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THE MONEY-LENDERS ACT, 1906.

Money-lenders have never been favoured children of the law, and Portia is not by any means the only judge who has won praise for astuteness in seizing upon a legal flaw in some Shylock's bond. Nevertheless it has been found in all ages of the world that the need of those who "have not," and the desire of those who "have," to have more, will find means of meeting each other, in spite of the innumerable laws that have been passed from time to time by the legislatures of every nation with a view to the suppression or regulation of the practice of usury.

As time went on and trade and commerce became more widely extended, the doctrines of political economists such as Bentham, and Adam Smith, who looked upon all laws for the regulation of the rate of interest as economically unsound, began to exert great and increasing influence on public opinion, so that in 1854 the Imperial Parliament passed an Act repealing all usury laws, whether based on common law or statute. The example set by the mother country was followed in 1858 by the Canadian Parliament, which in that year passed the law which now stands in the statute book as R.S.C., c. 127, s. 1, a trenchant and far-reaching enactment which it may be well to quote here in full: "Except as otherwise provided by this or any other Act of the Parliament of Canada, any person may stipulate for, allow and exact on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon."

The law thus laid down with such emphatic clearness has practically remained in force during the period of nearly half a century that has elapsed since its enactment, until the present year, when it has received a rude shock by the passing of the important Act which is the subject of this article. We have thought it right therefore to call the attention of our readers to a statute which seems to deserve careful consideration, both from

its positive effect, in itself, and as an indication that in matters of this kind, as in so many others, "the whirligig of time brings in his revenges," and that there is a strong disposition to revert to principles and methods which were thought to have received their quietus fifty years ago.

The Money-Lenders Act has only been in force for a few months and it may be found useful to give an outline of its main provisions. The preamble, after reciting the undoubted fact that "on the part of some money-lenders a practice has obtained of charging exorbitant rates of interest to needy or ignorant borrowers," goes on to state that it is in the public interest that their "transactions should be controlled by limiting their rates of interest." After a definition of the expression "money-lender" as used in the Act, which is based, though with important variations, upon that given in the Imperial Money-Lenders Act, 1900, to the bearing of which upon our subject, reference will hereafter be made, we have the main gist of the Act in the third section, which in view of its importance we quote in full: "Notwithstanding the provisions of c. 127 of the Revised Statutes no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per cent. per annum; and the said rate of interest shall be reduced to the rate of five per cent. per annum from the date of judgment in any suit, action or other proceeding for the recovery of the amount due." Subsequent sections contain provisions giving ample powers to the Court whereby it may inquire into and re-open transactions of the kind aimed at, and making an important exception in favour of the bona-fide holder, before maturity, of a negotiable instrument discounted by a preceding holder at a rate of interest exceeding that authorized by the Act. There is also a formidable section, rendering the money-lender who transgresses the Act liable to criminal penalties, while some slight consolation for his woes may be found in the concluding sections which provide that the Act shall not apply where the

whole interest charged does not exceed fifty cents, and point the way to a new El Dorado in the Yukon Territory, which is expressly exempted from its operation.

Reference to the discussion which took place when the bill, which is now embodied in this Act, was before the House of Commons, will shew that there was a great difference of opinion amongst the members, not so much as to the desirability in a general way of the object aimed at, but rather as to the possibility of attaining it in the way proposed. We fancy that most, if not all, of our readers will endorse without hesitation the views expressed by the present Minister of Justice in clear-cut language which it is a pleasure to reproduce in our columns: "I may say—speaking only for myself alone—that I have very great doubt whether any legislation can ever be effective against the evils of usury. The endeavour to fix by statute the rate of interest which the borrower shall pay to the lender seems to me not different in principle from endeavouring to fix by statute the price which the purchaser shall pay the seller for a bushel of wheat or any other commodity. I have no doubt that in whatever way we shall endeavour to legislate against this evil, we shall find in practice, crafty and scheming men endeavouring to find means for circumventing the provisions of the law and, possibly, only too well succeeding,"

Mr. Aylesworth who had charge of the bill for the Government, after stating his own opinion as above, went on to say that the subject was one "in regard to which some effort must be made," and claimed that the attempt had been made to accomplish the purpose desired by following to a great extent, the provisions, and even the very language, of the English Money-Lenders Act of 1900." A comparison of the two Acts will shew the great resemblance, and even in many cases, identity of expression, for which credit was thus claimed, but we think one important element in the case was overlooked by those who discussed the question—the fact, namely, that the principles underlying these two Acts are radically different, and that therefore the use of the same, or similar language in both, may to a

certain extent, tend rather to mislead than to guide those who are hereafter called upon to interpret the Canadian Statute. The Canadian Act is avowedly and unmistakably a reenactment pro tanto of the old usury laws by which the rate of interest on money lent was expressly limited to a certain percentage—it is in fact, so far as it goes, a repeal of the Act of 1858 which is embodied in the first section of R.S.C., c. 127, to which reference has been made. The English Act on the other hand is in no respect to be looked upon as a re-enactment of the old usury laws which were repealed in 1854. It does not attempt to say what shall be the maximum rate of interest in any particular case, but applies in a general way to any case in which the Court is satisfied that excessive interest has been charged, and that the "transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief." The true meaning and construction of this Act has recently received a very full and careful discussion in the case of *Carringtons Limited* v. *Smith* (1906), 1 K.B. 79, and in this connection one or two quotations from the judgment of Channell, J., may be found useful, as shewing what is the real scope of the English law with respect to usurious transactions. In speaking of the difficulty found in deciding what would be an "excessive" rate of interest under the Act, he says: "Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the Legislature seems to have intentionally avoided re-enacting them and telling us what is to be the maximum of lawful interest."

What then is the criterion applied in the English Courts to cases in which relief is sought under under the provisions of their Act? This question, as pointed out in the judgment referred to, is by no means free from difficulty, and it is perhaps scarcely possible at present to harmonize all the decisions that have been given on the various points involved. The general principle, however, seems to be stated with sufficient clearness in the following quotation. "Whenever the borrower is in such

a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free-will, there is no difficulty in applying the Act, and judges are not likely to hesitate to apply it."

Enough we think has been said to shew that the leading principle of such an Act differs toto coelo from that of the Canadian Act, which recognizes no rule having any moral or intellectual value, unless indeed it can be contended that economic laws may safely be disregarded as regards transactions involving sums under five hundred dollars, and exceeding fifty cents! For this reason we do not think that our counsel and judges will derive much benefit from English cases, turning as they do upon considerations altogether different from those which will arise in the construction of the Canadian Act.

The object of the Act is, as we have said, in itself a worthy one, and every good citizen must sympathize with the desire to throw the law's protection around the weak and inexperienced victim of rapacity and oppression. But there is only too much reason to fear that little, if any relief, can be expected from a measure which attempts to regulate by a mere arbitrary standard the maximum rate of interest which any sum of money under five hundred dollars should bear, while beyond that magic boundary, borrower and lender may deal freely as before. Means will in all probability be found to evade its provisions on one hand, while on the other, it will bear hardly on intending borrowers of full age and competent understanding who are quite as able to understand and make a bargain as any money-lender that ever lived. It is to be hoped that the Minister of Justice will at some future session of Parliament, employ his keen intellect and his well-known power of clear and accurate expression in devising some better remedy for the evils of usuary than the Act of 1906, which as we have pointed out does not appear to enjoy any large measure of his personal approval.

Since the above article was written, the writer's attention has been called to the judgment of the House of Lords in

Samuel v. *Newbold*, 22 T.L.R. 703. This case is more recent, and, of course, of greater authority than *Carringtons, Limited* v. *Smith*, but it does not seem to alter the conclusions there arrived at to any material extent. No one would have objected if our Canadian Act had laid down the principle stated in the head-note to *Samuel* v. *Newbold*, that "the rate of interest charged upon a loan may be so excessive as of itself, if unexplained, to shew that the transaction is harsh and unconscionable."

