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THE MARRIAGE QUESTION.

Into matters of religious controversy it is not for us to enter, nor is it our province to criticise the actions of ecclesiastical bodies so long as the laws of the land, and the rights of individuals, either as regards their persons or their property, are not interfered with. It is from this point of view only that we refer to the very serious allegations made against certain ecclesiastics in the Province of Quebec in respect to their dealing with the marriage laws of that province.

So much has been said and written upon the subject that we shall not enter the maze of conflicting opinions, contradictory statements, varying judgments, and differing opinions as to the power of Dominion and provincial legislatures as set forth in the B.N.A. Act, with which we are confronted. The subject is difficult and complicated enough without the elements of sectarian animosity, and party zeal, which make confusion more confounded, and add to the difficulty of arriving at any reasonable conclusion as to the real merits of the case, and the best way of dealing with it. It is sufficiently clear, however, that attempts have been made, and made successfully, to override the law of the province so far as to declare that marriages legally contracted are null and void when not solemnized according to rules laid down by ecclesiastical authority; consequently there has been an interference not only with the law of the land but with the rights of persons entitled to its protection.

Cases arising from this conflict of authority have been, and are now before the provincial courts. In some judgments have been given upholding the civil authority, in others exactly the reverse, but so far the Superior Court of the Province has not

pronounced upon them though in due time it will no doubt be called upon to do so. Here evidently exists a state of things which cannot be allowed to continue. No doubt as to the validity of any marriage can be tolerated in any self-respecting community. No ecclesiastical authority can be permitted to overstep its legitimate bounds; it may penalize those under its authority who transgress its commands, but it may not either evade or dispute the law by which all are bound alike. These propositions are self-evident, but when we come to enforce them in the Province of Quebec we are met with difficulties not to be encountered in any other part of His Majesty's dominions. There is there a subtle influence which has taken advantage of the complexity arising from facts and conditions such as treaty engagements, French law, ecclesiastical decrees, English common law, Dominion statutes, and Provincial statutes, forming the jurisprudence of the province, and which has persistently, and to some extent successfully, contrived to exercise a power continually working for its own ends, and thereby causing hostility in various quarters. It is the subject of marriage which is now in dispute, the republication or enforcement of the "Ne Temere" decree being the immediate cause of contention.

The object of this decree is in itself praiseworthy. As its title indicates its object is to check or prevent clandestine marriages—for this object it lays down rules such as providing that Roman Catholics must be married by the priest of their own parish, and in the presence of two witnesses. So in England the publication of banns and residence for a certain time in the parish is one of the conditions which make a marriage binding, though other means may be resorted to. It is not the decree itself, but the attempt to engraft a rule existing only in ecclesiastical authority upon the civil law which has caused the trouble now arising and which must be resisted. It is for this purpose that Mr. Lancaster brought into the House of Commons the bill recently debated, and which, with all due respect to the arguments to the contrary, might (if within the powers of Parliament under the B. N. A. Act) have been accepted as giving an easy

and effective means of accomplishing the object in view (see post p. 117).

Here, however, comes in the question of the dual authority created by the B.N.A. Act which in one clause gives the Federal Parliament the control of marriage and divorce, and in another gives the provincial authorities the right to deal with the solemnisation of marriage, and with this right the bill in question is held to conflict. As a compromise the Government propose to delay any further proceedings until the Superior Court, and, if need be, the Privy Council, shall have settled the question of jurisdiction. In the meantime, and for an indefinite period, the uncertainty as to the validity of certain marriages in Quebec will remain, and the present agitation will continue—a state of things very undesirable in itself, but quite in accord with the methods so often adopted to get out of political difficulties, especially where the interests of Quebec are concerned.

Now it is admitted that the Dominion Parliament has to settle the status of those competent to marry, and the provincial to control the means by which the marriage is to be solemnised. It must follow that, if the provincial authorities by their legislation affect the status of marriageable persons, as, for instance, by decreeing that a marriage between two persons legally entitled to marry, and performed by a person with power to perform it, shall be void because it has not been solemnised by some other person, or in some other way, there has been a change in the status of such parties, and the higher authority has a right to step in and protect them. We contend that the Dominion Government might well have boldly taken this ground, and settled the question without further delay. As it is, it is probable, as was suggested by one of the speakers on the recent debate, that some one of the suits now pending may go to appeal, and so a judgment more quickly and efficaciously obtained than would be possible by the method now proposed.

W. E. O'Brien.

THE NE TEMERE DECREE AND THE SUPREME COURT.

In the public mind the purpose of the reference of Mr. Lancaster's bill and supplementary questions to the Supreme Court is to ascertain and settle the relation of the "Ne Temere" decree to Canadian law. But if so, Mr. Hellmuth's opinion, which will, in a broad sense, be concurred in by most lawyers, does not comprehend enough to settle or even to touch the real point at issue. So long as the decrees of the Church of Rome were regarded by her bishops as only prohibiting the marriages of Roman Catholics before a Protestant minister there was merely a question of the legal right of the functionary to marry two Catholics. Down to 1907 the attitude of that Church towards these marriages and those in which Protestants were concerned is explained by Archbishop Bruchesi thus:—

"In order that a marriage may be valid between two Catholics in the limits where the Council of Trent has been published, the presence of the proper priest and two witnesses are necessary; consequently the marriage of two Catholics before a civil officer or a Protestant minister is null. By virtue of the constitution of the pontiffs there are countries, and the Province of Quebec is of the number, where in spite of the promulgation of the Council of Trent, we are to consider as valid, marriages celebrated clandestinely between two parties, one being a Catholic and the other a baptised non-Catholic. The marriage of a Catholic and a baptised Protestant, or vice versa, celebrated before a Protestant minister, although gravely illicit and calling down the censure of the church, is, however, a marriage contracted in a valid manner even in the eyes of the church herself. Once consummated this marriage cannot be broken by any earthly power, death alone rendering liberty to the party surviving."

It was always asserted that Article 127 of the Quebec Civil Code had recognised the impediment as to the marriage of two Catholics created by the Council of Trent (see *Laramee* v. *Evans*, 24 L.C.J. 235, per Papineau, J., and S.C. 25 L.C.J. 261, per Jetté, J., and *Durocher* v. *Degré*, 20 Q.O.R. 498, all of which include this view with additional and more abstruse reasons). The contrary was maintained by Monk,

J., in *Connolly* v. *Woolrich*, 11 L.C.J. 197, and by Archibald, J., in *Delpit* v. *Coté*, 1901, 21 Q.O.R. 338. Hence there has always been a difference of opinion among the Quebec judges upon this point and the question has never been authoritatively settled. And its extension to mixed marriages is the vital one at the present juncture. Upon its solution depends, not only the right of Catholics to be married by Protestant ministers (who by Articles 59A and 156 of the same Code are, when licensed, "competent officers" before whom marriage may be solemnised), but the question of the moment, namely, does Article 127 mean and include an impediment, first applied by the "Ne Temere" decree in 1907, to mixed marriages. Does it now enable the Roman Catholic bishop, as an ecclesiastical court, to declare the marriage of a Protestant void and authorise the civil courts to give effect to that annulment? Those who assert that the "Ne Temere" decree does not affect the situation overlook the use that is made of Article 127, which is part of the law of Quebec. That article is relied on to give validity to this impediment, recently created, which now affects the marriage of a Protestant.

The matter hitherto debated has, of course, dealt with the narrower one of the marriage of two Catholics. Now to that unsettled question is added this other and more important one. And it may be stated clearly. Section 124 of the Code having dealt with and prohibited marriage between uncle and niece, aunt and nephew, etc., section 127 enacts as follows:—

"The other impediments recognised according to the different religious persuasions as resulting from relationship or affinity *or from other causes* remain subject to the rules hitherto followed in the different churches and religious communities. The right likewise of granting dispensation from such impediments appertains, as heretofore, to those who have hitherto enjoyed it."

Now, assuming that "other causes" include impediments created by the Roman Catholic Church, such as requiring its members to be married in a church and by their parish priest (a more than doubtful point), and assuming further that these

impediments were before 1907 made valid civil impediments by section 127 (and no one can want a wider admission) the question still remains whether the "Ne Temere" decree (promulgated only in 1907) can extend as impediments these existing requirements and make them apply to future mixed marriages. In other words, must article 127 of the Civil Code, which on the assumption already made, may embrace the impediments then existing according to the Roman Catholic Church as affecting its own members, be now read as adopting and including the extension of that impediment to mixed marriages? Does it now for the first time, affect the Protestant who marries a Roman Catholic and subject him to have his marriage annulled first by a bishop of that Church and then declared void as to its civil consequences by the courts of the province of Quebec?

