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As we go to press it is officially announced that Hon. David Mills, K.C., Minister of Justice, has been appointed to the vacancy in the Supreme Court caused by the death of Mr. Justice Gwynne. We shall refer to this hereafter.

DEATH OF MR. JUSTICE LISTER.

The news of the sudden death of Mr. Justice Lister, one of the judges of the Court of Appeal for Ontario, came to his many friends as a sudden and a sad surprise. At 5 o'clock in the afternoon of the 8th inst. he was in his usual health and spirits, conversing with a brother judge at Osgoode Hall. Shortly after he went home, and after dinner retired early. A sudden attack of illness seized him during the night which proved to be a form of heart disease, and to this he succumbed about 4 o'clock the next morning. The sympathy of all goes out to the family thus bereaved of a loving husband and father.

Having been so recently appointed to the Court of Appeal, direct from the Bar, time had not sufficed to form an opinion as to what his judicial capacity would prove to be. There was, however, promise that he would have made a very useful member of that court. Certainly, however, it may be said that he applied himself to his judicial duties with patient industry, and that his pleasant manner and courteous treatment of the Bar won him many friends.

Mr. Justice Lister was born at Belleville June 21, 1843, but lived most of his life at Sarnia. He was called to the Bar in 1875, and from that time he was a well-known and successful counsel in Western Ontario. He was a prominent figure in politics in the Reform interest until his appointment to the Bench. A general favourite, his loss will be greatly felt.

FINAL COURT OF APPEAL FOR THE EMPIRE.

By the law of Ontario, in all matters of controversy relative to property and civil rights, resort is to be had to the law of England. The law of England, especially the common law or equity law, is only to be ascertained by the decisions of the English Courts. But where the English Courts decide a point in one way, and the Judicial Committee of the Privy Council decide it in another, we may possibly be left in the peculiar position of having our cases decided not by the law of England which our statute says is to govern, but by the law of the Privy Council. How is this dilemma to be avoided? A case in point may be found in our last volume at p. 808: *Duleau* v. *White* (1901), 2 K. B. 669.

Where the construction of a provincial statute was in question, though it was in similar terms to an English statute, the provincial Court of Appeal has preferred to adhere to its own opinion on the proper construction of the Act, rather than adopt a different construction which had been subsequently placed by an English Court on the corresponding English Act. Such a procedure is apparently no violation of the statute compelling our Courts to decide cases according to the law of England, because it is obvious that that provision is not intended to apply to cases which are governed by express provincial legislation, in which, it is clear, cases must be decided according to provincial, and not English, law, and our provincial Courts may well assume the right to construe our provincial enactments independently of English decisions on corresponding English enactments, though, of course, the latter decisions will always be regarded with due respect, even though they be not considered judicially conclusive. But where, as in the case to which we have referred, the question is one of pure common law or equity, the case seems to be somewhat different, and in that class of cases the statute seems to make it imperative upon the Courts dealing with Ontario cases to take the law from the most authoritative existing exposition of it by English Courts, and in such cases it seems doubtful whether even the Privy Council could properly disregard a decision of the House of Lords on the point in controversy. It may be competent for the Privy Council to say in the case of an inferior English tribunal, that it has not correctly decided the law, but such a contention could hardly be admissible in reference to a decision of the House

of Lords. The fact that there is a possibility of a difference of opinion between these august tribunals is certainly a strong argument for their being so amalgamated that the decision of the one shall be binding on the other, for this reason we think it somewhat unfortunate that the recent proposal to consolidate them so as to constitute one final Court of Appeal for the Empire did not take effect.

THE "PROHIBITED DEGREES" IN ONTARIO.

Some objection has been taken to the terms of a Bill introduced at the present session of the Legislative Assembly, whereby it is sought to amend the Ontario Marriage Act (R.S.O. c. 162) by specifically prescribing a table of prohibited degrees to be indorsed on the forms of affidavits to be required from applicants for marriage licenses; and by adding to the Act a schedule setting forth that part of 28 Hen. 8, c. 7, s. 7, which enumerates the prohibited degrees. It has been publicly asserted that 28 Hen. 8, c. 7, s. 7, is not, and never was, in force in Ontario, and that as a matter of law there are no "prohibited degrees" in this Province.

Under these circumstances, it may be well to inquire how far, if at all, these objections have any foundation. In order to do this it is necessary to go back to the beginning of our Provincial constitutional history. Whatever doubt may exist as to whether English or French law as to civil rights prevailed in the former Province of Quebec from the time of the cession of Canada up to the year 1774, at all events, after that date, there is no doubt as to the law in force, for by s. 8 of the 14 Geo. 3, c. 83, known as "The Quebec Act," it was enacted "that in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule for the decision of the same." The effect of this enactment, as is well known, was to re-establish the "laws of Canada" in regard to property and civil rights throughout the limits of the Province of Quebec, which then included the territory which was afterwards constituted the Province of Upper Canada and is now the Province of Ontario, which, Eve-like, sprang from the body of the pre-existing Province of Quebec. By "the laws of Canada," it is almost needless to say, was meant the French law existing in Canada prior to its cession to Great Britain. From

1774 up to 1792, therefore, the French or Canadian law as to property and civil rights prevailed in the territory which now constitutes Ontario. Under the authority of the Imp. Stat. 31 Geo. 3, c. 31, Upper Canada was constituted a separate Province having, at that time, as we have seen, the French civil law in force. One of the first Acts passed by the Legislative Assembly of the new Province of Upper Canada was to enact (32 Geo. 3, c. 1) that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on the 15th October, 1792 (R.S.O. c. 111, s. 1). This enactment had the effect of displacing the French civil law in Upper Canada and substituting therefor the English law. Now the laws relating to marriage appear to be plainly laws relating to civil rights, and it would hardly seem open to argument that the English law relating to marriage was not effectually introduced by that enactment.

It may be noticed that both the Imp. Act, 14 Geo. 3, c. 83, establishing, or re-establishing, French law in Quebec, and the Provincial Act (32 Geo. 3, c. 1) are in almost identical terms, the one introducing Canadian or French law, the other English law. If the French law of marriage was re-introduced by the 14 Geo. 3, c. 83, then the English law of marriage must also have been introduced by the Provincial Act of 32 Geo 3, c. 1. But even if it could be maintained that neither Act covered the law of marriage, it would, nevertheless, be untrue to say that no law existed on the subject of prohibited degrees. At the time of the cession of Canada to Great Britain, Canada was not without law on this subject. The French law provided for it, and until altered by Great Britain, or by some power properly constituted by Great Britain, the French law would continue in force. So that if the French law of marriage was superseded by the English law of marriage prior to the Quebec Act (1774), then that law, i.e., English law, was in force in Upper Canada when it was constituted a separate Province, and still so continues the law of the Province of Ontario, even if marriage is not to be deemed to come within the term "civil rights," and if, on the other hand, the French law of marriage remained in force from the time of the cession, it must have remained in force throughout Upper Canada at the time it became a separate Province. But, as already intimated, the French law, equally with the English law, prohibits marriage within certain

degrees: see Quebec Civil Code, ss. 124, 125, 126 (which is a codification of the French law as it existed in 1792), and even if both English and French law failed, there is still the Christian law to fall back upon, on the principle laid down by Harrison, C.J., in *Pringle* v. *Napanee*, 43 Q. B. 285. So that from no point of view whatever can it be successfully maintained that there are no degrees of consanguinity or affinity within which marriage is prohibited in Ontario.

It appears, however, to be beyond any reasonable doubt that marriage is within the term "civil rights," and that, therefore, all questions relating to marriage must be decided by the English law as it stood on October 15th, 1792, save as varied by Provincial or Dominion legislation. This was the opinion of that very learned judge, Esten, V.C., in *Hodgins* v. *McNeil*, 9 Gr. pp. 305, 309.

Assuming, then, that the law of England as it stood on October 15th, 1792, subject to the variations above referred to, is in force in Ontario, let us now proceed to enquire what that law is, more particularly as regards the question of prohibited degrees.

Prior to the reign of Henry 8, the question of "prohibited degrees" was a matter altogether within the jurisdiction of the Spiritual Courts, which exercised jurisdiction to dissolve marriages contracted within degrees contrary to canon law, and also granted dispensations permitting persons to marry within some of those degrees. It may be here noted that the prohibited degrees under the canon law extended far beyond the rules laid down in Leviticus, and that many of these additional canonical prohibitions seem to have been created merely in order that a wider field might be opened in which dispensations could be applied for and granted for a money consideration. In the reign of Henry 8, these unjust and unreasonable prohibitions of marriage by the canon law in order to fill ecclesiastical coffers with fees for dispensations were deemed to have reached such a pitch of abuse as to require correction at the hands of the civil power. Accordingly two statutes were passed which declared that the only degrees within which marriage should be prohibited are those prohibited in "God's law," which degrees these statutes proceeded to enumerate. The first of these statutes was 25 Hen. 8, c. 22, s. 2, the second 28 Hen. 8, c. 7, which repealed 25 Hen. 8, c. 22, but which, by s. 7, re-enacted with a slight variation s. 2 of the repealed Act which enumerated the prohibited degrees.

Section 7 commences with a recital that inconveniences have arisen by marriages within degrees prohibited by "God's law," "that is to say: the son to marry the mother, etc," setting forth the several degrees mentioned in the 18th chapter of Leviticus, including the disputed one of the deceased wife's sister. It then proceeds to prohibit marriages within those degrees. When Mary came to the throne many of the statutes which had been passed in her father's reign which were thought to interfere with the papal jurisdiction in England were repealed, and also those statutes which had been passed impugning or invalidating the marriage of Henry with Catharine of Arragon and the legitimacy of Mary. Among the statutes and parts of statutes thus repealed by 1 & 2 P. & M. c. 8, was "all that part of the Act made in the 28th year of the said king (i.e., Henry 8th) that concerneth a prohibition to marry within the degrees expressed in the said Act." These words are important to be noted, because they seem to limit the repeal to "the prohibition to marry," and do not apparently touch or deal with the definition in the previous part of s. 7 of the degrees within which marriage is prohibited by God's law. It has, nevertheless, been said that the repeal extended to the whole of the section. It will appear farther on, that the opinion that *the prohibition* only was repealed, is supported by very high judicial authority. A later statute of Henry's reign, viz., 32 Hen. 8, c. 38, made pre-contract of either party a bar to marriage, and went on to provide that "no reservation or prohibition, *God's law except*, shall trouble or impeach any marriage without the Levitical degrees."

