Canada Law Journal.

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The rumour as to the judicial appointments referred to in our last issue has proved correct. The *Canada Gazette* of July 7th, announced the appointment of Chief Justice Armour to the vacancy caused by the resignation of Sir George Burton, chief justice of the Court of Appeal, and of Mr. Justice Falconbridge to the chief justiceship of the Queen's Bench Division.

An Act to amend the Acts respecting interest passed at the last session of the Dominion Parliament marks an epoch in the financial world, in that it makes five per cent. per annum the legal rate of interest (as it is popularly called) instead of six per cent. If the accumulation of capital increases as it has done during the last quarter of a century, the rate will soon be down to four per cent.

The impropriety of placing undue weight upon expert evidence as to handwriting has been emphasized by a recent occurrence in the United States. A man was convicted of sending objectionable matter through the mails mainly upon the evidence of two experts in handwriting, but it was claimed that he was not the guilty person, inasmuch as after his imprisonment the objectionable matter continued to pass through the post office in apparently the same handwriting. Shortly after, the police arrested another man, who was also convicted on the same expert testimony. It was doubtless right that the first man should be pardoned, and possibly the second may also claim the same indulgence by and by; but however that may be, or whether the continuance of the crime was a put-up job by some clever friend of the first man so as to free him, it is clear that expert evidence of that sort has received a severe and well-deserved shock.

A correspondent calls attention to a matter which we submit as a suggestion to the reporters of the various courts of the Province. Our correspondent thinks it would be a valuable aid to a rapid perusal of the cases if the final judgments of the courts were more clearly pointed out and dissenting judgments unequivocally indicated. Every practitioner, he says, remembers the vexation of wading carefully through the arguments and conclusions of some learned judge only to find that they did not commend themselves to the majority of the court. It would entail no extra labour on the editors of the reports and would be most useful to the profession if the judgment of the court were indicated by the word "judgment" repeated in the margin of every page, and dissenting opinions by the word "dissenting" in the same manner. This was the practice in many of the older English reports, and it is suggested that it might be done with advantage to-day.

An ecclesiastical court in the Province of Quebec has recently pronounced a marriage of a Roman Catholic with a Protestant, performed by a Unitarian minister, to be no marriage according to ecclesiastical law, although it is certainly a valid marriage according to the law of the land: see Code Civile, s. 129. It is a pity that ecclesiastical and secular law should come in conflict, and that the one should pronounce that to be unlawful which the other declares to be lawful. Where, however, this conflict arises, the ecclesiastical sentence can have no weight except in foro conscientiæ, and although the ecclesiastical court may say the parties are not married, yet the rights, duties and obligations of the contract and the penalties for evading it which the law declares to have been lawfully made, will attach to the parties to the contract no matter what the ecclesiastical court may say. The parties may refuse marital intercourse, and no secular court, of course, can compel it, but the secular court may visit either party with any legal penalties which they may incur by the violation of the contract. If either party marry in the lifetime of the other, without a divorce a vinculo having been first obtained, he or she would be guilty of bigamy and liable to the consequences. If the husband refused to support his wife, he might be visited with the punishment attaching to that offence, and he would be liable for necessaries supplied to her. It is said that a judge of a civil court, before whom an action by the wife against her husband for maintenance came on to be

heard, refused to entertain the case until the status of the parties had been determined by an ecclesiastical tribunal. We should suppose there must be some mistake about this, and that no judge of a civil court would thus abdicate his functions, but if any civil judge so far misunderstood his duty, we are disposed to think that he ought to be called very sharply to account by the Minister of Justice.

THE COMMONWEALTH OF AUSTRALIA.

The union in Federal form of the Australian Provinces is a great political fact, making a step forward towards that larger Imperial union which is now foremost in the minds of people of British blood in all parts of the Empire. It is, however, with the constitutional features of the scheme, rather than with its political importance, that it is our province to deal.

The Australian Federation, embracing so far the colonies New South Wales, Victoria, Queensland, South Australia, and Tasmania, with power for the admission of West Australia and New Zealand, is based partly on the American, and partly on the Canadian system. It differs from the former in adhering to the principle of responsible government as understood in Great Britain and Canada. It differs from the latter in adopting the American plan of giving to the federated states, or provinces, all the powers not specially conferred upon the central authority. This difference in the distribution of powers between the central and provincial authorities is one of great importance. The tendency in the one case towards centralization, and in the other towards disintegration, has been frequently exemplified in the history of Canada, and of the United States. Conflicts in both countries have arisen; in the former from encroachments by the central governments upon the powers delegated to the Province; in the latter from attempts on the part of the States to claim authority in matters especially defined as within the jurisdiction of the Federal Government. In neither case is it possible so exactly to define the limits of the several powers that debatable questions, and doubtful points, will not arise. Happily for us we have been able to settle such disputes by referring them to the arbitration of the Supreme Court, and, in the last resort, to the judgment of the Privy Council. The power of appeal from the Supreme Court to the Imperial Privy Council upon questions arising

between the Federal and Provincial Governments, so important a feature of the Canadian Constitution, has, however, not been adopted by the framers of the Australian Commonwealth Bill. As finally adopted, and presented to the Imperial Parliament, the Bill contained a clause expressly declaring that no appeals should in future be carried to the Privy Council from the High Court of the Australian Commonwealth upon questions involving the interpretation of the Federal constitution, or of the constitutions of the several states, except in cases "where the public interests of some part of Her Majesty's dominions other than the commonwealth or a state are involved." To this clause of the Bill exception was taken by the Imperial authorities, and it was stricken out of the Act as introduced into the Imperial Parliament by Mr. Chamberlain. The grounds of the objection may be briefly stated as follows: The vagueness and uncertainty of the term "public interests"; the impairing of an important link in the unity of the Empire; the desirability of having grave questions arising between States settled by the highest tribunal in the Empire beyond suspicion of local bias or predilection; questions as to the operation of Commonwealth laws on British shipping, etc., which could not be finally left to the Australian court; that British subjects in other parts of the Empire whose interests might be affected by commonwealth legislation could not be deprived of the right of appeal to the Privy Council; and later the strong feeling expressed by banks and commercial institutions having interests in Australia in favour of maintaining the right of the appeal. Mr. Chamberlain concludes his list of objections in these words:—"Her Majesty's Government feel that the actual restriction and the power claimed to make further restriction, equivalent to a practical abolition of the appeal, are specially inopportune at a moment when they are considering the terms of the Bill, enhancing the dignity and promoting the efficiency of the Judicial Committee of the Privy Council by its practical amalgamation with the House of Lords, and providing for the adoption of permanent representation of the great colonies in the new court about to be created. The practical withdrawal of Australian appeals would deprive the new court of a large part of its value as providing new spheres of co-operation between the colonies and the mother country, and to some extent giving effect to the ardent desire for closer relations that now happily exist in the mother country and the colonies."

It is worthy of note that there is evidence of a strong feeling

among many of the leading men of Australia, expecially among the mercantile classes, and among the members of the Bar, in opposition to the restriction of the power of appeal.

A long controversy on this subject ensued between Mr. Chamberlain and the Australian delegates, and the matter was at last settled by the adoption, by way of compromise, of the following clause in place of that which had been struck out from the Bill:—"No question howsoever arising as to the limits inter se of the constitutional powers of the commonwealth and those of any state or states, or as to the limits inter se of the constitutional powers of any two or more states, shall be capable of final decision except by the High Court, and no appeal shall be permitted to the Queen in Council from any decision of the High Court on any such question, unless by the consent of the Executive Government or Governments concerned, to be signified in writing by the Governor-General in the case of the commonwealth and by the Governor in the case of any state. Except as provided in this section, this constitution shall not impair any right which the Queen may be pleased to exercise by virtue of her Royal Prerogative to grant special leave of appeal to her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, provided that any proposed laws containing any such limitation shall be reserved by the Governor-General for her Majesty's pleasure."

The clause as originally framed was as follows:—"No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this constitution or of the constitution of a state unless the public interests of some part of her Majesty's dominions other than the commonwealth or a state are involved. Except as provided in this section this constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of her Royal Prerogative, to grant special leave of appeal from the High Court to her Majesty in Council. But the Parliament may make laws limiting the matters in which such leave may be asked."

It will be noticed that besides putting in more definite terms the limitations on the right to appeal, the new clause permits an appeal by consent of the governments concerned. It also provides that the power given to the Commonwealth Parliament of limiting the matters in regard to which the Queen may be pleased to grant

special leave of appeal shall be exercised subject to reservation for her Majesty's pleasure. These differences are important, and well worth the time spent in the discussion which brought them about. Experience will probably teach the Australians the value of such a final court of appeal as the Imperial Privy Council, especially when it has been reinforced and reorganized in the manner proposed by Mr. Chamberlain.

In this question of the appeal to the Privy Council, in the choice of the names of Commonwealth and States in preference to those of Dominion and Provinces, in the distribution of powers between the central and local authorities, and in the election of the members of the second chamber of the Legislature, the framers of the Australian Act of Confederation have followed the American in preference to the Canadian model, with the result of arriving much more nearly at a position of independence than was contemplated, or achieved, by the fathers of the confederation of the Provinces of British North America.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—COVENANT FOR TITLE—WRITTEN CONTACT—MISTAKE—RECTIFICATION—PAROL EVIDENCE TO VARY WRITTEN CONTRACT.