This is a real and vital question. It may well be doubted, first, whether a province has the right to practically prohibit marriage between a Protestant and a Catholic by prescribing a particular and unwelcome mode of solemnisation, a power seemingly resting with the Dominion, which alone can define and prohibit marriage, and, secondly, whether a province can delegate to a church the right to prescribe a mode or modes of solemnisation and enact that failure to observe it or them, constitutes an impediment to marriage. While it is obvious that a provincial legislature can adopt any form of solemnisation, even though previously framed by a church and make it in that way its own statute law (as, it is sought to be argued, article 127 does), it seems equally clear that it cannot abdicate its functions and say that any form or ceremony thereafter prescribed by a church shall be the law of the land. The jurisdiction to legislate as to the solemnisation of marriage cannot be delegated to anyone. Yet this is the position adopted when it is said that the "Ne Temere" decree has applied for the first time an impediment to mixed marriages that formerly attached only to marriages between two Catholics and that such a recent prohibition or restriction can be brought within article 127.

There are, therefore, two main divisions on this question which must be settled. First: Can a province enact that marriage as such does not and cannot exist save that entered into with the ceremonies it prescribes, thus rendering the Dominion Parliament powerless to define marriage except as a state preceded by those ceremonies; and can the provincial courts dissolve such a form of marriage where in fact the parties have lived together. Second: Does article 127 adopt the Roman Catholic impediment, and does it embrace impediments not existing when it was passed but subsequently declared applicable to mixed marriages celebrated after Easter, 1908.

Whether clear or not, these questions will, unless now submitted to the Supreme Court, remain a source of strife and vexation. They involve, in their settlement, both to the relative jurisdictions of the Dominion and the provinces, and as well the view that article 127 does not validate Church impediments and if it does, it must in any case be limited to those impediments in existence when it was passed and to those then affected by it.

There is another question which has perhaps a somewhat more important constitutional aspect, namely, the right of the Dominion Parliament to define "marriage" and to prevent it being dissolved after the lapse of a definite period or otherwise impeached and then only in a Federal court. It can not be denied that if the Dominion is given jurisdiction as to marriage, its definition is part of that jurisdiction. Marriage originally was founded in consent, followed by cohabitation and if the Federal Parliament chose to say that those two elements without more should now constitute marriage it could do so. And if it could thus render unnecessary any form of solemnisation it seems to follow that it could in effect regulate the limits within which any local legislature could enact laws establishing forms and ceremonies of solemnization. It could do so by decreeing that marriage might be acknowledged before such civil authority as the Federal Parliament might name and with such civil ceremonies as might be prescribed by a provincial legisla-

ture. This would exclude religious ceremonies as essential to marriage but would leave that legislature free, within the realm of civil ceremonies, to prescribe what it liked, or it might leave to the local legislature the right to name or appoint the civil authority and prescribe the civil ceremonies. It must not be forgotten that at present the clergy obtain their right to celebrate marriage only from provincial enactment and that while they perform religious ceremonies at marriage their authority so far as the actual marriage is concerned is purely civil.

Then it seems clear that under its divorce jurisdiction the Dominion Parliament could enact that after the lapse of some specified time a marriage, if children were born of the union, should be conclusively presumed to have been legally entered into, and should not be dissolved or publicly impeached upon proof only that the local laws had not been complied with and only in a Federal court. Whether or not such legislation is constitutional or desirable is not necessary to be argued out but its apparent legality as legislation on marriage and divorce would seem to indicate that some more comprehensive reference should be had if the real rights of citizens, whether Catholic or Protestant, and the true limits of constitutional jurisdiction are to be finally settled.

FRANK E. HODGINS.

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*THE MARRIAGE LAWS OF CANADA—DEFECTS IN AND SUGGESTIONS FOR IMPROVEMENT.**

Mr. Holmested has in this volume collected with great care the law on the subject, so that we can, with ease, trace the legislation and authorities which affect it up to the present time. He arrives at the same conclusion that we have already done; that some legislation is necessary. His suggestion is that this

*The Marriage Law of Canada, its defects, and suggestions for its improvement. By Geo. S. Holmested, K.C. Toronto: Arthur Poole & Co., Law Publishers. 1912.

legislation should be passed both by the Dominion and Provincial legislatures. Whilst we are not prepared to say that all the defects can be cured and the difficulties overcome without resorting to a change in the British North America Act, we give our readers the benefit of his suggestions.

His suggestion for Dominion legislation is the draft of an Act which would read as follows:—

"1. Whereas doubts have arisen as to the law governing impediments to matrimony in Canada it is hereby declared that those referred to in the statute passed in the 32nd year of His late Majesty King Henry VIII. are the only impediments or prohibitions in force in this Dominion of Canada.

2. It is further declared that the prohibitions or impediments to matrimony referred to in the said last mentioned statute are those which were specifically set forth in a certain statute passed in the 27th year of His said late Majesty, chapter 7, as modified by the Statute of the Parliament of the United Kingdom passed in the Seventh year of His late Majesty King Edward the Seventh, chapter 47, and no others, that is to say (specifying them).

3. No marriage which has been duly solemnized according to law shall be impeachable by reason of the existence of any pre-contract of marriage which was not duly solemnized according to law.

4. It is further declared that no spiritual court, or Court Christian, has any jurisdiction, power or authority to annul any de facto marriage, or to grant a divorce, in the Dominion of Canada.

5. Any person hereafter publishing any sentence, judgment or decree purporting to annul the marriage of any persons in Canada, or to grant any divorce to any person or persons resident in Canada, which shall have been made, or purported to be made, by any person, power, or authority whatsoever not having lawful jurisdiction to make such sentence, judgment or decree, shall on conviction be subject to a penalty of $..... which shall be recoverable by anyone who shall sue for the same.

6. All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affin-

ity shall be absolutely null and void to all intents and purposes, whatsover: (see Imp. Stat. 5-6 W. 4, c. 54, s. 2)."

As to provincial legislature he says:—

"One of the grievances which has been revealed by the recent discussion is the fact that certain ministers of religion authorized by statute to solemnize matrimony make use of the public authority thus conferred on them to propagate their own peculiar religious views on persons coming to them for the solemnization of their marriage. This is a clear abuse of a statutory power. The right to solemnize matrimony is given for public purposes, viz., to secure the due solemnization of marriages; that is its purpose, and no other. Parliament in conferring this power had no intention that it should be used by those to whom it is given as a means for promoting any particular form of religious belief—or as a means for depriving any person of, or compelling him to forfeit or agree to give up, any right which the law gives him.

By the law of Ontario, and presumably also by the law of Quebec, and all the other provinces, a father has a right to control the religious education of his children, and to bring them up in his own faith; but some ministers of religion, having the right to solemnize matrimony, utilize their office for the purpose of exacting promises, having for their object the giving up of this right by persons coming to them to be married. It may be answered, no one need give any such promise unless he pleases, but if the minister teaches, as some do, that the marriage will be null and void unless he solemnizes it, and he refuses to solemnize it unless the promise is given, it is clear that a proselytising engine is placed in the hands of persons authorized by statute to solemnize matrimony which the legislature never intended to give them. That appears to be a real grievance which ought to be remedied, and would appear to be a matter within Provincial control—and the following enactment is suggested:—

1. No person authorized to solemnize matrimony shall exact or require directly or indirectly from either of the persons desiring to have their marriage solemnized before him, any promise or agreement whatever touching the religious education or faith of the children which may be the issue of such marriage,

or the religious faith or belief of such persons or either of them, and all such promises exacted or required, or given or made contrary to the provisions of this Act, are hereby declared to be null and void, and of no force or effect whatever.

2. Any person contravening the provisions of this Act shall be liable to a penalty of $..... to be recoverable by any one who shall sue for the same.

3. Any person convicted of a breach of this Act shall, on conviction, cease to be qualified to solemnize matrimony in this Province."

