# Canada Law Journal.

VOL. XLI. FEBRUARY 15. NO. 4.

## *THE ELECTION LAW.*

Any measures looking to the lessening of corruption in our elections are of moment to the community as this is an evil that strikes at the root of our representative system. I have, therefore, read with interest the article of Judge Wallace in your January number on "Proposed Amendments to the Election Law;" but as I am of the opinion that his plan of amendment is based on unsound principles, I crave leave to present another view of the question.

There are two well-defined philosophies of life to which, perhaps to a large degree unconsciously, men give allegiance and by which they are divided into two relative classes, the upholders of authority and the supporters of reason. In the religious sphere some men believe in a far away Deity who rules the world through a chosen few, to whom he delegates authority; others believe in the immanence of Deity and that the individual conscience is the sole arbiter of truth. In the social realm some believe in the aristocratic principles evidenced by a social head followed by a privileged aristocracy of degrees down to an obedient commonalty, others again believe in the equality of men before the law and object to legalized distinctions. In the political world there are the corresponding relative classes, the autocratic defenders of authority and the democratic believers in the people, and the difference between them extends to the administration of justice as well as to the substantive laws. The autocrat looks to the elect few as the energizing power in formulating and enforcing the laws rather than to the people, while the democrat regards the people at large as the vitalizing force in forming our laws and enforcing them.

If I do not misread Judge Wallace's article, the spirit of it is, to so amend the election law as to make it an autocratic instrument, an artificial extinguisher of electoral corruption and to place the control of this extinguisher as far as possible beyond the reach of the people and their representa-

tives. Taking as I do the contrary view that our laws and especially the laws designed to elevate morals must be founded on the will and the conscience of the people and that the enforcement, especially of such laws, can only be effected through the same sanctions, I disapprove most strongly of both the proposed changes in the law and the novel mode of enforcement by means of a powerful yet irresponsible functionary. Such changes in the law would I believe turn back the hands of progress and destroy the advance that has been made. And it is no small advance that has been made; for though bribery is too common, it is only a fraction of what it was a generation ago. During the period immediately following Confederation bribery was common at elections; there was little reason for either the man who sold his vote or the man who bought it feeling ashamed of the transaction, for public opinion frowned but lightly upon it. I estimate that twenty per cent. of the voters in the district which I knew well at that time could be bought and were bought; while to-day, I estimate that not more than five per cent. can be bought, but it is difficult to determine how many are now bought because everyone connected with the traffic in votes is ashamed of it and seeks to hide it. In all parts of the country there is a substantial improvement and this has taken place under the law, the basic principle of which it is proposed to change. The advance is fairly indicative of the growth of public sentiment on the question. The laws both Dominion and Provincial against corrupt practices have strengthened public opinion, and, like other laws grounded on the will of the people, they have been a factor in educating the public conscience. If these laws had been of the penal character proposed by Judge Wallace and had been enforced by an external authority I do not for a moment believe such an advance would have been made.

There is a dual purpose in enacting an election law against corrupt practices. It is a means for the politician to remedy unfair advantage taken of him by an opponent in a political contest, the rules of the game are laid down and there is a penalty for their infringement; but this is only one phase of the law, for there is a moral aspect of it which is intended to commend it to every moral man and not particularly to the

politician—it is a means in the hands of the good citizen to prevent corruption. It is a weapon of party warfare, but it is also a weapon of moral warfare. In short there is a civil remedy and a criminal remedy for electoral wrongs as there is in the case of many other wrongs. This duality Judge Wallace ignores, and it vitiates much of his reasoning, he says:—"Our Corrupt Practices Act is the only law in Canada based on the curious expectation that it will be enforced by persons who have just broken it." There is every "expectation" that the politician will use the election law as an instrument for ejecting his opponent from a position which he occupies wrongfully, and the number of instances in which it is so used fulfils that "expectation:" but I have never heard that there is any "expectation" that the politician will use the election law as an engine to elevate morals. The politician files an election petition by himself or his friends for the express purpose of turning out an opponent in wrongful possession. That is what his petition asks to have done, and when it is brought on for trial and the respondent admits corrupt practices voiding the election, the object of the petition is attained. If the petitioner, after succeeding in voiding the election, should continue to press the investigation, he would appear to the public as actuated by malice or a desire for revenge. It is notorious that the object of the politician is a civil object, he puts himself on record to this effect and the public admit that such is his object. Instead of there being any "expectation" that the politician will use the election law, not simply as a means of securing his political rights, but also as an instrument of moral discipline, there is the clearest conception that he will do nothing of the sort. The politician pursues his civil remedy, the public conscience palliates the criminal wrong.

It goes without saying that it is the duty of every citizen to aid in enforcing the provisions of the law against corruption in the interest of morality; the judge, the official stenographer, the lawyer, the doctor, the clergyman, the business man, the editor, the farmer, in a word the citizen has this duty cast upon him and, in common with other citizens, those who file or control election petitions have this duty cast upon them, but if these parties are often guilty of the same crimes, as Judge Wallace

declares, they surely are the last persons expected to enforce these punitive provisions of the law.

The laws against electoral corruption are largely in their moral aspect, of the nature of sumptuary laws and like sumptuary laws they are easy to enact but very difficult to enforce. indeed they cannot be enforced unless there is an overwhelming public opinion demanding and supporting such enforcement. The enforcement of the law is the crux of the question and Judge Wallace recognizes this; but, instead of suggesting measures to elevate public opinion and sharpen the public conscience he proposes to set on high a new external moral force, a dictator to make men moral whether they will or no. A dictator cannot do this successfully in Russia, he cannot do it at all in Canada

There are three material changes proposed in the election law, (1) that the practice of swapping petitions be prohibited, (2) that the bribed voter, the real criminal, be introduced as a paid informer to convict his accomplice, and (3) that a department of Government be established directed by an independent chief to enforce the law.

As to the first change proposed, it has at least the demerit of simple inutility, it would not accomplish its purpose, it does not do so in England, it would add one more to the stillborn provisions in our statutes and so lessen respect for the law.

The second charge is reactionary, it is a serious matter for the state to go into partnership with the criminal even to ferret out crime, it is difficult to justify it in any case, but particularly so in case of the enforcement of a law specifically designed to elevate the morals of the people. It is not easy to defend such a proceeding in individual cases when it meets with a measure of success, but it is monstrous to adopt it as the settled policy of the state when it is doomed to lamentable failure. This proposed amendment is based on the penal code of the State of New York, one of the most corrupt States in the Union. Not only are bribery and other forms of corruption common there, but these have been so systematized that the name "Tammany" has become a byword to designate a corruptionist society. The voters are not simply bribed as in Canada to vote a certain way, but both the voter and the non-voter are bribed to belong to a

certain political party between elections; they are bribed to vote at the primaries, they are bribed to vote, to repeat and to personate at the elections. I do not think I am minimizing the condition of affairs in Canada when I say that in no part of it is corruption as rife as in the State of New York, and yet it is proposed to adopt a New York law in order to lessen bribery in Canada.

The third proposal, to put the enforcement of the law into the hands of a "General Superintendent of Elections," an autocrat who would not be responsible to the people, is simply a reversion to the old doctrine of a beneficent despot. It is not even the case of a man trying to lift himself by his boot-straps, it is putting the Old Man of the Sea on his back and then getting that Old Man from his lofty position to lift him by his boot-straps. To turn loose a despot of this sort in a free country in the twentieth century is an anachronism. Assuming such an official appointed, he would have to act through witnesses and juries unless it is proposed to give him absolute power, and both the witnesses and juries would give a short shrift to the efforts of such a despot. It is too late to set up a political inquisition in Canada. No more apt illustration of the folly of such a course can be found than that suggested by the position of the Auditor-General. The consensus of opinion of those who do business with the Dominion Government through that gentleman is unfavorable to the wisdom of such an office, or the mode in which it has been conducted. But, this, at the worst, only affects the pockets of the people. The suggestion that a running mate to the Auditor-General be put in control of a department to censor electoral morals is too parlous. It would be dangerous to put the liberty and reputation of the subject at the mercy of such a functionary. New York State a model for substantive law and the Auditor-General a model for its enforcement! Heaven forbid it! The amendments to the law or rather the revolution in the law proposed by Judge Wallace would kill the enforcement of the law. A dead law is legislative carrion, it pollutes the moral atmosphere.

If some nostrum could be found to make people moral then would the path of virtue be easy but it is the difficulty of the ascent that gives moral stamina to those who climb. I wish I

could ignore the experience of every free country and doing so believe that there was some simple and effective panacea for electoral corruption, but experience teaches there is none. Scotland is almost free from political corruption; in the towns in the south of England under the same laws it is common.

