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OUR NEW GOVERNOR-GENERAL.

The announcement of the official appointment of the Duke of Connaught as Governor-General of Canada, appears as follows in *The Times*:—"His Majesty The King has been graciously pleased to approve of the appointment of Field-Marshall His Royal Highness the Duke of Connaught and Strathern, K.G., K.T., K.P., G.M.B., G.C.S.I., G.C.M.G., G.C.I.E., G.C.V.O., P.C., to be Governor-General and Commander-in-Chief of the Dominion of Canada, in succession to the Right Honourable Earl Grey, G.C.M.G., G.C.V.O. His Royal Highness, who will be accompanied by the Duchess of Connaught, will assume office in September, and will hold the appointment for a period of two years, which may be subject to further extension."

The Duke of Connaught was born at Buckingham Palace, in 1850 and, after he had completed his military education at Woolwich Academy, entered the army in 1868, his first commission being in the Royal Engineers. He was afterwards transferred to the Royal Regiment of the artillery, and afterwards to the Rifle Brigade of which he is still Colonel-in-Chief. Whilst still a subaltern, Prince Arthur, as he was then, served in 1870 during the Fenian Raid into Canada in that year, and he wears the medal and clasp for this service. The Duke is no carpet knight. He commanded the Brigade of Guards during the Egyptiah war, and was present at the battle of Tel-el-Kebir, and was three times mentioned in despatches, and was thanked by Parliament for his services on that occasion. After having served in other high positions in the army in various parts of the Empire, he recently visited South Africa as the King's representative and opened the first Union Parliament there.

We entirely agree with *The Times*, which says that this appointment will be received with the warmest appreciation both

in England and in the Dominion, and we agree with the remark that the appointment was appropriately made public on the day when His Royal Highness accepted the recognition of the city of London for the great service he had rendered to the Empire by his visit to South Africa. The success of that tour is a proof of the qualities which the Duke and Duchess will bring to the discharge of their duties in this Dominion, and we may rest assured that the same public spirit and unfailing tact which the Duke has shewn in other places will not be wanting in the important position which he is about to occupy, and we may be glad that one so wise and tactful as the Duke has shewn himself to be will represent our Sovereign in this important period of the Dominion's history.

*LEGAL REFORMS.**

I have been asked to speak to you upon the subject of "Legal Reform." In the first place I desire to congratulate you upon the fact that there is comparatively little in this favoured land calling for reform. When one reads the reports of meetings of bodies akin to this in other lands and reads the periodical literature of the profession one comes to realise that we are not face to face with many problems that confront other countries.

There is no congestion of business in our courts. Cases can be tried as soon as ready for trial. There are no arrears in any of our courts, either trial or appellate. Appeals can be heard practically as soon as they are set down, and speaking generally there is no delay between hearing and judgment. That this is so in all our courts from the court of first instance to the court of last resort, indicates that as a whole our system is well balanced and efficient. "Some Measure of Law Reform" has become a political phrase, used with the view of influencing votes, in many instances, by those with little knowledge of the real working of our courts, and, when reduced from mere generality to the con-

*Address delivered by Hon. Mr. Justice Middleton, at the Annual Meeting of the Ontario Bar Association.

crete, it is often found to mean little more than a general recasting of the machinery of the courts, and heretofore has not brought forth much real fruit. Speaking for myself, my short experience upon the Bench has not changed the view formed as the result of fairly active practice at the Bar, that a system that has been found to work well should not be radically changed, and that it would on the whole be better to endeavour to get rid of minor defects in the present system rather than to make any great change.

The administration of our criminal law, particularly in all cases of importance, leaves little to be desired. The limited right of review now permitted by the Code removes what was at one time a defect and substantial justice is now assured.

Yet the proceedings in magistrates' courts often miscarry. Technical errors, at one time, made it almost impossible to sustain any proceedings in the magistrates' courts. The magistrate was still surrounded by the necessity of technical accuracy which survived from the old common law days. The power to amend and sustain convictions when guilt is clear and there is no real miscarriage is a great advance. Yet too many convictions are still quashed and I would submit that the law might well be amended so that in all cases in which a conviction cannot now be sustained by reason of some error not falling within the saving and curative sections of the Code the courts should be given power to order a new trial, so that the guilty may not escape by the error or even stupidity of a magistrate.

This, however, is a minor matter. I desire to place in the forefront of suggested reform the need of a change in the law with regard to Workmen's Compensation.

Common law, said to be "the last result of human wisdom acting upon human experience for the public benefit" and to be "founded on the charities of religion, in the philosophy of nature, in the truths of history and the experience of common life," has admittedly proved inadequate.

We have for long had a "Workmen's Compensation Act" in some respects modifying the common law, and practically

all countries where the common law prevails have some special legislation dealing with the subject. In some countries the legislation is far-reaching and radical, in others by no means drastic. The common law obligation of the master has been thus defined: "The common law implies a contract between a master and servant whereby the former undertakes through himself or his agents to use reasonable care to furnish and maintain suitable and safe places, machinery and appliances for the work to be done, to hire competent servants and to warn the servants of all dangers of the work known to him and not known to the servant; and the latter undertakes to assume the risk of injury arising from the dangers of the work which he knows or ought to know and the risk of injury caused by the negligence of all other servants in the common employment."

I will not say the law is unjust—it is the result of the searching of able and righteous men after justice. According to common law ideas it has always been the law even though that fact was only ascertained in 1837, when *Priestly* v. *Fowler* was decided. The main defect in the law is that negligence of the employee, the negligence of the fellow-servant and the "voluntary assumption of risk," leave many a man disabled and with no right to recover—a burden upon the community. In the event of his disablement or death the community must care for him and his family. The master has not been in fault in any way, and the common law relieves him. It is not in the public interest that the man and his family should be placed in this position.

I cannot discuss the matter in all its bearings in the short time at my disposal. The great concurrence of opinion among those who have thought upon the subject is that the risk of carelessness either of the man or his fellow-servant resulting in injury ought to be borne by the industry. The indust[illegible] has to bear the risk of machinery proving defective and of machines being injured by careless workmen. Why should it not bear the risk of workmen being careless and injuring themselves and others. There must be a certain number of accidents

in any industry—let the making of some reasonable compensation be a charge on the industry. Let the common law stand, if the master be negligent let him make compensation—give indemnity to the extent of the common law liability. In other cases let the industry bear as part of its cost, some fair sum, small enough to prevent any suspicion of the voluntary incurring of an injury, small enough to be no premium on carelessness, yet sufficient to prevent the man being a charge upon society. Society at large must pay as the cost of production will to some extent be increased, but the loss will fall where it should, upon the consumer of the article produced.

The problem as to how this can be borne by the master is not easy. The fairest way would be to levy an assessment on the factory. This would represent accident insurance and the funds so raised should be administered by a board which should adjust all claims. This would obviate the difficulty now arising from employee's accident insurance, when the company defends all actions in the master's name and the amount paid in premiums to a large extent is used in law costs, expenses of the administration of the company and shareholders' profits. This will also enable the master to know the exact amount required to meet his liability as a factor of cost and prevent the ruin of the small manufacturer by an accident.

It might be right that the wage-earner should contribute to this form of accident insurance and the public might well contribute, as they would be relieved to a large extent of the burden of the unfortunate and the expense of litigation which is by no means inconsiderable. The working out of any scheme in detail must of necessity require great care, and full advantage should be taken of what has already been done in other lands. The report of a special committee of the New York Bar Association presented at the annual meeting this year, and the summary of the laws of Germany, Austria, France and England accompanying it, will be found of value, as will also the English government report of 1904 on the working of the English Act of 1897.

Akin to this question is a wider and more difficult one. Is our law with reference to contributory negligence reasonable and fair? This sounds like questioning the very foundation of our jurisprudence, You know that in civil law when there is an accident resulting from the negligence of both parties the loss is apportioned. The same law is administered by my brother Garrow when he deals with maritime cases. But in our courts if both plaintiff and defendant are negligent there can be no recovery. (I am leaving out of sight cases of ultimate negligence). If sailing on the lake there is a collision as the result of the negligence of both parties and one vessel is injured and one escapes injury each has to bear its share of the total loss. If navigating the even more perilous highway an unfortunate by the joint negligence of himself and a motorman has a collision with a street car, the chances are that all the injury will be done to him and comparatively little to the car. Assume the fault to be equal, it seems unfair that he must bear all—yet such is our law. Is it certain that our law is as just as the civil law?

