO OBTAIN PRIZE.

In *The Queen* v. *Button* (1900) 2 Q.B. 597, the defendant was indicted for attempting to obtain goods by false pretences. The facts were simple. Athletic sports were to be held at Lincoln, at which prizes were to be given to successful competitors. Among the contests were two races of 120 and 440 yards, in respect of each of which a prize of ten guineas was offered. Among the names sent in for these two contests was that of one Sims, and two written forms of entry were sent in to the secretary of the sports, containing a statement as to the last four races run by Sims, and also the statement that he had never won a race. These forms were proved not to have been written by the prisoner.

Sims, as a fact, was a moderate performer, and he was given 11 yards handicap in the 120 yards race, and 33 yards in the 440 yards race. Sims was ill and did not appear, but the prisoner attended the sports and represented himself to be Sims. He was a fine performer and won both races easily. On being subsequently questioned by the handicapper he declared his name was Sims, and that he had never previously won a race, both of which statements were untrue. He was found guilty. It was contended on behalf of the prisoner that he could not be convicted, because the representations were made to secure a good handicap, and that the object of obtaining the prizes was too remote from the false representation. The Court for Crown Cases Reserved (Mathew, Lawrance, Wright, Kennedy and Darling, JJ.,) held that the prisoner had been properly convicted, and that *Regina* v. *Larner*, 14 Cox C.C. 497, was not to be followed, it being opposed to the ruling of Lindley, J., in *Regina* v. *Dickinson* (1879) Times 26th July, of which the Court approved.

CRIMINAL LAW—PROPERTY STOLEN BY WIFE FROM HUSBAND—RECEIVING STOLEN PROPERTY.

In *The Queen* v. *Streeter* (1900) 2 Q.B. 601, two prisoners, a man and a woman, were indicted for stealing property in a dwelling house, and also for receiving the same property. The woman was the prosecutor's wife and the man had lodged in the house. After he left the woman packed up the property in question which belonged to her husband, and sent it to the man and afterwards left the house and joined him, and the two lived together. The property was found in their possession. The jury found the woman guilty of stealing, and the man of receiving. The question was reserved whether the man could be convicted of receiving, and the Court for Crown Cases reserved (Mathew, Lawrance, Wright, Kennedy, and Darling, JJ.), held that he could not, because as the stealing by a wife of her husband's property did not amount to a felony at common law, or by virtue of the Larceny Act 1861, but was only made a criminal offence by the Married Woman's Property Act 1882, sub-s. 12-16, the man was not liable to be convicted under the Larceny Act 1861, s. 91. In Canada the Cr. Code, s. 313, seems to be sufficient to render both the wife and the receiver liable to conviction in such circumstances.

ARBITRATION—SUBMISSION TO THREE ARBITRATORS—REFUSAL TO APPOINT ARBITRATOR—JURISDICTION TO STAY ACTION—ARBITRATION ACT 1889 (52 & 53 VICT., C. 49) S. 4 (R.S.O. C. 62, S. 6).

In *The Manchester Ship Canal Co.* v. *Pearson* (1900) 2 Q.B. 56, an application was made to Bigham, J., to stay the action under the Arbitration Act 1889, s. 4 (R.S.O. c. 62, s. 6), on the ground that the plaintiffs had agreed to refer the matters in dispute to arbitration. He made the order asked, from which the plaintiffs appealed, on the ground that the submission provided that the reference should be had to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and that they refused to appoint an arbitrator, and inasmuch as it had been held *In re Smith and Service* (1890) 25 Q.B.D. 545, that there was no jurisdiction to compel the plaintiffs to appoint an arbitrator, or to appoint one for them, in case of default therefore there was no jurisdiction to stay the action, but the Court of Appeal (Smith and Williams, L.JJ.) without disputing the correctness of *In re Smith and Service* which they considered demonstrated that there was a blot in the Act, nevertheless refused to make what they considered another blot by holding that there was no jurisdiction to stay an action when the submission was to refer to three arbitrators to be appointed as above mentioned.

LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT BREACH OF COVENANT AGAINST ASSIGNMENT—ASSIGNMENT OF LEASE SUBSEQUENT TO BREACH OF COVENANT BY LESSEE—RE ENTRY BY ASSIGNMENT OF REVERSION —CONSENT JUDGMENT.

Cohen v. *Tannar* (1900) 2 Q.B. 609, was an action for breach of a covenant for quiet enjoyment contained in an assignment of a lease made by the defendant to the plaintiff. The lease assigned contained a covenant on the part of the defendant, the lessee, not to assign or sublet the premises. The defendant in breach of this covenant had assigned the lease to the plaintiff, and had covenanted for quiet enjoyment of the premises by the plaintiff without any interruption by the defendant or any one claiming under him. Subsequently the original lessor assigned the reversion, and the assignees brought an action against the defendant to recover possession as upon breach of the covenant not to assign. The defendant gave the plaintiff notice of the action and informed him that he had no defence to it, and afterwards signed a consent to

judgment for possession under which the plaintiff was evicted. Ridley, J., who had tried the action gave judgment in favour of the plaintiff for damages assessed at £160, from which the defendant appealed, contending that there was no breach of his covenant, because the interruption of the plaintiff's possession was caused by the act of the superior landlord which was not covered by the defendants' covenant with the plaintiff. The Court of Appeal (Smith, Williams, and Romer, L.JJ.), however, upheld the judgment, on the ground that the assignment of the reversion having taken place after the assignment of the lease by the defendant to the plaintiff, the assignees of the reversion were not entitled to maintain an action for the breach committed before their assignment, and therefore the defendant had in fact a good defence to their action, and as he had nevertheless consented to judgment which resulted in the plaintiff's eviction, he had thereby committed a breach of his covenant for quiet enjoyment.

FOREIGN PROBATE—RESEALING OF FOREIGN PROBATE BY ENGLISH COURT.

In the goods of Sanders (1903) P. 292, was an application to the English Court of Probate to reseal colonial letters probate under the following circumstances: By an English will a legacy had been left to H. J. Sanders, and if he predeceased the testator, then to H. J. Sanders' personal representative to be administered as part of his estate. H. J. Sanders in fact predeceased the English testator, and letters probate of H. J. Sanders' will had been granted by a Colonial Court. The executors of the English will required the probate of the colonial will to be resealed in England. The officers of the English court considered this could not properly be done as the testator had no estate in England, but Barnes, J., allowed the application: See R.S.O. c. 59, s. 78.

MORTGAGE—CLOG ON REDEMPTION—TIED PUBLIC HOUSE.

Rice v. *Nokes* (1900) 2 Ch. 445, is a decision of the Court of Appeal (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) on appeal from the decision of Cozens-Hardy, J. (1900) 1 Ch. 213 (noted ante, vol. 36 p. 223). In this case a mortgage of a leasehold public house contained a covenant by the mortgagor to purchase the liquors sold on the premises from the mortgagees. The mortgagors were ready to satisfy the mortgage debt and claimed a reconveyance of

the premises, and a release of the covenant. Cozens-Hardy, J.) held they were entitled to what they claimed, and the Court of Appeal, it is almost needless to say, have affirmed his decision.