Bryce in "The American Commonwealth" says:—"It is always difficult to estimate the exact value of laws which profess to effect by mechanical methods reforms which in themselves are largely moral." And again:—"Although it is true that you cannot make man moral by statute, you can arm good citizens with weapons which improve their chances in the unceasing conflict with the various forms in which political dishonesty appears. The value of the weapons depends upon the energy of those who use them."

The law is now in advance of public opinion and what we need more than amendments of the law is a quickening of the individual conscience. The provisions in the law for the punishment of corruption are clear and strong. The Solicitor-General of the Dominion or the Attorney-General of any province may prosecute for bribery or other corrupt practices, any other person may do the same, a grand jury may present anyone for bribery, and any elector may file an election petition. The law is not enforced as it should be, not because the law is defective, but because the individual is apathetic. From the pulpit, the bench, the rostrum, the platform and the editorial chair, we hear it declared with monotonous reiteration that politics are corrupt, that the law against corruption is not well enforced, that the politician is proverbially a bad man and that public life is decadent. If these charges are true, there is one and only one remedy, that the occupant of the pulpit, the bench, the rostrum, the platform and the editorial chair come down from his high critical position to earth and take a hand at renovating morals. This is the crucial point. Each one is standing aloof calling on someone else to do the work which must be done, instead of doing it himself. The time and money required for a few citizens in any constituency to set the law in motion are small, there is no lack of this time and money, but the will to do it is wanting. The individual is not directly concerned and his moral apathy is great. No artificial standard of morals whether

or not it is called a law and no artificial censor of morals, call him what you will and give him what power you may, will ever take the place of the individual conscience and the individual man behind the conscience. It would be balm to the conscience of the florid moralist to have a drastic election law passed, but the remedy for defective enforcement of the law is unfortunately a not more drastic law but something more difficult to attain, a higher moral sense in the community. The sooner we realize that there is no royal road to moral heights in politics the better, for when we realize this, and not till then, is there likely to begin that moral reformation in the body politic which is so much needed.

A. McLEOD.

Morden, Man.

---

## *THE LIFE OF SIR JOHN BEVERLEY ROBINSON.*

This is the title of a book written by his son, Major General Charles W. Robinson, C.B. Of great interest in itself, it is introduced by an admirably written preface by Dr. Parkin, who gives a short comprehensive sketch of the life, character and achievements of the subject of the work, as well as of the great events in the history of Canada with which he was associated.

If it be true that the lives and characters of its great men are the most valuable possession of a nation, then, in the lives and characters of such men as he whose biography is now before us, Canada has something that should be more highly esteemed than any of her great national resources. As the material wealth of a nation is measured by the quantity and value of the articles which it produces, so its moral and intellectual standing will be guaged by the men who take the lead in its public affairs, and can rightly claim to represent its ideals of character and conduct. As the tree is known by its fruit, so a nation will be known by the men and women who are the product of its national life. If that life be sound and healthy, those who set an example of faithful discharge of every duty both in public and private should be accorded the meed of praise and esteem that is due. It is therefore a proof of the right feeling of our people at large

that the career of such a man as Sir John Beverley Robinson should be regarded with affectionate interest even by those who had no personal acquaintance with the man, as well as by many who were not in sympathy with his opinions, and may have disapproved of some of the things done in his official capacity.

Those who can remember the Chief Justice as he was in later years will not have forgotten the universal respect with which he was regarded when he made his public appearance at the Courts of Assize. How impressive was the natural dignity of his demeanour, so unassuming, so modest and yet so gracious; so courteous and kindly, yet so inspiring of confidence and respect. Few there were who knew how great a part he had played in public affairs, and what an influence for good he exercised; but all felt instinctively that here was a man to be trusted; who, as time has told, has always been worthy of trust, and of whom tradition had nothing to say but that he always had been held in honour and esteem.

In the story of his life just published, told by his distinguished soldier son in form and word alike modest, judicious, and appropriate, we have not only the life of a distinguished man but also a record of the principal events of the history of Upper Canada from the coming of the U.E. Loyalists down to the period of Confederation. In these events, almost from boyhood Sir John was concerned in various capacities, always with credit to himself, and benefit to his country.

As far back as the latter part of the 17th century the family of the late Chief Justice, emigrating from Yorkshire, settled in Virginia, where they took an active part in the affairs of that Province. One member of the family named Beverley moved to New York, where, when the Revolution broke out, he remained in allegiance to the Crown, took up arms in its defence, and in consequence was despoiled of his property. Of his sons two arose to high rank in the British Army, and appear again in the course of the narrative. Of the Virginia branch of the family all except Christopher, a nephew of Beverley, adhered to the revoluntionary side. Christopher joined his uncle in New York, and, at the age of 18, received a commission in the corps called Colonel Simcoe's Legion in which he served till the peace.

He then, with other U.E. Loyalists, went to New Brunswick, where in 1784 he married, and four years afterwards removed to Lower Canada. He subsequently lived for some years at Kingston and in 1798 went to Toronto, then York, where shortly afterwards he died, leaving a family of young children of whom Sir John was the second son.

This Mr. Christopher Robinson must have been a man of parts who made good use of his ability. A soldier at 18, he was, at the time of his death, a Bencher of the Law Society, and member for Lennox and Addington in the second Parliament of Upper Canada.

Thrown when a mere boy upon his own resources, young Robinson was fortunate in finding two friends who not only took charge of him during his boyhood, but throughout his after life aided him by wise counsel, and implanted in his mind those principles of rectitude and devotion to duty by which he was always distinguished. These friends were men whose names, like his own, are household words in Canadian history. One was the Rev. Dr. Stuart, of Kingston, a U.E. Loyalist, also from Virginia, and the other his life-long friend, the Rev. John Strachan. Dr. Strachan was then Master of the Grammar School at Cornwall where so many noted men of later days received their education, and afterwards was the first Bishop of Toronto. Upon leaving school in October, 1807, the future Chief Justice commenced the study of that profession in which he rose to such eminence. He was first articled to Solicitor-General Boulton (afterwards Judge Boulton), and subsequently to Colonel Macdonell, then acting Attorney-General, and later Aide-de-Camp to General Brock, by whose side he fell at Queenston Heights.

As recorded by his biographer the young student did not confine himself to his law books, but, in connection with them, read many classical authors and standard books of English literature. Four years elapsed in these pursuits, but, before his call to the bar, came the call to arms. The youth and manhood of the country were summoned by Sir Isaac Brock to defend their soil from the threatened invasion, and nobly was the call responded to. Foremost among those who answered the appeal were Robinson and his fellow students of the law, and among them

were many who subsequently rose to eminence in the profession. It is mentioned as a remarkable fact that "within thirteen years, viz., between 1828 and 1846, seven judges were sitting in the Bench all of whom had seen fighting in the Revolutionary War, or in that of 1812-15, and two of whom had been severely wounded. They were Sir William Campbell, Judge Boulton, Sir J. B. Robinson, Sir J. B. Macauly, Chief Justice McLean and Judges Jones and Hagerman."

Joining the militia as a private, Robinson was soon after gazetted a lieutenant in the 3rd Regiment of York Militia under Lt.-Col. Chewett. In that capacity he served with General Brock at the capture of Detroit, and at the Battle of Queenston, where his chief, Col. Macdonnell, was killed. Of this last engagement Mr. Robinson has left a very graphic account, given in full in the biography. General Robinson naturally deals very fully with the events of the war, but his subject's connection with it came to an early, and, no doubt, very unexpected termination. The death of Col Macdonell, acting Attorney-General, and the absence of Solicitor-General Boulton, a prisoner in France, left vacant the chief law offices of the Crown, and Mr. Robinson, though not yet called to the bar, was appointed acting Attorney-General, a position which he continued to hold till the close of the war. During that time many important questions arose in which the interests of the Government were concerned, and upon which legal advice was required. For so young a man (he was only twenty-one when appointed to office) and for so young a lawyer—not yet called to the Bar—the responsibility was a heavy one, but the value of his services was admitted and officially recognized.

With the peace came the release of Mr. Boulton, who on his return to Canada was appointed Attorney-General, and Mr. Robinson took his place as Solicitor General. Matters being thus arranged the new Solicitor-General made his first visit to England, partly for the sake of travel, and partly to qualify for the English Bar, though time did not permit him then to accomplish the latter object. He was given a passage in the sloop of war Morgiana, and a curious incident of a very properous voyage is recorded. Off the banks of Newfoundland the ship

stopped to fish for cod; fancy a cruiser of modern times stopping to fish!

This visit, which was extended to two years, was a pleasant and profitable one, and led to the making of many agreeable and useful acquaintances.

Mr. Robinson's position as Solicitor-General brought him officially into connection with the authorities at the Colonial Office, and also was the means of his introduction to members of his own profession eminent both on the Bench and at the Bar. He also met several officers with whom he had been associated during the war, and had introductions to many persons distinguished in social life and famed for their literary attainments: among the latter may be mentioned Scott, Jeffrey, Campbell and Dickens.