This Act, 32 Hen. 8, c. 38, has had a chequered career. It was repealed in the reign of Edward 6th, so far as it made pre-contract a bar to marriage: 2 & 3 Ed. 6, c. 23; and was subsequently wholly repealed by 1 P. & M. c. 8, s. 4. It was, however, afterwards, by 1 Eliz., c. 1, s. 3, revived as it stood in the reign of Edward 6th. In other words, 32 Hen. 8, c. 38, as amended by 2 & 3 Ed. 6, c. 23, again became law, and as it has never since been repealed, or further amended, it was the law of England in 1792, and is law in England to-day, and, consequently, under our Provincial Act (32 Geo. 3, c. 1) is law in Ontario, as was held by Esten, V.C., in *Hodgins* v. *McNeil*, 9 Gr., see p. 309.

By 1 Eliz., c. 1, s. 2, another statute of Henry 8th, viz., 28 Hen. 8, c. 16, which had been also repealed in Mary's reign, was also revived; this Act made valid certain marriages, "which marriages

be not prohibited by God's law, *limited and declared in the Act made in this present Parliament.*" In order to construe this revived Act, therefore, it is absolutely necessary to refer to "the Act made in this present Parliament," and that Act was 28 Hen. 8, c. 7, s. 7. It is proper here to say that 1 Eliz., c. 1, s. 4, expressly declares that "all other laws and statutes, and the branches and clauses of any Act or statute, etc., repealed and made void by the said Act, etc. (1 & 2 P. & M. c. 8), and not in this present Act specially mentioned and revived, shall stand, remain, and be repealed and void, etc.," and 28 Hen. 8, c. 7, s. 7, was not specially mentioned therein.

In 1792, therefore, the statute law of England stood thus. 28 Hen. 8, c. 7, s. 7. was repealed by 1 & 2 P. & M. c. 28, so far as it "concerneth a prohibition to marry within the degrees expressed in the said Act," and except so far as thus repealed it remained in force; whether any part of it remained unrepealed being a matter of controversy. 28 Hen. 8, c. 16, which expressly referred to 28 Hen. 8, c. 7, s. 7, and could only be construed by reference thereto, was revived by 1 Eliz., c. 1, s. 2, and was in force in 1792, and still is in force. 32 Hen. 8, c. 38 (as amended by 2 & 3 Ed. 6, c. 23), which prohibits marriages contrary "to God's law," for the words "God's law except," is held to constitute a legislative prohibition of marriages prohibited by "God's law," was also in force in 1792, and still is in force.

This being the state of the statute law, let us now glance at some of the leading cases on the subject, and before doing so it may be remarked that most of them are cases in which the marriage was called in question on the ground that the man had married his deceased wife's sister. This is one of the degrees which was expressly declared to be within the prohibition of "God's law" by 28 Hen. 8, c. 7, s. 7; but it has always been a controverted question whether it is within the degrees prohibited by the 18th chapter of Leviticus.

It was at first apparently considered that the prohibition contained in 32 Hen. 8, c. 38, must be construed by reference to the book of Leviticus and any other passage in the Scriptures bearing on the question. Hence in *Manu's Case*, Moore 907, it was held that marriage with a deceased wife's niece was not prohibited by the Levitical law, and a prohibition to the Ecclesiastical Court was awarded. But in the report of the same case, Cro. Eliz. 228

there is an incomprehensible note that a consultation was afterwards granted, but on what ground is not very clear.

In *Parson's Case* a similar conclusion was arrived at. It is thus referred to in Co. Litt. 235*a*: "And it is further to be understood that many divorces that were of force by the common law, when Littleton wrote, are not at this day in force; for by the statute, 32 Hen. 8, c. 38, it is declared that all persons be lawful (that is, may lawfully marry) that be not prohibited by God's law to marry (that is to say, that be not prohibited by the Levitical degrees). A man married the daughter of the sister of his first wife, and was drawn in question in the Ecclesiastical Court for his marriage, alleging the same to be against the canons, and it was resolved by the Court of Common Pleas, upon consideration had of the said statute, that the marriage could not be impeached for that the same was declared by the said Act of Parliament to be good, inasmuch as it was not prohibited by the Levitical degrees et sic de similibus;" but in this case it is said that a consultation was nevertheless awarded because of some defect in the pleadings (see *Harrison* v. *Burwell*, Vaugh. 248, 249). A consultation, as is well known, being in the nature of a procedendo. Coke, in his 2nd Institute, at p. 683, when discussing 32 Hen. 8, c. 38, refers in the margin both to 25 Hen. 8, c. 22, and 28 Hen. 8, c. 7, as being the statutory declaration of the prohibited degrees.

In *Hill* v. *Good* (1672) Vaugh. 302, an application was made to the Court of Common Pleas for a prohibition to the Ecclesiastical Court. The marriage called in question was one between a man and his deceased wife's sister. It was again argued that this was not a marriage within the Levitical degrees. Chief Justice Vaughan delivered the judgment of the Court, and entered into an elaborate inquiry, first, whether the judgment was prohibited by the Levitical degrees, and came to the conclusion that it was; but he also, and what is more to our present purpose, entered into an equally elaborate inquiry as to the effect of the statutes 28 Hen. 8, c. 7, s. 7, and 32 Hen. 8, c. 38, and came to the conclusion that the marriage was within the prohibition of those statutes.

As to 28 Hen. 8, c. 7, he says at p. 326, "In the statute of 28 Hen. 8, c. 7, there are two clauses concerning marriages—the first declaring certain marriages there recited to be within the degrees prohibited by God's law. . . . The second clause is in these words: 'Be it therefore enacted that no persons

or person, subjects or resiants of this realm or in any of our dominions, of what estate, degree or degrees soever they be, shall from henceforth marry within the degrees afore rehearsed, what pretence soever shall be made to the contrary thereof.' . . . Now we must observe the Act of 1 & 2 P. & M., c. 8, doth not repeal this Act entirely of 28 Hen. 8, c. 7 but repeals only one clause of it; the words of which clause of repeal are before cited and manifest, the second clause of the Act of 28 Hen. 8, and not the first to be the clause intended to be repealed." (*a*) In that case a consultation was granted. Matters remained in this condition in England when 5 & 6 W. 4, c. 54, was passed, which made null and void all marriages within "the prohibited degrees;" such marriages, up to that time, having been voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both parties.

In 1837, *Sherwood* v. *Ray*, 1 Moore P.C. 353, was decided by the Judicial Committee of the Privy Council (Lord Brougham, Mr. Baron Parke, the Chief Judge of the Court of Bankruptcy, and Sir John Nicholl). The suit was brought in the Ecclesiastical Court by the father of a lady to have a marriage contracted by her with her deceased sister's husband annulled, on the ground of its being a marriage within "the prohibited degrees," and the sentence of the Court of Arches, annulling the marriage, was affirmed by the Judicial Committee. The difficulties connected with the question of what are "the prohibited degrees" are stated very carefully and fully by the reporter in a note to that case on pp. 355 et seq. The validity of the marriage was but faintly argued, if at all, but the case appears to have been disposed of mainly on the question whether the plaintiff had any locus standi to maintain the suit. But Baron Parke, who delivered the judgment, says at p. 395, "That marriage (i.e., the one in question) having been celebrated between persons within the Levitical degrees, and prohibited from inter-marrying by Holy Scripture, as interpreted by the canon law and by the

(*a*) That contention was answered by counsel for the respondents in *St. Giles* v. *St. Marys*, 11 Q.B. 119, as follows: "The recitals of a statute are not binding upon courts of law, except for the purpose of construing the particular Act in which they are contained. A recital standing alone can have no force." But this does not appear conclusive; as a general proposition it is correct, no doubt, but in the very peculiar circumstances of the Act in question it is hard to see why if the recital was in fact left unrepealed it might not properly be used to explain another Act in pari materia.

statute 25 Hen. 8, c. 22, s. 3, was unquestionably voidable during the lifetime of both, and might have been annulled by criminal proceedings or civil suit." It will be seen that he refers to 25 Hen. 8, c. 22, s. 3, although 28 Hen. 8, c. 7, s. 7, which repealed that Act, is the one referred to in the revived statute of 28 Hen. 8, c. 16. He also refers to the canon law as assisting the interpretation. And as to that it may be well to say here that the table of prohibited degrees, which is usually included in the Book of Common Prayer, is no part of the Sealed Book, and therefore strictly no part of the Prayer Book. The table was drawn up by Archbishop Parker, by whose name it is known, and was published by the authority of Queen Elizabeth, it is entitled "A Table of Kindred and Affinity, wherein whosoever are related are forbidden in Scripture and our laws to marry together."

By the 99th canon of 1603 of the Church of England it is provided that "no persons shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority A.D. 1563; and all marriages so made and contracted shall be adjudged incestuous and unlawful and consequently shall be dissolved as void from the beginning; and the parties so married shall be by course of law separated; and the aforesaid table shall be in every church publicly set up and affixed at the charge of the parish." But in an elaborate judgment Lord Harwicke declared the opinion of the judges to be that this canon, not having been confirmed by Parliament did not proprio vigore bind the laity: *Middleton* v. *Crofts*, 2 Atk. 650; so that it would seem that no reliance can well be placed on that canon, or the table of prohibited degrees therein referred to, as being of any coercive force or operation in this province.