VENDOR AND PURCHASER—UNPAID PURCHASE MONEY—VENDOR'S LIEN.

In *Davies* v. *Thomas* (1900) 2 Ch. 462, the facts were as follows: The plaintiff was assignee by way of mortgage of the prospective share of one Edward Lewis in a deceased person's estate. Acting under a power of sale in the mortgage he had sold the share to one David Lewis for £500. David Lewis paid the plaintiff £294 18s. 11d., the amount due on his mortgage, and was to have paid the balance of his purchase money to the mortgagor, but did not do so, and the plaintiff was compelled to pay it. David Lewis became lunatic and his wife was appointed to receive his estate. The share of Edward Lewis, which had been mortgaged to the plaintiff, had been realized and was in the hands of trustees, and amounted to £570 9s. 8d., which David Lewis's wife claimed should be paid to her. The plaintiff brought the present action claiming a lien on the fund for the balance of the purchase money which David Lewis had failed to pay, and the Court of Appeal (Lord Alverston, M.R., and Rigby and Collins, L. JJ.) affirmed the judgment of Bruce, J., declaring the plaintiff entitled to the lien as claimed by him, and the fact of the lunacy of David Lewis was held not to interfere with or prejudice the plaintiff's right.

MARRIAGE—DOMICILED BRITISH SUBJECT—PROHIBITED DEGREES OF CONSANGUINITY—JEWS, MARRIAGE OF WITHIN PROHIBITED DEGREES.

In re De Wilton, De Wilton v. *Montefiore* (1900) 2 Ch. 481, was an application by originating summons to determine whether the defendant Montefiore was entitled as the legal personal representative of a testatrix's daughter Eugenie to her share of the residuary estate, and also whether the daughter Eugenie died leaving issue within the meaning of the will. The daughter Eugenie had been brought up a Christian, but decided to embrace the Jewish faith, before, however, she had been personally admitted as a member of the Jewish faith, and while both she and the defendant Montefiore were domiciled in England, they went to Wiesbaden, in Germany, and went through the form of civil marriage according to German law, and also according to Jewish rites. Subsequently they went to Paris, where Eugenie was

personally received as a member of the Jewish faith, and on the same day they again went through the ceremony of marriage according to Jewish rites. The defendant Montefiore was the maternal uncle of Eugenie, and it was contended that inasmuch as according to Jewish law the parties might lawfully contract marriage, the marriage was valid notwithstanding they were within the prohibited degrees according to English law; and it was contended that the English Marriage Acts do not apply to Jewish marriages. Stirling, J., however, was unable to agree with this contention, but held that Jews as well as all other British subjects are bound by the provisions of the Marriage Acts as far as the capacity to contract is concerned. He therefore held that the marriage was invalid, and there being nothing in the will indicating that the testatrix intended to benefit the issue of the union, he held that the residuary trust fund must be distributed on the footing of the testatrix's daughter Eugenie having died in the testatrix's lifetime without leaving issue.

MINES – SUBSIDENCE—INJURY TO ADJOINING LANDS AND BUILDINGS OCCASIONED BY WORKING MINERALS—DAMAGE CAUSED BY ACT OF OWNER'S PREDECESSOR IN TITLE.

In *Hall* v. *Norfolk* (1900) 2 Ch. 493, Kekewich, J., decided that where damage is caused to adjoining land and buildings by subsidence occasioned by the working of a mine, the present owner of the mine is not liable, if the damage was occasioned by the act of his predecessor in title, even though the damage did not actually occur until after the present owner acquired his title.

CONFLICT OF LAWS—FOREIGN WILL PURPORTING TO DISPOSE OF LEASEHOLDS.

Pepin v. *Bruyére* (1900) 2 Ch. 504, is another decision of Kekewich, J. The point in this case was whether the beneficial interest in leasehold property can be validly disposed of by the will of a domiciled foreigner validly executed according to the law of his domicile, but not in accordance with the provisions of the Wills Act. He held that it could not, and for this purpose leaseholds are to be regarded as real estate, to which the lex rei sitœ applies, and it makes no difference that letters of administration with the will annexed have been granted by the English Court of Probate.

CHARITY—VOLUNTARY ASSOCIATION—FAILURE OF OBJECTS.

Smith v *Kerr* (1900) 2 Ch. 511, was an action brought by the plaintiffs in reference to an old Inn of Court known as Clifford's Inn, for the purpose of settling the status of the property and ascertaining whether or not it was to be deemed subject to any trust for charitable purposes, using the word 'charitable' of course in its legal sense. In 1618 the property was conveyed to certain members of the Society of Clifford's Inn, in consideration of £600, with a declaration that the true intent and meaning of the deed was that the property "shall for ever hereafter retain and keep the same usual and ancient name of Clifford's Inn, and shall forever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of that Society, and for the benefit of the Commonwealth as aforesaid, and not otherwise, nor to any other use, intent or purpose." The property had long been dealt with by the Society as its own, and for its own purposes, and the surviving members of the Society contended that it was not now subject to, or affected by, any charitable trust, but belonged to the individual members for their own personal benefit, to be divided and disposed of as they might think fit. Cozens-Hardy, J., however, held that the deed of 1618 negatived the idea of private ownership by the members of the Society, and proved a dedication of the property to public or charitable purposes.

TRUST FUND—INVESTMENT—UNAUTHORIZED SECURITIES.

In *Ovey* v. *Ovey* (1900) 2 Ch. 524, Cozens-Hardy, J., was asked to authorize the investment of certain trust funds in other securities than consols. The will of the testator prescribed that the trust fund should be invested in 3 per cent. consolidated bank annuities "and no other securites." The decision of Malins, V.-C., *In re Wedderburn's Trusts*, 9 Ch. D. 112, where an investment was authorized in securities, authorized by 23 & 24 Vict., c. 38, s. 10, notwithstanding prohibitive words in the settlement, was cited, but Cozens-Hardy, J., declined to follow that case, considering that it would be a strong thing to set aside the express direction of the testator.

WILL—CONSTRUCTION—LAPSE—SETTLEMENT OF SHARES.

In re Powell, Campbell v. *Campbell* (1900) 2 Ch. 525, is a case upon the construction of a will whereby a testatrix gave her real

and personal estate to trustees "in trust for my said three daughters in equal shares;" the trustees were then directed to retain the share of each daughter upon trust to pay the income to each daughter for life, to her husband for life, and then for the children in the usual way; and in default of children, who should obtain a vested interest, in trust for the other daughters in equal shares, but so that the share so accruing should be subject to the same trusts as those declared concerning the original shares. One of the daughters predeceased the testatrix, leaving a husband, but without issue, and the question was whether or not this share had lapsed. On the part of the husband it was contended that the will constituted a settlement of each daughter's share upon herself, and her husband and children, if any, and that reading the will in that way there was no lapse. Cozens-Hardy, J., adopted that construction and held that the husband was entitled to the deceased daughter's share for life and, subject to his life estate, it accrued for the benefit of the other daughters, their husbands and children, upon the trusts declared of the original shares.