Anticipating the course of the narrative we may here say that when subsequently in London, shortly after the Rebellion of 1837, Mr. Robinson, then Chief Justice of Upper Canada, was consulted by Lord Glenelg, Secretary for the Colonies, upon Canadian affairs and especially with regard to the proposed union of the Provinces of Upper and Lower Canada. In regard to this and other subjects connected with Canada he was, during his stay in England, frequently called upon for information by the leading men in public life among whom were the Duke of Wellington, Sir Robert Peel, Lord John Russell, Lord Lyndhurst and others.

As stated by his biographer "much attention both of a public and private character was shewn to him in London, particularly by the Duke of Wellington, who was thoroughly versed in all Canadian matters." With Sir Robert Peel he also had much intercourse. But perhaps the most interesting portion of the journal which Mr. Robinson kept of this visit is that which relates to his visits to and frequent interviews with the Duke, who was strongly opposed to the union of the Provinces, fearing that the result would be their loss to the Empire, and as to which he used the following remarkable words: "If you lose Upper Canada you lose all your Colonies in that country; and if you lose them, you may as well lose London."

The tenth and eleventh chapters of this biography are especially valuable and interesting from a historical point of view for

the information they give as to the opinions on Colonial policy held by the leading public men of that period.

A tour through England and Scotland and on the Continent occupied part of the time mentioned, and a happy conclusion was his marriage. Immediately after this he returned to Canada, where he devoted himself to the duties of his office and his profession. In 1818 Attorney-General Boulton was appointed a judge, and Mr. Robinson succeeded him as Attorney-General. In 1821 he was elected member for York (now Toronto) in the House of Assembly for which place he continued to sit until 1829.

About this time the question of a legislative union between Upper and Lower Canada already referred to had been under discussion though not carried out till twenty years later. At this time, and always, this union of the two Provinces was strongly opposed by Mr. Robinson, both verbally and in writing, but as an alternative proposition he urged a legislative union of all the British American Colonies. He was therefore one of the first and most able advocates of what afterwards was known as Confederation, which was in fact carried into effect four years after his death. He was indeed a true Imperialist as the following extract from a pamphlet which he wrote in 1823 clearly shews: "The actual consolidation of the British Empire would be at least a grand measure of national policy. To unite the British North American Provinces would put an end to all danger and inconveniences from petty factions and local discontents, and secure the public counsels of all the colonies from foreign influence."

In 1829 Mr. Robinson's political career came to a close for he then accepted the position of Chief Justice of Upper Canada, vacant by the resignation of Chief Justice Campbell. For nine years he had been the representative of the government in the Legislative Assembly, and the leader of the Conservative party. During that period his duties had been onerous and his responsibilities heavy. He was firm in his convictions and resolute in carrying them out, but, to use the language of Marshal Spring Bidwell, a strong political opponent, "he was always courteous, communicative and obliging." Mr. Bidwell also bears witness

to his ability as an advocate, and his tact and talent as a Parliamentary leader.

In a former number of this journal (March, 1863) the pure public life of this great man, as well as his ability as a legislator and the service rendered to his country as one of the best judges who ever graced our Bench, were dealt with at length. It must suffice now to refer our readers to those pages, merely repeating what is there stated as to his judicial career that his judgments firmly established his fame as a jurist, and will ever be a storehouse of legal wealth, as well as a monument of departed wisdom. The special value of the volume now before us is that it gives so many particulars of his varied and interesting career not generally known and liable to be lost sight of.

The character of Sir John Beverley Robinson was such that it will never be superfluous to hold it up as an example, fitting to be honoured by Canadians in every rank of life. As a private citizen he was worthy of the highest esteem. As a soldier, patriot, legislator, statesman and judge we may now, and always will look for a pattern and guide to the man who for thirty-four years as Chief Justice of Upper Canada upheld the dignity of the Bench, maintained the sanctity of the laws, and, by the actions of his life made the whole country his friends, and no true man his enemy.

---

Hon. Mr. Justice Killam of the Supreme Court of Canada succeeds Hon. Mr. Blair as Chairman of the Board of Railway Commissioners. We have already characterized this Board as a Court, and a Court of great importance and one which ought to become more so as the Dominion grows in population. We are not sorry therefore that so eminent a judge, and one who possesses so largely the confidence of the public and the profession as Mr. Justice Killam, has been appointed to the vacant position. In contrasting him with the former Chairman it was recognized that Mr. Blair was the right man in the right place, being both a good lawyer, a shrewd business man and very familiar with railway matters. It has been objected that Mr. Justice Killam has not had the experience requisite to meet adequately the last qualification; but as to this every lawyer

knows that any man of good intellectual attainments, who has had a long training at the Bar, and, in addition, the experience gained on the Bench, would have no difficulty in rapidly mastering all such matters of railway requirements and management as would come before him in connection with the duties of a member of the Board of Railway Commissioners. We may be glad therefore that so good a selection has been made. At the same time, it is a source of great regret that so useful a member of the Supreme Court Bench has been removed from that most important forum. The most earnest effort should be made by any government that may be in power to secure the most suitable material possible for this our highest Court. We can well understand, however, as the fact is, that some of our best men both at the Bar and on the Bench decline to go to Ottawa, as such a move necessarily entails not only loss and expense, but is a severance of social and family ties and other sacrifices which few care to make.

---

The only remedy for the difficulty which has been experienced in obtaining the services of the best men is a large increase of salary. We notice that the leading organ of the Dominion government in the Province of Ontario recently urged a radical increase of judicial salaries. We hope that this is prophetic and that something is going to be done in the premises. It certainly should indicate that the government knows what it ought to do and that its supporters would as a whole be favorable to the change. We trust that both political parties, seeing the necessity that exists, will join hands and act accordingly. We are aware of course that there are many short sighted persons who thoughtlessly object to this increase. It is strange that any man of ordinary intelligence should fail to see what is for the best interests of the country in this regard. It is the taxpayers themselves who are most interested in having the best lawyers on the Bench.

---

It is announced that Mr. Justice Idington of the Supreme Court of Judicature for Ontario is to take the position vacated by Mr. Justice Killam. Having so recently severed his connec-

tion with his former place of abode at Stratford, he naturally would have less hesitation in going to Ottawa than many others. Mr. Justice Idington is to be succeeded by Mr. R. C. Clute, K.C., of Toronto. We congratulate both these gentlemen upon their promotion. Mr. Clute hails from Eastern Ontario. After practising for many years in Belleville he removed to Toronto. He has had good experience in counsel work and largely so in criminal cases. He will we venture to think make an excellent judge and be acceptable to the profession. He was born in 1848, called to the Bar in 1873, and made a K.C, in 1900.

---

We note some of the changes of modern days in prison discipline. In some of the State prisons of America the striped garments which were in use as the uniform of convicts have been abandoned for suits of grey or blue. It is said that the prison officials are unanimously of the opinion that the moral effect of this change upon the majority of prisoners is good. In the large prisons in the Dominion the striped or parti-coloured uniform is still used by the prisoners. Another sign of the times is the existence of at least one prison newspaper. The one referred to has been published in Sing Sing Prison, N.Y., since 1899. It is styled "The Star of Hope" and is written by prisoners, for prisoners, and printed and published within the walls of the prison, "Number 50,940" is "Chief Editor." Anything that tends to bring back the convicts to their sense of self respect must be beneficial; but at the same time, nothing that is attempted in that direction should be allowed to blunt the conscience as to the truth that all crime is in itself disgraceful, or to cause anyone to think lightly of it or its consequences. There is such a thing as the pendulum swinging too far in the new direction.

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Que.] [Nov 3, 1904.

DAVIE *v.* MONTREAL WATER & POWER CO.

*Appeal — Jurisdiction — Partial renunciation — Conditions and reservations—Amount in controversy—Supreme Court Act, c. 29—Refusal to accept conditional renunciations—Costs on appeal to court below—Costs of enquête—Nuisance—Statutory powers—Negligence—Legal maxim.*

Where a conditional renunciation reducing the amount of the claim to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original demand, and, if such demand exceeds the amount limited by s. 29 of the Supreme Court Act, an appeal will lie.

In an action for $15,000 for damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed en block by the trial court, without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants as it did not affect the costs and contained reservations and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to plaintiff the right of action for subsequent special damages and damages for permanent depreciation and gave full costs against the appellants, on the ground that they should have accepted the renunciation filed.

*Held*, DAVIES, J., dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appel-

lants; that the action should be dismissed as to the $2,590 with costs; and the reservation as to further action for depreciation disallowed, but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action should be affirmed. As the costs at the enquête were considerably increased on account of the large amount of damages claimed, it was deemed advisable, under the circumstances, to order that each party should pay their own costs thus incurred.

*Held,* also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them with evidence sufficient to support that finding, the maxim "sic utere tuo ut alienum non lædas" applied and that the powers granted by their special charter did not excuse them from liability. *The Canadian Pacific Railway Co.* v. *Roy* (1902), A.C. 220, referred to.