This, then, was the state of the statute law and authorities when the *Queen* v. *Chadwick*, 2 Cox Cr. Cases 381, was decided in 1847. In this case a man had gone through the form of marriage with a deceased wife's sister. He had subsequently left her and married another woman. He was indicted for bigamy, and the question therefore arose whether the marriage to the deceased wife's sister was or was not within "the prohibited degrees," referred to in 5 & 6 W. 4, c. 54, and 32 Hen. 8, c. 38. Sir Fitzroy Kelly, who argued the case for the Crown, contended that 28 Hen. 8, c. 7, s. 7, had been wholly repealed, and that under 32 Hen. 8, c. 38, resort must be had to the scriptures in order to determine what marriages are

prohibited, and he addressed a lengthy argument to the Court tc shew that, according to the scriptures, such marriages were not forbidden by "God's law." The Court (Lord Denman, C.J., Coleridge, Wightman and Erle, JJ.) unanimously determined that the marriage in question was within the degrees intended by the words "prohibited degrees" in 5 & 6 W. 4, c. 54. Both Lord Denman, C.J., and Coleridge, J., point out the manifold inconveniences and difficulties which would attend a Court of law if it were required to make an independent search of "God's law" to determine what are the degrees within which marriage is prohibited thereby, one of those difficulties being the deciding upon the proper text to be used, King James' version not having been in existence when 32 Hen. 8, c. 38, was passed, and, without expressly saying whether or not 1 & 2 P. & M., c. 8, had, or had not, repealed the whole of s. 7 of 28 Hen. 8, c. 7, or only the part prohibiting marriages within the degrees enumerated, both Lord Denman and Coleridge, J., were of opinion that whether by the reviver of 28 Hen. 8, c. 16, in which it is referred to, or by reason of its never having been repealed, it is still in force, for the purpose of explaining and construing 32 Hen. 8, c. 38, and defining what are the prohibited degrees. Wightman, J., reached the conclusion that marriage with a deceased wife's sister was within the prohibited degrees referred to in 5 & 6 W. 4, c. 54, by a somewhat different route. He held that the Act was intended to apply to all marriages which were theretofore voidable in the ecclesiastical courts as being within the prohibited degrees; marriages with a deceased wife's sister came within that category, ergo, they were within 5 & 6 W. 4, c. 54, and he said: "I do not think it necessary to inquire whether in the Ecclesiastical Court such a marriage was deemed prohibited by the Levitical law, the statute law, or the common law, or by all of them." But it may be noted that this argument altogether shirks the question most strenuously argued viz., whether or not such marriages were legally voidable prior to 5 & 6 W. 4, c. 54. Erle, J., concurred in the result.

At the same time that *Regina* v. *Chadwick* was argued, *St. Giles in the Fields* v. *St. Mary's Lambeth* was also argued, and the only difference between the two cases was that in the latter the deceased wife's sister was illegitimate, and the Court held that that fact made no difference.

In 1861, *Brook* v. *Brook*, 9 H.L.C. 193, was decided by the House of Lords. The question in that case was whether a marriage by a domiciled Englishman with his deceased wife's sister was valid, the marriage having been solemnized in Denmark, where such marriages are allowed by law. For the purpose of that decision it was necessary to determine whether a marriage with a deceased wife s sister was prohibited by the law of England. The case came originally before Stuart, V.C., and Cresswell, J., sat with him as assessor, and in the opinion which Cresswell, J., gave, he quotes, at p. 511, without dissent, the passage above cited from the judgment delivered by Baron Parke in *Sherwood* v. *Ray*, and he there says "this statement of the law was fully adopted by the Court of Queen's Bench in *Regina* v. *Chadwick*." Stuart, V.C., on that point uses the following language: "If the marriage had been solemnized in England, as it was a marriage between a widower and the sister of his deceased wife, it is settled that, according to the law of England, it was null and void to all intents and purposes whatsoever. As to this I have no doubt. It was so settled by the decision of the Court of Queen's Bench in the case of *The Queen* v. *Chadwick*, 11 Q.B. 105, and in hearing the present case I have had the great advantage of the assistance and advice of Mr. Justice Cresswell, who considers the law upon this point to be clear." When the case was argued before the House of Lords, it was contended on behalf of the appellants by Sir Fitzroy Kelly, who had made a very able but unsuccessful argument in *Regina* v. *Chadwick*, and who entertained a strong opinion that that case had been wrongly decided (see his argument in *Brook* v. *Brook*, 3 Sm. & G., p. 505), and he availed himself of the opportunity of so contending before the House of Lords. He argued that marriages with a deceased wife's sister could only be held invalid if contrary to the law of God, but, he said, "that is not asserted by any statute in this country, the only statute which did declare it, 28 Hen. 8, c. 7, having been repealed." Lord Chancellor Campbell in giving judgment, said: "Such a marriage (i.e., between a widower and his deceased wife's sister) was expressly prohibited by the Legislature of this country, and was prohibited expressly on the ground that it was 'contrary to God's law.' Sitting here judicially, we are not at liberty to consider whether such a marriage is, or is not 'contrary to God's law,' or whether it is expedient or inexpedient." He adopts *Hill* v. *Good* and *Regina* v. *Chadwick* as

correct decisions, and conclusive of the point. Further on he adopts an observation of Coleridge, J., in *Regina* v. *Chadwick*. "We are not on this occasion inquiring what God's law is, or what the Levitical law is. If the Parliament of that day (Hen. 8) legislated on a misinterpretation of God's law we are bound to act on the statute which they have passed." Lord Cranworth admitted that the statutes on this subject were "in a confused state," but comes to the conclusion and holds that it is "to 28 Hen. 8, c. 7, s. 11 (i.e., s. 7, according to the Statutes of the Realm), though repealed, that we are to look to see what marriages the Legislature has prohibited as being contrary to God's law." Lord St. Leonards said: "We are not at liberty to consider whether the marriage is contrary to God's law, and detested by God; for our law has already declared such to be the fact, and we must obey the law. That law has been so clearly and satisfactorily explained by the learned judges in the case of *The Queen* v. *Chadwick* as to render it unnecessary to observe further upon it or to trace the repeals, and re-enactments of the law to which I have referred." Lord Wensleydale (who was the judge who, as Baron Parke, delivered the judgment in *Ray* v. *Sherwood* above referred to) refers to the note to that case, and as he then proceeded to deal with the matter more at large, it may be well to quote his words. He said: "The state of the law appears to be this:—the two statutes in which the term 'Levitical degrees' is explained are the 25 Hen. 8, c. 22, where they are enumerated, and include a wife's sister, and the 28 Hen. 8, c. 7, in the ninth section (i.e., the seventh, according to the Statutes of the Realm) of which are described by way of recital, the degrees prohibited by God's laws in similar terms, with the addition of carnal knowledge by the husband in some cases, and with respect to them the prohibition of former statutes was re-enacted The whole of this Act, 25 Hen. 8, c. 22, was repealed by a statute of Queen Mary; and so was part of 28 Hen. 8, c. 7, but not the part as to prohibited degrees. That part was repealed by 1 & 2 P. & M., c. 8. But by the 1 Eliz., c. 1, s. 2, that Act itself was repealed, except as therein mentioned, and several Acts were revived, not including the 28 Hen. 8, c. 7; no doubt, because it avoided the marriage with Ann Boleyn. But by the 10th section of the 28 Hen., c. 16 (which, in the second section referred to marriages prohibited by God's law as limited and declared in 28 Hen. 8, c. 7, or otherwise by Holy Scripture), all

and every branches, words and sentences in those several acts contained, are revived and are enacted to be in full force and strength to all intents and purposes. The question is whether that part of 28 Hen. 8, c. 7, which relates to prohibited degrees and describes them is thus revived? *I think it is.* But whether it is or not, the statements in the statutes are to be looked at as a statutory exposition of the meaning of the true "Levitical degrees"

Now, notwithstanding the somewhat halting opinions as to how 28 Hen. 8, c. 7, s. 7, is now in force, the conclusion is clearly reached that as a matter of fact it is in force for the purpose of defining the prohibited degrees. Whether it is because that part of the statute (as Vaughan, C.J., argued) never was in fact repealed—or whether it is because, if repealed, it has been revived by 1 Eliz., c. 1, or whether it is because though repealed and not revived it is, nevertheless, of force as being a legislative expression of the mind of Parliament as to the meaning of an expression used in a later Act of Parliament in reference to the same subject matter; the fact remains that the highest Court of the Realm has held as indubitably law that 28 Hen. 8, c. 7, s. 7, is of vital force and efficacy so far as it defines the prohibited degrees. It must be admitted that great authorities and probably a numerical number incline to the view that s. 7 of 28 Hen. 8, c. 7, was wholly repealed, the reasoning of Vaughan, C.J., in *Hill* v. *Good*, that the declaration as to the degrees prohibited by "God's law" was never repealed, nevertheless appears to be tolerably conclusive.