In *May* v. *Platt* (1900) 1 Ch. 616 the plaintiff sued for damages for breach of an implied covenant for title. The defendant under what is hereafter called the principal agreement, was entitled inter alia to a lease of a parcel of land coloured red on a plan annexed to the agreement, this interest he contracted to sell to the plaintiff, and in pursuance of such contract conveyed to the plaintiff "all his estate term and interest, under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement." Prior to the deed it appeared that the plaintiff had in fact released a part of the land coloured red, called plot A, as to which consequently he was unable to make title. The action was brought to recover damages occasioned by the deficiency. The defendant tendered evidence to show that before the contract of sale was made the plaintiff's agent was shown an amended plan, and that the agent intimated that the difference in

the amount of land occasioned by the abstraction of plot A was immaterial for the purposes for which the land was required by the plaintiff, and the defendant alleged that plot A had been included in the conveyance by mistake and contrary to the true intention of the parties, and on the ground of these allegations, which were denied by the plaintiff, he claimed a rectification of the deed. Farwell, J., held that, as the written contract and conveyance were clear and unambiguous, the proposed evidence and parol agreement to vary the deed, in the absence of any fraud, was inadmissible: that the covenant was binding on the defendant and extended in regard to title to all the estate which the defendant acquired under the principal agreement, and the words "if any" could not be implied; and in regard to the quantity of land, to the whole of the parcel coloured red in the plan annexed to that agreement. Judgment was consequently awarded in favour of the plaintiff and the counterclaim of the defendant was dismissed. The learned judge expressed the opinion that the cases of *Harris* v. *Peperell*, L. R. 5 Eq. 1; *Garrard* v. *Frankel*, 30 Beav. 445; and *Page* v. *Marshall*, 28 Ch. D. 555; where relief was granted on the ground of a unilateral mistake, can only be supported on the supposition of there having been also fraud on the part of the defendants, although the judges appear to have shrunk from actually stigmatizing the conduct of the defendants in those cases as fraudulent; and in the absence of fraud he holds that the court has no jurisdiction to put vendors or purchasers of land to their election to rescind or accept rectification, on the ground of a unilateral mistake.

WASTE—LANDLORD AND TENANT—ALTERATION OF NATURE OF DEMISED PREMISES.

In *West Ham Charity Board* v. *East London Waterworks Co.* (1900) 1 Ch. 624, 12 acres of meadow land were leased for 99 years to the defendant waterworks company for the purpose of constructing a reservoir, but the company did not construct the reservoir, but used the land for grazing purposes down to 1896 when they sublet for a part of the residue of the term to the defendant Base for the purpose of being used as a rubbish shoot. Base took possession and shot quantities of rubbish on the premises thereby raising its surface about ten feet. The plaintiffs claimed that this user of the land amounted to waste, and claimed an injunction restraining the further deposit of rubbish on the demised premises, and damages. The only value of the land at the end of

the term would be for building factories, to obtain a proper foundation for which it would be necessary to dig down to the original level of the land. Buckley, J., held that there had been such an alteration of the thing demised—irrespective of the question whether the added material was offensive or not—as to constitute waste; and that it was no answer to the plaintiffs' claim that the increased expense of digging to obtain a proper foundation would be more than compensated by the increased rent which would be obtainable by the reversioner for the land in its heightened condition, and that both the waterworks company and Base were liable for the past acts of waste and both should be restrained by injunction from committing waste in the future, and he gave judgment accordingly, and directed an inquiry as to damages.

LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT—ERECTION OF BUILDINGS BY LESSOR ON ADJOINING LAND CAUSING LESSEE'S CHIMNEYS TO SMOKE.

In *Tebb* v. *Cave* (1902) 1 Ch. 642, Buckley, J., decides a single point, viz., that where a lessor builds on land adjoining the demised premises so as to cause his lessee's chimneys to smoke, that constitutes a breach of his covenant with his tenant for quiet enjoyment, for which the tenant is entitled to damages.

CHARTER-PARTY--DEMURRAGE—DELAY AT LOADING POINT.

Tyne & Blythe Shipping Co. v. *Leech* (1900) 2 Q.B. 12, was an action for demurrage. A ship was chartered to go to a foreign port for a cargo, the charterers guaranteeing a cargo and quay berth ready at the port on the arrival of the ship at the foreign port, owing to the charterers being unable to provide a quay berth the ship went on demurrage, and while lying at anchor waiting for a quay berth was run into by another ship and disabled; it was then taken by the captain to another port for repair, and during her absence for that purpose a quay berth fell vacant which would have been given to her had she been there. After her return to the port of shipment she was kept waiting a further six weeks for a quay berth. The shipowners claimed demurrage for this six weeks, but not for the period the ship was absent for repair. The defendant contended that they were not liable because the terms of the charter party exempted the charterers from liability for delays in the loading from causes beyond the control of the

charterers, and they claimed the loss of the quay berth for the six weeks was due to the collision over which they had no control, but Kennedy J. was of opinion that the case did not come within the exception, that the vessel being absent for repairs without any default of the owners, when she returned, the demurrage obligation was immediately again in force without any break in its continuity.

PRINCIPAL AND AGENT — BROKER LUMPING SEVERAL ORDERS IN ONE CONTRACT—LIABILITY OF PRINCIPAL TO JOBBER ON DEFAULT OF BROKER.

Beckhuson v. *Hamblet* (1900) 2 Q.B. 18, involved a neat point in the law of principal and agent. A broker having orders from several different customers (including the defendant) to purchase shares for them on the stock exchange, purchased from the plaintiffs who are stock jobbers, 360 shares, 210 of which the brokers apportioned to the defendant in respect of the shares he had ordered to be bought. Before the settling day the brokers failed, and were declared defaulters in accordance with the rules of the stock exchange, and their transaction with the plaintiffs was closed, and the price of the shares was fixed at the price then current. The plaintiffs having ascertained that the broker was acting for the defendant as regarded the 210 shares, tendered those shares to the defendant and demanded payment, and on his refusal, sold them on the settling day and brought the present action for the difference between the contract price and the selling price. The action failed, Kennedy J. holding that as the brokers had lumped the defendant's order with others, and had contracted in a single transaction for the purchase of a larger number of shares that he was authorized to purchase for the defendant, there was no contractual relation between the plaintiffs and defendant, which would support the action. In other words he held that the contract made by the broker was his contract and not a contract of either of his customers.

CONTEMPT OF COURT—SCURRILOUS ABUSE OF JUDGE AS A JUDGE.

The Queen v. *Gray* (1900) 2 Q.B. 36, was a summary proceeding instituted by the Attorney-General against the defendant for contempt of court in publishing in a newspaper an article containing scurrilous abuse of a judge, with reference to his conduct as a judge in a judicial proceeding which had terminated. The facts

were that Darling J. when presiding at the assizes at which a man named Wells was about to be tried before him for publishing indecent and obscene words, made some observations in court deprecating the publication in the newspapers of particulars of the case, and warning the public of the consequences of so doing, and stating that he hoped and believed his advice would be taken, but if it was disregarded he should make it his business to see that the law was enforced. On 16th March, after the trial of Wells, which had resulted in his conviction and after sentence passed, and whilst the assizes were still continuing and Darling J. was still sitting, the defendant published the article in question. Whereupon the Attorney-General obtained an order calling on the defendant to answer for his contempt. On the return of the order it was admitted that the article was a contempt of court, and the defendant filed an affidavit expressing his regret and apologizing to the court; he was, nevertheless, ordered by the court (Lord Russell, C.J., and Grantham, and Phillimore, JJ.) to pay a fine of £100 and £25 costs, and to be detained in custody until payment. The Reporter adds a note that the practice in such cases has recently been to obtain an order directing the accused to appear and answer for his contempt, referring to *Onslow and Whalley's Case* L.R. 9 Q.B. 219, and he adds "the procedure by writ of attachment seems to have been superseded."

PRACTICE—COSTS OF REFERENCE—REFERENCE OF ACTION TO ARBITRATION—SCALE OF COSTS.

In *Street* v. *Street* (1900) 2 Q.B. 57, the Court of Appeal (Collins and Romer L.JJ.) has given what Romer L.J. calls a "coup de grace" to *Moore* v. *Watson* (1867) L.R. 2 C.P. 314. The point of practice involved was simply this: The action was brought to recover £90, the alleged balance of a builder's account, and, on the application of the plaintiff, had been referred to an arbitrator agreed on by the parties. The costs of the action were ordered to abide the event, and the costs of the reference and award were in the discretion of the arbitrator. The arbitrator awarded the plaintiff £33 and ordered the defendant to pay the costs of the reference and award, but gave no direction as to the scale on which they should be taxed. *Moore* v. *Watson* had practically decided that, under such circumstances, the costs of the reference and award are in effect part of the costs of the action, and are taxable

on the same scale as the costs of the action. The correctness of that decision had been questioned in a late case, and it was also opposed to earlier decisions which were not referred to. The taxing officer taxed the costs of the reference on the High Court scale, and Bingham J. had confirmed his ruling. The Court of Appeal being of opinion that *Moore* v. *Watson* ought not to be followed, dismissed the appeal from Bingham J. Romer L.J. says that the arbitrator having simply awarded costs the proper inference is that he intended to award costs on the ordinary scale in High Court actions, namely, on the High Court scale, and not that he intended to award them on any special scale, such as the County Court scale.