TRUSTEES—SECURITIES PAYABLE TO BEARER—CUSTODY OF SECURITIES—BANKS.

In re De Pothonier, Dent v. *De Pothonier* (1900) 2 Ch. 529. In this case Cozens-Hardy, J., authorized trustees to deposit bonds payable to bearer with detachable coupons for interest, with an incorporated bank, with authority to the bank to detach the coupons as they become due for collection, so long as the bank should act as the bankers of the trustees.

MARRIED WOMAN—SEPARATE ESTATE—SETTLEMENT BY INFANT—SUBSEQUENT REPUDIATION—MARRIED WOMAN'S PROPERTY ACT, 1882, (45 & 46 VICT., C. 75), SS. 2, 19—(R.S.O. C. 163, SS. 5, 21).

Buckland v. *Buckland* (1900) 2 Ch. 534, is a somewhat curious contribution to married women's property law. It may be remembered that the Married Women's Property Act, of 1882, s. 19, (R.S.O. c. 163, s. 21) expressly provides that the Act is not to interfere with or affect any settlement or agreement for a settlement made or to be made before or after marriage. At first blush it might be thought that this could only refer to settlements by which the married woman is bound. The present case, however, shews that the provision has a wider effect. The facts were as follows: An ante-nuptial settlement was made between intended

husband and wife (the latter being an infant) and trustees, reciting an agreement that property belonging to the wife and then in the hands of the trustees should be settled, and the intended wife in pursuance of the agreement declared that the trustees should hold the property on certain trusts. On attaining twenty-one the wife repudiated the settlement and claimed that the trustees should hand over the property purported to be settled as her separate property under the Married Women's Property Act, 1882. Buckley J., however, held that the settlement, though not binding on the wife, was, nevertheless, binding on the husband and affected his marital rights, and therefore was a settlement which would have bound the property if the Married Women's Property Act had not been passed, and consequently that it was, notwithstanding the wife's repudiation, effectual to bind the husband's interest, and that the wife was not entitled to have the trust funds transferred to her as her separate estate. The recital of the agreement to settle in the settlement operated, in the learned Judge's opinion, as a contract by the husband to settle. The line of reasoning appears to be this: But for the Married Women's Property Act the husband would, after the marriage, by virtue of his marital right, have been entitled to the fund upon reducing it into possession; a settlement by him alone would have bound the fund. The Married Women's Property Act gives a wife the right to hold her property as separate estate, but the Act is not to interfere with any settlement which would have bound the property if the Act had not been passed. This settlement, though not binding on the wife, would, nevertheless, have bound the property if the Act had not been passed, therefore the wife's right to hold the property as a separate estate under the Act does not rise.

Correspondence.

SOLICITORS AND CLIENTS.

To the Editor of the CANADA LAW JOURNAL.

DEAR SIR,—Having seen the circular letter of the Attorney-General asking the views of the Law Associations, the judges, and others on the subject of some changes in legal precedure, I notice what is said as to solicitors being allowed to make agreements with clients.

I feel very strongly that this is a step in the wrong direction—that such a huxtering bargaining way of doing business would be a system which would be undignified and lowering to the status of the profession, and in the second place it would be financially injurious. Lawyers in good positions and with a fair practice would doubtless try, if such agreement were in vogue, to uphold fair work for fair pay, but I fear there are many who sooner then lose a suit would take anything they could get. It is nonsense to say that lawyers are overpaid. I have no doubt whatever that taking anywhere twenty doctors and twenty lawyers of equal standing, the former make a much larger income than the latter. $3,000 a year has become almost an unknown thing amongst country lawyers, and the average income of lawyers in the province (if you leave out of the question the income of some few large firms in Toronto) probably does not average more than $1,000 a year. Being a country practitioner myself I know whereof I am speaking. The subject is a very important one, and I feel strongly that no change should be made in the direction indicated.

CONSTANT READER.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

VILLAGE OF GRANBY *v.* MENARD.

Que.] [Oct. 31, 1900.

Negligence Trial by judge without a jury—Findings of fact—Evidence —Reversal by appellate court.

In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were heard, held that the expert evidence of the witnesses for the defence was best entitled to credit and dismissed the action. The judgment was reversed in the Court of Review, and its decision affirmed on further appeal by the Court of Queen's Bench, upon a different appreciation of the weight of evidence by the judges in those courts. On appeal to the Supreme Court,

Held, that as the judgment at the trial was supported by evidence, it should not have been so reversed. Judgment appealed from reversed, and judgment of the trial judge restored.

The North British and Mercantile Ins. Co. v. *Tourville*, 25 Can. S.C.R. 177; *Montreal Gas Co.* v. *St. Laurent*, 26 Can. S.C.R. 176; *Sénésac* v. *Central Vermont Railway Co.*, 26 Can. S.C.R. 646; *George Matthews Co.* v. *Bouchard*, 28 Can. S.C.R. 580; *Lefeunteum* v. *Beaudoin* (28 Can. S.C.R. 89); *City of Montreal* v. *Cadieux*, 28 Can. S.C.R. 616; and *Paradis* v. *Municipality of Limoilou*, 30 Can. S.C.R. 405), distinguished. *Phœnix Ins. Co.* v. *McGhee*, 18 Can. S.C.R. 73, discussed. Appeal allowed with costs.

Fitzpatrick, Q.C. (Solicitor-General), and *Duffy*, Q.C., for appellant. *Lafleur*, Q.C., and *Giroux* for respondent.

Ont.] RYAN *v.* WILLOUGHBY. [Nov. 12, 1900.

Contract—Municipal work—Condition as to sub-letting—Consent of council.

Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation, it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do.

In an action against the sub-contractor, the latter pleaded the want of assent by the council, whereupon the plaintiff replied that the assent was withheld "at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract." Issue was joined on this replication.

Held, that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld, and that the plaintiff had failed to prove his case on that issue. Appeal dismissed with costs.

Shepley, Q.C., for appellant. *Watson*, Q.C., for respondent.

Que.] [Nov. 13, 1900.

PHARMACEUTICAL ASSOCIATION *v.* LIVERNOIS.

Appeal—Jurisdiction—Withdrawal of defence—Raising constitutional question—R.S.C. c. 135, s. 29a—"Quebec Pharmacy Act"—Retrospective legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs.

Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal.

The amendment to the "Quebec Pharmacy Act" by 62 Vict., c. 35, s. 2 (Que.), adding art. 4039 (b) Revised Statutes of Quebec, has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force.

Penalties for several offences under the said Act may be joined in one action, and when the aggregate amount is sufficiently large the action may be brought in the Superior Court as a court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the Province of Quebec.

It is improper in such an action to describe subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty under a first offence charged.

The sale in the Province of Quebec by an unlicensed person of drugs by retail, whether or not such drugs be poisonous, or partially composed of poison, or absolutely free from poison, is a violation of the prohibition contained in art. 4035 Revised Statutes of Quebec, and whether or not the articles sold be enumerated in the "Quebec Pharmacy Act" as poisons or as containing an enumerated poison.

