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The Right Hon. Sir Henry Strong, P.C., who has held the office of Chief Justice of the Supreme Court of Canada for the past ten years has resigned the same, his successor being Mr. Justice Taschereau, senior puisne judge of that Court.

This appointment of Sir Henri Elzear Taschereau will be an acceptable one to the Bar and we doubt not to his brethren of the Bench. He has had a valuable experience of twenty-four years in the Supreme Court, has a good knowledge of both English and Quebec law, and is withal a courteous gentleman who will preside over the Court with dignity and efficiency.

The Supreme Court of Canada will gain and the Ontario Court of Appeal will lose by the transfer of Chief Justice Armour to the former Court. His robust common sense, a clear conception of the conditions of life in this country, and a capacity to grasp the true inwardness of a legal proposition will make him especially useful in a Court of final resort, and, in addition to his being an able lawyer, he is recognized as one of the best judges on questions of fact that we have had in this country.

As to the changes in the Court of Appeal caused by the removal of Chief Justice Armour to Ottawa, we understand that the next *Gazette* will contain the announcement that Mr. Justice Moss becomes Chief of the Ontario Court of Appeal and that Mr. J. J. Maclaren, K.C., will be one of the judges of that Court.

Business at Osgoode Hall is very much disorganized owing to three judges of the High Court being absent, and to the fact of the large amount of extra work occasioned by the Ontario election trials. The sittings of the Divisional Court during November have been going on by fits and starts. The court when it did sit being composed of only two judges, and out of a list of eighty-six cases only a bare dozen have been disposed of. If this state of things goes on much longer it will take the courts a long time to overtake

their work. Under the circumstances, it appears to us that one or more K.C.C. should be temporarily appointed to relieve the pressure? Section 188 of the Judicature Act evidently contemplates such appointments being made, but we do not find anything in the Act to indicate in what manner or by whom they are to be made. At a recent assize the judge assigned to hold it being unable to proceed called on a member of the inner bar to continue; a procedure we believe sanctioned by the pre-Judicature Act usage.

It is a pity that the hour of the sittings of the courts and Judge's Chambers at Osgoode Hall is not uniform, as much inconvenience is caused to the profession by the fact that some judges sit at ten and others at eleven o'clock. The sittings at ten were commenced, we believe, by Chief Justice Armour, and have been continued by the judges of the King's Bench Division. Judges of the other Divisions as a rule commence their sittings at eleven although some of them occasionally begin at ten. If the convenience of the majority of the profession were consulted the uniform hour of the sittings at Osgoode Hall would be eleven o'clock. But although this is the case, the profession could with some little inconvenience accommodate themselves to ten o'clock sittings, if it were made the rule in all the courts. The great trouble is, that a practitioner is often at a loss to know whether he is due at ten or eleven, and clients are often prejudiced by their cases being adjourned or delayed, or perhaps involved in extra costs. We are quite sure that the learned judges do not properly appreciate the difficulties occasioned by this irregularity in the hour of the sittings, or it would long ago have been corrected.

Some recent appointments to offices of emolument in the gift of municipal councils bring to the notice of the public a practice which we conceive to be highly objectionable and injurious to the body politic. Some years ago the mayor of a large city in the Province of Ontario resigned his office and took a position then newly created by the council of the city at a considerable salary. More recently an alderman of the same city gave up his seat to become one of the paid officials of the corporation. It is immaterial whether these appointments were good or bad; they should not

have been made at all, and simply because of the positions occupied by the appointees. It is surely unnecessary to enlarge upon the very serious objections to such a practice. The electorate in choosing men as their representatives do not do so to giv the latter stepping stones to office, but to clothe them with power to manage their affairs and protect their interests free, presumably, from all thought of any selfish purpose, and in full reliance on their probity and independence. All temptations to "log rolling," (a slang word seems best to express the situation), should as far as possible be removed, and all persons elected to positions of public trust should be above suspicion. This desirable condition of things is impossible when men are subject to the temptations of using their public positions for advancing their personal interests. What has been said as to mayors and municipal councillors applies with equal and perhaps greater force to members of parliament, their positions being higher and their influence wider. As to the latter class, however, it may be that occasionally an office becomes vacant (such as the one recently occupied by the late Sir John Bourinot) which it would seem might better be filled by some one familiar with the rules and procedure of the House—where a member of long experience might be more useful than an outsider; so that possibly an exception might be excusable in such a case. The underlying principle however is the same.

We learn from our exchanges that Mr. Justice Harlan, of the United StatesSupreme Court, who is a member of the faculty of the Columbian University Law School recently interfered to prevent a class fight between the freshmen and sophomores. Judge Harlan is a giant in stature, and although 69 years of age, is vigorous and active still. The youngsters were no match for him when he entered the arena. We congratulate the learned judge on possessing a body as sound as his mind is sane. To parody Tennyson, we would say that this is a very effective illustration of

"Mastering the lawless *scions* of our law,"

Even on this side of the line, the judges are taking to golf, and who knows but that some day we shall have a senior Osgoode Hall football team composed of the judiciary?

AN INTERNATIONAL COURT.

Turgot, whom Carlyle depicts as "virtuous, philosophic, with a whole reformed France in his head," uttered a great sociological truth when he said: "La masse du genre humain, par des alternatives d' agitation et de calme, avance quoiqu' à pas lents vers une perfection toujours plus grande." Although the desire for a tribunal for the peaceful settlement of disputes among the family of nations found expression in the earliest literature of International Law, it was not until the last year but one of the nineteenth century that such a tribunal was realized and established as a result of the International Peace Conference at the Hague, convened on the initiative, oddly enough, of the Emperor of Russia. On the 16th of October last, the first judgment of the Permanent Court of Arbitration was delivered, and that judgment will stand in the annals of all time as a token of the greatest ethical achievement of the civilization of our age. The reports of this court ought to refresh the wells of aspiration in us all, and bid us take courage that the true Golden Age lies ahead of this generation and not behind it, in the dreams of ancient poets.

That which had the honour of first setting the wheels of justice in motion in this court was "The Case of the Pious Fund of the Californias." It arose, to state it briefly, in this way: So long ago as the year 1697 the collection of a Roman Catholic fund was started for the evangelization of the Indians of California. A large amount of money was eventually obtained, some $800,000 in all, and was safely invested. Until Mexico got her independence from Spain in 1821 the fund was administered by the Spanish Government. From that time on till the acquisition of California by the United States, the Mexican Government duly administered the fund in conformity with the object for which it was raised. Thereafter, however, that government declined to pay over the income to the Bishops of Monterey and San Francisco. At the instance of these ecclesiastics, the United States Government made a demand upon the Mexican Government for the annual income of the fund during the period it had been withheld. In May last the governments of the two republics entered into a formal agreement to submit the controversy to the final determination of a tribunal of arbitration under the provisions of the Hague Convention. Five judges of the Permanent Court were chosen to hear the case, and within the period of five months, a

commendably short time considering the initial difficulties to be overcome, the case was prepared, heard and determined ; the award being given on the 16th of last month, as above mentioned, in favour of the United States, as representing the Californian bishops, for the full sum claimed by them.