GOODWIN GIBSON.

SUGGESTED AMENDMENT TO THE ELECTION LAW.

In the *Weekly Sun*, of Dec. 5, the "Bystander" has commented briefly upon the suggestion recently made in this Journal, that the time has come when it is expedient to convert into a specific statutory offence the attempt to influence constituencies as a whole, either by the present expenditure of public money, or by declarations, whether promises or threats, with respect to the future expenditure of such money.

The writer of the article in which that suggestion was made regrets that the opinion or his critic regarding the utility of the proposed legislation is distinctly unfavourable; and his regret is increased by the fact that this unfavourable opinion, having been expressed in a newspaper widely circulated among farmers, will find its way to that very section of the community which, as it derives the least benefit from the application of the funds of the state to those objects which most commonly furnish the opportunities and means for that particular form of corruption against which the proposed enactment would be directed, might reasonably be expected, merely on the ground of self-interest, to be the warmest supporters of such legislation.

The broad ground upon which the "Bystander" takes exception to the suggested addition to the statute books is that, "if people are willing to be corrupted, corrupted in some form they will be," a proposition from which he draws the pessimistic and uncomfortable inference, that it is not worth while to close

a single avenue of corruption, as long as this unamiable characteristic renders it certain that others will presently be opened. It needs but little consideration, however, to perceive that, if this argument had always been deemed valid and carried to its logical conclusions in all departments of legislation, many existing enactments which are commonly believed to be beneficial, would never have been adopted. At different times "strict statutes and most biting laws" have been passed for the purpose of curbing various evil propensities not less deeply ingrained in human nature than that which is emphasized by our critic. If it is useless to supplement the laws against bribery by provision calculated to check new forms of corruption, according as their mischievous operation and effects may become apparent, than by parity of reasoning it must have been lost labour to produce those numerous enactments by means of which legislatures have sought to protect societies against the novel and more refined forms of fraud, peculation and roguery by which a certain portion of the community is constantly endeavouring to gratify the predatory instincts derived from the period when men were content with

> the good old law, . . the simple plan.
> That they should take who have the power,
> And they should keep who can.

A conspicuous and pertinent example of such enactments is furnished by those which are directed against various kinds of sharp practice by promoters and officials of companies. It is, of course, true enough that even the shrewdest of business men not infrequently makes the unpleasant discovery, that, while carrying on some complex operation of "high finance," he has placed himself in a predicament in which the criminality of his acts is as obvious with reference to extremely elementary principles as was the civil liability of certain parties in a notable case in which that singularly clear-sighted judge, Sir George Jessel, after listening to lengthy arguments, fortified by numerous precedents, remarked that the only authority which he deemed it necessary to cite for the purpose of sustaining his decision was

the commandment, "Thou shalt not steal." But it cannot seriously be questioned, that some of the most harmful of the forms which dishonesty assumes with a Protean elusiveness in the modern business world could not be punished at all, if they had not been made the subject of definite statutory provisions. That the legislatures have not only not wasted their time in elaborating such enactments, but that they would have been derelict in their duty to the public, if they had not strengthened the hands of justice in this manner has never been doubted.

The analogy between new kinds of dishonesty in business and new kinds of political corruption seems in the present point of view to be sufficiently close to warrant the conclusion that, if the former class of offences can be effectually checked only by means of special legislation, which is therefore desirable, similar legislation for the purpose of checking the latter class of offences is neither inexpedient nor useless. The general principle of legislative policy in this connection may, it is conceived, be stated in some such form as this: Whenever a new description of immoral or dishonest conduct developes itself in a community, and it is either indisputably outside the purview of existing statutes, or not clearly within their scope, an occasion arises for the enactment of additional provisions. That form of political corruption with which we are here concerned is, so far as regards Canada, manifestly one of those which are not covered by any of the laws now in force, and if it is to be suppressed at all, must be defined and prohibited by a new statute. With all deference the author of the article in question confesses that the consideration upon which his critic relies still seems to him a wholly inadequate reason for refusing to legislate on the lines proposed. From the view of the "Bystander," that, until the standard of political morality is raised among voters themselves, it is vain to expect a total cessation of bribery in one shape or another, no one is likely to dissent. But, as already pointed out, unless analogy is to be entirely disregarded, it cannot successfully be contended that the impossibility of stamping out that offence altogether, until new ethical standards are recognized, is a suffi-

cient ground for declining to deal immediately with one of its forms which is already producing an abundant harvest of deplorable consequences, and which threatens to cause far greater evils in the future. The mere fact that the proposed law would, if honestly and unflinchingly administered, go far towards depriving the party which happens to be predominant of the opportunity of influencing voters at the expense of the community at large, is quite sufficient, as it would seem, to recommend that law to favourable consideration. If, as our critic states, and perhaps truly, political corruption is to continue for an indefinite period, the taxpayers would gain something, if corrupt politicians were at least compelled to supply the materials of bribery at their own expense. It is a preposterous situation that they should be allowed to manipulate the public money in a manner which, though technically legal, is essentially inconsistent with the primary and fundamental obligation of legislators and ministers to use that money impartially for the benefit of the whole community. Finally it may be observed that a distinct and noteworthy advantage of the suggested statute is that, as the acts to be prohibited could, in the very nature of the case, only be committed under circumstances which would render it extremely easy to obtain the evidence required to convict the offender, the deterrent effect of such an enactment would in all probability be much greater than that of any of those which are directed merely against the corruption of individual voters.

C. B. LABATT.

LOCAL MASTERS OF TITLE.

It has been customary in times past to appoint men without any previous legal training to be registrars of deeds in Ontario. On the whole we believe no serious difficulty has arisen from the practice; but we do think that if the present government of that province should unhappily adopt the same principle in making

appointments to the office of the Master of Titles, or Local Masters of Title, it would be undertaking risks which it is not justified in the public interest in assuming.

A registrar of deeds, if he possesses ordinary intelligence and is systematic and painstaking in the conduct of his office, may possibly carry on the business of his office without mishap, notwithstanding his want of knowledge of law; but a Master of Titles who has to administer the Torrens system of land transfer has a very different system to deal with, he is not merely a custodian of such deeds as may be tendered him for registration, but he has to pass on their legal sufficiency, and he is often called on in a quasi judicial character to consider documents presented to him for registration and questions arising thereon for which an accurate knowledge of law is indispensable. Mistakes by such a functionary may cause at any time heavy drafts on the Assurance Fund, and in case of that being exhausted, on the Provincial Exchequer. To appoint to such offices men without any legal training is to court disaster.

Quite apart from the very important consideration above referred to, one is at loss to know why the claims of professional men to positions which should, for the safety and convenience of the public, be filled by lawyers, have been ignored in the past, notably so by the late government in Ontario. One fails to see why a baker should be elected to superintend the important work connected with the granting of letters of administration, the proof of wills and such like as Registrar of a Surrogate Court, or farmers, grocers, or blacksmiths be chosen as Clerks of County Courts to decide on points of practice and tax costs, etc., with which matters they are totally unfamiliar. But the comical aspect of such appointments is not the most striking. If fairness to the legal profession is to be set aside surely the requirements of public business should not be overlooked. In all the matters above referred to legal training is not merely desirable, but it is essential to the proper discharge of the duties imposed.

REVIEW OF CURRENT ENGLISH CASES.

FATAL ACCIDENTS ACT, 1846 (9 & 10 VICT. c. 93)—(R.S.O. 3. 166) —NEGLIGENCE CAUSING DEATH OF CHILD—LOSS OF SERVICE—BURIAL EXPENSES—PARENT AND CHILD.

