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THE INDEPENDENCE OF THE BENCH AND EXTRA JUDICIAL DUTIES.

For many years back the safeguards on which the public have been wont to rely for securing the independence, the purity, and the dignity of the Bench, have been gradually giving way to other considerations. No longer can our judges be regarded as a body apart from and above the rest of the community, removed from all temptations of personal advantage, or political advancement, chosen as possessing special qualifications which they were prepared to devote to the public service, content in the emolument provided, and satisfied that in the discharge of the important duties of their office, they could attain a position than which none could be more useful to their fellow subjects or more honourable to themselves.

Far from such being the case the Bench nowadays is too often looked upon as a reserve of rather able men who, for various reasons have gone into temporary retirement, but whom a government in difficulties or a party in distress may draw upon to obtain the special instrument required to meet the emergency.

The example set us by the Liberals when they induced Sir Oliver Mowat to leave the Bench, which he adorned, to become their leader in a party fight, and followed by Sir John Macdonald who took a similar course for the purpose of strengthening his own administration, has led to the practice now quite common of looking to the Bench for political leaders. What the Liberals have this year done in Alberta the Conservatives have done in the Dominion. Both parties have thus adopted a course which makes the position of a judge not one of the highest and most honourable in which a member of the legal profession can attain, but a mere stepping stone to political advancement.

Nothing can be conceived more likely to lower the position of the Bench in public estimations, and thus weaken its influence and impair its usefulness than the action to which we have re-

ferred and another phase of the subject which is now forced upon our attention.

More than once governments have taken judges from their proper sphere of duty to work of a more or less political character and always with injurious results to the character and standing of the judiciary. The latest development of this practice has been the appointment of Chief Justice Meredith as Provincial Commissioner to prepare legislation to compensate workmen for injuries received during employment. This may seem a very simple matter, but it is one requiring grave consideration and opens the door to a wide field of discussion, not only in relation to the Bench of the Province of Ontario, but also to that of the Dominion and all its Provinces.

In the present case the appointment of a judge actively engaged in his judicial duties to such a duty as that referred to is in our opinion open to serious criticism from a constitutional point of view. Personally, of course, no objection to the selection could be made, assuming that with the many interests which already engage the attention of the learned Chief Justice he can spare time for such a task as that imposed without interfering with the regular duties of his office. But it is submitted that the office of a judge is to administer law, not to enact it. The two positions are entirely distinct, and cannot be properly united in one functionary. Under our system of government every law governing the body politic must be enacted by the Legislature and must be discussed and considered by that body, and will be treated from a party point of view. The measure which it is proposed shall be thus introduced will have its maker's stamp upon it and must necessarily bring him into any controversy that may arise, and it must be remembered that the subject is one of a highly controversial character. Controversial not only as relating to questions of policy and therefore political, but controversial also as concerning the great issues between labour and capital, and the mutual liability of employers and employed, out of which the most bitter hostility has arisen and may arise again, questions which a judge may properly be called upon to adjudicate when presented in the form of

statutory enactment, but which he should not be called upon to deal with as a legislator. Then it would appear from what the Premier has said that the commission will be called upon to give "all possible opportunity to individuals and bodies interested in the subject to present and urge their views of what the law should be." This is a sort of roving commission quite incompatible with the position of a judge and to which he cannot do justice without neglecting the duties which properly belong to his office.

There is, moreover, no necessity for taking the course adopted by the government. There are men in the profession fully competent for the work that is required and to whom it would be more properly entrusted if the law department of the province has not the time to make the necessary investigation or does not feel competent to grapple with it. When a report has been obtained "as to the laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to operate satisfactorily," (a task very easily accomplished), there is surely sufficient capacity in the government itself to report a bill embodying "such changes in the law as in their (not his) opinion should be adopted." If they are not competent to do this work they should not undertake it. In other words the government of the day should assume the whole responsibility of obtaining the desired information and of preparing any necessary legislation. They should bring the measure before the country entirely as their own and not take shelter under the robe of a chief justice. If this is not what such a commission means what does it mean?

It would be quite proper for the government to consult the judges from time to time as to defects in present legislation and to ask for such suggestions as their experience might enable them to give. In other words, there could be no possible objection to an arrangement by which the opinion of the judges could be obtained for such a purpose. It is customary for them to state

their views on such matters in England, and it might well be done here. In fact such opinions might often be the most valuable part of the evidence received by a commission or committee charged with the task of revision. But that is quite a different thing from taking the head of a court from his proper duties to do work, part of which at least would be to act as a sort of referee in what would be a contest between capital and labour to the detriment of the dignity of his high office.

DRIFTING.

"I feel there is getting abroad amongst Canadians a sense that is not of very great importance after all that crime should be punished, and that it is a pity to punish those who have committed crime, and that means should be taken to effect escape of those who are undoubtedly guilty. That is a very false sympathy which has been the curse of a great part of this decade. We have to determine whether life and property shall be secure in the English sense in which it has been for a century, or whether we are to deteriorate to that course of civilization which characterizes some of the States in the adjoining country."

Such were the words addressed by Mr. Justice Riddell to the grand jury of the county of York in the Province of Ontario at the opening of the late Assizes. If the learned judge be correct in the opinion thus expressed, Canada is in danger of losing what is, even in an economic sense, one of her most valuable assets. As much as the possession of vast natural resources in the fertility of her soil and the wealth of her minerals, her reputation as being a well-governed, an orderly, law-abiding, and a law-respecting community, has been the means of bringing within our boundaries a large number of settlers of the class best qualified to develop the natural wealth of which we are so fond of boasting. That reputation we cannot afford to lose, not only for the benefits it brings to us, but still more for its effect upon the character of our rising population. The spirit of order and obedience must be maintained, not only in the administration of justice, but in the

family life of our people. Sad as must be the confession, and yet there can be no doubt of the fact, the home is no longer the school in which the elementary principles of respect for and obedience to constituted authority are taught. Respect for parents, which is the foundation stone of all authority, is neither enforced nor respected, and, failing that, all effort to maintain in wider spheres that regard for law and order so essential to the well-being of a country must of necessity be fruitless.

Of the prevalence of serious crimes against the person we have in the columns of the daily press evidence which cannot be denied, and should not be disregarded. Scarcely a day passes in which we have not the record of some deadly crime for which no adequate reason can be assigned, or provocation alleged. Wilful murder, frequently followed by suicide, may almost be said to be a common occurrence.

On the one hand we have the recklessness with which human life is assailed, and, on the other, the sentiment which shrinks from the punishment of the man or woman who do not hesitate to take that life for the gratification of passion, the lust for gain, or on the specious plea of self-defence. The frequency with which jurors excuse the most serious crimes on the plea of insanity is evidence of this.

How strangely this contrasts with the religious activity which is one of the characteristics of the present age, and which certainly is both sincere, and well directed, and in accordance with the teaching of Christianity. Zeal in missionary and philanthropic work is to be commended, but there is evidently something wanting which zeal in those directions does not provide.

There can be no doubt that the possession and handling of deadly weapons, such as the revolver and the knife, often lead to their use under circumstances which, but for their presence, would not be attended with fatal, or even very serious results. The man with a revolver in his pocket will be very apt to use it if involved in a quarrel which otherwise would be settled by a blow of the fist. The police would be doing a good work if they took a little more trouble in compelling the observance of the law with regard to such weapons.

Again Mr. Justice Riddell asks whether "property" shall be secure in the English sense. Among a large class of people in this country there is, to say the least of it, no delicacy of feeling with regard to the property of other people. The public are not held to have any rights when it suits the convenience of some person, or some corporation, to interfere with them; and, in turn, the public have no compunction in trampling upon private rights which come in the way of their profit or enjoyment. A railway company or a municipal corporation will neglect the most ordinary precaution for the protection of the public, or a picnic party, bent upon amusement, will enter upon your grounds, break down your fences, open your gates and complacently depart without any thought of making compensation or even offering an apology.