Judgment of the Court of Queen's Bench (Q.R. 9 Q.B. 243) reversed, TASCHEREAU and GWYNNE, JJ. dissenting. Appeal allowed with costs.

L. P. Pelletier, Q.C., and *Brosseau*, Q.C., for appellant. *Fitzpatrick*, Q.C., Solicitor-General, and *Robitaille*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

[Oct. 29, 1895.

IN RE WEST WELLINGTON PROVINCIAL ELECTION.

McQUEEN *v.* TUCKER.

Parliamentary elections — Corrupt practices — Treating — Candidate — Corrupt intent—Habit.

The undisputed evidence shewed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the bar-rooms of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who in the course of his ordinary occupations frequented bar-rooms.

Held, OSLER, J.A., dissenting, that the trial judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent.

Remarks by BURTON, J.A., on the amendment to the Election Act, in respect to "the habit of treating," by 58 Vict., c. 4, s. 21.

Robinson, Q.C., and *Laidlaw*, Q.C., for appellant. *J. K. Kerr*, Q.C., *E. F. B. Johnston*, Q.C., and *R. A. Grant*, for petitioner.

From Trial Judge.] [Nov. 14.

IN RE EAST ELGIN PROVINCIAL ELECTION. EASTON *v.* BROWER.

Parliamentary elections—Corrupt practices—Voting without right—Knowledge—Bribery—Inference from evidence—Providing money for betting—Loan—Agency—Proof of—Party association—Saving clause—Election Act, ss. 164 (2), 168, 172.

It was charged that a person had voted at the elections, knowing that he had no right to vote, by reason of his not being a resident of the electoral district. He knew that his name was on the voter's list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not, a right to vote.

Held, that a corrupt practice under s. 168 of the Election Act, R.S.O. 1897, c. 9, was not established. Under that section the existence of the mala mens on the part of the voter, "knowing that he has no right to vote," not merely his knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that; nor does the fact that he has taken the oath, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed. *Haldimand Case*, 1 Elec. Cas. 529, distinguished.

2. The bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shewn that anything was said to them about voting; L. having paid them, for trifling services which he engaged them to perform upon election day, sums in excess of the value of such services, knowing them to be voters and to belong to the opposite political party.

3. As to the agency of L., it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district; L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, or any proved agents of his, either as regards his or their knowledge of the fact that he was working or proposing to work on behalf of the candidate, or as regards any actual authority

conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some votes; and, from his antecedents, the respondent hoped or believed or expected, that he would be an active supporter.

Held, by the Court of Appeal, BOYD, C., dissenting, affirming the decision of the trial judges, that L. was not an agent of the respondent. *Haldimand Case*, 1 Elec. Cas. 572, distinguished.

4. Three persons, T. being one of them, each lent $10 to R. L., knowing that the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting any one to bet with him, and he returned the money to each on the following day.

Held, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of s. 164 (2) of the Election Act.

5. As to the agency of T., it appeared that he was one of the local vice-presidents of the party association above referred to; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election, and had contributed towards the cost of hiring the club room; at these meetings he had gone over the voters' list with others, which was the only work done; at a meeting held by respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and had made a speech introducing and commending the respondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate.

Held, reversing the decision of the trial judges, BURTON, C.J.O., and MACLENNAN, J.A., dissenting, that T. was an agent of the respondent.

6. The total vote polled was over 4500, and the majority for the respondent was 29. The trial judges had reported one person guilty of an act of undue influence, three of being concerned in acts of bribery, and T. and two others of providing money for betting.

Held, that s. 172 of the Election Act could not be applied to save the election.

Aylesworth, Q.C., and *R. A. Grant*, for petitioner. *Wallace Nesbitt*, Q.C., *E. A. Miller*, and *Falconbridge*, for respondent.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.] [August 27, 1900.

MCNEVIN *v.* CANADIAN RAILWAY ACCIDENT INS. CO.

Accident insurance—Hazardous occupation—Voluntary exposure—Unnecessary danger.

The insured, who was a baggageman at a railway station, received the injuries which caused his death while in the act of coupling cars, which was not part of his duty as baggageman. The evidence shewed that he had coupled cars on other occasions and that on this occasion he understood the brakesman to request him to make the coupling. In his application for an accident insurance policy he was described as a baggageman, and in the policy there was the following clause, which was also in substance contained in the application: "1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." By clause 4 it was provided that the contract should not cover death resulting from "voluntary exposure to unnecessary danger."

Held, that the words "occupation or exposure" did not apply to the insured's casual act of coupling, nor was there "voluntary exposure to unnecessary danger."

McGarry and *Devine*, for plaintiff. *W. R. White*, Q.C., and *Fripp*, for defendants.

Rose, J.] RE CLARKE. [Oct. 31, 1900.

Solicitor—Non-payment of fees—Suspension—Law Society—R.S.O. c. 174.

A solicitor cannot practice as such, even in an insolated instance or even where he is joined as plaintiff himself with another who holds his claim in the interest of and for the solicitor, without making himself liable to the provisions as to suspension of R.S.O. c. 174.

Walter Read, for Law Society. *S. R. Clarke*, the solicitor in person.

Divisional Court.] REGINA *v.* CITY OF LONDON. [Oct. 8, 1900.

Criminal law—Prosecution of municipal corporation for nuisance—Non-repair of street—By indictment—Preliminary inquiry—Prohibition.

1. A prosecution of a municipal corporation for a nuisance in not keeping a public street in repair can only be by indictment (under par. 641 (2) of the Criminal Code).

2. A preliminary inquiry cannot be taken before a magistrate for the purpose of sub-s. 2.

3. The judges of the Chancery Division Court of the High Court of Justice for Ontario have the jurisdiction conferred by common law and par. 2, c. 18, 28 Vict. (D.), in prohibition in criminal cases notwithstanding that no rules have been made under par. 533 (b) and 754 of the Code.

Bartram, for the motion.

Meredith, C. J.] [Nov. 23, 1900.

IN RE WILLIAM LAMB MANUFACTURING CO.

Company—Voluntary assignment by—Petition for winding-up-order—Discretion.

Where the insolvency of the company is admitted, the Court has no discretion under s. 9 of the Winding-up Act, R.S.C. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 34 O.R. 107, not followed.

Gideon Grant, for petitioners. *George Bell*, for company and assignee.

Falconbridge, C.J., Street, J.] [Nov. 26, 1900.

BUTLER *v.* MCMICKEN.

Action on judgment—Period of limitations—Renewal of writ—Order nunc pro tunc—Jurisdiction—New evidence on appeal—Conflict of Canadian and English precedents.