We have now to consider the latest case on the subject, viz, *Wing* v. *Taylor* (1861), 2 Sw. & T. 278. The suit was for nullity of marriage on the ground that the petitioner before his marriage with the respondent had had illicit intercourse with her mother. A demurrer was put in on the ground that the facts stated did not shew the petitioner to have been within the prohibited degrees of affinity to the respondent. The demurrer was argued before Sir Cresswell Cresswell, Wightman and Williams, JJ. Both Cresswell and Wightman, JJ., we may here remark, had taken part in previous cases; Cresswell, J., in *Brook* v. *Brook*, and Wightman, J., in *Regina* v. *Chadwick and St. Giles* v. *St. Mary's. Brook* v. *Brook* had been recently affirmed in the House of Lords and all of these cases were relied on by the petitioner. The case turned upon whether affinity was created within the prohibited degrees by mere

sexual intercourse without a marriage, and on this point 28 Hen. 8, c. 7, s. 7, seems to shew that it can be. After enumerating the degrees it goes on to say, "and further to dilate and declare the meaning of the prohibitions. It is to be understande that if it chance any man to know carnally any woman that then all and singular persons being in any degree of consanguinity or affinity (as is above written) to any of the parties so carnally offending shall be deemed and adjudged to be within the cases and limits of the said prohibitions of marriage, all which marriages all be it they be plainly prohibit and detested by the laws of God, etc., etc." The case of the petitioner therefore seemed to be plainly within the prohibition of 28 Hen. 8, c. 7, s. 7, if in force. Cresswell, J., delivered the judgment of the Court, and the conclusion of the Court was that 28 Hen. 8, c. 7, s. 7, had been repealed by 1 & 2 P. & M., c. 8, the Court adopting the opinion in Gibson's Codex 496 in preference to the view of Vaughan, C.J., in *Hill* v. *Good*, supra. Moreover that it had never been revived, as held in *Regina* v. *Chadwick*, supra, nor was it in force as held by Creswell, J., himself and the House of Lords, in *Brook* v. *Brook*, supra. Wightman, J., who concurred in the judgment in *Regina* v. *Chadwick*, agreed also on the judgment in *Wing* v. *Taylor*. For this apparent judicial somersault on the part of Cresswell and Wightman, JJ., one would have thought some explanation might have been offered and some attempt made to explain why *Regina* v. *Chadwick* and *Brook* v. *Brook* were not followed, but the judgment makes no reference whatever to either of those cases and makes no attempt to distinguish them, and winds up with the following passage: "If the statute, 28 Hen. 8, c. 7, had been considered to be revived, or if the statute 32 Hen. 8, c. 38, had been capable of receiving the construction now contended for, it can hardly be doubted that some suits for nullity of marriage on such a ground would have been instituted long ago. The absence of any such case is in our judgment strong evidence of what has been the general opinion as to the state of the law on that subject, and we think the opinion sound. But even supposing the question to be doubtful, we should not think ourselves justified in putting for the first time upon a statute, passed about three centuries ago, such a construction as would expose marriage to the peril of impeachment upon allegations, the falsehood of which it would be difficult to prove, and so render uncertain the status of many persons supposing themselves

to have been lawfully married and rendering the issue of such marriages liable to be bastardized upon an objection which at the time of marriage might be wholly unknown to either of the parents."

This appears to afford the real key to the judgment. The policy of 28 Hen. 8, c. 7, in declaring illicit intercourse sufficient to create an affinity within the prohibited degrees was regarded as bad, and so the statute for that particular case was judicially repealed in spite of the decisions of the Queen's Bench and the House of Lords declaring it to be operative.

Notwithstanding this decision, however, must we not in Ontario be clearly bound by *Regina* v. *Chadwick*; *St. Giles* v. *St. Mary's*, and *Brook* v. *Brook*, as declaring the law of England, and therefore for us the law of Ontario?

It cannot be denied that both the cases and the statutes are indeed in a "confused state." Even the Imperial Statute Law Revision Committee seems unable to agree with itself on this point. In the Chronological Table and Index of the Statutes (1896), under 28 Hen. 8, c. 7, p. 49, they thus refer to s. 7. "S. 7 r., 1-2 P. & M. c. 8, s. 4 (ss. 17-20 Ruff.); r. conf., 1 Eliz., c. 1, s. 4 (s. 13 Ruff.)." From which it would appear that s. 7 was repealed and is not in force; but in the Index of the Statutes in force (1896), under the title "Marriage," p. 840, 28 Hen. 8, c. 7, s. 7, is referred to as being in force, and a note is appended referring to vol. 1, p. 37c, 2nd Revised Edition of the Statutes, and in that volume in a note to 32 Hen. 8, c. 38, there are these words: "The following sections (s. 7 of 28 Hen. 8, c. 7, and s. 2 of 28 Hen. 8, c. 16), so far as they declare what marriages are prohibited by God's law, affect the construction of this Act: see *Reg.* v. *Chadwick*, 11 Q.B., 173; *Brook* v. *Brook*, 9 H.L.C. 193; but contra *Wing* v. *Taylor*, 30 L.J. Matt. Cases 258." 28 Hen. 8, c. 7, s. 7, is then set out in the note as far as it relates to prohibited degrees, and forbids marriages within them. On the whole, the Imperial Statute Law Revision Committee may be said to be of the opinion that s. 7 is operative for the purpose they mention, viz., to govern the construction of 32 Hen. 8, c. 38, notwithstanding the statement in the chronological table that it is repealed. In Ruffhead's edition of the Imperial Statutes, 28 Hen. 8, c. 7, is not printed, but against the title of the Act is set out in the margin a note to the

effect that it was repealed by 1 Mary St. 2, c. 1, which is clearly erroneous.

The result of the weight of the authorities which have been referred to would appear to lead irresistibly to the conclusion that by 32 Hen. 8, c. 38, marriages contrary to God's law are prohibited and 28 Hen. 8, c. 7, s. 7, contains a binding legislative declaration of what are the prohibited degrees according to "God's law." See, however, the English Enc. of Law under title "Nullity of Marriage," Vol. IX., p. 240, which apparently assumes that *Wing* v. *Taylor* is to be preferred to *Regina* v. *Chadwick*, and *Brook* v. *Brook*.

In Ontario very few cases are to be found. The principle one is *Hodgins* v. *McNeil*, 9 Gr. 305 already referred to, which was afterwards followed by Boyd, C., in *Re Murray Canal*, 6 Ont. R 685. In both of these cases a marriage with a deceased wife's sister was in question. In the first case Esten, V.-C., said: "No doubt the Act of the 32nd of the late King (i.e, 32 Geo. 3, c. 1) introduced all the law of marriage as it existed in England at that date except, perhaps, some clauses of the 26 Geo. 2, c. 33. It introduced the Acts 25 Hen. 8, c. 22; 28 Hen. 8, c. 7; 28 Hen. 8, c. 16, and 32 Hen. 8, c. 38, as far as they remained in force, and so much of the canon law as had been adopted by the law of England." At p. 310 he says: "It cannot be doubted that the marriage in this case was unlawful and void at the time of celebration, and could have been annulled by the sentence of the ecclesiastical court at any time during the lifetime of both parties." But one of the parties being dead he held the marriage no longer impeachable. Of course, if there were no prohibited degrees in Ontario the reasons given for the judgment are wholly wrong, and a needless slur was cast by the learned judge upon the marriage in question.

It may be therefore concluded that so far as we have any judicial authority to go by, the law of Ontario agrees to this extent with the law of England, viz.: that marriages within prohibited degrees are forbidden by 32 Hen. 8, c. 38, and that 28 Hen. 8, c. 7, s. 7, defines what the prohibited degrees are. But whereas in England marriages within those degrees are null and void under 5 & 6 W. 4, c. 54, in Ontario they are still only voidable in the lifetime of the parties.

If such be the law, is it not reasonable that, so far as it can be, it shall be made accessible to those whose conduct it is intended to regulate, instead of being hidden away in volumes altogether inaccessible to the public generally?

Under the B.N.A. Act the legislative jurisdiction in respect of marriage is divided, while to the Dominion is relegated the power of dealing with the subject so far as the status and right to contract and dissolve marriage is concerned, to the Provinces is committed the power of regulating the persons who may solemnize marriage and matters connected with its solemnization. For the purposes of guarding against improper marriages the Ontario Marriage Act provides (s. 19) that the party applying for a license shall make affidavit that the parties desiring to be married are not related within the prohibited degrees, and on the back of the affidavit is required to be indorsed a table of the prohibited degrees. Hitherto the terms of this table have been practically left to the issuer of the license. The Bill now before the Legislative Assembly proposes to prescribe how this table is to be framed, and it also adds a schedule in which is contained the prohibited degrees as set forth in 28 Hen. 8, c. 7, s. 7. The table set forth in the Bill as the one to be indorsed on affidavits substantially agrees with that which has been actually in use for some time past. It is somewhat more full in its terms than that set forth in 28 Hen. 8, c. 7, but only explicitly states what is by necessary implication included in that statute: see *Buller* v. *Gastrill* (1722), Gilb. Ch. 156, 158.

GEO. S. HOLMESTED.

Apropos of "kissing the Book" an amusing story is told in the London *Times*. It appears that the late Lord Iddesleigh, then Mr. Stafford Northcote, having been appointed a magistrate, attended at the Castle of Exeter to be sworn in, and was handed a book which had been of, what the late Mr. Dickens called, the "underdone pie crust" colour. It was tied round with what had been, many years before, red tape. Mr. Northcote did not like the look of it, so he cut the tape, and on opening the book it proved to be a ready reckoner, on which for about thirty years the magistrates had been sworn. Who will say when such a thing is possible that the Scotch form of oath is not preferable?

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRINCIPAL AND SURETY—MORTGAGEE—COLLATERAL SECURITY—MORTGAGEE—EQUITY OF REDEMPTION, LIEN OF MORTGAGEE—SALE OF MORTGAGED PROPERTY—APPLICATION OF PURCHASE MONEY—PRIORITIES.

Dixon v. *Steel* (1901) 2 Ch. 602, seems a plain case involved in needless obscurity. The action was by a surety for redemption under the following circumstances. The principal mortgaged property B to secure £225 and £500. The surety gave a mortgage on other property to secure these debts by way of collateral security. The principal recovered a judgment and execution against the mortgagor for a debt not secured by the mortgage, and in respect of which execution the principal claimed a lien on the mortgagor's equity of redemption. Property B was sold and realized insufficient to pay the two mortgages on it. Part of the purchase money was applied in payment of the mortgage for £225, but the mortgagees as against the surety claimed the right to apply the rest of the purchase money on their execution debt, and contended that as the surety had not been called on to pay anything, the right of the surety in the property B was in abeyance. It seems tolerably plain that the lien on the equity of redemption was merely a lien on the right of the mortgagor to the mortgaged property, subject to the payment of the two mortgages thereon, and the property having failed to realize the amount of these two mortgages it was evident that no part of the purchase could properly be attributable to the equity of redemption and the whole of the purchase money was applicable on the two mortgages. The right to have the money so applied Cozens-Hardy, J., held the surety entitled to insist on, as he says, "It certainly is not the law that a surety has no rights until he pays the debt due from his principal."