Another matter that I think calls for consideration is the speedy trial of serious criminal cases; cases that can only be heard before a High Court judge. Minor offences can now be dealt with speedily by the county judge, but an innocent man (or worse still a woman) may remain in gaol for several months before this case can be heard. While there should be no undue haste in the trial of these cases it is not in the public interest that there should be long delay.

The expert witness is always with us. His presence is most felt in accident cases and testamentary cases in which capacity is in issue. The evil of a witness who is in truth a paid advocate and who states not facts but opinion is manifest. He was upon my list as a possible subject for reform. In many of the States there is some attempt to reach the difficulty by legislation mostly along the line of having a board of experts nominated, one or more of whom is to assist the court by his evidence. Among medical men the evil is admitted but the remedy suggested is a medical assessor to sit with the Judge.

I have had the opportunity of reading Mr. Justice Riddell's paper read to the Medical Association and am convinced that he is right and any real remedy must come from within the medical body itself. Medical men should be taught the true office and function of a witness, and with regard to cases dealing with testamentary capacity should learn what the courts have given as the standard of capacity and, accepting that, attempt to aid in the solution of the question before the court rather than to confuse by giving evidence based upon some other than the accepted legal definition.

Then there is the question whether the right of appeal upon questions of fact should not be restricted.

Courts exist to ascertain and determine the rights of the parties, that is their primary purpose. This is answered by determining what the facts are and what the law applicable to the facts found is. The finding of fact is of importance to the parties and the parties only. The finding of law is of importance not only to the parties but also to the community as a whole. The court declares what the law is and this binds the whole community and therefore it is of importance that the law should be rightly declared and there should be freedom of appeal. The finding of fact is confined in its operations to the parties and while it is of great importance that it should be right the importance is confined to the parties and the parties only. There is and can be no assurance that the finding of fact by an appellate court will in any great number of cases be any nearer the truth than the finding of the court of original jurisdiction. One appeal upon questions of fact ought to suffice. A second appeal seldom has any beneficial result and the expense becomes a factor of great importance. In the classification of appealable and non-appealable matters this seems to me to be a satisfactory line to draw.

With regard to procedure, I have few suggestions. I submit that the scope of originating notices might well be enlarged. At present they afford a satisfactory way of determining questions that arise in the administration of estates. Many other questions could readily be dealt with in a summary way.

Then there should be some summary way of determining questions arising upon titles without having the whole title quieted. The Vendors and Purchasers Act is not satisfactory as the order only binds as between the vendor and purchaser and does not determine the right as against any adverse claimant. The originating notice might well be made to apply to this.

A standard form of insurance policy for accident insurance and employees' fidelity insurance is urgently required. At present the policies are often so cumbered with provisos as to be as meaningless as an old-time fire insurance policy. When any departure from a normal and fair policy is desired then departure should be made plainly evident to the insured.

A standard form of bond should be prescribed as necessary for all municipal and school treasurers and other similar officers. The bonds now given by surety companies are so conditioned as to prevent recovery in many instances.

The Insurance Act might well contain some similar provision as to the bonds to be given by the treasurers of all fraternal bodies, and all bonds by such treasurers and municipal officers should be filed in some central public office.

The sale of land under execution is now conducted in a manner well devised to produce the minimum amount. A fair advertisement stating the description of the property and the exact interest to be sold should be required. This might well be settled by the Master who might have the same discretion as to the kind of publication necessary as in sales in his office.

Tax sales also produce less than they ought as the uncertainty of a tax title is proverbial. Could not a measure be devised by which all preliminary steps should be proved before the municipal board whose finding should be final?

In a similar way would it not be well to require that all municipal debentures should be passed by that board, and when so vouched for should not be subject to attack in the hands of any bona fide holder.

And lastly, there is great need for the establishment of houses of refuge for the destitute, in the districts. There is

provision for them in counties, but in the new country there is no haven for the destitute but the gaol. This is not as it should be, and when one finds old men and women committed time and again as vagrants—the only offence being poverty—it seems to me there is something wrong. Why should not the districts assume some share of the burden?

These suggestions I make with much diffidence. They are suggestions only. Care is necessary if any of them are to be worked out. Probably you will see fit to consign them to the last resting place of so many presentments of the "Grand Inquest"—the pigeon-hole—or they may perchance only be destined for the waste paper basket.

THE ENGLISH LANGUAGE FOR ENGLAND'S PEOPLE.

There is no part of our heritage as Britons which should be as highly prized, as closely cherished, as carefully guarded, as our English tongue.

In it are enshrined the lessons of the past, guidance for the present, and assurance of hope for the future. It is the record of our life as a people from the beginning of our history. It tells of the glorious deeds of our forefathers—of their trials encountered, their sufferings endured, their victories won. Of these it is not for us to speak at present, but we may properly refer to the history it gives of the reign of law which from the time of our first great law-giver, the Saxon Alfred, has maintained its supremacy, and secured for all, small and great, rich and poor alike, the great blessings of freedom and justice.

We are led to this subject by the timely remarks of the Minister of Justice with reference to the change proposed in the title of the Hudson's Bay railway. It seems a small matter—merely the elision of a letter—but it is significant of the heedless and often reckless way in which our language is mutilated and debased. We quote the words of Sir Allen Aylesworth on the occasion referred to:—

"We Canadians should adhere to the English method of spelling, rather than that adopted in the United States. I do not desire to take up the time of this House with trifles, but this matter, in my opinion, is no trifle. There is a growing tendency in Canada to adopt the United States method of abbreviating the spelling of words by dropping out letters. The good, old, well-established English spelling should be maintained."

Sir Allen alluded to the fact that the "good old English spelling" was "Hudson's Bay," while the United States had adopted and amended the term in "Hudson River." He deplored the general tendency to follow American forms of spelling. "It is," said he, "the English language that we speak, and we look to England for our standards of orthography and geography. I believe that we in the Canadian Parliament, in all our official writings, do well to maintain that standard, whatever the newspapers or other people may see fit to do."

The suggestion of the Minister of Justice was unanimously adopted, and the bill in question amended accordingly.

It is unfortunate that so many of those who have it in their power to preserve in this country the purity and the beauty of the English language seem to prefer to do what they can to debase it. How many of our school teachers set an example of the use in common conversation of the rules which they teach or should teach in their classes? In works of fiction, of which so many are now being written for the perusal of the youth of this country, why do the writers think it appropriate to make the country people speak a language which certainly is not English, whatever else it may be, and which in point of fact they do not use in ordinary conversation? Why do they make the children going home from school talk to each other in the strange compound of Yankee slang and bad grammar which is no more English than Chocktaw? If the children attending our common schools do really talk the gibberish put into their mouths by the story-teller, then our system of education is wanting in one of its most important features. But the worst offenders of all, because the most widely read, are our daily newspapers.

We are heartily in accord with our Minister of Justice and hope that the members of our profession will do what they can to maintain the purity of the language in which they are perhaps more concerned than any other class of the community.

THE LAW SOCIETY OF UPPER CANADA.

The radical change affected by the Act of 1908 in the mode of electing Benchers of the Law Society by requiring nomination papers was suggested by us in 1901. The benefit of this suggestion has been recognized, and the election now about to take place will be under the provisions of the statute referred to. All details as to this new mode of election will be found in the Act of 1908, and will doubtless be supplemented by necessary papers from the Secretary of the Law Society.

In 1910 it was provided that there should be added to the ex officio Benchers any one who "shall have been elected under this Act (R.S.O. c. 172, s. 4, as amended by 63 Vict. c. 20, s. 1) as a Bencher by members of the Bar at four quinquennial elections." The names of those who have been thus added are as follows: Alex. Bruce, K.C., Z. A. Lash, K.C., C. H. Ritchie, K.C., G. F. Shepley, K.C., George H. Watson, K.C., and Donald Guthrie, K.C.

Public bodies do not always appreciate the services of those who work under them and this is as applicable to lawyers as to any other class in the community, but it is evident that the Benchers of the Law Society of Upper Canada recognize the eminent services of Dr. Hoyles, K.C., as Principal of the Law School of Ontario; a position which he has occupied for some 17 years. At a recent meeting of Convocation the following resolution was passed—"That a record be made in the minutes that Convocation expresses its high appreciation of the merits, qualifications and valuable services of Dr. Hoyles as Principal of the Law School, and that Convocation regards with satisfaction the present high standing of the Law School of the Law Society." It was also ordered that his salary should be

increased from $5,000 to $6,000 per annum and that this increase should date from the first of the year. We hasten to add our word of appreciation to this action of the Benchers; and we are confident that in doing so we voice the thought of the profession of Ontario as a whole in thus recognizing the excellent and faithful work done by Dr. Hoyles in the important position he occupies. It is fortunate that one so highly respected as well as one so learned and gifted as a teacher is in charge of the Law School.

