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INCREASE OF JUDICIAL SALARIES.

It has come at last, after much protesting and petitioning by this Journal.

By resolution declaring it expedient to amend the Supreme and Exchequer Courts Act, the Chief Justice of the Supreme Court will receive an annual salary of $10,000, and each of the puisne judges $9,000. The judge of the Exchequer Court will receive $8,000 per annum. This is as it should be. It goes without saying that the Bench of the highest Appellate Court of the Dominion should be made as attractive as possible to the best men at the Bar. This increase is one means to that end.

By another resolution the Act respecting the judges of Provincial Courts is to be dealt with as follows. We begin with the Province of Ontario: The five Chiefs will now receive $8,000 per annum each; the twelve puisne judges $7,000 each. This is also as it should be, and is in the line of what we have long and earnestly contended for.

In the Province of Quebec: The Chief Justice of the King's Bench is to receive $8,000, and the five puisne judges of that Court $7,000. This is as it should be. We see, however, that the same rule is applied to the Superior Court of that Province. Whilst we congratulate the learned judges of that Court upon their good fortune, we fail to see why even sixteen of them should be put on the same plane as the judges of the highest Court of that Province, or why all of them should be better paid than the County Court judges of other Provinces. They are termed "Superior Court" judges; but in effect that Court corresponds more nearly to the County Courts of the other Provinces; and, with some exceptions, the business done by its judges is not anything like as great or important as that which falls to the lot of many of the County Court judges. Again, there are in all thirty-five puisne judges, of whom sixteen

have now $7,000 a year, and two $4,500 each. This makes an annual addition of $60,356 to the cost of administration of justice in Quebec. There is manifestly a want of proportion when we compare the salaries of the judges of the Superior Court of Quebec with those of the County Courts of the other Provinces.

The Chiefs of the Supreme Courts of Nova Scotia, New Brunswick, Manitoba, British Columbia and North-West Territories are to have $7,000 each, and the puisne judges of these Courts $6,000 each. The Chief of the Supreme Court of Prince Edward's Island has $6,000, and his assistants $5,200 each. All this is also as it should be; indeed, it would not have been unreasonable if all judicial salaries (with the one exception above referred to) had been made even larger. In proportion to Parliamentary and ministerial salaries, as now fixed, they should be larger. But we are very glad that an increase has at last been made.

The judges of the County Courts are also better paid than formerly, the sum of $3,000 per annum being now the standard.

As stated by the Premier, the question of judicial salaries and the apportionment of judicial work is "undoubtedly one of the most vexed and most complicated questions with which the Parliament of Canada is called upon to deal. The reason has been stated more than once in the course of this debate; it is because there is divided legislative authority over this matter. The constitution of the Court belongs to the Province, but the appointment of judges belongs to the Federal Government. I agree that there is less litigation in some parts of the country than there was, but at the same time there is more in several other parts. In the cities there is a new class of litigation which has arisen from new inventions. The tendency has been to transfer legal and judicial business from the rural parts of the community to the centres, to the large cities. The real trouble arises not so much from the fact that the Bench is over-manned as from the defective distribution of work. We are inheriting a condition of things created many years ago. Speaking for my own Province (Quebec) it would not be a di dvantage, and I suppose in Ontario there would be no disadvantage if we would remove one-half the law Courts which are scattered over the Province, but the difficulty is to do that. If there is to be, as has been sug-

gested, a conference between the Dominion and Provincial Governments, I agree altogether that this is one of the subjects that we ought to try and settle."

It is most important in the interests of the Bench, and, therefore, of the Bar, as well as of the country at large, that this matter should be speedily and carefully dealt with.

The debate, as recorded in *Hansard*, is very interesting reading, and contains much information and many valuable suggestions, some of which will, perhaps, bear fruit in the near future.

In connection with this subject there is a statutory provision, which is of very great importance—one which we have strongly contended for, and which every thoughtful lover of his country must recognize as most commendable legislation. The provision referred to is as follows: "No judge mentioned in this Act shall, either directly or indirectly, as director or manager of any corporation, company or firm, or in any other manner whatever for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties."

If this provision can be so interpreted that it has now become impossible for a judge to act as a Commissioner or arbitrator in any matter of a *quasi* political character, there will be a feeling of relief and satisfaction. We need not dilate upon the injury done to the Bench, the lowering of its dignity, and the resulting tendency to lower its usefulness, by judges being placed in equivocal positions and set to do work outside that which properly comes within their judicial duties.

The remarks of the Minister of Justice, the Hon. Charles Fitzpatrick, K.C., and we gladly quote his words as he is the best Minister of Justice Canada has ever had, in reference to the above resolutions, are as follows: "This amendment to the Act respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest they should be so employed. I think the less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the Bench. Of that I am absolutely convinced. I would even go so far as to say that I entertain

grave doubts as to the constitutionality of such appointments. That question arose in Parliament when it was decided by the British Parliament to refer matters arising out of contested elections to the Courts. When the Courts were first charged with the duties of investigating such matters, Chief Justice Cockburn wrote a strong letter of protest from the constitutional standpoint. That protest was of no avail, but, nevertheless, it shewed that there was considerable doubt as to the right of the judges to sit in such matters. There are cases, however, where it is in the public interest that we should utilize the services of the judges outside the Bench, but only in matters of urgent public necessity."

The Premier also expressed his thoughts as to the scope of this provision as follows: "The judges are specially well qualified to act in arbitration between the Dominion and the Provinces, or between the Provinces themselves, and I think no one would object to that. The judges have also been called upon to act as arbitrators between workmen and their employers on the occasions of strikes, and as that is in effect a judicial matter to determine, I do not think judges should be prevented from so acting. But what Parliament intends, and what we are all agreed to is, that judges should not be allowed to participate in any kind of business which is of a commercial character; they should not be directors of insurance companies or banks, or such. But as regards anything which partakes of a judicial character, I do not think any one has the intention of preventing the judges from acting."

The remarks of the first Minister are not, we venture to suggest, as strong as they should be, nor are they, we hope, correct as to the narrower construction placed by him on the words of the resolution. The expression used by the Minister of Justice, "only in matter of urgent public necessity," is more worthy of the occasion. It is a pity it was not embodied in the Act.

ALIEN LABOUR LEGISLATION AND THE COURTS.

Upon considering the judgment of Mr. Justice Anglin, *In re Gilhula*, and the editorial in this journal in the issue for July, 1905, on Alien Labour Legislation, certain phases of the under-

lying question, not touched upon in the judgment nor in the editorial, present themselves.

The gist of the judgment is that the Dominion statute assuming to direct deportation is ultra vires, as attempting to authorize extra territorial restraint, the act of deportation in any conceivable case involving the use of such extra territorial restraint. The arguments used in support of the judgment do more than uphold the conclusion that the colonial statute is ultra vires, for they would, it seems, apply equally to an act of the Imperial Parliament; and if, as the learned judge concludes, the return of the alien to the United States in the case at bar necessarily involves an assumption of extra territorial jurisdiction, it must follow that deportation is impossible of authorization alike by the Imperial as by the Dominion Parliament.

In determining that the act of deportation does necessarily involve the use of extra territorial constraint, the reasoning is that even when the prisoner is taken to the actual boundary line the application of force by the Canadian officer, himself wholly within Canadian territory, operating upon the person of the alien while even partly within the foreign territory is an extra territorial constraint of such alien by the Canadian officer.

If that be so, will it not follow that a criminal by taking his position astride of the boundary line will render himself safe from lawful apprehension by the officers of either country, whether of the one for punishment or of the other for extradition? For if the force that would eject him, even when applied wholly within one country, necessarily operates partly at least in the other, so also does the force that would draw him into one country even when applied wholly within that country; and the latter is no less unlawful than the former, and thus is as well beyond the power of the Imperial Parliament or of Congress to authorize as of the Dominion Parliament.

Again, if the deportation of a contract labourer be unlawful so also is the deportation of a criminal or of one suffering from a loathsome and contagious disease, who, in violation of the laws of a country has entered its territory; and society is thus without power to protect itself from physicial and moral contagion because powerless to prevent by force the breach of the laws it makes for its own preservation.

And then what becomes of the home as a castle if one may not eject an intruding neighbour because of the trespass involved in forcing him back upon his own land? The analogy is reasonably close.

It seems upon reflection questionable whether deportation in the case under consideration does, in any proper sense, involve assumption of extra territorial power on the one hand or trespass on the other. And even if the judgment be upheld upon the minor point of ultra vires, may there not be another side to the main question which would justify the view that a country that permits even unwittingly the passage of a person, be he contract labourer, malefactor or diseased, from its own territory into that of another country whose laws forbid his entrance, must be regarded as having impliedly agreed to the return of the offender to its own territory by the officers of the offended country.

In the former editorial referred to, the deportation law of the United States is charged with involving a breach of the extradition treaty because the malefactor may be forced back to the country whose law he has broken at the will and pleasure of one signatory to the compact who, jointly with another, pledged itself that no criminal should be transferred unless an extraditable offence had been committed. This argument seems to lose sight of the main object of extradition treaties which is to secure extraditions not to restrict them, and if pressed would hold one guilty of breach of contract who should do all that he had agreed and more. These treaties are agreements to hand over persons guilty of certain offences, not agreements not to hand over others, and they leave either party free to purge itself of noxious elements even not named in them.

The determination of the Privy Council will be awaited with interest, and to many it will seem meanwhile that no sufficient reason has as yet been adduced why the judgment of the High Court of Justice should not be over-ruled and the right of the Dominion to exercise within its jurisdiction powers that may produce effects outside sustained.

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THE RIGHT OF PRIVACY.

