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LAW REFORM IN ONTARIO.

The Attorney-General of Ontario has by his resolution, quoted hereafter, signified his intention of dealing with the much discussed subject of law reform. More than a year ago this was promised, but we do not quarrel with the delay, for the subject is one that should receive most careful consideration and only be dealt with after due deliberation. The proposed measure has not yet been given in detail; but we have it rough hewn in the resolution referred to.

We trust, however, that the attention it may receive will not be in the spirit indicated in a leading daily paper which said it had discovered in law reform "a programme to fight for." The same journal also says the present system is "a conspicuous and ignominious failure and possesses nothing sacred or even dignified in its decrepitude." It seems odd that in 1902 the same journal which uses this extravagant language congratulated the country on the condition of its legal procedure in the words following:—"The suitor no longer spends half a fortune with no better result than to find out that he is in the wrong Court; the best talent of the legal profession is no longer wasted in sharp practice and scientific hair-splitting; multiplicity of actions has been discouraged in favour of expedition and directness, as well as completeness of remedies; and law and equity, so far as the administration of justice is concerned, have become synonymous terms."

What was so excellent in 1902 cannot be so bad in 1908; but it may be remarked that the "outs," were then in, and now the "ins" are out, which naturally accounts for the milk in the political cocoanut.

The matter, however, is too important to be made a mere football for party wrangles, and we have sufficient confidence in the

leaders on both sides of the House, that when the matter comes up for discussion they will agree that law reform shall not be the object of a mere politic' crusade or as something which is denied or neglected on one side, and must, therefore, be fought for tooth and nail on the other.

The subject is confessedly one of the most difficult that could engage the attention of jurists and statesmen, and requires the fullest and most patient consideration from the best minds of both parties, with the aid of all the light that can be gained from the ability and experience of those who are learned in the law. Just here we would venture to suggest that any draft bill should be sent to the profession for their consideration and suggestions. And in a matter of this kind it is especially desirable to make haste slowly.

It is unnecessary to say that this subject should be approached in the spirit of those great English Chancellors, Lord Cairns and Lord Selborne, who though strenuous opponents in politics, joined together in loyal and cordial co-operation to promote every measure which tended to improve or simplify the principles and practice of the law. It is to the unselfish efforts of these, and like-minded men, that are due such notable measures as the Common Law Procedure Act, the Judicature Acts, the Conveyancing and Settled Lands Acts, and many others which have borne good fruit in this, as well as in the mother country.

As to the subject itself there is no doubt that there are some excrescences that should be lopped off, abuses that should be rectified and improvements made. At the same time we doubt very much whether law can ever be made such a cheap, easy and expeditious means of securing justice as some sanguine persons seem to expect. These persons of course belong to the laity, who so commonly receive wrong impressions from, and are put on the wrong track by, writers for the daily papers, who from want of training have only a dim appreciation of what is wrong, and have absolutely no knowledge of how the wrong can best be remedied.

Another wrong impress n, which is part of their cheap and

misleading literature, is the assertion that lawyers are enemies of law reform. Nothing could be farther from the truth. As our English namesake said in a recent issue: "Of all the popular notions concerning the legal profession probably none is more fallacious than the assumption that lawyers are the persistent opponents of law reform. As a matter of fact all the great reforms in legal procedure have been initiated and carried on by lawyers." This is as true in Canada as it is in England.

Some of the matters which require the aid of the legislature are:—The lessening the number of appeals, and this is the matter of most moment and most difficult of solution. The suggestions in connection with this are numerous, and none of them very satisfactory.—Making provisions whereby there shall be as little block in business as may be; possibly by reducing the volume of business in the High Court and giving more work to the county judges, by increasing their jurisdiction or otherwise.—Doing away with the present system of bills of costs; that most unsatisfactory mode of arriving at what a lawyer should receive for his services; inequitable and insufficient to the practitioners, irritating to the client, and giving large opportunities for the penny-a-liner to jeer and joke about.

There is another matter to which we have frequently called attention, namely, the most objectionable, and to solicitors the utterly unfair system by which litigants and lawyers are compelled to act as tax gatherers for the Government to provide salaries for Court officials or to swell the public revenue. As we said on a former occasion the disbursements for fees in every bill of costs form a large portion of the whole; and the opprobrium attaching to a lawyer's bill is largely due to the fact that in it are included disbursements which ought rather to appear in the public accounts. Another subject has been suggested as worthy of discussion, viz., the appointment of a practice judge so that there may be uniformity in procedure.

The resolution of the Attorney-General reads as follows:—

"That in the opinion of this House, with a view to the more prompt and satisfactory administration of justice in civil matters and the assessing of the cost thereof, it is expedient:—

"That there should be but one Appellate Court for the Province.

"That all the judges of the Supreme Court of Judicature for Ontario should constitute the Appellate Court.

"That the Appellate Court should sit in divisions, the members of which should be permanently assigned to them or chosen from time to time by the judges from among themselves.

"That the divisions should consist of five members, four of whom should be a quorum, except in election cases and cases in which constitutional questions arise, for which five members should sit, and except in appeals from inferior Courts, for the hearing of which three judges should form a quorum.

"That the decision of the Court of Appeal should be final in all cases except where (*a*) constitutional questions arise, or (*b*) questions in which the construction or application of a statute of Canada are involved, or (*c*) the action is between a resident of Ontario and a person residing out of the Province.

"That the appeal of right to the Judicial Committee of the Imperial Privy Council should be abolished, and the prerogative right of granting leave to appeal to that tribunal, if retained, should be limited to cases in which large amounts are involved or important questions of general interest arise.

"That in matters of mere practice, the decision of a judge of the Supreme Court, whether on appeal or a judge of first instance, should be final.

"That provision be made to regulate examinations for discovery to prevent the excessive costs that are often incident to such examinations, and the undue prolongation of such examinations.

"That the County and District Courts shall have jurisdiction in all actions, whatever may be their nature or the amount involved in both parties' consent.

"That the ordinary jurisdiction of the County and District Courts should be increased.

"That communications should he had with the Imperial and Dominion Governments with the view to legislation by the Imperial and Canadian Parliaments as to such of the foregoing matters as are not within the legislative authority of the Province."

These matters will require much thought and mature consideration. We would only at present refer to two of the proposals. It is suggested that the appellate Court of the Province

should consist of all the judges of the Supreme Court of Judicature. This follows the constitution of the old Court of Error and Appeal as constituted in 1849, when the Courts of Chancery and Common Pleas were organized. It was apparently not found to work satisfactorily and the Appellate Court finally took the form it now has, as a distinct and substantive Court. There is of course much to be said on both sides of this question; but at present we are not prepared to agree with the Attorney-General's resolution in that respect.

As to the suggestion that the present right of appeal to the Judicial Committee of the Privy Council should be abolished, or largely so, as set forth in the resolution, we doubt the wisdom of the change. Much has been written about this in the lay press and much said on the subject which has not been characterized by either calm judgment or due recognition of the constitution and the future of the British Empire.

This suggestion was much in evidence on a recent occasion, in some of the daily papers, mainly because the judges of the Judicial Committee (very properly as most lawyers seemed to think) declined to agree with our Court of Appeal as to the construction of a certain agreement; the writer alleging that the finding was to be accounted for because judges in England "could not be familiar with the practice and temper of the parties to the agreement." In fact they should, in the view of this writer, have based their judgment not on the words used by the parties, but on some supposed popular sentiment or local prejudice which of course was not, and could not have been brought before any Court in such a contention.

Speaking generally it may be said that it is desirable that all unnecessary procedure and useless and expensive appeals should be done away with. That any changes in procedure which seem to be desirable should be as far as possible along the lines laid down by English legislation, which has produced what is perhaps the simplest and most modern system in existence, and which for reasons of convenience it is desirable that ours should conform to it. Lastly that it is most desirable that whatever is

done should be a complete and well considered measure, so that the pernicious tinkering of statutes so common in this Province may be reduced to a minimum.