The same sort of spirit is in evidence in another and a higher sphere where the example and effect must be much more harmful to the state. Our Provincial Legislatures apparently have absolute control of our property and our fortunes. They are not amenable, as we are informed from the judicial bench, even to the law of the eighth commandment, and they claim the right to wield and sometimes do wield, a power which even the Imperial Parliament does not assume to exercise. It is said they have not hesitated, in order to carry out a policy of their own devising, to violate rights, public and private, secured by so venerable an authority as Magna Charta. Private property has been most injuriously affected by the violation of pledges given for its security. The authority of the courts has been set aside and their doors closed against suppliants for justice. In short, great principles of law or justice have been recklessly disregarded, and that by those in high places. These things may all have been done with the best intentions, and we might admit that they were; but that forms no excuse; nor is it any excuse that these things were intended for the public benefit; for that is just where thoughtful men at once take issue. It is never for the good of the state that its rulers should act unjustly, or, without ample compensation, disregard minority rights, or in any way shew an example of

that which would as between individuals be properly designated as lawlessness.

The sad part of all this is not so much the monetary loss to private individuals or their feelings of outraged justice, nor that a Government may have brought discredit upon the country: but, more than all this, is the fact that most people seem to be perfectly indifferent, some of them even applauding acts which, if done to themselves, would be most strongly reprobated. We talk very loudly about the country's prosperity and perhaps do too much bragging, forgetful that the lax tone and departure from the old paths of national righteousness, the indifference of the public as to the fundamental principles of meum and tuum, and the false sympathy above referred to point to national disaster in the future. Surely this is a matter of too much moment to pass unnoticed.

DISSENTING JUDGMENTS.

It is not mentioned as a matter of news, for it is as old as the hills, that those who occupy judicial positions are always subject to and receive ample criticism from the Bar. Peculiarities of mind, manner, temper and person constantly and naturally come up for discussion and comment. In this respect judges might naturally be expected to seek the gift to see themselves as others see them, a gift which, by the way, would be as useful for us as for them. We are led to this midsummer maundering by reading the judgments of the Court of Appeal for Ontario which appear in some recent numbers of the *Weekly Notes*. More than one judge has in days gone by established for himself a reputation as a "hanging judge." Why should not others be known as a "dissenting judge" or as a "dilatory judge." We remember a well-known counsel in former days who was nicknamed "Stephen the unready," but perhaps fortunately, although an excellent lawyer, he never arrived at the Bench. As to those who have acquired the "dissenting habit," one learned judge of the Court of Appeal dissented not less than

nine times in the delivery of about thirty judgments, whilst the remaining judges altogether appear to have only dissented on two occasions. This perhaps was indicative of their extreme modesty and diffidence. In the Supreme Court dissent may almost be said to be rampant. Whilst the Bench and Bar may have their harmless and playful vacation jokes about such matters, there is a serious side to the situation, in this, that the public are apt to lose confidence in the administration of justice when the uncertainty of law is thus unnecessarily forced upon their attention. We admit that there are difficulties in the way and some reasons against it, but might it not in this view of the matter be desirable, and thereby perhaps save many appeals, if only the judgment of the court as a whole should be delivered, and that all dissent should be thrashed out or known only in the judges' consultation room. Most certainly this should be so in courts of final resort. The Supreme Court, for example, would, we submit, lose nothing in respect and authority if such a rule should be enforced.

AVIATION AND WIRELESS TELEGRAPH AS RESPECTS THE MAXIMS AND PRINCIPLES OF THE COMMON LAW.

The maxim cujus est solum ejus et usque ad coelum—whose is the soil, his it is even to the sky—did not, when we took our common law from England, carry any thought of human occupation of the superincumbent air, unless by structures attached to the soil. It was intended, as we think the common law, viewed as a system, demonstrates, to indicate that the owner of the soil had the right to forbid the plane above him being used to his detriment.

But movement across this plane was not conceived to be injurious actually or technically to any right of the owner of the surface below. The word surface itself in distinguishing an upper from a nether estate in land implies a several sort of enjoyment.

The further maxim quicquid plantatur (fixatur) solo, solo cedit—whatsoever is affixed to the soil belongs to the soil—and its kinfellow, omne quod solo inaedificatur solo cedit—what is built on the soil pertains to the soil—enforce the fixtures theory as the strict limit in land ownership.

All of us are acquainted with the decoy case which assumed, that one had the right to establish a business in attracting ducks flying through the air, from all directions, and it could not be interfered with by another standing even on his own soil and maliciously discharging guns. *Keeble* v. *Hickeringill*, 11 Mod. 74, 131.

It is not an answer to distinguish this case by saying that the flying of birds is one of the things in nature with which no ownership of property was ever expected to interfere except by actual occupancy. The point is that the owner of the decoy was using for his private profit that part of the air which another could exclusively occupy.

It would yet be considered something of a fantastic claim for one who held land on the four sides of another to assert, that the latter could not maintain feeding grounds to attract wild fowl, because he was inviting aerial trespass across the objector's soil. And yet the claim would be not without merit, if it could be established that birds came in such clouds as to damage him, by temporarily alighting on his soil, or crops or trees.

This would be as if the inner owner of the soil had set lures to attract herds of beasts so that they would trample up the surrounding soil.

In Broom's Legal Maxims, page 397, Lord Ellenborough is reported to have ruled that an action of trespass was not maintainable for one nailing a board to his own wall so that it overhung plaintiff's close, but an action on the case. He reasoned that, if it were trespass to interfere with the columns of air superincumbent on the close, then any aeronaut would be liable at the suit of every occupier of a field over which his balloon passed, as trespass would not regard the length of time the air would be invaded. This illustration was intended to demonstrate

that to invade a close by an overhanging structure could not be trespass, because this led to an absurdity, to-wit, trespass in fugitive occupancy of the air. But invading a close for an instant by doing anything to the soil or to what is planted in, or built upon it, or grows out of it, is trespass. Running across or stopping within the soil surface of a close is not differentiated in any respect. Therefore, according to Lord Ellenborough, it is not the same thing to invade one's atmospheric plane as his soil possession.

Take the distinction of plucking fruit from a tree being trespass and taking and carrying it away after it has fallen being larceny. It has become in the latter case personal property because it is not attached to the freehold. But it is as much attached to the superincumbent air in the one situation as the other. It is impregnated, so to speak, with some freehold in every place it is, if, literally, a freehold extends to the sky, and nothing could be severed therein. If one bottled up some of the superincumbent air of A.'s freehold it would be going to an extravagant length to say he was committing larceny, but it would seem no less ridiculous to assert he was trespassing. If he took away A.'s soil or cut down his trees or drained his pond or carried away his mineral water, his act would be trespass.

All of truth there seems to be in the maxim of ownership to the sky is, that within lines extended through all points of soil ownership to the sky is a space of preferential use to the owner of the soil and such use is interfered with only when enjoyment of the soil is diminished.

On this theory a nuisance is abatable when it fills that space with noxious odors, or with concussion that shakes to their damage structures affixed to the soil; but any mere stirring of air that works no harm to occupancy of the soil has, we venture to assert, never been made the basis of any claim in a court.

It has been held, that the common law rule of cattle pasturing upon land whether open or enclosed has not been regarded as applicable to the condition of things in this country, and therefore it is not trespass here for cattle running at large to go upon,

and pasture in, open land. *Buford* v. *Houtz*, 133 U.S. 320; *Davis* v. *Davis*, 70 Tex. 123. It was argued in the *Buford* case that this right of general pasturage enured to the common benefit and was given and taken upon an implied understanding that inhered in our very titles.

One can hardly doubt, that, had aviation been known and utilized as rapid advancement promises it is on the way of being known and utilized, a similar understanding, based on the same character of common benefit, would have secured its right into all open spaces above the soil. It would be far within the principle, that one for his private gain may draw fowl ferae naturae across the air above another's soil, to hold that science discovering public highways through the same element is within its legal rights. This is a conquest that civilization has far more right to claim than superiority in land title over savage tribes.