The right of privacy is being discussed in some of the legal journals of the United States in connection with a recent judgment in the Supreme Court of Georgia, *Pavesich* v. *New England Life Ins. Co.*, 50 S.E. Rep. 68. It appears from the summary of the case given in the *Law Notes* that the agent of the defendant secured a photograph of the plaintiff and published it in a newspaper in an advertisement of the defendant side by side with the representation of a very disreputable and woe-begone individual. Above the effigy of the plaintiff, who seems to have been a well-groomed man with an air of prosperity, appeared the legend "Do it now [*i.e.*, get insured in the New England Life]. The man who did." Above the likeness of the woe-begone gentleman were the words: "Do it while you can. The man who didn't." Below the plaintiff's picture again was this joyous sentence: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Company of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid up policies." The woe-begone person by a statement in the like relative position, bitterly regretted his failure to follow the same course. The whole exhibit was unified and emphasized in a single line: "These two pictures tell their own story." The plaintiff failing to see anything humourous in the above brought action. He denied having any insurance in the defendant company, and charged that the publication was false and malicious tending to bring him into ridicule before the world especially with his friends and acquaintances, etc., and claimed that it was a trespass upon his right of privacy.

The Supreme Court of Georgia, upon an appeal from a demurrer decided in the defendants' favor in the Court below, considered that the plaintiff's declaration contained two counts, one for libel, and the other for violating the right of "privacy," and upheld both counts The judgment gave an elaborate review of the principles of the Roman law as well as of the common law on the subject and declared the right of privacy to be sustained by the fundamental principles of the law.

A discussion of this judgment in *Case and Comment* will be of interest. It commences with the following extract from the judgment of the Court:

"The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal co dition recognizes at once that, as to each individual member of society, there are matters private, and there are matters public, so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law."

"The injuria of the Roman law, sometimes translated 'injury' and at other times 'outrage,' and which," says the Court, "is generally understood at this time to convey the idea of legal wrong, . . . was committed, not only by striking with the fists or with the club or lash, but also by shouting until the crowd gathered around me, and it was an outrage or legal wrong to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an injury or legal wrong was committed 'by numberless other acts.' Sandar, Just. Hammond's ed. 499; Poste, Inst. of Gaius, 3rd ed. 449. The punishment of one who had not committed any assault upon another, or impeded in any way his right of locomotion, but who merely attracted public attention to the other as he was passing along a public highway or standing upon his private grounds, evidences the fact that the ancient law recognized that a person had a legal right 'to be let alone,' so long as he was not interfering with the rights of other individuals or of the public."

At common law the Court finds instances of the protection of this right of privacy. The right of liberty is said to include a right to seclusion at one's option when his presence in public is not demanded by any rule of law. So the law of private nuisances is said to recognize the right of a person to quiet in his home as against noise which interferes with his enjoyment

there, even though the noise results from carrying on a lawful occupation. Again, the common-law maxim that "every man's house is his castle" was interpreted in Semayne's Case, 5 Coke, 91, 1 Smith, Lead. Cas. 9th ed. 228, to mean not only for his defense against injury and violence, but "for his repose." The doctrine that eavesdroppers listening under walls or windows or the eaves of a house were a nuisance at common law and indictable, and might be required to give sureties for their good behaviour, is cited as a recognition of this right to the privacy of home. The same is said, though with less pertinency, as to the doctrine that a common scold could be indicted as a public nuisance. So the constitutional right to be secure against unreasonable searches and seizures, being also an ancient right antedating the constitutions, is declared to be an implied recognition of the existence of a right of privacy. While it is possible to base some, at least, of these doctrines of the common law on the theory that rights of property are thereby protected, it is clear that in some of them, at least, as in the case of eavesdroppers, the real right to be protected was a personal one, whether called a right of privacy or not. This right to be secure and undisturbed in one's home against process servers and searches by officers is also very clearly for the protection of the person, rather than the property. The Court reviews a series of cases in which what it regards as a right of privacy was actually protected, though nominally on other grounds, such as an alleged invasion of property rights. It is beyond question that the real right in many such cases was one of person, rather than of property. The property right involved in such cases is a fiction which the Courts have adopted to avoid the miscarriage of justice which would result from applying the ancient rule that would limit the jurisdiction of equity to the protection of property rights. How far the Courts have actually abandoned that rule in reality, though professedly adhering to it, is shewn in a note in 37 L.R.A. 783. But the personal rights involved in such cases, whether called rights of privacy or otherwise, are usually rights which involve the protection of personal comfort, or of reputation and standing.

The actual decision in this Georgia case is much narrower than the range of the discussion. The justice of the decision is

unquestionable. The law would richly deserve Mr. Bumble's characterization if it did not protect a person against such wrongs as that for which this action was brought. The plaintiff was impudently and insolently, and, as the Court found, maliciously, misrepresented by the unauthorized publication of his portrait, together with false statements made as coming from him, with respect to his having carried life insurance in the defendant company. This portrait and these statements were published as a contrast to a companion portrait of an illy-dressed, sickly-looking person, who was represented as bemoaning his own failure to take such insurance. All this was for advertising purposes, and the statements about the plaintiff were utterly untrue. The publication was humiliating to the plaintiff, and tended to hold him up to ridicule. It was plainly an injury to his personal rights. The fundamental principles of the law of libel certainly covered the case, and the Court upheld a count of the petition for libel against demurrer, as well as the other count for invasion of a right of privacy. The only uncertainty about the case, therefore, is whether the wrong should be called an injury to a right of privacy, or an injury to reputation. It was an outrage on the plaintiff which the law should punish in one form or another. As heretofore contended in these columns, it seems unnecessary and illogical to call the right invaded in such case a right of privacy, rather than a right to reputation in the broad sense, since mere publicity affecting the person only is not held by any of the Courts to constitute an invasion of any right, except when the publicity is of a kind to injure or degrade the reputation or standing of the person among his friends or the public at large. If, therefore, it is the injury to his reputation or standing which gives the right of action, the case seems to belong to the general class of actions for defamation, even though its decision may need to go somewhat beyond the technical limits of the rules usually applied in that kind of actions. Publicity of itself has never been, and it is not conceivable that it ever will be, held to invade any right of a person, except when the publicity is of a kind or under circumstances that will injure the reputation, standing, physical comfort, or other well-recognized personal right. If a right of privacy eo

noline is to be upheld, it is certain to be limited to the protection of some other personal right than the mere right to an exemption from publicity as such. It is, however, of infinitely more importance that such wrongs as those for which this Georgia action was brought should be prevented or punished, than that the right word should be used in defining the right invaded, since there can be little danger that, if this right is called a right of privacy, the Courts will ever extend it beyond the protection or real wrongs. The actual danger is, as in the Robertson Case in New York (171 N.Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N.E. 442), that an outrage upon personal rights shall go unpunished on a mistaken theory that there is no rule of law that covers the case.

Advocates of a divorce law for Canada would do well to note the following: Secretary Taft, of the United States War Department, a popular and able man, has been giving his views to the public on the subject of divorce and the propriety of a uniform law throughout the United States regarding it. The text of his remarks is the fact that last year there were in that country 612 divorces for every 10,000 marriages; and he very naturally enquires what is to become of the foundation of our civilization and our State,—the home and the family, if this continues. He also asks whether there ought not to be some adequate provision to prevent the looseness with which the marriage bond is tied, and the ease with which it may be dissolved. He suggests as a partial remedy for the condition of things in the United States that there should be uniform marriage and divorce laws and that the Federal Courts, subject to the supervision of the Supreme Court, should have charge of the administration of the law of divorces. We venture to think that something very much deeper and more far reaching in necessary to touch this admitted evil in the great Republic.

REVIEW OF CURRENT ENGLISH CASES.

CONTRACT — ILLEGALITY — MARRIAGE BROKAGE — CONTRACT TO BRING ABOUT INTRODUCTION WITH A VIEW TO MARRIAGE—EXPENSE INCURRED IN CARRYING OUT CONTRACT—RESCISSION OF CONTRACT—RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT.

In *Hermann* v. *Charlesworth* (1905) 2 K.B. 123 the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.,) have been unable to agree with the decision of the Divisional Court (1905) 1 K.B. 24 (noted ante, p. 361,) and strange to say although the action is essentially of a common law character the decision of the Court of Appeal is principally founded on equity cases The Divisional Court, it may be remembered, came to the conclusion that the contract to introduce the plaintiff to persons of the opposite sex with the hope and expectation that one among them might desire to become her husband, was not a marriage brokage contract, which they considered was a contract directed to procuring marriage with some particular individual. The Court of Appeal, however, hold there is no ground for that distinction, and on the authority of the equity case of *King* v. *Burr*, 3 Mer. 693, they held that the contract in question was illegal and that the plaintiff was entitled to rescind it and recover back her money; and that the fact that the defendant had incurred expense in bringing about introductions in performance of the contract did not disentitle the plaintiff to succeed.

COMPANY—SHARE CERTIFICATE—RE-DELIVERY OF SHARE CERTIFICATE TO TRANSFEROR—FRAUDULENT TRANSFER OF SHARES—ESTOPPEL—MISTAKE OF COMPANY'S SECRETARY.

Longman v. *Bath Electric Tramways* (1905) 2 Ch. 646 is a case which forcibly illustrates the danger of relying on a share certificate as of itself evidence of ownership. In this case the holder of shares in a limited company transferred them and delivered the certificate thereof to his transferee, who forwarded it to the company with the transfer, in order that the transfer might be registered in the company's books. After the registration of the transfer, the secretary of the company by mistake sent the certificate to the transferor, who fraudulently represented himself to the plaintiffs still to be owner of the shares men-

tioned in the certificate, and who on the faith of such representation and certificate made an advance on the security thereof. The plaintiffs claimed that the company under the circumstances were estopped from disputing the certificate—but the Court of Appeal (Williams, Romer and Stirling, L.JJ.,) affirming Farwell, J., held that in order to recover on that ground it would be necessary for the plaintiff to shew that the negligence of the defendants, of which they complained, occurred in the particular transaction in which their loss arose, and that such negligence was the proximate cause of loss. They also decided that the company owed no duty to the public at large to retain the certificate after registering a transfer by the person thereby certified to be the holder of the shares transferred.

WILL—CONSTRUCTION—CHARITY, GIFT TO—CONDITION PRECEDENT —REMOTENESS—PERPETUITY.