Clark v. *London General Omnibus Co.* (1906) 2 K.B. 648 was a case involving the sum of £14, but like a good many other cases where a trivial amount was in question, the point of law on which it turned is both difficult and interesting. The facts were quite simple. The plaintiff and his daughter were riding on their bicycles. Through the negligence of the defendants' servants they were knocked over by one of the defendants' omnibuses, the daughter was killed and the bicycles wrecked. The action was brought under the Fatal Accidents Act and also under the common law by the father, and the only question on the appeal was whether he was entitled to recover for the funeral expenses of his daughter, who was under age. He had also claimed to recover for loss of his daughter's services, but that claim had been disallowed at the trial. But really his right to recover for the funeral expenses, turned upon precisely the same principle as his right to recover for services; and that is the principle on which damages in such cases are to be assessed. It is quite obvious that if the damages are to be assessed upon the principle that they are to be for the injury the deceased himself sustained, then as he sustained no loss of service, or any expenses of his funeral, such damages are not recoverable. On the other hand, who can estimate the damage to the deceased for loss of *life?* One might think that though the plaintiff in such an action cannot put forward a claim of that kind as a ground of recovery, yet he may indirectly do so when it comes to a question of apportioning the damages which are recoverable as damages to the deceased. The Act says the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties for whose benefit the action is brought. The Court of Appeal (Lord Alverstone, C.J., Barnes, P.P.D., and Farwell, L.J.) decided, however, that the funeral expenses of the deceased are not recoverable in such actions.

INSURANCE—POLICY ON TRANSIT OF GOODS—"ALL RISKS BY LAND AND BY WATER"—CONSTRUCTION OF POLICY—DAMAGE BY INSECTS.

Schloss v. *Stevens* (1906) 2 K.B. 665 was an action on an insurance policy which covered "all risks by land and by water" during the transit of the goods in question; during the transit by abnormal delay, which necessarily involved the exposure of the goods, 12 bales were damaged by damp, one bale was damaged by wetting, and another by accidental wetting and injury by worms. It was contended for the defendants that the policy covered none of the damage thus occasioned, but only such risks as are ordinarily incurred in the transit of goods on a voyage by sea or land, and that all goods were in such cases more or less exposed to dampness, which was an ordinary incident of transit, and that risk was not covered by the policy. Walton, J., however, was of the opinion that the words "all risks" must be literally construed, and included inter alia those which caused the damage complained of.

HUSBAND AND WIFE—PRINCIPAL AND AGENT—GOODS SUPPLIED ON ORDER OF WIFE—JUDGMENT AGAINST WIFE FOR PART OF ENTIRE PRICE—ELECTION NOT TO SUE HUSBAND FOR BALANCE.

In *French* v. *Howie* (1906) 2 K.B. 674 the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have agreed with the dissenting opinion of Jelf, J., in the Court below and have reversed the judgment of the Divisional Court (1905) 2 K.B. 580 (noted ante, vol. 41, p. 832). The action was against husband and wife for the price of goods supplied on the order of the wife; the goods were furnished at one entire price of £26 11/6, for groceries. The wife admitted liability for £24; £20 was paid in the course of the proceedings and judgment given against her for £4, and the plaintiff was given liberty to proceed against the husband for the balance. At the trial it was found that there was no joint liability, but that the husband alone was liable, and judgment was given against him, and the Divisional Court refused to disturb it, holding that the plaintiff's taking judgment against the wife for part of an entire debt did not amount to an election not to sue the husband for the balance. This the Court of Appeal hold was erroneous and that the case was governed by *Morel* v. *Westmoreland* (1904) A.C. 11 (noted ante, vol. 40, p. 233).

CHEQUE—FORGED INDORSEMENT—PAYEE—FICTITIOUS PERSON——BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT. C. 61) S. 7 (3)—(53 VICT. C. 33, S. 7 (3) (D.)).

In *Macbeth* v. *North & South Wales Bank* (1903) 2 K.B. 718 the plaintiff sued for damages for conversion of a cheque, or alternatively for money had and received by the defendants to his use. The facts were that one White had falsely represented to the plaintiff that he had agreed to buy 5,000 shares from a man named Kerr at £2 5s. per share, and had arranged to re-sell the shares for £2 10s. a share, and induced the plaintiff, in order to enable him to finance the transaction, to give him a cheque for £11,250 payable to Kerr, in order that he might deliver it to Kerr in exchange for the shares. White fraudulently forged Kerr's name to the indorsement of the cheque and paid it into his own account with the defendant's bank. No transfer of shares was ever made by Kerr to White. The defendants having cashed the cheque in the due course of business claimed that they were protected, because, in the circumstances, "Kerr," the payee named in the cheque, must be deemed to have been a fictitious payee within the Bill of Exchange Act, s. 7 (3), but Bray, J., held that that contention was not tenable, that Kerr was in fact a veritable person for whom the plaintiff intended the cheque and therefore the forgery of his name gave the defendants no title. It may be mentioned that, in furtherance of his fraud, White had in fact by forged transfers purported to transfer 5,000 shares of the kind contemplated to the plaintiff, which the plaintiff had at first accepted, but immediately repudiated on discovering the fraud, and this circumstance was held not to affect the plaintiff's rights.

CONTRACT—MASTER AND SERVANT—PIECE WORK—CONTRACT NOT TO DISMISS FROM SERVICE WITHOUT MONTH'S NOTICE—IMPLIED OBLIGATION TO PROVIDE WORK.

Devonald v. *Rosser* (1906) 2 K.B. 728 was an action by a workman against his employer. By the contract of employment the plaintiff was employed to do piece work, and it was stipulated that he should not be dismissed from his employment without a month's notice. Owing to the state of trade the defendants found it impossible to keep their works running at a profit, and therefore closed them, and gave the plaintiff a month's notice

to quit. No work being provided for him during the month the plaintiff claimed to recover damages for breach of an implied obligation on the defendants' part to supply him with work during the continuance of his employment. Jelf, J., who tried the case, after a careful review of the authorities came to the conclusion that the plaintiff was entitled to succeed, and fixed the damages at a sum equal to the average wages earned by the plaintiff in a month when actively employed, and the Court of Appeal (Lord Alverstone, C.J., Barnes, P.P.D., and Farwell, L.J.) affirmed his decision.

EASEMENT—ANCIENT LIGHT—ACQUISITION OF EASEMENT OF LIGHT BY TENANT—SERVIENT AND DOMINANT TENEMENTS HELD UNDER SAME LESSOR- SURRENDER OF LEASE—NEW LEASE.

Fear v. *Morgan* (1906) 2 Ch. 406 involved a difficult question as to the law of Easements. The facts were these. Two tenements, Nos. 16 and 18, owned by the same lessors, were leased to different tenants. Tenant of 16 acquired an easement of light as against the tenant of 18, by reason of twenty years enjoyment. Tenant of 16 surrendered his lease and took a new lease of his premises, nothing being said about the lights in the new lease. Subsequently the tenant of 18 also surrendered and took a new lease of the premises subject to a condition imposed by the lessors that he should make an erection on his premises, which would have the effect of destroying or obstructing the ancient lights of No. 16, the plaintiff's premises. In these circumstances Kekewich, J., held, and the Court of Appeal (Williams, Romer and Moulton, L.JJ.) confirmed his decision, that it was competent for a lessee under the Prescription Act, 1832 (2 & 3 Wm. IV. c. 71), s. 3, to acquire an easement of light both as against an adjoining lessee and as against his lessor, even though the reversion of both the servient and dominant premises was in the same lessor; and that such right was not lost by a surrender of the dominant tenement and taking a new lease thereof in the absence of anything in the new lease to shew that such easement was not intended to be granted. Moulton, L.J., points out that upon the surrender of No. 16 it would have been competent for the lessors in granting the new lease to have put an end to the easement, but in this case he holds they did not.

PARTNERSHIP—DISSOLUTION—DEATH OF PARTNER—PARTNERSHIP BUSINESS CARRIED ON BY SURVIVING PARTNER—SURVIVING PARTNER—WINDING UP OF PARTNERSHIP—PLEDGE OF ASSETS BY SURVIVING PARTNER.