Of course it is to be observed that the " Pious Fund " case falls within a class of international matters which have been frequently submitted to arbitration of late years ; but the significance of this case lies in the fact that the agreement between the two republics recognized a competent court as already in existence, and did not attempt to create either tribunal or procedure, as in all previous treaties of international arbitration. That the " Court " has stood the test with such marked success, from every point of view, simply means that a new chapter has been opened in the history of sociology, and that War has abandoned at least the gates of its citadel to the forces of Civilization.

PROGRESS OF CRIMINAL LEGISLATION IN CANADA.

1. **Introductory.**
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1. **Introductory.**--When the bill to codify the criminal law of Canada was introduced in 1892, there were many persons who regarded some prominent features in the bill with misgivings ; but the code has now been tested by nearly a decade of years of practical operation and its enactment has been amply justified. Amendments have, of course, been found necessary and as time passes and new conditions arise other amendments may be considered expedient.

Let us now refer to some of these matters at such length as space will permit :—

2. The object of punishment and the treatment of criminals.—In Canada, as well as in Great Britain, there is a steadily increasing recognition of the sound doctrine that reformatory treatment of criminals ought to be substituted for retributive punishment and that the primary object of punishment is the protection of society. There are a number, however, who yet believe that the main purpose of criminal legislation is to punish offenders against the law rather than to protect the community. The changes of view on this question have been various and remarkable.

It is only within the last hundred years that any serious effort was made by legislators to study and understand the cause of crime. The system of trial and punishment prior to the nineteenth century was barbarous and brutalizing. The mental condition of the offender was very little regarded and his opportunity for defending himself against a charge was very slight. Perhaps however it would not be accurate to describe the legislators of the eighteenth century as deliberately cruel in maintaining such laws.

At that time the criminal population was an unexplored social strata. The legislators seemed impressed with the belief that the criminal would be certain to remain a criminal until he died, and that therefore the sooner that event was accomplished the better for the community. There were nearly two hundred cases of crime punishable by death. If the hanging of the accused did not cure him of his inclination to steal, or to commit similar offences, it at least prevented him from repeating the offence. As criminals in their actions, to use the phrase of the old indictments, were "moved by the instigation of the devil," the law was ready to send them to their instigator without undue delay. Instead of punishment being inflicted in the spirit of patient duty, the feeling of vengeance seemed to be the dominant influence in dealing with criminals at that time. The criminal had injured society and therefore society was entitled to wreak prompt and effective vengeance upon him.

Subsequently an arrangement became popular by which many criminals in England were given away as slaves to Western planters instead of being kept for the dungeon or scaffold. This was considered a merciful innovation, or at all events it answered

Portia's description of the quality of mercy—it was twice blessed; it blessed him that gave and him that took. England was relieved of an ugly burden and the slave-driver had a new victim without cost. Later on this system had to be abandoned and many criminals were then sent to Australia until such a course could no longer be followed. The next step was incarceration in the foul prisons, the earthly hells in the heart of society, which prevailed until Howard's time.

Gradually, however, the impression had grown in the community that all the people outside the gaols were of kinship with the unfortunate offenders against the law, and that it might be desirable to study the question of their treatment from a humane standpoint. Naturally those who advocated this view were for a long time a minority, but as "history is the record of the triumphs of minorities" the changes made by the law in the treatment of criminals since that time down to to-day have been characterized by a steady, if slow, humanizing of the criminal law in all its divisions.

The mental or physical condition of the offender was given no consideration by our fierce forefathers, and a trace of the old ferocious spirit which sent diseased, insane and irresponsible persons to the dungeon may still be found in the inhuman system which lingers in some of our cities and municipalities of punishing the chronic inebriate by sending him to a prison where there is no attempt to cure the disease of inebriety.

3. Evidence of prisoners.—Not only were the loathsome old prisons with their debasing tendencies abolished, but the person charged with crime was gradually given fair opportunity of defending himself. Each change, however, was stoutly resisted. The last important change whereby the accused himself is made a competent though not a compellable witness was viewed with the deepest apprehension by some leading jurists. The chief arguments against it were that perjury would be increased by it, and that it would frequently lead to the conviction of innocent accused prisoners who might be nervous or clumsy in giving their evidence.

In Canada, however, the result of the provision of our Evidence Act has been most beneficial in aiding in the discovery of truth. Jurors were quite as able in criminal as in civil cases to make allowances for the distress or nervousness of any innocent witness and the innocent accused is under no disadvantage in that respect.

But the provision has also had the further result that quite frequently a guilty prisoner goes upon the stand and is convicted mainly or partly as a result of his own evidence.

4. Juvenile offenders.—In no department has the criminal law of Canada made greater progress than in its treatment of juvenile offenders. The provision of the Code which in the case of boys apparently under sixteen years of age found guilty of offences enables the Court to sentence such offenders to reformatories was one of the most beneficial in the Code, and although a difference of opinion has been expressed as to the propriety of the amendment made last year, whereby the operation of this section hereafter can be applied to boys under eighteen years of age, time will prove the amendment a most useful one. Some boys of eighteen are quite as immature as others at sixteen. They are children still although grown up.

5. Release on probation and reformatory treatment. — An equally humane enactment is section 971 which provides for an offender being released on probation of good conduct. This is one of the most important sections of the Code and the amendment passed in the year 1900 widening the application of this section was a most commendable one. While in the vast majority of cases this section even as amended has only been invoked on behalf of juvenile offenders, there was nevertheless no reason why its scope should have been originally so restricted. In regard to juvenile offenders this section is utilized with increased frequency. One of the most painful duties discharged by Courts of Justice is the sentencing of a boy or girl to gaol or penitentiary. It is difficult to avoid the feeling that such a sentence in many cases eventually results in increasing the army of confirmed criminals, and thus the ultimate aim of punishment, to protect society by the repression of crime, is in the long run defeated. Moreover it should not be forgotten that before the youthful offender comes up for sentence he or she has already received some punishment. There has been an arrest and imprisonment before trial and a sickening realization of the chasm between the offender and the non-criminal part of society. Many of these wayward boys, however legally guilty, do not realize the serious character of their offence until the arrest, and then suffer severely from remorse and humiliation. In many cases it is not innate depravity in the offender. He may have started in the race of life bound in chains