In re Swain, Monckton v. *Hands* (1905) 1 Ch. 669. A testator by his will gave his residuary estate to a trustee upon trust to form a "reserve fund" for the purposes thereinafter mentioned and to pay the net income to his niece for her life, and after her death to pay such income (after payment into the said reserve fund every quarter of a year 10 per cent. of such income) by equal monthly payments to three annuitants for their lives who should be poor inhabitants of Maidstone. And the testator directed that "the said annuities shall not become payable until the said reserve fund shall amount to £400," and that the said reserve fund should be invested and only used in case of dire need, and be always kept at £400; and that if, after the annuities were payable, it should exceed £400 then the overplus might be used either to increase the annuities or to create another annuity. During the life of the niece there was no income available for the reserve fund, and on her death questions arose as to the construction of the will and the validity of the gift for charity. The Court of Appeal (Williams and Stirling, L.JJ.,) overruling Buckley, J., held that, subject to the life estate, there had been a good gift to charity as from the testator's death; and that the direction to postpone the payment of the charitable annuities until the reserve fund should amount to £400 was not a condition precedent to the charitable gift coming into effect, but was only a direction as to the particular application of the charitable fund and intended to secure the beneficial working of the charity, and the case was therefore within the second principle in *Chamberlayne* v. *Brockett* (1872) L.R. Ch. 206, 211; also that the reserve fund was validly devoted to a charitable purpose.

PRACTICE—AMENDED WRIT—SERVICE OF AMENDED WRIT ON DEFENDANT WHO HAS NOT APPEARED—DISCRETION OF COURT TO REQUIRE PERSONAL SERVICE ON NON-APPEARING DEFENDANT.

In *Jamaica Railway Co.* v. *Colonial Bank* (1905) 1 Ch. 677 a writ of summons had been amended, no special directions having been given as to service of the amended writ on a defendant who had been previously served with the writ, but who had not appeared. The plaintiff served it on this defendant by filing it in the office of the Court, under Rule 1015 (see Ont. Rule 573). On the action coming on for trial it was objected that this defendant should have been personally served with the amended writ, and Eady, J., allowed the objection. The Court of Appeal (Williams, Romer, and Stirling, L.JJ.), however, held that there is no hard and fast rule that in all cases where a writ is amended after service on a defendant who has not appeared, that the amended writ shall be personally served on such defendant; on the contrary, it is a matter in the discretion of the Court to require it or not, according to the nature of the amendment allowed; and that such a direction should be given in the order allowing the amendment, wherever it may appear that there is any probability of such defendant suffering any injustice, *e.g.*, where the plaintiff's claim against him is substantially changed or enlarged by the amendment. In this case the appeal was allowed, and the case remitted for trial.

WILL—LEGACIES GIVEN "FREE FROM DUTY"—DEFICIENT ESTATE—ABATEMENT OF LEGACY.

In re Turnbull, Skipper v. *Wade* (1905) 1 Ch. 726, a testatrix who made her will in 1893 and died in 1903 bequeathed numerous pecuniary legacies "free from duty." Her estate proved insufficient to pay all the legacies and duty in full; and for the purpose of abatement it was held by Farwell, J., that the duty payable in respect of each legacy should be added thereto as an additional legacy.

LANDLORD AND TENANT—FORFEITURE WHERE HALF A YEAR'S RENT IN ARREAR—MORTGAGE OF UNDER-LEASE—RELIEF AGAINST FORFEITURE—PARTIES—C. L. P. ACT 1852, SS. 210, 211, 212—(R.S.O. c. 170, ss. 20-23).

Humphreys v. *Morten* (1905) 1 Ch. 739 was an action by a mortgagee of an under-lease against a lessor and a mortgagor to be relieved from a forfeiture occasioned by the non-payment of rent under the head lease. The lessor opposed the plaintiff's right to relief on the ground that neither the lessee nor assignee of the

head lease was a party. It appeared that the lessee under the head lease had become bankrupt in 1877 and that the lease had been assigned by his trustee in 1879, and that the assignee had shortly thereafter disappeared and had not since been heard of. This was considered by Eady, J., a sufficient reason for not making either the lessee or the assignee a party, and he held that the plaintiff was entitled to relief; but that he must pay the lessor's costs of the action, except so far as they had been increased by the lessor's resistance of the plaintiff's claim, which costs the lessor was ordered to pay.

DEED—CONSTRUCTION—CONVEYANCE BY HUSBAND AND WIFE OF MOIETY OF WIFE'S LAND—HUSBAND'S RENT CHARGE NOT MENTIONED—RELEASE OR GRANT—LAW OF PROPERTY AMENDMENT ACT 1859 (22 & 23 VICT. C. 35) S. 10—(R.S.O. C. 119, S. 27).

In *Price* v. *John* (1905) 1 Ch. 744 a husband and wife by a voluntary settlement did "grant, release, dispose of and confirm" a moiety of the wife's hereditaments and "all the estate right title, interest, property claim, and demand," of either of them, in, to and out of the same to trustees and their heirs on certain trusts. The husband at that time was entitled to a rent charge issuing out of the hereditaments, but it was not mentioned in the settlement; and the question was whether under the general words in the settlement the moiety of the rent charge was released to the trustees under the settlement. Eady, J., held that the settlement operated by way of release and not by way of grant of the rent charge, and that its effect was merely to release the settled moiety of the lands from the charge, and as the husband and wife (the owners of the unsettled moiety) had concurred in the release of the settled moiety, therefore the unsettled moiety remained subject to the entire rent charge, by virtue of the Law of Property Amendment Act 1859, s. 10, (R.S.O. c. 119, s. 27).

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

P.E.I.] DODS *v.* MCDONALD. [May 15.

Title to land—Conveyance of fee—Reservation of life estate —Possession—Ejectment.

In October, 1853, D. conveyed to his father and two sisters six acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee, "saving and excepting" thereout six acres for the life of the grantor's father and sisters or that of the survivor, or until the marriage of the sisters, on the happening of said respective events the six acres to be and remain the property of M. his heirs and assigns under said deed. Three months later M. conveyed the block of land to R. M. in fee and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants who claimed the six acres on the ground that the deed to M. contained no grant of the same and also because the life tenants had had adverse possession for more than twenty years.

Held, that as the evidence showed that the life tenants went into possession under R. M. the title of the latter could not be disputed and the statute would not begin to run until the life estate terminated.

Held, per Idington, J., that R. M. under his deed and that to his grantor had the reversion to the fee in the six acres after the life estate terminated.

The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him, and on the trial it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees and no counterpart was proved to be in existence.

Held, that is was properly admitted in evidence.

Morson, K.C., and *DuVernet* (*McLeod*, K.C., with them), for appellants. *McLean*, K.C., and *Mathieson*, for respondents.

Board Ry. Comrs.] [May 30.

WILLIAMS *v.* GRAND TRUNK RY. CO.

Appeal—Special leave—Judge in Chambers—Appeal to full Court—Jurisdiction.

No appeal lies to the Supreme Court of Canada from an order of a judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under s. 44 (3) of the Railway Act, 1903.

Shepley, K.C., for appellant. *Ewart*, K.C., and *Cowan*, K.C., for respondents. *Glyn Osler*, for City of Toronto. *A. G. Blair*, Jr., for Board.

N.W.T.] HULBERT *v.* PETERSON. [June 2.

Chattel mortgage—Registration—Subsequent purchaser—Removal of goods.

For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by ordinance that registration of a chattel mortgage, not followed by transfer of possession shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district a certified copy of the mortgage shall be filed in the registry office thereof within three weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc.

Held, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the three weeks from time of removal, and that though no copy of the mortgage is filed as provided it is valid as against a purchase made within such period.

Beck, K.C., for appellants. *Masters*, K.C., for respondent.

Ont.] LANGLEY *v.* KAHNERT. [June 13.

Title to goods—Sale or transfer—Retention of ownership—R.S.O. (1897) c. 148, s. 41.

K. a manufacturing furrier, by agreement with a retail trading company, placed a quantity of his goods with the latter which could sell them as they pleased, paying on each sale, within 24 hours thereafter, the price mentioned in a list supplied by K. K. had the right to withdraw from the company any or

all such goods at any time; and all remaining unsold at the end of the season were to be returned. While still in possession of a quantity of K's goods the company made an assignment for benefit of creditors, and they were claimed by the assignee.

Held, affirming the judgment of the Court of Appeal (9 O.L.R. 164) which maintained the verdict for defendants at the trial (7 O.L.R. 356), that the property in and ownership of the goods never passed out of K., and the transaction was not one within the terms of R.S.C. (1897) c. 148, s. 41.

A. C. Macdonell, for appellant. *Jas. E. Day*, for respondent.

Ex. C.] RYDER *v.* THE KING. June 26.

Negligence—Common employment—Defence by Crown—Workmen's Compensation Act.

The Manitoba Workmen's Compensation Act does not apply to the Crown. Idington, J., dissenting.

In Manitoba the Crown, as represented by the Government of Canada, may in an action for damages for injuries to an employee, rely on the defence of common employment. Idington, J., dissenting.

Heap, for appellant. *Newcombe*, K.C., for respondent.

Ont.] HOOD *v.* EDEN. [June 26.

Company—Winding-up—Contributories—Consideration for shares.

H. and others, interested as creditors and otherwise in a struggling firm agreed to purchase the latter's assets and form a company to carry on its business, and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they understook to furnish. A power of attorney was given to one of the parties to purchase said assets which was done, payment being made by the discount of a note for $2,000, made by H. and indorsed by another of the parties. The company having been formed the said assets were transferred and the said note was retired by a note of the company for $4,000 indorsed by H. which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company which eventually went into

liquidation. After the company was formed in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid up according to the accounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of the local master in this respect was affirmed by a judge of the High Court and by the Court of Appeal.

Held, reversing the judgment of the Court of Appeal, Davies and Nesbitt, JJ., dissenting, that as all the proceedings were in good faith, and there was no misrepresentation of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid-up was valid, and the order making them contributories should be rescinded.

Held, per Davies and Nesbitt, JJ., that as they did not pay cash or its equivalent for any portion of the shares as such the order should stand.

Held, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three, or any number of successive Courts before whom the case has been heard.

Aylesworth, K.C., and *Robertson*, for appellant. *Haight*, for respondent.

Ont.] McVITY *v.* TRANOUTH. [June 26.

Limitation of actions—Unregistered deed—Subsequent registered mortgage—Possession—Right of entry.