In re Bourne, Bourne v. *Bourne* (1906) 2 Ch. 427 was an administration action, in which a question arose as to the validity of a mortgage of real estate made by a surviving partner in the following circumstances. At the time of the dissolution of the partnership in question by the death of one of the partners, the partnership banking account was overdrawn and remained overdrawn until the final winding-up of the business, and the mortgage in question was given by the surviving partner on certain partnership real estate to secure the overdraft. Certain creditors of the deceased partner contested its validity, and priority as against the lien of the deceased partner's executors on the surplus assets for his share, but Farwell, J., held that the surviving partner had power to make the mortgage, and in the absence of evidence to the contrary the bank were entitled to assume that the dealings with the account were for the purpose of winding-up the partnership, and therefore the mortgage was entitled to priority over any lien of the executors of the deceased partner.

COMPANY—COSTS OF MEMORANDUM OF ASSOCIATION—PRELIMINARY EXPENSES—REGISTRATION—LIABILITY OF COMPANY.

In re English & Colonial Produce Co. (1906) 2 Ch. 435. A solicitor had been employed by the promoters of a company and who afterwards became its directors, to draw the memorandum of the association and also to register it, he now claimed to recover against the company the costs so incurred. As regards the costs of the memorandum it was held by Buckley, J., and the Court of Appeal (Williams, Romer, and Moulton, L.JJ.), that the company was not liable, and as to the fees for registration Buckley, J., held, and on this point there was no appeal, that inasmuch as the company was under a statutory obligation to register the memorandum, that the expenses thereof might be recovered from the company. The fact that a company adopts and takes the benefit of services rendered under a contract entered into before its formation, does not in the opinion of the Court of Appeal impose any equitable obligation on the com-

pany to pay for such services; and a dictum of the Court of Appeal *In re Hereford & S. W. E. Co.* (1876) 2 Ch. 621, 624, to the contrary was disapproved.

PATENT—INFRINGEMENT—CONDITION AS TO SALE OF PATENTED ARTICLE—PURCHASER WITHOUT NOTICE OF CONDITION.

Badische Analin und Soda Fabrik v. Isler (1906) 2 Ch. 443. This was an action to restrain the alleged infringement of a patent. The plaintiffs alleged that the defendant had bought the patented article from the plaintiffs' licensees with knowledge that the license was restricted by a condition binding the licensees to sell to consumers only, and not to dealers; and that the defendant was a dealer. The only restriction on sale by the licensees proved, was that contained in a label attached to the tins in which the patented article was sold, and these conditions, as the Court found, implied that the purchasers of unopened tins might re-sell them, and as the defendant had bought in that way it was held that he had not infringed. The judgment of Buckley, J., was therefore affirmed by the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.).

GENERAL BEQUEST OF PERSONALTY—POWER TO CREATE CHARGE ON LAND—WILLS ACT, 1837 (1 VICT. C. 26) S. 27—(R.S.O. C. 128, S. 29).

In re Slavin, Marshall v. *Wolseley* (1906) 2 Ch. 458 is a case in which the provisions of s. 27 of the Wills Act (R.S.O. c. 128, s. 29) were sought to be applied. By that section it is provided that a general bequest of personal estate shall be held to pass the personal estate which the testator may have power to appoint in any manner he thinks fit, and shall operate as an execution of the power unless a contrary intention appears by the will. In this case the testator had power to charge real estate, of which he was only tenant for life, with a sum or sums not exceeding in the aggregate £6,000. He made his will whereby he gave all his real property to one person and all his personal property to another. He did not execute the power or refer to it in his will. The legatees of the personalty claimed that under the statute the general bequest of the testator's personalty operated as an execution of the power in their favour, and that they were

therefore entitled to the £6,000 by way of charge, but Buckley, J., held that the statute did not apply. According to his view the section contemplates the existence of some fund or property in existence which is the subject of a general power of appointment by the testator and at his uncontrolled disposition, although not his property; but it does not extend to a power to impose an otherwise non-existing charge which when created would be personalty and at his absolute disposition.

COMPANY—INSOLVENCY—FRAUDULENT PREFERENCE—DELAY IN GIVING SECURITY UNTIL INSOLVENCY.

In re Jackson & Bassford (1906) 2 Ch. 467 was a winding-up proceeding in which a debenture covering all the assets of the company had been handed to one of the directors in the following circumstances. In December, 1904, the company asked for an overdraft from its bankers. The bank required the guaranty of William Jackson, one of the directors, and by a resolution of the Board of Directors he was authorized to arrange with the bank for the overdraft and it was also resolved that the company should "whenever called upon by him" so to do, give him security by debentures or other charge for the amount for which he should so become liable. The overdraft was obtained and Jackson deposited securities of his own with the bank to secure it. In February, 1905, the overdraft was increased, a similar resolution being passed. Neither agreement was registered. On 8th December, 1905, Jackson claimed his debenture, which was accordingly given him. On 29th December, 1905, the directors resolved to call a meeting of shareholders to pass a resolution for the winding-up of the company. Buckley, J., was of the opinion that as the giving of the debenture was purposely delayed until the company was insolvent, in order to prevent its credit being impaired which would result from the registration of the debenture, the transaction amounted to a fraudulent preference and could not stand.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Yukon.] [Oct. 11, 1906.

RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO.

Cause of action—Limitation of actions—Contract—Foreign judgment—Statute of James—Statute of Anne—Lexi fori—Lexi loci—Absence of debtor.

Under the provisions of the Yukon Ordinance, c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose, notwithstanding the debtor has not been for that period resident within the jurisdiction of the Court.

Judgment appealed from reversed. GIROUARD and DAVIES, JJ., dissenting.

Ewart, K.C., for appellant. *Chrysler*, K.C., for respondents.

Quebec.] [Oct. 17, 1906.

ATTORNEY-GENERAL OF QUEBEC *v.* FRASER.

Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence—Collateral circumstances leading to grant—Title to land—Riparian rights—Fisheries.

A river is navigable, when with the assistance of the tide it can be navigated in a practicable and profitable manner, notwithstanding that at low tides it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell* v. *Corporation of Quebec*, 5 App. Cas. 84, followed.

Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to

enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein.

The judgment appealed from (Q.R. 14 K.B. 115) was restored. *Steadman* v. *Robertson*, 18 N.B.R. 580, and *The Queen* v. *Robertson*, 6 S.C.R. 52, referred to; *In re Provincial Fisheries*, 26 S.C.R. 444, (1898) A.C. 700, discussed.

Stuart, K.C., and *Lafleur*, K.C., for appellant. *Flynn*, K.C., for respondents

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Quebec.] TANGUAY *v.* PRICE. [Nov. 15, 1906.

Floatable river — Boom — Logs from up river — Retention — Freshet salvage.

P. owned a saw-mill on the bank of a floatable river and placed a boom across the stream to hold logs floated down to the mill. T. had a boom further up-stream in which he had stored pulp-wood. An unusual freshet broke T.'s boom and brought a quantity of his pulp-wood down with the current into P.'s boom, where it was caught and held until removed some time afterwards by T.'s men without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s logs had been held therein,

Held, that as P. had no right of property in the river where he had placed the boom in which T.'s wood had been caught, those waters remained publici juris, notwithstanding the construction of the barrier; that T.'s wood came to the boom and remained there in a lawful manner; that the service rendered in stopping the pulp-wood was involuntary and accidental, and that P. could recover nothing therefor.

Per FITZPATRICK, C.J.:—There is no difference between the laws of the Province of Quebec and those of England in respect to the rights of riparian owners to the water of floatable streams flowing past their lands. *Miner* v. *Gilmour*, 12 Moo. P.C. 131, referred to.

Appeal allowed with costs.

Belcourt, K.C., and *Turcotte*, K.C., for appellant. *Stuart*, K.C., and *Bender*, K.C., for respondent.

Ex. Ct.] [Nov. 15, 1906.

HATTON *v.* COPELAND-CHATTERSON CO.

Patent of invention—Infringement of patent—Sale for a reasonable price—Use of patented device—Contract—Evidence.