THE ONTARIO BAR ASSOCIATION.

This Association held its Annual Meeting in Osgoode Hall on the 28th of December last; the retiring president, Mr. S. F. Lazier, presiding. There was an exceptionally large attendance partly owing doubtless to the expectation that papers would be read by the Minister of Justice, Mr. Justice Middleton, and others.

The important paper of the morning session was that of Mr. Justice Middleton on Law Reform, which our readers will be glad to have in extenso. It will be found elsewhere in this number. The event of the afternoon session was the address by the Minister of Justice on the subject of the Fisheries Award and the Hague Tribunal. Sir Allen jocularly explained that he was asked to read a paper on this important subject but that he had prepared no paper and had left any documents on the subject behind. Nevertheless he addressed the Association for two hours from memory, giving a most interesting and lucid explanation of the contentions of the United States and of the difficulties that arose in meeting these contentions, and of the successful issue of the matter in so far as it related to Canada. As the subject, however, has been so fully dealt with in the public press it would be merely repetition to reproduce his address here.

The President and others also addressed the Association and some interesting reports were submitted by various committees, but want of time prevented their discussion. They will doubtless be brought up at a future meeting.

The appointment of officers resulted in the election of the following:—

Hon. President, E. F. B. Johnston, K.C.; President, Charles Elliott; Vice-Presidents, W. C. Mikle, K.C., M. H. Ludwig, K.C., F. M. Field, K.C.; Recording Secretary, W. J. McWhinney, K.C.; Corresponding Secretary, A. J. Maclennan; Treasurer, George C. Campbell.

The Annual Banquet following the Annual Meeting was held in the evening at the National Club with a record attendance of 140, the retiring President, Mr. S. F. Lazier, K.C., presiding. The principal guests were Judge Clearwater, representing the Bar of New York State, Mr. R. C. Smith, K.C., of Montreal, representing the Bar of Quebec; Sir Thomas Moss, Chief Justice of Ontario, who responded to the toast to the Bench; Sir William Mulock, Hon. Mr. Justice Riddell, Hon. Allen Aylesworth, K.C., Minister of Justice; Hon. J. J. Foy, K.C., Attorney-General of Ontario, and others. The banquet was a great success. The speeches were of an exceptionally high order and the reply to the toast of the profession by Mr. R. C. Smith of Montreal was simply inimitable. It is no wonder that when delegates go from the Ontario Bar to different parts of the United States to similar festivities, Mr. Smith is spoken of as the after-dinner orator of Canada; he is perhaps the best on the Continent.

The efforts of this Association have been effectual in arousing a more active interest in the welfare of the profession generally, and in fostering a proper esprit de corps. It is to be hoped that this will continue in future and that much benefit will thereby accrue to the profession of this Province as a whole. We also trust that the members outside of Toronto will help on this good work by attending these meetings more largely, and by taking a more active interest in the work of the Association. The result of the recent meeting and banquet amply repaid those present for the time and money expended.

The apparently irrepressible Mr. Justice Grantham has again been much in the limelight. *The Times* says he was among the first, and it is to be hoped will be among the last, of the judges who choose to defend themselves publicly against charges of partisanship; and that "Certainly he is the first in recent times who has exposed himself to a rebuke such as that of the Prime Minister, who declared that Mr. Justice Grantham had signally violated the obligation of the Bench to abstain from criticism of the procedure at Parliament and had thereby created a unique situation." The same learned judge by his attack on Mr. Justice Channell brought upon himself a well-merited lesson from the latter, who told the grand jury at the Northampton Assizes that he did not think the charge of the grand jury was a very appropriate occasion for a judge to make remarks that went outside the calendar or were of a personal character. It has been said that the Premier's castigation might result in Mr. Justice Grantham's retirement from the Bench, but it may be as our contemporary hopes, that "we shall hear no more of an unfortunate demonstration by the judge—at all events that he will do nothing further to keep alive a controversy which ought for many reasons to end at this point."

We hear complaints that sufficient time is not given for the trial of cases on the Northern Circuit in the Province of Ontario. The increase of population in Northern Ontario and the fact that there is always a large amount of litigation in newly settled and in mining districts and mining camps, easily accounts for the congestion. Some re-arrangement of circuits would appear to be desirable:—in fact it would be well that a judge should, if possible, be appointed to clean up a mass of unfinished business.

REVIEW OF CURRENT ENGLISH CASES.

LANDLORD AND TENANT—DISTRESS—EXEMPTION—GOODS COMPRISED IN HIRE PURCHASE AGREEMENT—POSSESSION ORDER OR DISPOSITION—"REPUTED OWNERSHIP"—GOODS OF WIFE UNDER HIRE PURCHASE AGREEMENT—DISTRESS AMENDMENT ACT, 1908 (7 EDW. VII. c. 53) s. 4—(R.S.O. c. 170, s. 31).

In *Rogers* v. *Martin* (1911) 1 K.B. 19, a landlord having seized in distress a piano on the demised premises which the wife of the tenant had agreed to purchase on a hire purchase agreement, the vendors claimed the piano and the bailiff having refused to deliver it up the present action was brought. The Distress Amendment Act, 1908 (8 Edw. VII. c. 53) which exempts the goods of third persons from distress provides that such exemption is not to extend to the goods belonging to the husband or wife of the tenant, nor to goods comprised in any bill of sale, hire purchase agreement or settlement made by the tenant, nor to goods in the order and disposition of the tenant by the consent of the true owner under such circumstances that the tenant is the reputed owner. Following *Shenstone* v. *Freeman* (1910) 2 K.B. 84 (noted ante, vol. 46, p. 538), the Court of Appeal (Lord Alverstone, C.J., and Buckley, and Kennedy, L.JJ.) held that the piano was not subject to distress, the hire and purchase agreement not having been made by the tenant, and the piano could not be deemed to be in the "possession, order or disposition" of the tenant by the consent of the true owners in such circumstances as that he was "the reputed owner thereof." One other point is also decided. The statute requires that the claimant shall deliver a declaration of ownership to the bailiff, and the Court held that does not mean that a statutory declaration must be delivered, nor, where there are several joint owners, that all must sign the declaration.

LANDLORD AND TENANT—SUB-LESSOR AND SUB-LESSEE—COVENANTS TO REPAIR IN HEAD-LEASE AND SUB-LEASE—NEGLECT OF SUB-LESSEE TO REPAIR—DAMAGES FOR BREACH—COSTS.

In *Clare* v. *Dobson* (1911) 1 K.B. 35, the plaintiff was sub-lessor of the defendant; both the head and sub-lease contained covenants in identical terms to repair, and on the face of the sub-lease it appeared that the reversion was a leasehold reversion.

The premises were suffered to go out of repair; the head lessor notified the plaintiff and the plaintiff notified the defendant, but the defendant neglected to execute the repairs, whereupon the plaintiff's lessor commenced proceedings of ejectment, the plaintiff in the present action defended that action, the repairs were made and he then applied for relief from the forfeiture, which was granted on the terms of his paying £64 14s. taxed costs and he became liable also for £25 costs between solicitor and client and £10 10s. for surveyor's fees, these items he now claimed to recover from the defendant. Lord Coleridge, J. who tried the action, however, determined that the plaintiff could not succeed, and that on the authority of *Ebbets* v. *Conquest* (1895) 2 Ch. 377 in the absence of a covenant of indemnity, the damages recoverable for breach of a covenant to repair do not include costs paid to a third party to which the covenantee had been put in consequence of the default, nor his costs of proceedings to be relieved from the consequence of his own default.

CRIMINAL LAW—BETTING-HOUSE—USER OF PREMISES—EVIDENCE —RECEIPT OF MONEY—CONSIDERATION—BETTING ACT, 1853 (16-17 VICT. C. 119) SS. 1, 3—(9-10 EDW. VII. C. 10, S. 1 (D.)).