We may quote in conclusion the words of Sir William Mulock who on a recent public occasion said:—"The work of law reform is not to be undertaken by the man on the street. It is the duty of the Bar at all times to aid in such work but in so assisting we must not be stampeded by every cry from the laity; soundness and right of good judgment must be our guiding lights." These are wise and timely words coming from one who was recently in the thick of the political battle and may give food for profitable reflection to the legislators upon whom will shortly be laid the duty of dealing with this most important and highly technical subject.

PAYING DIVIDENDS OUT OF CAPITAL.

It is trite law that dividends cannot be paid out of capital. But this statement does not exhaust the subject. What is capital in a legal sense? And how far can the Courts interfere with the decision of the directors as to what sums are properly charged to capital, so as to leave free sufficient income to pay dividends?

This latter question arose first in *Bloxam* v. *Metropolitan Railway Co.* (1868) L.R. 3 Ch. 337, in which the Court laid it down that the payment of dividends will be restrained in cases of doubt as if paid they are irrecoverable from the shareholders. The discussion in the judgment is important as pointing out that the charging to capital of interest on debentures may be proper if the debentures were those of a separate company, i.e., guaranteed as to principal and interest by the operating company but not so if the undertakings were merged and, as a whole, were producing an income.

Again in *Stringer's case* (1869) L.R. 4 Ch. 475, the directors of the company were held justified in taking the facts as they actually stood and in declaring a dividend out of realized

profits, though some of the ships were lost—(the company was formed to run the blockade during the Civil War in the United States)—and the assets shewn depended for their value upon possible realization in an extremely hazardous business. In fact the Courts assert that if they laid down the rule that there must be actually cash in hand or at the bankers of the company to the full amount of the dividend declared, that rule would be inconsistent with the custom of the companies, and at variance with mercantile usage. The principle accepted is that in the absence of fraudulent intent the Court ought not to be astute in searching out minute errors in calculation in accounts honestly made out and openly declared.

In *Rance's case* (1870) L.R. 6 Ch. 104 the Court of Appeal, Sir Wm. James and Sir Geo. Mellish, L.JJ., discuss the duties of directors in declaring a dividend. In the first place a balance sheet is necessary, and if that is made out accurately and submitted, or even if the directors arrive at their conclusion by placing unfounded reliance upon the representations of their servants or actuaries, "the Court will not sit as a Court of appeal upon that conclusion, although it might afterwards be satisfactorily proved that there were a great many errors in the accounts which would not have occurred if they had been made out with greater strictness, or with more scrutinising care."

In the view of the Court no proper balance sheet was made out, in that no proper provision was made for risks (in the insurance sense) in regard to money received from another company for whom they had guaranteed certain policies.

In re Oxford Benefit Building & Investment Society (1886) L.R. 35 C.D. 502, the directors never submitted an account of income or expenditure nor any profit or loss account. But they paid dividends out of estimated profits and out of whatever money they happened to have in hand, without attempting to form a reserve fund or to provide for possible bad debts, losses or expenses and without ascertaining what profits were actually realized or out of what fund the dividends were actually paid.

The company were only entitled to pay dividends out of

"realized profits." Kay, J., held that profits were not "realized" by estimating the value, for the time being, of the instalments of principal and interest remaining unpaid by each mortgagor. He decides that realized profits out of which dividends can be paid must be either cash in hand or "rendered tangible for the purpose of division." In *Leeds Estate Co.* v. *Shepherd* (1887) 36 C.D. 787 Stirling, J., held that the articles of Association warranted the payment of dividends out of estimated profits arrived at upon estimates of the company's accounts, and he indicates that directors may properly act upon valuations of their properties in proposing a dividend. His reference to *Stringer's case* (ante) at pp. 801-2 is liable to misconstruction. The question in that case was as to dividends during the company's career and not after its complete winding-up. The quotation from the remarks of Gifford, L.J., that dividends might be paid "out of profits, although those profits were not profits in hand" refers obviously to profits in hand as meaning those ascertained after all the company's operations were concluded (see page 491) because the article mentioned as authorizing the payment of dividends (page 490) expressly says "as soon and as often as the profits of the company in hand are sufficient," i.e., in hand from time to time upon a proper estimate of the company's accounts. *In re Sharpe* (1892) 1 Ch. 154 emphasis is put by North, J., upon the necessity of directors having a proper profit and loss account made out and in seeing that that account contains what is essential for the purpose of ascertaining whether or not there is a profit. In that case interest had been paid upon the amounts paid up on the shares, and the Court of Appeal, while thinking that it was doubtful whether, under the articles, interest must be paid only out of profits, held that payment of interest when there were no profits was a misapplication of the assets of the company and was ultra vires, i.e., an act beyond any power which the company could confer upon its directors. It was in effect a return of part of the capital to the shareholders and authorization in the articles of Association to do so would be invalid. This

view is founded upon *Trevor* v. *Whitworth* (1887) 12 A.C. 409 where Lord Herschell says (p. 415): "The capital may be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on business operations authorized. Of this all persons trusting the company are aware and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders."

In *Bolton* v. *Natal Land and Colonization Company* (1892) 2 Ch. 124, and in *Wilmer* v. *McNamara* (1895) 2 Ch. 245 an injunction was refused even where a bona fide dispute existed as to the proper amount to be charged for depreciation against the year's profits when the directors had honestly exercised their judgment.

The case of *Burland* v. *Earle* (1902) A.C. 83 determines some practical questions. It is there held that, under the Letters Patent granted under the old Companies Act, a company (1) is not bound to divide all its profits on each occasion among its shareholders, (2) can legally reserve any portion of it at its own discretion, (3) may invest such sum as may be selected by the directors subject to the control of a general meeting but not restricted to trustee investments, (4) and may invest in the name of a sole trustee. These statements of law are not confined to the case of companies under the Act referred to, but are laid down as applicable generally to joint stock companies in the absence of special restrictions by charter.

These are matters of internal management and as stated by Lord Davey "it is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so."

Turning now to the question of how profits are to be determined and how far capital, fixed or circulating, must be made up

or depreciation allowed for before profits are available for dividend, the following cases are to be considered.

In *Re Ebbw Vale Steel Iron & Coal Co* (1877) 4 C.D. 827 Jessel, M.R., inclines to the opinion that a limited company could not pay dividends unless its paid-up capital were kept up.

In *Bouch* v. *Sproule* (1887) 12 A.C. 385 the use as capital of accumulated profits by companies having no power to increase their capital was considered. It was there determined, following *Irving* v. *Houstoun*, 4 Paton Sc. Ap. 521, that any distribution from those accumulated profits must be taken, as between a remainderman and life tenant, as a distribution of capital. But as stated by Lord Herschell this determination in no way affects the power of a company, which has the right to increase its capital and to appropriate its profits to such increase, to distribute these profits as dividends when it has not appropriated them to capital.

Lee v. *Neuchatel Asphalte Company* (1889) 41 C.D. 1 contains some very interesting views as to capital. It was there pointed out that capital may mean either the share capital or the assets of the company in which that share capital is invested. While, therefore, the share capital cannot be decreased except as provided by the Companies Act, the value of the assets may fall and it is not incumbent on the company to maintain the value of the assets at the original figure before it can pay dividends. Where property is taken over for shares and the shares are thereby paid up it is obvious that the property so taken may increase or diminish in value. Accretions to capital are capital and not divisible profits. In determining profits, according to Lopes, L.J., (p. 27) accretions to and diminutions of the capital are to be disregarded. And the share capital, paid in in cash, may, according to Lindley, L.J., (p. 22) be sunk in getting a business, e.g., a company to start a daily newspaper may expend £250,000 before the receipts from sales and advertisements equal the current expenses. This expenditure is proper if it is in accordance with the articles of Association or charter of the company. Cotton, L.J., (p. 17) endorses this view. Lindley,

L.J., points out three conclusions from a consideration of the Companies Act. First, that capital is not required to be made up if lost, second, that it is not provided that a company shall be wound up if the capital is lost, because if the debts are paid the company may go on and divide profits if the shareholders are satisfied, and third, that there is nothing in the Companies Act defining what must be considered as capital and what as profits. Of course if the charter requires provision for reparation or depreciation (as in *Davison* v. *Gillies* (1879) 16 C.D. 347 n.) or that the dividends are to come out of the profits of the year (as in *Dent* v. *London Tramways Co.* (1880) 16 C.D. 344), then those are proper charges to be made and must be made before profits can be ascertained for division. It must be observed, however, that in the latter case, which the Lords Justices say was decided solely upon the articles of Association, Jessel, M.R., expressly decides that "profits for the year" mean the surplus in receipts, after paying expenses and "restoring the capital to the position it was in on the 1st of January of that year."