The patentee of a device for binding loose sheets sold the defendant H. binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants contrary to the condition. In an action for infringement of the patent,

Held, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of s. 37 of the Patent Act, R.S.C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent.

Judgment appealed from (10 Ex. C.R. 224) affirmed.

Mignault, K.C., and *Perron*, K.C., for appellant. *Raney*, for respondent.

Ont.] [Nov. 22, 1906.

CANADIAN CARRIAGE CO. *v.* LEA.

Appeal—Jurisdiction—New trial—Discretion—Ontario appeals—60-61 Vict. c. 34.

Per FITZPATRICK, C.J.:—Sec. 27 of R.S.C. c. 135 prohibits an appeal from a judgment granting, in the exercise of judicial discretion, a new trial in the action.

Per DAVIES, J.:—Under the rule in *Town of Aurora* v. *Village of Markham*, no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial, unless it comes within the cases mentioned in 60-61 Vict. c. 34, or special leave to appeal has been obtained.

Appeal from judgment of the Court of Appeal (11 O.L.R. 171) quashed.

Lynch-Staunton, K.C., for appellants. *Shepley*, K.C., for respondents.

Ont.] [Nov. 22, 1906.

GLOSTER *v.* TORONTO ELECTRIC LIGHT CO.

Negligence—Electric Light Co.—Wires on public highway—Proximity to bridge—Injury to child—Dedication.

Several years ago the owner of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto, and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires which had become worn and ceased to be insulated. A boy under nine years of age, while playing on the new bridge, put his arm through the railing and his hand touching the wire he was badly injured.

Held, that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it, and such highway included the land over which the wires passed.

Held, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to the boy.

Appeal allowed with costs.

Millar and *D. J. McDougal*, for appellants. *Hellmuth*, K.C., and *G. L. Smith*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Nov. 13, 1906.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION. PRESTON *v.* KENNEDY.

Parliamentary elections—Controverted election—Scrutiny—Ruling of trial judge as to disqualification of class of voters—Appeal to Court of Appeal—Jurisdiction—Finality of voters' lists.

Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal (ante, pp. 685, 720), TEETZEL, J.,

one of the judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew minority or alienage, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive.

Held, that no appeal lay to the Court of Appeal from such ruling.

Per MEREDITH, J.A., dissenting, that an appeal was competent, and should be entertained and allowed and the ruling reversed.

Hellmuth, K.C., and *W. J. Elliott*, for petitioner, appellant. *Mowat*, K.C., for respondent.

Full Court.] REX *v.* BURR. [Dec. 1, 1906.

Criminal law—Illicit intercourse with girl under sixteen—Corroborative evidence—New trial.

Criminal case reserved.

The requirements of s. 684 of the Criminal Code—which provides, inter alia, that a person accused of seducing and having illict connection with a girl of previously chaste character, above the age of 14 years and under the age of 16 years, is not to be convicted upon the evidence of one witness unless such witness is corroborated, in some material particular, by evidence implicating the accused—are satisfied if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

Such otner testimony being found in this case, a new trial was directed under s. 746 of the Code, that being the proper alternative to adopt under that section under such circumstances as in this case, more especially as the Crown was appealing.

J. R. Cartwright, K.C., for the Crown. *O. L. Lewis*, for the prisoner.

HIGH COURT OF JUSTICE.

Divisional Court.] [Oct. 12, 1906.

LEBU *v.* GRAND TRUNK RY. CO.

Railway—Animal killed on track—Escape to highway from enclosure—Open gate from highway to track—Negligence—Liability.

Sec. 237, sub-s. 4 of the Dominion Railway Act, 1903, provides that if an animal at large upon the highway gets upon the property of the railway company and is killed, the owner may recover the amount of his loss from the company, unless it be proved that the animal got at large through the owner's negligence.

Where, therefore, the plaintiff's horse escaped, without any negligence on his part, from a pasture field adjoining the railway, and got upon the highway, and then going a short distance, passed through an open gateway into the defendants' freight yards and then on to the track where it was killed by a passing train,

Held, that the defendants were liable to the plaintiff for the loss he had sustained.

Lewis (Chatham), for plaintiff. *W. Nesbitt*, K.C., and *Frank McCarthy*, for defendants.

Falconbridge, C.J.K.B., Britton, J., Mabee, J.] [Oct. 23, 1906.

RE BELL AND THE CORPORATION OF THE TOWNSHIP OF ELMIRA.

By-law—Omission of essential part—Quashing—Con. Mun. Act, 1903 (O.)—Secs. 204, 341 and 342.

The omission in a local option by-law of the time and place where the votes are to be summed up as provided for by ss. 341 and 342 of the Con. Mun. Act, 1903 (O.), is the omission of an essential part of the by-law and s. 204 of the Act does not apply as such omission is more than an irregularity.

Judgment of ANGLIN, J., reversed.

Haverson, K.C., for the motion. *H. B. Morphy*, contra.

Divisional Court.] [Oct. 30, 1906.

LONDON AND WESTERN TRUST COMPANY *v.* LUSCOMBE.

Practice—Payment of dividends out of capital—Action by liquidator against directors—Claim of relief over against shareholders—Application to be added as third parties—Rule 200—Scope of.

In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment against dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid by dividends, issued the usual third party order, under Con. Rule 200, directing that two out of a large number of shareholders should be joined as third party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for by the plaintiff and the third parties. On appeal to a judge in Chambers, the order was set aside. An appeal, therefore, by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local judge.

C. S. Gibbons, for plaintiffs. *Middleton*, for defendants. *F. Aylesworth*, for third party.

Meredith, C.J. C.P., MacMahon, J.,
Anglin, J.] PETTYPIECE *v.* TURLEY. [Oct. 31, 1906.

Will—Construction—Trust—Precatory trust — Power — Execution of.

A testator whose mother owned an estate for life in a farm in which he had the reversion in fee by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother after his death deeded the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will.

Held, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created, or a power, inasmuch as even if a trust was created in the mother, the conveyance by the mother operated, and was intended to operate, as an execution of the trust, although the whole was granted to one daughter only.

F. E. Hodgins, K.C., for plaintiff. *Rose,* for defendants.

Mabee, J.] [Nov. 6, 1906.

RE BADEN MACHINERY COMPANY.

Costs—Company—Costs of alleged contributories payable out of assets—Deficiency of—Costs of petitioning creditor—Liquidator's costs and compensation—Priority—Abatement.

On the application of the liquidator of a company directed to be wound up an order was made by a local judge directing H. and S. to be placed on the list of contributories which was affirmed by a judge of the High Court and by the Court of Appeal, but was reversed by the Supreme Court with costs to be paid by the liquidator as well of that Court as of the prior appeals,

Held, that H. and S. were entitled to their costs out of the assets of the estate in priority to those incurred by the liquidator —the reasonableness of the liquidator's claim forming no element in the matter—but subject to such as were incurred by the liquidator in the realization of any assets, as well as a reasonable sum as compensation for his care and trouble in such realization.

Middleton, for H. and S. *J. E. Jones,* for petitioning creditor. *J. C. Haight,* for liquidator.

Britton, J.] BELL *v.* GODISON THRESHER CO. [Nov. 14, 1906.

Venue—Contract—6 Edw. VII. c. 19, s. 22 (O.)—Retroactivity.

An action was brought in the High Court by the purchasers of a machine against the sellers, for a return of money paid on the agreement of sale, damages for breach thereof, the return of the plaintiffs' promissory notes given thereunder, and cancellation of the agreement. The plaintiffs based their action upon a

new agreement which they alleged superseded the original one as to some of the terms, but, except as specified, the engine was to fulfil the terms and conditions of the original agreement. The original agreement contained a clause providing that if any action or actions arise in respect to the machine or notes or any renewals thereof, the same should be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the defendants is located, *i.e.*, at Sarnia, and another clause providing that any action brought with respect to this contract or in any way connected therewith, between the parties, shall be tried at the Town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia.