The action was brought in a County Court upon a judgment recovered November 15th, 1877. The writ of summons was issued on November 12th, 1897. It was renewed for one year on November 9th, 1898. It was then served on the defendant on November 2nd, 1899, in London, England, but the writ so served not being a writ for service out of the jurisdiction, on January 30th, 1900, on notice to the defendant, the County Court Judge set aside the service, but gave leave to the plaintiff to renew the writ nunc pro tunc as of November 8th, 1899, for one year and issue a concurrent writ for service out of the jurisdiction. The plaintiff accordingly did this, and issued and served a concurrent writ to which the defendant appeared and filed a defence, setting up: (1) That the claim was barred by the Statute of Limitations, under R.S.O. 1877, c. 103, s. 23, on the authority of *Jay* v. *Johnston*, [1893] 1 Q.B. 25, 189; (2) That the order of January 13th, 1900, allowing the amendment of the writ nunc pro tunc, was ultra vires; (3) That he had obtained a discharge under the Insolvent Act in force in Canada, in 1881. He did not, however, prove any discharge, and

judgment was entered for the plaintiff. From this judgment the defendant now appealed.

Held, 1. The court is governed by our own Court of Appeal in *Bryce v. O'Loane*, 3 A.R.167, and the later case following it, and must hold that 20 years and not 10 is the period of limitation applicable to an action on a judgment of a court of record.

2. The question whether a writ should be renewed after expiration of it is a matter resting in a judicial discretion of the judge, and whereas here that discretion has been exercised and no appeal is provided, and none had been attempted, the order was binding and the court could not discuss its propriety, or at this stage entertain an objection to the validity of the writ, the foundation of the action, and to which the defendant had appeared without objection.

3. On the application of the defendant to prove a discharge in insolvency as pleaded, issued by the court at Winnipeg in 1881, on the ground that notwithstanding due diligence he had not been able to ascertain, until after the trial, where this discharge had been obtained, that under Consol. Rule 498 the court could entertain the application even in a County Court appeal, notwithstanding R.S.O. c. 55, s. 51, sub-s. 3, and would give leave to adduce the evidence as desired upon payment to the plaintiff within four weeks of the costs of the former trial and of this appeal.

J. M. Clark, Q.C., for defendant. *Garrow*, Q.C., for plaintiff.

Boyd, C., Ferguson, J., Robertson J.] [Dec. 1, 1900.

STANLEY PIANO CO. *v.* THOMSON.

Witnesses and evidence — Right to contradict ones own witness on facts material to the issue — Judge's leave - Refusal of.

Where a witness (whether a party to the action or not) is called by the plaintiff to prove a case, and his evidence disproves the case, the plaintiff may yet establish his case by other witnesses called not to discredit the first, but to contradict him on facts material to the issue, and the right to contradict by other evidence exists though the judge may not grant his permission. Judgment of MACMAHON, J., reversed.

Shepley, Q.C., for plaintiff. *Watson*, Q.C., for defendant Thomson, *Bicknell*, for defendants Marcy & Co.

Boyd, C., Ferguson, J.] RITTER *v.* FAIRFIELD. [Dec. 1, 1900.

Judgment in foreign state — Warrant of attorney — Confession — Jurisdiction.

The general rule is that a judgment valid by the laws and practice of the State where it is rendered or confessed may be sued upon as a ground

of action in any other State. A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court whereby competency is acquired to deal with the matter submitted.

Held, that a judgment recovered in the State of Pennsylvania, after the defendant had ceased to be a resident of that State, upon a warrant of attorney executed there, was valid, and that the Courts there had jurisdiction to deal with the matter. Judgment of MACMAHON, J., affirmed.

W. E. Middleton, for the appeal. *E. H. Smythe*, Q.C., contra.

Boyd, C., Ferguson, J., Robertson J.] [Dec. 10, 1900.

SCRIVER *v.* LOWE.

Negligence—Contributory negligence—Nonsuit—Undisputed facts—Inference.

In actions for negligence the power of the judge to nonsuit on the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own want of proper care. Where the facts or the proper inference from the facts, are in dispute, the case must go to the jury.

And where the defendants negligently left a hole in the floor of a room unguarded, and the plaintiff, going into the room, saw the danger and at first avoided it, but, on turning to go out again, lost sight of it, stepped into the hole and was injured:

Held, these facts being undisputed, that it was properly left to the jury to say whether she was negligent or not.

Washington, Q.C., for plaintiff. *McBrayne*, for defendants.

Trial of Actions, Street, J.] [Dec. 10, 1900

REYNOLDS *v.* PALMER.

Wills—Widow's election—Evidence of election—Ignorantia juris.

A testator left to his wife all his personal estate absolutely, and his real estate for life or so long as she remained his widow, subject to which he devised his lands in specific parcels to his sons, and died in 1889. After his death his widow remained in possession of the land and supported the children, and built an addition to the house, and married again in 1891. She and her husband in 1893 took a lease of the property from the executors to expire when the eldest son came of age. On this latter event happening in 1899 the parcel of land devised to him was conveyed to the latter by the executors, who then granted a new lease of the balance to the second husband which was now current.

Held, that the widow was put by the will to her election.

Held, also that, though the rewas no positive evidence that the widow know she had a right to elect between the will and her dower, yet on the principle ignorantia juris naminem excusat, she must be held to have made her election in favour of the will.

F. D. Davis, for plaintiff. *M. Wilson*, Q.C., for adult defendant. *Ellis*, for infant defendant.

Falconbridge, C.J., Street, J.] [Dec. 12, 1900.

ONTARIO MINING CO. *v.* SEYBOLD.

Constitutional law—Indian lands—Surrender—Treaty—Crown patent—Precious metals—Acquiescence.

The judgment of BOYD, C., 31 O.R. 386; 36 C.L.J. 25, affirmed on appeal.

Robinson, Q.C., *Laidlaw*, Q.C., and *J. Bicknell*, for plaintiffs. *Biggs*, Q.C., for defendant E. Johnston. *J. M. Clark*, Q.C., for defendants Moyes, Ambrose, Brown and Ewart. *R. U. Macpherson*, for defendant Seybold. *A. M. Stewart*, for defendant Osler.

Boyd, C.] EAST *v.* O'CONNOR. [Dec. 14, 1900.

Admissions—Withdrawal—Leave—Motion for judgment.

After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed.

Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts which had not been acted upon or brought before the court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the plaintiff to get judgment on the statement of facts; and if the sanction of the court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion.

W. D. Gwynne, for plaintiff. *L. V. McBrady*, for defendant O'Connor. *J. R. Roaf*, for other defendants.

Trial of Actions, Street, J.] [Dec. 15, 1900.

IN RE BROWN, BROWN *v.* BROWN.

Will—Charitable use—Bequest to poorhouse—Mortmain—Void condition.

An executor directed his farm to be sold, and the proceeds, after deducting certain legacies, to be paid over to the Bruce County Poorhouse

Treasurer, to be expended by him or them in luxuries for the inmates of the said poorhouse in addition to the regular supplies to the said inmates, said sale to be made at the expiration of four years from the date of the will, namely Feb. 21st, 1900. The testator died a few days afterwards. The House of Refuge of the County of Bruce is generally known as the Bruce County Poorhouse.

Held, that the County was entitled to the proceeds of the sale under R.S.O. c. 112, the bequest being a charitable use within that Act.

Held also, that the provision of the will which would postpone the sale more than two years from the death of the testator contrary to section 4 of that Act was invalid, unless the period allowed by the Act were extended by the court or judge.