wrought by heredity, misfortune and environment. He may be the child of a drunkard, and it was natural that his guideless feet should turn from such a home to the street and stray into wrong paths. Thus morally crippled it was natural that he should fall. If he is sent to gaol he is likely to go there with a heart filled with despair. Unless a youth is radically vicious and depraved, or has committed a very serious offence, it is a question calling for the gravest consideration whether he should be sent to any prison. It is true that the law must aim to protect the community, but that duty should be discharged with the least possible injury to the offender, towards whom the law also owes a duty. If there is any hope of reforming such an offender it is better to help him to struggle back to honesty than to make him an outcast at heart. Even as regards an adult offender, who has not shown clearly that he is confirmed in his criminality, reformatory treatment should be regarded as the rule. Although there are a larger percentage of incurables in the adult class there will always be at least a few who are not beyond redemption. To sentence any of these unfortunates causes a depression of spirit resulting from doubt as to the effect of punishment upon them, and from a realization of the sad truth that much may be said on behalf of these offenders, whose souls may have been stunted by their surroundings and whose bad homes, early training, and inherited weakness may have driven them to the street and to crime. In referring to such unfortunates how impressive are the words of one who had himself suffered in prison and who eventually became one of the great leaders in all reforms in the United States, as well as one of the best-loved of her poets :

"God pity them all ! God pity the worst ! for the worst are reckless and need it most :
When we trace the causes why lives are curst with the criminal taint, let no man boast :
The race is not run with an equal chance : the poor man's son carries double weight ;
Who have not, are tempted ; inheritance is a blight or a blessing of man's estate."

6. Incorrigibles.—But if an offender, after being given a fair chance, returns to his evil ways, then the safety of the public demands his severe punishment. If he is shewn to be incorrigible it is useless and harmful to treat him with homeopathic doses. Lenity does harm to the incorrigible and greater harm to the com-

munity. Sir Robert Anderson, who has had an experience of many years in dealing with criminals in England, is in favour of depriving the professional criminal of his liberty permanently. This eminent authority urges that in any case where it could be clearly established that a criminal was reasonably likely to continue to pursue crime as a calling, his permanent deprivation of liberty should be imperatively demanded in the interests of the community. His incorrigibility would be proof that he is not fit for liberty. The difficulty in such cases of course would be to establish beyond doubt that he is a confirmed and incurable criminal. Once, however, that could be established beyond reasonable doubt it would be as unwise to give such a man a limited sentence as to send a violently insane patient to an asylum with the condition that he should be discharged at the end of a limited time whether cured or not. Society in its own interest has the right to say to him, "Your record and character are such that you cannot be trusted with liberty." To take away liberty permanently from such a man may lead the sentimentalists to cry out for "justice!" to the criminal, but the victims of the criminal, and their relatives, and the probable subsequent victims, must be considered. In short, to release such a criminal would be in effect to give him his liberty to repeat his offence. It is a spurious pity which thinks too much of the criminal and too little of his victims.

Sir Robert Anderson cites Mr Justice Phillimore's public advocacy of the proposal by which old offenders might be restrained. The statement of this eminent judge is thus reported in the London Times:—

"Communications had passed between the Home Office and the judges with a view to ascertain whether it would not be possible to devise some new form of detention more or less permanent, but slighter in its incidence than penal servitude, by which old offenders might be restrained from preying upon the public. It was constantly necessary for judges to pass sentence upon prisoners as to whom it was certain that when their term of imprisonment was over they would renew their old dishonest life. Such unhappy people were the despair of the judges, the police and the reforming agencies."

If any such scheme is adopted by Canada it could be safeguarded by a provision which would permit conditional liberation

by the Minister of Justice when satisfied that the prisoner could be released without danger to society. Sections 418 and 952 of our Code are intended for cases of such criminals but do not solve this problem.

Admittedly, however, it is difficult to ascertain conclusively whether a criminal is incorrigible or not. Some of the criminals who were granted a ticket-of-leave in Canada, and whose records might induce some people to believe that they were incorrigible, have kept from violation of law since their release. The ticket-af-leave system has not been in operation sufficiently long in Canada to justify anyone in forming a conclusive opinion as to its merits, but it is confidently claimed by its advocates to have had beneficial results. Necessarily, however, a long period of years must pass before it can be possible to say that permanent reform of criminals is obtained under this corrective system. It is difficult to obtain reliable evidence of reformation, although there seems ground for believing that many of the criminals released with tickets-of-leave are reformed, or perhaps it would be more accurate to say in some cases, are more cautious in their transgressions.

The last report of the Minister of Justice shows that, during the previous year, 199 tickets were issued and only 4 of these were revoked for misconduct during the year. This statement and previous statistics afford ample justification for the adoption of the system.

7. **Crime resulting from weak or irrational nature.**—Having referred to the incorrigible or professional criminal, something also might be said in regard to that other type of criminal whose conduct is due rather to weak or irrational nature than to down right depravity. Is it not also in the interests of society that such unfortunates after committing one offence should be deprived of their liberty permanently? About ten years ago the writer defended a woman who shot and slightly wounded a man who was in a crowd just leaving a railway station. The act seemed motiveless as the man had never seen the woman before, but it was impossible to establish the insanity of the woman. Indeed she was not legally insane. The judge sentenced her to fourteen years in the penitentiary. The sentence at the time seemed to her counsel extremely severe, but a closer study of the principles which should guide in such cases justifies the view that the protection of the community requires that such unfortunates

should be deprived of their liberty even permanently, although an asylum-prison (if existing) would be more appropriate for them than a penitentiary.

While the reaction against the old, harsh methods of treating criminals must be commended there is some danger that in some portions of this continent the pendulum is swinging too far in the other direction. It is now actually urged by some able writers that the criminal is merely a defective citizen and that his crime is a weakness rather than a disgrace to which any stagma should be attached. With regard to this novel theory I cannot do better than to quote the forcible words of Mr. Douglas Stewart, Inspector of Penitentiaries, "I respectfully submit the opinion that the idea that a convict must not be allowed to feel that he is disgraced is not only fallacious and dangerous but that some of the fiendish crimes that have startled the country during the past few years are traceable to the laxity of public sentiment regarding the disgrace which attaches to crime, thereby inducing the criminal to feel that if executed he will die a hero and if merely imprisoned will be pampered and coddled as an unfortunate with a defective moral organism."