Held, that the action did not come within either clause; but, if it did, that s. 22 of 6 Edw. VII. c. 19 (O.) applied, although the contract was made before it was enacted.

Order of the Master in Chambers refusing to change the venue to Sarnia affirmed.

Phelan, for defendants. *W. A. Boys*, for plaintiffs.

Falconbridge, C.J.K.B.] [Nov. 15, 1906.

RE SHARON AND STUART.

Will—Construction—Devise—Life estates—Remainder in fee—Estate tail—Period of distribution—Surviving wife—Title—Vendor and purchaser.

A testator devised to one of his sons, G., fifty acres of land, "to have and to hold to him, etc., *as aforesaid* and not otherwise." In an earlier part of the will he had devised lands to his other sons, "to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their and each of their wives to have and to hold to their children respectively and their heirs forever." G. was unmarried at the date of the will and of the testator's death.

Held, that G. took an estate for life, and his widow (if he left one) an estate for life after his death, and his children the remainder in fee after her death, or if no widow, after G.'s death.

G. was not entitled to an estate tail under the rule in *Wild's* case, for that rule applies only where the gift to both parent and children is immediate, nor under the rule in *Shelley's* case.

Grant v. *Fuller* (1902) 33 S.C.R. 34, and *Chandler* v. *Gibson* (1901) 2 O.L.R. 442, followed.

Held, also, that the devise to the children of G. was a gift to a class, which would comprise all children coming into existence before the period of distribution.

G. had married and had children living and his wife had died at the time of an application under the Vendors and Purchasers Act, he having contracted to sell the land.

Held, that if he married again, his second or any future wife who survived him would be entitled to a life estate.

Title could not be made without the order of the Court.

A. H. Clarke, K.C., for both vendor and purchaser.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Nov. 23, 1906.

ANDERSON *v.* NOBELS EXPLOSIVE CO.

Writ of summons—Service out of jurisdiction—Rule 162(e)—Tort committed within Ontario.

It is only where the tort for which the plaintiff brings action has been "committed" within Ontario, that Con. Rule 162(*e*) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad.

An order permitting service upon the defendants abroad was set aside where the cause of action alleged against the defendants, a company engaged in the manufacture of explosives in Scotland, was that they were negligent in allowing a fuse, which has been purchased by the plaintiff's employers, and which injured the plaintiff at a place in Ontario, to be manufactured and sold in a defective condition, the manner in which the fuse reached the plaintiff's employers not being alleged or suggested. The manufacture and sale must be deemed to have taken place in Scotland, and, although the invasion of the plaintiff's right of personal security occurred in Ontario, the tort comprises also the wrongful act or omission of the alleged tort-feasor.

Orders of the Master in Chambers and of MABEE, J., affirmed.

Phelan, for plaintiff. *W. H. Blake*, K.C., for defendants.

Cartwright, Master.] REID *v.* GOOLD. [Nov. 23,1906.

Parties—Action against guarantors of a promissory note—Dispute between makers and payee as to amount due—Adding makers as defendants.

In an action against the guarantors of a promissory note for $1,935.46 payable in a year, given by a company for machinery bought from the plaintiffs when it appeared that the company before the maturity of the note was claiming from the plaintiffs $953.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during the currency of the note in which the defendants paid into Court $1,195.01 as the amount justly due. A motion was made to add the company as defendants.

Held, that the interests of justice as defined by sub-s. 12 of s. 57 of the Judicature Act, require that wherever it can possibly be done without injustice or inconvenience one action should be sufficient and so multiplicity of legal proceedings avoided and as the guarantors (defendants) should not be required to pay more than what the plaintiff was entitled to recover the company was added as a party defendant.

W. T. Henderson (Brantford), for the motion. *Biggs*, K.C., contra.

Meredith, C.J.C.P., MacMahon, J., Anglin, J.] [Nov. 26, 1906.

IN RE WILSON AND TORONTO GENERAL TRUSTS CORPORATION.

Surrogate Court—Taking accounts—Jurisdiction to rescind order on account of mistake.

Held, that the Surrogate judge acting as the Surrogate Court has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of a party who has obtained it, and also to set aside or vary an order which he has made by mistake, though not to correct errors which he has made in the judicial determination of any question upon which he has actually passed; thus in this case he had jurisdiction on these grounds to set aside and vacate an order made by him upon the taking of executors' accounts and to re-open the accounts and further investigate them without reference to the order made.

Held, also, that the acts of the Surrogate judge in passing

accounts of executors are those of the Court and not of the judge as persona designata.

F. E. Hodgins, K.C., and *D. T. Symons*, for appellant. *Shepley*, K.C., and *J. H. Moss*, for respondents.

Falconbridge, C.J.K.B., Britton, J., Mabee, J.] REX *v.* SPELLMAN. [Nov. 30, 1906.

Conviction—By police magistrate of city and county—Subsequent appointment of salaried police magistrate for the county—Offence committed in county outside the city limits—Jurisdiction.

On a motion to quash a conviction made by a police magistrate of a city appointed under R.S.O. 1877, c. 72, and later appointed police magistrate for the county in which the city was situate, under 41 Vict. c. 4, s. 9(O.), for an offence committed in the county outside the city limits.

Held, that notwithstanding there was a salaried police magistrate subsequently appointed for the county under 48 Vict. c. 17, s. 1 (O.); R.S.O. 1887, c. 72, s. 8, the conviction was good, although the convicting police magistrate was not acting because of the illness or absence of or at the request of the other county police magistrate.

Per BRITTON, J.:—The city police magistrate is ex-officio justice of the peace for the county, and could as police magistrate sitting alone do anything that two justices of the peace could sitting together.

Haverson, K.C., for the motion. *J. R. Cartwright*, K.C., contra.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Dec. 7, 1906.

FLEUTY *v.* ORR.

Negligence—Injury to person by fault of driver of vehicle in highway—Liability of owner—Relation between owner and driver—Master and servant or bailor and bailee—Inference from facts—Duty of appellate Court.

The defendant, an hotelkeeper, being the possessor of an omnibus and horses, made an agreement with M. whereby, in

consideration of M. driving the defendant's guests free to and from the railway stations, paying the defendant 70 cents a day for the board of the horses at the defendant's stables, M. should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage. The plaintiff was injured upon the highway owing to the negligence of M., who was driving the omnibus empty to one of the stations to meet an incoming train.

Held, that the question whether the relation between the defendant and M. was that of master and servant or that of bailor and bailee was a question of fact, and the test was the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by M. for the defendant; and (CLUTE, J., dissenting), that the proper inference from the above facts and other facts in evidence (set out in the judgments) was that the relationship between the defendant and M. was that of bailor and bailee; and therefore the defendant was not responsible for the negligence of M.

Saunders v. *City of Toronto* (1899) 26 A.R. 265 followed.

There was no conflict of evidence and the trial judge drew inference from the undisputed facts.

Held, that an appellate Court was at liberty (and per ANGLIN, J., was bound) to review the inferences of the trial judge.

Judgment of the County Court of Huron reversed.

E. L. Dickinson, for defendant, appellant. *W. Proudfoot*, K.C., for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Anglin, J.] [Dec. 7, 1906.

GEORGE *v.* GREEN.

Practice—Special endorsement—Nullity—Irregularity—Account stated—Interest on—Setting aside judgment—Terms.

The weight of English authority is against the proposition that an account stated entitles the creditor to interest. Such a creditor is not entitled to claim interest either by law or upon implied contract, unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or the

parties have themselves in adjusting their accounts, allowed interest upon balances outstanding—though a jury might, and probably would allow such interest as damages. In such a case, therefore, a claim for interest is not a proper subject of special endorsement.

But in view of Con. Rule 575, notwithstanding in such a case the addition of a claim for interest in the nature of unliquidated damages, final judgment may be rightly signed for the liquidated demand upon the accounts stated, while as to the rest of the claim the judgment should be interlocutory only. And if under these circumstances final judgment for the whole claim has been entered it is not a nullity, but merely irregular, and terms may be rightly imposed on setting it aside.