*Beaudin,* K.C., and *W. J. White,* K.C., for appellants. *Cross,* for respondent.

---

Que.] FEE *v.* DUFRESNE. [Nov. 14, 1904.

*Construction of contract—Custom of trade—Art. 1016 C.C.—Sale of goods—Delivery.*

The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful or ambiguous. Appeal dismissed with costs.

*Bisaillon,* K.C., for appellant. *Buchan,* K.C., for respondent.

---

B.C.] BAILEY *v.* CATES. [Nov. 21, 1904.

*Negligence—Careless mooring of vessels—Vis major.*

The plaintiff's tug "Vigilant" was moored at a wharf in Vancouver Harbour with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached the "Vigilant." The "Lois" was left in that position all night with no one in charge and no fenders out on the side next the "Vigilant." During the night a heavy gale came up and the "Lois" pounded the "Vigilant" causing her considerable damage.

*Held,* affirming the judgment appealed from, that, as the defendant was not a trespasser, he was not guilty of negligence, under the circumstances, in leaving his tug as he did and that he was not obliged to observe extreme and unusual precautions to

avoid injury by a storm of exceptional violence. Appeal dismissed with costs.

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

---

Ont.] ADAMS *v.* COX. [Dec. 14, 1904.

*Contract—Security for debt—Husband and wife—Parent and child.*

C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt it was agreed between them that if C. could procure the signatures of his wife and daughter each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first the wife and daughter finally agreed to sign notes in favour of C. for sums aggregating over $7,000 which were delivered to W. Neither of the makers had independent advice.

*Held,* reversing the judgment appealed from, TASCHEREAU, C.J., dissenting, that though the daughter was twenty-three years old she was still subject to the dominion and influence of her father and the contract made by her without independent advice was not binding.

*Held,* also, TASCHEREAU, C.J., and KILLAM, J., dissenting, that his wife was also subjected to influence by C. and entitled to independent advice and she was, therefore, not liable on the note she signed.

*Held,* per SEDGEWICK, J., that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures to the notes and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required. Therefore the plaintiff could not recover.

Appeal allowed with costs.

*Laidlaw,* K.C., and *G. T. Blackstock,* K.C., for appellants. *Shepley,* K.C., and *D. M. Robertson,* for respondent.

---

Ont.] CARPENTER *v.* PEARSON. [Dec. 14, 1904.

*Principal and agent—Gambling in stocks—Advances by agent —Crim. Code, s. 201.*

P. speculated on margin in stocks, grain, etc., through C. & Son, brokers in Toronto, and in March, 1901, directed [illegible]

buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo, and the price going down C. & Son forwarded money to the latter to cover the margins. P. having written the brokers to know how he stood in the transaction received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you," on which he gave them his note for $1,500 which they represented to be the amount so advanced. Shortly after the Buffalo firm failed and P. became satisfied that they had only conducted a bucket shop and the transaction had no real substance. He accordingly repudiated his liability on the note and C. & Son sued him for the amount of the same.

*Held,* DAVIS and KILLAM, JJ., dissenting, that the evidence shewed that the transaction was not one in which the wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of s. 201 Crim. Code and plaintiff could not recover.

*Held,* also, DAVIES and KILLAM, JJ., dissenting, that assuming C. & Son to have been agents of P. in the transaction, they were not authorized to advance any moneys for their principal beyond the sums deposited with them for the purpose.

*Held,* per DAVIES and KILLAM, JJ., that the transaction was complete in Buffalo and in the absence of evidence that it was illegal by law there the defence of illegality could only be raised by plea under rule 271 of the Judicature Act of Ontario.

Appeal allowed with costs.

*W. R. Smyth,* for appellant. *Lynch-Staunton,* K.C., for respondents.

---

Ont.] [Dec. 14, 1904.

TRAPLIN *v.* CANADA WOOLLEN MILLS CO.

*Negligence—Master and servant—Dangerous works—Knowledge of master—Employers' Liability Act.*

T. an employee in a mill, entered the elevator on the second floor to go down to the ground floor and while in it the elevator fell to the bottom of the shaft and he was injured. On the trial of an action for damages it was proved that the elevator was over 20 years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key to fall out again occasioning the accident. On appeal from the judg-

ment of the Court of Appeal maintaining a verdict for the plaintiff.

*Held*, that the defendant company was liable under the Empoyers' Liability Act.

*Held* also, NESBITT, J., dissenting, that the company was negligent for not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of its employees and was, therefore, liable at common law.

*Held*, per NESBITT, J., that as the company had employed a competent person to attend to the working of the elevator it was not liable at common law for his negligence.

Appeal dismissed with costs.

*Shepley*, K.C., for appellants. *Riddell*, K.C., and *Guthrie*, K.C., for respondent.

---

# Province of Ontario.

## COURT OF APPEAL.

Osler, J.A.] [July 23, 1904.

PANTON *v.* CRAMP STEEL COMPANY.

*Company—Transfer of shares—Right to have same recorded—Resolution closing books invalidity of mandamus.*

A transferee of fully paid up shares in a company incorporated under the Ontario Companies Act, R.S.O. 1897, c. 191, is entitled, on the presentation to the company of a transfer of shares to have same recorded in the books of the company, the company having no discretion whatever in the matter.

Where, therefore, under a resolution of the directors, the books were closed for a brief period for the alleged purpose of avoiding confusion or inconvenience in ascertaining the shareholders entitled to vote at the meeting, and during such period the company refused to record a transfer of shares, a mandamus was granted compelling such transfer to be recorded.

*Arnoldi*, K.C., for applicant. *W. H. Blake*, K.C., for National Trust Company.

---

Full Court.] HOEFFLER v. IRVIN. [Sept. 19, 1904.

*Contract for sale of interest in timber limit—Not in writing—Part performance—Partnership property—Statute of Frauds—Amendment.*

Plaintiff, who was a partner in a contract for driving logs, brought an action against the defendant who was a partner in a timber limit license alleging that by a verbal agreement the de-

fendant had agreed to give himself his interest in the timber limit in consideration of an interest in the log driving contract. It was shewn that the defendant had received an equal share with plaintiff ($2,330.27) of the profits of the driving contract. The defendant alleged this was a return for his services driving the logs and denied any agreement to pay the plaintiff any share of the profits from the timber limit.

*Held*, 1. A contract for an interest in a timber limit is a contract for an interest in land within the Statute of Frauds.

2. The division of the profits of the drive contract was not a sufficient part performance to take the case out of the statute as this at the most could only be regarded as payment of the purchase money.

3. There was no evidence that the timber limit was held as partnership property and even if it was so that it did not follow that a transfer by one parnter of his interest would not be within the statute. And had the evidence of the alleged agreement been clear and satisfactory leave to amend and recover the consideration paid on the footing of the contract might have been given. But as the verdict of the jury was so manifestly against the evidence the action was dismissed and leave given to the plaintiff if so advised to bring a new action to establish the verbal agreement and recover the purchase money.

Judgment of TEETZEL, J., reversed.

*Douglas*, K.C., for the appeal. *Aylesworth*, K.C., and *Clarry*, contra.

---

From Meredith, C.J.C.P.] [Nov. 14, 1904.

COULTER *v.* EQUITY FIRE INS. CO.

*Fire insurance—Interim receipt—Estoppel—Statutory conditions—R.S.O. 1897, c. 203, s. 168.*

The plaintiff, on Nov. 9, 1901, applied to defendants, through their agents, for an insurance against fire for one year. The defendants accepted the risk at an annual premium of $33.60, and as a matter of routine an interim receipt was issued, in terms restricted to thirty days, which was handed to the plaintiff on Nov. 30, 1901, and with out observing its effect he, supposing he was insured for one year, paid the $33.60 to the agent, and which the agent, as was his usual custom, did not pay over to the defendants till Jan. 30, 1902, who with full knowledge accepted it. No policy was ever issued. On the insured property being destroyed by fire, the company repudiated liability, on the ground that the insurance was only for thirty days and had expired.

*Held*, that, there was a binding parol contract of insurance for one year, which was not, under the circumstances, affected by the interim receipt.

The applicant at the time of his application for the insurance herein omitted to disclose an existing incumbrance on the property.

*Held*, that this had not the effect of vitiating the contract of insurance, for, under the statutory conditions and a variation thereof relating thereto, the fact to be disclosed must be one which is material to the risk, which was not the case here.

*Watson*, K.C., for appellants. *Riddell*, K.C., for respondents.

---

From Street, J.] [Nov. 14, 1904.

CROWDER-JONES *v.* SULLIVAN.