8. Guilty receivers.—One of the greatest reforms accomplished by the Code was the enactment of the various sections dealing with theft. The unsatisfactory character of the English law and the conflicting decisions of the English judges made it necessary for the Canadian law makers to deal with this important branch of criminal law in a thorough and comprehensive manner. But there yet remains one weakness common to both countries in another branch of the law having close relation to the subject of theft. The offence of receiving stolen property, knowing it to have been stolen, has always been considered by our law a serious offence, but unfortunately although sections 716 and 717 are of some value, the law does not afford much aid in procuring a conviction for this pernicious and wide-spread crime, and in effecting restitution of stolen property. If the thief were not enabled to carry on business with a dishonest receiver the thief would be quickly detected. Moreover, the guilty receiver, unlike other criminals, can urge no mitigating circumstances. Assaults may be committed under excitement, and theft may sometimes be the result of sudden and almost irresistible temptation or pressure of want, but the dishonest receiver is absolutely without even the

pretence of any palliation for his crime. He coolly trades on the crimes of others and in many instances indirectly induces them to repeat their offences.

It is deplorable that these recruiting sergeants of the army of crime should carry on their business so frequently with impunity. There are very few prosecutions for this offences in Canada, but that circumstance is no index to the extent of the crime. The police in any Canadian city could give impressive information as to the goods disposed of by household servants, boys employed in stores, and employees of large companies, such as gold mining companies and other employees who abstract goods not easily identified, and who find ready purchasers in persons cunning enough to keep just within the margin of the present law. Recently I heard a prominent detective connected with police administration of one of our cities, declare that he had almost abandoned all hope of securing a conviction against a receiver because of the condition of the law in exacting such precise proof of guilty knowledge on the part of the receiver.

On the other hand, it is much easier to refer to the evil than to suggest an adequate remedy. The parties to the purchase and sale of stolen goods are generally only the receiver and the thief, and the latter in his testimony is usually friendly to the receiver, but even if the thief does make a statement tending to shew guilty knowledge on the part of the receiver, it would not be wise to condemn a man upon the uncorroborated evidence of the thief. It often happens, however, that a small portion of the stolen property is found upon the person of the thief soon after the theft is committed, and the thief in this and similar cases being found guilty, refuses to disclose the whereabouts of the other stolen property. Such a disclosure might not be sufficient to justify the conviction of the person having possession of the property, but it would frequently result in the restitution of the stolen goods to the owner. A thief who after conviction refuses to disclose the whereabouts of the stolen property should in every case be treated with the utmost severity. If the sentence inflicted might seem unduly severe the thief would have it in his power to lessen its severity.

There are cases in which purchasers shew a recklessness in buying certain kinds of goods from boys of tender years, and this recklessness ought to be dealt with as a criminal act on the part of the purchaser. If the Code were amended by the addition of a

section which would render proof of such recklessness in certain specified classes of cases a conclusive presumption of guilty knowledge on the part of the purchaser, there would be a noticeable decrease in such business and necessarily a wholesome reduction in the crime of theft.

9. Abolition of juries.—Some prominent lawyers, chiefly in the United States, have advocated the abolition of the petty jury system, and one jurist has gone so far as to denounce the petty jury as being especially adapted for the protection of criminals. There are other persons who are not prepared to favour the abandonment of the jury system in criminal cases, but advocate the abolition of the requirement of unanimity. They urge that the change by which unanimity is no longer necessary in civil cases was a notable reform and that it would be a reform in the criminal law if a verdict upon which ten of the twelve jurors agreed should stand, so that one or two perverse, ignorant, obstinate, or corrupt jurors could not have the power to defeat or seriously obstruct justice.

The abolition of the petty jury system, however, would be a grave blunder, and even a change which would render unanimity unnecessary would be a dangerous innovation. Even if there are defects in the jury system as at present in operation in Canada, these defects are not inherent in the nature of the system, but arise from the method of selecting the jury and the numerous classes of exemptions whereby many of the most intelligent citizens never serve as jurors. In some counties many of the best citizens obtain appointments as justices of the peace or seek some other position with the deliberate purpose of escaping jury service. These citizens by seeking to escape the performance of an important duty are shewing a strange shortsightedness in unconsciously rendering a service to the criminal by increasing his chances of escape. The uncertainty of punishment is a sheltering and protecting rampart for crime, and anything that increases that uncertainty operates as an aid to the criminal and an incentive to further crime.

The constantly growing list of exemptions from jury service constitutes the only serious weakness in our system of criminal law. The efficiency of our police administration renders detection and arrest reasonably certain, and at the trial the criminal cannot now escape by receiving the demoralizing advantage of tortured technicalities. The one remaining hope of the guilty criminal is

that by virtue of the exemptions and exclusions permitted under the law he may get a jury that will acquit him or disagree upon the verdict. When it is considered to what a great extent service upon juries is evaded by leading citizens, it is a remarkable tribute to the uprightness, common sense and courage of the men who serve as jurors that so comparatively few criminal trials by jury result in a miscarriage of justice. The action of those citizens who deliberately evade the performance of such a duty does not reflect credit upon their public spirit or far sightedness, and sometimes tends to nullify or weaken the operation of a most important division of criminal procedure.

This weakness, however, in the jury system as at present existing in some sections of Canada does not justify the abolition of the system, but rather its reform. The statutes creating these exemptions should be amended so that many intelligent citizens now avoiding jury service should be hereafter compelled to perform when called upon one of the highest duties of citizenship.

On the other hand, in regard to the grand jury it seems like a superfluous duty which they are required to perform in holding investigations to decide whether or not there is sufficient evidence against certain accused persons to put them upon their trial after such duty has already been discharged by a competent magistrate. Mr. J. A. Kains, in his able articles, advocating the abolition of the grand jury, has enumerated many reasons to justify his view. Nothing additional can be contributed on that question.

Perhaps the strongest reason which can be advanced for the abolition of the grand jury is that a large number of most intelligent citizens would thereafter be available for petty jury service. There is one instance in which a grand jury still performs a useful function and that is in the very rare case of a person being committed for trial on insufficient evidence. But in substitution of the grand jury a Crown prosecutor might be appointed who would, in dealing with such a case, at a reasonable period before each criminal sittings, file a report equivalent in effect to the "no bill" of the grand jury. Upon the filing of this report and the authorization of the Court the accused might be discharged. Under such a system it would be desirable that the Crown prosecutors should be officials of high standing and should not be paid by fees.

10. The labors of philanthropy.—Of late years legislation has made long strides forward in the race with crime. But criminal jurisprudence cannot effectively grapple with the originating causes of crime. These are too often beyond the jurisdiction of the law makers. As an eminent penologist says: "If you would prevent the growth of noxious weeds pull up their roots and do not fancy you are accomplishing much by merely cutting off their tops." In other words the best way to abolish the effects is to abolish the causes.