R. T. in 1891, about to marry W. T. and wishing to convey to him an interest in her land, executed a deed of the same to a solicitor who conveyed it to her and W. T. in fee. The solicitor registered the deed to himself but not the other, forging on the same a certificate of registry, and he, in 1895, mortgaged the land and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891 and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought action to enforce his mortgage.

Held, affirming the judgment of the Court of Appeal (9 Ont. L.R. 105) Davies and Nesbitt, JJ., dissenting, that the legal title being in the solicitor from the time of the execution of the deed to him the statute of limitations began to run against him then, and the right of action against the parties in possession was barred in 1901.

Scott, K.C., for appellants. *Watson*, K.C., and *Ruddy*, for respondents.

Que.] IN RE GAYNOR AND GREENE. [June 27.

Extradition— Prohibition — Appeal — Jurisdiction — Supreme Court Act, s. 24 (g)—Public policy—Criminal proceedings.

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made is a proceeding arising out of a criminal charge within the meaning of s. 24 (g) of the Supreme Court Act, as amended by the Act 54 & 55 Vict. c. 25, s. 2, and in such a case no appeal lies to the Supreme Court of Canada. *In re Woodhall*, 20 Q.B.D. 832; and *Hunt* v. *United States*, 166 U.S. 424, referred to.

MacMaster, K.C., and *Stuart*, K.C., for motion. *Casgrain*, K.C., and *A. Taschereau*, K.C., contra.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [March 17.

REX *v.* PIERCE & RANKIN.

Court of Appeal—Right to appeal to—Order of Divisional Court on appeal from conviction—Loan Corporations Act —Judicature Act.

There is no right of appeal to the Court of Appeal from a judgment or order of a Divisional Court made upon an appeal to that Court under s. 117 (4) of the Loan Corporations Act, R.S.O. 1897, c. 205, from a magistrate's conviction.

Construction of ss. 50 and 75 of the Judicature Act, as enacted by s. 2 of the amending Act 4 Edw. VII. c. 11.

Leave to appeal from the decision in 9 O.L.R. 374, refused.

Johnston, K.C., and *Godfrey*, for defendants. *Cartwright*, K.C., and *Curry*, K.C., for the Crown and private prosecutor.

Full Court.] [March 17.

Re North York Provincial Election.

Kennedy *v.* Davis.

Parliamentary elections—Judgment voiding election—Dissolution of legislature—Effect on pending appeal—Costs.

Where, after an appeal from the judgment of the trial judges voiding the election of the respondent had been argued, and while it was standing for judgment, the Legislative Assembly was dissolved:—

Held, that the Court of Appeal could make no order, as to costs or otherwise.

S. B. Woods, for petitioner. *Aylesworth*, K.C., for respondent.

Full Court.] [March 17.

Canadian Pacific Ry. Co. *v.* Rat Portage Lumber Co.

Execution—Seizure of product of timber—Permit to execution debtor to cut and remove from Crown Lands—Lien—Partnership—Interest of partner.

An execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another person in the business of manufacturing to be carried on upon the lands comprised in the permit, and the partnership got out ties to fill a contract with a railway company. The ties were seized by a sheriff under the execution against the debtor, and claimed by the partnership. It was conceded that the execution was not a lien upon any of the timber embraced in the permit until severed, but it was contended that the moment there was a severance the timber cut vested in the debtor, and eo instanti the execution attached.

Held, that there could be no objection to the execution debtor forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials necessary to enable the work of production to be proceeded with. The product would be the property of the partnership, and not that of the individual who held the permit. Such an agreement was not in its nature either void or voidable as against creditors. The interest transferred by the debtor was not exigible under a writ, and was not affected by any lien or charge arising therefrom.

The execution creditors were, no doubt, entitled to seize the partnership interest of either debtor, but no claim of that kind was before the Court.

Rowell, K.C., for appellants. *Douglas*, K.C., for respondents.

From Boyd, C.] [March 17.

ELGIN LOAN CO. *v.* NATIONAL TRUST CO.

Company—Shares—Deposit of certificates—Bailment—Trust—Detention—Excuse—Trustee Act—Winding-up—Direction of Master—Jurisdiction—Detinue—Measure of damages—Price of shares.

The E. company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, depositing the certificates thereof, which were put in the name of the defendants, a trust company, with them for safe keeping, receiving from the trust company a document under seal whereby they acknowledged the receipt of the certificates and agreed to hold same in their safe deposit vaults to the order of the loan company with any dividends received in respect thereof, guaranteeing they would be kept safely therein and delivered up to the E. company. The remuneration of the trust company also being provided for, 375 of the shares had been acquired by the E. company under an agrement with another company, the A. Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendants' possession both loan companies were ordered to be wound-up under the Dominion Act, the defendants being appointed liquidators of the A. company, the L. & W. Trust Company liquidators of the E. company. After the commencement of the liquidation proceedings the L. & W. company, as such liquidators, demanded the certificates from the defendants (on the latter, refusing tc deliver them up, this action was brought for damages for the detention.

Held, that the defendants were merely bailees and not trustees but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust, for which they were fairly excusable under 62 Vict. (2) c. 15, s. 1 (O.), for owing to their dual character of trustees of the E. company and liquidators of the A. company they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding-up of the A. Loan Company,

that the whole 575 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price which could have been procured for the shares between the demand and the delivery.

Judgment of Boyd, C., affirmed.

S. H. Blake, K.C., and *W. H. Blake*, K.C., for appellants. *Gibbons*, K.C., and *Shirley Denison*, for respondent.

Osler, J.A.] [March 18.

MOLSONS BANK *v.* STEARNS.

Court of Appeal—Leave to appeal from judgment at trial.

It is to the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance.

Leave to appeal direct from the judgment at the trial to the Court of Appeal granted, in the circumstances of this case.

Middleton, for defendant. *MacInnes*, for plaintiffs.

REX *v.* TORONTO RAILWAY COMPANY.

Full Court.] [April 12.

Criminal Code, s. 191, 192—Common nuisance—Negligent operation of cars—Running reversely—Absence of fenders and headlights—Accident.

An indictment alleged that defendants were authorized to operate a street railway on certain streets in a city, and, in doing so, were under a legal duty to take reasonable care and precautions to avoid endangering the lives and safety of the public, which, it was averred, the said company, without reasonable excuse, neglected to do so, whereby the lives and safety of the public were endangered and a common nuisance thereby committed. In support of the indictment, it was shown that near the northerly end of a double tracked street, and, at the intersection with a street at right angles thereto, there was what was called a "Y," whereby cars were turned on to the intersecting street and then switched on to a single track, which would be

the continuation of the down track of the said line of railway, the cars being backed up for about a half a mile, the rear part of the car thus for the time being the front thereof. While being so backed up, a woman, in attempting to cross the street and not seeing or knowing of the approach of the car, it being dark at the time, was knocked down and killed. There was no fender or head-light on this end of the car, although provided on the usual front thereof, nor was any gong sounded or signal given of the car's approach.

Held, that the indictment sufficiently charged a common nuisance both at common law and under ss. 191 and 192 of the Criminal Code; and that a conviction of the defendants was properly sustainable on the evidence.

Cartwright, K.C., and *H. L. Drayton*, for Crown. *James Bicknell*, K.C., and *J. W. Bain*, for defendants.

From Britton, J.] [May 9.

BOARD OF EDUCATION OF WINDSOR *v.* COUNTY OF ESSEX.

High Schools—Payment for county pupils—Settlement of amount—Reference to county judge—Absence of jurisdiction—Action to restrain reference—Award of county judge—Res judicata—Estoppel—High Schools Act, 1 Edw. VII. c. 40, s. 34, sub-s. 3 (O.).

Sub-s. 3 of s. 34, of the High Schools Act, 1 Edw. VII., c. 40 (O.), which enables the amount to be paid annually by the county for the maintenance of county pupils in a high school to be settled by the mutual agreement of the trustees and the county, or on their failure to do so, for either party to refer the dispute to the county judge who is thereby empowered to settle the same, refers to a dispute in the settlement of the amount, so that when the question was whether the amount paid in a specified year was for that or a prior year—the evidence disclosing that it was for the specified year—and that there was, therefore, a settlement, so that there was nothing to refer, and an award of the county judge fixing the amount for such year was invalid.

The fact of the making of the award, and the dismissal of an action to restrain proceeding on uch reference, but without any declaration as to the rights of the parties, does not render the matter res judicata, and create an estoppel preventing these matters being afterwards raised.

Judgment of Britton, J., reversed.

A. H. Clarke, K.C., for appellants. *J. H. Rodd,* for respondents.

Full Court.] [June 29.

RYCKMAN *v.* HAMILTON ELECTRIC R.W. Co.

Railway—Negligence—Gratuitous passenger—Free pass—Liability—Limitation of actions.

Appeal from judgment of Meredith, C.J., at the trial. Action for damages for injuries resulting from a railway accident, brought by the wife of one of the defendants' servants who was at the time travelling under an unconditional free pass. The only evidence of negligence was that there was a head-on collision between two cars on the defendants' own line, managed by their own servants.

Held, that this being prima facie evidence of negligence,—and even of gross negligence, if such were necessary, as to which quære—the plaintiff was entitled to recover.

Held, also, that the action was not barred by the limitation clause of the General Railway Act, 1897, c. 207, s. 42, incorporated into the defendants' Special Act—because the plaintiff's injury had arisen from the defendants' breach of their common law duty, founded on their undertaking to carry the plaintiff safely,—and not "by reason of the railway" within the meaning of that clause.

A. M. Lewis, for plaintiff. *J. W. Nesbitt,* K.C., for defendants.

Full Court.] [June 29.

TAYLOR *v.* TOWNSHIP OF COLLINGWOOD.

Waters and watercourses—Drain—Culvert—Revocable license therefor—Damages—Easement—Prescription—Injunction.

The owner of a farm consented to the water which came through, culvert being carried off by means of a drain, which he himself dug through a corner of the farm, into a ravine. No written agreement was entered into therefor, nor was there any expenditure of public money thereon, nor any consideration given for its use.

Held, that a revocable license merely was constituted, which the plaintiff, claiming through such owner, was entitled to re-

voke; and even if a valid agreement with such owner were established, it would not be binding on the plaintiff, for no notice or knowledge to him was proved, knowledge merely of the existence of the culvert and drain not being sufficient.