The King v. *Mortimer* (1911) 1 K.B. 70 was a prosecution for keeping a common betting-house. The defendant was convicted under the Betting Act, 1853 (see 9-10 Edw. VII. c. 10, s. 1 (D.)) of having used his premises for the purpose of receiving money thereat "as and for the consideration for certain assurances, undertakings, promises and agreements to pay thereafter" money on bets on horse races. The evidence shewed that the defendant was a bookmaker and at the time mentioned in the indictment postal orders for £5 were sent to the appellant at the premises in question and retained by him in pursuance of a letter previously received by defendant from the sender in which the latter stated he wished to open an account of £5, and that his commissions would not exceed that amount without a further remittance. To which the defendant replied sending a book of rules, etc., and subsequently sent the sender of the £5 an account of bets made and lost on his behalf. It was also shewn that a few days later the defendant's premises were searched by the police and betting slips and ledgers containing entries relating to bets were found there. The Court of Criminal Appeal (Lord Alverstone, C.J., and Pickford, and Coleridge, JJ.) held that the evidence was sufficient to warrant a conviction.

CRIMINAL LAW—QUARTER SESSIONS—POWER OF QUARTER SESSIONS TO BIND CONVICT TO APPEAR FOR SENTENCE—RECOGNIZANCE TO APPEAR FOR SENTENCE—BREACH OF CONDITION—INHERENT JURISDICTION OF QUARTER SESSIONS.

The King v. *Spratling* (1911) 1 K.B. 77 may be shortly noticed for the fact that the Court of Criminal Appeal (Lord Alverstone, C.J., and Pickford, and Coleridge, JJ.) held, on a case stated, that a court of quarter sessions has inherent jurisdiction to bind over a person convicted at the sessions, to appear for sentence when called on, and to inflict sentence in case of breach of the recognizance.

SOLICITOR—REGISTRAR OF COUNTY COURT—DEFENDANT IN PERSON—REGISTRAR ACTING AS DEFENDANT IN PERSON IN HIS OWN COURT—TAXATION BY REGISTRAR OF HIS OWN COSTS—COSTS OF SOLICITOR DEFENDANT ACTING IN PERSON.

Tolputt v. *Mole* (1911) 87 is an illustration of the exception to the general rule that a judge who has an interest in the result of a suit is disqualified from acting, the exception being "in cases of necessity where no other judge has jurisdiction." By the County Courts a registrar who is a solicitor is debarred from practising as a solicitor in his own court. In the present case the defendant was a solicitor and was registrar of the court in which he was sued. He appeared in person and successfully defended the action and was awarded costs, which as Registrar of the court be taxed. An appeal was had from his taxation on the ground that being himself the litigant he was debarred from acting as taxing officer of his own costs, and should have appointed a deputy, or requested the judge to tax the costs. The Divisional Court (Phillimore, and Avory JJ.) held that he was not under any obligation to incur the expense or obligation of getting any other person to act, and that he being the only officer having jurisdiction he was entitled to tax the costs himself. The case also deals with the question as to what items of costs a solicitor defendant is entitled to be allowed, where he acts in person.

COMPANY—FRAUDULENT PROMOTER—DEBENTURE ISSUE—SECRET PROFIT.

In re Darby (1911) 1 K.B. 95. When the limited company system was devised it was probably not anticipated that it would

be utilized so freely as it has been by fraudulent persons for preying on an unsuspecting public. This case affords another instance of that objectionable perversion of a beneficial Act. A corporation was formed by two persons named Darby and Gyde consisting of only the seven signatories of its memorandum of association nominated by these two persons, and the object was to cloak their identity in carrying out their fraudulent schemes, and they were the sole directors and managers of the corporation. This corporation contracted to buy for £3,500 a license to work a quarry, and Darby and Gyde then promoted another company to acquire the license, and a contract was entered into by means of a trustee for the company with the corporation whereby the latter agreed to sell the license to the company for £10,500 in cash, £2.000 in debentures and £5,500 in fully paid-up shares of the purchasing company. Darby and Gyde then caused the company to be registered, the signatories to its memorandum of association being stool pigeons furnished by themselves. The company duly adopted the contract with the corporation and Darby and Gyde prepared prospectuses which were issued to the public and debentures of the company were then sold realizing £14,060 out of which £9,200 on account of the purchase money was paid to the "corporation" and found its way into the hands of Darby and Gyde. The company as might naturally be expected was ordered to be wound up—assets £160. Darby having also become bankrupt the liquidator claimed to prove against his estate for the secret profit made by him by means of the sale of the license to the company. The trustee rejected the claim, but Phillimore, J., held that the corporation was merely another name for Darby and Gyde, and that Darby's estate was liable to account to the company for the secret profit he had made, less the reasonable costs and expenses of promoting the company.

EXECUTION—SHERIFF—"SHERIFFS' COSTS OF EXECUTION"—COSTS OF INTERPLEADER PROCEEDINGS.

In re Rogers (1911) 1 K.B. 104. In this case a sheriff was entitled under the Bankruptcy Act to be paid "his costs of execution" and the question was whether his costs of certain interpleader proceedings which had arisen out of the seizure were "costs of execution" and Phillimore, J., held that they were.

MARRIAGE SETTLEMENT—COVENANT BY HUSBAND TO SETTLE AFTER ACQUIRED PROPERTY—FURNITURE—AFTER ACQUIRED FURNITURE USED IN SETTLOR'S FAMILY—DELIVERY TO TRUSTEE.

In re Magnus (1910) 2 K.B. 1049, although a bankruptcy case deserves a brief notice, inasmuch as the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) hold that where a husband covenants to settle after-acquired property, the customary and ordinary use of after-acquired furniture by the settlor and his family in the family residence in accordance with the trusts of the settlement is sufficient to vest the property in the trustee for the purposes of the settlement, without any formal delivery to him.

HABEAS CORPUS—FUGITIVE OFFENDER—DISCHARGE OF ORDER NISI FOR HABEAS CORPUS—"CRIMINAL MATTER"—APPEAL—RES JUDICATA—SUBSTANTIVE APPLICATION TO COURT OF APPEAL—FUGITIVE OFFENDERS ACT, 1881 (44-45 VICT. c. 69).

The King v. *Governor of Brixton Prison* (1910) 2 K.B. 1056. This was an appeal from an order discharging an order nisi for a habeas corpus obtained by the applicant under the Fugitive Offenders Act, 1881 (44-45 Vict. c. 69), with a view to obtaining his discharge from arrest. The Court of Appeal held that the matter was "a criminal matter" and therefore no appeal lay, but held, that as the order drawn up merely discharged the order nisi, there was no adjudication of record which would constitute the matter res judicata, consequently the refusal of the former application for an order nisi presented no obstacle to the making of a substantive application for a like order to the Court of Appeal, that court, and the High Court, having concurrent jurisdiction under the Act.

ILLEGALITY—GAMING—STREET BETTING—HOUSE USED FOR BETTING—SEIZURE IN HOUSE OF PROCEEDS OF BETS—ACTION TO RECOVER MONEY SEIZED BY POLICE.

Gordon v. *Chief Commissioner of Police* (1910) 2 K.B. 1080. The plaintiff in this case sought to recover from the defendant certain moneys which had been seized by the police in the following circumstances. The plaintiff engaged in betting on the street and deposited in a house occupied by one of his employees the proceeds of such betting operations. In pursuance of a

warrant issued under the Betting Act, 1853 (16-17 Vict. c. 119) s. 11, the police entered the house, and seized a number of betting slips, and the aforesaid money. The plaintiff's employee was convicted of keeping a common gaming house, but the plaintiff was acquitted. The plaintiff then claimed a return of the money, but the defendant claimed that it was forfeited under the Metropolitan Police Act, 1839, s. 48. Warrington, J., who tried the action, found that the money had not been forfeited as claimed, because the procedure required by s. 48 had not been complied with, but he held that inasmuch as the money had been acquired by bets in the street, which were illegal transactions, the maxim ex turpi causa non oritur actio applied, and the plaintiff therefore could not recover. The Court of Appeal (Williams, Moulton and Buckley, L.JJ.), however, were unable to agree in this conclusion, but, though they were agreed in the result, they were not agreed in their reasons. Williams, L.J., dissents from the views of Moulton, L.J., on the application of the maxim in question. Williams, L.J., appears to consider the rule would be applicable, but for the fact that there was really no evidence as to the circumstances in which the money in question had been received by the plaintiff. Whereas Moulton, L.J., thought the maxim had no application to such a case, because, in his view, although the betting by which the money was alleged to have been obtained might have been illegal, yet the property in the money passed to the plaintiff and any person from whom it had been obtained could not have claimed the specific coins, but would only have had an action of debt for its recovery. Buckley, L.J., on the other hand, thought the maxim is only applicable when the plaintiff cannot establish his cause of action without relying upon an illegal transaction, and here the plaintiff had the possession and property, and his case was exhaustively stated by saying he sued the defendant for having deprived him of the possession of his property.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Alberta.] LIMOGES *v.* SCRATCH. [Dec. 9, 1910.