Were it not that the subject has been brought up by the address of a president of a Bar Association, it would scarcely be worth while, one would think, to refer to the suggestion that lawyers should be public officers paid, as are judges and others, from the public treasury. In his address the president said: "The profession is too closely identified with success or failure of litigation. The object of the attorney is to obtain success, and this is often accomplished at the sacrifice of the highest purpose for which the profession exists, the aiding in the administration of justice. Justice does not necessarily mean that the lawyer should succeed in winning a lawsuit. So long as private individuals are allowed to use an officer who is a quasi-public officer as their representative, and pay him from their private means, so long will the ends of justice, to a great extent, be diverted from that source. An attorney is a quasi-public officer. His duty, so far as the public is concerned, and as an officer of the court, is to aid and assist in the administration of justice. I would suggest that the duty owed to the client be decreased proportionately, so that private interest shall have no power to trespass upon the rights of the public."

It may be doubted, however, whether the system suggested would result in all the facts of the case and the various views which it might present being brought to the attention of the court as fully as they would be by the present practice. The subject, however, is not at present one of practical importance.

It will be remembered that the Court of Criminal Appeal was established in England in 1907, and it is of interest to note that the case of *Rex* v. *Ball* (1911), A.C. 47, was the first criminal appeal, in the strict sense of the word, to come before the House of Lords. The dates of the various proceedings up to the time of final judgment may be noted as illustrating the promptitude of the administration of justice in England as compared with what it sometimes is in this Dominion, and almost always when compared with the extraordinary and baleful slowness of the courts in the United States; where, by the way, they are beginning to find that a complete change in their procedure is absolutely necessary. In the case referred to the defendants were tried and convicted on October 14th, 1910; on October 31st the arguments on the appeal were heard, and on November 8th judgments were given. An appeal to the House of Lords was immediately lodged. On November 28th the order for the appearance of counsel was made, and, on the following day, the necessary directions were given, and on December 15th the point of law was argued and judgment rendered. The *Crippen* case is another notable instance of expedition; there the criminal was tried, condemned and executed before a jury would have been impanelled according to the methods in vogue in the United States.

LORD BROUGHAM.

Lord Brougham's mother tells how when he was quite a child at their home at Brougham Hall he used to get up make-believe court of justice for the trial of a supposed prisoner, he himself acting as counsel, prosecuting the prisoner, examining the witnesses, summing up the case, and ending by passing sentence. Nothing could be more characteristic. Throughout his life Brougham loved to play many parts—the politician, the lawyer, the scientist the social reformer, the slave emancipator, the orator, the educationist—and in each he must have the leading rôle. He loved to domineer, and this domineering propensity

was responsible for much of the unpopularity which pursued him through life, even among his best friends. Creevey's nickname for him is "Beelzebub," sometimes the "Archfiend." Macaulay does not conceal his dislike. "Strange fellow," he exclaims; "his powers gone, his spite immortal—a dead nettle"! Even the genial Sydney Smith found him a severe trial. "There goes a carriage," said the witty canon as Brougham drove past, "with a B. outside and a wasp inside!" His restlessness, his aggressiveness, his spirit of intrigue, his jealousy, seems to have estranged them all.

But this wappishness of temperament must not blind us to the solid and splendid services which Brougham, as a public man, rendered to the cause of education and reform—political, social, and legal. With all his faults he was emphatically a great man; and it is not too much to say that to his enlightened views and tremendous driving power we owe most of what is best in our modern progress.

The Boy who beat the Master.

Brougham's mother was a niece of the Scotch historian Robertson, and this family connection determined Brougham's father to quit Brougham Hall, his ancestral residence in Westmorland, and take up his residence in Edinburgh. He preferred the education of the High School there for his sons to that of Eton or Westminster as they then were. There is a very characteristic story told by Lord Cockburn of young Brougham, while the two were at school together, illustrating his irrepressibleness even at that age.

"Brougham," he says, "made his first public explosion while at Fraser's class. He dared to differ from Fraser, a hot but good-natured old fellow, on some small bit of Latinity. The master, like other men in power, maintained his own infallibility, punished the rebel, and flattered himself that the affair was over. But Brougham reappeared next day, loaded with books, returned to the charge before the whole class, and compelled honest Luke to acknowledge that he had been wrong. This made Brougham famous throughout the whole school. I remember as

well as if it had been yesterday having had him pointed out to me as 'the fellow who had beat the master.' It was then that I first saw him."

Edinburgh Society 120 *Years Ago.*

The society of Edinburgh at this period when Brougham was beginning life was particularly delightful. The city was rich in talent, full of men distinguished in literature, science, and philosophy, among them—to name only a few—Walter Scott, Playfair, Dugald Stewart, Lord Monboddo, Jeffrey, Horner, Brown, Murray, Henry Erskine. The war with France kept the British from the Continent and Edinburgh became a favourite resort for residence and education. Sydney Smith—then a young parson with a pupil in charge—was one of those who thus put into the port of Edinburgh. Society, he says, was upon the most easy and agreeable footing. The Scotch were neither rich nor ashamed of being poor, and there was not the same struggle for display which so spoils the charm of London society. Few days passed without friends meeting either in each other's houses or in what were then very common—oyster cellars—where the most delightful little suppers used to be given in which every subject was discussed with a freedom impossible in large societies, and with a candour only found where men fight for truth and not for victory. Not the least attractive part of Edinburgh society were the old Scotch gentlewomen of the period—a delightful set—strong-headed, warm-hearted, high-spirited, who dressed and spoke and did exactly as they chose. Brougham's grandmother was one of these, and to her he used to say he owed everything. Of course this society—like that of every epoch—had its failings, graphically described in Lord Cockburn's Memorials of My Time. To drink and swear were considered the marks of a gentleman, and tried by this test, nobody who had not seen them could be made to believe—as Lord Cockburn remarks—how many *gentlemen* there were. Nothing was more common, for instance, than for gentlemen, who had dined with the ladies and meant to rejoin them, to get drunk—a state of things due largely to the fashion of "Toasts" and

"Sentiments." Who was likely to remain sober to the end when he had to begin by drinking separately the health of everybody else round the table? And this was only coquetting with the bottle! Ladies, too, were very tolerant of masculine failings —witness the young Scotch lady, who, in reproving her brother for swearing, admitted that "certainly swearing was *a great set off* to conversation!"

"Daft Days"—A Resourceful Advocate.

Into this life—legal, literary, social, and convivial—young Henry Brougham—who as Dr. Robertson's great-nephew knew everybody—threw himself with characteristic energy and zest. He wrote papers on "Optics" for the Royal Society. He declaimed at meetings of the "Speculative Society" with equal eloquence whether he had an audience of six or sixty. He could take his three bottles at a sitting ,and, as Sir Hildebrand in Rob Roy expressed it, be "neither sick nor sorry" the next morning. If a frolic was afoot in the way of wrenching off brass knockers or carrying away shop signs, Brougham was the ringleader. At twenty-two he was admitted as an advocate of the Scotch Bar, and went the Southern Circuit—trying to get practice by defending poor prisoners for nothing. His resourcefulness in this way inspires admiration and deserved success if it did not meet with it. The first trial was for sheep-stealing, and Brougham objected to the relevancy of the libel (indictment) on the ground that it did not specify the sex of the animal stolen—tup, ewe, or wether—which he contended was necessary for the purpose of informing the panel (prisoner) exactly of the offence with which he was charged. Every tup was a sheep, but every sheep was not a tup, and so of ewes and wethers. Could you indict a man for stealing an ox and convict him on evidence that he stole a cow? Or for stealing a goose and shew that he stole a gander? In the next case, which was for stealing a pair of boots, the articles when produced were "half-boots," and Brougham contended that "half-boots," were not boots any more than a half guinea is a guinea. But here the judge, Lord Eskgrove, discovered an unwonted sagacity by

pointing out that a "half-boot is not the same as half a boot, but nomen generale. The moon is always the moon, though sometimes she is the half-moon.' This poor old Scotch judge—one of the oddities of the Bench—was almost driven demented by Brougham's volubility and acuteness. He liked to dawdle on—Dogberry fashion—with prisoners and juries in his own way, and just when he was looking forward to the pleasure of doing so, lo! his enemy would appear in court—tall, cool, resolute, remorseless. "I declare," said the old judge, "that that man Broom, or Brougham, is the torment of my life." He revenged himself by sneering at Brougham's eloquence, and calling him "The Harangue." "Well, gentlemen, what did the Harangue say next? Why it was this" (misstating it), "but here, gentlemen, the Harangue was most plainly wrong and not intelligible."—*Law Times.*

We regret that want of space forbids our publishing in extenso the address on the Constitutional History of Canada, recently delivered at the Canadian Club, by Mr. Justice Riddell at its first regular meeting for the present season. The facts therein contained are, of course, obtainable elsewhere, but the value of the address consists largely in their careful selection, and the interesting and consecutive manner in which they are given. This condensed summary will be very valuable, both to those who are beginning the study of Canadian history, as well as to those who desire to refresh their memory respecting it. It is time there was more attention given to the history of our country, as it has its pages of heroism and romance quite equal to many of those we hear more about.