In *Guille* v. *Swan*, 19 Johns. 381, 2 Hughes' Gr. and R. 528, an aeronaut was held liable in trespass for damage done by his being dragged by a balloon through plaintiff's field and also for that of the crowd breaking in to rescue him from his peril. The judge said: "I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain the aeronaut has no control over its motion horizontally; he is at the sport of the winds and is to descend when and how he can; his reaching the earth is a matter of hazard." Then it was concluded he was responsible, because the consequences that ensued should have been foreseen. But the suggestion that he had no right to invade the air of whomsoever's close is impliedly repudiated. It would seem, that aviation has already placed itself beyond the application of the language we quote.

Wireless telegraphy uses air columns above earth planes in essentially the same way as does aviation. The only difference is that in the latter case the substance carried is more corporeal, so to speak. But what is carried by each method is something tangible and capable of being weighed and measured. If science attains the goal of its desire neither will be astray in its element,

or, as we might say, ferae naturae. Either may be intercepted, as wires transporting other telegraphy may be tapped. Between them we perceive no difference in plucking a Marconigram from the air for appropriation and capturing an aeroplane and calling it your own.

If they were even trespassers to no one accrues the right of use or confiscation. If, as was held in *Skinner* v. *Wilder*, 38 Vt. 115, 88 Am. Dec. 645, fruit cannot be appropriated by the owner of the soil when taken from the overhanging bough of a tree belonging to the adjacent soil, a fortiori it seems to us, these coursers of the air do not lose their ownership.—*Central Law Journal.*

VALIDITY OF INDEMNITY INSURANCE CONTRACTS.

Even the best courts sometimes go astray. Failing to hitch their frail wagons to some fixed star in the judicial firmament they become lost in by-paths of their own creation and other courts following in their uncertain footsteps, suffer the fate of that court which first led into error. But worse than that, these self-distrusting courts, following each other so blindly into the ditch, serve as they run, to kick up a great cloud of dust which, for a better term, we call the "great weight of authority" and which is so compelling in its attraction for both courts and lawyers.

Follow the cloud! Follow the crowd! Where the greatest number tramp must be the right road. Not always. There's a further question—Who's the leader? When he took this short cut, did he seem to know where he was going? Herein lies the danger of judicial precedent. Unless a court is unable to escape the cumulative effect of precedent it becomes a snare to trap the unwary and to still the questionings of the sincere judicial mind.

Take the case of a contract to indemnify one for the consequences of his violation of the law. Is such a contract good or is it void because the consideration is illegal? We pick up that

great index to the fixed stars of independence, Hughes' Grounds & Rudiments of Law, and turning to the alphabetical heading of illegality we are put in possession of two great maxims.

Ex turpi contractu non oritur actio.

Salus populi suprema lex.

Holding fast to these two fixed stars which are forever true in all ages and for all time, we are ready to say that if whatever fails to come within the description of these maxims is absolutely void and should not escape our condemnation because of other considerations, of business or otherwise, which seem to support it.

From these great maxims we are led to the first great case, one which is called a leading case, not only because it was the leader in a new departure but because it was a good leader. The court knew the way it was going and gave good reasons in harmony with the great principles of justice.

This case is none other but the great case of Collins v. Blantern, Wils. 341, 1 Smith L.C. 715, Hughes G. & R. 436. It held that a contract of A. to indemnify B. for the results of breaking the common law was a void contract. We see easily why this must be so. Salus populi suprema lex, demands that no contract shall encourage a result that will in any manner affect the salus populi. This contract does so, for it encourages B. to commit an infraction of law. It is therefore tainted with illegality because it violates a fundamental principle of law and public policy. An action based thereon is therefore "ex turpi contractu," and must fail.

Now, we make more definite our assumed contract. A. promises B. to indemnify him if he B. suffer judgment in a civil action for damages for violating some statute, for instance, the Safety Appliance Act. This Act is in the interest of salus populi and requires the use of certain appliances which increase the safety of passengers and servants of railroad companies. B. is a railroad company and does not wish to obey this law or become liable for damages if he disobeys it (which, by the way, is the same thing, for where the law has lost its sanction it is no longer binding upon the consciences of men). At this interesting

moment A. comes along and tells B. that for a small annual payment, he will remove the sanction of the law, to wit, its penalty, himself becoming liable therefor, or what is the same thing, refunding to B. all the consequences of his unlawful act. B. feels much encouraged. No longer is he so careworn and anxious lest through some negligence he shall violate the law by failing to adopt the new devices, because, for him, the law has lost all terror, its sting has gone and he can operate to some extent independently of its commands.

Does not the mere statement of this proposition carry irresistibly its own conclusion? The Safety Appliance Act is passed in the interest of the salus populi and that great maxim (a fixed star of jurisprudence) immediately controls the result. A.'s contract encourages B. to violate that statute as much as A.'s contract in the case encouraged B. to violate a criminal statute, because in either case, the contract of indemnity practically, though not theoretically, removes the sanction of the law. That being the effect of the contract, from that moment the salus populi is endangered. The contract becomes tainted with a hopeless illegality and the great maxim we quoted at the beginning sweeps up the refuse and wipes it off the boards—Ex turpi contractu non oritur actio.

If this is convincing, why need authority? Why be slaves to precedent? No matter who it hits, the court that first went off into error was blind to general principles. There were no stars to guide and no fixed lights to lead into any safe harbour, but into utter darkness the court went stumbling on its way and after it went other courts, equally blind, and all have fallen into the ditch.

In the splendid article in this issue by Judge Needham C. Collier, we discuss fully the fundamental error in the decision on this question and we cite all the decisions of many respectable courts who have raised the great cloud of dust which has blinded the eyes of the profession, but above and beyond them all we have shewn one jurist who refused to be coerced by any "weight of authority" whose eyes scanned the heavens for some fixed

star to guide him out of what he believed was a most atrocious error and in a most magnificent opinion in the case of Breeden v. Frankfort, etc., Insurance Company, 220 Mo. 327, 119 S.W. 576, Judge A. M. Woodson leads in a conflict against a "weight of authority" that would daunt an ordinary jurist. All honour to such judges!

The trouble with our courts to-day is that they are not intimate enough with the great maxims and the great leading cases wherein are imbedded the really few great principles of justice. Too frequently the expediency of business or private gain or convenience, will lead such courts to ignore great immutable, unchangeable principles of jurisprudence, which, because of the fact that they are forever true, continually embarrass their detractors into error and forbidden paths.

Indemnify contracts insuring against loss for negligence or any other violation of law are illegal contracts absolutely unenforceable in any jurisprudence that has any respect for the great universal maxim, salus populi suprema lex. And our voice shall be forever raised against such contracts and against the business of those companies which encourage the extension of this character of insurance on the ground that such insurance is a continual menace to the public safety and violative of every sound principle of contract legality.

Let the courts wake up, and not regard so highly the "business interests" of the country, especially where such interests are opposed to the "safety of the people." The later consideration becomes the "supreme law" of the land which the courts are charged to enforce.—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

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ADMIRALTY—COLLISION—TUG AND TOW—DAMAGE BY TOW THROUGH NEGLIGENCE OF TUG.

The W. H. No. 1 and Knight Errant (1910) P. 199. This was an admiralty action to recover damages occasioned by a collision which took place in the following circumstances: W. H. No. 1 was a barge in tow of the tug Knight Errant. Through the unskilful management of the tug the barge under the influence of wind and tide drifted to leeward, so that those in charge of the barge though making reasonable efforts by porting the helm to get to windward failed to avoid the danger, and the barge run into and sunk a lightship. Bigham, P.P.D., held that both tow and tug were liable, but the Court of Appeal (Lord Halsbury and Moulton and Farwell, L.J.J.) varied his decision, and held that the tug alone was liable.

VENDOR AND PURCHASER—CORPORATION—RESTRICTIVE COVENANT —ULTRA VIRES.