*Marriage—Contract in restraint of—Master and servant—Promissory note.*

In 1897, the plaintiff, who had been for several years, at $8.00 a month, the housekeeper for R., a widower, with a young daughter and being engaged to be married, she, at R.'s request and on his promising, either to give her $1,000 in cash, his promissory note for $1,500, or to remember her in his will, agreed to give up the marriage, and to remain on with him, on the same wages, so long as he needed her. The plaintiff and R. at this time, were about 30 and 60 years respectively. In 1900, without any solicitation by the plaintiff, R. gave her his promissory note for $1,500, payable with interest three years after date. He died in 1901. The wages had always been duly paid. In an action against the deceased's personal representatives to recover the amount of the promissory note,

*Held*, that, the plaintiff was entitled to recover, for that the agreement would not be treated as a contract in restraint of marriage.

Judgment of STREET J., at the trial, reversed.

*Maclennan*, K. C., for appellants. *Clute*, K.C., for respondents.

---

From Meredith, C.J.C.P.] [Dec 16, 1904.

KIRK *v.* CITY OF TORONTO.

*Municipal corporations—Dangerous machine on highway—Use by independent contractors—Precautions—Injury to passer-by—Liability of corporation and contractors.*

In a public and busy street of a city a horse became frightened by a steam roller engaged in repairing an intersecting street,

and, swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the City Corporation, and was being used by paving contractors under a provision in the contract. The work was being done for the corporation, and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of ordinary courage and steadiness; that of this the City Corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing.

*Held*, that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the City Corporation, if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; and the corporation could not rid themselves of this obligation by intrusting the work to a contractor.

*Penny* v. *Wimbledon Urban District Council* (1898), 2 Q.B. 212; (1899), 2 Q.B. 72, followed.

*Held*, also, that the contractors were bound equally with the corporation to take notice that the roller was likely to cause danger to the public, and their failure to take proper precautions occasioned the accident.

Judgment of MEREDITH, C.J., affirmed.

*Fullerton*, K.C., and *Chisholm*, for City Corporation, appellants. *D. C. Ross* and *W. H. Irving*, for Dominion Paving and Construction Co., appellants. *Russell Snow* and *Nasmith*, for plaintiff, respondent.

---

## HIGH COURT OF JUSTICE.

Master in Chambers.] [Sept. 7, 1904.

MCBAIN *v.* WATERLOO MANUFACTURING CO.

*Infant—Next friend out of jurisdiction—Security for costs or appointment of next friend witnin jurisdiction.*

Where an infant, as well as his father, who sues on his behalf as next friend, reside out of the Province, either security of costs must be given, or a next friend within the jurisdiction appointed.

*D. L. McCarthy*, for defendants. *J. E. Jones*, for plaintiff.

Master in Chambers.] [Oct. 13, 1904.

BRUCE *v.* ANCIENT ORDER OF UNITED WORKMEN.

*Insurance—Beneficiary under policy and by will—Interpleader issue—Parties—Security for costs—Costs out of fund.*

By the terms of an insurance policy it was made payable to the wife of the insured, giving her name. He had lived for many years in this Province and with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the Province, whom he described as his wife and to a daughter by name. In an interpleader issue to try the right to the policy, the legatees under the will were directed to be plaintiffs, who were not required to give security for costs, the difficulty having been caused by the deceased himself; while it might be assumed that the costs of all parties would be made payable out of the fund.

*W. J. Elliott,* for plaintiff. *F. S. Mearns,* for defendant.

---

Master in Chambers.] [Oct. 19, 1904.

SHEPPARD PUBLISHING COMPANY *v.* HARKINS.

*Examination—Discovery—Breach of agreement—Question as to breach before proof of agreement.*

Where the plaintiff, on his statement of claim, set up an agreement whereby the defendant was to devote his whole time, during a stated period, to the plaintiffs' service, and alleging, as breach thereof, his failure to do so, and the defendant by his statement of defence, while denying the making of any such agreement, stated that, if there were such an agreement, it had been duly performed, the defendant on this examination for discovery must answer questions directed to the alleged breach without the agreement itself having been first established.

*W. J. Elliott,* for plaintiff. *J. G. O'Donohoe,* for defendant.

---

Anglin, J.] RE WIGHTON. [Oct. 24, 1904.

*Life insurance—Bequest to wife—Subject to payment of debts.*

Policies of life insurance were, by the terms thereof, made payable to the insured's personal representatives, but, by his will, after directing the payment of his just debts, etc., out of his general estate, he devised and bequeathed to his widow, all his estate including the policies.

*Held*, that, the widow only took the policies subject to the payment of the debts, etc.

*A. Weir*, for executors. *Middleton*, for creditors. *C. A. Moss*, for widow.

---

Anglin, J.] RE BRAIN. [Oct. 26, 1904.

*Will—Brewery business—No express authority to carry on—Authority to do so refused.*

Where under a will no express power was given to carry on the deceased's business—a brewery business—an order will not be made authorizing the carrying on of the same by the personal representatives, but they were given a discretionary power, either to sell the chattel property with a lease of the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, with an agreement for sale if deemed advisable, but subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority.

*Justin*, for executors. *W. S. Morphy*, for defendant J. C. F. Brain. *Harcourt*, for infant.

---

Britton, J.] BELLEISLE *v.* TOWN OF HAWKESBURY. [Oct. 27, 1904.

*Municipal law—Construction and repair of sidewalk—Incomplete state—Plaintiff's knowledge of—Injury to—Misadventure.*

The defendants were taking up an old board sidewalk and putting down a new one on one of their streets, and had completed the work up to a point somewhere in front of plaintiff's shop when the men were taken away to perform some urgent work in another part of the town, and were away part of a Saturday and the whole of the following Monday. Plaintiff, who was aware of what was being done, and the uncompleted state in which the work was left, drove up in a cart with goods for his store, and in alighting slipped off the unfinished end of the sidewalk and was injured.

*Held*, that the defendants, as far as they had constructed the walk, did so in a proper manner and were complying with a statute in improving the condition of the street; that they were not negligent; that the walk was not, at the time the accident happened, unsafe for persons lawfully using it or going upon it; that it was not dangerous or a trap to persons having ordinary eyesight; that there was no duty on the defendants to put up barriers to prevent persons walking across it; that as the plain-

tiff knew about its condition a printed notice was not required; that the accident was a mere misadventure and the plaintiff could not recover.

*Maxwell*, for plaintiff. *Maclennan*, K.C., and *Lawlor*, for defendants.

---

Boyd, C., Meredith, J., Idington, J.] [Oct. 27, 1904.

CRAIG *v.* MCKAY.

*Insolvency—Assignment for creditors—Mortgage by insolvent—Preference—Purchase by assignee—Action to set aside mortgage—Status of assignee—Statutory presumption—Rebuttal—Nonsuit—New trial.*

On Oct. 15, 1896, an insolvent made a second mortgage of his farm to the defendants, solicitors, as security for a bill of costs, and six days later made a statutory assignment to the plaintiff for the benefit of creditors. The assets were realized and a dividend paid to the creditors in June, 1897. The farm was sold, subject to the first mortgage, on March 13, 1897, to a nominal purchaser, who conveyed it to the plaintiff himself in August, 1897. After providing for the first mortgage out of the purchase money, there was a balance of $600, which the plaintiff distributed among the creditors. The defendants filed their claim as creditors (but without disclosing their mortgage) in December, 1896, and received their share of the dividend in June, 1897. The defendants' mortgage was not registered until the 10th February, 1897, and the plaintiff had no notice or knowledge of it until October, 1897. The plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until he received notice of the exercise of the power of sale contained in the defendants' mortgage, on May 10, 1903, when this action was begun by the plaintiff as assignee to invalidate the instrument or to stay proceedings thereon. The action was tried without a jury, and the trial Judge dismissed it without hearing the defendants' evidence.

*Held*, 1. The plaintiff was still assignee and had a status to maintain the action; his purchase of the farm could not stand for his own benefit, and he was to be regarded as in possession as trustee for the creditors and liable to account, which he submitted to do.

2. In view of the conflicting authorities, that the defendants should be allowed upon a new trial to give evidence to shew the validity of their mortgage, notwithstanding the presumption that it was an unjust preference within the meaning of 54 Vict. c. 20,

s. 2, sub-s. 2(*b*), and notwithstanding the decision in *Macdonald* v. *Worthington*, 7 A.R. 531, as to the effect of accepting a non-suit in an action tried without a jury.

Judgment of BRITTON, J., reversed; IDINGTON, J., dissenting.

*Arnoldi*, K.C., and *P. McDonald*, for plaintiff. *Watson*, K.C., for defendants.

---

Anglin, J.] [Oct. 11, 1904

PERRINS LIMITED *v.* ALGOMA TUBE WORKS.

*Evidence—Discovery—Company — Foreign company — Officer residing out of jurisdiction.*

No order will be made for the examination for discovery of the officer residing in a foreign country of a foreign corporation, which has attorned to the jurisdiction of the Courts of this Province.

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

---

Anglin, J.] FRASER *v.* MUTCHMOR. [Nov. 1, 1904.