C. Millar and *C. McCrea*, for appellant George. *C. A. Moss*, for respondent Green.

Mulock, C.J., Ex.D., Anglin, J., Clute, J.] [Dec. 13, 1906.

RE PRESTON.

Trusts and trustees—Trustee de son tort—Infant cestui que trust—Illegal disposition of fund—Payment into Court—Jurisdiction.

Moneys payable to a widow as trustee for her infant child were collected for her by M., and by arrangement between them retained by him and employed in his business. By writing addressed to the widow he acknowledged holding the moneys to the credit of the infant, "bearing interest at the rate of six per cent. per annum."

Held, that M. was a trustee de son tort, and as such either an express or a constructive trustee, and liable to account to his infant cestui que trust, and so entitled to come to the Court, under the Trustee Relief Act, R.S.O. 1897, c. 336, s. 4 (and s. 2, defining "trustee"), and obtain an order allowing him to pay the moneys into Court, against the opposition of the widow, who pressed for payment to her, on the ground that he was simply her debtor.

Semble, also, per ANGLIN, J., that the Court had jurisdiction, as custodian of the interests and property of infants, to order, motu proprio, that which, upon application of the official guardian or of the infant by her next friend, it could and would direct.

by virtue of Rule 938(*d*); and further, if the widow had resided abroad for a year and was resident abroad when the application for payment in was launched, the order might be made under 62 Vict. c. 15, s. 3 (O.)

Order of MABEE, J., affirmed.

Middleton, for the widow. *Raney*, for James Moneypenny.

DIVISION COURT, COUNTY OF LANARK.

Senkler, Co. J.] ANDERSON *v.* CHURCHILL. [Nov. 6, 1906.

Friendly society—Non- payment of dues—Suspension—Payment by secretary for member—Implied request—Recovery back —Subrogation.

In this case the plaintiff was financial secretary of the Perth Lodge of the Ancient Order of United Workmen and was the officer to whom the members of the lodge were required to pay their dues and assessments. The defendant was a member of the lodge. The defendant failed to make payment of his dues and assessments for the months of May, June, July and August, of 1905, but the plaintiff remitted the payments for the four months to the Grand Lodge, reporting the defendant suspended in September of 1905. This action was to recover the amount paid by the plaintiff for the defendant's dues and assessments for the four months.

It was established that according to the constitution of the society, the mere fact of non-payment for one month would without any formal notice by the member operate as a suspension from the society. It was shewn that the defendant had upon a former occasion requested the plaintiff to carry him for a month and had afterwards paid his arrears. It was also shewn that the defendant did not pay his assessment for April, 1905, until after the 1st May

Held, 1. That as the defendant had upon a former occasion requested the plaintiff to keep him in good standing, the onus was on the defendant to shew that he had revoked what was an implied request to keep him in good standing.

2. That although the plaintiff had in the first instance re-

mitted for the defendant out of the funds of the local lodge, that as he was obliged to make good the amount, he was entitled to be subrogated to the rights of the lodge and had the right to sue.

Judgment for plaintiff for full amount of the four months' dues and assessments.

F. W. Hall, for plaintiff. *J. A. Stewart,* for defendant.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] HART *v.* CITY OF HALIFAX. [Nov. 26, 1906.

Municipal Corporation—Illegal expenditures—Action by ratepayer—Attorney-General a necessary party.

Plaintiff, a ratepayer of the City of Halifax, in an action brought in his own name, sought to have declared illegal and re-payment enforced of moneys paid by the city to cover the expenses of the mayor and city engineer, delegates appointed to attend the convention of Canadian municipalities held at Winnipeg in July, 1905.

Held, that in the absence of any clause in the city charter authorizing such expenditures as those in question the expenditures were illegal and the moneys paid could be recovered in an action for that purpose at the suit of the city, to which the Attorney-General would be neither a necessary nor a proper party. But in this case, the city having declined to sue or to allow its name to be used for that purpose, the action must be in the name of the Attorney-General, and could not be brought in the name of plaintiff without shewing that he had suffered special injury.

Allison, for plaintiff. *Bell,* for defendants.

Full Court.] REX *v.* CLARK. [Nov. 28, 1906.

Canada Temperance Act—Form of conviction—Averment that penalty was proceeded for within three months not necessary —Amendment of information—Waiver of right to adjournment—Objection cannot be taken subsequently.

Defendant was committed to jail for a third offence against the Canada Temperance Act. On motion for his discharge under proceedings in the nature of a habeas corpus the ground chiefly relied on was that the conviction should shew affirmatively that the informations were laid within three months after the offences for which defendant was convicted were committed.

The commitment was regular on its face and while it did not disclose the dates of the laying of the informations in the first and second prosecutions the other proceedings brought up did, and shewed that the informations were respectively laid within the three months limit.

Held, following *Wray* v. *Toke*, 12 Q.B. 492, that it was not necessary to aver in the conviction that the penalty was proceeded for within three months next after the offence.

R. v. *Adams*, 24 N.S.R. 559, overruled.

The information as originally sworn alleged an offence between the 24th September and the 15th October, but upon application by the prosecutor at the trial, the "15th" was amended to the "16th" so as to embrace the offence of keeping for sale liquor seized on defendant's premises on the 15th. The information was re-sworn and defendant was expressly informed of the amendment and declared himself ready to proceed with the trial on the amended charge.

Held, that having waived his right to an adjournment he could not afterwards object that he had not sufficient time.

J. J. Power, in support of application. *Ralston*, contra.

Townshend, J., Graham, E.J., Meagher, Russell and Longley, JJ.] [Dec. 8, 1906.

THE KING *v.* CURRIE.

Criminal information against magistrate for acting illegally—No allegation of corrupt motive.

Motion under the Crown Rules for leave to exhibit a criminal information, against the defendant, a justice of the peace, for

the County of Hants. The applicant in her affidavit swore that she had been arrested on August 2nd, 1906, under a warrant, based on an information, laid on August 1st, 1906, before the defendant, by his sister-in-law, for the theft of her watch, that she had been put on trial, after a preliminary examination, at which she gave evidence, held on the day of arrest, that a bill had been ignored by the grand jury, at Windsor, Nova Scotia, in September last, that she was innocent of the offence, that she believed that the defendant had been actuated in his judicial conduct by corrupt motives, and that he had been actively engaged for the last thirty-three years discharging magisterial functions. The defendant filed an affidavit denying that he knew he was acting illegally at the instance of his sister-in-law, but stating that he would have given the applicant time to prepare her defence, if she had asked for it, and that he did not act from any corrupt motive.

TOWNSHEND, J.:—We are all of opinion that this application must be dismissed, because it has not been shewn that the magistrate had acted corruptly, but we think it was very improper for him to act in the matter at all. He should have referred the prosecutrix to another magistrate. The application is dismissed.

J. J. Power, for the motion. *Drysdale*, K.C., Attorney-General, for defendant.

Province of Manitoba.

COURT OF APPEAL

Full Court.] MACDONALD *v.* DRAKE. [Oct. 22, 1906.

Company—Liability of directors for wages.

The plaintiff, having recovered a judgment against a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, for wages, and an execution on such judgment having been returned nulla bona, brought this action under s. 33 of the Act, against two persons who had been elected and had acted as directors of the company during the whole

term of the plaintiff's employment, to recover the amount of his wages.

The defendants shewed that they did not own the stock that stood in their names absolutely in their own right, but one as security for an accommodation indorsement, and the other as trustee for his father, and both claimed that, under s. 27 of the Act, they were not qualified to be directors, and, therefore, that s. 33 did not apply to them. Both had, however, acted as directors de facto, had attended many meetings of directors and taken part in the management of the company's affairs.

Held, affirming the verdict of the County Court for plaintiff, that the defendants were liable to him for the amount claimed.