Held, also, that the plaintiff was entitled to an injunction, the damages allowed him, $100, being, under the circumstances, substantial, while the cause was a recurring one, which, if allowed to continue, might ripen into an easement by prescription.

Aylesworth, K.C., and *Dyre*, for appellant. *R. McKay*, for respondents.

Full Court.] [June 29.

BRADLEY *v.* TOWNSHIP OF RALEIGH.

Water and watercourses—Drainage of lands—Pumping machinery—Negligent operation of—Land injuriously affected by—Damages.

Persons whose lands are injuriously affected by the non-operation or neglegent operation of pumping machinery constructed under the Drainage Act, R.S.O. 1897, c. 226, are entitled to damages under the provisions of s. 73 of that Act, and s. 4 of 1 Edw. VII., c. 30 (O.).

Where, therefore, the plaintiff's lands and crops were injured by the overflow of water caused by the neglect of the corporation to efficiently operate the pumping plant erected in connection with certain drainage works constructed by the township, the plaintiff was held entitled to recover damages for the injury he had sustained, one-half of which was imposed in the general funds of the township, and the other half on the area benefitted.

Matthew Wilson, K.C., for appellant. *Lewis*, for respondents.

HIGH COURT OF JUSTICE.

Anglin, J.] REX *v.* BANK OF MONTREAL. [Feb. 1.

Bills of exchange—Forged cheques—Crown—Forgeries by clerk in Government department—Payment by bank—Negligence—Pass-book—Duty of customer to check accounts—Settlement of accounts—Audit Act—Estoppel—Laches—Deposit of cheques in other banks—Liability over—Duty of knowing customer's signature—Alteration in position—Mistake—Liability as between two innocent parties.

A clerk in one of the departments of the Dominion Govern-

ment forged several cheques upon the bank account kept by the department with the defendants, and deposited the forged cheques to his own credit with other banks (third parties). The cheques went through the clearing house, and were paid by the defendants. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account and examining the pass-book. In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by the defendants against the department's account, the defendants contended that the right to recover was barred by the omission or neglect by officers of the Government of duties which the ordinary customer owes to his bank.

Held, upon the evidence, that there was no negligence or carelessness on the part of the Crown officers in the circumstances preceding the forgeries which conduced to their commission.

2. That there is no contractual obligation on the part of the banker's customer to examine his pass-book; nor in this case was the passing of the book to and fro evidence of a stated and settled account, for the account was "a letter of credit" account, and the settlements between the Crown and the defendants were made by means of re-imbursement cheques, pursuant to s. 30 of the Audit Act, and the re-imbursement cheques accepted by the defendants did not cover the forgeries.

3. But, if there was a breach of duty or negligence or omission, it would not avail the defendants, for the Crown is not bound by estoppel, nor responsible for the negligence or laches of its servants.

4. The claim of the defendants against the other banks with which the forged cheques were deposited was based upon liability as indorsers, or upon warranty or representation that the cheques were genuine, or upon payment and receipt of the proceeds of the forgeries under mistake of fact.

Held, upon the evidence, that the third party banks were not indorsers, and that there was no implication of warranty or representation upon which a claim for indemnity could be founded.

5. The rules as to notice established in regard to genuine bills and notes are inapplicable to the case of mere forgeries.

6. The defendants never were acceptors of any of the cheques within the meaning of s. 54 of the Canadian Bills of Exchange Act.

7. A banker does not owe to the holder of a cheque the duty of knowing his customer's signature. *Imperial Bank of Canada* v. *Bank of Hamilton* (1903), A.C. 49, applied and followed.

8. But upon the ground of estoppel arising from payment by the defendants of the forged cheques and the change in position of the third parties which ensued, the defendants were not entitled to recover against the third parties.

9. And, apart from the estoppel, the rule that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it, afforded the third parties a defence; for, though they had credited the forger's accounts with the amounts of the forged cheques before they were presented for payment, that mistake would have been innocuous to them had it not been for the subsequent mistake of the defendants in honouring those cheques; and this act of the defendants was the proximate cause which enabled the forger to reap the benefit of his frauds.

Aylesworth, K.C., and *J. H. Moss*, for Crown. *Shepley*, K.C., *Gormully*, K.C., and *Orde*, for defendants. *Riddell*, K.C., and *R. B. Matheson*, for Quebec Bank. *G. F. Henderson*, and *A. W. Greene*, for Royal Bank. *J. A. Ritchie*, for Sovereign Bank.

Boyd, C., Teetzel, J., Magee, J.] [Feb. 2.

IMPERIAL TRUSTS CO. v. NEW YORK SECURITY CO.

Mortgage—Interest on interest post diem.

A mortgage contained the following proviso: "Provided this mortgage to be void on payment of five thousand dollars . . . with interest from the date hereof at the rate of eight per cent. per annum as follows: The said principal sum at the expiration of one year from the date hereof . . . and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every twelfth day of November, February, May, and August hereafter. . . . In the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same."

Held, that the proviso, taken as a whole, did not entitle the mortgagees to interest upon interest accruing after maturity of the principal money.

W. H. Irving, for defendants. *H. C. Fowler*, for plaintiffs.

Anglin, J.] [March 9.

HUNT *v.* TRUSTS AND GUARANTEE CO.

Distribution of estates—Ascertainment of next of kin—Legitimacy—Foreign law—Conflict of expert testimony—Determination by Court.

In an action by the descendants of a half-brother of an intestate to establish their status and rights as next of kin, it appeared that the mother of the intestate in 1824 was deserted by her husband, and, believing him dead, in 1826 entered into marriage relations with another man, which continued until her death in 1833. The plaintiffs' ancestor, the issue of this union, was born in 1829. The wife always remained unaware that her husband was not dead, and acted in good faith. He, in fact, survived her. All the events took place in the State of New York, where the parties were domiciled. The intestate died in Ontario, and his estate consisted entirely of personalty.

Held, that the question of the legitimacy of the plaintiffs' ancestor and the right of succession of his descendants to the intestate's property, depended upon the law of the State of New York.

The expert evidence as to the law being conflicting, the Court examined the authorities upon which the experts respectively relied, and reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analogous to those of a special jury, determined that by the law of the State of New York the plaintiffs' ancestor was legitimate.

DuVernet and *A. H. Lewis*, for plaintiffs. *D'Arcy Tate* and *Marquis*, for defendants.

Master in Chambers.] [March 13.

ADAMS *v.* COX.

Interest—Moneys made under execution—Reversal of judgment—Liability to refund—Payment into Court.

Under a judgment against the defendant, the plaintiff issued execution and realized a sum of money which was in his hands when the judgment was reversed, and he become liable

to repay it to the defendant. The money, however, was claimed by another execution creditor, and the plaintiff gave notice of an application for an interpleader order, but did not proceed with it. By consent of all parties the money was paid to the solicitor for the defendant, but without interest.

Held, that the plaintiff was liable for interest, notwithstanding the conflict as to who was entitled to the money, for he could have protected himself by paying the money into Court or obtaining a waiver of the right of interest; and the interest should be at the legal rate of 5 per cent., for the same reason.

J. J. Maclennan, for plaintiff. *J. Bicknell*, K.C., for defendant.

Teetzel, J.] [March 14.

GEIGER *v.* GRAND TRUNK RY. CO.

Damages—Nervous shock—Impact—Railway.

Damages for "nervous shock" are not too remote where there has been direct physical impact through the negligence of the defendant.

Victorian Railways' Commissioners v. *Coultas* (1888) 13 App. Cas. 222, and *Henderson* v. *Canada Atlantic R.W. Co.* (1898) 25 A.R. 437, distinguished.

Dulieu v. *White* [1901] 2 K.B. 669, specially referred to.

The plaintiffs were rightfully travelling on a highway in an enclosed vehicle, when, without warning, it was struck by a moving car of the defendants, pushed a short distance sideways, and struck on the other side of a car moving in the opposite direction. The plaintiffs suffered no visible bodily injuries, except slight bruises, but complained of mental or nervous shock, and a jury assessed damages therefor.

Held, that they were entitled to recover.

DuVernet and *W. M. Boultbee*, for plaintiffs. *Riddell*, K.C., for defendants.

Street, J.] FRASER *v.* DIAMOND. [March 15.

Way—Dedication of highway—Public user—Crown lands—Locatee—Acquiescence—Subsequent grant without reservation—Rights of public—Order of sessions.

In 1834 an order of the Quarter Sessions was made under 50 Geo. III. for the opening of a highway through several lots, the title to one of which was still in the Crown, although it had

been recently occupied under a license from the Crown. The road described in the order was never opened, but another road, following the same general direction, was opened across this lot and others in 1835 or 1836, and was ever after regularly travelled and used as a highway, fenced off from the lot referred to, improved from time to time by statute labour and public money, and treated by the locatee and his successors in title as a public highway. In 1904 the plaintiff, claiming to be the successor in title of the original locatee, established his right, to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road was made.

Held, that the road in question had become established as a public highway, the plaintiff had no right to close it, and the defendant, as one of the public, had a right to remove the plaintiff's obstructions, and was not liable in trespass for having done so.

There was evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a Sessions order was made for the establishment of a highway, but never acted upon, was no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication.

E. D. Armour, K.C., and *A. B. Colville*, for the plaintiff. *S. C. Smoke*, and *G. A. Layne*, for the defendant.

Street, J.] PUFFER *v.* IRELAND. [March 17.

Distress—Payment of rent, after distress, to mortgagee—Continuation after payment—Bailiff—Costs of distress—Costs of action—Counterclaim.

Rent being arrear, the landlord distrained, and the tenant paid the rent to the landlord's mortgagees, who had previously given him notice to pay to them (their mortgage money being in arrear), and threatened him with proceedings if he did not do so.

Held, that the tenant, having paid the mortgagees under compulsion, was entitled to be relieved from the distress and from further liability to the landlord; but the distress was lawful when made, and the landlord was entitled to retain a sufficient quantity of the goods until the costs of the distress were paid.

The tenant sued the landlord and bailiff claiming an injunction to restrain them from proceedings with the distress, and damages, and the landlord counterclaimed for the rents and costs of the distress.