Mechanics' lien—Construction of statute—Alberta Mechanics' Lien Act—Building erected by lessee—Liability of owner.

Sec. 4 of the Alberta Mechanics' Lien Act, 6 Edw. VII. c. 21 gives to any contractor or material man furnishing labour or materials for a building at the request of the owner of the land a lien on such land for the value of such labour or materials. Sub-sec. 4 of s. 2 provides that the term "owner" shall extend to and include a person having any estate or interest "in the land upon or in respect of which the work is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done," etc. By s. 11 "every building . . . mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or his authorized agent . . . shall be held to have been constructed at the request of such owner," unless the latter gives notice within three days after acquiring such knowledge that he will not be responsible. The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner of the land was aware of the work being done but gave no notice disclaiming responsibility therefor. Mechanics' liens having been filed under the Act,

Held, that the interest of the owner in the land was subject to such liens.

Judgment appealed from varying that at the trial (2 Alta. L.R. 109) in favour of the lienholders, affirmed. Appeal dismissed with costs.

Perron, K.C., for appellant. *Bennett*, K.C., for respondent.

B.C.] [Dec. 9, 1910.

VANCOUVER, VICTORIA & EASTERN RY. CO. *v.* MCDONALD.

Railway—Right of way—Expropriation—Delay in notice to treat — Property injuriously affected — Compensation — Mandamus.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the Railway Act, and the subsequent construction and operation of the line of railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn within such area which have not been physically occupied by the permanent way as constructed. FITZPATRICK, C.J. and DAVIES, J., dissenting.

Appeal allowed with costs.

Ewart, K.C., for appellant. *G. E. Martin*, for respondent.

Exch. Court.] [Dec. 23, 1910.

CAP ROUGE PIER CO. *v.* DUCHESNAY.

Prescription—Interruption — Acknowledgment of title — Uncertainty.

The appellants claimed prescriptive title of a part of the bed of a small river on which D., the respondents' auteur, was a riparian owner. D. had leased lands on the banks of the river to the appellants which, it was alleged, included the property in dispute. In answer to the claim of prescriptive title the respondents produced, as their only evidence of interruption of prescription, a letter from the appellants to D. enclosing a cheque in payment of "use of your interest in Cap Rouge River this year," indorsed by D. acknowledging receipt of the funds "with the understanding that the navigation of the river is not to be prevented."

Held, reversing the judgment appealed from, 13 Ex. C.R. 116, GIROUARD and IDINGTON, JJ., dissenting, that as D. had an interest in other portions of the river, the memorandum was too indefinite to serve as an interruptive acknowledgment defeating the title claimed by the appellants. Appeal allowed with costs.

G. G. Stuart, K.C., for appellants. *Flynn*, K.C., and *Paquet*, for respondents. *Arthur Fitzpatrick*, for Trans. Railway Commissioners.

Province of Ontario.

HIGH COURT OF JUSTICE.

Middleton, J.] LOVEJOY *v.* MERCER. [Jan. 6.

Judgment by consent—Mistake as to date—Power of court to relieve from.

This was a motion by the defendant for an order relieving him from the consequences of default in making a payment on a certain date under a judgment pronounced by consent of counsel at the hearing. This judgment was intended to place the rights of the parties upon a definite basis and the date for the payment of a certain sum of money was fixed. There was a clear misunderstanding by the defendant as to this date, he thinking the amount was not payable for some time after the date mentioned in the judgment. There was no fraud or misleading on the part of the plaintiff and nothing in his conduct upon which any equity could be raised against it.

MIDDLETON, J.:—I am satisfied that the defendant has erred in good faith, and that he should be relieved if I have power. The oft-quoted words of Ferguson, J., in *Re Gabourie*, 12 P.R. 252, 254, "to do justice in the particular case, where there is discretion, is above all other considerations," are not widely, if at all, different from is said by Halsbury, L.C., in *South African Territories Co.* v. *Wallington*, [1898] A.C. 313, 314.

Neale v. *Lady Gordon Lennox*, [1902] A.C. 465, I think, gives me the same power in this case to relieve the defendant from his slip as I would have to relieve from a slip or default in the course of an action—and the same principle should guide me in the exercise of that discretion. . . .

The plaintiff here used the aid of the court, by its process, to restore him to the possession of his own land, free from the possession of the defendant, taken under the original agreement and held under the terms of the consent judgment. I cannot see that in assuming that I now have a power to relieve, upon proper terms, I am really carrying this case (the *Neale* case) beyond its due application. I place the exercise of this discretion on the power to relieve against mistakes, slips, blunders, and even stupidity of parties in the course of litigation, which I regard as quite distinct from the power assumed by equity to relieve from default under a foreclosure decree.

Had a motion been made by the defendant for an extension of time to pay the money by the date he had, by his contract, fixed for payment, upon the ground that he was then unable to meet his obligation, I could not have helped him, nor would he have had any equity in his favour. His accidental misunderstanding of the date fixed for paymen is another matter.

Order made upon terms relieving the defendant from the consequences of his default.

McBrayne, K.C., for defendant. *Schelter*, K.C., for plaintiff.

Falconbridge, C.J.K.B., Latchford, J., Riddell, J.] [Jan. 7.

MICKLEBOROUGH *v.* STRATHY.

Landlord and tenant—Lease—Surrender by act of parties and operation of law—Intention.

Appeal by plaintiff from judgment by TEETZEL, J., 21 O.L.R. 259, dimissing the action and allowing defendant's counterclaim. The action was for a declaration that a certain lease had been determined by the acts of the defendant and that the plaintiffs were no longer liable for rent. The counterclaim was for rent.

Held, that in order that the lease shall be surrendered by operation of law there must be a resumption of possession by a landlord through himself or his (new) tenant; that there is no difference in the effect of a landlord himself going into possession and of a new tenant obtaining possession; and that, aside from unequivocal acts, there must be on the part of a landlord an intention to take possession and put an end to the lease, *i.e.*, no longer "to hold the tenant to his lease" (*Oustler* v. *Henderson*, 2 Q.B.D. at p. 578); and that the taking possession for a limited time of two rooms by a landlord is not one of those unequivocal acts, but the effect of such an act depends on the intention (or not) "to hold the tenant to his lease."

A. C. McMaster, for plaintiff. *Geo. Bell*, K.C., for defendant.

Province of Quebec.

SUPERIOR COURT—MONTREAL.

Charbonneau, J.] [February 1.

MONTREAL LIGHT, HEAT & POWER CO. AND ROYAL ELECTRIC CO. *v.* TOWN OF MAISONNEUVE AND DOMINION LIGHT, HEAT & POWER CO.

Electric power company having poles and wires installed on streets cannot be interfered with by another such company —Extent of interference—Inconvenience and danger.

The petition of the Montreal Light, Heat & Power Company alleged that on October 19, 1910, it presented a petition praying for an interlocutory injunction against the Town of Maisonneuve and the Dominion Light, Heat & Power Company, to prevent them, among other things, from placing their poles, wires and other electrical apparatus at a distance of less than six feet from the poles, wires and other electrical apparatus of the petitioners: that its petition was continued to the following day and an order was given by the court stopping all work, pending the adjournment; that on October 20, this order of statu quo was continued until November 18, and that on this date the court granted the interlocutory injunction asked for, fixing the distance at three feet; that notwithstanding the statu quo so ordered and notwithstanding the said judgment, the respondent the Dominion Light, Heat & Power Company erected a series of poles on Orleans Ave., north of Ontario St., from the west side of the said avenue, which poles are not only placed at a distance of less than three feet from the electrical apparatus of the petitioner, but have been actually placed in the middle of the petitioner's electric wires, and in such close proximity to these wires that it has been found necessary to fasten them to insulators, placed on the respondent's poles, in order to prevent the wires from touching the poles. The petitioners asked in consequence that the respondents should be declared in contempt of court, as well for having violated the terms of the interim injunction ordering the statu quo to be preserved, as for having violated the interlocutory order of injunction given as aforesaid and asking also that an order should be given that the said poles and wires should be removed within a time to be fixed by the court, and that in default

of the respondents removing the said poles, the petitioners should be authorized to do so at their expense, and that moreover the respondents should be condemned to a fine for the said contravention. A rule was accordingly issued by order of this court against the Dominion Light, Heat & Power Company.