This case forms the starting point for a line of cases referred to below, which are criticised in Palmer's Company Law, 4th ed., p. 178, as laying down conclusions which the author considers remarkable. And in *Dovey* v. *Cory* (1901) A.C. 477, Lord Halsbury (pp. 482. 486), Lord Macnaghten (p. 487), and Lord Davey (pp. 493-4), expressly reserve their opinion upon the reasoning of the Court of Appeal in regard to the method of arriving at profits until a concrete case came before them for their decision.

And in a case noted below, *Bond* v. *Barrow Hæmatite Co.* (1902) 1 Ch. 353, Farwell, J., considers the decision of *Lee* v. *Neuchatel Asphalte Co.* as confined to some and not all companies having wasting assets.

Bolton v. *Natal Land Company* (1892) 2 Ch. 124 is authority for the proposition that if profits are made in any one year, then, notwithstanding the depreciation of the company's assets and consequent loss of part of its share capital, those profits may be divided without providing for depreciation even although

in former years the company has charged depreciation of assets against profits.

This case is noted by Lindley, L.J., in *Verner* v. *General, &c., Trust* (1894) 2 Ch. at p. 267, as depending upon the fact that there is no law which compels limited companies in all cases to recoup losses shewn by capital account out of the receipts shewn in the profit and loss account.

In *Lubbock* v. *British Bank of South America* (1892) 2 Ch. 198, Chitty, J., held that a sum of £205,000 profit remaining after a sale of part of its business in Brazil by a banking company, after deducting the paid-up capital and other incidental expenses was profits on capital and not capital. His argument was that where a company was a trading company everything made by the sale of its stock in trade was, after deducting the share capital, clear profit and that the capital to be regarded is the capital according to the Companies Act and not the things for the time being representing the capital in the sense of being things in which the capital has been laid out. He distinguishes *Lee* v. *Neuchatel Asphalte Co.* in that that company was formed to work a wasting property and hence was, apparently, not bound to keep up the value of its share capital before dividing profits.

In *Verner* v. *General and Commercial Investment Trust* (1894) 2 Ch. 239, one of the abstract questions discussed in *Lee* v. *Neuchatel Asphalte Company* (1889) 41 C.D. 1, came up in concrete form before Stirling, J., and the Court of Appeal. The case is put thus very tersely by Stirling, J., (at p. 245): "There being a loss in respect of capital of not less than £75,000 and a gain in respect of receipts over expenditure of £23,000, can a dividend be declared?" Lindley, L.J., having stated that capital means, in contrast to dividends or profits, money subscribed pursuant to the memorandum of Association or what is represented by that money, asserts (p. 266) that although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other

assets regardless of the debts and liabilities of the company. He then cites three instances of improper payments, (1) out of receipts without deducting expenses, (2) out of borrowed money, and (3) out of the income produced by the consumption of what he calls "circulating capital." Kay, L.J., alludes to the difference between a company making its profits on the purchase and sale of stocks, etc., and a company such as the one he was dealing with which had merely the right to invest and whose profit was only the interest on such investments.

In the one case the capital must be kept intact before profit can be shewn, in the other it may be lost by depreciation in the investments, which, however, may yield a yearly profit, distributable in dividends.

In *Wilmer* v. *McNamara* (1895) 2 Ch. 245 Stirling, J., followed the *Neuchatel and Verner cases* in the case of a company carrying on business of a carrier, the loss of capital not having occurred from the company receiving a price less than it originally gave for a portion of its assets. Depreciation of good will is treated by the learned judge as a loss of fixed capital. In *Re London and General Bank,* No. 2 (1895) 2 Ch. 673, dividends paid out of borrowed money were held to be improperly paid.

Vaughan Williams, J., in *Re Kingston Cotton Mill Co.,* No. 2 (1896) 1 Ch. 331, follows the *Neuchatel and Verner cases* and holds that a trading company as well as an investment company and a company formed to work a necessarily wasting property, may lawfully pay a dividend out of current profits without setting aside a sum sufficient to cover depreciation in the value of fixed capital.

Re National Bank of Wales, Limited (1899) 2 Ch. 629 is an interesting case upon the charging up of bad debts of successive years. Wright, J., considers that as bad debts had wiped out the paid-up capital, leaving a deficiency of £41,000, he was justified in holding that the dividends in question were paid out of capital. His view, however, was not adopted by the Court of Appeal. Lindley, M.R., while admitting the fact that omitting

to write off bad debts year by year would inevitably lead to disaster, contends that such a course must not be confounded with paying dividends out of capital. He says that what losses can be charged to capital and what to income must be left to business men to determine. All debts cannot be charged to capital, but there is no hard and fast rule on the subject. He explains what is meant by circulating capital as being the money employed in earning returns and this must first be deducted from the returns in order to ascertain profits. The result of his view is that leaving bad debts as a charge against capital and thus diminishing it yearly does not, in law, affect the question of whether profit, i.e., the excess of income over expenditure is or is not, in fact, made, and that a banking company is not bound to keep its capital intact, as such a company lends its capital and may, therefore, lose it. And in appeal as stated above, the House of Lords expressly decline to assent to all the propositions laid down by the Court of Appeal in this case.

In the case of *Bosanquet* v. *St. John del Rey* (1897) 77 L.T. 207, the view of the Court of Appeal was followed.

Cozens-Hardy, J., in *Re Barrow Hæmatite Steel Co.* (1900) 2 Ch. 846, refers to the *Neuchatel and Verner cases* as establishing that a trading profit may be applied in payment of dividends, notwithstanding a depreciation in the fixed capital of the company.

In *Bond* v. *Barrow, Hæmatite Co.* (1902) 1 Ch. 353 the company had bought collieries and mines and erected blast furnaces and cottages. By the surrender of certain leases the pulling down of blast furnaces and the sale of cottages, a loss had been incurred. Farwell, J., held that these assets were "circulating capital" and must be made good before dividends were paid, and illustrates his view by saying that if a company had bought out of capital the last two or three years of a valuable patent, they would, in his view, be bound to replace that capital before dividing the receipts as profits.

In *Foster* v. *New Trinidad* (1901) 1 Ch. 208 Byrne, J., deals with a question said to be involved in *Lubbock* v. *British Bank*

of South America (ante), which dealt with the distribution, as profits, of a balance on the sale of part of the bank's assets after deducting the capital and expenses.

The defendants, in this case, bought out the assets of an old company and unexpectedly realized upon one which was considered valueless. Byrne, J., while expressing the view that it was capital, as being part of the capital assets of the old company (a result which, by the way, does not seem to follow when it is being dealt with as purchased asset of the new, and not as a capital asset of the old company) did not finally determine the point. His view was that as an appreciation in the total value of capital assets, if realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for the purpose of dividend, this windfall might be taken into the accounts for the year, but could not be treated as available for dividend without reference to the whole accounts, fairly taken, capital as well as profit and loss.

But since the House of Lords, in that case, reserved its opinion upon the question of the replacement of capital before profits are divided the reasoning in some of the cases given above has been canvassed.

The authors of Lindley on Companies, 6th ed. (1902) p. 600, regard the question as one on which it is at present impossible to lay down any general principle which will apply to all cases. They regard the expressions of opinion in the *Verner case* as requiring caution in their application and as needing, possibly, modification where a definite portion of the company's fixed capital has been lost.