LANDLORD AND TENANT — BREWER'S LEASE—COVENANT TO BUY BEER OF LESSORS "AND THEIR SUCCESSORS IN BUSINESS"—COVENANT RUNNING WITH THE LAND—LEASE EXECUTED BY LESSEE ONLY—ASSIGNMENT OF REVERSION—BREACH OF COVENANT—32 HEN. 8, C. 34—BENEFIT OF COVENANT OR CHOSE IN ACTION—JUDICATURE ACT, 1873 (36 & 37 VICT., C. 66) S. 25, SUB-S. 6—(R.S.O. C. 51, S. 58, SUB-S. 5).

In *Manchester Brewery Co.* v. *Coombs* (1901) 2 Ch. 608, the plaintiffs, as assignees of the reversion, sought to restrain a breach of covenant by defendants as lessees, contained in an agreement to take a lease, and whereby they agreed to buy beer of the lessors "and their successors in business." The lease was executed by the lessees only; the original lessors were in fact brewers, though that fact did not appear in the lease. The lessors had sold their business and tied houses (including the demised premises) to the plaintiffs, to whom the reversion was also assigned. After the sale the original lessors ceased to carry on their business as brewers. Notice of the change of ownership was given to the defendants, and for a time they purchased beer of the plaintiffs, but having ceased to do so, the present action was brought. The defendants contended that as there was no actual lease, but merely an agreement to take a lease, signed by the lessee alone, the covenant did not run with the reversion under 32 Hen. 8, c. 34, and was consequently a mere personal covenant which was not assignable. That the plaintiffs were not successors in business of the lessors because they carried on business at another place. Farwell, J., held that there was nothing in the covenant to shew that the beer was to be brewed by the covenantees, and was therefore not personal, and that being so it was a covenant which might run with the reversion, but that inasmuch as the lessors had not signed the agreement, though the covenant might not be enforceable by an assignee under 32 Hen. 8, c. 34, prior to the Judicature Act, yet that it was a chose in action, assignable and enforceable by the assignee in his own name under the Judicature Act, s. 25, sub-s. 6, (R.S.O. c. 51, s. 58, sub-s. 5). Even before the Judicature Act, however, he considered that the payment of rent to the assignees would have created an implied contract to hold the property on the same terms as they were held under the covenantees.

EXPROPRIATION OF LAND—STATUTORY RESERVATION OF MINERALS—'MINERALS,' MEANING OF IN STATUTORY RESERVATION—RAILWAY COMPANY—PURCHASE OF SURFACE.

Great Western Railway Co. v. *Blades* (1901) 2 Ch. 624, was an action to restrain the defendants from removing clay from beneath

the plaintiffs' line of railway, the surface of which had been expropriated by the plaintiffs under the Railway Act, which provides that the rights to mines and minerals shall not pass to the railway unless it makes compensation to the owner therefor. It appeared from the evidence that there was on the top of the land in question a layer of vegetable or wind blown deposit made up of decomposed vegetable matter or ordinary surface soil of about two feet, and thereunder lay the bed of clay which the defendants claimed the right to remove unless they were paid for it as "minerals" within the statutory reservation. Buckley, J., in view of what is said in *Lord Provost* v. *Farie* (1888) 13 App. Cas. 657, came to the conclusion that though clay is prima facie a mineral, yet as the clay in question formed the subsoil and thus constituted "the land" purchased for the purposes of the railway, it was not a "mineral" within the meaning of the reservation; at the same time he intimates that "clay" may be a mineral in one district and not in another.

PARTNERSHIP—SALE OF SHARE—VENDOR, RIGHT OF TO INDEMNITY—PARTNERSHIP ACT, 1890 (53 & 54 VICT., C. 39) S. 31.

In *Dodson* v. *Downey* (1901) 2 Ch. 620, the short point decided by Farwell, J., is that where a partner sells his share in the partnership business, he is entitled as of right to a personal indemnity from the purchaser against the partnership liabilities.

RIGHT OF WAY—DEDICATION, PRESUMPTION OF—PRIVATE CARRIAGE WAY ALONGSIDE PUBLIC FOOT WAY—FOOT WAY—INJUNCTION.

In *Attorney-General* v. *Esher Linoleum Co.* (1901) 2 Ch. 647, Buckley, J., holds that where a private carriage way is laid out alongside a public foot way without any barrier or separation between them, then there is a presumption, in the absence of evidence to the contrary, of the dedication of the carriage way to the public, and a foot passenger cannot be lawfully excluded therefrom; and he granted an injunction restraining the defendants from enclosing such carriage way.

PRACTICE—COSTS—TAXATION—ORDER TO TAX COSTS AND INCLUDE THEREIN REMUNERATION OF RECEIVER—SEPARATE CERTIFICATE.

In *Re Silkstone and H. M. Coal Co.* v. *Edey* (1901) 2 Ch. 652, a small point of practice is involved; an order had been made directing the taxation of the plaintiffs' costs, including therein

the remuneration of the receivers and managers appointed in the action, and to certify the balance after deducting certain costs of the defendants. The taxing officer made a separate certificate of the costs alone, but Byrne, J., held, and the Court of Appeal (Rigby, Collins and Romer, L.JJ.) agreed with him, that this was not a compliance with the order of reference, and was not warranted by the practice, and the separate certificate was ordered to be taken off the file.

VENDOR AND PURCHASER — SALE OF LEASEHOLDS — ONEROUS COVENANT, DUTY OF VENDOR TO DISCLOSE TO PURCHASER—ACCEPTANCE OF TITLE IN IGNORANCE OF ONEROUS COVENANTS—RESCISSION.

In re Haedicke and Lipski (1901) 2 Ch. 666, was an application under the Vendors and Purchasers Act. The contract in question was for the sale of leaseholds, and the purchasers had signed an agreement accepting the vendor's title. They subsequently discovered that the lease under which the property was held contained onerous and unusual covenants which had not been disclosed by the vendor; and they then claimed the right to rescind and to recover back their deposit, and Byrne, J., held they were entitled to this relief, and that the acceptance of the title did not affect the vendor's duty to disclose the covenants.

COMPANY—DIRECTOR—MISFEASANCE—PAYMENT OF DIVIDENDS OUT OF CAPITAL —ADVANCES ON IMPROPER SECURITY—DUTY OF DIRECTOR—NEGLIGENCE.

In *Dovey* v. *Cory* (1901) A.C. 477, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Davey) affirmed the judgment of the Court of Appeal (1899) 2 Ch. 629, which holding was to the effect that a director of a joint stock banking company is not chargeable with misfeasance who bona fide consents to the payment of dividends, and the investment of moneys on improper security, relying on the judgment and information and advice of the chairman and general manager of the bank by whose statements he was misled, and whose integrity, skill and competence he had no reason for suspecting, even though as regards the dividends they were in fact paid out of capital.

CONSPIRACY—INDUCING A PERSON TO BREAK CONTRACT, OR NOT DEAL WITH ANOTHER, OR CONTINUE IN HIS EMPLOYMENT—INTENT TO INJURE—INTERFERENCE WITH TRADE—TRADE UNION.

In *Quinn* v. *Leathem* (1901) A.C. 495, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Brampton,

Robertson and Lindley) have given an important decision as to the liability of persons who conspire together in the interest of a trades union to injure the business of a person who has become obnoxious to the union. In the present case the plaintiff was a butcher, and employed non-union men whom he refused to discharge on the demand of a trades union, whereupon the defendants conspired together to injure the plaintiff's business by inducing his customers and servants to break their trade contract with him, or not to deal with him or continue in his employment, resulting in damage to the plaintiff. Their lordships, affirming the judgment of the Irish Court of Appeal (1899) 2 I.R. 667, held this to be an actionable wrong. In doing so *Allen* v. *Flood* (1898) A.C. 1, is referred to, and their lordships declare that all that that case decides is that a lawful act gives no right of action to a person injured thereby merely because it is prompted by a malicious motive. A conspiracy to injure a third person in his person or property is not a lawful act, and on that ground the plaintiff in the present case was held entitled to succeed. The ground of dispute between the plaintiff and the union was occasioned by the union insisting that he should discharge and refuse to employ a non-union man who had been many years in the plaintiff's employment and had a large family dependent on him, although the plaintiff was perfectly willing that the man should join the union, and offered to pay his fees and fines. This their lordships held was in no sense "a trade dispute between employer and workmen," and that the acts in question could not be said to be done "in furtherance of a trades dispute between employers and workmen" within the meaning of the Conspiracy and Protection of Property Act, 1875, c. 86, s. 3, and even if they were, that, nevertheless, the Act had nothing to do with civil remedies.

SALVAGE—INJURY TO SALVOR'S VESSEL—COMPENSATION—ONUS PROBANDI.

Baku Standard v. *Angelo* (1901) A.C. 549, was an action to recover salvage. In the course of the salvage operation, the salving vessel was injured, and the question was whether the damages so occasioned were recoverable by the salvors. The Judicial Committee (Lords Macnaghten, Davey, Robertson and Lindley and Sir Ford North) held that the damages were recoverable, either separately, or the salvage might be assessed on a liberal scale so as to cover such damage, and that the presumption is that the injury

is caused by the necessities of the service, and the onus is on those who allege default by the salvors.

PRACTICE—APPEALABLE VALUE—EVIDENCE.

In *Falkner's Gold Mining Co.* v. *McKinnery* (1901) A.C. 581, the Judicial Committee of the Privy Council (Lords Hobhouse, Davey, Robertson and Sir R. Couch) hold that when a statute gives a right of appeal in cases where the amount involved is not less than £500, the Appellate Court cannot properly refuse to hear an appeal, because the value of the amount in question is not found, or stated by the court appealed from, but it is competent for such Appellate Court to ascertain the amount in dispute on affidavit.