Malcolmson, for plaintiff. *Garrow*, Q.C., for infants. *Loscombe*, for executors. *Shaw*, Q.C., for County of Bruce.

Boyd, C.] [Dec. 17, 1900.

IN RE THOMPSON—THOMPSON *v.* THOMPSON.

—Money in court—Payment out—Life-tenant Lunatic—Foreign guardian —Maintenance.

During the infancy of the defendant $2,000 was paid into court, to one-half of which she was entitled on attaining majority and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign court, the mother applied for payment out of the whole fund, having given specific security for the amount in the foreign court.

Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safe-guard it, or it might be paid out to the applicant upon substantia security being given.

Held, as to the other half, that being actually in the hands of the court, it was subject to the jurisdiction of the court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian.

J. D. Montgomery, for applicant. *J. Hoskin*, Q.C., for the person of unsound mind.

MacMahon, J.] [Dec. 18, 1900.

PARKER *v.* TORONTO MUSICAL PROTECTIVE ASSOCIATION.

Trade Union—Expulsion of member—Articles of association—By-law in restraint of trade—Illegality—Militia Act.

The plaintiff, a musician and a member of the active militia of Canada and of the band of a militia regiment, became a member of the defendant

association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealings between its members, and to assist members in sickness and death." After the plaintiff had become a member the defendants adopted and added as part of one of their articles of association the following: "No member of this association shall play on any engagements with any person who is playing an instrument, unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. * * * ." After the passing of this by-law the plaintiff and the other members of the regimental band to which he belonged played at a concert, and with the permission of the commandant and officers of the regiment. For so playing (some of the band not being members of the association) a fine was imposed on the plaintiff by the executive committee of the defendants, and in consequence of its not being paid within the time prescribed, he was expelled from membership.

Held, that, at the time the plaintiff joined the association, it was a perfectly legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade, and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid, and he was entitled to an injunction and damages.

Rigby v. *Carroll*, 14 Ch. D. 482, *Mineral Water Bottle, etc., Society* v. *Booth*, 36 Ch. D. 465, *Swaine* v. *Wilson*, 24 Q.B.D. 252, and *Chamberlain Wharf, Limited* v. *Smith*, [1900] 2 Ch. 605, considered.

F. E. Hodgins, for the plaintiff. *E. F. B. Johnston*, Q.C., for the defendants.

Meredith, C.J., Rose, J.] [Dec. 24, 1900.

CARNAHAN *v.* ROBERT SIMPSON CO.

Master and servant—Injury to servant—Negligence of fellow-servant—Workmen's Compensation Act—Factories Act—Elevator—Mechanical device.

The plaintiff was employed as a dressmaker in the defendants' departmental store, and, while descending in their elevator after her day's work was done, was injured by the fall of the elevator.

Apart from a question as to the defective condition or arrangement of the safety appliances in connection with the elevator, the cause of the fall was the failure of the person in charge to properly manage it and to use the brake for the purpose of controlling its movements, and which, but for that failure, would have controlled its movements.

Held, that the defendants were not answerable at common law for such neglect, which was that of the plaintiff's fellow-servant, nor under the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, for the fellow-servant was not a person having any superintendence entrusted to him, within ss. 2 (1) and 3 (2).

By s. 20, sub-s. 1 (*d*), of the Ontario Factories Act, R.S.O. 1897, c. 256, in every factory all elevator cabs are to be provided with some suitable mechanical device to be approved by the inspector, whereby the cab will be securely held in the event of accident.

Held, that the defendants' store was a factory within the meaning of the Act, and the onus of proving that the brake and "dogs" in use in connection with the elevator was upon the defendants; but it was not necessary for them to shew that the device in its concrete form as part of the elevator had been approved; it was sufficient that the kind of device used had been approved.

Held, also, that in order to render the employer liable to a civil action it was incumbent on the plaintiff to make out the causal connection between the omission to provide the statutory safeguards and the injury complained of; and that she had not done.

Masten, for plaintiff. *W. Nesbitt*, Q.C., and *John Greer*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] RUSSELL *v.* MURRAY. [NOV. 13, 1900.

Landlord and tenant—Overholding—Forcible entry—Costs.

On an action brought by plaintiff against defendant claiming damages for forcibly and unlawfully entering a house occupied by plaintiff as tenant of defendant and ejecting the plaintiff therefrom, costs were refused to plaintiff on the ground that each party had succeeded on one issue; that although defendant had technically violated plaintiff's right of possession, plaintiff was withholding possession in violation of good faith.

Held, that the reasons given were sufficient and that plaintiff's appeal must be dismissed. *Rice* v. *Ditmars*, 21 N.S.R. 140, followed.

H. V. Bigelow, for appellant. *F. A. Laurence*, Q.C., for respondent.

Full Court.] THE BANK OF MONTREAL *v.* BENT. [NOV. 15, 1900.

Practice—Discretion of Chambers Judge—Appeal.

On a motion at Chambers to set aside defendant's pleas as false, frivolous and vexatious, defendant applied for leave to cross examine

plaintiff's manager at A. on the affidavit on which the motion to set aside pleas was made. The Chambers Judge refused defendant's application.

Held, that the matter was one within the discretion of the judge and that there was no appeal.

D. McNeil, Q.C., for appellant. *W. H. Fulton*, for respondent.

Full Court.] HUTCHINSON *v.* CONWAY. [Dec. 5, 1900.

Architect—Right to commission where work not proceeded with.

Plaintiff was engaged by defendants to prepare plans and specifications of an hotel building to cost not more than $4000 or $5000 for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, etc., were given by defendants. Before the plans were completed changes were made by additions to the original plan, involving an additional expenditure of $1,500. The plans were approved of by defendants, when completed, and tenders called for, and the work partly proceeded with. It was then found by defendants that owing to an advance in the price of materials the building would cost much more than they had expected, and the work was stopped.

Held, affirming the judgment appealed from, that plaintiff was entitled to recover from defendants the commission agreed upon on the estimated cost of the building.

D. McNeil, Q.C., for appellant. *J. A. Chisholm*, for respondent.

Province of New Brunswick.

SUPREME COURT.

En Banc] SHARPE *v.* SCHOOL TRUSTEES, DISTRICT No. 6. [Nov. 29, 1900.

Offer to suffer judgment by default—Trial before expiration of ten days from date of filing offer—Costs.

In an action for false imprisonment defendants seven days before trial made an offer to suffer judgment by default for $75.00. Plaintiff went down to trial and recovered verdict for precisely the amount of offer.

Held, on motion to review taxation of plaintiff's costs, GREGORY, J., dissenting, that the offer, not having been filed in time to give the plaintiff ten days before the trial in which to make her option, the defendants were not entitled under s. 184 of the Supreme Court Act, to judgment against the plaintiff for costs incurred by them after the date of such offer, but on the contrary the plaintiff was entitled to full costs of suit. Rule discharged.

C. N. Skinner, Q.C., for plaintiff. *F. B. Carvell*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] SINCLAIR *v.* PRESTON. [Dec. 22, 1900.

Contract—Rectification—Interest—Effect of taking judgment for claim—Partnership.