It appears that certain politicians in the United States have quarrelled with their historical and much vaunted constitution; and some of them go so far as to reflect upon their judges for constructing it in ways which seem to them objectionable in view of present trade and commercial conditions. This has

resulted in suggestions for which is styled the "recall of judges," which might have the effect of subjecting them to the risk of public disgrace for conscientiously declaring the law to be as they find it. Col. Roosevelt favours the right of repeal by popular vote of decisions which declare desirable laws unconstitutional. It may well be questioned whether such a novel and objectionable procedure would be of any avail under their constitution. We note the above, as it seems somewhat curious that whilst many in this country have, owing to occasional injustice in our legislation, resulting from party politics, thought that we would be better off under a written constitution, on the other side of the line they think it would be better to make their constitution subject to the caprice of an ignorant populace. In reference to the above it may be noted that in the United States constitutional questions are necessarily legal problems, and not political issues as they are in England, and to a lesser extent in this country.

It is a matter of common notoriety in the province of Ontario, that the municipal system is satisfactory in rural municipalities, but, largely a failure and inadequate so far as cities are concerned. We have not space, at present, to enlarge upon the difficulties which loom up on a survey of the present situation in that regard. We are convinced that at some future time some other system will be adopted in cities.

We have always protested against the practice which has too long prevailed, of appointing judges on commissions. Though this subject has been often discussed, our reason for referring to it now is to draw attention to a phase of it which is becoming accentuated in our larger cities.

At present, it is the law that investigations into matters connected with municipal management and mismanagement are sent for investigation to the county judge. The evil of this is not so apparent in small communities, but cannot escape attention in the principal centres. A county judge has, in all these

heavy judicial duties to perform, and his time and talents should be devoted, as should those of High Court judges exclusively, as far as possible, to such duties. It goes without saying, however, that investigations, numerous and important, have to be made to supplement the deficiencies attendant upon municipal mismanagement, and for investigation as to other public matters.

It must also be remembered that under our system of municipal government, county judges have numerous duties laid upon them which have nothing to do with those which properly devolve upon them as judges, but which are part of the municipal machine. In the result, therefore, a county judge is, in a sense, an official of the city, and as such he might be called upon in municipal investigations to enquire into and adjudicate on matters which he had already passed upon as a quasi city official; a position which is unseemly and provocative of hostile criticism.

Now as to a remedy. These investigations are often very important and must be had, and they must be given into the hands of competent persons. There are many members of the profession quite as competent as a county judge for such work, and in whom the public would have just as much confidence. It is work that can only properly be done by a professional man, of course. The government of the day is responsible to the people for the due administration of such matters, and might therefore be the proper appointing power. If, however, it were thought desirable to have such appointments made so as to free them from any charge of political bias they might from time to time be left to the selection of, say, the Chief Justice of Ontario, or some board of judges of the High Court. They have the profession continually before them, and might, in that respect, be properly charged with the choice of some one suitable for such a position.

We venture to make this suggestion to the powers that be, assuring them that some such change would be acceptable, not merely to the profession, but to the public at large.

REVIEW OF CURRENT ENGLISH CASES.

HEARING IN CAMERA—PUBLICATION OF EVIDENCE TO THIRD PARTIES —CONTEMPT.

Scott v. *Scott* (1912) P. 4 was a suit for nullity of marriage on the ground of alleged impotence of the defendant. The cause was ordered to be heard in camera. After the trial the plaintiff and her solicitor procured a copy of the shorthand writer's notes of the proceedings in camera, and communicated them to the father and sister of the defendant. A motion having been made to commit the plaintiff and her solicitor for contempt in so doing, Deane, J., held that the publication was a contempt, but the plaintiff and her solicitor pleading ignorance and apologising, he refused to make any order except that they should pay the costs of the motion.

ADMIRALTY—SHIP—COLLISION—ACTION IN REM—FOREIGN DEFENDANTS—ARREST—BAIL—VOLUNTARY APPEARANCE—PERSONAL LIABILITY OF DEFENDANT.

The Dupleix (1912) P. 8 was an action in rem by the owners of a British ship to recover damages for a collision on the high seas. The vessel alleged to have been responsible for the collision was owned by foreigners domiciled abroad. She was arrested, and the owners appeared, and obtained the release of the vessel by giving bail to the value of the ship and freight. They then defended the action denying their liability, and counterclaiming for damage which they had sustained by the collision. The foreign vessel was in the result found to be solely to blame, and judgment was pronounced in the usual form condemning the defendants and their bail to the amount of the damage they had sustained by the collision, with costs of claim and counterclaim. The defendants moved to vary the decree by limiting it to the value of their vessel, freight and costs. But Evans, P.P.D., held that (apart from an application for a statutory limitation of liability) the appearance of the defendants being voluntary, and their proceedings in the action amounting to a submission to the jurisdiction of the Court, they were personally liable to the full extent of the plaintiff's proved claim.

VENDOR AND PURCHASER—CONTRACT—TITLE—ABSTRACT SHOWING OUSTER OF TRUE OWNER IN 1874—POSSESSORY TITLE—TITLE FORCED ON PURCHASER.

In re Atkinson & Horsell (1912) 1 Ch. 2 was an application under the Vendors and Purchasers Act. By the contract it was agreed that the abstract of title was to commence with a general devise in the will of a testator who died in 1842, and whose seisin was to be presumed. The vendor in fact derived title from a person who had in 1874 ousted the true owner, under a mutual mistake as to the effect of the will, the person ousted being under no disability. Possession had since been held under the title so acquired for 37 years. The fact that the title was possessory was not realized at the date of the contract. In these circumstances Eady, J., held that a good title had been shewn which could be forced on the purchaser. On the part of the purchaser it was claimed that a title dependent on the Statute of Limitations could not be forced on a purchaser, but the learned Judge held that position was untenable.

SOLICITOR—COSTS—CHARGING ORDER—PROPERTY RECOVERED OR PRESERVED—SOLICITORS ACT, 1860 (23-24 VICT. C. 127), S. 28—(R.S.O. c. 324, s. 21).

In re Cockrell's Estate (1912) 1 Ch. 23. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.) has affirmed the decision of Neville, J. (1911), 2 Ch. 318 (noted ante, vol. 47, p. 694), agreeing with him that the granting of a charging order is a matter of discretion, and that the discretion had been rightly exercised in refusing the order, inasmuch as it appeared that the costs in respect of which it was claimed had already been in effect liquidated by being ordered to be set off against a debt due by the client to the estate in question.

WILL—SPECIFIC LEGACY—DEFINITE NUMBER OF SHARES BELONGING TO TESTATOR AT DATE OF WILL—SUBSEQUENT SUB-DIVISION OF SHARES—WILL SPEAKING FROM DEATH—CONTRARY INTENTION—ADEMPTION—WILLS ACT, 1837 (1 VICT. C. 26), S. 24—(10 EDW. VII. C. 57 (ONT.), S. 27 (1)).

In re Clifford, Mallam v. *McFie* (1912) 1 Ch. 29. A testator by will dated in 1909, bequeathed "23 of the shares belonging to me in the London and County Banking Co." At that time

he had 104 original £80 shares in that company. After the date o. his will, and before his death, these 104 shares were each subdivided into four shares of £20 each, and at the time of his death he held 416 shares of £20 each in the company. The question for Eady, J., to determine therefore was whether the legatee of the 23 shares took 23 of the new £20 shares or 92—and the learned Judge came to the conclusion that as the bequest was a definite, specific bequest of a thing that could neither be increased or diminished by events subsequent to the will, there was a "contrary intention" on the face of the will to prevent it from speaking from the death under s. 24 of the Wills Act, 1837—(10 Edw. VII. c. 57, s. 27 (1) Ont.)—and he held that the twenty-three original shares though changed in name and form, substantially still existed in their sub-divided form, that there was no ademption, and that the legatee was entitled to 92 of the new shares.