The great aim should be to stop the supplying of the class of confirmed criminals. Prisons are better than penitentiaries for juvenile offenders, but prisons are not as efficacious in accomplishing reform as institutions established by practical philanthropists. Prisons and penitentiaries in their very names involve a permanent odium. The system existing in Nova Scotia by which juvenile offenders are sent to a "Home" or an "Industrial School" established years ago by philanthropists is most successful. The results of the labours of such philanthropists who fully recognize their fraternity with the fallen, cannot be overestimated. The moral and practical training in these institutions has produced most beneficial results. The founders and benefactors of these homes—often the first real home the inmates ever had—have saved thousands of children from being drawn into the ever-flowing stream of criminality. Unpromising material has thus often been turned into respectable citizenship and the results of squalid surroundings and bad company have been overcome because the boy or girl has been "caught young."

It is indeed the highest form of Christian benevolence to have rescued those who were once hopeless and helpless, but who now find their feet going in safe paths and their burdens lifted. Much yet remains to be done particularly in our cities. There will always be social wreckage where the shoals are so many.

In our cities there are many boys whose homes are cheerless and who go out on the streets because there may be some attractive company there. Efforts should be made by establishing boys' clubs to offer such boys something as a substitute for the street.

There is one source of evil as to which little is said and no legislation tried. The person who sells liquor to a minor is punished by fine or imprisonment, but the shop keeper goes unpunished who sells a dime or five cent novel in which the hero is a terror to all

detectives and a dashing fine fellow who leads a jolly romantic and successful life and uses oaths and revolvers and wine in every chapter. Our criminal code aims to prevent juvenile offenders from associating with hardened criminals, but we have no effective law to prevent this form of companionship with criminals which is brought about by the sale to boys of the soul-poisoning stuff so easily procurable and in every page of which there lurks moral bacteria. Persons who have fair opportunities of observing the record of young criminals state that this sort of "literature" is often an inciting cause of crime.

It is not within the province of this article to dwell upon one great cause of crime, the absence of true religious faith and practice.

11. Concluding observations.—In conclusion, it is hoped that a revision of the code will remove existing ambiguities so that our code will be characterized by lucidity, simplicity and effectiveness, and approach the ideal of Bentham, the great English law reformer, "a code which would not require schools for its explanation, or casuists to unravel its subtleties, and which would speak a language familiar to everybody and which each one might consult at his need."

The foregoing observations are not contributed because specially new or original, but were written because it was suggested that in view of the approaching revision of the statutes of Canada, some words upon the criminal legislation and the practical working of the code might be opportune and might direct attention afresh to subjects vitally affecting the welfare of the whole community.

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ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—MISTAKE OF PURCHASER—PURCHASE OF WRONG LOT—SPECIFIC PERFORMANCE.

Van Praagh v. *Everidge* (1902) 2 Ch. 266 is an illustration of the rule that an unilateral mistake to which the opposite party has not contributed, is ordinarily no ground for relief from a claim for specific performance of a contract for the sale of land. In this case the purchaser had attended at an auction sale and, by mistake, had bid for and purchased a different lot from that which he intended to buy. The price was not extravagant, and the mistake was entirely due to the purchaser's carelessness. Kekewich J. under these circumstances held that the vendor was entitled to judgment for specific performance.

INJUNCTION—UNAUTHORIZED USE OF TRADE NAME—HOLDING OUT ANOTHER AS PARTNER—MISREPRESENTATION.

In *Walker* v. *Ashton* (1902) 2 Ch. 282, Byrne J. granted an interim injunction restraining the defendant, a dealer in bicycles, from representing the bicycles offered for sale by him as in fact offered by the proprietors of the *Times* newspaper, and from representing that he was carrying on business as a department of, or in connection with, the *Times* newspaper, and from in any way holding out the *Times* newspaper or the proprietors thereof to be the owners of his business. The defendant had advertised bicycles for sale as "*Times* bicycles" and issued circulars in which it was stated that payment therefor could be made on "The *Times* system," and he had described his business as "The *Times* Cycle Department," and as a matter of fact inquiry had been made both of the plaintiffs and defendant whether the business was connected with the *Times* newspaper. Upon the evidence Byrne J. was of opinion that there had been a holding out by the defendant of the *Times* newspaper as being connected with his business, and that the plaintiffs as proprietors thereof were exposed to litigation and possibly of being made responsible, and that they were justified in taking proceedings to restrain the defendant from continuing the acts complained of.

VENDOR AND PURCHASER—TRUST FOR SALE—PURCHASE BY TRUSTEE FOR SALE.

In re Douglas & Powell (1902) 2 Ch. 296, the facts are somewhat involved, but the main point of the case is that where the beneficial owner of a moiety of an estate is also trustee for sale of the other moiety, and purports to buy the outstanding moiety; although such sale is made with the consent and at the request of the cestui que trust, yet a title so acquired can not be forced on an unwilling purchaser. The case was complicated by difficult questions as to whether the trust for sale had come to an end.

TRUST—TRUSTEE—BREACH OF TRUST—TRUST FUND IMPROPERLY EMPLOYED BY TRUSTEE IN TRADE—OPTION OF CESTUI QUE TRUST TO TAKE PROFIT OR INTEREST—RATE OF INTEREST.

In re Davis, Davis v. *Davis* (1902) 2 Ch. 314, Farwell J. lays down that it is still the rule of the court that where a trustee, in breach of trust, employs the trust fund in trade, the cestui que trust may either elect to take the profits realized, or interest on the money, and if the latter it will be allowed at the rate of five per cent.

COMPANY — REGISTERED NAME — INJUNCTION—RESTRAINING USE OF NAME CALCULATED TO DECEIVE—SIMILARITY OF NAME.

In *Aerators* v. *Tollitt* (1902) 2 Ch. 319, the plaintiffs, a limited company, claimed an injunction against the defendants the promoters of a new company which they proposed to style "The Automatic Aerators Patents, Limited" from using the word "Aerators" as being calculated to deceive and lead to belief that the defendants company was that of the plaintiffs. Farwell J. held that the plaintiffs had no monopoly in the word "Aerator" which was a common English word and he refused the injunction.

SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—BEQUEST TO SEPARATE USE—MARRIAGE WITH FOREIGNER—DOMICIL.

In re Bankes, Reynolds v. *Ellis* (1902) 2 Ch. 333, the main questions to be determined were (1) whether a marriage settlement executed in Italy by a domiciled Englishwoman on her marriage with an Italian, in English form and concerning English property, was governed by English or Italian law and (2) whether certain property subsequently bequeathed to the wife for her separate use, came within a covenant for the settlement of after

acquired property. According to Italian law the settlement was void, but according to English law it was valid. Buckley J. held that English law governed, and that though the property in question was bequeathed to the wife's separate use and subject to a restraint against anticipation, yet it being a reversionary interest, the restraint ceased on its falling into possession and it was bound by the covenant to settle.