BICYCLE—CARRIAGE—TOLL.

Cannan v. *Abingdon* (1900) 2 Q.B. 66, is a case which turns upon the question whether a bicycle is a "carriage" within the meaning of a Turnpike Act, and as such, liable to tolls. Bingham and Phillimore JJ. determine that question in the affirmative.

PARTY WALL—ADJOINING OWNERS—IMPLIED CONTRACT TO PAY HALF COST OF PARTY WALL.

Irving v. *Turnbull* (1900) 2 Q.B. 129, was an action brought by the plaintiff to restrain the defendants from using a certain wall as a party wall, or in the alternative to compel the defendants to pay half its value. The plaintiff had purchased the land on part of which the wall was built, as part of a building estate, subject to certain building conditions, one of which was, that the purchaser first building a party wall should be repaid half its current value by the purchaser of the adjoining site. The defendants purchased the adjoining site subject to the like conditions and made use of the wall built by the plaintiffs, predecessor in title, as a party wall. The defendants admitted that they were bound to pay some one for half the value of the wall, but denied any privity of contract with the plaintiff, or any liability to pay him. Darling and Channell JJ. were of the opinion that there was an implied contract on the part of the defendants to pay the plaintiff half the current value of the wall in question and affirmed the judgment of the County Court in his favour.

FRAUDULENT PREFERENCE—BANKRUPTCY—PAYMENT TO CREDITOR WITH VIEW TO PREFER SURETY.

In re Warren (1900) 2 Q.B. 138, the question determined is a simple one. A bankrupt was liable on a promissory note, jointly and severally with two other persons who were mere sureties; being insolvent, and with the view of relieving the sureties, she paid the note to the holder. The assignee in bankruptcy claimed that this payment was a fraudulent preference of the sureties, from whom he sought to recover the amount of such payment, but Wright and Phillimore JJ. held that to constitute a fraudulent preference under the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 48, the payment must be made to the creditor intended to be preferred.

DISCOVERY—PRODUCTION OF DOCUMENTS—COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT—PRIVILEGE—EVASION OF STATUTE.

The Queen v. *Bullivant* (1900) 2 Q.B. 163, deals with a point of practice. The action was in the nature of an information by a colonial Attorney-General to recover succession duty on certain property under a Colonial Act. The information claimed that certain conveyances had been made by the deceased for the purpose of evading the Act. On the examination of the defendant for discovery he admitted that he had in his possession, as solicitor for the deceased, certain books in which were entered instructions received from the testator in reference to the impeached conveyances which he objected to produce as being privileged. On application to Mathew J. he was ordered to produce the book in question, and the Court of Appeal (Collins and Romer, L. JJ.) sustained the order, holding that privilege cannot be claimed for communications between solicitor and client which came into existence for the purpose of the client obtaining professional advice as to how to evade the statute, the evasion of which is the ground of the action in which the discovery is sought.

LIBEL—PUBLICATION OF LIBEL—CIRCULATING LIBRARY—BOOK CIRCULATED IN IGNORANCE OF LIBEL THEREIN CONTAINED—NEGLIGENCE.

Vizetelly v. *Mudie's Library* (1900) 2 Q.B. 170, was an action of libel against the Mudie's Library Company for circulating a book containing a libel on the plaintiff. One of the two managing directors of the company was called as a witness for the defence

and denied any knowledge when the company circulated and sold the book in question that it contained any libel on the plaintiff, and he stated that the books which they circulated were so numerous that it was impossible, in the ordinary course of business, to have them all read, and they were guided in their selection of books by the reputation of the publishers and the demand for the books. He said there was no one else in the establishment besides himself, who exercised any supervision, and that they did not keep a reader; that on one or two occasions they had had books which contained libels, that that would occur from time to time; that no previous action for libel had been brought, and that it was cheaper to run the risk of an action than to keep a reader. On this evidence the jury found the defendants guilty and gave a verdict against them for £100 damages. On a motion by the defendants for judgment, or a new trial, the Court of Appeal (Smith, Williams and Romer, L.JJ.) held that the verdict was warranted by the evidence, and the application of the defendants was accordingly dismissed.

COSTS—PROBATE ACTION—SEVERANCE OF DEFENCES.

In *Bagshaw* v. *Pimm* (1900) P. 148, the action was brought in the Probate Division to establish the third, and alternatively the second, will of a testator; the defendants to the action were the executors of the first will and two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The legatees and executors appeared by separate counsel, and the first will was established. Barnes, J., who tried the action, on appeal from the taxing officer, considered that the defendants ought not to have severed and gave them only one set of costs, and such extra costs as were incurred by the legatees in getting up evidence material to the case. On appeal, however, the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) thought that as the executors might have preferred to compromise on the footing of the second will being established, there was such a divergence of interest between them and the legatees as to justifying the latter appearing by separate counsel, and that therefore they were entitled to full costs. The rule laid down by Boyd C. in *Logan* v. *Herring*, 19 P.R. 169, would seem to need modification.

Correspondence.

SUPREME COURT APPEALS.

To the Editor CANADA LAW JOURNAL.

Dear Sir,—In a late number of your journal I endeavoured to show concisely the opinions of the Judges of the Supreme Court in *Farquharson* v. *Imperial Oil Co.*, as to the power of the Court or a judge to grant leave to appeal per saltum from a judgment of a Divisional Court from which there is no appeal as of right to the Court of Appeal. At page 362 of the current volume of your journal, you advance the opinion that the statute 62 Vict., 2nd Sess., c. 11, s. 27 settles the question in favour of the right to grant such leave. As the question is important perhaps you will grant me the privilege of space enough in your journal to point out why I consider the position you take an untenable one.

The judges who held that no leave to appeal could be given in this case, did so on the ground that under s. 26 of the Supreme Court Act, such leave can only be granted where the parties have an absolute right to go to the Court of Appeal, but it is advisable to dispense with the exercise of such right and allow an appeal direct. That section provides that an appeal shall lie only from the Court of final resort for the Province, but the Court or a judge may grant leave for an appeal from the Court of original jurisdiction "without any immediate appeal being had to any intermediate Court of Appeal in the Province." Following the terms of the statute, in this case, then, the order was to grant leave to appeal from the judgment of the Divisional Court without an intermediate appeal being had to the Court of Appeal.

Judge Taschereau was of opinion that to grant leave in the Farquharson case would have the effect of striking out of the section the words above quoted. Then, assuming that he was not aware of the section referred to in your editorial, could its terms change his opinion? Admitting that an appeal will always lie to the Court of Appeal by leave, is s. 26 satisfied by dispensing with such potential right? If application for leave to appeal is made and refused by the Court of Appeal what is dispensed with by the order under s. 26? Surely nothing more than if the application could not have been made.

Judge Taschereau points out another objection to granting leave in such a case. By 60 & 61 Vict., c. 34 (Dom.), there is a limitation on appeals to the Supreme Court from judgments of the Court of Appeal, but the limitation would not extend to appeals from Divisional Court judgments. Then the power of granting leave to appeal to the Court of Appeal might work this way. If the leave were granted the case might not be appealable under 60 & 61 Vict., c. 34. If it were refused leave to appeal per saltum might be given in spite of the Dominion legislation.

An article in a late number of the *Canadian Law Times* on the Farquharson case states that four judges of the Supreme Court must be held to favour the right to grant leave to appeal per saltum. That is not so. The jurisdiction of the Court was settled by a ruling that the exercise of judicial discretion by Mr. Justice Gwynne in Chambers would not be interfered with, which is all that King and Girouard, JJ., can be held to assent to. If a case should come before the Court in the same way hereafter, there would be nothing in that ruling to prohibit a motion to quash for want of jurisdiction or to prevent either of these two judges giving effect to such motion.

For the same reason that the *Law Times* is in error your own editorial is wrong in assuming that the Court agreed with Gwynne, J., that in the Farquharson Case the Court of Appeal could not have granted the leave to appeal asked for. The grounds on which Judge Gwynne proceeded were not at all considered by the full court.

C. H. MASTERS.

Ottawa, July 6.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] HIBBEN *v.* COLLISTER. [June 12.

Partnership — Construction of deed—Continuance after expiry of term—Deceased partner—Purchase of share—Discount—Goodwill.

A deed providing for a partnership during seven years from its date provided for purchase by the survivors of the share of a deceased partner with a special provision that if one partner, K., should die, the value of his share should be subject to a discount of 20 per cent. After the seven years had expired the partners continued the business by verbal agreement for an indefinite period, and while it so continued K. died.