MUNICIPALITY—MAINTENANCE AND LIGHTING OF STREETS—DANGEROUS RAVINE—OMISSION TO FENCE HIGHWAY—ACCIDENT TO PERSON USING STREET—LIABILITY OF MUNICIPALITY—MISFEASANCE—NEGLIGENT EXERCISE OF STATUTORY POWERS.

McClelland v. *Manchester* (1912) 1 K.B. 118 was an action against a municipal corporation to recover damages for injuries sustained in the following circumstances. A street within the limits of the corporation was dedicated to the public by its owner. Across the end of the street was an unfenced natural ravine. In 1904 the defendants took over the street under the provisions of a statute and paved it and made it up and subsequently maintained it, but omitted to fence it where it bordered on the ravine. They also under their statutory powers lighted it. In 1910 the plaintiff when travelling in a motor car along the street at night, owing to the omission of sufficient light, and proper fencing, was precipitated down the ravine. The jury found that the street as made up and constructed was a danger to persons using it, and that the unfenced ravine was a hidden trap, and that the defendants had not taken proper care to warn the public of the danger. Lush, J., on these findings, held that the defendants had been guilty of misfeasance and were liable therefor, and gave judgment in favour of the plaintiff for the damages assessed.

PRACTICE—EVIDENCE—PRODUCTION OF DOCUMENTS BY WITNESS—ACTION IN FOREIGN COURT—EXAMINATION OF WITNESS IN FOREIGN ACTION—DOCUMENTS IN POSSESSION OF SERVANT—REFUSAL OF SERVANT TO PRODUCE DOCUMENTS OF MASTER—ATTACHMENT.

Eccles v. *Louisville & Nashville Ry.* (1902) 1 K.B. 135. In this case an order had been made under the Foreign Tribunals Evidence Act, 1856, for the examination of a witness whose evidence was required in an action pending in a foreign Court. The witness on examination admitted that he had certain documents in his possession but objected to produce them, on the ground that he only held them as a servant of a firm, and he declined to apply to the firm for permission to produce them. An application was then made for an attachment against the witness for contempt, which was refused by Lush, J., but a Divisional Court reversed his decision, and granted leave to issue the writ. The Divisional Court (Williams, Buckley, and Kennedy, L.JJ.) reversed the decision of the Divisional Court (Kennedy, L.J., dissenting). The majority of the Court thought it lay on the applicant to shew affirmatively that the masters were willing that the documents should be produced. Kennedy, L.J., on the other hand, thought that as the witness was unable to state that his masters had refused permission to produce the documents; and having had plenty of opportunity to learn their wishes, and having made no effort to ascertain them, that it was a contempt on his part not to produce them.

TRANSMISSION OF DOCUMENT—DATE OF TRANSMISSION.

Holland v. *Peacock* (1912) 1 K.B. 154 may be briefly noticed for the fact a Divisional Court (Lord Alverstone, C.J., and Hamilton, and Bankes, JJ.), held that where a statute required a case stated by a magistrate to be "transmitted to the Court" within three days after the same should be received from the magistrate by the party applying therefor. The putting of the case in the letter box of the High Court of Justice on the last of the three days was a sufficient compliance with the Act, although the case was not actually received by the officer of the Court until the day after the three days had expired.

CRIMINAL LAW—FELONY—ACCESSORY AFTER THE FACT—"RECEIVE, HARBOUR AND MAINTAIN"—REMOVAL OF INCRIMINATING ARTICLES AFTER ARREST OF PRINCIPAL.

The King v. *Levy* (1912) 1 K.B. 158. In this case, after the arrest of a man charged with a coining offence (of which he was afterwards convicted), the appellant, a woman, removed from a workshop occupied by the man certain articles which would be used in making counterfeit coin. The appellant was indicted as an accessory, the indictment alleging that she well knowing the man had committed a felony "did feloniously receive, harbour and maintain him." The jury were directed that if they believed the appellant removed the articles knowing the man to be guilty, and for the purpose of assisting him to escape conviction, they should find the accused guilty, which they did; and, on a case stated, the Divisional Court (Lord Alverstone, C.J., and Hamilton, and Bankes, JJ.) held that the conviction should be affirmed, because any assistance given to a felon in order to hinder his conviction, was a "receiving" of him, and makes the person giving it an accessory.

An official at Osgoode Hall, Ontario, who knows a good thing when he sees it and likes to divide up with his brethren, sends us the following expressions used in affidavits on file in his office. They are extracts from affidavits on file in three distinct and separate matters coming from a different law office in each case:—No. 1. A woman swears: "I am the lawful widow and relic" (note the last word); No. 2. a solicitor swears: "I have had the 'conduction' of this case"; No. 3, a woman swears: "I am the 'natural' and 'lawful' mother of," etc.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] RAY v. WILLSON. [Dec. 22.

Promissory note—Signature to blank note—Authority to use—Condition—Bonâ fide holder—Bills of Exchange Act, ss. 31, 32.

W. residing near Toronto owned property in Port Arthur and signed some promissory note forms which he sent to an agent at the latter place to be used under certain circumstances for making repairs to such property. The agent filled in one of the blank notes and used it for his own purposes. In an action by the holder, W. swore, and the trial judge found as a fact, that the notes were not to be used until he had been notified and authorised its use. He also found that the circumstances attending the discount of the note by the agent were such as to put the holder on inquiry as to the latter's authority. The first finding was affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (24 O.L.R. 122), FITZPATRICK, C.J., dubitante, that secs. 32 and 33 of the Bills of Exchange Act did not apply and the holder could not recover.

Held, per DAVIES, DUFF, and ANGLIN, JJ.:—The finding of the trial judge that the circumstances never arose upon which the agent had authority to use the note was not so clearly wrong as to justify a second appellate court in setting it aside.

Held, per IDINGTON, J.:—The finding of the trial judge that the holder was put on inquiry as to the agent's authority was justified by the evidence and bars the right to recover. Appeal dismissed with costs.

Bicknell, K.C., for appellants. *Choppin,* for respondent.

Ont.] GRAND TRUNK RY. CO. *v.* GRIFFITH. [Dec. 6.

Negligence—Railway company—Death from contact with train—Absence of eye witness—No warning at crossing—Finding of jury—Reasonable inferences—Balance of probabilities.

About 5.30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found

some 350 yards east of a crossing of the Grand Trunk railway, nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train and that his death was due to the negligence of the latter in failing to give such warnings. This finding was upheld by the Court of Appeal.

Held, that the jury were justified, on considering the balance of probabilities, in drawing the inference from the circumstances proved, that the death of G. was caused by such negligence. Appeal dismissed with costs.

D. L. McCarthy, K.C., for appellants. *McClemant*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* JESSAMINE. [Jan. 16.

Murder—Insanity no defence except when no capacity to understand nature of act—Defective inhibition not ground for acquittal.

The prisoner was tried on a charge of murder before Mr. Justice Riddell and a jury, at Toronto, November 13, 1912. It appeared that the prisoner had watched for one Lougheed upon the street and shot him several times, killing him almost instantly. The defence was insanity. The medical evidence was that the prisoner was insane, incurably so, but that he understood the nature and quality of the act and that it was wrong in the sense that it was forbidden by the law, but that he had lost the power of inhibition.

Mr. Justice Riddell in his charge to the jury, said:—"It is not the law that an insane man may kill whom he will without being punished for it. It is not the law that an insane man may kill another and escape punishment simply because he is insane. There have been hundreds of insane persons who have

killed others and have been executed, both in England whence we take our law, and in Canada in which we live. . . . Life would not be safe under such circumstances. There is one in every three hundred persons, in most countries; of persons who are insane in one way or another, and it would never do if the law were such that one man out of every three hundred (that in Toronto would be something over a thousand people) could go out and slay at will without being brought to task and punished by the strong arm of the law. A man is not to be acquitted on the ground of insanity unless his mind is so affected thereby that he is not capable of appreciating the nature and quality of his act, and of knowing that such act was wrong. It is not the law here, as it is said to be in some countries, that if an insane person, who is capable of appreciating the nature and quality of the act, and of knowing that it is forbidden by law (for that is the meaning in this connection of the word "wrong") has what is called an impulse to do the act which he cannot resist, he is to be acquitted on the ground of insanity. I charge you as a matter of law that it is not enough for the prisoner to have proved for him that he had lost the power of inhibition—the power of preventing himself from doing what he knew was wrong. It is your duty to find a verdict of guilty if you find that the prisoner killed Lougheed, and if at the same time it has not been proved to your satisfaction that the condition described by Dr. Bruce Smith was not his actual condition; in other words if he killed the man, and it has not been proved that his condition was not as Dr. Bruce Smith says it was, he is guilty of murder, and it is your duty to find so."