In the Encyclopedia of the Laws of England, p. 201, it is said that while a company is not bound to carry on business in perpetuity, yet the so-called profits in case of a company working wasting property are profits only in a conventional sense, that is, are agreed between the shareholders to be treated as such and are not profits in the ordinary sense, and that it is difficult to see why dividends out of such conventional profits are not really a return of capital to the shareholders. It is to be ob-

served that in some of the later cases the question is treated as if the judges were not wholly persuaded by the authority which they were bound to follow. For example, Vaughan Williams, J., in *Re Kingston Cotton Mills Co.*, No. 2 (ante) does not profess to express an opinion upon the principle of the *Neuchatel and Verner cases*, and Farwell and Stirling, JJ., cannot be said to have fully accepted it.

In Buckley on Joint Stock Companies, 8th ed., 1902, p. 584, et seq., the two leading cases and others are analysed and explained. The author emphasizes the fact that all the cases are reconcilable upon the principle that approval or disapproval depended upon the provisions of the articles of Association.

If companies are authorized by their charter to acquire and work a wasting property, then if they sink their capital in that class of property and make other property by working it, the depreciation being incident to the exercise of their powers is not necessarily a charge on revenue account, but may by their charter be thrown on capital. The destruction of the company's capital is within its objects and is therefore legitimate. If the company is authorized to make investments, which it does, and those depreciate, the same rule applies. If this be the real test the cases of *Bolton* v. *Natal Land Co.* (1892) 2 Ch. 124; *Wilmer* v. *McNamara* (1895) 2 Ch. 245, *Re Kingston Cotton Mills Co.*, No. 2 (1896) 1 Ch. 331, and *Re Barrow Hæmatite Steel Co.* (1900) 2 Ch. 846 may be said to be consistent with it. The difficulty is apparent, however, if the capital is not fixed but is circulating, because that capital must be first secured before any profit can be said to be earned.

If a bank lend its capital and lose it, is it fixed or circulating capital? Depreciation is a deduction from the value of property remaining in use and is properly applied to fixed capital. But how does it differ in principle from losses on investments or losses on circulating capital?

It must be admitted as Lord Halsbury says in *Dovey* v. *Cory*, that the question of what is capital and what are profits is difficult and perhaps insoluble. To be quite safe capital should be re-

placed before profits are paid. But in all cases circulating capital must be made good and in the opinion of some of the most eminent judges fixed capital must also be made up. The extreme difficulty of laying down any rule may be seen by comparing the definitions of "circulating capital." John Stuart Mill and Prof. Marshall distinguish "circulating capital," which fulfils the whole of its office in the production in which it is engaged by a single use, from fixed capital which exists in a durable shape and the return from which is spread over a period of corresponding duration. Buckley defines circulating capital as property acquired or produced with a view to resale or sale at a profit, and Lord Lindley considers it equivalent to any money employed in earning returns.

In Canada it may be said that some of the reasoning in the cases referred to is not applicable. The words in the Canada Companies Act and in the Ontario Companies Act are not the same as those in the English Companies Act. By the latter dividends must not be paid out of profits. Hence the question has continually arisen, what are "profits"? In this country no dividend can be paid "which renders the company insolvent or impairs the capital stock thereof" (Canada), and no dividend can be paid "which renders the company insolvent or diminishes the capital thereof" (Ontario). It seems reasonably clear that if by any loss of fixed capital the company would be rendered insolvent, unless enough were carried from revenue account to replace it, no dividend could be paid till the capital was restored sufficiently to make the company solvent. But it is also obvious that if fixed capital be lost but the company is not insolvent, the payment of a dividend out of profits on the year's business will not impair or diminish the capital stock. But in the case of circulating capital, unless that is made good, a payment may render the company insolvent or may diminish its capital.

Insolvency or impairment of capital are made the tests, not the actuality of realized profits, and it would seem that the line of cases beginning with *Lubbock* v. *British Bank of South America*, 1892, 2 Ch. 198, in which the position of accretions to

capital are discussed, would have no bearing on Canadian questions. But the general principles laid down in the English cases may very well be adopted by business men and are applicable to many concerns where both fixed and circulating capital enter into the balance sheet. Profits are defined by a learned text writer as the credit balance of a profit and loss account, properly prepared, having regard to the definition of the business in the articles of Association or charter and it is easy to see what difficulties lurk in the words "properly prepared."

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KING'S COUNSEL IN ONTARIO.

We almost feel that we ought to apologise for referring again to this unsavory matter, but we do so in connection with the legislation on that subject, which stands in a somewhat peculiar position, and which has not as yet been discussed.

In 1897 an Act was passed limiting the number of these appointments to five in one year or twenty in any four years. There were some limited exceptions, which, however, are not material at present. It was also provided that no one who was not of at least ten years' attending at the Bar of Ontario, should be appointed. By another section the appointments might all be made at one time, and partly at another time, during the four years. Then comes an enactment that "This Act shall not come into force until a day to be named by the Lieutenant-Governor by his proclamation." This statute now finds its place in R.O.S. c. 173, s. 7, which also covers certain rules as to precedence, etc.

So it is that for nearly eleven years this enactment has been on the statute book, but has not been brought into force by reason of no proclamation having been made. It may here be suggested that the legislature then considered the provisions of the Act desirable and proper. If any succeeding House thought otherwise the proper procedure would have been to have re-

pealed the Act and not leave it hanging in mid air like Mahomet's coffin—to be used or not as political exigency might require.

The memorandum published by the Government with the last batch of K.C.'s in effect declares that it was necessary for the party now in power to "even up" with their predecessors. This desirable end having now been obtained we presume the proclamation will shortly be made, and the statute brought into force. But it should have been in force on the day it was assented to, April 13, 1897. The fact of both Governments having played fast and loose with a matter affecting the honour and standing of the profession is worthy of the severe criticism which it has called forth. It is unnecessary to refer to the reasonableness of these criticisms or to speak of them in detail. The profession can judge of all that as well as we can.

One of our correspondents, in writing an indignant protest against the list, seems to think that it is useless advocating the abolition of the distinction and sarcastically remarks, "A counsel in large practice actually needs this precedence in Court, but happily the majority of the new appointees are not in his way, because they have no business." We agree that the doing away with these appointments is not within the range of practical politics for obvious reasons; and from past experience we can scarcely venture to hope that any Government, however strong, will do what really ought to be done in the matter, viz., give the power of appointment to say, the Chief Justice of Ontario, or, if preferred, the Chief Justices of the various Divisions of the High Court. Appointments by him or them would be marks of deserved professional distinction; but the majority of the appointments recently made are simply indicative that the recipients have deserved well of their party in matters outside their profession.

It is interesting to notice that during the month of December last that eminent jurist, Lord Halsbury, ex-Lord Chancellor of England, sat in the Court of Appeal during the absence of Lord Justice Vaughan Williams on the Welsh Church Commission. Lord Halsbury is now in his eighty-third year.

Correspondence.

Toronto, Ont., Feb. 5th, 1908.

Editor, CANADA LAW JOURNAL:—

DEAR SIR,—We are told that we are to expect legal reform as a special feature of the coming session of the Ontario Legislature. There is a very small point which has just come to my notice and which I should think might well be considered by the powers that be. Our statutes provide for a certain priority of wages in the case of assignments for the benefit of creditors, in winding-up proceedings, over execution creditors, on attachment against absconding debtors, and on administration of estates. But no priority is provided for in the case of distress by a landlord.

The case that is troubling me is one of a poor stenographer whose employer has been distrained on for rent, and who has received no salary for two weeks, and now finds herself without a remedy as the goods distrained are barely sufficient to pay the rent. I can conceive no earthly reason why landlords who may be presumed to be by no means among the less well-to-do classes should be alone able to exercise their special and peculiar privilege of distress in entire disregard of wages due to employees of the lessee, against whom they are distraining.