Stourcliffe v. *Bournemouth* (1910) 2 Ch. 12. In this case the defendants a municipal corporation had acquired by purchase from the plaintiffs under statutory powers, a parcel of land for the purposes of a public park. The defendants had entered into a covenant with the plaintiffs not to erect upon the lands so acquired any buildings except such structures as summer houses, a band stand or shelters, not more than 12 feet high. The defendants having proposed to erect two lavatories and urinals the plaintiffs objected that such structures would be a breach of the covenant, whereupon the defendants altered their plans by adding on open shed between the two lavatories, which they called a shelter. The action was brought to restrain the erection. The defendants contended that the covenant in question was ultra vires and void, but Parker, J., held that the covenant was valid so long as it did not restrict the defendants from using the property for the purpose for which they were authorized to acquire it; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.).

DESIGN—"NEW OR ORIGINAL"—REGISTRATION.

Dover v. *Nürnberger* (1910) 2 Ch. 25. The plaintiffs, a firm of cycle accessory manufacturers, registered a design for hand grips for cycle handles. The design consisted of an engine-turned pattern in wavy lines applied to the grip and broken up into panels by deep longitudinal grooves. The engine turning was a common pattern and none of the details of the design were new. The action was brought to restrain its infringement, and Warrington, J., held that the design was "new or original" and granted an injunction, but his decision was reversed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.J.J.).

VENDOR AND PURCHASER—FORM OF CONVEYANCE—DESCRIPTION BY REFERENCE TO PLAN—RESTRICTIVE WORDS.

In re Sparrow & James (1910) 2 Ch. 60. This was an application under the Vendors and Purchasers Act. The property in question was offered for sale by auction under printed conditions to which a plan was attached, but it was stated that the plan was for reference only; and that there was no guarantee that it was accurate in any particular, but that it was believed to be accurate, and there was no express provision as to the form of conveyance. The purchaser prepared a conveyance in which the property was described by reference to a plan, as follows: "which said premises are more particularly described in the first schedule hereunder written, and with their respective quantities and boundaries are indicated or shewn on the plan drawn on the back of these presents, and therein surrounded by a red verge line"; and the vendor proposed to insert after the word "boundaries" the words "by way of elucidation and not of warranty," to which the purchaser objected. It appearing that the description of the property was insufficient or unsatisfactory without reference to the plan, and it not being shewn that the plan was inaccurate, Farwell, J., held that the vendor was not entitled to insert the qualifying words, and that the purchaser was entitled to have the property described by reference to the plan.

TRADE MARK—REGISTRATION—LATIN WORD.

In re Aktiebolaget & Co. (1910) 2 Ch. 64. This was an application referred to the court by the registrar of trade marks.

The applicants desired to register the word "Primus" as a trade mark for their paraffin stoves. The application was opposed by the Board of Trade. The word had been used by the applicants in connection with their stoves since 1893, and Eady, J., without deciding that the word was a distinctive mark of the applicants' goods, held that the word was one which might properly be the subject of a trade mark, and he, therefore, simply directed the registrar to proceed with the application.

WILL—BEQUEST OF RESIDUE—"EQUALLY BETWEEN STATUTORY NEXT OF KIN"—PER STIRPES OR PER CAPITA.

In re Richards, Davies v. *Edwards* (1910) 2 Ch. 74. In this case a testator had bequeathed his residuary estate "for and equally between" the persons "who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates," and an application was now made by the executors and trustees to determine whether according to the proper construction of the will the next of kin were to take equally or per stirpes. Eady, J., held that as there was no reference in the will to the statutory mode of distribution, and the statutes were only referred to for the purpose of defining the class, the word "equally" must have its full effect, and the statutory next of kin were entitled per capita.

PRACTICE—CLAIM AND COUNTERCLAIM DISMISSED WITH COSTS—COUNTERCLAIM—COSTS—FORM OF JUDGMENT.

In *James* v. *Jackson* (1910) 2 Ch. 92, the claim and counterclaim were both dismissed with costs, and Warrington, J., was called on to decide what is the proper form of the judgment in such a case. As prepared by the registrar the judgment provided that the taxing officer was to tax the defendants costs of action except so far as they had been increased by the counterclaim, and to tax the plaintiff's costs so far only as they had been increased by the counterclaim, and set them off, and directed the balance to be paid by the party found liable. This was held not to be the proper form and as settled by the judge, the action was dismissed with costs to be paid by the plaintiff to the defendant, and the counterclaim was dismissed with costs to be paid by the defendant to the plaintiff, and it was referred to the taxing officer to tax the defendant's costs of the action and the plaintiff's costs of the counterclaim which were ordered to be set off, and the balance paid by the party found liable.

ESTATE TAIL—DISENTITLING ASSURANCE—PROTECTOR OF SETTLEMENT—CONSENT OF PROTECTOR OF SETTLEMENT—TENANT IN TAIL ALSO PROTECTOR—FINES AND RECOVERIES ACT, 1833 (3-4 WM. IV. c. 74), ss. 34, 42—(10 EDW. VII. c. 52, ss. 9, 19 (ONT.)).

In re Wilmer, Wingfield v. *Moore* (1910) 2 Ch. 111, a rather unusual state of facts existed, a tenant in tail was also himself entitled to a life estate by virtue of which he was protector of the settlement, being desirous of barring the entail, he executed a disentailing deed, which, however, contained no formal consent on his part as protector of the settlement, but Neville, J., held that his execution of the deed operated as a consent by him as protector of the settlement and was effectual to bar all remainders expectant on the estate tail.

SET-OFF—MUTUAL DEBTS—ASSIGNMENT TO DEFENDANT OF DEBT OWED BY PLAINTIFF—SET-OFF BY DEFENDANT OF DEBT ASSIGNED—JUDICATURE ACT, 1873 (36-37 VICT. c. 66), s. 25(6)—(ONT. JUD. ACT, s. 58(5)).

In *Bennett* v. *White* (1910) 2 K.B. 1, strange to say, the question has been presented for decision, apparently for the first time since the passing of the Judicature Act, whether a debt assigned can be set off by the assignee against a debt owed by himself to the debtor. The case was tried before a recorder, who held that the debts could not be set off, and a Divisional Court (Darling and Bucknill, JJ.) also held that the debts are not mutual and therefore cannot be set off; but we notice that this decision has been since reversed by the Court of Appeal: see 129 L.T.J. 181.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Alb.] [June 15.

CALGARY & EDMONTON RY. CO. *v.* MACKINNON.

Expropriation—Form of award—Evidence—View of property—Proceeding on wrong principle—Disregarding evidence.

In expropriation proceedings, under the Railway Act, the arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions and that after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from the judgment of the Supreme Court of Alberta setting aside the award and increasing the damages,

Held, that it did not appear from the language used that the arbitrators had proceeded without proper consideration of the evidence adduced or upon what was not properly evidence, and, therefore, the award should not have been interfered with.

Appeal allowed with costs.

Hellmuth, K.C., and *Curle,* for appellants.

Chrysler, K.C., and *Travers Lewis,* K.C., for respondent.

Railway Board.] [June 15.

GRAND TRUNK RY. CO. & CANADIAN PACIFIC RY. CO. *v.* FORT WILLIAM.

Board of Railway Commissioners—Jurisdiction — Municipal streets—Railway upon or along highway—Leave to construct—Approval of location—Condition imposed—Payment of damages to abutting landowners—Construction of statute.

Having obtained the consent of the municipality to use certain public street for that purpose, the railway company applied to the Board of Railway Commissioners for Canada for leave to construct and approval of the location of the line of their railway upon and along the highways in question. None of the lands abutting on these highways were to be appropriated

for the purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by the construction and operation of the railway upon and along the streets. In granting the application the Board made the order complained of subject to the condition that the company should "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street." On appeal to the Supreme Court of Canada,

Held, DAVIES and DUFF, JJ., dissenting, that, under the provisions of s. 47 of the Railway Act, R.S.C. 1906, c. 37, the Board had, on such application, the power to impose the conditions directing that compensation should be made by the company in respect to the damages which might be suffered by the proprietors of the lands abutting on the highways of the municipality upon and along which the line of railway so located was to be constructed.

Appeal dismissed with costs.

D'Arcy Tate and *W. L. Scott*, for appellants. *Chrysler*, K.C., for respondent. *Sinclair*, K.C., and *G. F. Henderson*, K.C., for landowners.

Ont.] FRALICK *v.* GRAND TRUNK RY. CO. [June 15.