PRACTICE—LEAVE TO APPEAL TO THE KING IN COUNCIL IN FORMA PAUPERIS—RESCISSION OF LEAVE.

In *Quinlan* v. *Quinlan* (1901) A.C. 612. the Judicial Committee of the Privy Council rescinded leave to appeal in forma pauperis, on the ground that the proposed appeal was idle and frivolous, and would not have been granted had all material facts been presented to the Committee on the application for such leave.

Correspondence.

PATENT LAW.

Editor CANADA LAW JOURNAL:

Dear Sir,—I should be glad to be informed as to whether there is any decision as to the effect of a prior assignment which has not been registered on a subsequent assignment without consideration, which has been registered under R.S. Can. 1886, c. 61, s. 26. If not, what is your opinion as to the validity of such subsequent assignment?

It occurs to me that the question is of considerable public importance, as it is an innovation of the ordinary elementary principles of law to have a prior assignment cut out by a subsequent one without consideration, and resting solely on the bare fact that it is registered in virtue of s. 26.

Yours, etc.,

A SUBSCRIBER.

Have any of our readers considered this subject? If so, their research would be helpful to a brother in doubt.—Ed. C.L.J

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT OF CANADA.

Ont.] MORRIS *v.* UNION BANK. [Nov. 16, 1901.

Joint stock company—Payment for shares—Equivalent for cash—Written contract.

M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash, and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396), that as there was no agreement in writing for the payment of the difference by money's worth instead of cash under s. 27 of the Companies Act, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the company. Appeal dismissed with costs.

Watson, K.C., for appellants. *Hellmuth* and *Saunders*, for respondents.

Ont.] SOPER *v.* LITTLEJOHN. [Nov. 16, 1901.

Lease—Covenant—Forfeiture—Company—Shareholder—Personal liability—Waiver.

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months' rent should immediately become due, and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting thereto.

Held, reversing the judgment of the Court of Appeal (1 O.L.R. 172), that the lessors and the company were distinct legal persons, and the individual interests of the former were not affected by the above action: *Salamon* v. *Salamon* (1897) A.C. 22, followed.

The assignee of the company held possession of the leased premises for three months, and the lessees accepted rent from him for that time and from sub-lessees for the month following.

Held, also reversing the judgment appealed from, that as the lessors had claimed the six months' accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; and as the assignee had a statutory right to remain in possession for the three

months and collect the rents; and as the evidence shewed that the receipt by the lessors of the three months' rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the month's rent from the sub-tenants was only compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease.

Mortgagees of the premises having notified the sub-tenants to pay rent to them, the assignee paid them a sum in satisfaction of their claim with the assent of the lessors, against whose demand it was charged.

Held, that this also was no waiver of the lessors' right to claim a forfeiture.

Quære. Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee? Appeal allowed with costs.

Ritchie, K.C., and *Ryckman*, for appellant. *Thomson*, K.C., and *Tilley*, for respondents.

Que.] [Nov. 16, 1901.

PARENT *v.* QUEBEC NORTH SHORE TURNPIKE.

Title to land—Trespass—Overhanging roof—Right of view—Evidence—Boundary line—Waiver.

In 1844 the defendants constructed a toll-house close to or on the boundary of their land with windows overlooking the adjoining lot and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the adjoining lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable to his house, and defendants paid the cost of the necessary alteration. In 1900 the plaintiff instituted the present action against defendants to have the remainder of the projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties, and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty.

Held, STRONG, C.J., dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute and, consequently, that his action could not be maintained.

Held, further, per GIROUARD, J., following *Delorme* v. *Cusson*, 28 S.C.R. 66, that, as the plaintiff and his auteurs had waived objection to the manner in which the toll-house had been constructed, and permitted the roof and windows to remain there, the demolition could not be

required, at least so long as the building continued to exist in the condition in which it had been so constructed. Appeal dismissed with costs.

Pelletier, K.C., for appellant. *Stuart*, K.C., for respondents.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] [Dec. 2, 1901.

GILBERT BLASTING AND DREDGING CO. *v.* THE KING.

Contract—Public work—Breach—Contractor's duty to press claims—Extra work—Loss of profits—Damages.

By a clause in the suppliants' contract with the Crown for the construction of a public work, it was, in substance, stipulated that if the contractors had any claims which they considered were not included in the progress certificates it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims were alleged to have been omitted; and by another clause it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reason why in their opinion they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions.

Held, that a petition of right for moneys claimed to be so due to contractors could not be sustained.

By one of the clauses of the contract it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract.

Held, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him have required the contractor to do, should be given to the contractor; and where this is not done by the engineer, and such outside work is given to others, the contractor is not entitled to the profit that he would have made on the performance of such work.

Where by a change in the plan of the works, certain works were abandoned and others substituted therefor, and the contractor was paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works.

Aylesworth, K.C., and *Belcourt*, K.C., for suppliants. *Newcombe*, K.C., for respondent.

Burbidge, J.] THE KING *v.* HARRIS. [Dec. 11, 1901.

Expropriation—Possession by officers of the Crown of land not expropriated —Taking of highway—Rifle range—Damages.

Defendants complained that possession of certain lands not covered by the plan and description filed by the Crown in an expropriation proceeding had been taken by the officers of the Crown, and claimed compensation.

Held, that the right to recover compensation must be limited to lands mentioned in the plan and description filed, and to the injurious affection of other lands held therewith.

The defendants' predecessor in title in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown closed up the roadway, and from the land taken from the defendants opened another in lieu thereof.

Held, that the defendants were not entitled to compensation in respect of the taking of the roadway.

Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such adjacent property, he is entitled to compensation for damages arising from the use of such rifle range.

Martin, for plaintiff. *Helmcken* and *McPhillips*, for defendants.

Burbidge, J.] THE QUEEN *v.* YOUNG. [Dec. 11, 1901.

Expropriation—Lessor and lessee—Covenant to build on demised premises.

When a lessee is under covenant to build upon the demised premises, and a part of the said premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the Court in fixing the amount of compensation to be paid to the lessee.

Martin, for plaintiff. *Helmcken* and *Luxton*, for defendants.

Burbidge, J.] THE KING *v.* SEDGER. [Dec. 11, 1901.

Expropriation—Public work—Owner residing on lot taken—Compensation.

Where the owner of certain land taken for a public work had resided thereon up to the time of the expropriation and had refused to give up possession until he was dispossessed under legal process by the Crown (the

cost of which proceedings he was obliged to pay), the Court, in assessing compensation, treated the case as one where the compensation ought to be liberal, and increased the amount offered by the Crown before action brought, although upon the evidence such offer did not appear unreasonable.

Martin, for plaintiff. *Jay*, for defendant.

Martin, J.] RAE *v.* GIFFORD. [Dec. 11, 1901.

NEW WESTMINSTER ELECTION PETITION.

Election petition—Presentation of—Time—Computation.

Summons by petitioner for an order disposing of the preliminary objections filed by respondent to the petition filed against respondent's return as a member of the Legislative Assembly. One of the objections was that the petition was not presented in time. The return was made to the Provincial Secretary on September 21st, not later than 9.30 a.m., and the petition was presented to the Registrar about noon on October 12th. Under the Provincial Elections Act the petition must be presented within twenty-one days after the return has been made.

Held, dismissing the petition, that in the computation of the time the day on which the return is made is not excluded.

McPhillips, K.C., and *Duff*, K.C., for respondent. *Martin*, K.C., for petitioner.

Province of Ontario.

COURT OF APPEAL.

Armour, C.J.O., Osler, Maclennan, Moss and Lister, JJ.A. } [Dec. 31, 1901.

REX *v.* CLARK.

Criminal law—Theft—Evidence tending to criminate—Claiming privilege Admission of evidence—R.S.O. c. 140, s. 5.

The prisoner, being a manager of a branch store for the sale of goods supplied by a factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to his branch store without keeping the usual check on them which his employers' system demanded, and had the goods delivered to a customer of his branch.

Held, that he was properly convicted of theft as defined by the Criminal Code.

If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case provided for by s. 5 of the

Canada Evidence Act, R.S.O. c. 140, as amended,) in any criminal proceedings against him thereafter, but if he does object he is protected.

Judgment of the County Judge of the County of Wentworth affirmed.

Teetzel, K.C., for prisoner. *Cartwright*, K.C., Deputy Attorney-General, and *Crerar*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Trial—MacMahon, J.] [Dec. 5, 1901.

LEE *v.* CANADIAN MUTUAL LOAN AND INVESTMENT CO.

Building society mortgage—Liability of members—Contribution to losses—Redemption—R.S.O. 1887, c. 169—R.S.O. 1897, c. 205, s. 21.

The plaintiff applied for and obtained twelve shares of ordinary terminating instalment stock in the S. Loan Company, a building society incorporated under R.S.O. 1887, c. 169. He then applied for an advance of the maturity value on his shares, namely, $1,200, "payable in eight years as per the rules, terms and conditions of the Company," and executed a mortgage as collateral security for the advance, which was duly made to him in which he agreed to pay the monthly instalments or dues upon his stock, the premium for the advance, and interest at six per cent. on the whole amount borrowed; and also agreed to submit to the by-laws and rules of the Company and to assign his shares to the Company forthwith. It was estimated by the S. Loan Company that if these payments were continued for ninety-six months the stock would mature and the loan be paid off; and they obtained from the plaintiff ninety-six promissory notes accordingly, the last payable ninety-six months after date. Subsequently, in 1893 the S. Loan Company sold out all their assets to the C. M. L. & I. Company.