I suppose it is a last lingering trace of the good old times when landlords had it all their own way, but I should think that it might well be wiped out in Ontario, and claims of wage earners given the same priority as against claim for rent that they have in apparently all other cases.

Yours, etc.,

EQUITY.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] [Dec. 13, 1907.

McMULLEN *v.* NOVA SCOTIA STEEL & COAL CO.

Negligence—Railways—Breach of statutory duty—Common employment—Employees' Liability Act.

Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village, the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach, and provides a penalty for violation of such provision.

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of one engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach, and owing to frost the bell could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal car to work the brakes, but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine.

Held, IDINGTON, J., dissenting, that the evidence was not sufficient to prove a system or rule of the company, by means of which the obligation imposed by section 251 of the Railway Act would be performed by the company; that the negligence therefore, was that of the company and not of its servants; and that the doctrine of common employment could not be invoked.

Held, per IDINGTON, J., that though the negligence was that of a fellow-servant of M., for which the company was not liable under the Fatal Injuries Act, they were guilty of common law

negligence, and plaintiffs could recover under the Employees' Liability Act. Appeal allowed with costs.

Mellish, K.C., for appellants. *Newcombe*, K.C., for respondents.

N.S.] NEW GLASGOW *v.* BROWN. [Dec. 13, 1907.

Municipal corporation—Sale of corporate property—Committee of council—Authority to sell—Ratification.

A committee of a municipal council cannot, unless authorized by the Council, sell corporate property, and if they do an action lies against them by the corporation for any loss incurred thereby.

Such illegal sale cannot be ratified by resolution of the council carried by the votes of the members of the committee.

Appeal allowed with costs.

Gregory, K.C., and *Mellish*, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* EDMONSTONE. [Dec. 13, 1907.

Criminal law—Indictment for robbery with violence and wounding—Finding "guilty of assault"—Interpretation of—New trial.

On the trial at the General Sessions of the Peace of an indictment charging two prisoners with robbery with violence and wounding, on the jury bringing in a finding of "guilty of assault," the chairman questioned the county attorney as to its meaning, when the county attorney replied, "Assault as charged in the indictment." The chairman then asked the foreman, when he replied, "We mean inflicting the blow with a bottle as described, but not guilty of robbery," and on being questioned as to which prisoner, replied "Both," whereupon the chairman endorsed the verdict on the record as follows: "Guilty

of assault as charged, but not guilty of robbery," he so interpreting the finding.

Held, that the verdict was not properly interpreted and acted upon by the chairman and was not rightly recorded, and a new trial was directed.

O'Reilly, for the prisoners. *Cartwright*, K.C., for the Crown.

Full Court.] [Dec. 20, 1907.

RE ONTARIO VOTERS' LISTS ACT, WEST YORK.

Parliament—Voters' lists—Appellant—Non-qualification of—Abandonment of appeal—Right to substitute new appellant.

By section 33 of the Ontario Voters' Lists Act R.S.O. 1897, c. 7, where an appellant "entitled to appeal" dies or abandons his appeal, or having been on the alphabetical list, etc., is afterwards found not to be entitled to be an appellant, the judge may "if he thinks proper," allow any other person who might have been an appellant to intervene and prosecute the appeal, on such terms as he may think fit. This Act was repealed by the present Voters' Lists Act, 7 Edw. VII. c. 4(O) s. 33, being the same as the repealed section, except that the words "entitled to appeal" are omitted, and the words "in his discretion" are substituted for the words "if he thinks proper." Section 15 defines an appellant namely, "any voter whose name is entered, or who is entitled to have his name entered on the list for the municipality."

Held, that the substituted section does not empower the judge—where an appellant, after the time for appealing has elapsed, abandons his appeal by reason of not being properly qualified—to allow a duly qualified appellant to be substituted.

Bayley, for Attorney-General. *Godfrey*, for certain voters.

Full Court.] REX v. HILL. [Dec. 23, 1907.

Indian—Conviction for unlawfully practising medicine—Ontario Medical Act—Application to unenfranchised Indians—Constitutional law—Stated case.

The defendant, an unenfranchised treaty Indian, residing on a reserve, was convicted for having practised medicine for hire,

in Ontario, but not upon the reserve, without being registered pursuant to the provisions of the Ontario Medical Act, R.S.O. 1897, c. 176; and upon a case reserved by the convicting magistrate it was contended that that Act was ultra vires of the provincial legislature, because Indians of the class or having the status of the defendant are wards of the Dominion, and subject in all relations of life only to federal legislation, under section 91 (24) of the British North America Act.

Held, that the defendant was subject to the provisions of the Medical Act and was properly convicted.

Per OSLER, J.A.:—Parliament may remove an Indian from the scope of the provincial laws, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there.

Semble, also, per OSLER, J.A., that the question was not one proper to be raised by means of a special case stated under R.S.O. 1897, c. 91, s. 5. The Medical Act does not in terms profess to be applicable to Indians, and the question was really whether it could be interpreted as applicable to them, not whether it was ultra vires if applicable to them.

J. B. Mackenzie, for defendant. *Curry*, K.C., for informant.

HIGH COURT OF JUSTICE.

Boyd, C., Magee, J., Mabee, J.] [Dec. 6, 1907.

FOSTER *v.* ANDERSON.

Vendor and purchaser—Delay of vendor—Time of essence—Whether of contract or acceptance of offer—Deed to be prepared at vendor's expense—Effect of—Misrepresentation—Description—Statute of Frauds—Specific performance.

Where the non-completion of a contract for the sale of land within the time limited thereby was caused by the vendor, she was held to be precluded from insisting on the strict performance of the provision in that respect by the purchaser.

The contract consisted of an offer made by the purchaser, and its acceptance by the vendor, the offer containing the terms of the contemplated contract, amongst which was the provision

that "Time shall be of the essence of this offer": and that the deed should be "prepared at the expense of the vendor."

Quaere, whether the limitation referred to the completion of the contract, or merely to the acceptance of the offer; and whether the provision as to the deed being prepared at the vendor's expense dispensed with the requirement of the general rule that the purchaser should prepare and tender the deed to the vendor.

Misrepresentation on the purchaser's part, and of there not being a sufficient description of the land within the Statute of Frauds, set up as defences by the vendor, were held not to have been established.

Decree for specific performance was directed.

Marsh, K.C., and *W. J. Clark*, for plaintiff. *Watson*, K.C., for defendant.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Dec. 10, 1907.

KEECH *v.* TOWN OF SMITH'S FALLS.

Highway—Obstruction—Injury to traveller — Knowledge of danger—Negligence—Municipal corporation — Misfeasance or nonfeasance.

The mere fact that the plaintiff knew that a heap of dirt was standing upon a highway is not sufficient to disentitle him to recover damages from a municipal corporation, for personal injuries sustained by him owing to the heap having been negligently left there unguarded.

Gordon v. *City of Belleville*, 15 O.R. 26, and *Copeland* v. *Village of Blenheim*, 9 O.R. 19, followed.

It was argued that the municipal corporation in discharging their duty of cleaning the highway, had a right to cause the dirt to be raked into a heap, and that leaving it there unguarded was mere nonfeasance.

Held, that the doing of a lawful act in such a way as to endanger the safety of the public was misfeasance—the whole was one act and an unlawful act.

Rowe v. *Corporation of Leeds and Grenville*, 13 C.P. 515, and *Bull* v. *Mayor of Shoreditch*, 18 Times L.R. 171, 19 Times L.R. 64, followed.

Judgment of the County Court of Lanark affirmed.

Middleton, for defendants. *C. A. Moss*, for plaintiff.

Boyd, C., Magee, J., Mabee, J.] [Jan. 9.

POW *v.* TOWNSHIP OF WEST OXFORD.

Highway—Nuisance—Obstruction—Usual travelled way—Electric railway tracks on highway—Contributory negligence—Fatal Accidents Act.