SOLICITOR—CHARGING ORDER—LIEN FOR COSTS—MONEY IN COURT AND IN HANDS OF RECEIVER—"PROPERTY RECOVERED OR PRESERVED"—SOLICITORS ACT 1860 (23 & 24 VICT. C. 127) S. 28—(ONT. RULE 1129).

Ridd v. *Thorne* (1902) 2 Ch. 344, was an action for dissolution of a partnership. The plaintiff had obtained the appointment of a receiver who had received the assets of the firm, part of which was paid into court and another part still remained in his hands. Certain creditors of the firm had obtained charging orders against the assets which should come to the hands of the receiver, they undertaking to deal with the charge thus created according to the order of the court. The solicitor of the plaintiff in the action now claimed a lien on the assets recovered in the action for his costs and claimed a charging order therefor on the assets, under the Solicitors Act 1860 (23 & 24 Vict. c. 127) s. 28 (Ont. Rule 1129) as being "property recovered or preserved" within the meaning of that section. Joyce J. held that he was so entitled, and that his charge was entitled to priority over the charging orders obtained by the creditors.

COMPANY—CORPORATE NAME—TRADE NAME—INJUNCTION.

In *Randall* v. *The British American Shoe Co.* (1902) 2 Ch. 354 the plaintiffs were a joint stock company incorporated by the name of "Randall Limited" and had for the purposes of their trade also adopted and used in addition to this corporate name, the name of "The American Shoe Company." Eady J. held, that the plaintiffs were entitled to an injunction restraining the defendants from using the name of "The London American Shoe Company" or "The British American Shoe Company" and that the fact that the plaintiffs had not always complied with the provisions of the Companies Act requiring them to have their corporate name outside their places of business did not disentitle them to relief.

VENDOR AND PURCHASER — ASSIGNMENT OF CONTRACT — PAYMENT ON ACCOUNT TO ASSIGNEE OF VOIDABLE CONTRACT—MONEY HAD AND RECEIVED.

In *Fleming* v. *Loe* (1902) 2 Ch. 359, the Court of Appeal (Williams, Romer and Stirling, L.JJ.) have reversed the judgment of Cozens-Hardy J. (1901) 2 Ch. 594 (noted ante p. 70, and dismissed the counter claim, holding upon the facts that the moneys paid to the plaintiff Loe's assignee, had been duly appropriated by him to the purpose for which under the contract they were paid and intended by the defendant, and therefore could not now be recovered from the plaintiff.

WILL—CONSTRUCTION—"ELDEST SON ENTITLED TO POSSESSION"—SALE BY ELDEST SON OF FUTURE ESTATE.

The Law Union & C. Insurance Co. v. *Hill* (1902) A.C. 263, is a case which was previously known as *Shuttleworth* v. *Murray*, and the House of Lords (Lord Halsbury L.C. and Lords Macnaghten, Shand, Davey, Brampton, Robertson and Lindley) have affirmed the decision of the Court of Appeal (1901) 1 Ch. 819 (noted ante vol. 37, p. 497). By the terms of a will successive life estates in Blackacre were limited to the members of a class other than the eldest or only son, entitled to the possession or receipt of the rents and profits of Whiteacre as tenant for life or a greater estate. A tenant in tail in remainder joined with the father the tenant in tail in possession of Whiteacre in a sale of Whiteacre. The Court of Appeal overruling Cozens-Hardy J., held, that the son was not entitled to the possession or receipt of the rents and profits of Whiteacre within the meaning of the will and was therefore not excluded, and the House of Lords have affirmed that conclusion.

UNDUE INFLUENCE—HUSBAND AND WIFE—SOLICITOR AND CLIENT—INDEPENDENT ADVICE.

Willis v. *Barron* (1902) A.C. 271 is the case known as *Barron* v. *Willis* (1900) 2 Ch. 121, (noted ante vol. 36, p. 622). In this case the plaintiff sought to set aside a deed which she had been induced to sign changing, to her prejudice, the terms of a marriage settlement. She was induced to execute the instrument on the representation that it was necessary to correct a mistake in the settlement, but she was not informed by the solicitor, who drew it up at the request of her husband, and whose son was materially benefited by the deed, that she was not under any obligation to execute it, and that it was contrary to her interest to do so. The decision of the Court of Appeal setting aside the deed was affirmed by the

House of Lords (Lord Halsbury L.C. and Lords Macnaghten, Shand, Davey, Brampton and Robertson) unanimously.

SALE OF GOODS—ESTOPPEL—LOSS OCCASIONED BY FRAUD OF THIRD PERSON—CONDUCT CONDUCING TO FRAUD—POWER OF DISPOSITION OF GOODS GIVEN TO CLERK—FRAUD OF CLERK—SALE OF GOODS ACT 1893 (C. 71) S. 21.

In *Farquarhson* v. *King* (1902) A.C. 325, the House of Lords (Lords Halsbury L.C. and Lords Macnaghten, Shand, Robertson and Lindley) have unanimously reversed the judgment of the Court of Appeal (1901) 2 K.B. 697 (noted ante vol. 37 p. 809). It may be remembered that the plaintiffs were timber merchants, having stocks of timber warehoused in the name of their firm with a dock company. They authorized the dock company to deliver the timber from time to time as the plaintiff's confidential clerk Capon should direct. Capon proved to be a thief, and gave fraudulent orders to the dock company to transfer the timber to the order of Brown, a fictitious person, and in the name of Brown he purported to sell the timber to the defendants to the extent of £1200. The action was brought to recover the timber thus obtained by the defendants, or its value. The majority of the Court of Appeal was of opinion that the plaintiffs by their conduct had enabled Capon to hold himself out as the owner of the timber, or as entitled to dispose of it, and on that ground the action failed Their Lordships, however, were clearly of the opinion that it was not enough that the plaintiffs had been careless in the management of their business, or had given Capon an opportunity to steal, as even if they had, that would not estop them from claiming their property. Lord Halsbury points out that the case was in fact governed by s. 21 of the Sale of Goods Act, which provides that where goods were sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell," and mere carelessness would not have that effect ; but it must be some representation which the buyer acts upon ; here the buyer acted on no representation of the plaintiffs, but dealt with a fictitious person whom they never saw, and of whose title they made no inquiry, and the defendants were consequently in no better position than any other persons who buy property from a thief, and they could not set up that but for the owner's carelessness his property would not have

been stolen. This seems to savour not only of sound law, but good sense.

NEGLIGENCE—INJURY RESULTING FROM ESCAPE OF ELECTRIC CURRENT—STATUTORY POWERS—DAMAGE—LIABILITY.