By this transaction it was intended that the latter company should take the place of the former company, but there was a deficiency in the asset. of the former company which rendered a reduction in the amount to the credit of the plaintiff necessary, he being liable as shareholder under his contract and the by-laws to pay his proportion or share of such deficiency; and he was in consequence credited on the shares in the books of the C. M. L. & I. Company after paying expenses with only sixty-two per cent. of the amount which he had formerly had to his credit in the S. Loan Company, the plaintiff having withdrawn his shares from the S. Loan Company and accepted in lieu thereof a stock certificate of the C. M. L. & I. Company for twelve shares of the stock of that company. He continued to make his payments until he had retired the last of the ninety-six notes above mentioned, when he claimed to be entitled to the discharge of his mortgage.

In 1896 the C. M. L. & I. Company passed a by-law which required the borrower to continue to make his monthly payments until his shares

matured by reason of them and the accrued profits from time to time credited.

Held, 1. There had been a complete innovation, and a change of membership by the plaintiff from the S. Loan Company to the C. M. L. & I. Company.

2. Until the plaintiff had paid his proportion or share of the deficiency resulting from a depreciation of the assets of the S. Loan Company he could not compel the C. M. L. & I. Company to discharge his mortgage.

3. There had been no violation of what is commonly called the Usury Act, R. S. C., c. 127, s. 3 (embodied in the Loan Company's Act, R.S.O. 1897, c. 205, s. 21) the same having no application to such a building society mortgage as that in question here; and because apart from that, the rate of interest charged was only six per cent., what was charged more than that being the bonus or premium payable to the Loan Company for the privilege of receiving the maturity value of the shares in advance, as authorized by R.S.O. 1887, c. 169, s. 38, which bonus or premium is expressly received not as interest but in addition to interest.

G. Ross and *W. J. Clark* for plaintiff. *Shepley*, K.C., and *A. M. Macdonell*, for defendants.

MacMahon, J.] RE TOUGHER. [Dec. 16, 1901.

Administration order—Application for, in more than one Surrogate Court—Preference.

When application for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the party nearest in the order in which administration is usually granted.

Jurisdiction to proceed was conferred on the Surrogate Court in which application was made by a mother, as against that in which application was made by a trust company under instructions from brothers, who claimed as creditors.

James Bicknell, for mother. *J. H. Moss*, for trust company.

Falconbridge, C.J., Street, J.] [Jan. 1.

DODGE *v.* SMITH.

Estoppel by deed—Privies—Reservation in deed—Action not based on deed set up as estoppel.

The plaintiffs brought this action to restrain the defendants from trespassing on their rights by working certain mines under the plaintiffs' lands. In 1884 the plaintiff's predecessor in title granted and conveyed the lands to the defendants' predecessor in title, reserving in the conveyance all mines and minerals and ores in, upon or under said lands and free

access and egress over the lands for the purpose of mining. This conveyance was not executed by the grantee, who however, gave a mortgage back to the grantee for $300, "saving and excepting the mines which said mortgagor has no claim to." It appeared that as a matter of fact, at the date of this conveyance and mortgage back, the grantee mortgagor had acquired title by length of possession of the lands and minerals. The mortgage had been paid off before this action.

Held, that there was nothing in the conveyance of 1884 or in the circumstances of the case, which had the effect of revesting the mines in the then grantor; and that whatever might be the effect of the words of the exception in the mortgage, if this were an action between the parties thereto or their privies upon the mortgage, it was clear that they did not estop the defendants in the present action which was not based upon the mortgage, but wholly collateral to it. When the grantor reserved the mines from his grant he reserved something which he did not own because his title to it had already become barred by the statute, and it was plain that the reservation did not operate as a grant from his grantee.

McWhinney, for plaintiffs. *Watson*, K.C., for defendants.

Falconbridge, C.J., Street, J.] [Jan. 2.

TRUSTEES METHODIST CHURCH, CARLETON PLACE, YONGE *v.* KEYS.

Methodist Church—Power to allot free seats—Power to rent pews—47 Vict., c. 88, O.—47 Vict., c. 146, D.

Under the trusts set out in the schedule to the above Acts, the trustees of a Methodist church have no power to allot free seats to particular members of the congregation, although they have the general power possessed by the officers of any place of public worship to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during the service. They have, however, the power to rent pews at a reasonable rent to particular members, reserving as many free seats where, and as may be thought necessary or expedient.

Maclaren, K.C., for defendant, appellant. *J. A. Allan*, for plaintiffs.

Falconbridge, C.J., Street, J.] [Jan. 6.

IN RE THURESSON.

Mortgage—Mortgagee so dealing with property as to lose power to reconvey—Action on covenant—Right of way.

A mortgagee being compellable under his mortgage to discharge at any time any portion of the land described in it, having not less than 20 feet frontage, upon payment of a certain sum per foot frontage, not only discharged a certain portion of the land upon payment of a certain sum, but also assented to a right of way across the whole of the property, which right of way had been granted by the owners of the equity of redemption

to the purchaser of a portion of the mortgaged lands, and released said right of way from his mortgage.

Held, that in so doing the mortgagee had debarred herself from restoring the estate covered by the mortgage, unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, inasmuch as such reconveyance could now only be subject to the right of way, and therefore under the equitable principle in that regard, could not sue upon the covenant in the mortgage.

It is proper, however, in such a case that the mortgagee claiming under the covenant should have an opportunity within a limited time to put himself in a position to restore the estate upon payment of the mortgage money; and so in this case 20 days were to be allowed for the mortgagee to bring into the Master's office evidence that this had been done.

Armour, K.C., and *R. D. McPherson*, for the appeal. *J. D. Montgomery*, for the executors.

Trial—Meredith, C.J.] McGOWAN *v.* ARMSTRONG. [Jan. 9.

Limitation of actions—Real Property Limitation Act—Parent and child—Tenancy at will—Accrual of right of entry—Commencement of statute—Caretaker—Effect of entry by consent—Creation of new tenancy—Assessment—Agreement—Concealment of facts—Family arrangement—Will—Devise subject to charge—Election—Mistake.

In the autumn of 1879 the defendant was put by his father in possession of a farm, which the latter had bought for his son, but took the conveyance to himself. His father told him that he had bought the farm for him, but the defendant knew that what was done had not the effect of transferring the title to him, and was aware that it must be obtained either by conveyance or devise from his father, and the father did not intend to divest himself of the ownership of the farm, but to leave himself free, in devising it as he intended to his son, to charge it with the payment of such sum as he might think it right to require him to pay. The defendant continued in possession of the farm until his father's death in 1900, occupying it for his own benefit, and having the exclusive enjoyment of the profits. He paid no rent and rendered no service or other return for it, and gave no acknowledgment of his father's title; he also made valuable permanent improvements at his own expense.

Held, that the title of the father had, long before his death, by force of the Real Property Limitation Act, R.S.O. 1897 c. 133, become extinguished. The defendant became, upon his entry with the permission of his father, a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year from the commencement of it (s. 5, sub-s. 7), and was barred at the expiration of eleven years. There was no evidence that the defendant was a caretaker or servant of his father. Upon the expiration of the tenancy at

will the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped by an entry, unless, before the statute had operated to extinguish the title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of s. 5., sub.-s. 7: the effect of the sub-section is, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be determined at the expiration of a year from the time when it began.

Held, however, that there was no entry by the father sufficient to prevent the running of the statute; a visit made by the father to the son, within eleven years before action, when he lived with him on the farm for a few days, was not an entry on the land and did not put an end to the existing tenancy at will, not being against the consent of the tenant in such a way that but for the determination of the will the landlord would be liable for an action of trespass.

In 1879 and 1880 the farm was assessed in the name of the father as well as of the defendant, to the former as freeholder, and to the latter as owner, and from 1880 to 1899 to both as freeholders, and in 1882 this was done at the instance of the defendant, who also knew of the way in which the assessment was made in each of these years.

Held, that this was not evidence of a new tenancy at will created within eleven years before the commencement of the action. *Doe d. Bennett* v. *Turner*, 7 M. & W. 226, distinguished.

By an agreement in writing made a few days after the death of the father between the devisees and legatees under the father's will, the defendant admitted and acknowledged that, although the farm was occupied by him, the father was at the time of his death the owner in fee simple of it, and the defendant agreed to abide by the will and to carry out the terms of it. By the will the father devised the farm to the defendant, charged with the payment of $4,000. This agreement was made before the will had been opened or the contents of it known to the defendant; no doubt existed as to validity of the will; the agreement was the result of a suggestion made at an interview between one of the executors and the solicitor for the executors, and the object of it was, though this was not known by or communicated to the defendant, to get rid of any difficulty which might arise if the defendant asserted title to the farm under the Real Property Limitation Act, but the defendant did not in fact know of his rights under that statute.

Held, that, in these circumstances, the agreement was not, even when viewed as a family arrangement, binding on the defendant. *Fane* v. *Fane*, L.R. 20 Eq. 698, applied and followed.

Held, also, that if there was any election by the defendant to take under the will, it was made under a mistake as to the defendant's rights; and besides, if the agreement fell, what the defendant did, which was relied on as being an election, being a part of the same transaction, must fall with it.

Armour, K.C., and *W. B. Milliken*, for plaintiffs. *Johnston*, K.C., and *J. D. Montgomery*, for defendants.

Trial—Ferguson, J.] BEAM *v.* BEATTY. [Jan. 20.

Infant—Bond—Void or voidable—Ratification—Breach—Damages—Interest.

To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock, at $10 per share, the defendant gave the plaintiff his bond in the penal sum of $1,100 conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at $50 per share, less expenses of sale, not to exceed 10 per centum. The defendant was an infant when he executed the bond.

Held, 1. The bond was not void ab initio; that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age.

2. The shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was $495, the price of the 11 shares, less 10 per centum.

3. The recovery was not for a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment.

Lynch-Staunton, K.C., and *Marquis*, for plaintiff. *Masten* and *McBurney*, for defendant.

Meredith, C.J., Lount, J.] [Jan. 21.

MCKENZIE *v.* MCLAUGHLIN.