Directors who are only such de facto and not de jure may bind the company in all dealings with persons acting in good faith without notice of defects in the appointment of such directors. *Re County Life Assurance Co.*, L.R. 5 Chy. 288, and *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869.

If, then, persons can, by acting as, and holding themselves out to third parties to be, directors, estop the company, as against persons dealing with it in good faith, from denying the legality of their appointment, much more should they be estopped, as against such persons, from disputing the regularity of their elections or that they were legally qualified to hold such office.

Held, also, that the provision in s. 33 is remedial and not penal in its nature, being only the withholding from directors, in respect of wages, of the freedom which the statute would otherwise give them from personal liability for all debts of the company.

Crichton, for plaintiff. *Hoskin*, for defendants.

Full Court.] ROGERS *v.* BRAUN. [Nov. 30, 1906.

Contract—Construction—Agent "producing" a purchaser to vendor of land—What may amount to a refusal of an offer.

Appeal from decision of MATHERS, J., noted ante (Vol. 42, p. 543), allowed with costs.

Held, that, under the circumstances there stated, the plaintiff had not within the meaning of the agreement, produced the proposed purchaser to the defendant within the time limited, nor could it be said that the defendant had refused the offer.

Haggart, K.C., for plaintiff. *Pitblado*, for defendant.

KING'S BENCH.

Mathers, J.] WATT *v.* POPPLE. [Nov. 3, 1906.

Practice—Adding party as co-plaintiff—Consent in writing must be signed personally—King's Bench Act, Rule 242 (b).

The plaintiff applied for leave to add his former co-partner as a party plaintiff in the action. The co-partner had absconded and the plaintiff signed for him a consent in writing to be added as a plaintiff, relying on the authority of a partner to sign such name.

The referee dismissed the motion. Rule 242 (*b*) of the King's Bench Act provides that "No person shall be added or substituted as a plaintiff . . . without his own consent in writing thereto to be filed."

Held, following *Fricker* v. *Van Grutten* (1896) 2 Ch. 649, that the personal signature of the party is required by the rule and the signature of an agent, however undoubted his authority, is not sufficient.

Appeal from referee dismissed with costs in the cause to the defendant in any event. A substantive motion for leave to amend by adding the co-partner as a defendant was granted on the same terms as to costs.

Mulock, K.C., for plaintiff. *McKerchar,* for defendant.

Mathers, J.] FRASER *v.* C.P.R. Co. [Nov. 8, 1906.

Examination for discovery—Duty of officer under examination to obtain information to enable him to answer questions on oath.

On his examination for discovery, one of the defendant company's officers, in answer to the questions asked, proceeded to read from a memorandum prepared beforehand by one of the defendants' solicitors and purporting to contain the information asked for. The memorandum had been placed in his hands about an hour previously. He knew nothing of the facts otherwise than as stated in the memorandum and he had not verified its accuracy. The plaintiff's solicitor objected to the evidence being given in that way, when the officer refused to answer without the memorandum because he had no knowledge of the facts apart from its contents.

Held, on appeal from the Referee, that the officer should avail himself of the best sources of information and put himself in a position to answer all proper questions without the aid of a memorandum, or if he cannot rely upon his memory for all the facts he may rely upon a memorandum prepared by himself or otherwise under such circumstances that he can pledge his oath to its accuracy. If the information is contained in documents, books or papers, he must inspect them if he has an enforceable right to do so, and if the inspection is wrongfully refused he must take proceedings to enforce it: Bray's Digest, p. 53. If the information is contained in documents or papers in the custody of another officer of the corporation, he must not be satisfied with the statement of such other officer as to their existence or contents, but must inspect them himself. *Bolckow* v. *Fisher*, 10 Q.B.D. 161, and *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 657, followed.

Welsbach Co. v. *New Sunlight* (1900) 2 Ch. 1, distinguished.

Order made accordingly.

Mulock, K.C., for plaintiff. *Aikins*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] [Nov. 21, 1906.

NORTHERN COUNTIES INVESTMENT TRUST *v.* CANADIAN PACIFIC RY. CO.

Railway—Damage by fire—Sparks from engine—Inflammable material on right of way—Limitation of actions.

This was an action for damages for setting fire to the plaintiffs' orchard adjoining the right of way of the defendants' railway; the fire being alleged to have been caused through sparks having been omitted from the engine. The jury brought in a verdict of $2,500 damages and on motion for judgment on the verdict of the jury, it was opposed by defendant counsel on the ground that the action was barred because it was not brought within six months as required by s. 27 of the Consolidated Railway Act, 1879, which the defendants claimed the benefit of. The negligence found consisted also in allowing an accumulation

of inflammable material on the right of way and the user of a defective engine, resulting in a fire spreading from the right of way to plaintiff's property. It was questioned whether or not apart from the limitation of the action, this damage came within the expression "by reason of the railway" used in said section.

Held, that said damage was included in such expression; and that as the section referred to of the Consolidated Railway Act was incorporated in the special charter of the defendant company, the action would not lie as having in fact been brought within the six months' limitation and that this was not effected by the extension of time granted by s. 242 of the Railway Act, of 1903.

Martin, K.C., for plaintiff. *Davis, K.C.*, for defendant.

Book Reviews.

The Supreme Court Act, R.S. c. 139 (1906), and Rules, with reference to all the decisions of the Court dealing with its practice and jurisprudence, by EDWARD ROBERT CAMERON, one of His Majesty's Counsel, and Registrar of the Court. Toronto: Canada Law Book Company, Limited, 1907.

This compilation will be of great benefit to the profession, especially as some eight years have elapsed since the publication of the second edition of Mr. Cassel's book. The author reminds us that in the Revised Statutes of 1906, the sections of the old law relating to appellate jurisdiction of the Supreme Court are entirely re-drafted, but that this revision, however, makes no alteration in the law.

The book is in three main divisions: 1. The Supreme Court Act. 2. The rules and orders, which are given as they stand to-day amended by the different orders passed since February, 1876. 3. An appendix referring to appeals under special Acts; such as, Exchequer, Election, Railway, Winding-up and Criminal appeals, and the Orders of the Privy Council.

The construction adopted is to give the various sections and rules under their numerical order, and at the end of each, under appropriate headings is given a digest of the authorities bearing upon them. We may well suppose that one so familiar with the subject as is Mr. Cameron has not omitted any case which might

helpfully be referred to by those seeking light on the various sections of the Act, or the rules of Court.

The author has prepared a very useful statement, designated "a key," for determining questions of jurisdiction under the Supreme Court Act. As a matter of convenience it would have been better if this instructive table had appeared in more extended form and larger type. This book well fills a vacant place.

The Law of Probate, including Administration, Guardianship, Contentious proceedings, Custody of infants, Succession duty, etc., by A. WEIR, B.A., LL.B., author of the Law of Assessment. Toronto: Canada Law Book Company, Limited, 1907.

With characteristic modesty the author gives the reader no preface; but, what is of much more importance, he gives an excellent book on a subject with which he is evidently very familiar. It is over twelve years since we had a book on the subject of probate. It is unnecessary, therefore, to dilate upon the need of something up to date on this most important subject.

Mr. Weir has written a concise and comprehensive treatise on the practice relating to all matters within the jurisdiction of the Surrogate and Probate Courts. Each step in these proceedings is commented upon and practical directions given and supplemented with appropriate forms.

This book may be said to go even beyond the law of probate. It touches upon the requisites of valid testamentary dispositions, testamentary capacity, undue influence, etc. It also deals with the revocation and revival of wills and survivorship, and various other matters which are not readily accessible elsewhere. The much discussed and little understood Devolution of Estates Act and its amendments have received careful attention. The Succession Duty Act, which has proved so important a source of revenue to the country receives due attention in its exposition.

The forms are numerous, as they should be in a book of practice, and seem to have been carefully selected and revised, and the index is unusually complete and well arranged. We really have nothing but commendation for this, Mr. Weir's second effort at book making, and we shall hope to hear from him again in some other branch of law or practice.