Upon the contestation of the said rule the Dominion Light, Heat & Power Company alleged that it had not violated the terms of the interim order nor of the interlocutory injunction of November 18, 1910: that it is true that it had caused to be erected certain poles upon the street in question, but that these poles are more than three feet from the petitioners' wires and that six of these poles have been placed between the electric wires of the petitioner by reason of the fact that on Orleans Ave. the petitioners, as well as the Montreal Street Railway Company have, on each side of the street, lines of poles carrying electric wires of which the last are scarcely twenty feet from the ground; that this did not leave the respondents any alternative other than to place its poles as it had done; that to avoid the dangers of contact it was necessary to attach certain of the petitioners' wires to the poles in question by means of insulators, but that this work was done with care and absolutely prevents all danger; that the respondent had acted in good faith, not believing that it was violating the terms of the interlocutory injunction, nor of the order for the statu quo.

The petition of the respondents also asked that the terms of the interlocutory injunction of the 18th November last, should be modified in such a way as to permit the respondents to leave the said poles located at a distance of less than three feet from the electric wires of the company petitioner in view of the measures taken by the company respondent to protect the said wires, and to remove every element of danger.

Held, 1. The mode of installation which the Court is asked to authorize constitutes a very considerable inconvenience to the company petitioner and a permanent source of danger to its apparatus and also to the public.

2. The right conferred upon the company respondent to instal its apparatus in the streets of the town of Maisonneuve is subject to the rights acquired previously by the company petitioner, and among these rights so acquired is necessarily included the localization of its apparatus made previous to the respondent's charter.

3. It has not been shewn that it was absolutely necessary

to place the poles in question through the petitioner's wires to permit the company respondent to install its service on Orleans Ave.; but on the contrary the same end could have been obtained by several different modes of construction not affording the inconvenience and dangers above indicated.

4. It is impossible to permit the superplacing of an aerial line of wires charged with electricity over another line, belonging to a different company, without at the same time authorizing one of the two lines to make use of the apparatus of the other company, or establishing a method of joint use of the same apparatus.

5. This Court has not the power to order this kind of partnership, or to create a servitude upon the wires and apparatus of the other company.

The application of the respondent was dismissed with costs; and the Dominion Light, Heat & Power Co. was ordered to pay the Crown a fine of $100, and to remove the wires and poles installed on Orleans Ave. through the wires of the Company respondent, within fifteen days from the present judgment and that in default, the company petitioner was authorized to do so at the expense of the respondent—the whole with costs.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] DIMOCK *v.* GRAHAM. [Jan. 31.

Municipal elections—Preparation of lists—Striking off parties in arrears for taxes—Procedure—Names inadvertently omitted—Evidence on trial—Improper rejection of.

The list of voters prepared under the provisions of the Nova Scotia Franchise Act, R.S. 1900, ch. 4, is prima facie the list to be used (R.S. 1900, c. 71, s. 71, as amended by N.S. Acts of 1907, c. 56, s. 1), in the holding of town elections for mayor and councillors, but is to be corrected by striking out therefrom "by scoring with red ink" the names of persons who are in arrears for taxes.

The only evidence as to whether a person is so in arrears or not is the rate book and where the town clerk finds there the

name of a person who has not paid his taxes it is his duty to strike it from the list of voters to be delivered to the presiding officer for the purposes of the election.

It is a wrong view of the statute to strike from such list the names of persons whose names are not to be found on the rate or poll books of the town.

Where the result of an election is attacked it is not necessary for the person attacking it to shew that the persons whose names were struck off attempted to poll their votes and were prevented from doing so.

Persons whose names are so struck off are not within the provision (s. 131 (2)) providing for application to the town clerk for the insertion of names inadvertently left off.

Where on the trial of a controverted town election the trial judge rejected evidence which would have shewn how many of the persons struck off by the clerk were delinquents with respect to the payment of their taxes.

Held, that the case must go back to enable the petitioner to shew that the persons whose names were so struck off were not delinquents.

Per RUSSELL, J., the election having been run on lists which were shewn to have been made upon a wrong principle should be declared void.

J. M. Cameron, for appeal. *Lovett*, K.C., contra.

Full Court.] REX. *v.* OGILVIE. [Feb. 4.

Intoxicating liquors—Evidence of sale—Partnership—Presumption of knowledge—Parties—Non-joinder.

Where a quantity of liquor proved to be intoxicating was delivered by a teamster in the employ of defendant and the firm of which he was a member to a customer of the firm and the books of the firm and the accounts rendered shewed the sale although the customer testified that he had nothing to do with defendant personally,

Held, 1. reversing the judgment of the County Court judge for District No. 7 and restoring the conviction, that the evidence was sufficient to support the conviction.

2. Each member of a firm is presumed to know what is entered in the books of the firm and of money payments made to it.

3. The non-joinder of one member of a firm in a prosecution

for a violation of the provisions of the Liquor License Act is immaterial, the penalty being several.

J. McK. Cameron, for appeal. *O'Connor*, K.C., contra.

Full Court.] SHAND *v.* POWER. [Feb. 4.

Vendor and purchaser—Option—Entry after expiry of time—Ejectment—Recovery in.

Defendant, the holder of a legal title to property of which plaintiff was in possession under an agreement to purchase, entered and took possession after the expiration of the period allowed by the agreement for payment of the purchase money for default of payment. Plaintiff brought an action claiming damages for trespass and for acts amounting to an assault alleged to have been committed in connection with the entry and taking possession, but on the trial failed to give evidence of the alleged assault. Defendant counterclaimed in ejectment under the terms of the agreement.

Held, that defendant being the holder of the legal title and entitled to immediate possession should have had judgment on his counterclaim and that the judgment of the trial judge dismissing the counterclaim must be reversed with costs.

J. J. Ritchie, K.C., for appeal. *Rowlings*, contra.

Full Court.] MCDONALD *v.* BAXTER. [Feb. 4.

Infant—Contract by—Substantial advantage—Warranty—Burden of proof as to.

Plaintiff, an infant, purchased a horse from defendant in the month of April, 1908, paid the purchase price and took delivery and used him for general farm and other work down to June, 1909, when he sought for the first time to rescind the contract of sale and to recover the purchase price on the grounds: (1) That the contract was not one for necessaries, and (2) that there was a breach of warranty as to the age, soundness and general capacity of the animal.

Held, dismissing plaintiff's application to set aside findings and for a new trial, that plaintiff having derived substantial advantage under the contract could not repudiate or rescind it.

The trial judge instructed the jury that the burden was on

plaintiff to prove that the warranty alleged was given and that if the evidence was equal on both sides plaintiff would have to fail and the jury having returned the answer, "evidence equally balanced,"

Held, that the trial judge was right in accepting this finding as a finding against plaintiff and in directing entry of judgment for defendant.

Power, K.C., for. *W. B. A. Ritchie*, K.C., and *Sangster*, contra.

Full Court.] RICHEY *v.* CITY OF SYDNEY. [Feb. 4.

Sales—Contract—Order of goods not included in contract—Price—How determined.

Plaintiff and defendant entered into a contract for the supply by the former to the latter of a quantity of sewer pipe of specified dimensions at an agreed price. Subsequently to the making of the contract plaintiff was requested to supply a quantity of pipe of a size not included in the contract but for which a price had been quoted in correspondence leading up to the making of the contract.

Held, affirming the judgment of the trial judge, that plaintiff was not bound to accept the price quoted for pipe not included in the contract but was entitled to recover the fair market price of the pipe supplied at the time the order was given.

McDonald, for defendant, appellant. *Mellish*, K.C., contra.

Full Court.] LEVINE *v.* SEBASTIAN. [Feb. 4.

Sale of goods—Agreement of third party to pay in certain event—Form of remedy—Action wrongly brought—Amendment.

In an action for goods sold and delivered, plaintiff's evidence shewed that the goods in question were sold to men employed on board of a steamer of which defendant was chief steward and that defendant's undertaking, if any, was to pay for the goods if the parties to whom they were sold remained on the vessel after she cleared from St. John, N.B., or to return the goods.