This was an appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B. dismissing an action brought by the widow to recover damages for the death of her husband under the following circumstances:—The deceased was driving on a dark night on a highway on which had been constructed an electric car track. After crossing this track he got on the travelled road but coming upon some piles of gravel and large stones and the rough surface of a drain lately covered, he turned aside and again got on the track. After going on a short distance he apparently turned off the car track to go on to the travelled road. Probably in crossing the raised rail of the track which, in some places, was about a foot and a half above the road-bed, the deceased was thrown out and killed.

Held, 1. That on the evidence there was no contributory negligence.

2. Under the common law the public are entitled not only to free passage along the travelled part of the highway, but also to a free passage along any portion of it not in the use of another traveller.

3. Under our Municipal Law the local municipality are responsible for keeping in proper repair the travelled part of the road, but it is also liable for misfeasance or nonfeasance if it permits obstacles to be placed alongside of the travelled way which are dangerous to travellers, and any traveller suffering injury from coming in contact with such obstacles has right of action against the municipality for injury caused thereby.

4. The municipality having the power to control the construction of the electric railway tracks having failed to exercise any effective supervision was guilty of negligence.

5. As to the measure of damages. The deceased was making about $500 or $600 a year, and his widow depended upon him for support. It was considered that three years' earnings, say, $1,800, would be a fair allowance for damages, together with costs.

Douglas, K.C., and *W. P. McMullen*, for plaintiff. *Johnston*, K.C., and *G. F. Mahon*, for defendants.

Trial.—Riddell, J.] [Jan. 13.

BRAZEAU *v.* CANADIAN PACIFIC RY. CO.

Railway—Passenger—Right to particular seat—Authority of conductor—Smoking car—Removal of passenger from seat taken by another and temporarily vacant—Assault—Rights of passengers—Damage—Costs.

The plaintiff brought an action for an assault upon him by a conductor of a train of the defendants, and for removing him from a certain seat in a car. A party of five gentlemen associated in business were travelling from Montreal to Ottawa on the defendants' railway, and had been sitting together in the smoking car conversing about matters of common interest. One of them, F., required to go to the lavatory, and left his seat. No baggage or clothing was left to indicate that he intended to return, though he did so intend. While he was in the lavatory the train stopped at a station, and the plaintiff got in. Coming into the car and seeing this vacant seat he went to take it; but before sitting down he was told that the seat belonged to another who was in the lavatory, and was asked to take another seat which was vacant. He, however, insisted on occupying the seat. Shortly afterwards F. returned and wanted his seat. He pointed out to the plaintiff that there was another vacant seat, and it was explained that the five gentlemen were travelling together, but he refused to vacate, and appeal was made to the conductor who told the plaintiff he must give up the seat. The plaintiff remaining obdurate, the conductor finally took him by his coat and gently lifting him from the chair, placed him in the passage way, and pointed him to a vacant chair.

Held, 1. A railway company is liable for the acts of its conductors while they act in the course of their employment, however improper such acts may be.

2. It makes no difference that the plaintiff acted rather to annoy the person whom he deprived of his seat and his friends than for any other reason, that the law cannot consider the object or purpose of the action of any person who is acting within his rights.

3. That the custom of putting smoking cars on trains, though a concession to the smoker and intended for his comfort, is not compulsory on the company.

4. The company whether at the common law or by statute are bound—holding themselves out as common carriers—to find

room for all who offer themselves as passengers and in general to find seats for all passengers, but there is no right for a passenger to occupy any particular seat unless the seats are numbered and a ticket is bought therefor.

5. The conductor was within his rights in determining that the plaintiff should not occupy the seat of which he had taken possession; that F.'s retiring for a temporary purpose was not an abandonment of the seat, and that as the action thus failed upon the law it was dismissed with costs.

A. Lemieux, for plaintiff. *W. H. Curle*, for defendants.

Riddell, J.] SCHLUND *v.* FOSTER. [Jan. 18.

Discontinuance—Terms—No action to be brought in any Court for same cause.

Plaintiff's writ was issued Dec. 22, 1906, and upon the same day the statement of claim was filed in which the plaintiff was described as "at present residing at the City of Toronto." Copies of the writ and claim were served on the defendant Jan. 7, 1907. The plaintiff swore to his desire to have the case tried by jury and it was duly set down for trial for the Toronto winter assizes. In the meantime the plaintiff had taken advantage of the fact that the defendant was passing through Chicago to issue process out of the Supreme Court of Cook County in an action of assumpsit, and the defendant was served when passing through that city. It was admitted that the two actions were upon one and the same cause. The plaintiff eventually served notice of discontinuance and the defendant serving notice for an order setting aside the motion of discontinuance the plaintiff countered by serving notice that upon the return of this notice he would move for an order allowing him to discontinue the action on payment of costs, or for an order confirming the notice of discontinuance already filed.

Held, that the plaintiff could not discontinue except upon terms, that no action should be brought in this or any other Court, domestic or foreign, upon the same ground of action, and that no further proceedings be taken in the action in Chicago, or any other action already brought, and that the plaintiff pay the costs: see *Black* v. *Barry* (1887) which was a judgment by

Mr. D[illegible]on, K.C., Master-in-Chambers, (not reported) and *Fox v. Star Co.* (1900) A.C. 19.

W. A. Ferguson, for plaintiff. *Blackstock*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] RODGER *v.* MINUDIE COAL CO. [Dec. 14, 1907.

Railway company—Tolls for carriage of goods—Non-approval of by-law fixing rates—Right to recover- Claim of refund disallowed—Reasonableness of rate—Amendment allowed to raise question—New trial.

Action by plaintiff as liquidator of the Canada Coal and Railway Co., for an amount claimed for car rental, etc. Defendant pleaded by way of offset, a claim for re-payment of overcharges for the carriage of coal made by the company in liquidation.

The evidence shewed that the Joggins Railway Company, predecessors in title of the Canada Company, passed a by-law which was approved by the Governor in Council fixing the rate per ton for the carriage of coal over their line and that the Canada Company subsequently passed a by-law increasing the rate, and that the defendant company were charged toll as fixed by the latter by-law, although it had never received a sanction of the Governor in Council, and they claimed to be entitled to recover the difference between the two amounts.

Held, 1. The by-law passed by the Joggins Company relating to the tolls to be taken by that company was not a regulation affecting the road and running with the property, and was not binding upon their successors in title.

2. The Canada Company was not liable to refund moneys paid to them for the carriage of goods simply because they had failed to secure the approval of the Governor in Council to the by-law fixing the rates. The trial judge should, however, have allowed an amendment applied for on the trial intended to raise the question of the reasonableness of the rates taken, and that

the appeal must be allowed and the new trial ordered on this ground.

Ralston, for appellant. *A. A. Mackay*, for respondent.

Full Court.] [Jan. 14.

THE KING EX REL. JOHNSTON *v.* JUDGE OF THE COUNTY COURT FOR DISTRICT NO. 5.

Canada Temperance Act—Appeal from conviction—Computation of time—Code section 750 (a)—Mandamus to judge of County Court.

The relator, who was convicted of a third offence against the Canada Temperance Act, appealed to the judge of the County Court for District No. 5, who declined to hear the appeal on the ground that it was too late. The conviction was made in the County of Pictou on Oct. 21, and the next sittings of the Court, thereafter, were at Amherst, in the County of Cumberland, on Nov. 5, and the next at Pictou in the County of Pictou, on Dec. 3.

The Code, section 750 (*a*), requires the appeal in such case to be taken "to the next sittings of the Court if the conviction is made more than 14 days before such sittings."

Held, per MEAGHER, J., TOWNSHEND, C.J., concurring, that words "more than" were the equivalent of "not less than," and that in the computation of time within which the appeal was to be taken the day of conviction must be excluded, and as so read the conviction or order was not made more than 14 days before the sittings of the Court at Amherst the appeal was properly taken to the next sittings at Pictou, and a mandamus should go to the judge of the Court requiring him to hear the appeal.

Also, that in the Province of Nova Scotia, appeals from summary convictions under the Criminal Code must be to the next sittings of the County Court in the district and not in the county.