Held, varying the judgment of the Supreme Court of British Columbia, that even if the parties had not admitted that the business was continued under the terms of the partnership deed such terms would still govern as there was nothing in it repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K., and to be allowed the deduction of 20 per cent. therefrom as the deed provided; and that in the absence of any stipulation in the deed to the contrary the goodwill of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. Appeal dismissed with costs.

Aylesworth, Q.C., for appellant. *Riddell*, Q.C., for respondent.

Ont.] CASTON *v.* CITY OF TORONTO. [June 12.

Assessment and taxes—Ontario Assessment Act, R.S.O. 1887, c. 193, s. 135—Imperative or directory—Failure to distrain—Enforcing payment in subsequent year.

The provisions of s. 135 of the Ontario Assessment Act, R.S.O. 1887 c. 193, in respect to taxes on the roll being uncollectable, and what the account of the collector in regard to the same shall show on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.

Taxes on the roll not collected cannot be recovered by distress in a subsequent year, unless such arrears have accrued while the land in respect of which they were imposed was unoccupied.

Judgment of the Court of Appeal, 26 A.R. 459, 35 C.L.J. 495, affirming the judgment of a Division Court, 30 O.R. 16, 35 C.L.J. 27, affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *J. W. McCullough*, for respondent.

Ont.] DUEBER WATCH CASE CO. *v.* TAGGART. [June 12.

Bankruptcy and insolvency—Assignments and preferences—Sale of assets—Extinguishment of debt—Composition—Release of debtor.

T. and C., doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the plaintiffs, creditors, to pay off a chattel mortgage on the stock and a composition of 25 cents on the dollar of unsecured claims, the plaintiffs to receive their own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the plaintiffs, and the arrangement was carried out, the plaintiffs eventually re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action against T. & Co. on the original debt:—

Held, affirming the judgment of the Court of Appeal, 26 A.R. 295, 35 C.L.J. 387, that the original debt was extinguished, and C. was released from all liability thereunder.

C. Millar, for appellants. *W. Nesbitt*, Q.C., for respondents.

Que.] TALBOT *v.* GUILMARTIN. [June 12.

Appeal—Jurisdiction—Action for separation de corps—Money demand.

In an action by a wife for separation de corps for ill treatment the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property.

Held, that no appeal would lie to the Supreme Court from the decree for separation; *O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, followed; and the money demand in the declaration being only incidental to the main cause of action could not give the court jurisdiction to entertain the appeal. Appeal quashed with costs.

Stuart, Q.C., for motion. *Fitzpatrick*, Q.C., contra.

N.S.] STARR, SON & CO. *v.* ROYAL ELECTRIC CO. [June 12.

Principal and agent—Sale by agent—Commission—Evidence.

The appellants dealt in electrical supplies at Halifax, and had at times sold goods on commission for the respondents, a company manufacturing electrical machinery in Montreal. In 1897 the appellants telegraphed the respondents as follows: "Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply to this was: "Can furnish Windsor 180 Killowatt Stanley two phase complete exciter and switchboard, $4,900, including commission for you. Transformers, large sizes, 75 cents per light. . . ." The manager of the appellants went to Windsor, but could not effect a sale of this machinery. Shortly afterwards a travelling agent of the respondents came to Halifax and saw the manager, and they worked together for a time

trying to make a sale, but the agent finally sold a smaller plant to the Windsor company for $1,800. The appellants claimed a commission on this sale, and on its being refused brought an action therefor.

Held, affirming the judgment of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that the appellants were not employed to effect the sale actually made; that the respondents offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission.

Cahan, for appellants. *Belcourt*, Q.C., for respondents.

N.S.] SUMNER *v.* COLE. [June 12.

Contract—Offer and acceptance—Telegrams—Completion—Mutuality.

S., a grain merchant in Truro, N.S., telegraphed to C., a grain merchant in Toronto: "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." C. replied next day: "White oats 32 half, Truro, bags two cents a bushel extra." S. telegraphed on the same day: "How much less can you do mixed oats for? Might work white at 32, but not any more. Answer." C. answered: "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding for white. Highest freight, Truro freight two half over Halifax. Offer white 32 hulled, 34 half in 4 bushel bags, Truro." Next day S. wired: "I confirm purchase 20,000 bushels oats, white, at thirty-two, mixed at thirty-one half bagged even four bushels in my bags. Confirm. May get order five cars more in bulk." And he confirmed it also by letter. C. answered telegram at once: "Cannot confirm bagged. Am asked half cent for bagging. Bags extra." S. replied: "All right. Book order. Will have to pay for bagging." C. wired on the same day: "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired: "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day: "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged, parties demanded half cent for bagging. They sold before your second wire arrived yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered, and S. brought an action for damages.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover. (See 35 C.L.J. 455)

W. J. O'Connor, for appellant. *Borden*, Q.C., for respondent.

Que.] ASSOCIATON PHARMACEUTIQUE *v.* LIVERNOIS. [June 21.

Appeal—Action for penalties—Plea of unconstitutionality of act—Judgment on other grounds.

The Association Pharmaceutique sued L. for $325, penalties for selling drugs without license. L. pleaded 1. General denial. 2. That Pharmacy Act was ultra vires. The action was dismissed by the Superior Court for want of proof of the illegal selling alleged and this was affirmed by the Court of Queen's Bench. On motion to quash an appeal to the Supreme Court,

Held, STRONG C. J. and GWYNNE, J. dissenting, that if the Court should find error in the judgment appealed from the question of ultra vires pleaded by L. would have to be dealt with and the case was therefore appealable under s. 29 (a) of the Supreme Court Act, though no appeal would lie if this plea were not on the record. Motion to quash refused with costs.

Fitzpatrick, Q.C., for the motion. *Lajoie*, contra.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] EVES *v.* BOOTH. [June 29

Dower—Husband and wife—Separation deed.

A covenant in a separation deed by trustees on behalf of the wife, that the wife will whenever called upon release her dower in any lands which the husband may acquire, is a bar to a claim by her to dower in lands afterwards acquired by him. Judgment of a Divisional Court, 35 C.L.J. 449; 30 O.R. 689, affirmed.

George Wilkie and *J. E. Irving*, for appellant. *A. Hoskin*, Q.C., for respondent.

From Meredith, C.J.] [June 29.

HORSMAN *v.* CITY OF TORONTO.

Assessment and taxes—Distress—Change of ownership—Chattel mortgage—Purchase from mortgagee.

Goods purchased from the chattel mortgagee thereof are not "claimed by purchase, gift, transfer or assignment" from the mortgagor within the meaning of R.S.O. c. 224, s. 135, sub-s. 4 (*b*), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor. Judgment of MEREDITH, C.J., 31 O.R. 301, ante p. 29, affirmed.

Fullerton, Q.C., for appellants. *Brewster*, Q.C., and *Heyd*, Q.C., for respondent.

From Street, J.] CLARK *v.* BELLAMY. [June 29.

Executors and administrators—Negligence—Agent's fraud—Limitation of actions.

The Trustee Limitation Act, R.S O. c. 129, s. 32, protects executors where relying in good faith on the statement of their testator's solicitor that he has in his hands securities sufficient to answer a fund they are directed by the will to invest for an annuitant. They distribute the estate, and it is afterwards found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had in fact at the time of the representation no securities or money in his hands.

Payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, do not keep alive the right of action against the exectors. Judgment of STREET, J., 30 O. R. 532, reversed.

S. H. Blake, Q.C., and *St. John*, for appellant Riseborough. *Harding*, for appellant Bellamy. *Clute*, Q.C., and *Skeans*, for respondent.

STEWART *v.* SNYDER. [June 29.

Executors and administrators—Notice to claimants—R.S.O. c. 129, ss. 32, 38—Limitation of actions—Trustee Limitation Act—Reversionary interest—Trustee Relief Act—62 Vict., c. 15 (O.).

A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date" is not a sufficient notice within s. 38 of R.S.O. c. 129 to protect the executors from liabillty for claims not brought to their knowledge until after the estate has been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee.

Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession.

After judgment had been given in the court below against the executors in this case the Act for the Relief of Trustees, 62 Vict., c. 15 (O), was passed:

Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants.

Du Vernet, for appellants. *M. Houston*, and *R. M. Thompson*, for respondents.

From Boyd, C.] [June 29.

HIGGINS *v.* TRUSTS CORPORATION OF ONTARIO.

Executors and administrators—Mortgage—Purchaser of equity of redemption—Indemnity—Death of mortgagor—Release of purchaser.

The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage. Judgment of BOYD, C., 35 C.L.J. 453; 30 O.R. 684, affirmed.

R. U. Macpherson, and *G. C. Campbell*, for appellant. *Aylesworth*, Q.C., and *J. H. Moss*, for respondents.

From Divisional Court.] [June 29.

MYERS *v.* BRANTFORD STREET RAILWAY.

Railways—Street railways—Negligence—Frightening horses.

An appeal by the defendants from the judgment of a Divisional Court (ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.) reported 31 O.R. 309, ante p. 67, was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS and LISTER, JJ. A., on the 18th of May, 1900, and on the 29th of June 1900, was allowed with costs, the court agreeing with the reasons given by STREET, J., in his dissenting judgment in the court below.