Railway—Accident—Negligence—Railway rules—Special instructions—Defective system—Common law negligence—Workmen's Compensation Act.

Rule 2 of the rules of the Grand Trunk Ry. Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force."

Trains running out of Brantford, Ont., are under control of the train-despatcher at London. The railway time-table has for many years contained the following foot-note:

"Tillsonburg Branch. Yard engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. Station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of the yard-engine, and for knowing such engine has returned before allow-

ing a train or engine to follow." By rule 224 "all messages or orders respecting the movement of trains . . . must be in writing."

Held, DAVIES and DUFF, JJ., dissenting, that assuming the foot-note on the time-table to be a "special instruction" under rule 2, it is inconsistent with the train-despatching system in force at Brantford and if, as the evidence indicated, engines were sent out under verbal orders to push freight trains up the grade it is also inconsistent with rule 224. Such instruction has, therefore, no legal operation.

2. Per GIROUARD and ANGLIN, JJ., that it was not a "special instruction" but a regulation and not having been sanctioned by order in council operation under it was illegal.

3. By the Railway Act a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals."

4. Per GIROUARD, IDINGTON and ANGLIN, JJ., DUFF, J., contra, that an engine returning to the yard after pushing a train up the grade, though not equipped with signals is a "train" subject to the provisions of rule 224.

The accident in this case occurred through the yard-foreman failing to protect the engine on its return to the yard.

Held, DAVIES and DUFF, JJ., dissenting, that the company operated the yard-engines under an illegal system and were liable to common law damages.

Per DUFF, J., that the train-despatching system in general use was safer than that authorized by the time-table and the company by using the less safe system were liable at common law.

Appeal allowed with costs.

Gibbons, K.C., and *G.S. Gibbons*, for appellant. *D. L. McCarthy*, K.C., for respondents.

Man.] CANADIAN NORTHERN RY. CO. *v.* ROBINSON. [June 15.

Denial of traffic facilities—Damages—Injury by reason of operation of railway—Limitation of actions—Construction of statute.

Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the Railway Act, to and from a shipper's warehouse, by means of a private spur-

track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in s. 242 of the Railway Act, 3 Edw. VII. c. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed for the commencement of actions and suits for indemnity prescribed by that section.

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

Chrysler, K.C., and *G. F. Macdonell*, for appellants. *Nesbitt*, K.C., and *Hudson*, for respondents.

N.S.] MUSGRAVE *v.* ANGLE. [June 15.

Evidence—Will—Evidence Act—Secondary evidence—Ejectment—Mesne profits.

Sec. 27 of the Evidence Act of Nova Scotia, N.S.N.S. (1900), c. 163, provides that "A copy of the notarial Act or instrument in writing made in Quebec before a notary public, filled, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved." And by the first two sub-sections of s. 22 it is provided that:

"The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy."

(2) "This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and adminstration of intestate estates, or the custody of wills."

Held, that a copy of a will executed before two notaries in

the Province of Quebec under the provisions of art. 843 C.C. certified by one of said notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia, as provided in s. 27.

In an action of ejectment the plaintiff cannot recover mesne profits which accrued while the title was in his predecessor: and the defendant in possession by consent of the owner is not entitled to be paid for improvements or repaid disbursements made before the plaintiff obtained title.

Appeal dismissed with costs.

O'Connor, K.C., and *Gunn*, for appellants. *Finlay McDonald*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J., Osler, Garrow, Maclaren, JJ.A.] [June 15.

ALLEN *v.* CANADIAN PACIFIC RY. CO.

Railway—Carriage of goods—Destruction—Liability—Tort—Special contract between express company and shipper—Exemption—Application for benefit of railway company—Contract between express company and railway company.

Appeal by the defendants from the judgment of RIDDELL, J., 19 O.L.R. 510, in favour of the plaintiff, in an action to recover the value of goods, destroyed in the course of carriage.

The plaintiff, desiring to send a trunk of valuable samples from Toronto to Quebec, sent it in the usual way to the Dominion Express Co. by one of their carters. The plaintiff failed to place a value upon the articles contained in the trunk, with the result that such value, under the terms of the receipt, was fixed as between him and the express company at $50. The express company are an independent company operating upon the lines of railway of the defendants in Canada, under a general agreement with the defendants containing a provision by which the express company assume all responsibility for and agree to satisfy all valid claims for the loss of or damage to express matter in their charge, and to hold the defendants harmless and indemnified against the claims The goods were placed by the express com-

pany in the car used for that purpose upon the defendants' railway, and there remained in the charge of the express messenger, where they were when a collision occurred between the train on which they were and another train of the defendants, as a result of which a fire took place and the goods were destroyed. The defendants admitted that the collision was caused by the negligence of their servants: and for the damages thus caused this action is brought.

GARROW, J.A.:—The cause of action is one arising, if at all, ex delicto, because the plaintiff had no contract with the defendants. And it is not the ordinary cause of action against a common carrier for not carrying safely—which may be in tort as well as upon the contract—because the goods were not received by the defendants in that character, but under their general agreement with the express company, which contains the exemption from liability clause to which I have referred. That such an action will lie seems beyond question. Here, if the loss had occurred through any negligence on the part of the express company or their servants, the defendants would not have been liable. What they are, in my opinion, liable for is their own separate, or, as it is in some of the cases called, "active," negligence in bringing about the collision.

The only real defence to the plaintiff's claim is made upon two grounds: (1) that the defendants are entitled as against the plaintiff to the exemption from liability stipulated for in their agreement with the express company under which they received and were carrying the goods; and (2) that in any event they are entitled to the benefit of the limitation of liability to $50 provided for in the plaintiff's contract with the express company, which amount the defendants paid into Court without admitting liability.

There is, however, in my opinion, this fatal objection to the success of both defences that to the first agreement the plaintiff is a stranger, and to the second the defendants are in the same position. In addition the exemptions claimed would not extend to include an act of collateral or "active" negligence . . . such as the collision. Such indemnity or exemption clauses are, quite properly, construed strictly, and, if intended to exclude claims for negligence, that should be clearly expressed. See *Price* v. *Union Lighterage Co.*, 20 Times L.R. 177. . . . But, if the agreement between the plaintiff and the express company has any application, I agree with the construction placed by RIDDELL, J., upon the obscurely expressed clause relied on, "that the

stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom through this company the below described property may be intrusted or delivered for transportation,'' namely, that it was not intended to apply and does not apply to the defendants, but to a company or person beyond the line of the defendants' railway, over the whole of whose lines in Canada the express company operate, to which company or person it might be necessary for the express company to part with the property in order that it might reach its destination.

Appeal dismissed with costs.

W. Nesbitt, K.C., and *MacMurchy,* for defendants. *Shepley,* K.C., and *Mason,* for plaintiffs.

Full Court.] REX *v.* VENTRICINI. [June 20.

Criminal law—Murder—Judge's right to comment on evidence.

The prisoner was tried before RIDDELL, J., for murder and was found guilty with a strong recommendation to mercy. The case was reserved for the opinion of the Court of Appeal touching the right of a judge to discuss and advise on the evidence.

Held, that the judge is under no obligation to refrain from commenting upon the evidence. He is not a mere automaton, but is at liberty to state his own impressions of the evidence, provided he is careful to make the jury understand that in the matter of deciding upon the evidence and finding what they deem to be the facts, that they are to be the sole judges; and, in this case, the judge emphatically impressed this upon the jury, and there was no reason to suppose that there was any misapprehension on their part as to their functions or duties.

Robinette, K.C., for prisoner. *Cartwright,* K.C., for the Crown.

Full Court.] REX *v.* SMITH AND LUTHER. [June 20.

Criminal law—Usury—Conviction—Money Lenders Act—Evidence—Evasion of statute—Leave to appeal refused.

The defendants were tried before DENTON, Co.J., under the provisions of the Criminal Code for the speedy trials of indictable offences, upon a charge of lending money at a greater rate of interest than that authorized by the Money Lenders Act, R.S.C.