Per LONGLEY, J., that the appeal must be to the next sittings in the county.

Per RUSSELL, J., dissenting, that the appeal must be taken to the next sittings of the Court in the district, and that section 750(*a*) of the Code must be construed to mean "just 14 days."

J. J. Power, K.C., for relator. *H. Mellish*, K.C., for the judge. *W. McDonald*, for the inspector.

Full Court.] STEPHEN *v.* FLEMING. [Jan. 23.

Municipal election—Recount—Appeal to County Court—Payment for dinners—Marking ballot paper.

Petitioner, one of the candidates at a municipal election, was declared elected by a majority of one vote over respondent. On a recount, three of the ballots which had been counted for petitioner by the presiding officer, were thrown out and the seat awarded to respondent. On appeal to the judge of the County Court for District No. 1, the ballots thrown out by the municipal clerk were allowed, and petitioner declared elected. On further appeal,

Held, 1. The declaration of the municipal clerk was not final, but was simply the return that the presiding officer should have made had he counted the ballots correctly, and in its effect did not differ from the return of that officer, and that there was nothing in the Municipal Act, R.S., c. 70, s. 64, which deprived the County Court of its jurisdiction to try election petitions conferred by the Municipal and Town Elections Act, R.S., c. 72.

2. The petition in the case sufficiently complied with s. 7, sub-s. (*a*) of c. 72, if it complained of an undue return and set forth facts sufficient, if true, to shew that such was the case.

3. The fact that petitioner was shewn to have paid for certain dinners was not a corrupt practice for which he should be disqualified, where it appeared clearly from the evidence that the payment was not made in view of any previous arrangement or agreement, but after the electors had voted, and without any intention of influencing them.

The ballot papers used at the election in question contained the names of three candidates separated by a line printed between each name and with a double line at the top and bottom of the paper.

One of the ballots counted for petitioner by the county judge was marked with a cross below the name of the candidate and below the lines printed at the foot of the paper.

Held, per Russell and Longley, JJ., Townshend, C.J., and Meagher, J., contra, that the lines printed at the top and bottom of the paper were immaterial and that the mark, although made below the lines at the foot of the paper was within the division

of the candidate for whom the voter intended to vote within the meaning of s. 46 of c. 70 R.S.

W. B. A. Ritchie, K.C., for appellant. *Cluny*, for respondent.

NOTE.—The decision of Meagher, J., in the above case is understood to have been confined to the point last noted.

Full Court.] [Jan. 25.

BELL *v.* INVERNESS COAL & RAILWAY CO.

Employers' Liability Act—Operation of coal mine—Liability of company for negligence of employee.

Under the system of operating the defendant company's coal mine, coal was brought to the surface by means of box cars, and at intervals what was termed a "rake of cars" was sent down to bring up men. In the latter case the rules of the company required the man in charge of the rake to give four raps upon the rope connecting the cars with the hoisting engine at the surface as a signal that men were on board, when the cars were raised at a much slower rate of speed than that employed in raising coal. The man in charge of the rake, in violation of the rules, gave only one rap upon the rope (the signal used when coal was being raised) and the cars being brought up at a great speed ran off the track, the accident resulting in the death of one man and serious injuries to another. In an action under the Employers' Liability Act, R.S. (1900) c. 179,

Held, affirming the judgment of the trial judge,

1. The case was within s. 3, sub-s. (*e*) of the Act relating to the negligence of persons in the service of the employer and having "charge or control of any points, signal—upon a railway, etc."

2. There was no such contributory negligence on the part of plaintiff in remaining upon the cars (there having been an opportunity of getting off at a stopping place) as would disentitle him to recover.

3. The principle volenti non fit injuria could not be invoked on behalf of the defendant company.

Mellish, K.C., for appellant. *D. McNeil*, for respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] [Nov. 28, 1907.

CANADA ELEVATOR CO. *v.* KAMINSKI.

Practice—Payment into Court—Condition sought to be imposed on plaintiff getting money out of Court.

The defendant paid into Court under Rule 530 of the King's Bench Act the sum of $853 in satisfaction of a specified part of the plaintiff's cause of action and his pleading stated that he was "content that the same be paid out to the plaintiffs after payment of the defendant's costs of action."

Held, that the plaintiffs were entitled under Rule 532 to an order for payment of the money out to them free from the condition sought to be imposed by the defendant. Money cannot be paid into Court except under Rule 530 in satisfaction of the cause or part of the cause of action or one or more of the causes of action for which the plaintiff sues, and when it is so paid in there is nothing in any of the rules to enable a defendant to prevent the subsequent rules from operating, and under them the plaintiff is entitled to take it out in satisfaction of the cause of action for which it was paid in.

Wheeler v. *United Telephone Co.*, 13 Q.B.D. 597, followed.

Galt, for plaintiffs. *Dennistoun*, for defendant.

Mathers, J.] BROCK *v.* ROYAL LUMBER CO. [Dec. 30, 1907.

Contract—Penalty or liquidated damages.

The defendants entered into an agreement to purchase 1,500 tons of coal from the plaintiffs and to accept delivery between Oct. 1, 1906, and April 1, 1907. The defendants were not obliged to order any particular quantity in any one month, but were at liberty to order portions of the whole at such times within the six months as they might deem best. They were to pay for each amount ordered at the time of the order and for

the whole 1,500 tons on or before 1st April, 1907. The agreement contained the following provision: "And for the insuring of the more effectual performance of this agreement, the purchasers further agree to pay to the vendors on April 1, 1907, the sum of one dollar as a penalty by way of liquidated damages for every ton of the said full amount of 1,500 tons not ordered and paid for by them on April 1, 1907." The defendants failed to order and pay for 467 tons of the coal within the period limited by the contract and the plaintiffs sued to recover $467 by way of liquidated damages for the defendants' breach of the contract. The plaintiffs, however, had sold their whole supply of coal at a greater profit than they would have realized had the defendants ordered the full amount.

Held, that the contract should be construed as providing for a penalty only and that, as the plaintiffs suffered no damages, they could not recover, because:—

1. The intention was to secure the performance of the contract: Hudson on Building Contracts, p. 519;

2. When doubtful the Courts will generally construe the sum payable as a penalty: Joyce, par. 1298, 1300; Mayne, pp. 155, 156.

3. When the parties themselves call it a penalty, the onus lies on those who seek to shew that the money is to be payable as liquidated damages: *Wilson* v. *Love* (1896) 1 Q.B., at pp. 630, 632.

4. The actual damages for a breach of the contract could in this case be readily and accurately computed: Joyce, par. 1301; Mayne, p. 158; 19 Am. & Eng. Enc. 402 and 407.

T. R. Ferguson and *Mackay*, for plaintiffs. *Minty and Donovan*, for defendants.

Cameron, J.] KING *v.* MCEWEN. [Jan. 27.

Criminal law—Crim. Code, ss. 777, 951—*Habeas Corpus Act*, 31 *Ch.* 2, *c.* 2, *s.* 2—*Summary trial—Jurisdiction of police magistrate.*

The prisoner was tried before the police magistrate of the City of Portage la Prairie in the charge of carnally knowing a girl under fourteen years of age, not being his wife. He consented to be tried summarily on that charge. The magistrate held that there was not sufficient evidence to justify a convic-

tion upon the charge laid, but he convicted the prisoner of an indecent assault and sentenced him to fifteen months' imprisonment.

On application for a habeas corpus it was contended that the magistrate should have given the prisoner an opportunity to elect whether he would be summarily tried upon the substituted charge, also that the magistrate's extended jurisdiction conferred by section 777 of the Code only covered offences committed in the City of Portage la Prairie, and the evidence left it in doubt whether the offence had been committed in that city or in the rural municipality of Portage la Prairie. It was admitted on the argument that the offence charged necessarily included that of which the prisoner had been convicted.