J. A. Patterson, for appellants. *Brewster*, Q.C., for respondent.

From Street, J.] REGINA *v.* MURDOCK. [June 29.

Criminal law — Conviction — Certiorari — Amendment — Criminal Code, s. 889—Indian Act.

Under s. 889 of the Criminal Code, the Court, if a conviction under any Act to which the procedure in the Code applies, is brought up by certiorari (whether in aid of a writ of habeas corpus or on motion to quash the conviction is immaterial) may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary or modify the decision.

A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately and by substituting for imprisonment for six months, and a fine of $50.00 and $5.00 costs or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months, and a fine of $50.00 and $5.00 costs or imprisonment for a further term of three months in default of payment of the fine and costs. Judgment of STREET, J., affirmed.

Du Vernet, for the prisoner. The Crown was not represented.

From Armour, C.J.] FILE *v.* UNGER. [June 29.

Master and servant—Parent and child—Negligence.

The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf.

The father of a lad of twenty, living at home, was held not liable therefore for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horses and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. Judgment of ARMOUR, C.J., reversed.

Thomson, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

From Ferguson, J.] CULBERTSON *v.* MCCULLOUGH. [June 29.

Estate—Estate tail—Bar of entail—Mortgage—Will—Construction.

By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within a few days of its execution and each containing the usual proviso that it was to be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered and there was no evidence whether either mortgage had in fact been paid:—

Held, per OSLER, and MOSS, JJ. A., that under this will the son did not take an estate tail. MACLENNAN, and LISTER, JJ. A., contra.

But *held*, also, per Cur., that even if the son did take an estate tail that estate tail had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages.

Lawlor v. *Lawlor*, 10 S.C.R. 194, and *Plomley* v. *Felton*, 14 App. Cas. 61, applied. Judgment of FERGUSON, J., affirmed.

E. Gus Porter, for appellants. *Aylesworth*, Q.C., and *W. B. Northrup*, for respondent.

From Divisional Court.] KIMBALL *v.* COONEY. [June 29.

Will—Construction—Annuity—Interest on fund.

A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make $200 of interest per year, said amount of $200 to be paid to my beloved wife each and every

year of her life, said $200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce $200 a year :—

Held, affirming the judgment of a Divisional Court, that the widow was entitled to $200 a year, and to use the corpus for that purpose.

Hughson, for appellants. *Fish*, for respondent.

From Divisional Court.] REGINA *v.* DAVEY. [June 29.

Criminal law—Trespass—Damage to property—"Fair and reasonable supposition of right—Water and watercourses—Access to shore—Crown grant.

The honest belief of a person charged with an offence under R.S.O. c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property) that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief.

The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats and persons," gives a right of access only from the water to the shore, and in this case a person how had broken down fences and had driven across private property to the shore was held not to be able to successfully assert, when charged under R.S.O. c. 120, s. 1, and the Criminal Code, s. 511, that he "acted under a fair and reasonable supposition of right" in so doing. Judgment of a Divisional Court affirmed.

Clute, Q.C., and *G. F. Ruttan*, for appellants. *Aylesworth*, Q.C., and *J. H. Madden*, for respondent.

From Armour, C.J.] [June 29.

WINTEMUTE *v.* BROTHERHOOD OF RAILROAD TRAINMEN.

Insurance—Life insurance—Benevolent society—Beneficiary certificate—Forfeiture—Non-payment of dues—Rules—Conditions—60 Vict., c. 36, s. 144 (O.).

The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this province :—

Held, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments and compliance with certain conditions, to certain pecuniary benefits were not

subject to the provisions of s. 144 of the Ontario Insurance Act, 60 Vict., c. 36.

Held, also, that even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum, but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the section and that the conditions of the constitution must be read into it in determining its validity. Judgment of ARMOUR, C.J., reversed.

Clarke, for appellants. *Davis*, for respondent.

HIGH COURT OF JUSTICE.

Rose, J.] ROSS *v.* THE QUEEN. [June 13.

Succession Duty Act—Deduction of debts—Compromise of claim by executors—R.S.O. c. 24, s. 3, sub.-s. 3.

Held, that for the purpose of arriving at the aggregate value of the property of a deceased person under s. 3, sub.-s. 3 of the Succession Duty Act, R.S.O. c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking; and the estate on which the duty is to be paid is the surplus estate after payment of debts.

Held, also, that a certain sum bona fide paid by executors for the purpose of settling a claim against them as such, must be considered a debt for the purpose of administration and of ascertaining the amount of succession.

Macdonald, Q.C., for petitioner. *J. R. Cartwright*, Q.C., contra.

Rose, J.] IN RE SEBERT *v.* HODGSON. [June 13.

Division Court Act—Amendment at trial—Endorsement on summons beyond jurisdiction—Prohibition.

Motion for prohibition.

Held, that a Division Court Judge has powers to allow a plaintiff at the trial to amend his particulars and substitute for a claim beyond the jurisdiction a claim within the jurisdiction; and where the defendant does not insist on re-service of the summons, but proceeds to answer the claim, and the trial proceeds, and the Judge finds the facts so as to shew jurisdiction, and the judgment entered is within the jurisdiction of the Court, prohibition should not be granted.

R. McKay, for defendant. *W. E. Middleton*, for plaintiff.

Rose, J.] SALE *v.* LAKE ERIE & DETROIT R. W. CO. [June 15.

Words "in a summary way"—Reference of matters in dispute in an action—Right of appeal.

Proceedings in an action upon a solicitor's bill were stayed upon a certain agreement being entered into between the parties, whereby it was provided that evidence as to services rendered and disbursements made was to be given to a certain accountant named, and, "in case of dispute as to services rendered or disbursements made, the matters disputed are to be referred in a summary way to F. E. Marcon, Deputy-Clerk at Windsor, under R.S.O. c. 174 for decision."

Held, that by "a summary way" the parties meant that the reference was to be without ceremony or delay, the words "under R.S.O. c. 174" merely introducing the procedure under that Act (the Act respecting solicitors), but not to be construed as providing for an appeal.

Anglin, for plaintiff. *W. H. Blake*, for defendants.

Armour, C.J., Street, J.] [July 3.

IN RE TOWNSHIPS OF METCALFE, ADELAIDE AND WARWICK.
IN RE TOWNSHIPS OF COLCHESTER NORTH, GOSFIELD NORTH.

Costs—Scale of—Appeal from judgment of Drainage Referee.

Having regard to ss. 111, 112, and 113 of the Municipal Drainage Act, R.S.O. c. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Court applies not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts' tariff.

Riddell, Q.C., for Gosfield North. *Folinsbee*, for Metcalfe. *Langton*, Q.C., for Colchester North. *C. A. Moss*, for Adelaide and Warwick.

Armour, C.J., Falconbridge, J., Street, J.] [July 3.

BABCOCK *v.* STANDISH.

Costs—Scale of—County Court—Payment into Court—Sum within competence of Division Court—Acceptance by plaintiff—Order for set-off—Finality—Appeal.

The plaintiff in an action in a County Court claimed $140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court $95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff.

Held, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge.

Held, also, that the order of the Judge was in its nature final, and therefore appealable under s. 52 of the County Courts Act, R.S.O. c. 55.

W. H. Blake, for plaintiff. *W. E. Middleton*, for defendant.

Street, J.] ARMSTRONG *v.* JOHNSTON. [July 3.

Bankruptcy and insolvency—Preference—Promise to give security—Presumption — Rebuttal — Payment — Transfer of security — Cheque — Promissory notes—Discount by third person.

In April, 1898, a firm of traders, desiring to purchase goods, obtained from a bank accommodation to the extent of about $8,200 for the purpose of buying them, upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the parties; they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly $11,000, their liabilities being about $19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, $1,000 in cash, $5,000 by a cheque to their order and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and the notes, the latter being at his request indorsed and discounted by a stranger for him, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors; and this action was afterwards brought to recover from the defendant the amount applied in retiring the notes, upon the ground that he had been unjustly preferred.

Held, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference: *Webster* v. *Crickmore*, 25 A. R. 97; *Ex p. Fisher*, L.R. 7 Ch. 636; Cassels's Assignments Act, 3rd ed., p. 14.

The payment of $1,000 in cash to the defendant could not be attacked, and that sum should be treated as having formed part of the sum of $5,200 paid to retire two of the notes.

The $5,000 cheque transferred to the defendant was not a payment in cash but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm; *Davidson* v. *Fraser*, 23 A.R. 439.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself: *Botham* v. *Armstrong*, 24 Gr. 216; *Churcher* v. *Cousins*, 28 U.C.R. 540.

Gibbons, Q.C., for plaintiff. *Magee*, Q.C., for defendant.

Rose, J.] KIRBY *v.* RATHBURN CO. [July 4.

Company — Winding-up — Mortgage to creditor — Setting aside — Insolvency — Knowledge — "May be set aside" — Presumption — Rebuttal — R.S.C. c. 129, ss. 68-71.