The prisoner was convicted and sentenced to death.

Mr. Justice Riddell reserved a case for the Court of Appeal upon this charge, but refused to reserve a case upon the question whether the prisoner being undoubtedly insane could be executed.

The learned judge referred to 32 C.L.J., pp. 75, 76; *Re Creighton*, 14 Can. C.C. 349; *R.* v. *Thomas*, Crim. App. Cas. 36.

Held, that the charge of the trial judge correctly stated the law and that the prisoner was properly convicted.

Robinette, K.C., for prisoner. *Cartwright*, K.C., and *Bayly*, K.C., for the Crown.

Full Court.] RE MILNE AND TOWNSHIP OF THOROLD. [Jan. 17.

Municipal law—Local option by-law—Ballot not in prescribed form.

Held, that where a definite form is prescribed by statute for a local option ballot paper so that it shall be in a form calculated to distinguish it from one to be used for voting upon other by-laws, and the by-law does not give the form so prescribed it will be quashed, and *semble*, even though there is no evidence that voters were misled.

Haverson, K.C., for appellant. *Shepley*, K.C., and *H. S. White*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C., Riddell, J., Sutherland, J.] [Jan. 24.

SINGER *v.* RUSSELL.

Principal and agent—Commission on sale of land—Implied promise—Taking the benefit of agent's exertions.

Appeal by defendant from the judgment of Denton, Jun. J., county of York, in favour of plaintiff, for commission on the sale of land for defendant.

Held, 1. Although there may be no express bargain about commission, when there is clear evidence that the agent was working upon an implied promise of compensation, and that defendant took the benefit of what was done, commission is payable.

2. Slight service in bringing parties together, so that, in the result, sale is effected is sufficient to give a right to commission and it is for the jury to say whether the sale was or was not brought about by the agency of the plaintiff by his introduction or intervention.

RIDDELL, J., dissented.

D. Macdonald, for defendant. *G. M. Ferguson*, for plaintiff.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] THOMPSON *v.* BALDRY. [Jan. 8.

Injunction—Promissory notes obtained by fraud—Negotiation of—Affidavit evidence on motion to continue injunction until hearing.

A defendant may be restrained by injunction from negotiating promissory notes obtained from the plaintiff by false representations, and the plaintiff will not necessarily be left to his remedy for damages even though he might be compensated thereby.

On a motion to continue an interim injunction until the hearing, an affidavit of the plaintiff that he believes and fears that the defendant will negotiate the notes, unless restrained, etc., is sufficient without stating the grounds of such belief, as the allegation of fear of negotiation remains. *In re Young*, [1900] 2 Ch. 753, distinguished.

Swift, for plaintiff. *Foley*, for defendants.

Macdonald, J.] COLE *v.* CROSS. [Jan. 8.

Vendor and purchaser—Incumbrance—Caveat filed after certificate of title under Real Property Act—Costs.

The defendant agreed to sell the land in question to the plaintiffs' assignor and, upon payment of the purchase money, to convey the land "to the purchaser by a transfer under the Real Property Act or a deed without covenants other than against incumbrances by the vendor," and the purchaser agreed to accept the title of the vendor and that he should not be entitled to call for the production of any abstract of title or proof or evidence of title or any deeds, papers or documents relating to the said property other than those then in the possession of the vendor. The defendants had a clear certificate of title for the property, except that there was indorsed upon the duplicate sent to him a caveat filed by one Latzke after the issue of the original certificate.

Held, that the plaintiffs were not entitled, upon tender of the balance of the purchase money, to demand from defendant

a transfer free from the caveat of Latzke for which the defendant was in no way responsible.

The defendant was deprived of the costs of the action although he succeeded, because, in his statement of defence, he said that he did not admit the alleged assignment to the plaintiffs, which was equivalent to a denial of such assignment, although he was well aware of it.

Macneill, for plaintiffs. *Hugg,* and *A. M. S. Ross,* for defendant.

Mathers, C.J.] CROMPTON *v.* ALLWARD. [Jan. 8.

Bailment—Possession as evidence of title as against a wrong-doer—Chose in action—Assignability of cause of action for a personal injury—Negligence.

Held, 1. One who, on a dark night, is driving on the wrong side of a road 24 feet wide and collides with a vehicle going in the opposite direction on the right side of the road, though not proved to have been driving recklessly or furiously, is prima facie guilty of negligence, and liable to the person having charge at the time of the other vehicle, for any injuries to him or the horse he was driving or to the vehicle and harness.

2. The plaintiff may recover the full amount of the damages caused by the collision, although he is not the owner, but only the bailee on a hiring from a livery stable, as possession of the property is sufficient evidence of title as against a wrong-doer. The bailee in such a case must account to the bailor for what he collects above his own interest as money received to the use of the bailor, and the wrong-doer, having once paid full damages to the bailee, has a good answer to any action by the bailor.

In re The Winkfield, [1902] P. at p. 60; *Glenwood* v. *Phillips,* [1904] A.C. 405, and *Turner* v. *Snider,* 16 M.R. 79, followed.

3. A cause of action for a personal injury occasioned by negligence, is not assignable and an assignee cannot recover upon it. *McGregor* v. *Campbell,* 19 M.R. 38, and *McCormack* v. *Toronto Ry. Co.,* 13 O.L.R. 656, followed.

Macneill, and B. L. Deacon, for plaintiff. *Thornburn,* for defendant.

Mathers, C.J.] WALLACE *v.* SMART. [Jan. 8.

Registered judgment, realizing on—Land held by deed from judgment debtor absolute in form, but only as security—Rights of purchaser from apparent owner—Power of sale—Notice—Costs.

Action for sale of the interest of the defendant Smart, in the lands in question to realize the amount of the plaintiff's registered judgment. Smart had, before the registration of the judgment, conveyed the land, subject to a prior mortgage by a title absolute in form to the defendant Hinch, but only as security for a debt. Two days before the registration of the plaintiff's lis pendens in this action, Hinch had assumed to sell the lands to the defendant Bonter, who paid a deposit of $55; but, before anything else was done towards completing his purchase, Bonter had full knowledge of the action.

Held, 1. That the interest of Smart was "land" within the meaning of the Judgments Act, R.S.M. 1902, c. 91, and could be sold to realize the amount of the plaintiff's judgment. *McCabe* v. *Thompson*, 6 Gr. 175, and *Fitz Gibbon* v. *Duggan*, 11 Gr. 188, distinguished.

2. Hinch was a mortgagee without power of sale unless to a purchaser without notice. *Pearson* v. *Benson*, 28 Beav. 598, followed.

3. Plaintiff's rights were not affected by the attempted sale to Bonter, except to the extent of the money Bonter paid before the registration of the lis pendens.

4. Plaintiff was entitled to redeem Hinch, or sell subject to his claim at his (plaintiff's) option.

5. A judgment creditor, like any other subsequent incumbrancer, has the right to bring an action to sell the equity of redemption held by his judgment debtor without making the mortgagee a party; and, when a prior mortgagee holds by a title absolute in form, he may be made a party defendant without an offer to redeem: *Moore* v. *Hobson*, 14 Gr. 703.

The defendant Hinch, in his pleading denied that Smart had any interest in the land and claimed to be himself the absolute owner.

Held, that he should be charged with all the increased costs occasioned by such denial, and by his sale to Bonter and by the adding of Bonter as a party, but should have his general costs otherwise; to be taxed and added to his claim, that the defendant Bonter's costs of suit, together with the $55 he had paid, should be paid out of the proceeds of the sale in preference to

the plaintiff's claim and costs, but deducted from Hinch's claim against Smart, and that in the event of the plaintiff electing to sell the equity of redemption and the sale not realizing enough to pay the claims of Hinch and Bonter and their taxed costs, they should recover against the plaintiff such costs as remain unpaid.

Reference to the Master. Costs of the reference and further directions reserved.

O'Connor and *Jacob*, for plaintiff. *Parker* and *A. H. S. Murray*, for defendants.

Richards, J.A.] RE PROVENCHER ELECTION. [Jan. 8, 1912.