Held, that the action should be dismissed as against the bailiff with costs; that the landlord should have judgment against the plaintiff for the costs of the distress without costs of the counterclaim; and that there should be no costs of the action between the plaintiff and the landlord.

F. L. Webb and *A. J. Armstrong*, for plaintiff. *W. L. Payne*, for defendants.

Falconbridge, C.J., MacMahon, J., Clute, J.] [March 29.

SANDWICH EAST (No. 1) ROMAN CATHOLIC SEPARATE SCHOOL *v.* TOWN OF WALKERVILLE.

Separate Schools—Adjoining municipalities—Three mile limit—Separate school supporters—Notice—Recovery of taxes.

Supporters of a separate school resident in a town may, by proper notice, become supporters of the nearest separate school in an adjoining rural municipality, within three miles' distance; and the High Court has power, in an action brought by the trustees of the rural separate school section against the town corporation, to adjudge that all taxes levied and collected for a certain year, from all ratepayers of the defendant municipality, being Roman Catholics, who gave the required notice, shall be paid over to the plaintiffs.

Judgment of Boyd, C., varied.

Aylesworth, K.C., for plaintiffs. *J. H. Coburn*, for defendants.

PLOUFFE *v.* CANADA IRON FURNACE CO.

Britton, J.] [May 13.

Accident—Negligence—Contributory negligence—Cause of accident—Failure to prove—Hole in ice—Navigable water.

The defendants were the owners of a tug which had been laid up for the winter in a harbour alongside of the defendants' dock, being a place accessible to, but not frequented by the public. The tug accidently filled with water and sank, breaking the ice and leaving open water above the deck over which fresh ice formed. This was cut by the defendants with the object of raising the tug, and while in this condition, the body of the plaintiff's husband was found lying on its back, with its feet and legs on the surrounding ice and the head in the water. It

appeared that the deceased in the evening before the finding of the body was in a state of intoxication. To a question put to the jury, whether deceased by means of ordinary care could have avoided the accident, and how would he have done so, the jury answered, "yes, he might have taken another road; or if sober, on a bright night, he might have avoided the hole."

Held, that no negligence on the part of the defendants was established, for it was quite as reasonable to conclude that deceased voluntarily sat down on the edge of the hole and perished by exposure as that he walked into the hole; that the answer of the jury to the question put to them was not in favour of contributory negligence.

Creswicke, for plaintiff. *DuVernet*, for defendants.

Divisional Court.] [June 1.

BECK *v.* ONTARIO LUMBER CO.

Water and watercourses—Improvements on stream—Floating logs over—Reasonable tolls—Order for—Restriction to future tolls.

The reasonable tolls which, under ss. 11, 13, of the River and Streams Act, R.S.O. 1897, c. 142, the person who has made improvements on a stream is entitled to recover on logs floated over same are only those chargeable on logs floated over the stream after the making of the order of the county or district judge under s. 13.

Riddell, K.C., and *Hodgins*, K.C., for plaintiffs. *Lawrence*, for defendants.

Divisional Court.] [June 8.

RE FARLEY.

Life insurance—Beneficiaries, designation of—"Legal heirs"—Preferred beneficiaries. Children—Death of beneficiary—Further designation—R.S.O. 1897, c. 203, s. 159, sub-s. 1.

By a beneficiary certificate issued in 1901, a benevolent society agreed to pay $2,000 to the beneficiary or beneficiaries designated therein, with a reservation of powers of revocation and substitution. The beneficiaries were designated by an endorsement whereby payment was to be made to three named persons: "Executors in trust for legal heirs," the insured having at this time a son and grandson living. In 1902, after the death of the son, the insured by a declaration in writing directed the moneys to be paid to a daughter-in-law, and by his will he also

so assumed to dispose of the said moneys. The insured died in 1904, leaving him surviving the said grandson, and several brothers and sisters. On a claim made by the grandson as "legal heirs,"

Held, that by the use of the words "legal heirs," an irrevocable declaration was not thereby created in favour of the persons who would answer that description on the death of the insured as a preferred beneficiary under s. 159 of the Insurance Act, for according to the true construction of the contract "legal heirs" meant children, and on the death of the insured's only son the designation failed, and the insured had, therefore, the right to designate another beneficiary, which was properly exercised in favour of the daughter-in-law.

Riddell, K.C., for appellant. *A. Hoskin*, K.C., for daughter-in-law. *Rose*, for executors.

Meredith, C.J.C.P., Britton, J., Teetzel, J.] [June 22.

METALLIC ROOFING CO. *v.* AMALGAMATED SHEET METAL WORKERS' ASSOCIATION.

Attachment of debts—Moneys of union—Representative action—Judgment for costs against representatives—Effect of—Non liability of union—Garnishment.

In an action against a union, in which certain members of the union had been by an order of Court authorized, besides representing themselves, to defend the action on behalf of and for the benefit of all other persons constituting the union, and were to be bound by the judgment and proceedings therein, certain costs were ordered by the Court of Appeal to "be paid by the respondents to the appellants" (respondents being the representative members).

Held, that although all the members of the union might possibly be bound by the judgment to be ultimately pronounced, an order that the defendants (respondents) shall pay money whether for damages or costs without more could not be enforced by execution or process against the property of the union or members thereof not named as defendants, and that money in a bank to the credit of the union not be garnisheed.

Judgment of Anglin, J., reversed.

O'Donoghue and *O'Connor*, for appellants. *Strachan Johnston*, contra.

Street, J.] RE GOULET. [June 24.

Will—Construction—Lands, devise of—Subject to mortgages—Exoneration—R.S.O. 1897, c. 128, s. 37.

A testator by the 3rd clause of his will devised to his son X., after his mother's death, a certain lot in which the testator had given her a life estate; and also two other parcels. By the 4th clause he devised to his son A. a certain lot of land on condition of his paying $1,000 to assist in paying off the mortgage on the property; but, if he failed to do so, he devised the said lot to his said son X. By the 5th clause he devised to A. the last specified lot devised to X., X. to pay him $500 and to have this land charged therewith. A. refused to take the lot firstly devised to him. This parcel was subject to a mortgage for $1,750, while all the other lands were subject to a mortgage for $4,000.

Held, that X., on taking the land so firstly devised to A., was not bound to pay the $1,000 in reduction of the mortgage, the $500 he was to pay A. being substituted therefor.

Held, also, that the three daughters were not entitled to hold the lands exonerated from the $4,000 mortgage, for under s. 37 of the Wills Act, R.S.O. 1897, c. 128, they were still liable to the payment of same.

By another clause of the will testator directed that his wife was to have full control of his lands for ten years after his death in order to pay off the mortgages if not paid at his death.

Held, that the trust thereby created terminated with the death of the wife.

Aylesworth, K.C., for executors. *Middleton*, for daughters.

Street, J.] RE ROACH. June 30.

Succession duty—Appraisement of property by sheriff—Appeal to surrogate judge—Amount exceeding $10,000—Further appeal to High Court—Gift—Deed executed more than year—Contemplation of death—Change of possession—Valuation of stock in company.

From the appraisement and assessment of a testator's estate by the sheriff, the Provincial Treasurer, under s. 9 of the Succession Duties Act, R.S.O. 1897, c. 24, appealed to the surrogate judge, the notice of appeal stating that he appealed on the following, amongst other grounds, which were stated to be, that the sheriff had not included in the appraisement the value of the

homestead property and the household goods, valued at $7,680 and $1,000 respectively. The testator had more than a year before his death, and while in comparative good health, conveyed the homestead to his two daughters in fee, the conveyance being at once registered. No change of possession, however, took place, the testator continuing to live in the house until his death. The surrogate judge, on the appeal, fixed the value of the estate at $197,152.27, refusing to include the homestead property, but including the value of the homestead goods.

Held, that the Provincial Treasurer came within the meaning of "any person" contained in s. 9 of the Act, so as to give the Treasurer the right to appeal; and that such appeal was not limited to the grounds expressly stated, the whole appraisement being open to appeal; and the appeal, therefore, being for an amount in excess of $1,000, there was a further appeal to a judge of the High Court.

Held also, that the conveyance to the daughters of the homestead property, could not be deemed to have been made in contemplation of death within sub-s. (b) of s. 4, but that it came within sub-s. (c) of that section, which read in connection with the Interpretation Act included real as well as personal estate.

Masten and *Chisholm*, for Treasurer. *Bruce*, K.C., and *Middleton*, for executors.

Teetzel, J.] BRAUCH *v.* ROTH. [July 7.

Master and Servant—Breach of contract—Breach induced by third person—Trade union.

It is an actionable wrong to persuade a servant to break his contract with his master, and it is no excuse that the persuader is not actuated by ill-will to the master, but acts in good faith in pursuance of the provisions of the constitution of a trade-union of which he and the servant are members.

The principles of *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A.C. 239, and *Read* v. *Friendly Society of Operative Stonemasons* [1902] 2 K.B. 732, applied.

DuVernet and *J. A. Scellen*, for plaintiff. *Aylesworth*, K.C., and *M. A. Secord*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Jan. 10.

GRAHAM *v.* WARWICK GOLD MINING CO.

Specially indorsed writs—Claims for work and labour and goods sold—Summary judgment.

A claim for reasonable remuneration for work and labour, even in the absence of an express contract as to the rate of remuneration, comes within the description of a "debt or liquidated demand," and may be specially indorsed.

A claim for work and labour in the absence of an express contract is in the nature of a quantum meruit, and a claim for goods sold, in the absence of a price agreed, is in the nature of a quantum valebat, and a form which is good in the one case must be equally good in the other.

R. E. Harris, K.C., for appellant. *E. P. Allison*, for respondent.

Full Court.] [Jan. 10.

LOWE *v.* ROBB ENGINEERING CO.

Contract—Breach—Measure of damages—Burden of proof—Value of materials.

In an action claiming damages for breach of contract the measure of damages is the profit which plaintiff might reasonably look for in performing his contract had he not been prevented from doing so. Plaintiff gave evidence that he estimated his profit at from 15 per cent. to 20 per cent. on the total amount of the contract, or from $75 to $80, but on cross-examination he failed to give any data by which the accuracy of his estimate could be tested, while the person who actually did the work gave evidence that his profit was about $35.