A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R.S.C. c. 129.

Held, 1. Notwithstanding the fact that the mortgage was given upon demand of the mortgagee, the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should therefore be set aside, that being the effect of the words "may be set aside."

2. The words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," are not applicable to the giving of a mortgage as security for a past debt.

3. None of the other sections relied on apply so as to avoid the mortgage; and, following *Lawson* v. *McGeoch*, 22 O.R. 474; 20 A.R. 464, and distinguishing *Webster* v. *Crickmore*, 25 A.R. 97, the presumption referred to in s. 71 is rebuttable.

Forde, for plaintiffs. *Hogg*, Q.C., for defendants

Armour, C.J., Falconbridge, J., Street, J.] [July 9.

TUFTS *v.* PONESS.

Sale of goods—Non-acceptance—Contract—Tender—Waiver—Damages—Price of goods—Property not passing—Possession—Judgment—Payment into Court.

On the 30th May, 1899, the plaintiff and defendant agreed in writing for the sale by the former to the latter of certain goods for $175, payable $30 on receipt of bill of lading for or tender of the goods, and the balance to be paid in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible. On the 6th June the plaintiff sent the defendant an invoice of the goods. On the 14th June the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and draft and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refused to take them, giving as a ground that the season for use of them had passed, and saying that they were now at the station at the plaintiff's risk.

Held, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance was waived: *Ripley* v. *McClure*, 4 Ex. 345; Benjamin on Sales, 7th Am. ed., 789.

Held, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff had done all that he was required by the contract to do to entitle himself to payment of the price. The stipulation by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of posession to the defendant and the fact that the plaintiff had given up possession to the defendant, as far as he could, took the case out of the general rule which prevents a vendor from recovering the price where he has not parted with the property in the goods.

Held, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goods.

F. E. Hodgins, for defendant. *F. A. Anglin*, for plaintiff.

Meredith, C.J.] GEARING *v.* ROBINSON. [July 13.

Costs—Mechanic's lien—Appeal—R.S.O. c. 153, ss. 41, 42, 45.

Secs. 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursments, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action.

Semble, that the costs of such an appeal are within the scope of s. 45.

Du Vernet, for plaintiff. *W. N. Ferguson*, for defendants.

Meredith, C.J., Falconbridge, J.] [July 18.

PLESTER *v.* GRAND TRUNK R. W. CO.

Railways — Farm crossing—51 Vict., c. 29, s. 191—"Farm purposes"—Injury to stranger—Duty—51 Vict., c. 29, s. 289.

The defendants having, in compliance with the requirements of s. 191 of the Railway Act of Canada, 51 Vict., c. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway.

Held, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner.

Nesbitt, Q.C., and *H. E. Rose*, for defendants. *Buckingham*, for plaintiff.

COUNTY COURT OF THE COUNTY OF YORK.

WARWICK *v.* THE COUNTY OF SIMCOE.

Municipal law—Liability of county for cost of advertising list of lands for sale for arrears of taxes—Persona designata—Mun. Act, ss. 271, 274.

Held, 1. A county municipality is not liable for the cost of advertising the county treasurer's list of lands for sale for arrears of taxes, although sent to the plaintiff by the county treasurer.

2. The county treasurer does not act as an officer of the corporation in relation to tax sales, and the duties connected therewith are not within the scope of his authority as county treasurer. He is merely persona designata on behalf of the local municipalities, and a creditor must look to him personally.

[TORONTO, FEB. 26, MCDOUGALL, Co. J.

This was an action brought to recover the amount of an account for publishing an advertisement of the County Treasurer's list of lands in the

County of Simcoe, for sale for arrears of taxes in the year 1896. The advertisement was forwarded to the plaintiffs by S. J. Sanford, treasurer of the county of Simcoe, in a letter dated 20th October, 1896. The letter directed the advertisement to be inserted the usual number of times, and ordered certain extra copies. It was written on paper with the printed heading, "County of Simcoe, County Treasurer's Office," and was signed S. J. Sanford, "Treasurer County of Simcoe," the last three words being in print. The advertisement was duly inserted, the charge therefor being entered in the plaintiffs' books to the debit of S. J. Sanford, Barrie. Accounts were afterwards rendered, made out and mailed to him. Nothing appears in the plaintiff's books, or in the several accounts produced as rendered, to indicate the official position or office held by Sanford. In 1897 Sanford, who was in fact treasurer for the county of Simcoe, absconded from Ontario, a defaulter for a large amount of the defendants' funds.

Evidence was given to show that in 1894, 1895, and 1896 Sanford paid former accounts to the plaintiffs for similar advertisements by issuing cheques signed by himself and countersigned by one R. H. Stewart (a gentleman said to have been appointed by the county council to countersign the treasurers' cheques, and who was also assistant treasurer), and drawn upon a bank account kept in the Bank of Toronto in the defendants' name.

J. W. Curry for the plaintiff: The defendants are liable to pay, because Sanford, as county treasurer and as an officer of the defendants, gave the order for the services charged for; that to direct the publication of this advertisement was within the scope of his authority as county treasurer, and constitutes it a debt payable by the defendants. The account not having been paid by Sanford it is recoverable from the defendants. He relied strongly upon ss. 271 and 274 of the Assessment Act as establishing the liability of the county.

F. E. P. Tepler, Q.C., for the defendants: In taking any proceedings in connection with the sale of lands for taxes, the county treasurer is a statutory officer, and does not act as an official of the county, or for them in their corporate capacity. With regard to the moneys passing through his hands arising from such sales, he is bound to account for them not to the county, but to the various local municipalities who have forwarded to him their several lists of lands liable to be sold for arrears of taxes; that as such statutory officer, and pursuant to the various provisions of the Assessment Act he must advertise and sell for the sole benefit and advantage of such local municipalities. With respect to the costs of advertising, etc., and his own commission (fixed by the statute and connected with such sale proceedings), he is directed by the statute to proportion the amount of such costs and commission over all the lots in his list to be sold, and the proportion so charged against each lot is directed to be added to the arrears of taxes, and so far as the owner of the land is concerned such costs and charges are to be treated as part and

parcel of the tax arrears. Except for the provision made by ss. 271 and 274, the county would not be liable even to the local municipalities for the proceeds of tax sales coming into the county treasurer's hands, should they not be duly accounted for by the treasurer. The fact that the treasurer keeps track of his dealings with these various local municipalities, in regard to the land sales in the books of the county does not create any liability against the county, or in any way alter the status of the county treasurer qua these tax sales. The county is not entitled to any of the proceeds of such sales, taxes, costs or commissions. The county does not pay and is not bound to pay the treasurer out of county funds for any of his services in connection with such sales. If in the course of realizing for a local municipality the taxes forwarded to him, for collection according to law, the result of a sale did not produce sufficient money to pay said arrears, and the proportion of the cost and charges attending such sale, the local municipality would be charged with the deficiency. The county treasurer might, and did in some instances in the County of Simcoe, recoup himself from county funds for such deficiency, but the payments so made out of county funds were in all cases charged against the local municipality as a disbursement on their account and would appear in the general account in the county's ledger relating to such local municipality. Nowhere in the Assessment Act is any duty cast upon the county by name or inference to conduct these sale proceedings for taxes. No county property is sold. No benefit directly or indirectly accrues to the county as a corporation.

McDOUGALL, Co. J.—It appears to me that the county treasurer is not acting as an officer of the corporation in relation to tax sales nor is the act a corporate act. The legislature, instead of leaving to each local municipality the duty of realizing the arrears of taxes existing against the lands in their municipality to their own officers, have named a statutory officer to conduct such sales. They could have named the Sheriff or the Clerk of the Peace as the official to perform these duties. They, however, selected the county treasurer as an individual by name of his office. They could, had they desired, directed that the county through their officials should perform these duties, but they have not chosen to do so. It appears to me that by selecting an officer of the defendants for this purpose the legislature has not imposed any legal liability upon the county for the acts of such officer in connection with the performance of the duties directed by the statute except the liability imposed by s. 271. That section reads as follows:—

"Every county, city and town shall be responsible to Her Majesty and to all other persons interested that all moneys coming into the hands of the treasurer of the country, city or town in virtue of his office shall be by him duly paid over and accounted for according to law."

This means, in my opinion, that any person paying the treasurer money is entitled to have it applied according to law. The taxpayer, the local municipalities, private individuals paying money to the treasurer for

the use of the county or for the use of the local municipalities are entitled to have it reach its proper destination and if the treasurer fails to pay over the amount so placed in his hands the county must make good the default; but a creditor with a claim against the treasurer as a statutory officer is not, in my judgment, within the protection of this section. Section 274 appears te me to support this view, for it settles the form of action: "Any person aggrieved by the default of the treasurer may recover from the corporation of the county, city or town the amount due or payable to such person as money had and received for his use."