Dominion Controverted Elections Act, ss. 19, 87—*Preliminary objections—Time for filing—Application to enlarge time after lapse of time fixed by statute—Practice.*

Held, 1. The filing of preliminary objections to an election petition under the Dominion Controverted Elections Act, is only an interlocutory proceeding as distinguished from the filing of the petition itself and the bringing on of the trial; and, if the objections are not filed within the five days allowed by section 19 of the Act, the time for filing may be extended under section 87, although the application is not made until after the lapse of the five days.

Alexander v. *McAllister*, 34 N.B.R. 163; *Re Bothwell Election*, 9 P.R. 485; *Re Burrard Election*, 32 C.L.J. 638; *Wheeler* v. *Gibbs*, 3 S.C.R. 374, and *Stratton* v. *Burnham*, 41 S.C.R. 410, followed. *Re Glengarry Election*, 14 S.C.R. 453; *In re North Perth Election*, 18 O.L.R. 661; *Re Lisgar Election*, 20 S.C.R. 1, and *Re Burrard Election*, 31 S.C.R. 459, distinguished. *McDougall* v. *Davin*, 2 Terr. L.R. 417, not followed.

2. If the respondent files his preliminary objections after the five days without first applying for an extension of the time, he runs the risk of an order being made to remove them from the file; but, if the respondent applies for the extension after the petitioner moves to strike out the objections because filed too late, and the Judge thinks he should have allowed the extension if applied for in time, the proper course is to order that, upon payment of the costs of the petitioner's motion, the objections do not stand as properly filed. *Eaton* v. *Storer*, 22 Ch. D. 91, followed.

Blackwood, for petitioners. *H. V. Hudson*, for respondent.

Prendergast, J.] CARON *v.* BANNERMAN. [Jan. 17.

Costs—Taxation—Appeal from—Extraordinary circumstances —Inherent power of court to remedy case of hardship.

There is no right of appeal, under Rule 684 or any other Rule of court, from a taxation of costs in respect of items which have not been objected to in accordance with Rule 968: *Snowden* v. *Huntingdon*, 12 P.R. 248; but the court, under its inherent power over procedure, may grant relief from any manifest hardship to any party due to circumstances for which he is in no way responsible.

The plaintiff's action, which was for the cancellation of an agreement of sale, was dismissed with costs, and the defendant's counterclaim for specific performance of the agreement was allowed with costs. On the taxation the plaintiff was not represented, as his solicitor was seized with a sudden and very grave illness preventing him from attending or instructing any person for him; and the taxing master allowed defendant two sets of costs of $300 each, besides disbursements including $1,524, for a medical witness from Toronto and other witness fees objected to on the appeal.

Held, that, whilst the court could not review the taxation on the merits, it was proper under the circumstances to make an order vacating the certificate of taxation and giving the plaintiff time to prepare and put in his objections to the taxation under Rule 968.

Phillipps, for plaintiff. *O'Connor*, for defendant.

Macdonald, J.] [Jan. 24.

WHALEY *v.* O'GRADY, ANDERSON CO.

Company—Contract—Seal—Manitoba Joint Stock Companies Act, R.S.M. 1902, *c.* 30, s. 64—*Agreement to re-purchase shares.*

The vice-president of the defendant company authorized an agent employed to sell certain shares of stock in another company to give the defendant's agreement to re-purchase the shares at the buyer's option on a certain date, but there was no evidence that the vice-president had been authorized by the company to enter into such an agreement.

Held, that such an agreement was not in general accordance with the powers of the vice-president and the necessity of the

company's seal thereto was not dispensed with by s. 64 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, and therefore the company was not bound thereby.

Cooper, K.C., and *Meighen*, for plaintiff. *A. M. S. Ross*, for defendant.

Book Reviews.

Evidence and Practice at Trials in Civil Cases. By R. E. KINGSFORD, M.A., LL.B., of Osgoode Hall, Toronto. Toronto: The Carswell Co. Ltd. 1911.

This excellent work on Evidence has reached a new edition, which is really the fourth. The first edition was published in 1889, the second in 1897; the third published in 1908, in addition to discussing the line of proof and defence in particular actions contained a preliminary treatise on the general rules of evidence. The work was modelled on that of Roscoe; but it differed from it by its references to Canadian statutes and cases.

In the present edition the plan of the work has not been altered though there has been a re-arrangement of subjects and the cases both English and Canadian have been brought down to date. It is obvious that to a Canadian practitioner a reference to the cases or to the law of only one Province is insufficient. Mr. Kingsford has therefore drawn his authorities from all the Provinces. The Province of Quebec has furnished many authorities as well as the more English-speaking Provinces. Frequent reference is made to the decisions of the Courts in Manitoba, the Western Provinces and British Columbia. The statutory law of Ontario is brought down to date and reference is made wherever possible to the statutes of other Provinces.

The author has studied the virtue of compression and the absence of anything in the shape of padding adds much to its value.

Special pains have been taken to make a satisfactory index. The Table of Cases shews that in this edition there are quite a thousand cases more referred to than in the third edition. The form of the book is handy and has the advantage as a circuit volume of being light in weight; but even at the expense of being a little more bulky we should have been glad if a little larger type had been used. (Perhaps we are getting old!) The book is a most useful one and evidently commands a ready sale.

Forms and Precedents, of proceedings in the Supreme Court of Judicature for Ontario, and the Supreme Court of Canada, and other forms of general utility in the practice of solicitors. Second edition, 1911. By GEORGE SMITH HOLMESTED, K.C., and THOMAS LANGTON, K.C., editors of the Ontario Judicature Act. Toronto: The Carswell Company, Limited. 1911.

What member of the profession is not more or less familiar with "Holmested and Langton." It is a household word, not only in this Province, but in all the English-speaking Provinces of the Dominion, and has its place also in libraries in England and elsewhere. This volume is supplemental to the larger work on the Judicature Act and Rules, and is equally indispensable in the office of every practising lawyer.

The first edition published in 1904 has been favourably known to the profession for the last seven years and this new edition will prove equally welcome. The editors state that they have carefully revised the forms in the former edition and have added several new ones; and some which changes in the practice had rendered unnecessary have been omitted.

The former edition contained 1635 forms, the present contains 1707. The book is particularly rich in forms of pleadings and judgments, and we notice the editors have in this edition included forms of proclamation, etc. by officers of the court. In the forms of proceedings under the Vendors and Purchasers Act, p. 972, we notice that the editors' reference to form No. 403 might lead to the supposition that such motions were made in chambers whereas it is well settled they should be in court. The reference in form 1502, should therefore be to No. 400 instead of 403.

The Law of Motor Vehicles. By BERKELEY DAVIDS, of the District of Columbia Bar. Edward Thompson Co., Northport, Long Island, N.Y. 1911.

The 774 pages of this book does not begin to say all that might be said about a subject which has only come before the courts for consideration and adjudication within the past few years. The author frankly admits that he has not produced a treatise, but rather a text-book in the nature of a digest of

cases. The time has scarcely come for a treatise, as the law, speaking generally, is in an unsettled condition and new points are arising daily in reference to transportation by motor vehicles on land, and as to navigation in the air. It takes time and a consensus of judicial thought to evolve principles of law on any new subject. As the writer correctly says, motor vehicles involve, in one connection or another, almost everything under the sun. So that a treatise on motor vehicles for land or air must, eventually be evolved from such a text-book digest as Mr. Davids has given us.

He describes the motor vehicle as a chattel, also as a piece of machinery, also as a device for transportation of persons or merchandise on highways, and also as an instrument with which a tort or crime is committed. In this last aspect it has been much in evidence, and has very properly been classed as a sort of "wild beast" that is to be handled after the manner set forth in *Rylands* v. *Fletcher*.

The book is divided into chapters which discuss definitions and descriptive terms, legal status, regulation of use of motors, mutual rights of vehicles on highways, crossing railroad tracks, condition of highways with respect to these vehicles, injury to highways or adjoining property, owner's liability for negligence of drivers, rights of passengers, penal responsibility, contracts, aviation, etc. The arrangement is convenient and the cases made easily available for reference.

Within the limits which the author has prescribed for himself, the book will be a very useful one in every lawyer's library, and we commend it to the notice of our readers.

The Principles of Equity, intended for the use of students and of practitioners. By EDMUND H. T. SNELL, Barrister-at-law. Sixteenth edition, by ARCHIBALD BROWN, M.A. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1912.

It was in 1875 that law and equity were effectively fused in England, and this is the sixteenth edition of "Snell's Equity," which has been published since then. It is unnecessary to do more than to state the appearance of this new edition. Every student knows that such a book exists, as no course of legal training seems to be complete without it. The present edition does not materially differ from its predecessors except that it incorporates all new relevant decisions and statutes.