Held, that the burden was on plaintiff to shew grounds which would justify the Court in adopting his estimate and that in the absence of such evidence the amount of damages allowed must be reduced from $70, at which it was fixed by the trial Judge, to $35.

The trial Judge added to plaintiff's estimated profit an allowance for plaintiff's time while the contract existed.

Held, that he was wrong in doing so, as time was one of the elements forming the basis upon which the profit was to be

calculated. And that as to material provided by plaintiff for the purpose of carrying out his contract he could only be allowed damages in so far as the material was shewn to be useless for any other purpose.

Fullerton, for appellant. *O'Connor*, for respondent.

Full Court.] [Jan 10.

ACADIA LOAN CORPORATION *v.* WENTWORTH.

Costs—Counsel fee—Only one allowed except in special cases.

Except as otherwise specially provided only one counsel fee can be taxed in an action. Such fee must be taxed on the completion of the action and cannot be taxed before that event is reached. Where, on a motion for continuance, based upon the absence through illness of defendant, who was alleged to be a necessary and material witness on his own behalf, the continuance prayed for was granted on payment by defendant of costs of the day.

Held, that a counsel fee was improperly allowed as part of such costs, and that the appeal from the judgment of the judge at Chambers reviewing the taxation and striking out such item must be dismissed with costs.

Whitman, for appellant. *Gourley*, for respondent.

Full Court.] [Jan 10.

HART *v.* BISSETT.

Practice—Joinder of agent and undisclosed principal in one action—O. 16, r. 6—Pleading—Sufficiency of—Costs where both parties fail on substantial points.

In an action for breach of a contract in writing (contained in various letters and telegrams) plaintiff joined as defendants both the agent through whom the contract was made and the undisclosed principal.

Held, dismissing points of law raised by defendants, that under the Judicature Act, O. 16, r. 6, plaintiff could join the two defendants claiming alternatively against one or the other and that he could recover at the trial against one or the other.

Semble, that the statement of claim in such case should read "the plaintiff claims alternatively against one or other of the defendants" rather than "the plaintiff claims . . . damages."

Held, further, dismissing the point of law raised by plaintiff that the plea of the defendant B. that if any agreement was entered into between plaintiff and defendant it was entered into by B. as agent of the other defendant and not on his own account, and that at the time plaintiff knew that B. was so acting, was sufficiently pleaded, there being nothing to prevent the inference that the fact set forth in the allegation that B. entered into the agreement (in the letters and telegrams) solely as agent of the other defendant and not on his own behalf appeared on the face of the correspondence.

O'Connor and *Foley,* for appellant. *Allison,* contra.

Province of Manitoba.

KING'S BENCH.

Dubuc, J.] [July 8.

FIRST NATIONAL BANK OF MINNEAPOLIS *v.* MCLEAN.

Promissory note—Holder for value without notice—Delivery on condition of signature by another joint maker.

Plaintiffs sued as indorsees of one of four promissory notes made by defendant to McLaughlin Bros. as part payment of a stallion sold to defendants, thirteen, in number, and one Lee, under a syndicate agreement which had also been signed by Lee. When the agent of McLaughlin Bro. presented the notes to the defendants for signature, they refused at first to sign unless Lee would join with them. The agent told them that he had called to get Lee's signature, that he was not at home, but that his wife had said her husband would sign, and added that he would see that the notes would be signed by Lee, and that, if he refused, he would sue him to get his signature. On these representations the defendants signed the notes. Lee afterwards refused to sign. The defendants took delivery of the stallion, and had the use of it for one season and a half, after which it died. Plaintiffs gave evidence to satisfy the judge that they had discounted the note during its currency, and that they were holders for value without notice of any defect of any fraud or misrepresentation in the procuring of it. Defendants contended that the note was not complete when handed to the agent, that it was delivered to him conditionally on its being also signed by Lee as joint maker with them, and relied on the cases of

Awde v. *Dixon*, 6 Ex. 869; *Hogarth* v. *Latham*, 47 L.J.Q.B. 339, and *Ontario Bank* v. *Gibson*, 3 M.R. 406, 4 M.R. 440, as showing that they were not liable.

Held, following *Merchants Bank* v. *Good*, 6 M.R. 339, that the above cases are distinguishable and that the defendants were liable to the plaintiffs on the note.

The note, on its face, was regular without anything to suggest to an indorsee that there was any condition.

The defendants received full consideration for the notes, as they got the horse and shared amongst themselves all benefit of its services to the exclusion of Lee. After ascertaining that Lee was not to be a joint maker with them, the defendants did not repudiate the contract or notify McLaughlin Bros. to take the horse back or demand the return of their notes, but by keeping and using the horse they adopted the contract.

Although, without his name on the note, each of the 13 defendants became responsible for one-thirteenth of the amount instead of one-fourteenth, yet the share of each in the horse was correspondingly greater and the defence was more technical than really meritorious.

Wilson, for plaintiffs. *Munson*, K.C., for defendants.

FERRY *v.* MANITOBA MILLING CO.

Dubuc, C.J.] [July 12.

Contract—Shipment—Place of weighing grain sold—Costs.

Action to recover the price of a car-load of wheat sold under a contract in writing containing the following terms: "Shipment 1st half October, Fort William weight, Government inspection."

The wheat was loaded in a car at Birney, a station of the Canadian Northern Railway, on 13th October. The shipping bill, prepared by the plaintiff, was dated the same day, but the car was not moved from the station until the 17th, when the shipping bill was signed by the train conductor. There was no agent of the railway company at Birney, but the plaintiff went to the defendants on the 14th and told them that the car was loaded. Defendants' manager only received the shipping bill on 19th October.

Held, following *Barnes* v. *Shand*, 2 A.C. 455, that the wheat had been shipped in time and that shipment means simply putting on board.

The car in question was, in the regular course of the traffic on the C.N.R., sent to Port Arthur, and the wheat was weighed

there, and not at Fort William where wheat sent over the C.P.R. is generally weighed, and if appeared that the insertion of the words "Fort William weight" was inadvertently made by the defendants' manager himself, who had prepared the original contract, and that it really made no difference to the defendants whether the wheat was weighed at one of those places rather than the other.

Held, that plaintiff was entitled to recover although the wheat had not been weighed at Fort William.

When defendants' manager received the shipping bill, he objected to the delay on account of the price of wheat having declined, but offered to pay within $5 of the amount demanded by plaintiff.

Held, that plaintiff should not have incurred the risk of litigation for so small a sum, and should be deprived of costs on that account.

Wilson and *Davis*, for plaintiff. *Phippen* and *Minty*, for defendants.

Full Court.] WRIGHT *v.* BATTLEY. [July 14.

Dominion land scrip—Assignment of—Replevin.

The defendant, having been awarded a certificate or scrip entitling her as a child of half-breed to locate 160 acres of Dominion lands, made for valuable consideration an assignment of the scrip to the plaintiff. This assignment was filed with the Commissioner appointed by the Dominion Government, who, thereupon, handed the scrip to the plaintiff. Under the Order-in-Council regulating the issue of the scrip and the rights of the recipients, the Commissioner was forbidden to recognize or accept assignments of scrip or to deliver them to assignees; and it was required that the actual lands should be located by the allottees of the scrip personally.

After the scrip came to the hands of the plaintiff, the defendant got possession of it and refused to give it up. Plaintiff then replevied it in this action.

Held, that the effect of what had been done was the same as if the defendant had personally received the scrip from the Commissioner, and had then sold and delivered it to the plaintiff, and that the plaintiff was entitled to the possession of the scrip, there being nothing illegal in the transaction that had taken place. Defendant might still refuse to locate the land under the scrip, and the plaintiff might thus be unable to get the land or to

derive any benefit from the scrip; but he was entitled to the actual possession of the document, the right to which was the only point in issue in this action.

Bradshaw, for plaintiff. *Potts*, for defendant.

Full Court.] KING *v.* NUNN. [July 14.

RE ROGERS AND NUNN.

Municipality—By-law as to repairing buildings within fire limits —Ultra vires—Validation of by-laws by subsequent legislation.

In *King* v. *Nunn* the rule nisi asked for a writ of certiorari to bring before the Court a conviction, dated March 8, 1905, made by the Police Magistrate of Winnipeg, whereby the defendant was convicted of having unlawfully commenced the repair of a building without first having submitted the plans and specifications of the proposed repairs to the Inspector of Buildings for inspection, and without obtaining the said inspector's written certificate that the proposed repairs were in compliance with the provisions of By-law No. 1615.

In *Re Rogers and Nunn* the rule nisi asked to restrain the same magistrate from hearing and adjudicating upon a charge laid by the same inspector against the defendant for having unlawfully re-erected the same building contrary to the provisions of the same by-law, which was enacted on 8th May, 1899. The alleged re-erection consisted of certain repairs to a frame building which was within the first-class fire limits and had been damaged by fire. The cost of the repairs made by the defendant was only about $50, although other repairs and fixtures were put in by a tenant. A clause of the by-law provided that, if repairs should cost as much as 40 per cent. of the actual value of a building, they should be considered a re-erection thereof and subject to the by-law, and the prosecution relied on this provision in pressing the charge of unlawful re-erection of the building. Both rules were argued together and dealt with in one judgment.

The provisions of the Municipal Act, with its amendments to the date of the by-law, under which such by-law might be claimed to have been authorized, are found in sub-ss. (a) and (b) of s. 607 of R.S.M. (1892), c. 100, and give the City of Winnipeg power to pass by-laws for regulating the erection in specified parts of the city of wooden buildings or additions thereto or alterations thereof, and for prohibiting the erection

of buildings with the walls other than of brick, iron or stone, within defined areas, and for regulating the repairing or alteration of roofs or external walls of existing buildings within the said areas, so that the said buildings might be made more nearly fire-proof; also for regulating the size and strength of walls, beams, joists, rafters and roofs and their supports in all buildings to be erected or repaired or added to, and for compelling production of the plans of all buildings for inspection, and for enforcing the observance of such regulations.

Held, 1. The by-law in question, in so far as it required the submission of plans and specifications of proposed repairs to the Building Inspector, and the obtaining of his certificate before the commencement of repairs to any building, was ultra vires of the City Council, and that the conviction was bad.