*Registry laws—Registered plan—Sale of lots according to—Building—Projection on adjoining lot—Possession—Title—Mortgage—Construction—Short Forms Act—General words.*

After building a house on certain land, the owner thereof had a plan prepared and registered in June, 1872, covering amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house stood upon lot 3, a small portion extended over part of lot 4. According to this plan the subsequent sales were made. In 1872 lot 3 was conveyed to one person and lot 4 to another person—all parties acting upon the assumption that the house was wholly upon lot 3, the deeds describing the lands as lots 3 and 4 according to the registered plan, and these descriptions being carried down through all subsequent conveyances and mortgages of the respective properties. The ownership and possession of the two properties remained distinct until 1883, and from that time until 1896 both were owned and possessed by one person, subject to mortgages. This person in 1892 mortgaged lot 3 to the defendant, who in 1896 foreclosed and obtained possession. In 1893 the same person mortgaged lot 4 to one M., and through foreclosure proceedings and a subsequent mortgage to himself the plaintiff claimed title. The legal estates in both properties had throughout been in different mortgagees.

The action was to enforce by foreclosure the plaintiff's mortgage upon lot 4, and the defence was in respect of the part covered by the defendant's house.

*Held,* that the defendant had acquired no title by possession to the strip of land in dispute; and that the provisions of the Registry Act precluded him from setting up title to any part of lot 4 as laid down upon the registered plan.

*Semble,* that, but for the provisions of the Registry Act, the strip might have passed to the defendant by the mortgage to him of lot 3 in 1892, which was made pursuant to the Short Forms Act, under the "general words" implied in such mortgages.

*McNish* v. *Munro,* 25 C.P. 290; *Hill* v. *Broadbent,* 25 A.R. 159, and *Winfield* v. *Fowlie,* 14 O.R. 102, considered.

*Kidd,* for defendant Mansfield. *Burbidge,* for plaintiff. *Beament,* for defendants A. P. and Ida Mutchmor.

---

Street, J.] [Nov. 3, 1904.

CITY OF HAMILTON *v.* HAMILTON STREET R.W. CO.

*Street railways—Contract with municipality — By-law — Intra vires—"Workmen's tickets" — Amendment — "School children's tickets"—Action to enforce contract—Parties—Attorney-General — Specific performance — Injunction—Declaration of right.*

*Held,* upon the proper construction of the defendants' Act of Incorporation, 36 Vict. c. 100 (O.), the amending Acts, 56 Vict. c. 96, and the contract and by-law contained in the schedule to the latter Act, that the defendants were bound to sell tickets called "workmen's tickets" upon their cars to the public, and to receive them in payment of fares at the hours mentioned in the by-law, not from workingmen only, but from the public generally; and that the provision of the by-law in that behalf was not ultra vires of the plaintiffs.

The aforementioned contract was modified in accordance with a subsequent by-law of the plaintiffs, by requiring the defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for five cents."

*Held,* 1. There was nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, within the prescribed hours.

2. The plaintiffs could maintain an action for a mandamus or mandatory injunction to compel the defendants to continue to sell workmen's tickets, without adding the Attorney-General as a party representing the public.

The defendants, having refused to sell certain classes of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were

restrained from running cars upon which these tickets were not kept for sale, and this restraint was coupled with a declaration that they were bound to sell them on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in the by-law.

*City of Kingston* v. *Kingston Electric R.W. Co.*, 28 O.R. 399, 25 A.R. 462, distinguished.

*MacKelcan*, K.C., and *Riddell*, K.C., for plaintiffs. *Armour*, K.C., and *Levy*, for defendants.

---

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Nov. 12, 1904.

IN RE VILLAGE OF SOUTHAMPTON AND COUNTY OF BRUCE.

*Municipal corporations — County by-law — Alteration of boundaries of local municipalities — Misdescription — Petitions — Notice — Waiver — Arbitration and award — Motion to quash by-law — Application by minor municipality.*

It is no objection to a by-law of a county council, under s. 18 of the Municipal Act, 3 Edw. VII. c. 19, detaching two parcels of land from one municipality and adding them to another, that the petition for the by-law asks to have only one of the parcels detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all or less or more than the territory described. But there must be a real exercise of discretion before the power is acted upon, it being judicial in its nature. The by-law of the county council in question in this case was objectionable when passed because it altered the limits of a village without intending to alter them to the extent actually effected, and without considering the expediency of so altering them; the objection was not waived by the act of the village council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitions covered the whole of the lands detached; and the objection was one upon which the by-law should be quashed—not one to be cured by the arbitrators correcting the description.

Notice should have been given to the village council before the county council acted upon the petitions; but that objection was apparent on the face of the county by-law, and was waived by the village council appointing an arbitrator.

The village corporation had the right, under s. 378(*a*) of the Municipal Act, to apply to quash the by-law.

Order of MACMAHON, J., 8 O.L.R. 106, reversed.

*D. Robertson*, and *Kilmer*, for the village. *J. H. Scott*, for the county. *Middleton*, for the township of Saugeen and others.

Trial—Boyd, C.] HIXON *v.* REAVELEY. [Nov. 28, 1904.

*Waste—Tenant for life—Repairs—English law—Sale of timber.*

All the nicetics of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this Province. It is laid down in the English authorities that the tenant for life cannot cut down trees for repairs and sell the same, but that he must use the timber itself in making repairs, and that to sell it is waste.

Where, however, the house and buildings were in need of repairs, and proper timber and shingles were obtainable from a dealer, whereas the timber on the place was unsuitable for the repairs needed, and the tenant for life proposed to sell a sufficient amount of timber off the place to pay for what was required, and for that purpose only, and an injunction was sought to restrain him,

*Held*, that no case of waste was made out to justify an injunction, nor could damages be awarded if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used or to be used in the repairs; but that the parties if they wished might have a reference to ascertain to what amount and in what locality the timber should be cut.

---

Falconbridge, C.J.K.B.] [Dec. 21, 1904.

IN RE TINNING AND WEBER.

*Vendor and purchaser—Title to land—Conditional devise over to children of named woman—Possibility of issue extinct—Presumption—Evidence.*

Land was devised to the vendor for life with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the vendor's son dying without issue. The son was living, and had had issue, and, he and the existing children of M. (all being of age) had conveyed their interests to the vendor. M. was now a widow and 54 years of age.

*Held*, on an application under the Vendors and Purchasers Act, that the Court should, without evidence as to the physical condition of M., act on the presumption that there would be no further issue of her body, and declare that the vendor could make a good title in fee simple—such a title as could be forced upon an unwilling purchaser.

*J. T. Richardson*, for purchaser. *N. F. Davidson*, for vendor.

Trial—Anglin, J.] [Dec. 22, 1904.

GIBSON *v.* LE TEMPS PUBLICATION CO.

*Partnership—Judgment against—Execution against partners—Registered declaration—Husband and wife—Dissolution of partnership—Evidence—Separate estate of wife.*

Upon an issue directed to determine whether a man and his wife were members of a partnership and as such liable to have execution issued against them personally upon a judgment against the partnership.

*Held*, that a registered statutory declaration under R.S.O. 1897, c. 152, signed by them, by which they declared themselves partners, was incontrovertible, by s. 5, as against the plaintiff, and it was not open to the wife to contend that she was incapable of becoming a partner of her husband.

*Semble*, if it were,, that the contention would be met by the Married Woman's Property Act, R.S.O. 1897, c. 163, s. 3, sub-s. 2, and s. 4.

*Held*, also, that a registered declaration signed by the husband only that the partnership had been dissolved, was no evidence in his favour.

The issue was found in favour of the plaintiff; the execution against the wife to be limited to her separate estate.

*Lorn McDougall*, for plaintiff. *Barry*, for Sara Moffet. *McLaurin*, for Flavien Moffet.

---

Trial—Anglin, J] HILL *v.* HILL. [Dec. 22, 1904.

*Gift—Moneys on deposit—Form of deposit receipt—Survivorship—Testamentary gift—Settlement—Costs.*

The plaintiff's father owned $400 on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to himself and the plaintiff, or either, or the survivor. The understanding between the father and son was that the money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son. He retained the receipt intact in his own possession, and it was found amongst his papers at his death.

*Held*, upon the plaintiff's own evidence, that the purpose of the father was to make a gift to the plaintiff in its nature testamentary, which he could not effectually do except by an instrument executed as a will. Nor could the receipt be regarded as equivalent to a voluntary settlement, reserving to the settlor a life interest, with a power of revocation.

An action against the personal representative of the father

for a declaration of the plaintiff's ownership of the fund was dismissed, but the costs of both parties were ordered to be paid out of the fund.

*Code* and *Findlay*, for plaintiff. *J. A. Allan* and *C. McIntosh*, for defendant.

---

Falconbridge, C.J.K.B.] [Dec. 22, 1904.