Held, affirming the judgment of the County Court judge assuming this to be the agreement, that defendant could only be held liable in damages for breach of his contract as bailee of the goods and not in the action as brought for goods sold and delivered.

Per DRYSDALE, J., the case was not one for amendment. RUSSELL, J., dissented as to the effect of the evidence.

J. J. Ritchie, K.C., and *R. H. Murray*, for appeal. *W. H. Thompson*, contra.

Longley, J.] THE KING *v.* NEILY. [Feb. 17.

Intoxicating liquors—Third offence—Certiorari refused.

On application for a writ of certiorari to remove a conviction for a third offence against the provisions of the Canada Temperance Act.

Held, refusing the application:

1. There is no substantial variation between a conviction which adjudges as a penalty imprisonment for two months and a warrant of commitment which directs the imprisonment of the party convicted for the period of two calendar months. If otherwise, the matter is clearly one for amendment, the period mentioned being clearly within the term for which imprisonment may be imposed.

2. Where the defendant has full opportunity of combating the validity of the previous convictions when the certificates are offered in evidence against him and fails to do so the court will not go behind the face of the proceedings as to the question of jurisdiction.

3. Following *R.* v. *Neilson*, unreported, s. 655 of the Code as amended by Acts of 1909, c. 9, is only applicable to charges of indictable offences under the Code s. 750 and is not applicable to proceedings under the Summary Convictions Act.

W. B. A. Ritchie, K.C., for applicant. *Roscoe*, K.C., contra.

Longley, J.] [Feb. 17.

BRAS D'OR LIME CO. *v.* DOMINION IRON & STEEL CO.

Waters and watercourses—Riparian proprietors—Easement—Revocation—Blasting operations.

An interest in the waters of a stream cannot be conveyed to the detriment of bona fide riparian proprietors even though the riparian title be subsequently obtained.

The permanent withdrawal by one proprietor from the waters of a stream of a considerable quantity of water for use in connection with the operation of its works is an illegal act

which will be restrained by the court and it is not necessary as a condition of obtaining relief that the proprietor complaining should shew that the withdrawal in question results in any immediate injury.

The fact that the one proprietor has assented during a period of from ten to fifteen years to the withdrawal of water by the other and has suffered a pipe line for that purpose to be laid across his land does not estop him from revoking the permission given and standing upon his legal rights although the court in such case will not grant an injunction unless it appears that such course is unavoidable. In the absence of formal notice of termination of the privilege given the bringing of the action will have that effect.

The right of one proprietor to take minerals from the land of another does not abridge in any way the right of the owner of the land to make use of the surface in any way that he sees fit and damages cannot be claimed or awarded because the manner in which the surface is used makes it more difficult or expensive to obtain access to the minerals.

The owner of a quarry will not be enjoined from carrying on blasting operations unless it is shewn that such operations are systematically carried on in a negligent, reckless and dangerous manner.

Rowlings, for plaintiff. *Crowe*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Prendergast, J.] GRAVES v. TENTLER. [Jan. 24.

Jurisdiction—Awards—Enforcing award against non-resident of province—Service of notice of motion out of jurisdiction—King's Bench Act, Rules 201, 773—*Finality of award—Reservation of matter for subsequent adjudication by arbitrator.*

The respondent, who was not a resident of the province, joined with the applicant in referring their disputes to an arbitrator residing in Winnipeg, agreed to abide by his award and afterwards submitted his case to the arbitrator. Having refused to obey the award, the applicant served him out of the

jurisdiction with a notice of motion, under Rule 773 of the King's Bench Act, to have the award made a judgment of the Court.

Held, that the service was authorized both by Rule 773 and also by Rule 201, and the court had jurisdiction to make the order asked for. *Rasch* v. *Wulford* (1904), 1 K.B. 118, distinguished.

In making his award, the arbitrator found against the respondent in respect of his claim to be credited with the amount of a cheque for $800, but reserved the right to allow that claim provided the respondent would produce proof of same satisfactory to the arbitrator within thirty days. The respondent made no attempt to avail himself of the opportunity thus given.

Held, that this reservation, being for the respondent's benefit, could properly be separated from the rest of the award without requiring a re-adjustment of the position of the parties, and that the whole award was not thereby vitiated, but should be enforced disregarding such reservation. *Johnson* v. *Latham*, 19 L.J.Q.B. 329, and *Tomlin* v. *Mayor of Fordwich*, 5 A. & E. 147, referred to.

Foley, for applicant. *Kemp*, for respondent.

Robson, J.] [Jan. 30.

DALZIEL *v.* HOMESEEKERS LAND AND COLONIZATION CO.

Vendors and purchasers—Specific performance—Cancellation of agreement of sale—Forfeiture—Repayment of moneys paid on account—Damages for breach of agreement to purchase.

A purchaser of land under an agreement who has paid some of the instalments provided for, but whose rights the vendor has unsuccessfully attempted to put an end to by notice of cancellation for default in payment of a subsequent instalment, may, in an action against the vendor claiming relief from the forfeiture of the money paid, be entitled to a return of such money; but, if the value of the land has diminished in the meantime, he should have his claim reduced by the amount of the damages caused to the vendor by his breach of the contract; that is, the amount by which the price agreed on exceeds the reduced value of the land.

Hansford, for plaintiff. *Sproule*, for defendants.

Robson, J.] SNIDER *v.* WEBSTER. [Jan. 30.

Vendor and purchaser—Damages for breach of covenant to convey land—Vendor's lien.

When a vendor of land has received the amount of the purchase price agreed on and covenanted to convey with a clear title within a time limited, the measure of damages in case of an absolute failure to convey the land is the amount of the consideration paid with interest, whether the land has increased or diminished in value in the meantime. Dart on Vendors and Purchasers, 801, and Mayne on Damages, 250, 251, followed.

That the consideration mentioned in the deed and acknowleged by the defendant to have been received was not actually cash, but only lands received in exchange at a valuation agreed on, makes no difference if such lands have actually been conveyed by the plaintiff to the defendant, and the plaintiff is also, in such a case, entitled to a lien on the lands so conveyed for the amount at which they were taken in the proposed exchange.

Ferguson, K.C., for plaintiff. *Galt,* K.C., for defendant.

Referee.] [Jan. 31.

WESTERN CANADA FLOUR MILLS CO. *v.* CANADIAN PACIFIC RY. CO.

Practice—Third party—Defendants' claim against, founded on tort.

The rules of court providing for a defendant bringing in a third party to contest the plaintiff's claim, Nos. 246 and 249 of the King's Bench Act, do not extend to a case in which the defendant's claim against the third party is founded on tort. The defendants, therefore, being called upon to account for a car load of wheat received from the plaintiffs to be shipped on their line, could not bring in, as third party to the action, another company which it was alleged had wrongfully got possession of the wheat and disposed of it. *Gagne* v. *Rainy River Lumber Co.,* 20 O.L.R. 433, followed.

Hamilton, for plaintiffs. *Curle,* for defendants. *Montague,* for third party.

Robson, J.] WILSON *v.* STUART. [Jan. 30.

Joint debtors—Effect of taking judgment against one of two or more.

Rule 585 of the King's Bench Act, as amended by s. 12 of c. 12, of 7 & 8 Edw. VII. permitting judgment to be signed

against such defendants as do not defend without prejudice to the right of the plaintiff to proceed with the action against any other defendant or defendants, in so far as it is intended to abrogate the old rule that, in an action against two or more joint debtors, taking judgment against one is a release of the other or others, must be construed strictly, and cannot be applied in a case in which the judgment was entered against a joint debtor who had actually entered a defence, although such defence was afterwards struck out for default in making discovery.

J. F. Fisher and *W. C. Hamilton*, for plaintiff. *A. H. S. Murray*, for defendants.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] CUDDY *v.* CAMERON. [Jan. 27.

Agreement—Construction of—Set-off for deficiency to be decided—Arbitration condition precedent to right of action.

In an agreement between the parties for the purchase and sale of a logging plant, one of the provisions was:

"The said parties of the first part further guarantee that the balance of the assets of the said company . . . are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of said deficiency shall be estimated by three arbitrators . . . and the amount of the award of the said arbitrators shall, in the manner hereinbefore mentioned, be deducted from the said purchase money still owing and unpaid under this agreement."

Held, on appeal (affirming the judgment of CLEMENT, J., at the trial), that the holding of an arbitration to determine any deficiency was a condition precedent to the claiming of any set-off against the purchase price.

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

[Jan. 27.