Eastern and South African Telegraph Co. v. *Capetown Tramway Co.* (1902) A.C. 381, although an appeal from the Supreme Court of the Cape of Good Hope is deserving of attention because it turns upon the application of the well known case of *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330. The injury complained of in this case was caused by the interference with the working of a submarine electric cable of the plaintiffs, owing to the escape of an electric current stored by the defendants for the purpose of working their tramways. Part of the defendant's system had been constructed without statutory authority, and as to this it was held by the Judicial Committee (Lords Macnaghten, Shand, Davey, Robertson and Lindley) that the principle of *Rylands* v. *Fletcher* did not apply because the disturbances to the plaintiffs' cable only resulted from its being constructed without certain precautions which when adopted, as the evidence shewed, secured its immunity. On this branch of the case their Lordships point out that the injury complained of was not to either person or property, that it resulted from the plaintiffs' user of a peculiar and delicate trade apparatus, and that such user could not extend the liability of their neighbours, so as to make them liable to any greater extent than they would be to ordinary owners of land, who do not trade in electric cables. "If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation, etc., etc. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure." As to the sections of the defendants' system constructed under statutory authority, it was held that the escape of electricity being a natural incident of the operations legalised by the statutes, and not the result of a leak within the meaning of the statutes, the leakage did not impose any liability on the defendants though it caused the injury complained of, in which respect their Lordships have followed the principle on which they proceeded in the late case of *Canadian Pacific Railway Co.* v. *Roy*.

ERRATUM.—Page 668, last line, for "Equitable" read "English."

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] THORNE *v.* PARSONS. [Sept. 19.

Will—General gift—Context confirming it to real estate—Deleted words—Right to look at.

By one of the clauses of his will a testator gave to his nephew his mill, tannery houses, lands and all his real estate, effects and property whatsoever and of what nature and kind soever at a named place, chargeable with certain legacies.

Held, that the clause when taken by itself would include personal as well as real property, yet when read with other clauses of the will, and the whole context taken into consideration, the gift was limited to the real estate.

The judgment of the Divisional Court reversing the judgment of the Master in Ordinary affirmed.

Quere, whether in constructing a will deleted words can be looked at.

D. O. Cameron and *T. J. Blain* for appellants. *S. H. Blake*, K.C., *D. W. Saunders* and *W. T. J. Lee*, for respondents.

From Divisional Court.] [Sept. 19.

ARMSTRONG *v.* CANADA ATLANTIC R.W. CO.

Master and servant Workmen's Compensation Act—Notice of injury—Absence of—Reasonable excuse—Meaning of—Cause of injury—Matter of conjecture—Negligence.

Whether notice of injury required by s. 9 of the Workmen's Compensation for Injury Act, 1897, c. 160, is for the employers' protection against stale or imaginary claims, and to entitle him, while the facts are recent, to make enquiry, the injured workman, however, is the primary object of the legislative consideration; and therefore under such section and ss. 13, 14 notice may be dispensed with where there is reasonable excuse for the want thereof, the employer not being prejudiced thereby.

What constitutes reasonable excuse must depend upon the circumstances of each particular case, and a reasonable excuse will be inferred where, as here, there is the notoriety of the accident, the knowledge of the employers of the injury, which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative, which they had stated they would take into their consideration, but to which no final answer had ever been given.

In an action against a railway company for alleged negligence it appeared that the deceased was killed by being run over while shunting cars. The evidence showed that the space between the two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but that the tracks themselves were in good condition, and it was merely a matter of conjecture whether, at the time of the accident, the deceased was on the tracks themselves or on the space between them.

Held, that under these circumstances the accident could not be said to be due to the defendants' negligence, and the plaintiff's action failed.

Chrysler, K.C., for appellants. *Fripp*, for respondent.

From Ferguson, J.] [Oct. 9.

MUTCHMOR *v.* WATERLOO MUTUAL FIRE INS. CO.

Fire insurance—Conditions—Prior and subsequent insurance—Substitution of policies—Implied assent—Adjustment of loss—Waiver.

In an application for insurance, particulars of prior insurance in two other companies of $4,000 in each company were given, but in the policy in question prior insurance for only $4,000 was assented to, neither company being named. The defendants pleaded as a breach of the statutory condition non-disclosure of prior insurance for $4,000 in one of the two companies.

Held, that the plea must be read strictly and without amendment, and that so read the assent in the policy to insurance of $4,000 might be treated as an assent to the prior insurance complained of in the plea; and *semble*, that had the defendants not intended to assent to the prior insurance of $8,000 they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application.

Held, also, that to a subsequent insurance for $4,000 in another company in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary.

Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was held to be

sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted.

Judgment of FERGUSON, J., affirmed.

Aylesworth, K.C., for appellants. *Wallace Nesbitt*, K.C., and *T. A. Beament*, for respondents.

From Divisional Court.] HENNING *v.* MACLEAN. [Oct. 9.

Will—Construction—Alternative disposition—Death of testator and wife "at the same time"—Non-interpellation of words.

The testator bequeathed to his wife all his estate and appointed her his executrix. His will then proceeded: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time I request the following disposition to be made of my property;" disposing of his estate and appointing executors. A few months after the making of the will the testator and his wife went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month.

Held, that the testator and his wife were not deprived of life at the same time, the deaths not being the result of a common accident or other catastrophe, and as this actual event was not provided for there was an intestacy.

Held, also, that there was no power in the Court to interpelate any such words as "or in case I should survive her."

The judgment of a Divisional Court affirmed. MACLENNAN and GARROW, JJ.A., dissenting.

C. Robinson, K.C., *H. J. Scott*, K.C., and *H. O'Brien*, K.C., for plaintiffs. *Aylesworth*, K.C., *Ball*, K.C., and *Rolph*, for defendants.

From McDougall, Co. J.] [Oct. 10.

IN RE LEACH AND CITY OF TORONTO.

Assessment and taxes—Local improvements—Sidewalk.

Under the agreement of the 20th of March, 1889, entered into by the Crown as representing the University of Toronto, and the City of Toronto confirmed by 52 Vict. c. 53 (O.), College Street, in the city of Toronto, has become so far a public highway of the city as to make the interest of a leasee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction as a local improvement of a sidewalk in front of the leased land, even though the lease has been made before the agreement.

J. A. Paterson, K.C., for leasee. *Fullerton*, K.C., and *Chisholm*, for City of Toronto.

HIGH COURT OF JUSTICE.

Divisional Court.] REX *v.* JAMES. [July 18.

Fruit Marks Act, 1901, c. 27, s. 7—Offering for sale.

The note of this case, ante p. 690, [as sent to us], requires a slight correction. The result of the decision was that the offering for sale of the fruit improperly packed and not having it in possession was the offence under s. 7 of the Fruit Inspection Act, no one being imposed upon and no fraud intended. The contention was that the inspector had the right to go into the warehouse and examine fruit, no matter whether offered for sale or not, and obtain a conviction for having fruit in storage, although not offered or intended for sale. This was negatived.