IN RE THOM *v.* MCQUITTY.

*Division Courts—Jurisdiction—Amount over $100—Ascertainment—Extrinsic evidence—4 Edw. VII. c. 12, s. 1 (O.)—Application to pending actions—Prohibition.*

In an action in a Division Court for the price of goods, the amount claimed was more than $100, and the plaintiff relied upon the signature of the defendant to an agreement containing the terms of purchase, under which it was alleged default had been made, as ascertaining the amount.

*Held*, that other and extrinsic evidence beyond the mere production of the document and the proof the signature to it, would have to be given to establish the claim of the plaintiff, and therefore the Division Court had no jurisdiction, by reason of the new s. 72*a* added to the Division Courts Act, by 4 Edw. VII. c. 12, s. 1 (O.).

The amending Act is declaratory, and applies to an action begun before it was passed.

*Hales*, for defendant. *C. A. Moss*, for plaintiff.

---

## Province of Manitoba

---

### KING'S BENCH.

Richards, J.] [Oct. 31, 1904.

RUTHERFORD V. MITCHELL.

*Mortgage—Conveyance absolute in form, but given to secure debt—Redemption—Real Property Act, R.S.M., 1902, c. 148—Real Property Limitation Act, R.S.M., c. 100, s. 20—Constructive possession by mortgage of vacant land—Acknowledgment to prevent statutory bar.*

In January, 1891, the plaintiff borrowed $200 from the defendant giving his promissory note for the amount payable in two months, and, as security, a transfer of the title to the land in question which was under "The Real Property Act." Defendant registered this transfer and received a certificate under the Act, dated Jan. 10th, 1891, vesting the title in him in fee simple. Plaintiff paid none of the taxes on the property after the transfer to defendant, and had never paid anything on the principal or interest of the debt, and allowed the matter

to rest as it was until Oct. 6, 1902, when he asked defendant for a statement of his claim against him. Defendant then sent plaintiff a memorandum shewing, among other things, the amount claimed to be due on the note. The land in question was vacant and continued to be so until this action was commenced in December, 1902, for its redemption.

*Held*, 1. The transfer of the land, having been given only as a security, should have the same effect given to it as a bare mortgage under the old system of registration without re-demise clause, covenants or provisoes, and that plaintiff would have had a right to redeem if he had commenced his action in time.

2. At the issue of the certificate of title to defendant in January, 1891, he was entitled to the possession of the land, it being vacant, and should he demand to have "obtained possession" within the meaning of s. 20 of R.S.M. 1902, c. 100, and that, under that section, plaintiff's right of action for redemption was barred by the lapse of over ten years from the date of certificate of title. *Bucknam* v. *Stewart*, 11 M.R. 625, followed.

3. An acknowledgment of the right of redemption given after the lapse of the ten years is of no avail to the mortgagor seeking redemption as against the statute: *Sanders* v. *Sanders*, 19 Ch. D. 373.

*Elliott*, for plaintiff. *Wilson* and *Potts*, for defendants.

---

Perdue, J.] MUIR *v.* ALEXANDER. [Oct. 31, 1904.

*Production of documents—Order for better affidavit on production.*

The plaintiff, having an execution against the goods of one Chisholm, a flour and grain merchant at Winnipeg, caused the seizure of a quantity of flour at the premises where he had been carrying on his business. Defendants claimed the flour as their property shipped to Chisholm as their agent to sell for them, and had taken the stock away from Chisholm and placed another person in charge before the seizure under the execution. The Sheriff then made an interpleader application and the defendant Brodie was examined on the affidavit filed on that application on behalf of the claimants. On Brodie's examination certain letters and documents were produced and the solicitors for the claimants afterwards voluntarily produced for the inspection of the plaintiff's solicitor a number of other letters without admitting their relevancy. After that examination the Referee made the usual order for the trial of an interpleader issue in which the execution creditor was to be the plaintiff. Pursuant to the usual order for production, the defendant Brodie made an affidavit on produc-

tion in the ordinary form, in which no mention was made of a number of the documents which had been shewn to the plaintiff's solicitor on his former examination. Plaintiff then made an application to the Referee for an order that the defendants should make better production, contending that the documents now withheld would probably shew that the flour had been sold to Chisholm and not simply consigned to him for sale. This was an appeal from the Referee's order directing the defendants to file a better affidavit on production, and to deposit with the proper officer of the Court all documents in their custody or power relating to the matters in question in the issue, and particularly six classes of documents consisting of letters between Chisholm and the defendants, stock sheets showing what was in Chisholm's hands from time to time, an insurance policy, a balance sheet of defendant's business dated prior to the seizure, a memorandum as to stock, etc.

*Held*, 1. A further and better affidavit on production should only be ordered when the party has by his own admission or former statements on oath discredited the statement in his affidavit or given rise to a reasonable suspicion that he has in his possession or control other documents relating to the matters in question: *Wright* v. *Pitt*, L.R. 3 Ch. 809; *Lyell* v. *Kennedy*, 27 Ch. D., p. 20; *Moxley* v. *Canada Atlantic Ry. Co.*, 11 P.R. 39.

2. Where there is a mere surmise or suspicion that documents not referred to may be relevant, although that may justify an order for a further affidavit, it does not entitle the Court to order production of them: *Compagnie Financière* v. *Peruvian Guano Co.*, 11 Q.B.D., pp. 65 and 66; and, if, upon the further affidavit, the relevancy of the documents is clearly denied, the Court can go no further; it cannot disregard the oath of the party making the affidavit unless reasonably satisfied of its untruth: *Bray*, p. 181; *Lyell* v. *Kennedy*, 27 Ch. D., pp. 19, 21 and 22; *Mogul Co.* v. *McGregor*, 2 T.L.R. 752. The mere probability that documents if produced might be found to contain relevant matters will not warrant an order for further production.

Following these principles, and holding that there was nothing in the examination of Brodie or otherwise to shew positively that any of the documents mentioned in the order contained anything pertaining to the issue, in the face of the affidavit denying it, the order of the Referee was rescinded, except as to the policy of insurance which the defendants, while not admitting its relevancy, stated their willingness to produce.

Costs of the application to the Referee to be costs in the cause, and those of the appeal to be costs to defendants in the cause.

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

Richards, J.] [Dec. 12, 1904.

HOPKINS *v.* FULLER.

*Contract—Mutual mistake—Innocent misrepresentation—Rescission of contract—Damages—Costs when fraud charged.*

Action for rescission of a contract for the sale of land and repayment of the instalments of purchase money already paid by the plaintiff, and for damages, based on the allegation that defendants had misrepresented the locality of the land, and had fraudulently shewn the plaintiff other and better land not belonging to defendants as being the land owned by him, and, which he was offering to sell. The trial judge found as facts that the misrepresentation alleged had actually been made, but had been innocently made in the belief that it was true.

*Held,* that, under the circumstances, plaintiff was entitled to have the contract rescinded and to repayment of all moneys paid by him under it with interest, but not to damages: *Adam* v. *Newbigging,* L.R. 13 A.C. 308, followed.

*Held,* also, that appearances having justified the charge of fraud, though this was not proved, costs should be allowed.

*Daly,* K.C., and *Crichton,* for plaintiff. *Aikins,* K.C., *Graham,* and *Robson,* for defendants.

---

Perdue, J.] EMES *v.* EMES. [Dec. 16, 1904.

*Alimony—Desertion—Offer to receive wife back—Bona fides.*

Action for alimony. The trial Judge was satisfied upon the evidence that plaintiff had sufficiently proved desertion but defendant in his statement of defence had, for the first time since the separation, offered to "receive the plaintiff as his wife at any time when she is prepared to come and reside with him and accept the home he is able to provide for her and conduct herself as a wife reasonably should." Plaintiff, however, contended that this offer was not honestly made, but solely for the purpose of avoiding a judgment for alimony, and the trial Judge, having come to the conclusion upon the evidence that this contention was correct,

*Held,* following *Rae* v. *Rae,* 31 O.R. 321, that the offer, under the circumstances, was not sufficient to defeat the plaintiff's claim.

*H. E. Henderson,* for plaintiff. *G. R. Caldwell,* K.C., for defendant.

Perdue, J.] BARNES *v.* BAIRD. [Dec. 20, 1904.

*Mortgage—Foreclosure—Opening foreclosure.*

The plaintiff claimed possession of the land in question under a final order of foreclosure made by the District Registrar under the Real Property Act, R.S.M. 1902, c. 148, in respect of a mortgage from the defendant to the plaintiff covering the property and a certificate of title in fee simple for the land issued to the plaintiff under the said Act. After the foreclosure the plaintiff's solicitor received for him several payments expressly made on account of the mortgage and with the understanding that the defendant would be allowed to redeem, and the defendant claimed in this action to be allowed to redeem and offered to pay the amount due under the mortgage. The property originally mortgaged to the plaintiff largely exceeded in value the amount still due on the mortgage. Plaintiff contended that, under s. 71 of the Real Property Act, his certificate of title was absolute and could not now be opened up, as the defendant's claim did not come within any of the qualifications mentioned in that section to the positive enactment that the certificate of title should be conclusive evidence at law and in equity as against all persons that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified, and relied on the head note of the decision in *Campbell* v. *Bank of New South Wales*, given in the Torrens Australian Digest at page 149, and on *Colonial Investment Co.* v. *King*, decided in the N.W.T.