Now, here it could not be reasonably contended that there were any moneys in the hands of the county treasurer of the County of Simcoe which were moneys had and received for the use of the plaintiffs. The moneys in the hands of the treasurer were moneys had and received for the use of the local municipalities. They are moneys paid by taxpayers, had and received by the treasurer to be applied in payment of their taxes due the local municipalities; but the moneys collected by the treasurer for his costs of advertising and commissions were not moneys had and received for the use of the plaintiffs in the sense contemplated by s. 274. The treasurer was not bound to account for these moneys either to the local municipality or the county. It is true he was expected out of these moneys to pay any outlay made by him, or indebtedness for advertising, but the statute does not make these expenditures a charge against either the local municipality or the county. The statute authorizes the county treasurer to collect from the ratepayers in arrears for taxes an additional amount to reimburse himself for incidental disbursements in connection with the performance of his statutory duties. It evidently contemplates that he will pay these amounts in the first instance out of his own personal funds. If credit is given to him by the persons publishing the advertisements that is a matter exclusively between himself and the creditor. Creditors of that class cannot look beyond the individual authorized to make the expenditure, not as a corporation, but as persona designata.

Under sub-s. 2 of s. 184 of the Assessment Act the county treasurer is only to account to the local municipality for the full amount of the taxes paid. Sec. 181 directs him to add to the arrears published his commission or other local charges and the cost of publication. Sec. 177 directs him to include in a separate column the proportion of costs chargeable on each lot for advertising and for the commissions authorized by this Act to be paid to him. The person paying to the treasurer arrears of taxes pays two amounts —the arrears of taxes to be remitted by the treasurer to the municipality, and the proportion of costs of advertising and commissions in respect of his lot—the latter for the treasurer's personal use, to recoup him pro tanto his disbursements for the cost of advertising and for his commission for collecting the arrears due in respect of the lot that is being settled for. This commission is fixed in the statute itself by s. 196 at 2½ per cent. on all sums over $10, and a fixed sum of 25c. for $10 and under.

Dillon, in his admirable work on municipal corporations, thus describes the liability of corporations for the act of an official appointed by them to perform statutory duties:—

"It will be seen, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of respondeat superior for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation."

Par. 980 further states this doctrine: "The doctrine may be considered as established, where a given duty is a corporate one—that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, etc."

Par. 981: "The liability of the corporation for its own negligence, or for its servants', is especially clear, and, in fact, indisputable, where it has received a consideration for the duty to be performed or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit."

In *McSorley* v. *Mayor of St. John*, 6 S.C.R. 531, the whole question is very ably and fully considered as to the extent of the liability of corporations for the acts of persons appointed by them pursuant to a statute to perform statutory duties assigned by the Legislature, and although on the peculiar facts of that case the corporation were held liable by a majority of the judges, the statement of the legal principles applicable in determining the liability of a corporation for the acts of an officer, though appointed by them, for acts performed by such officer pursuant to statutory directions, as laid down by Chief Justice Ritchie in his dissenting judgment have since been approved of by our own Court of Appeal in *Seymour* v. *Maidstone*, 24 A.R. p. 376. This latter case decided that the acts of a civil engineer appointed by the county in performing certain statutory duties set out in the Ditches and Watercourses Act, R.S.O. 285, were not acts of the corporation and that the municipal corporation were not liable to the plaintiff for any irregularities or other improper performance of his duties by the engineer. Judge Osler based his judgment upon the fact that for the purposes of that act, the engineer was an independent officer though appointed by the corporation. His duties were fixed and prescribed by the statute. The council and the corporation could exercise no judgment nor give him instructions, nor have any control over his proceedings. In my view the county treasurer in conducting tax sales under the provisions of the

Assessment Act occupied a similar position though appointed to his office by the corporation. His duties in relation to tax sales were fixed and prescribed by statute. The defendants could exercise no judgment or control over his proceedings nor were these proceedings taken for their benefit, advantage or profit.

In *Black* v. *Harrington*, 12 Grant 175, Spragge, V.C., in an action to set aside a sale of land for taxes, in which the county was made a party defendant said:—"I confess I do not see how there can be any remedy over against the county. . . . . The treasurer and sheriff in so acting (conducting the sale) are the instruments for enforcing payment for the several municipalities, and for their benefit, and not for the benefit of the county. The county itself has nothing to do with the sale. Its only connection with it, if connection it can be called, is that two county officers, upon whom the legislature has cast certain municipal duties for the benefit of townships, towns, and the like, have been the instruments for the sale of land for taxes, by which sale the owner of certain land has been aggrieved. It would be an anomaly to make the county liable under such circumstances." The appeal was dismissed with costs as against the county. See also *Charlton* v. *Watson*, 4 Ont. R. 493, and *Mills* v. *McKay*, 14 Grant 602.

Counsel for the defendants rely also upon the alleged election by the plaintiffs to treat Sanford as their debtor. The plaintiffs were aware that he was county treasurer and chose to charge him personally in their books, and bill him personally with the account. It was only after Sanford's departure from Ontario that the plaintiffs changed their attitude and sought to make the defendants liable. I think that apart from the question thus raised relating to the doctrine of principal and agent a further difficulty meets the plaintiffs. A municipal corporation is a pure creature of the statute, and it is unquestionable that it is not bound by the unauthorized act of an individual whether an officer of the corporation or a mere private person. The defendants indeed might be bound by an executed contract for small matters of county business of frequent occurrence of which contract they had full knowledge and had taken or received the benefit; but was the ordering the insertion of an advertisement in a newspaper or the *Ontario Gazette*, which related exclusively to the sale of land for arrears of taxes, situate in various local municipalities a matter in which the county was at all concerned? Neither the Municipal Act nor the Assessment Act imposed any such duty upon the county. As a county they derived no benefit or advantage from its performance nor did they become entitled to any part of the money proceeds resulting from the sale. As I have observed the Legislature assigned all the duties created by the Assessment Act in connection with tax sales to a county official as persona designata. In my judgment the county was in no sense responsible for the performance of these duties, save to the extent provided for by section 271 of the Assessment Act; nor liable to provide means to enable the treasurer to carry

them out. The act generally was not one within the scope of the authority of the county treasurer as an agent of the corporation. There therefore could be no exercise of an implied authority which would bind the corporation. The evidence fails to show any express authority or direction from the corporation to make the contract. The defendants were not principals in this transaction, nor was Sanford their agent for any such purpose. If there were any principals they would be the various local municipalities whose business was being conducted by Sanford pursuant to the statutory powers and directions.

I make the further extract from Dillon, par. 460:—

"In reference to money or other property it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury or been appropriated by her, and when it is property other than money it must have been used by her or be under her control. But with reference to services rendered the case is different. Their acceptance must be evidenced by ordinance or express corporate action to that effect. If not originally authorized no liability can attach upon any ground of implied contract. The acceptance upon which alone the obligation would arise would be wanting."

In discussing the liability of a corporation upon an executed contract, not under seal, Mr. Justice Gwynne, in *Bennardin* v. *Municipality of North Dufferin* commenting on the case of *Sanderson* v. *Guardians of the St. Neot's Union*, 8 Q.B. 810 makes the following remarks:—

"The court, it is submitted, based their judgment in that case upon a sound and rational principle equally applicable in the case of every corporation and not limited to trading corporations only, namely, where work has been executed for a corporation under a parol contract, which work was within the purpose for which the corporation was created and it has been accepted and adopted and enjoyed by the corporation after its completion, it would in such case be fraudulent for the corporation while enjoying the benefit of the contract to refuse to pay for it upon the ground that the contract in virtue of which it had been executed was invalid for want of the corporate seal and that justice required that it should not be permitted to commit such a fraud." See also *Haigh* v. *North Brierly Union*, 1 E. B. & E. 873. The question of the liability of the defendants in this case is rather one of fact than of law, namely, where the work performed by the plaintiffs was incidental to the purpose for which they as a municipal corporation were created, and I am of opinion that it was not.

After a careful consideration I am of opinion that the plaintiffs have failed to establish any liability on the part of the defendants, the County of Simcoe, to pay their claim. The action will be dismissed with costs.

Province of Nova Scotia.

SUPREME COURT.

Graham, E. J., in Chambers.] [July 4.

MONTREAL TRADING STAMP CO. *v.* CITY OF HALIFAX.

Trading stamps—B. N. A. Act—Ultra vires—Provincial legislature—Property and civil rights—Threats of criminal prosecution made by police officers.

Application for a restraining order to restrain defendants from sending their police officers to call on merchants and threaten them with prosecution for violation of c. 57 of the Acts of 1899—an act against the use of trading stamps, etc., and to prevent said defendants from so prosecuting on the grounds (1) That it is illegal and against public policy for police officers to visit merchants and so threaten them, and (2) that the act was ultra vires the Provincial Legislature as not coming within the head of "Property and Civil Rights" and was a criminal act.

Congdon and *Mellish*, for the applicant. *Drysdale*, Q.C., and *W. B. MacCoy*, contra.

GRAHAM, E. J., The Legislature of Nova Scotia by c. 57 of the acts of 1899 amended the charter of the City of Halifax. Section 2 of that act is to the following effect, "No person . . . shall give, sell or dispose of trading stamps, tickets or cards to any persons . . . doing business in the City of Halifax, nor shall such persons so doing business in the City . . . . take or have in his possession any such trading stamps . . . . nor shall any vendor give, sell or dispose of any such trading stamps . . . . to any of his customers whereby such customer shall be entitled to receive for such trading stamp . . . . any money, personal property. . . . ."