2. Repairs to a building do not constitute a re-erection thereof, and it was ultra vires of the council to enact that, if the proposed repairs should cost 40 per cent. of the actual value of the building they should be considered a re-erection thereof and subject to the by-law, and that the rule for a prohibition should be made absolute to stop the prosecution on the charge of unlawful re-erection.

In 1899, subsequent to the enactment of the by-law in question, the Legislature passed certain amendments under which the city might have re-enacted the provisions of the by-law objected to, and under which the council amended other provisions of the same by-law.

Held, that this had not the effect of re-enacting the clauses objected to. The subsequently amended clauses did not affect in any way the operation of the clauses in question. The by-law is not such an enactment that all the parts of it are necessary to each other's working. Through it is limited to certain subjects, many large portions of it might be omitted without affecting the working of other portions.

Section 6 of the Winnipeg charter, passed in 1902, was cited as validating all then existing by-laws of the city.

Held, that the effect of that section was merely to provide that the then existing by-laws should stand as they stood before the passing of the charter. It could never have been in the contemplation of the Legislature to validate such a body of subordinate legislation as the City Council might have passed without first carefully examining all the by-laws to see that the limits of jurisdiction had not been exceeded. Such an intention could only be presumed from clear and distinct enactments open to no other construction.

Rules absolute without costs.

O'Connor, for defendant. *Campbell*, K.C., contra.

Full Court.] [July 14.

FONSECA *v.* LAKE OF THE WOODS MILLING CO.

Negligence—Liability of owner of unsafe premises for injury to person falling into a hole.

The plaintiff went to defendant's premises on their invitation to examine the roof of the building, and give an estimate as to cost of repairs required. There was a cupola covering part of the roof and having windows at the north and south ends furnishing good light on the floor of the cupola. This floor was reached by a ladder leading up to an opening in the floor, and there was another opening in the floor 2 feet 2 inches by 1 foot 8 inches, giving light on the floor below and totally ungarded.

The plaintiff, accompanied by defendants' foreman, ascended to the cupola in broad daylight and viewed the roof through one of the windows. In stepping back from the window, the plaintiff, not noticing the last mentioned opening, fell through it and was injured.

The plaintiff was a contractor for roofing and repairing roof, and accustomed to go upon roof and into attics and unused and unfloored places, where holes and trap doors might exist, and the foreman, though present, did not think it necessary to warn him about the opening which was plainly visible.

Held, that defendants were not liable: *Indermaur* v. *Dawes*, L.R. 1 C.P. 274, L.R 2 C.P. 311, distinguished. *Thomes* v. *Quartermaine*, 18 Q.B.D. 685; *Headford* v. *McClary*, 24 S.C.R. 291, and *Johnson* v. *Romberg*, 51 N.W. Rep. 1051, followed.

Full Court.] CARROLL *v.* MCVICAR. [July 14.

Mechanics' Lien Act—Sub-contractors' lien when amount payable under building contract only on completion of work—Percentage to be retained from contractor—Series of jobs done under separate orders.

Action by sub-contractor to enforce lien under R.S.M. 1902, c. 110, against the contractor and the owner.

The building contract only provided for payment on the completion of the whole work; and as the contractor abandoned the work before completion, the owner contended that he was not bound to pay anything, either to the contractor or to any sub-contractor, until the whole work was performed. He had, however, made payments to the contractor during the progress of the work amounting to $750 in all.

Held, following *Russell* v. *French*, 28 O.R. 215, that the percentages required by s. 9 of the Act to be retained by the owner from the contractor are intended to form a fund for the protection of sub-contractors, not subject to be affected by the failure of the contractor to perform his contract fully; and, as the plaintiff's lien was the only one filed and enforceable, he was entitled to have his lien declared valid for $150, being twenty per cent. of the $750 paid by the owner which was shewn to be the actual value of the work done and materials furnished.

It was also claimed on behalf of the defendant that the plaintiff's work was done under three different contracts between him and the contractor, and that, as to the first one, the putting in of a furnace, his lien was not filed within the time required. He swore that the putting in of the furnace, of the soft water tank, and of the pump, although ordered at different times, was done by him as one job.

Held, that, when a tradesman is doing such jobs, all in his line of business, although ordered or requested to do first one and then another, he should not be required, in order to secure payment, to file a lien after completing each piece of work. Filing the lien when he has completed all the separate pieces or work should be considered sufficient.

Potts, for plaintiff. *Robson*, for defendant.

Full Court.] HICKEY v. LEGRESLY. [July 14.

Foreign judgment—Pleading defences that had been set up in the original action—King's Bench Act—Embarrassment or delay as ground of striking out pleadings.

This action was brought on a judgment recovered in the Supreme Court of Cape Breton. The defendant pleaded a number of defences to the original cause of action in Nova Scotia with a further allegation that, according to the laws of that Province, the facts so pleaded would constitute a good defence there. These defences had been actually raised in the original action. Plaintiff then applied for an order striking out these defences.

Sub-s. (1) of s. 38 of R.S.M. 1902, c. 40, enacts that, in an action on such a judgment, the defendant "may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered," with the proviso that "the opposite party shall be at liberty to apply to the Court or a judge to strike out any such pleading or defence upon the ground of embarrassment or delay."

Held, that the defences allowed by this provision are not limited to such as might have been, but were not, pleaded as the original action, but include such as were actually pleaded there, subject to the power of a judge to strike them out on the ground of embarrassment or delay.

In answer to the application, defendant set up by affidavit that he had fully intended to defend the Cape Breton action, but that, owing to misunderstanding, he was unable to be present when it came on for trial, and that, as a result, judgment went against him by default.

Held, that the pleas should not be struck out. *Gault* v. *McNabb*, 1 M.R. 35, distinguished, on the ground that in that case the defences sought to be raised in this Court had been set up in the original action and had been fully gone into at the trial and finally decided in favor of the plaintiff, and had been struck out on the ground of embarrassment and delay.

Myers v. *Prittie*, 1 M.R. 27, not followed. *British Linen Co.* v. *McEwan*, 8 M.R. 99, discussed.

Hoskin, for plaintiff. *Locke*, for defendant.

Perdue, J.] [June 15.

SAVAGE *v.* CANADIAN PACIFIC RY. CO.

Discovery—Examination—Privileged documents—Reports of officials to company respecting accidents.

Action by widow for damages for the death of her husband killed in a railway collision, alleging negligence by the defendants. The chief clerk in the office of the General Superintendent of the central division of defendant company admitted on his examination that the reports as to the accident, claimed to be privileged, were made before the defendants had any notice as to litigation, and were partly in view of possible litigation and partly in the usual course of business, the company's rule requiring that particulars of every accident should be promptly reported to the proper officer by telegraph confirmed by mail. The defendant refused to say whether the accident was reported by wire or mail or to indicate by their numbers the reports made to the Superintendent. He admitted, however, that the documents for which privilege was claimed contained reports made under the above rule.

Held, 1. Following *Woody* v. *North London Ry. Co.*, L.R. 4 C.P. 602, that such reports were not privileged.

2. When such information is furnished it is for the judge to decide the actual question of privilege on further motion.

3. If any of the information sought was not within the knowledge of the deponent, he must ascertain the facts and give the information. *Bolckow* v. *Fisher*, 10 Q.B.D. 161; *Southwark Water Co.* v. *Quick*, 3 Q.B.D. 321, and *Harris* v. *Toronto Electric Light Co.*, 18 P.R. 285, followed.

4. The information required to be given is not privileged because thereby the names of some of the defendants witnesses might be disclosed: *Marriott* v. *Chamberlain*, 17 Q.B.D. 165; *Storey* v. *Lord Lennox*, 1 Keen 341, 1 M. & C. 525; *Humphrey* v. *Taylor*, 39 Ch. D. 693.

5. Questions as to whether reports had been sent as to the condition of the locomotive before the accident, and as to repairs thereto, must be answered.

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

Province of British Columbia.

SUPREME COURT.

Duff, J.] McLAGAN *v.* McLAGAN. [June 15.

Probate—Affidavit verifying endorsement on writ—Citation—Service of—Order LXX., r. 1—Curative provisions of—Practice.

Where in an action brought for the purpose of revoking a probate, the rule requiring the filing of an affidavit verifying the endorsement on the writ has not been complied with, the proceeding should not be invalidated, but the curative provisions of Order LXX., r. 1, ought to be applied.

Where the rule requiring the issue of a citation calling on the defendant to produce the probate has not been followed, proceedings will be stayed until this is done, at the cost of the party responsible for the omission.

McDonnell, for plaintiff. *Griffin*, for defendant.

Duff, J.] MELLOR *v.* MELLOR. [July 31.

Interim alimony—Jurisdiction—Order LXVI., r. 1—Validity of—Statutory validation of Supreme Court Rules, 1890.

The Court has jurisdiction to grant interim alimony pending an action for divorce.

Application for alimony by the wife, who is living apart from her husband and supporting a family of three children.

Held, that in view of the interpretation for years past put upon the Rules, and especially in view of their validation by statute, it would not be proper to give effect to the view that the right to grant alimony independent of the proceedings in divorce or matrimonial causes did not exist. On the contrary there was the power to decree alimony as provided under Order LXXI., and that certainly if any such ultra vires contention was to be seriously advanced, it would have to be by way of appeal to the Full Court.

A. E. McPhillips, K.C., for plaintiff. , *Eberts*, K.C., for defendant.

COURTS AND PRACTICE.

His Honour, Judge Morrison, junior judge of the County of Grey, Ontario, has been appointed county judge of Prince Edward. C. H. Widdifield, barrister, of Picton, takes the place thus vacated.

L. J. Cannon, K.C., formerly Deputy Attorney-General of Quebec, becomes puisne judge of the Superior Court of Quebec.

Flotsam and Jetsam.

Two men were brought before the magistrate in Belfast the other day charged with fighting on the public street. Both pleaded "Not guilty." After hearing the evidence of the constable, the magistrate discharged one, and was about to impose a fine on the other, when his released comrade shouted out "Yer worship, we worn't fightin' when the polis tuk us, we were trying to separate each other." Both got off.