*Held*, that s. 71 of the Real Property Act must be read along with the other provisions of the Act, not only those specially referred to in it, but also with section 92 dealing with trusts, section 76 declaring the cases in which an action will lie against a registered owner, and section 52 giving the Court power over certificates of title in any proceeding respecting land, that foreclosure proceedings conducted by the District Registrar in the case of lands which have been brought under the Act are no more binding between mortgagor and mortgagee than a decree and final order of foreclosure made by the Court; and that, if the dealings between the parties, subsequent to the foreclosure, are shewn to be such as would be sufficient in equity to open the foreclosure and let the mortgagor in to redeem, they should in the case of lands under the Act have the same effect.

The certificate of title issued in such a case is, as between the parties, nothing more than a decree of foreclosure vesting the title in the mortgagee, absolute while it stands, but liable in a proper case to be set aside to allow the mortgagor in to redeem.

Judgment for redemption of the lands in the usual form with costs to the plaintiff of an ordinary redemption suit.

*Baker*, for plaintiff. *Marlatt*, for defendant.

---

# Province of British Columbia.

## SUPREME COURT.

Full Court.] TANGHE *v.* MORGAN. [Nov. 11, 1904.

*Mining law—Location of placer claim over lode claim—Essentials of a placer location—Application and declaration—Belief—Gold Commissioner—Powers of—Appeal—Pleadings—Issue not raised in court below.*

Appeal from judgment of MARTIN, J.

*Held*, 1. A placer claim may be located on a lode claim.

2. A Gold Commissioner has no authority to change the entire location of a placer claim and an order to that effect made by him is null and void.

3. Where it is sought to sustain an appeal on an issue outside the record, on the ground that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the court and the adversary was directed to the fact that such an issue was being raised otherwise a waiver of the necessity for a formal pleading will not be assumed.

*Per* MARTIN, J., at the trial: 1. Upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim and the officer has no discretion in the issuance thereof, and where the record is not granted to him in due course he shall, under the remedial provisions of section 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor.

2. The validity of a placer mining record primarily depends upon the mere belief of the locator based upon indications he has observed on the claim in the existence of a deposit of placer gold thereon.

Decision of MARTIN, J., affirmed.

*W. A. Macdonald*, K.C., for appellant. *MacNeill*, K.C., for respondent.

Full Court.] [Nov. 26, 1904.

LAMBERTON *v.* VANCOUVER TEMPERANCE HOTEL CO.

*Master and servant—Manager of restaurant—Dismissal—Reasonable notice.*

*Held*, allowing an appeal from the County Court and ordering a new trial:

A manager of a restaurant who is employed by the month is not entitled to a month's notice of dismissal.

In the absence of custom or special agreement the length of notice must only be reasonable.

In order to recover damages for dismissal without reasonable notice a plaintiff must shew an endeavour and failure to obtain other employment.

*Brydone-Jack*, for appellants. *Bowser*, K.C., for respondent.

## North-West Territories.

### SUPREME COURT.

Scott, J.] [Sept. 15, 1904.

TRUSTEES VIENNA SCHOOL DISTRICT *v.* ROSZKOZ.

*School law—Taxes—Invalid striking of rate.*

Action for arrears of taxes for the year 1903. The defence was that no rate had been struck by the trustees for that year. The minute book of the district, which had been kept by the Secretary, contained the only record of the proceedings of the Board. There was no entry in it containing any reference to the striking of a rate for that year. The Secretary, however, stated that a Court of Revision had been held though no minute was made or entered in the books; that an estimate had been made, and there had been some informal meetings in reference to the matter as to which there was no minutes.

*Held*, that as the fixing of the rate was one of the more important acts of the Board some record of it should have been made. It was doubted whether the mere verbal understanding arrived at by all the members of the Board that a certain rate should be struck, even if it had been arrived at during a regular or special meeting duly held, would be sufficient in the absence of a record; but the evidence being, that if a rate was agreed upon, it was not so agreed upon at a regular or special meeting, and therefore by c. 30 of 1901, s. 91, it was an invalid proceeding. Judgment for defendants with costs.

*Biggar*, for plaintiff. *MacDonald*, for defendant.

# Book Reviews.

*Commissioner Kerr.* An individuality, by G. PITT-LEWIS, K.C., London: T. Fisher Unwin, Paternoster Square. Canada Law Book Co., Toronto, 1904.

A very interesting biography of a man well known in the city of London from the time of his appointment as Judge of the City Sheriff's Court in 1859. The Commissioner commenced by cleansing the Augean stable of his Court and then administered "rough and ready" justice in his own quaint way. Amongst other reforms he earned the gratitude of the profession by clearing his Court of touts and agents and making it attractive to solicitor advocates, insisting, however, that they should be duly robed. A special detestation of his was verbose and irrelevant talking, and this offence occasionally provoked such an observation as the following: "Don't talk, sir; hold your tongue; get into Parliament or the County Council or some other talking shop, if you want to talk, but you must not do it here." While sometimes caustic as well as jocular at the expense of others he could appreciate a good repartee. Thus—to an advocate with a beard and moustache (which he hated), who appeared before him—"How can I hear you, sir, if you cover up your muzzle like a terrier dog," "Well I had rather be an English terrier than a Scotch cur," was the reply. The Commissioner chuckled, and merely remarked "Get on." We cannot quote further. Those who desire some light legal literature had better get a copy of the book and read some of the many wise and witty sayings of this eccentric, but thoroughly just and humane Judge.

---

*Pratt's Income Tax.* 7th ed. London: Butterworth & Co., 12 Bell Yard, and Shaw & Son, 7 and 8 Fetter Lane, 1904.

Our assessment law differs so materially from that of England that this manual does not give much information that is useful in this country. All complete law libraries, however, should be provided with it.

---

*Seaborne's Vendors and Purchasers,* by W. ARNOLD JOLLY, M.A., Barrister-at-Law. 6th edition. London: Butterworth & Co., 12 Bell Yard, Temple Bar. 439 pages.

The original treatise on which this book was founded was published in 1871, but little of the original writing is left. Few elementary books on this subject are better known or more appreciated than this concise manual of the law, relating to vendors and purchasers of real property. It should find a ready sale in this country.

*Banking and Currency*, by ERNEST SYKES, B.A., Oxon., with introduction by F. E. Steele, Fellow of the Institute of Bankers. London: Butterworth & Co., 12 Bell Yard, Temple Bar, 1904.

This little volume is intended mainly as a text book for students; and useful as well to those who are connected with banking institutions, giving as it does a broad outline of those branches of business and finance with which a banker is chiefly concerned. It would be well if all banks were to require their clerks to pass an examination in the contents of such a book as this.

## *PROCEEDINGS OF LAW SOCIETIES.*

### HAMILTON LAW ASSOCIATION.

The Annual Meeting of the Hamilton Law Association was held Jan. 10. The Trustee's Report shews a membership of 70, a Library of 4,125 volumes, of which 137 were added during the year. The Inspector of County Libraries in his report for 1904 says: "It is hardly necessary to mention that this Library continues to be a model for all others. In the past year the Association sustained a severe loss in the death of Edward Martin, Esq., K.C., who for sixteen years held the office of President.

The following officers were elected for 1905: President, F. MacKelcan, K.C.; Vice-President, S. F. Lazier, K.C.; Treasurer,

### CARLETON LAW ASSOCIATION.

The annual meeting was held on the 21st ult. The report shewed its affairs to be in a very satisfactory condition. The membership now numbers 80, and the number of volumes in the library is 2,391. The following officers were elected: President, J. Bishop; Vice-President, J. F. Orde; Treasurer, F. A. Magee.

### NORTH-WEST TERRITORIES LAW SOCIETY.

Convocation was held at Calgary on January 9, 10, 11, 1905. Reports were presented by the committees on Finance and Library; Examining and Legislation; and Reporting, Printing and Discipline. The total amount expended by the Society for the various libraries at Calgary, Edmonton, McLeod and Lethbridge, Regina, Moosomin, Prince Albert, Medicine Hat, Yorkton, and Moose Jaw was $28,738.38. Amongst other business transacted a minute was prepared suggesting amendment to the tariff of fees, and in reference to collecting material for the Territories Law Reports, etc. The following officers were elected: N. D. Beck, K.C., President; E. L. Elwood, Vice-President; C. H. Bell, Regina, Secretary-Treasurer.