Practice before the Comptroller of Patents. By CARROLL ROMER, M.A., Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

A book of 324 pages, giving information as to the details and precedents for practice connected with the English Patent Law. It will doubtless be of use to those who, in this country, are engaged in the same line of business.

Obituary.

MR. A. F. McLEAN.

We regret to record the death of the late Alexander Farquhar McLean, which took place suddenly at his residence in Toronto on the 31st day of January last. Mr. McLean was, at the time of his death one of the junior registrars of the High Court of Justice for Ontario. Mr. McLean entered the public service as a clerk in the registrar's office of the former Court of Chancery in 1866, and steadily worked himself up, until he attained the position of one of the registrars of the High Court. Mr. McLean has been so long and so favourably known to the profession as a faithful, diligent, and courteous officer that it would be here superfluous to recount his claims to the respect and esteem with which he was always regarded by the profession, and by whom his sudden death will be deeply regretted.

Mr. McLean came of an old loyalist stock and was the son of the late Col. McLean, of Cornwall, and was a nephew by marriage of the late Sir Oliver Mowat. Although Mr. McLean was neither a solicitor nor a member of the Bar his long training in the offices of the Court enabled him to discharge the duties of his office with the utmost efficiency.

Bench and Bar.

JUDICIAL APPOINTMENTS.

George Herbert Thompson of Cranbrook, B.C., barrister-at-law, to be Judge of the County Court of East Kootenay, vice Peter Edmund Wilson, resigned. (January 29.)

HAMILTON LAW ASSOCIATION.

TRUSTEES' THIRTY-SECOND ANNUAL REPORT.

The membership of the Association at the date of the last annual report was 73 and the present membership is 74.

The number of bound volumes in the library, exclusive of sessional papers and Government reports is 4,855, of which 98 volumes have been added during the past year.

The trustees, to the extent of the funds at their disposal have kept the library supplied with all the latest appropriate legal publications, and the library is kept insured for the sum of $8,800.

Reference was made to a meeting held in February, 1911, when a resolution was passed, requesting that there be four sittings of the County Court, with a jury, in each year, and that the fees in the County Court actions that were formerly tried in the High Court be the same as if tried in the High Court.

The trustees reported with regret the resignation, owing to ill-health, of Mr. Chas. Lemon, who for a number of years had ably filled the office of treasurer. Col. W. A. Logie has been appointed to fill the vacancy caused by Mr. Lemon's retirement.

The officers and trustees elected at annual meeting, January 9th, 1912, were:—President, S. F. Lazier, K.C.; Vice-President, Wm. Bell, K.C.; Treasurer, W. A. Logie; Secretary, W. T. Evans; Trustees, Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, K.C., Geo. S. Kerr, K.C.

DOMINION LEGISLATION.

(BILL OF MR. LANCASTER.)

An Act to amend the Marriage Act.

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The Marriage Act, chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the person

so married and without regard to the religion of the person performing the ceremony.

"2. The rights and duties, as married people, of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province in Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsover."

Flotsam and Jetsam.

INCREASE OF PERJURY.—His Honour Judge Edge, in giving his decision recently in a case tried before him in Clerkenwell County Court said: "The increase of perjury in the County Courts is so alarming that public attention ought to be directed to it. It is a pressing demand. I am saying it as a retiring judge, after being on the Bench for twenty-three years, that it is almost impossible to do justice between parties owing to the prevalence of false swearing. It really is shocking. It has been a matter which has placed a very great anxiety upon judges who have to try cases, and endeavour to do what is right and just between parties. False swearing is increasing in a way that I think the legislature ought to pay attention to at once. I do not think any one would oppose that great powers should be placed in the hands of judges for checking perjury."—*Law Notes.*

MARRIAGE LAWS OF FOREIGN COUNTRIES.—A Blue Book [Cd. 5993] has been issued giving the latest information to be obtained about the marriage laws of foreign countries. Wherever possible a translation of the actual text of the law is given; and all the summaries and other additional matter have been either supplied by the authorities of the country concerned or based on information supplied by those authorities. An introductory note explains that the principal object of this publication is to enable British subjects desiring to contract marriage in one of the countries mentioned therein, or to marry a foreigner in any country, to take such precautions as they may desire (*a*) to insure that their marriage will be valid in all countries in which it is to their interest that it should be valid;

(*b*) to avoid committing a breach of the law of the foreign country in which their marriage is to take place.—*Law Notes.*

TITLE OF OCCUPANT OF THRONE.—The style, title, and dignity of King-Emperor applied to His Majesty the King in relation to the great state ceremonial in India, in which the sovereign has been the centre of attraction, will recall to recollection the variations from time to time in the title of the occupant of the throne. The position of the crown as an imperial crown has been well established. In the reign of Henry VIII. by two successive statutes the crown was declared to be an imperial crown. This doctrine was reiterated at the accession of James I., and was again reiterated at the time of the union of Great Britain and Ireland. The title, however, of the sovereign has changed. In 1541 Ireland was raised from a lordship to a kingdom, and the King of England and France, as the sovereign of this country then and for many a generation afterwards styled himself, became King of England, France, and Ireland. When James VI. of Scotland became King of England his title was King of England, Scotland, France, and Ireland. At the union with Scotland the sovereign became King of Great Britain, France, and Ireland. At the union with Ireland he became King of the United Kingdom of Great Britain and Ireland, while the title of King of France was, more than three centuries after it had ceased to have a semblance of reality, abandoned. In 1876, by virtue of the Royal Titles Act of that year, the sovereign by proclamation is also styled Emperor of India. This title, however, as a general rule, is only to be used in India, while by the Royal Titles Act of 1901 the sovereign is styled "King of all the British dominions beyond the seas." In the Acts of 1876 and of 1901 the words of the new title in the clauses of these statutes which make legal a change in the style and title of the sovereign were not embodied—a course which was adopted in the precedent of the Act of Union with Ireland in its provisions in relation to a change in the style and dignity of the monarch. The title "Defender of the Faith," which is jealously retained by the sovereigns of this country in accordance with public sentiment, was originally conferred on Henry VIII. by Pope Leo X., and, after his severance from Rome, was retained by him by virtue of an Act of Parliament. The title of Defender of the Faith is still so dearly prized by a Protestant people that the florin of 1849 had to be recoined because the letters "F. D." were omitted in the legend.—*Law Notes.*

ADVICE TO LAWYERS.—To a counsel arguing before him at Clerkenwell County Court, Judge Edge remarked: "Let me tell you a story of a case in which as counsel I appeared before Mr. Justice Mellor. I had used my strongest arguments, and, thinking I was not convincing him, I used some weak arguments afterward. Mr. Justice Mellor said to me: 'Now, Mr. Edge, don't put too much water in your brandy.'"—*Ex.*

WHAT IS A PRIZE FIGHT?—The question of the legality of boxing contests has again been raised by the decision of the stipendiary magistrate at Birmingham to bind Moran and Driscoll over to keep the peace. The test generally applied, in order to ascertain whether a proposed boxing contest could legally be held, is whether the proposed contest is to be a mere exhibition of skill in which case it would not be illegal, or a contest in which the parties intend to fight in such a manner that actual bodily harm to one or both of them may result: *Reg.* v. *Orton*, 39 L.T. Rep. 293; 14 Cox C.C. 226; and *Reg.* v. *Coney*, 46 L.T. Rep. 307; 8 Q.B. Div. 534. If the proposed contest come within the latter category, it is the duty of the magistrate to bind the combatants over to keep the peace: *Reg.* v. *Billingham*, 2 C. & P. 234. In the case of Moran and Driscoll, the learned stipendiary appears to have found on the facts that the proposed contest would amount in law to a prize fight. He consented to state a case for the opinion of the High Court if, on consideration, he found he could do so. The decision of the High Court will be awaited with considerable interest, in view of its probably far-reaching effect.

Sydney Brooks's article on "The American Yellow Press," which *The Living Age* reprints in a recent issue, from *The Fortnightly Review*, is one of the keenest and most discriminating articles on the subject yet printed. The writer has a familiarity both with American politics and with American journalism which entitles him to speak with authority. Readers of the article on "Socialist Sunday-Schools" in the same issue will be amazed to discover how far removed from the traditional Sunday-schools these centres of Socialist propaganda are. About the only thing they have in common is the day of meeting.