The Trading Stamp Co. (so called) is prohibited from doing business in the city, etc. "Any person violating this section . . . . shall be imprisoned in the city prison for nine months with hard labor."

The plaintiff has entered into a contract with several merchants in the city to supply them with trading stamps at 50 cents per hundred, and they must supply one to their customers on demand a trading stamp for every ten cents worth of goods bought by the customer. When the customer has accumulated the book full of trading stamps, about 900, he is entitled to receive from the Trading Stamp Co. a premium in goods of sorts, that is to say triple plated silverware. The Stamp Co. prints and circulates a directory containing the names of the merchants. John F. Ryan, one of the merchants, makes an affidavit that two policemen notified him that if he did not cease giving out trading stamps or dealing with them he would be prosecuted under this act and he has ceased dealing in stamps, and

the manager of the plaintiffs alleges in her affidavit that she has contracts with some 18 firms. A directory is also produced which explains the system.

A summons was taken for an injunction to restain the city from threatening to prosecute, etc., and from inducing people to violate their contracts with the plaintiffs. A police sergeant and policeman were joined as parties. It was contended that the act was ultra vires the Provincial Legislature. In my opinion it comes within the head "Property and Civil Rights, etc.," or matters of a merely local or private nature in the Province, and is not a criminal law: *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A.C. 364; *Reg.* v. *Wason*, 4 Cart. 578; *Keefe* v. *McLennan*, 2 Cart. 400.

Then it was contended that it was illegal for the city to send a policeman to notify a citizen to desist from violating a provision of the charter or he would be proceeded against under the act. There is no evidence of any illegal act on the part of the city or policeman.

The summons will be dismissed, the costs to abide the event.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] SINCLAIR v. PRESTON. [June 20.

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

The defendant in October, 1889, contracted with one Charlebois to build certain fences and gates along the line of the C.N.W. Central Railway and, after associating the defendant Musson with him, they sublet the contract to the plaintiffs by a written agreement which provided for payment to the plaintiffs as follows: "Estimates for the said work shall be made monthly by the company to the engineer, or at such other times as said engineer shall deem reasonable and proper, and such estimates, less ten per cent. rebate, shall be paid forthwith upon same being paid to said Preston & Musson by said company, and the said ten per cent. rebate shall be paid forthwith upon the same being paid to them by the said company."

Charlebois was the contractor for the whole of the railway work being done by the company, and the evidence showed that the word "company" in the above provision was inserted by mistake for Charlebois.

After payment of two estimates for part of the plaintiffs' work difficulties arose and the company's engineer, who also acted as engineer for Charlebois, to prevent the bringing of an action, withheld further estimates, but in September, 1890, after litigation between Charlebois and the company had commenced, Preston accepted a judgment against the company

for the balance due to him by Charlebois on his fencing contract. This judgment, however, was not paid till 1898, and then it was paid without interest.

Held, 1. The agreement between the plaintiffs and defendants should be treated as if Charlebois had been mentioned in it instead of the company, and should be rectified if necessary.

2. By accepting the judgment against the company, Preston had put it out of his power to insist on getting further estimates from the engineer for his work and it should be considered, as between Preston and the plaintiffs, that he was thus paid the balance due on the contract, and the plaintiffs could then have brought their action: *Atway* v. *Huldips*, 2 Mod. 266; *Pillrow* v. *Pillrow*, 5 C.B. 439, and were therefore entitled to interest for six years and not merely from 1898, when Preston was actually paid.

3. Under 3 & 4 Wm. IV., c. 42, s. 28, the plaintiffs were entitled to interest, as the money was payable by virtue of a written instrument at a certain time within the meaning of the statute: *Duncombe* v. *Brighton Club Co.*, L.R. 10 Q.B. 371.

4. The defendant Musson was bound by Preston's action in accepting the judgment just as he would have been by a payment made by Charlebois to Preston.

Ewart, Q.C., and *Wilson*, for plaintiffs. *Elliott*, for defendants.

Province of British Columbia.

COURT OF CRIMINAL APPEAL.

REGINA v. UNION COLLIERY COMPANY. [May 8.

Criminal law— Manslaughter—Grevious bodily injury—Indictment of corporation—Punishment—Criminal Code, secs, 191, 192, 213, 252, 639 and 713.

The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway, which was used for hauling coal and carrying passengers, and that on the 17th August, 1898, a locomotive engine and several cars then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons.

The defendants were found guilty and a fine of $5,000 was inflicted by WALKEM, J., at the trial.

Held, *per* MCCOLL, C.J., and MARTIN, J., on appeal, affirming the conviction, that such an indictment will lie against a corporation under s. 252 of the Code.

Per DRAKE and IRVING, JJ.: Such an indictment will not lie against a corporation.

Secs. 191, 192, 213, 252, 639 and 713 of the Code considered.

A corporation cannot be indicted for manslaughter.

Per MCCOLL, C.J.: The words "grievious bodily injury" in section 252 have no technical meaning, and in their natural sense include injuries resulting in death.

Per DRAKE, J.: The indictment charges the Company with the death of certain persons owing to the Company's neglect of duty and is a charge of manslaughter, the punishment for which is a term of imprisonment for life, and because a corporation cannot suffer imprisonment, therefore the punishment laid down in the Code is not applicable to such a body. When death ensues the offence is no longer "grievous bodily injury," but culpable homicide.

H. A. Maclean, D.A.G., for the Crown. *Duff* and *Luxton*, for the Company.

Book Reviews.

The Division Court Act of the Province of Ontario with the General Rules and Forms. Second edition, by JAMES BICKNELL, Barrister-at-Law and EDWIN E. SEAGER: Canada Law Book Co., Publishers, 32 Toronto St., Toronto, 1900.

It is scarcely necessary to enlarge upon the value of this work to practitioners and officers of Division Courts. The first edition is so largely in use that its value is known to all.

We are glad to notice that the editors, besides reprinting the Rules by themselves, have weaved them into the text, which is a much more convenient arrangement than the former one, so that the whole law now appears in one convenient volume. One would scarcely suppose that it would take some 800 closely printed pages to give all information that might reasonably be expected in reference to these Courts, but the fact is the editors have not been content with merely giving Division Court law and practice proper, but have branched out in various ways so as to give practitioners ready access to matters which are incidentally of value to those engaged in the practice of these Courts, and which could not be otherwise obtained except by reference to numerous expensive and often unobtainable volumes The result of this is that there is in the book before us much of law and practice which is very valuable to the practitioner in reference to County Courts and High Court suits There are for example helpful notes on such matters as prohibition, substitutional service, adding and changing parties, setting aside judgments, the Statute of Limitations, witnesses and evidence and commission connected therewith, interest on money under Dominion and Provincial statutes, proceedings by and against executors and administrators,

attachment of debts, absconding debtors, interpleader, proceedings under executions, etc.

The rules and forms appear in an appendix, together with a large number of additional forms concluding with the boundaries of Division Courts and other statutory provisions relating to these Courts, the whole having a full index of over 70 pages The work of the printer and publisher has been done in first class style, the selection and arrangement of type and the marginal references being excellent.

Flotsam and Jetsam.

UNITED STATES DECISIONS.

Master and servant—Fellow servants—Incompetent servant.—The master is liable for an injury to a servant by the negligence of a fellow-servant where he had, before the injury, upon a complaint as to the incompetency of the negligent servant, promised the injured servant to put in his place a competent workman, provided such a time had not elapsed after the promise as to preclude all reasonable expectation that it would be kept.—*Brown* v. *Levy*, *Central L. J.*, *468*.

Death by wrongful Act—Foreign statute—Action by administrator or parent.—We find two recent interesting cases on the subject of death by wrongful act. In *Mattherson* v. *Kansas City, Ft. S. & M. Ry. Co.*, 60 Pac. Rep. 747, the Supreme Court of Kansas holds that the Missouri statute giving a right of recovery for death caused by the neglect or wrong of another is so far penal in its nature, and so dissimilar in its provisions from the Kansas Statute authorizing a recovery for death by wrongful act, that it is not enforceable in the Courts of Kansas.

The Supreme Court of Arkansas decides, in *St. L., I. M. & S. Ry. Co.* v. *Dawson*, that a right of action for negligence resulting in death survives to the personal representative of deceased, if she lived after the act constituting the cause of action, though she never became conscious; that a verdict of $4,000 in an action by an administrator for pain and suffering borne by deceased cannot stand the interval of consciou. suffering, if any, between the injury and death being only for a moment; that a parent whose negligence contributed to the death of his young child cannot recover therefor for his own benefit; and that whether a parent's negligence contributed to the death of his child, 6 years old, whom he allowed to go visiting, when he knew that she would have to pass the railroad tracks where she was killed,—the train being overdue, so that it might be there at any moment, and she being unattended and not specially cautioned,—is a question for the jury—*Central L. J.*, *480*.