Decision of BAIN, J., noted vol. 36 p. 469, affirmed, except as to the right of the plaintiff to interest on his claim.

The provision in this agreement as to the time of payment of the money to be earned by the plaintiff was that it was to be paid as soon as the defendants received it from the railway company.

Held, following *London, Chatham and Dover Ry. Co.* v. *South-Eastern Ry. Co.* (1892) 1 Chy. 120, in which *Duncombe* v. *Brighton Club, etc., Co.*, L.R. 10 Q.B. 371, was overruled, that the money was not payable by virtue of a written instrument at a certain time within the Act, 3 & 4 Wm. IV., c. 42, s. 28, and so the plaintiffs were only entitled to interest upon it from the commencement of the action.

Wilson and *Allan Ewart*, for plaintiff. *Phippen* and *Elliott*, for defendant.

Book Review.

A Treatise on the Law of Real Property, by Edward Douglas Armour, Q.C., of Osgoode Hall, Toronto: Canada Law Book Company, 1901.

For a long time past the practice of the law has been more or less divided into specialties, one man being prominent in one branch and another in another branch. Mr. Armour has a specialty, and that specialty is the law of real property. Most appropriate therefore that he should give to his brethren of the profession the result of his research and the benefit of his learning on this most important and difficult subject—at least to the extent that it can be given in 507 large pages.

It was very many years ago that that great jurist, Sir William Blackstone, wrote his historic commentaries on the law of England, the best known legal work in the English language, and although it had its defects, it has remained the greatest exposition of the principle of the laws of England from that day to this. The law, however, changes continually, and many writers have used his book as a framework whereon to set forth the law as it stands from time to time. This is notably so as to the volume which treats of jura rerum—the rights of things.

One of the past masters in real property law in this Province, was the late Alexander Leith, Q.C., so well known to a generation fast passing away. In 1864 he published his first edition of Blackstone's second volume—a work of much learning and careful research, and in its day invaluable. In 1880, Mr. Leith, with the assistance of Mr. J. F. Smith, Q.C., the present excellent editor-in chief of The Ontario Reports, brought the law down to that date. During the past twenty years there has been no work in this country which has given us a comprehensive summary of the law of real property in this Province, though there have been a number of good, bad and indifferent books dealing with special branches of the subject.

It has happily fallen to the lot of Mr. Armour to take up the parable, and he gives us now, not so much a revised edition of the former works, as a treatise on real property, which, apart from matters historical, is largely his own. The original text as to matters of interest in that connection is very properly retained.

The preface shortly indicates the added matter as follows:—"The text of Blackstone upon the Feudal Law, and Ancient and Modern Tenures, has been retained, both for the use of students, and because the principles still exist as living principles in our law, and should not be lost sight of in any case. There have been added to the chapter on Incorporeal Hereditaments a few pages on Ways; to the chapter on Estates less than Freehold, the cases under the modern portion of the Landlord and Tenant Act; to the chapter on Estates of Freehold not of Inheritance, the Obligations of Life Tenants, including the law of Waste; to the chapter on Estates upon Condition, the modern cases on Conditions Void for Repugnancy; and Blackstone's archaic arrangement of Mortgages under the head of Estates upon Condition has been abandoned, and a new chapter devoted to Mortgages. Dower, Curtesy, and Separate Estate are dealt with anew; the chapter on Deeds has been largely added to; and the chapters on Inheritance and Succession, Wills, the Statute of Limitations, and Conveyances by Tenants in Tail have been completely re-written."

Mr. Armour has been so long before the profession as a leading exponent of the law of Real Property, and has had such large experience in matters pertaining to legal literature in various ways that it is scarcely necessary to say that the work done by him on this occasion has been well done. To write a book on the principles of the law is not as easy as some persons might thoughtlessly imagine. There must be a careful and skilful handling of the subject, so as to give all the leading principles with a sufficiency of detail to illustrate them, without at the same time crowding the pages with such detail, or giving undue prominence to any one branch. There requires to be in writings of this kind, as in the art of the painter, the skill to duly proportion the subjects so as to give the general effect with such detail as may be necessary to fill in and make a complete whole.

It is, as we have implied, manifestly impossible, and under the circumstances would be objectionable, to be exhaustive on any subject, and Mr.

Armour seems to have hit upon the happy medium, seizing upon the salient points and illustrating and proving them by appropriate authorities and arguments clearly and concisely stated. Some minor matters are, perhaps, open to criticism. The table of contents, full and complete as it is, and giving a bird's eye view of the contents of the book, would have been clearer if arranged by way of sub-heads. We should also have been glad if the index had been fuller, for it really gives no adequate idea of the amount of information to be found in the work. There is frequently, even in the most valuable books, too little attention paid to the making of the index. It is not every one who has the gift, and those who have do not perhaps realize how important an adjunct it is. The mechanical execution in paper, type and printing leaves nothing to be desired, and is quite up to the standard of the work by the publishers, the Canada Law Book Company.

We close the book with the reflection that a very valuable contribution has been made to every Canadian lawyer's library, and venture to prophecy that the volume will take a good place in the legal literature of the Empire.

SUGGESTED CHANGES IN THE ADMINISTRATION OF JUSTICE IN ONTARIO.

The following is the letter of the Attorney-General asking the opinion of the profession as to the matters therein referred to, and the answer received from the Law Association of the County of Simcoe.

The letter is as follows:

TORONTO, December 1st, 1900.

"MY DEAR SIR,—For some considerable time there has been a demand more or less general for an increase in the jurisdiction of the Division Courts, and it seems probable that some extension of this jurisdiction will have to be provided at no distant period. If any substantial increase is made, the cases falling under the jurisdiction of County Courts would be so reduced as to leave a comparatively trifling amount of business for those courts, and the question arises whether it would be expedient to make a corresponding increase in the jurisdiction of the County Courts, or whether those courts should be abolished or merged in the High Court, the County Judges acting as "Local Judges of the High Court" and having exclusive jurisdiction in their respective counties over causes of action considerably above the present limits as well as jurisdiction in actions of higher amount where the parties consent. Were the change above suggested carried out, it is thought that one sittings in the spring and one in the autumn for the trial of cases with a jury, (except perhaps in some of the larger centres of population and business) would suffice for the work now done at both the Assizes and the County Courts, including the criminal business of both the Courts of Oyer and Terminer and of the General Sessions. Such an arrangement would effect a considerable saving of expense both in the summoning and mileage of jurors, as well as in the per diem allowance, all business civil or criminal at each sittings to be disposed of by a High Court Judge could be taken first, the Local Judge disposing of the remaining business and trying all criminal cases within the jurisdiction of the General

Sessions of the Peace, unless otherwise directed by a High Court Judge or by the Attorney-General. In this way much time spent by High Court Judges in trying cases of little importance would be saved.

Clearly whatever additional work can be disposed of by the County Court Judges to the satisfaction, both of the profession and the public, should be transferred to them and the time of the High Court Judges economized as far as possible, so as to leave them free for appellate work and for more important cases.