1906, c. 12? and were convicted. Counsel for the defendants applied to the Judge to reserve a case for the opinion of this court, and, upon his refusal, applied to this court for leave to appeal.

Moss, C.J.O.:—The questions of law sought to be raised for the opinion of the court are, whether certain evidence admitted by the learned judge was properly receivable in evidence against the defendants, and whether, in any event, there was evidence upon which the learned judge could properly convict. For the purposes of this application it is not necessary to determine whether all the evidence objected to was or was not properly receivable. There was no jury, and the case really resolved itself into a question whether there is evidence properly receivable upon which the learned judge could find the defendants guilty of the offence charged.

Having examined the evidence and proceedings, we do not think there is any reasonable ground for calling for a stated case. The matter to be decided by the learned judge was one of fact, whether the defendants were, notwithstanding the methods adopted and the forms practised, engaged in money-lending in contravention of the Money Lenders Act, or were aiders or abettors of persons engaged in such illegal money-lending, and so guilty as principals under s. 69 of the Criminal Code. It appears to us that there was evidence to which no objection could be taken to justify the learned judge's conclusion. The methods adopted and the forms practised by which an incorporated company is made to appear to act as agent for the borrower for a liberal commission, the amount of which is first added to the loan and then deducted from the whole sum advanced, and for which security is taken, the company being represented in the procuring of the loan by the same person who at the same time is acting under a power of attorney from an individual personally unknown to the attorney, but whose money the attorney says he advances to the borrower, or the professed ignorance of the defendants of the nature of these dealings, cannot cloak the real transaction or the obvious design of exacting from the borrower a rate of interest upon the advance greatly exceeding that authorized by the Act.

Application refused.

J. W. Curry, K.C., for the defendant Smith. *J. R. Roaf*, for the defendant Luther. *J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown.

Moss, C.J., Garrow, Maclaren and Meredith, JJ.A.] [June 20.

NEWTON *v.* CITY OF BRANTFORD.

Negligence—Unguarded hole in floor of building—Duty of owners to person invited on premises—Knowledge of danger—Evidence—Nonsuit.

Appeal by the defendants from the order of a Divisional Court, setting aside the judgment of LATCHFORD, J., who dismissed the action at the trial, and directing a new trial. The action was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendants in leaving unguarded an opening in the floor of a fire hall, used by the firemen to reach the lower floor, into which hole the plaintiff fell and was injured. The plaintiff was in the employment of one Cave, who had contracted with the defendants to paint the fire hall. On the 15th May, 1909, the plaintiff was at work painting on the second floor, and to reach a part of his work was using a stepladder which he placed near the opening, and in coming down from the ladder he inadvertently stepped into the opening and fell to the floor below, a distance of about 16 feet. The trial judge had held that no evidence had been given from which an inference of negligence could be drawn. He also was of the opinion that in any event the plaintiff had, upon the uncontradicted evidence, been guilty of contributory negligence, and accordingly dismissed the action.

The Divisional Court considered that there was some evidence of negligence on the part of the defendants in the failure properly to guard the opening, and it was for the jury to say whether the plaintiff had voluntarily assumed the risk; and a new trial was directed.

GARROW, J.A.:—The measure of duty imposed by law in such a case has, I think, been clearly defined . . . A leading case appears still to be *Indermaur* v. *Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, in which the position of such an one as the plaintiff is defined to be that of a person invited upon the premises by the owner for the transaction of business in which both are interested. And the duty owing in such a case is there said to be to take reasonable means to guard the invitee from dangers which are not visible and of which he does not know. But the plaintiff here knew all about the opening. In the course of his examination he was asked these questions: "Q. Had you known about this hole from the time you went to work, nine days before the accident? A. Yes, sir. Q. Knew what it was used for? A. Yes,

sir. Q. Knew its danger when you were up-stairs? A. Yes, sir, but really could not realize that I was to be called on to be so close." No one told him how or where to place the stepladder. That was entirely his own doing, just as stepping into the opening was his own mistake.

I therefore agree with LATCHFORD, J., that there was no evidence of negligence on the part of the defendants, and that the appeal should be allowed and the action dismissed, both with costs if demanded.

W. T. Henderson, for the defendants. *W. S. Brewster*, K.C., for the plaintiff.

HIGH COURT OF JUSTICE.

Riddell, J.] JOHNSON *v.* BIRKETT. [June 10.

Evidence—Examination of plaintiff for discovery—Death of plaintiff—Continuation of action by executor—Tender of depositions of deceased as evidence on behalf of executor —Principal and agent—Moneys intrusted to agent for purchase of stock—Purchase of stock by agent on his own behalf—Intention to appropriate part to principal—Absence of evidence of good faith and information given to principal —Scale of costs—10 Edw. VII. c. 30(*O.*).

This action was brought in September, 1908, for the return of $500 alleged to have been paid by her to the defendant in 1906. After the pleadings had been delivered, i.e., in February, 1909, she was examined for discovery. She died in December, 1909, and her executor obtained an order to continue the action in his name. The action was tried before RIDDELL, J., without a jury.

The plaintiff offered as evidence the examination for discovery of the deceased Mrs. Johnson. The defendant objecting, the trial judge allowed the examination to be marked for identification only, and the trial proceeded. The plaintiff then read certain parts of the examination for discovery of the defendant, and rested his case. The defendant called no evidence.

RIDDELL, J.:—It becomes necessary to consider whether, in the circumstances, the plaintiff can be allowed to make use of the examination for discovery of the original plaintiff, his testatrix. . . .

It was said in *Drewitt* v. *Drewitt*, 58 L.T.R. 684, that a motion under the English rule corresponding to Con. Rule 483

should be made before trial, but the judge there, said he would treat the application at the trial as having been made before the trial—and I shall pursue the same course in the present instance, and treat the application by the plaintiff to read the examination for discovery of Mrs. Johnson as an application regularly made for that purpose before trial. There is nothing in principle or in authority to justify my admission of this examination to prove the case of the plaintiff here; and I accordingly reject it. My reasons briefly are: (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the rules provide for the use to be made of the examination for another—and expressio unius est exclusio alterius.

Turning now to the admissible evidence. The statement of defence puts everything in issue except that the defendant, on or about the 24th August, 1906, "secured from the plaintiff instructions to purchase for her 500 shares of the capital stock of the Boston Mines Company, Limited, at or for the price or sum of $1 per share. The examination for discovery of the defendant sets out that he received a cheque for $500 from the plaintiff about the 24th August, 1906, which he cashed; that he had an agreement with the company for some shares, but they are still "pooled" and so not issued; that Mrs. Johnson bought some of his 2,000 shares in August, 1906, and by August, 1906, he had been paid by her for them. No shares have been issued yet to her, because her solicitor didn't want it. He used the $500 received as his own, and did not pay it to anybody as the price of shares in the company; he never offered her certificates for any shares; he never had them to offer: the only thing he had was his agreement; on the 27th July, 1908, he received a letter from the solicitor of the plaintiff that his authority to buy shares was revoked, and requiring him to return the $500, which he refused to do.

Taking the admissions in the pleading and the examination together, it sufficiently appears that the defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of the company, and having received $500 from her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued—and that, the defendant not having carried out his instructions exactly, his authority was revoked, and the money demanded back. . . .

It may well be that, had the defendant seen fit to give evidence, he might have shewn not only perfect good faith on his part, but also full information given, but he has not done so. He makes the statement in a letter, but does not swear to it.

The plaintiff is entitled to judgment.

W. C. Mackay, for the plaintiff. *J. C. Sherry*, for the defendant.

Britton, J., Clute, J., Middleton, J.] [June 11.

RE GILES AND TOWN OF ALMONTE.

Municipal corporations—Local option by-law—Voting—Form of ballot—Departure from statute—Interpretation Act, s. 7 (35).

Appeal from order of MEREDITH, C.J.C.P., dismissing without costs a motion to quash a local option by-law.

The sole question argued was as to the sufficiency of the form of the ballot used at the voting. The form used was that existing prior to the amending Act of 1908, where the words in the respective columns are "for the by-law," "against the by-law."