FAKKEMA *v.* BROOKS SCANLON O'BRIEN COMPANY.

Master and servant—Injury—Defective system—Voluntary acceptance of risk—Common employment—Verdict of common law or under Employer's Liability Act.

Plaintiff's duty in a logging camp was to work a donkey-engine intended to extricate logs which might become jammed or stopped in their progress down a long chute leading to the water. The engine was placed near the water and close to the foot of the chute, down which the logs came with considerable speed. There was a foreman in charge of the logging operations, and plaintiff was subject to the directions of such foreman. The latter had made two changes in the position of the engine within a few days, the place it occupied at the time of the accident being the first location. There was no dispute as to the foreman's fitness. A log coming down jumped the chute and, striking the plaintiff, broke his leg and carried him into the sea.

Held, following *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, that the system was defective, and that the verdict of the jury giving common law damages should stand.

Observations per MARTIN, J., as to desirableness of submitting questions to the jury in negligence actions.

Bodwell, K.C., for appellant. *Woodworth*, and *Smith*, for respondent.

Book Reviews.

The Examination of Witnesses in Court, adapted for the use of English readers, and revised to date. By FREDERIC JOHN WROTTESLEY. London: Sweet & Maxwell, 3 Chancery Lane. 1910.

This very interesting book is founded on the "Art of winning cases," by Henry Hardwicke of the New York Bar, and the "Advocate," by Edward W. Cox, Serjeant-at-law.

Mr. Wrottesley, in view of the difference in practice between the two countries, abandoned an attempt to adopt part of Mr. Hardwicke's book relating to discovery, etc., and gives instead a general sketch of the manner in which evidence, documentary or otherwise, is obtained from any opponent before the

trial. So far as questions of policy and rules of conduct of advocates are concerned he leaves the text of Mr. Hardwicke's book practically untouched. The subject is dealt with in the following chapters: I. Preliminary step (diverse, interrogatories, advising on evidence, etc.); II. Examinations in chief; III. Cross-examinations; IV. Re-examinations; V. Elementary rules of evidence.

Many books have been written in reference to the general subject matter treated in the one before us, but none of them are more interesting and instructive. After all, however, it is only experience that can be of much practical benefit to counsel in the discharge of their delicate duties in court.

Whilst every one of the 170 pages is as pleasant reading as any novel, we might recommend to our readers one extract among numberless others from the advice given by that most accomplished of all advocates, Sir James Scarlett, as to how best to deal with witnesses to be found on pp. 147 and 148.

This name reminds us of an incident which was related many years ago. Scarlett and Brougham were on opposite sides once on the Northern circuit. After the assizes two countrymen, who had been on the jury panel, discussed the relative merits of these two great lawyers in the conduct of a case. One thought Scarlett was the best, but his friend preferred his opponent, stating his opinion in words to this effect:—"Brougham's my man. He seems unfortunate in being always on the wrong side of the case and Scarlett has the easy side, but I like Brougham for he fights so hard for his client." Scarlett won his cases by his suaviter in modo, which was more efficacious than Brougham's fortiter in re. Our young friends may well apply the moral of this incident to the conduct of their cases.

A Selection of Legal Maxims, classified and illustrated. By HERBERT BROOM, LL.D. 8th edition by JOSEPH GERALD PEASE and HERBERT CHITTY, Barristers-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

Little need be said of this standard work, most interesting reading as we all know, quite apart from its value as a book of law. The original was published in 1854, and at once became an established text-book for legal students. Five editions were produced by Dr. Broom himself; the seventh was published in 1900 and now we have the eighth. This one incorporates a selec-

ted number of recent decisions and enactments which bear upon the principal matters discussed under the various maxims, which of course gives additional value to this edition. It does not, however, pretend to be a new book; in fact any attempt in that line may well be expected to be a failure.

The Marriage Laws of the British Empire. By W. P. EVERSLEY, Recorder of Sudbury and W. F. CRAIES, Barrister-at-law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1910.

Several books have appeared recently with reference to marriage laws and divorce matters. The one before us is a short practical treatise devoted to the elucidation of the law of marriage (1) in England, Ireland and Scotland; (2) in the various British possessions in all parts of the world. The principle adopted by the authors is firstly to discuss impediments to marriage, and then to set out what are the essentials of a good marriage, irrespective of the religious belief of the contracting parties, referring also to the subject of registration. This takes up Parts I. and II. of the book. Part III. gives the statutory law applicable to the British Isles. Part IV. deals with marriage laws in the British possessions.

This is not a place to moralize on the subject, but one cannot, in looking at the list of these possessions, but be struck with the immense number of them, and the consequent vastness of the British Empire. Nor can one wonder at the desire of so many for closer imperialistic relations between these various dependencies of the Crown. One can also be excused for a feeling of pity, if not contempt, for those who do not appreciate the glory as well as the responsibility of belonging to such a vast Empire—one which could not be so great were it not that some great mission for good has been given it by an overruling Providence.

Just a word, however, as to the typographical arrangement of this excellent work. Parts I. and II., which refer specially to the British Isles, are in large type. Part III., giving the statutes, is properly in smaller type. Part IV., relating to the marriage laws of British possessions, though editorial matter, is also in small type. Why so? To be consistent it ought to be the same as Parts I. and II. Further, the type used in the headings and sub-heads used in this part is very confusing. It is

unnecessary to particularize, but this will be evident to any one accustomed to book-making. We have no doubt a second edition will within a reasonably short time be required, and attention to these minor matters will doubtless be given.

Digest of Law of Discovery with Practice Notes. By His Honour Judge Bray. 2nd edition. Sweet & Maxwell, 3 Chancery Lane, and Stevens & Sons, 119 Chancery Lane. 1910.

This volume is a concise statement of the leading principles affecting matters of discovery, in a form which enables the practitioner to follow these principles more readily than if he had to hunt for them in rules and scattered notes. Every practitioner should have this book as a matter of ready reference.

Workmen's Compensation Act, 1906, with notes, rules, orders and regulations. By W. Addington Willis, LL.B. 11th edition. London: Butterworth & Co., Bell Yard, and Shaw and Sons, Fetter Lane. 1910.

The author states that he has referred to some 360 new cases (including a few County Court decisions) thus bringing the authorities down to Nov. 1st, 1910. The fact of this book having reached the eleventh edition is a sufficient indication of what the profession think of it.

Law Societies.

COUNTY OF HASTINGS LAW ASSOCIATION.

The following officers were elected for 1911:—Hon. President, W. N. Ponton, K.C.; President, F. E. O'Flynn; Vice-President, J. F. Wills, K.C., Treasurer, P. McL. Forin; Secretary, M. Wright; Curator, W. C. Mickel, K.C.; Trustees, E. J. Butler, E. G. Porter, K.C., W. B. Northrup, K.C., W. N. Ponton, K.C., and M. Wright.

A vote of thanks was passed to the retiring president Col. W. N. Ponton, K.C., who has most ably filled the office for the past six years. The gift of a portrait of Judge E. B. Fraleck to the library was suitably acknowledged. Nearly 200 volumes have been added to the library shelves.

Flotsam and Jetsam.

We are quite sure that the police magistrate of the city of Toronto, himself a lawyer, and therefore, he may think, quite competent to judge of his brethren, which he does very freely, will be glad to note for future reference when the occasion offers the following (probably aprocryphal) incident. "You have a pretty tough-looking lot of customers to dispose of this morning, haven't you?" remarked a friend of a police magistrate who had dropped in at the Police Court. "Huh!" rejoined the dispenser of justice, "you are looking at the wrong bunch. Those are the lawyers."

Dr. Johnson's famous talk with Boswell on the ethics of advocacy contains this passage: "What means may a lawyer legitimately use to get on? Nice questions of casuistry arise. 'A gentleman,' says Boswell, 'told me that a countryman of his and mine, Wedderburn afterwards Lord Loughborough—who had arisen to eminence in the law, had when first making his way solicited him to get him employed in city causes. Johnson: 'Sir, it is wrong to stir up lawsuits; but when once it is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavouring that he shall have the benefit rather than another.' Boswell: 'You would not solicit employment, sir, if you were a lawyer?' Johnson: 'No, sir; but not because I should think it wrong, but because I should disdain it. However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then to prevent his being overlooked.' "—*Case and Comment.*

RULES OF COURT—ONTARIO.

We are notified that a typographical error occurs in the copies of the rules distributed to the profession. The word "other" in Schedule A, paragraph 4, should read "outer."