It has also been stated that the costs in County Court actions are excessive, the procedure being the same as that of the High Court, and it has been suggested that instead of taxed costs the judge should, in ordinary cases at any rate, allow a limited sum, having relation to the amount recovered and being within a maximum limit fixed by statute.

With a view to preparing a way for a full consideration of this important matter, during the last session of the Legislature the undersigned introduced a bill providing for the extension of County Court jurisdiction, and a good deal of discussion on the part of the legal profession and the law associations followed.

With the same object, the undersigned also at the last session of the Legislature introduced a bill entitled "An Act Respecting Agreements between Solicitors and their Clients." This bill, modelled upon a similar English enactment, provided that a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for past or future services, whether as advocate, solicitor or conveyancer, under certain safeguards, as for example, that with respect to litigious business, the amount payable under the agreement is not to be received until the agreement has been examined and allowed by the Senior Taxing Officer, at Toronto, who may refer the matter for the opinion of a judge. Among other things it is provided that the agreement shall not affect the rights or remedies for the recovery of costs against the client by any other person. A simple procedure is provided for the enforcement of the agreement by summary application, for its cancellation if unfair and unreasonable and for the reopening of the matter under special circumstances and within a limited time. Special provision is made where the client acts in the capacity of guardian, trustee or committee for preventing unreasonable bargains by requiring that the agreement shall be first submitted to the Senior Taxing Officer, at Toronto, who may require the direction of a judge as to its disallowance in whole or in part. Solicitors are not to purchase any interest in contentious proceedings, but the agreement may stipulate for payment only in the event of success, or the amount of the remuneration may be made to depend upon the amount recovered. Authority is given solicitors to take security from clients for future fees, charges or disbursements to be ascertained by taxation or otherwise.

My object in sending out this letter is to obtain opinions upon the matter referred to from those whose views should have much weight, and I would be glad to have as early and as full a reply as possible."

The following is the memorandum submitted by the Association as their answer to the above letter:

"A very great desideratum in reference to the Division Courts, and in fact one of the main objects of their existence, is the rapid and inexpensive disposition of minor causes of litigation, and following on this, the opening and closing of the Court Sittings on the same day, thus avoiding the attendance of suitors and witnesses on a second or even later day, and

who would in most cases have to return home and back again to the place of trial were the court prolonged beyond the first day, as there is generally no sufficient accommodation for strangers at the places where courts are held.

Increased jurisdiction would also mean more jury trials in Division Court cases and the employment of counsel, all of which would tend to make long trials and to do away with one of the chief objects for which Division Courts were brought into existence.

It is also not possible for a judge holding Division Courts (away from a law library and other means of reference as a general thing, unless he frequently reserves judgment, which is also against the spirit of the Division Court, the law in which is supposed under the Act to be administered largely according to natural justice) to decide cases according to the law bearing upon the same, and upon which one or other of the parties to the suit may have gone to trial; this may do little harm in minor matters, but would work real injury to suitors where any considerable sum was involved.

For these and other reasons, this Association, believing that to further increase the jurisdiction of the Division Court would, in a great measure destroy its usefulness, and the primary object of its existence, does not approve of any increase therein being made.

As to the idea of having certain cases at the Assizes or High Court Sittings disposed of by the Local Judge after the High Court Judge had disposed of the more important cases, this Association is not disposed to approve of same for the following amongst other reasons:

The trial forum would always be uncertain, a most undesirable thing, suitors and counsel would not know when or before whom a case would be tried, one High Court Judge would think many cases unimportant, another few, special counsel from a distance might be retained presuming that the case would be tried in its order before the High Court Judge, when upon its coming before such judge it would be sent to the foot of the list for trial by another judge, whom possibly neither of the parties desired to act as such; witnesses for the same cause would be in attendance and have to be kept possibly for days or even weeks while other cases later on the list were disposed of, in fact the uncertainty arising from ignorance of what the High Court Judge might do when the case came before him, would render the lives of suitors, their witnesses, solicitors and counsel a burden, and this Association knowing that the Honorable the Attorney-General, who has no doubt had experiences of a character somewhat analogous to what is referred to, will realize that what is stated is not a matter of fancy, but an actual reality.

This objection does not apply with equal force to the trial of criminal cases (if the sittings are for jury cases only so that jurors will not be kept in attendance while non-jury cases are being disposed of by the High Court Judge) as it would probably be known before hand what criminal cases would be tried before the County Court Judge and arrangements could, to some extent, be made to meet this; it might at times prove awkward for Crown Counsel from a distance, but possibly the idea would be to have the County Attorney act in these less important cases, that is those tried before the County Court Judge.

The fees of summoning jurors for the trial of civil cases in the County Court, might be saved if the summonses served on such jurors were for the sittings of both High and County Courts; this Association sees no special objection to this course, as the same jurors could attend both sittings and it thinks that as a general rule the extra mileage to jurors would amount to little, if anything, more than the extra days they would probably be kept

awaiting the disposing of those cases at the Assizes in which the jury notices were struck out by the High Court Judge.

This Association does not approve of any increase being made in the jurisdiction of the County Court, but thinks that (subject to an appeal to the Divisional Court) a High Court Judge Sitting in Chambers (not the Master or Local Court Judge) should have power on the application of either party to an action, to direct that any case brought in the High Court should be transferred to the County Court, or be tried with or without a jury by the County Court Judge, and in such case direct that costs be taxed either from the issue of the writ or from the time of the order, on the County Court scale: this would enable defendants to bring this question before the High Court at an early stage and ensure certainty of the trial forum. This Association believes that High Court Judges, with the object of diminishing the work in the High Courts, and because they thought such cases could properly be tried by the County Court Judges, would direct many cases to be so transferred or tried. This would also be a healthy check on those solicitors who make a point of bringing nearly all cases in the High Court, with the object of securing increased costs. This Association also believes that the High Court Judges would exercise this jurisdiction with discretion and this procedure would also avoid the many objections that exist against any increased jurisdiction in the County Courts, one of which being that the amount involved does not by any means always indicate the importance of the litigation.

The costs in ordinary suits in the County Court rarely exceed $100, and are generally considerably less, the trouble and time involved is, however, frequently as much as in a High Court suit, and this Association does not believe that any agitation exists against the present scale of costs in the County Court, or that the suggested change which might mean more costs than at present, if the Local Judge was a man of large views, or less, if he was a man of a different kind, is desirable; the existing plan gives certain, and at least reasonable satisfaction, and does not, as the proposed one would do, place a County Court Judge in the unenviable position of having to fix what costs a litigant should pay, either to his own solicitor or the opposite party.

This Association takes very strong ground against the scheme of an agreement for a percentage or lump sum being made between the solicitor and his client in lieu of taxable costs. This plan, it is submitted, has not proved a success in the United States and is not likely to do so in Ontario. A weak client with an unscrupulous lawyer might be imposed upon, a sharp client would huxter his suit from place to place and give it to some "cheap John" in the profession, thus lowering the whole status of the profession and also encouraging speculative litigation on the "no cure no pay" plan. There are other objections to the idea which would certainly act disadvantageously to the scrupulous practitioner, and as the present plan ensures only *reasonable* payment for the work actually done, it meets the approval of this Association."