Held, 1. There being nothing in the Criminal Code of Canada relating to the procedure for obtaining a writ of habeas corpus, a prisoner's right to it in Manitoba depends on the Statute of Charles II. c. 2, s. 2, and the writ cannot be taken out on behalf of a prisoner under sentence of conviction by a police magistrate exercising the extended jurisdiction to try indictable offences summarily conferred by section 777 of the Code, unless an absolute want of jurisdiction is shewn: *Re Sproule*, 12 S.C.R. 141.

2. A police magistrate of a city or incorporated town, who is also a police magistrate in and for the whole Province, when acting under section 777 of the Code, may try offences committed anywhere in the Province.

3. It having been admitted that the offence charged necessarily included that of which the prisoner was convicted, there was no necessity to offer a new election to the prisoner.

Anderson, for the prisoner. *Patterson*, D.A.-G., for the Crown.

Province of British Columbia.

SUPREME COURT.

Clement, J.] [Jan. 4.

CRANBROOK POWER CO. *v.* EAST KOOTENAY POWER CO.

Waters and water r ·hts—Jurisdiction of Gold Commissioner—Change of point of diversio· application for.

The defendant company, who held a record for 25,000 inches

of water out of the St. Mary's River, granted May 8, 1906, applied, under s. 27 of the Water Clauses Consolidation Act, 1897, to the Assistant Commissioner at Cranbrook to change the point of diversion. This was opposed by the plaintiff company, who held a record, granted Oct. 20, 1906, for 5,000 inches of water out of the St. Mary's River at the new point of diversion applied for by the defendant company. The Commissioner decided that he had jurisdiction under s. 27, but upon it appearing that the defendant company had taken certain proceedings under s. 84, etc., to have their undertaking approved by the Lieutenant-Governor in Council, the Commissioner ruled that his jurisdiction was voided by these proceedings. They appealed under s. 36 and afterwards withdrew, and they also withdrew their application to the Lieutenant-Governor in Council and secured an appointment from the Gold Commissioner to proceed again with the application for a change of point of diversion. On motion by the plaintiff company for prohibition.

Held, that the Commissioner had jurisdiction to entertain the application.

S. S. Taylor, K.C., for plaintiff company. *Smith*, for defendant company.

Clement, J.] [Jan. 8.

HUGGARD *v.* NORTH AMERICAN LAND AND LUMBER CO.

Practice—Fixing of venue—Application for after order made in regular way—Case necessary to be made out.

In order to invoke the inherent jurisdiction of the Court to grant an order for change of venue, after the venue has been fixed, the applicant must set up a case shewing circumstances justifying the change.

W. A. Macdonald, K.C., for the application. *S. S. Taylor*, K.C., contra.

Clement, J.] RE W. P. ELLIS & CO. [Jan. 14.

Bills of sale—Registration, extension of—Intervening rights.

A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, B.C. It was not possible to send the instrument to Toronto and have it returned for filing with the

Registrar with the affidavit of bona fides within the five days required by s. 7, sub-s. 2, of Bills of Sale Act, 1905.

Held, that, in the order granting an extension of time for filing the instrument, there should be a provision protecting intervening rights.

Full Court.] [Jan. 17.

DE LAVAL SEPARATOR CO. *v.* WALWORTH.
NORTH-WEST CONSTRUCTION CO. *v.* YOUNG.

Principal and agent—Right of principal to recover—Contract of agency—Illegality—Contract prohibited by statute, enforceableness of — Statute, construction — Companies Act, 1897, *R.S.B.C.*, 1897, *c.* 44, *s.* 123—*Registration—Penalty.*

The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law is not applicable so as to exonerate an agent from accounting to his principal by reason of past unlawful acts, or intentions of the principal collateral to the agency. If the money is paid to him in respect of an illegal transaction he is bound to pay it over, provided that the contract of agency is not itself illegal.

The making of the contract in this case was not a "carrying on business" within the meaning of the Companies Act. Decision of HUNTER, C.J., upheld on different grounds.

An unlicensed extra-provincial company, carrying on business within the province, sued for a balance due upon a contract to deliver building stone, entered into within the province. The defence advanced was that, by reason of s. 123 of the Companies Act, the contract was illegal and void.

Held, on appeal, reversing the decision of IRVINE, Co. J., that as the act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable.

Martin, K.C., and *Craig*, for appellants. *Davis*, K.C., and *Barker*, for respondents.

Full Court.] WALSH *v.* HERMAN. [Jan. 17.

Foreign Court, jurisdiction of—Judgment obtained in an undefended action for statute barred claim.

Judgment was given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note signed

in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899, for Winnipeg, and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment. At the trial, evidence was given of a payment made after the British Columbia action had been commenced, and it was sought to make this payment operate as a revival of the statute barred debt.

Held, by the Full Court, following *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894) A.C., 670, that defendant had acquired a British Columbia domicile, and was not subject to the Ontario Courts.

Held, also, following *Bateman* v. *Pinder* (1842), 11 L.J Q.B., 281, that the payment made could not operate to defeat a plea of the Statute of Limitations, and that it was a mere conditional offer of compromise which was declined.

A. D. Taylor, for appellant. *Macdonell*, for respondent.

Full Court.] [Jan. 22.

CORTESE *v.* THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Railway Act, R.S.C. c. 37, s. 254, sub-s. 4—"Locality," meaning of—Obligation to fence.

Plaintiff's animals were killed on the defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 x 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity some being fenced and others not, but with unfenced and unoccupied land intervening.

Held, reversing the decision of WILSON, Co. J., (CLEMENT, J., dissenting), that as the land in question per se could not be classed as a settled or inclosed locality, there was no obligation

on the company to fence its right of way in the absence of an order of the Board of Railway Commissioners to do so, and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town.

Having regard to the powers given the Board of Railway Commissioners by section 254 of the Railway Act, and particularly the language of sub-section 4, the word "locality" must be construed without reference to the proximity of town limits.

Davis, K.C., for appellant. *Burns*, for respondent.

Hunter, C.J.] [Jan. 29.

ANGLO-AMERICAN LUMBER CO. *v.* MCLELLAN.

Company law—Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of note—Allotment.

Defendant purchased fifty shares in plaintiff company, giving his note for $5,000 therefor, payable ten days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between defendant and the president of the company that defendant was to be employed as a foreman by the company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the company beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note.

Held, that upon the signing of the application and the delivery of the note, the defendant became the owner of the fifty shares, with power to forthwith validly assign them to anyone else, or to have bound himself to do so on the issue of the certificates if the company's articles of association required endorsement of the certificates; and that there was no nature of allotment necessary.

J. A. Russell, for plaintiff company. *Craig*, for defendants.

Law Associations.

COUNTY OF HASTINGS LAW ASSOCIATION.

At the annual meeting the following officers were elected for 1908:—

Hon. President, John Parker Thomas, K.C.; President, William N. Ponton, K.C.; Vice-President, E. J. Butler; Treasurer, W. S. Morden; Secre ary, A. A. Roberts; Curator, W. C. Mikel, K.C.; Librarian, Miss McRae; Auditors, Messrs. P. J. M. Anderson and A. A. Roberts; Trustees, F. E. O'Flynn, Stewart Masson, J. F. Wills, E. Guss Porter, K.C., W. B. Northrup, K.C.

HAMILTON LAW ASSOCIATION.

The annual meeting of the Hamilton Law Association was held Jan. 14th, 1908. The Twenty-eighth Annual Report (for 1907) shews a membership of 71, a library of 4,470 volumes, of which 107 were added during the year. The library is kept insured for $8,800.

A report was brought in by the Committee on a Tariff for Conveyancing, etc. It was decided to adopt the tariff as amended and that it be printed and distributed.

The following officers were elected for 1908:—President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell; Treasurer, Mr. Chas. Lemon; Secretary, Mr. W. T. Evans. The Trustees were elected as follows: Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., P. D. Crerar, K.C., T. C. Haslett, E. D. Cahill. Auditors, Messrs. W. S. McBrayne and James Dickson. Committee on Legislation, Messrs. S. F. Lazier, K.C., Wm. Bell, A. Bruce, K.C., Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., W. T. Evans and E. D. Cahill.