Held, the statute 8 Edw. VII. c. 54, s. 10, amends the Liquor License Act, s. 141. and provides that the form of the ballot paper to be used for voting on a by-law under that section shall be as follows: "For local option"—"Against local option." The defect in form, if any, is cured by the Interpretation Act, 7 Edw. VII. c. 2, s. 7(35), which reads: "Where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." Although the words used were "for the by-law," instead of "for local option," they are the same in substance; nor was the change calculated to mislead any voter.

Appeal dismissed with costs.

Haverson, K.C., for the appellant. *Raney*, K.C., for the town corporation.

Divisional Court, C.P.] [June 29.

WAGNER *v.* CROFT.

Meaning of the word "about."

The word "about" is a relative and ambiguous term, the meaning of which is affected by circumstances, and evidence may

be received to shew the intention of the parties in the light of surrounding circumstances. See *Harten* v. *Loeffler*, 212 U.S. 397. The correspondence in this case supply the necessary explanation.

T. P. Galt, K.C., for plaintiff. *A. McLean Macdonell*, for defendant.

Meredith, C.J.C.P.] [June 20.

CANADIAN RAILWAY ACCIDENT CO. *v.* WILLIAMS.

Execution—Interest in oil lands—Goods or lands—Incorporeal heriditaments.

Motion by defendant to restrain plaintiff and the sheriff from selling under the plaintiff's execution their interest in certain oil leases which were made by the owners of certain lands to one Egan who had executed a declaration that he held certain undivided interest in them in trust for the defendant.

Held, that these oil leases were substantially in the same form as the instrument the effect of which was considered in *McIntosh* v. *Leckie*, 14 O.L.R. 54, and were not saleable as goods under the execution. See *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475, 483; *Wickham* v. *Hunter*, 7 M. & W. 62, 78; *Gowan* v. *Christie*, L.R. 2 Sc. App. 273; *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315.

H. S. White, for applicants. *J. M. Ferguson*, for the plaintiff and the sheriff.

Boyd, C.] RE STOKES. [June 17.

Will—Construction—Devise of dwelling—Addition of buildings after date of will.

The testator devised to his adopted daughter "the dwelling on the south side of Banfield Street in which we now reside in the town of Paris."

At the date of the will, October, 1907, the testator and his wife lived in this house. He died in December, 1909, and in the interval, had added two rooms to the original house and removed a barn which was on the rear of the lot in front and improved it into another habitable house. It was contended that there was an intestacy as to the improved part of the lot.

Held, that the above structural changes did not change the area of the benefit intended by the testator in the property described and identified in the will. There was therefore no intes-

tacy and the devisee took the whole premises. See *In re Alexander* (1910), W.N. 36; *In re Champion* (1893), 1 Ch. 101; *St. Thomas Hospital* v. *Charing Cross R.W. Co.*, 1 J. & H. 404.

Wm. Charlton, Grayson Smith, and *J. E. Jones,* for the various parties.

Riddell, J.] PRICE *v.* PRICE. [June 16.

Husband and wife—Alimony—Wife living in husband's house, he supplying her food but not with clothing.

Action for alimony. The wife was living under her husband's roof though not occupying the same bed and did not desire the resumption of marital intercourse. He supplied her with food, but not with clothing, and notified the storekeepers not to supply her with clothing at his expense.

Held, that under the circumstances there could be no alimony the right to which is found in Ont. Jud. Act, s. 34. As long as the wife remains in her husband's house, the law only enables her to enforce the marital obligations to supply her with clothing by a circuitous route, viz., by pledging the credit of her husband for necessaries. See *Debenham* v. *Melton*, 5 Q.B.D. 394, 398.

G. F. Mahon, for plaintiff. *H. W. Mitchell,* for defendant.

OFFICIAL REFEREES.

Kappelle, O.R.] [June 11.

RE STANDARD MUTUAL FIRE INCE. CO.
MUSSON'S CASE.

Company—Winding-up—Contributory—Shares held by agent or trustee—Liability.

This was an application to place the name of T. C. Musson on the list of contributories in respect of the amount unpaid on 20 shares of stock standing in his name in trust for the Union Fire Agency, Limited. The referee found that Musson was the nominee of the United Fire Agencies, Limited, holding shares for them in trust. It was urged that Musson was simply the agent for a disclosed principal, and that the principal should be placed on the list of contributories and not the agent. See Winding-up Act, s. 51, and Ont. Ins. Act, R.S.O. (1897), c. 203, and Ont. Companies Act, ss. 66, 71, 72.

Held, that where, as in this case, A. holds shares in trust for B., in the absence of any statutory provision to the contrary, even although B. is named, A. must be put on the list of contributories as the shareholder liable. B. is not the shareholder, A. is. The case is governed by Ont. Ins. Act, R.S.O. 1897, c. 203, s. 21. The sole question is who is the legal owner of the shares, and Musson, in this case, is the owner and the shareholder in respect of these shares, and in therefore liable to contribute the amount unpaid thereon.

E. P. Brown, for liquidator. *Shirley Denison*, for Musson.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] JOHNSTON *v.* ROBERTSON. [June 24.

Reply and defence to counterclaim out of time—Motion to dismiss action for want of prosecution and assess damages on counterclaim—Terms.

Motion to dismiss the action for want of prosecution and to assess damages on the counterclaim. The statement of claim delivered Aug. 20th, 1909, was for damages for the illegal issue of a warrant for the plaintiff's arrest and under which he was arrested and imprisoned all at the defendent's instance. The counterclaim for an aggravated assault by the plaintiff upon the defendant for which he had been convicted and suffered imprisonment, delivered with the defence, August 28th, 1909. The reply and defence to the counterclaim of denial and self-defence pleaded June 7th, 1910. A notice of motion dated June 7th, 1910, was served June 9th, 1910, for an order to dismiss the action for want of prosecution and for an assessment of damages on the counterclaim.

Held, that the reply and defence to the counterclaim although pleaded out of time and without formal leave cannot be disregarded and while it remains upon the record damages cannot be assessed upon the counterclaim and the motion must be dismissed on the terms that the parties must go to trial at a special term on July 18th, 1910, on the action and counterclaim, all costs of the motion being reserved. *Giggings* v. *Strong*, 26 C.D. 66, and *Gilder* v. *Morrison*, 30 W.R. 815 referred to.

H. S. McKay, for the motion. *J. J. Power*, K.C., contra.

Graham, E.J., Trial.] [July 12.

KAULBACH *v.* MORASH.

Vendor and purchaser—Unpaid purchase money—Lien for enforcement of Statute of Limitations—Interest.

The main defence to an action to enforce a vendor's lien for unpaid purchase money was that the claim was barred by the Statute of Limitations, but it appeared from letters written by defendant that within the period of twenty years he had acknowledged plaintiff's right to the purchase money, and to have the property to satisfy it, and further, that ever since a payment made on account, more than twenty years before action brought, the defendant had been in a foreign country out of the jurisdiction of the court.

Held, 1. That plaintiff was entitled to a lien on the land for the amount of his claim.

2. That he was entitled to recover interest on the amount at the rate of six per cent. to date of the writ and interest at the same rate after that date until payment of the amount claimed.

3. That plaintiff was entitled to an order for sale of the land as in case of foreclosure and sale, unless before the day of sale the amount due was paid.

Pakin, K.C., for plaintiff. *Chesley,* K.C., and *Lane,* for defendant.

Graham, E.J.] [July 12.

EQUITY LODGE NO. 11, PROVINCIAL WORKMEN'S ASSOCIATION *v.* MCDONALD.

Beneficial association—Dissolution—Distribution of funds.

Plaintiff was a subordinate lodge of an association known as the Provincial Workmen's Association, the general affairs of the association being managed by a body known as the Grand Council, which was supported by fees received from the various lodges and had power to enforce special levies for funds and made grants of funds to lodges in cases of strikes or other necessity. The various lodges composing the association were incorporated and the Grand Council was also incorporated and upon the dissolution of subordinate lodges the property of such lodges was forthwith vested in the Grand Council, to be applied for purposes specified in the act incorporating the latter body. A majority of the members of plaintiff lodge desired to surrender the charter of the lodge and dissolve the lodge and distribute

its property, real and personal, among the members preliminary to connecting themselves with another organization known as the United Mine Workers of America, and introduced and carried resolutions to that effect. This was opposed by the minority who applied for and obtained an interim restraining order.