Defamation—Pleading—Privilege—Discovery—Examination of plaintiff—Relevancy of questions—Mitigation of damages—Rule 488.

In an action for slander, the defence, besides a denial of the material allegations of the statement of claim, was that the words were spoken without malice, in the belief that they were true, and under such circumstances as to make them a privileged communication. There was no justification. The words were, "He perjured himself and stole the money from the township;" and the innuendo was that the plaintiff had committed wilful and corrupt perjury for the purpose of procuring a reward of $5 from a municipal corporation, and had secured the reward by perjury.

Held, that certain questions put to the plaintiff upon his examination for discovery relating to the reward and directed to eliciting information as to the payment of it to the plaintiff; another question as to statements

made by the plaintiff at meetings of the municipal council; another question as to the fact of the council having offered a reward to be paid to any one who killed a dog found worrying sheep; another question apparently intended to elicit information as to the particular times or occasions when the words were spoken; and other questions which might elicit information relevant to the defence of privilege, were all questions relevant to the issues raised on the pleadings, and should be answered by the plaintiff.

Though a defendant may not be able to prove all that is necessary to be shewn to establish a defence of privilege, he is entitled to the benefit of what he does shew, in mitigation of damages, if it goes to that, subject, perhaps, to his having given the notice required by Rule 488.

The Court expressed no opinion on two questions raised, viz., whether, having regard to the provisions of Rule 488, it is necessary for a defendant to plead the facts on which he intends to rely in mitigation of damages (*Beaton* v. *Intelligencer Printing and Publishing Co.*, 22 A.R. 97), and whether, if it is not necessary to so plead, it is proper to examine for discovery as to matters affecting damages only, unless or until the notice required by the Rule has been given.

I. F. Hellmuth, for plaintiff. *C. Swabey*, for defendant.

Meredith, C.J., Lount, J.] [Jan. 21.

McINTYRE *v.* LONDON AND WESTERN TRUSTS CO.

Trustees — Will — Annuities — Setting apart securities — Distribution of residue — Realization of estate — Investments — Redemption of annuities out of estate — Consent.

An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose, came to the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled. The order also provided that, in the event of differences as to matters arising under the foregoing declaration, a local Master should determine such differences and give necessary directions.

Held, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose; and, there

being in the hands of the executors and trustees proper trust securities amply sufficient to secure all the annuities and to leave a surplus presently available for distribution among the persons entitled to the residue, there was no necessity to convert these securities into money; and it would suffice to set apart securities for such an amount as, calculating the interest to be derived from it at the rate of four per cent. per annum, would produce a yearly sum equal to the amount of the annuities to be provided for. *In re Parry*, 42 Ch. D. 570, and *Harbin* v. *Masterman* (1896), 1 Ch. 351, followed. *Ross* v. *Hicks* (1891), 3 Ch. 499, referred to.

Held, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue. *In re Medland, Eland* v. *Medland*, 41 Ch. D., at p. 492, and *In re Parry*, supra, followed.

The order also directed that, in the event of the parties agreeing or the Master directing that any sum be expended on the purchase of Government annuities, the annuitant might elicit to receive such sum in discharge of his annuity, and that the same should, on the execution of a proper discharge, be paid to the annuitant.

Held, that it is only when the persons whose estate is liable to pay an annuity and the annuitant both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent.

G. F. Shepley, K.C., *A. B. Aylesworth*, K.C., *M. D. Fraser*, *J. Folinsbee* and *D. Urquhart*, for various parties.

Meredith, C.J., Lount, J.] [Jan. 22.

BIRKETT *v.* BREWDER.

Mechanics' liens—Material men—Agreement between owner and contractor—Draw-back—Value of plant—Completion of work—Judgment—Estoppel.

The plaintiffs furnished materials to the contractors for certain works, and the action was brought against the contractors and the owner to realize a lien under the Mechanics' and Wage-Earners' Lien Act. The agreement between the contractors and the owner for the execution of the works provided (cl. 10) that all machinery and other plant, materials, and things provided by the contractors and not rejected should, from the time of their being provided, become and be, until the final completion of the works, the property of the owner for the purpose of the works, and should not be taken away or used or disposed of except for the purpose of the works, but at the completion of the works all such plant and machinery as should not have been used should be delivered to the contractors; also (cl. 12) that on the happening of certain events the owner might take the works out of the contractors' hands and complete them, and in that case the contractors should have no claim for any further payments in respect of the work

performed, but should, nevertheless, remain liable for all loss and damage which might be suffered by the owner, and that all materials and plant should remain the property of the owner for the purposes mentioned in cl. 10.

After work to the value of $24,290.88 had been done, the owner took possession of the works, the materials on the ground, and the plant and machinery of the contractors, and no work had since been done by them under the contract.

An action by the contractors against the owner for damages for improperly taking the works out of their hands and to recover the value of the materials, machinery and plant, and some supplies taken by the owner, and also to recover a large sum on account of work done, had been dismissed.

Held, that the 15 per cent. which, under s. 11 of the Act, R.S.O. c. 153, the owner was required to deduct from any payments made in respect of the contract and to retain as a fund for the discharge of liens, was to be computed on the value of the work and materials, but not upon the value of the plant as well, notwithstanding that for the security of the owner the plant was declared to be for the purposes of the contract his property.

It was contended for the plaintiffs that, although there might be nothing justly due by the owner to the contractors, the lien of the plaintiffs attached upon what might ultimately become due, and that the trial should have been postponed until the final completion of the works.

Held, that, if the judgment dismissing the action brought by the contractors was binding on the plaintiffs, they would not be benefited by the postponement, for the effect of that judgment was that the contractors had forfeited all right to payment for any work which they had performed and for which they had not been paid; and, even if the judgment were not binding on the plaintiffs the case should not be sent back for a new trial.

Shepley, K.C., for plaintiffs. *Aylesworth*, K.C., for defendants.

Meredith, C.J., MacMahon, J., Lount, J.] [Jan. 30.

EXCELSIOR LIFE INS. CO. *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Arbitrators and award—Submission—Appointment of sole arbitrator—Arbitration Act, R.S.O. 1897, c. 62, s. 8.

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."

Held, MACMAHON, J., dissenting, that the submission was one providing for a reference "to two arbitrators, one be appointed by each party,"

within the meaning of the Arbitration Act, R.S.O. 1897, c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other might appoint a sole arbitrator.

Decision of STREET, J., 2 O.L.R. 301, affirmed.

In re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, 2 O.L.R. 585, overruled.

A. B. Aylesworth, K.C., for appellants. *R. McKay*, for respondents.

GENERAL SESSIONS OF THE PEACE, COUNTY OF YORK.

McDougall, Co. J.] THE KING *v.* KARN. [Dec. 9, 1901.

Crim. Code, s. 79 (c)—Words charged as being an offence under must be interpreted in their natural and primary sense.

The prisoner, who was a manufacturer and dealer in a medicine advertised as a "Female Regulator," was indicted under s. 179 (*c*) of the Code.

The indictment charged that the prisoner "did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise and have for sale or disposal a certain medicine, drug or article, commonly known as 'Friar's French Female Regulator,' intended or represented as a means of preventing conception or causing of abortion or miscarriage, and did thereby then commit an indictable offence, contrary to the Crim. Code, s. 179 (*c*)."

A box of the medicine was produced in evidence. On the back of this box, in conspicuous lettering, was printed, "Caution—ladies are warned against using these tablets during pregnancy." Circulars were also produced explaining that its object was to promote a natural condition in the patient—it having the properties of an emmenagogue—which accompanied the remedy. No evidence was offered shewing the ingredients of the tablets, and the Crown simply pressed for a conviction for the offence of advertising.

Dewart, K.C., for Crown. The caution in reality counsels the employment of the medicine to avoid pregnancy.

Du Vernet and *S. W. Burns*, for prisoner.

Held, in accordance with the contention on behalf of the prisoner, that the words used by him must be taken in their natural and primary sense, and could not in this view be treated as coming within the contemplation of the above section of the Code. The case must be dealt with as though the allegation had been the subject of a criminal libel. The learned Judge directed the jury to return a verdict of not guilty, reserving a case to the Crown.

NOTE.—Whilst on the evidence before him the learned Judge probably came to the proper conclusion, the result might have been different if

the tablets had been analyzed and the analysis given in evidence, coupled with expert evidence to explain the operation of the ingredients. It is hardly conceivable that a drug which would have the result cautioned against would act in the beneficial way claimed for it in assisting nature.—ED. C.L.J.

Province of British Columbia.

SUPREME COURT.

Full Court.] HARRIS *v.* HARRIS. [March 6, 1901.

Debtor and creditor—Garnishee order—Claimant—Judge by consent trying issue summarily—Appeal—County Court—Garnishee proceedings—Practice.

Appeal from the decision of FORIN, Co.J. Plaintiffs in County Court proceedings issued several garnishee summonses, and subsequently in Supreme Court actions judgment creditors of the defendants in the County Court actions issued attaching orders against the same garnishees. The judgment creditors in the Supreme Court actions contended that the County Court garnishee summonses were nullities, as they were issued on an affidavit which did not comply with the statute, and all the interested parties agreed that the County Judge might decide the matter in a summary way. He held that the County Court plaintiffs were entitled to the moneys garnished.

Held, on appeal, by the full Court, following *Eade* v. *Winser & Son* (1878) 47 L.J.C.P. 584, that the County Judge was in effect an arbitrator, and no appeal lay from his decision.

Per DRAKE, J.:—(1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action, and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnished. Appeal dismissed.

L. G. McPhillips, K.C., for appellant. *Davis*, K.C., for respondent

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By some mistake in making up the calendar of our sheet almanac the date of the appointment of Chief Justice Armour to the Court of Appeal, and of Mr. Justice Falconbridge as Chief Justice of the King's Bench Division, on June 7, 1901, was omitted. This can be of no interest to those eminent judges, but we desire to correct the omission.