Held, 1. Making the order perpetual, that the majority could not dissolve the lodge under the circumstances and with the object in view, and that the minority, remaining in allegiance to the association had the right to apply to restrain the proposed diversion of funds, and that for such purpose they had the right to make use of the corporate name.

2. The fact that under their Act of incorporation the members had the right to dispose of the property of the lodge "for the benefit of the lodge" did not give the majority the right to dissolve and divert the funds in the manner proposed.

3. The Grand Council, having an interest in the funds of the lodge, was properly made a party to the proceedings.

D. A. Cameron, for plaintiff. *J. M. Cameron* and *Harrington,* for defendants.

Graham, E.J.] DEVENNE *v.* WARREN. [July 12.

Specific performance—Injunction by foreign court—No answer to claim—Pleas—Striking out.

It is no answer to an action claiming the specific performance of an agreement for the sale of land that one of the vendors, after the making of the contract, has been enjoined by a court of a foreign country pending the determination of a suit in such court, from transferring property of any kind and wheresoever situate.

Such a defence will be struck out on application for that purpose, as disclosing no reasonable defence to the action.

Sterne, for plaintiff. *Casey,* for defendant.

Province of Manitoba.

KING'S BENCH.

Mathers, C.J.] [May 25.

IN RE RURAL MUNICIPALITY OF OAKLAND.

Local option by-law—Form of ballot—Meaning of words "as soon as possible"—Failure to keep polls open during prescribed hours.

1. The use of the form of ballot prescribed by s. 4a of c. 31 of 9 Edw. VII., amending s. 68 of the Liquor License Act, R.S.M. 1902, c. 101, at the voting on a local option by-law together with the directions for the guidance of voters in the form prescribed by s. 391 and sch. F. of the Municipal Act, R.S.M. 1902, c. 116, is not a fatal objection to the by-law, notwithstanding the inconsistency of the two forms.

2. The first publication of the notice of the voting on a local option by-law required by s. 66 of the Liquor License Act having been on Oct. 14, this was not "as soon as possible" after the second reading, which had taken place on the preceding June 5, and the by-law, although carried, should be quashed because that section had not been complied with.

3. The deliberate closing of one of the polls for about an hour upon an adjournment for lunch, though with the consent of all present and in pursuance of a local custom, was held fatal to the by-law in the absence of positive evidence that the result of the voting had not been affected thereby. *Scott* v. *Imperial Loan Co.*, 11 M.R. 190, followed.

4. A local option by-law may be given its third reading without waiting for the time for applying for a recount to elapse. *Re Coxworth and Hensall*, 17 O.L.R. 431, followed.

Andrews, K.C., and *F. M. Burbidge*, for applicant. *Matheson*, for municipality.

Prendergast, J.] SMITH *v.* MURRAY. [June 11.

Practice—Demurrer—Motion to strike out parts of statement of claim as embarrassing.

After a defendant, in his statement of defence, has demurred to certain paragraphs of the statement of claim as disclosing no facts upon which the plaintiff would be entitled to recover,

a motion to strike out the same paragraphs as embarrassing and prejudicial to the fair trial of the action on the same grounds should not be entertained while such demurrer is pending.

Hagel, K.C., for plaintiff. *Cohen*, for defendants.

Mathers, C.J.] SCHRAGGE *v.* WEIDMAN. [June 22.

Conspiracy in restraint of trade—Criminal combination—Illegal contract—Crim. Code, s. 498 (*b*), (*d*).

Two junk dealers, who controlled practically the whole trade in junk in Western Canada, entered into an agreement to fix prices for buying and selling for one year, the effect of which was to do away with all competition between themselves. The evidence shewed that their intention was to destroy all other competition, and control the market for themselves.

Held, 1. Following *Mogul Steamship Co.* v. *McGregor* (1892), A.C. 25, and *Collins* v. *Lock*, 4 A.C. 674, that such agreement was not void at common law as being in restraint of trade. *Urmston* v. *Whitelegg*, 63 L.T.N.S. 455, distinguished.

2. Following *Rex* v. *Gage*, 18 Man. 175, that the agreement was not a contravention of sub-s. (b) of s. 498 of the Criminal Code against undue restraints of trade.

3. But, following *Rex* v. *Clarke*, 14 C.C.C. 46; *Wampole* v. *Karn*, 11 O.L.R. 619, and *Rex* v. *Elliott*, 9 O.L.R. 648, the agreement was in direct violation of sub-s. (d) of s. 498, as unduly preventing competition, and therefore one which could not be enforced by action between the parties.

MacNeil and *Deacon*, for plaintiff. *F. M. Burbidge*, for defendants.

Province of Quebec.

POLICE COURT—MONTREAL.

Judge Bazin, Pol. Mag.] [May 2.

THE KING *v.* LYONS.

Attempt to obtain money by false pretences—Advertisement of trade mark preparation—Passing off a substitute article with similar name—Cut-rate druggist—Sale of Pepto-mangan solution—Knowledge by vendee of attempted deception—Transaction completed—No conviction for obtaining money by false pretences—Conviction for attempt although vendee not deceived—Cr. Code secs. 72, 404, 405, 949, 951.

1. A storekeeper who advertises to sell a drug preparation under the registered trade mark name by which it is commonly known with the intention of passing off, to persons calling for the advertised goods, his own similar preparation which he had labelled so as not to infringe the trade mark, may be convicted of an attempt to obtain money by false pretences on proof that he took the advertised price and delivered his own preparation in carrying out the fraudulent intent, although a conviction for obtaining money by false pretences could not be had as the purchasers in the particular case being conversant with the drug trade knew they were not getting the trade mark goods and were not deceived.

2. Where the purchase is made and the money parted with from a desire to secure the conviction of the seller there is no obtaining by false pretences, but the seller may yet be liable for the attempt.

3. *Semble*, it is not necessary for the prosecution to shew that the commodity passed off is inferior in quality to the trade mark article, or that it is less in quantity; and the accused may be convicted, although it appears that the ingredients are nearly identical.

Book Reviews.

The law of meetings. A concise statement of the law relating to the conduct and control of meetings in general. 5th edition. By C. P. BLACKWELL, B.A. London: Butterworth & Co., Bell Yard, Temple Bar, Law Publishers. 1910

An excellent and handy compendium. The general propositions will be just as useful here as in England: but most of it refers to meetings under statutory provisions not in force here.

Students' Cases, illustrative of all branches of the law. By PHILLIP PETRIDES, Barrister-at-law. London: Stevens & Sons, Chancery Lane, Law Publishers. 1910.

Of the making of books there is no end, and students in these happy days have manuals without number. The author makes a new departure by giving some leading cases selected for students, appending thereto dissertations on various matters, which appear to be germane to the principle of the leading case itself.

Whether this book will be found helpful and so command an extensive sale by reason of the novelty of the scheme we do not pretend to prophecy, but the author seems to have done his part of the work well.

Hayes and Jarman's concise forms of will with practical notes. 13th edition. By J. H. MATTHEWS, Barrister-at-law. London: Sweet & Maxwell, Limited.

There is not much that need be said about a book which has arrived at the mature age of a 13th edition, and which as a standard work has enjoyed the confidence of the profession since 1835. It is as well known to them as it is to the reviewer. In the present edition references have been added to the Revised Reports and references have also been made in the notes of cases reported down to the end of the year 1909.

Flotsam and Jetsam.

A certain Philadelphia judge, who, disgusted with a jury that seemed unable to reach an agreement in a perfectly evident case, rose and said, "I discharge this jury."

One sensitive talesman, indignant at what he considered a rebuke, obstinately faced the judge.

"You can't discharge me," he said, in tones of one standing upon his rights.

"And why not?" asked the surprised judge.

"Because," answered the juror, pointing to the lawyer for the defence, "I'm being hired by that man there."