Master in Chambers and Street, J.] [Sept. 5 and 19.

MACKAY *v.* COLONIAL INVESTMENT AND LOAN CO.

Jurisdiction—Parties outside the jurisdiction—Service out of the jurisdiction—Setting aside proceedings—Real action—Con. Rule 162.

On a motion to set aside a writ of summons, the order permitting service out of the jurisdiction and the service thereunder, in an action brought in the Province of Ontario by shareholders, resident in the Province of Nova Scotia, of a loan company incorporated in and with its head office and assets (real estate mortgages) except about $1,200 in mortgages on land in Ontario, in the Province of Quebec against the loan company and its liquidators resident in the Province of Quebec, and a loan company incorporated in and with its head office in the Province of Ontario, to set aside an agreement transferring the assets of the Quebec company to the Ontario company and making the shareholders of the Quebec company shareholders in the Ontario company and for distribution of the proceeds of the assets, etc., on the ground that the Courts in Ontario had no jurisdiction and that the case did not fall within any of the clauses of Con. Rule 162,

Held, that the action was not brought with reference to real estate in the same sense as *Henderson* v. *The Bank of Hamilton* (1894) 23 S.C.R. 716, and similar cases were; and that the case fell within Con. Rule 162 sub-sections (b) and (g).

Aylesworth, K.C., and *A. McLean Macdonell*, for Ontario company. *Douglas*, K.C., for Quebec company. *Middleton* and *C. D. Scott*, for plaintiffs.

Boyd, C.] RE YATES. [Sept. 22.

Will—Legacy—Interest—Statute of limitations—Executor.

A legatee of monies charged on land, whose legacy was to be paid six months after the death of the testator, was appointed administrator with the will annexed, but did not sell the land to pay herself the legacy, but held it till it could be sold advantageously at a greatly advanced price to the benefit of all parties some eight years after the death of the testator.

Held, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application and the claim for the legacy was still a subsisting claim with interest as accessory for the period till the fund was in hand for payment.

D. W. Saunders, for legatee. *J. Hoskin*, K.C., for applicant.

Boyd, C.] FAIRFIELD *v.* ROSS. [Sept. 22.

Administration ad litem—Action by heir at law to set aside transfer—Locus standi.

The only living issue and heir at law of an intestate brought this action to set aside on the ground of undue influence, a transfer of her property heretofore made by the intestate to the defendant; and now applied for an order under rules 194 or 195, appointing him administrator or administrator ad litem of the deceased.

Held, that the order could not be made either under rules 194 or 195, for the reasons given in *Hughes* v. *Hughes*, 6 A.R. 373, 380, nor under rule 195 which was not applicable to a case of a plaintiff who without right or title has commenced an action and then seeks to legalize his illegal act by an order in the Court.

H. T. Drayton, for plaintiff. *Clute*, K.C., for defendant.

Boyd, C.] IN RE ALLEN AND TOWN OF NAPANEE. [Sept. 26.

Municipal corporations—Powers—Trimming trees on street—Resolution—Necessity for by-law.

Motion to quash resolution of town of Napanee that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed."

Held, that under s. 574, sub-s. (4) of the Municipal Act, R.S.O. (1897) c. 223, Municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but it is a matter which should be dealt with, not by resolution but by by-law as indicated by s. 575 of the Municipal Act.

Biggar, K.C., for applicant. *Middleton*, for town of Napanee.

Divisional Court.] [Oct. 7.

OTTAWA GAS CO. *v.* CITY OF OTTAWA.

Solicitor and client—Payment by salary—Costs of litigation—Taxation—Right to recover costs.

By arrangement between the defendants and their solicitor he was to receive a salary of $1,800 a year for all services, including the costs of any litigation in which the defendants should be engaged.

The present action against the defendants was dismissed with costs on September 14th, 1901, and the defendants brought in their bill for taxation.

Held, following *Jarvis* v. *The Great Western Railway*, 6 C.P. 280, and *Stevenson* v. *City of Kingston*, 31 C.P. 333, in preference to *Galloway* v. *Corporation of London*, L.R. 4 Eq. 90, and *Henderson* v. *Merthyr Tydfil Urban District Council*, [1900] 1 Q.B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiff.

J. H. Moss, for plaintiff. *H. T. Beck*, for defendants.

Divisional Court.] CROW'S NEST PASS CO. *v.* BELL. [Oct. 7.

Libel and slander—Fair comment—Absence of justification—Striking out defences.

In an action for alleged libel contained in an article in the defendant's newspaper, the defendant pleaded fair comment, but did not attempt in any way either to set up the facts upon which it was alleged the article was fair comment, or allege that the statements of fact in the article complained of were true.

Held, that the defence was bad, and should be struck out.

It is clear upon the authorities that a man may not invent his facts and then comment upon them and succeed upon the ground that the facts being assumed to be true, the comment is fair.

Lindsey, K.C., for plaintiffs. *Knox*, for defendants.

Divisional Court.] MILLIGAN *v.* JAMIESON. [Oct. 9.

Slander—Verdict for defendant notwithstanding proof of defamatory words—New trial—Aggravation of damages—Evidence—Pleading.

Motion for a new trial in an action of slander upon the ground that this verdict was reversed. The defamatory words were proved, but the jury nevertheless found a verdict for the defendant, instead of giving nominal damages to the plaintiff.

Held, that a new trial should not be granted in order that the damages which the jury ought to have assessed should be assessed to the plaintiff.

Another ground of the motion was that the judge had refused to

admit evidence offered by the plaintiff and directed to aggravate the damages.

Held, that inasmuch as there was no allegation in the plaintiff's pleading to entitle him to give evidence of the acts of the defendant on which he wanted to rely to aggravate the damages, a new trial should not be allowed on this ground.

It would be highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of without having set them forth in his pleading, and which might, if unanswered, seriously affect the damages.

Riddell, K.C., for plaintiff. *Aylesworth*, K.C., for defendant.

Boyd, C., Street, J., Meredith, J.] [Oct. 15.

IN RE SCADDING.

Will—Construction—Legacies—Interest.

A will directed that the estate, real and personal, should be sold and that the executors should hold the proceeds in trust to pay an annuity of $900, and then to pay all the residue of the income to the testator's widow for life, and on her death to divide the corpus, paying to two grandchildren $1,000 each, and dividing the residue amongst the testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest, and directed that they should be paid when the grandchildren should attain twenty-one, but in case the estate should be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow.

Held, that interest on the legacies should be paid by the estate only from the death of the widow.

Toomey v. *Tracey*, 4 O.R. 708, distinguished.

Decision of MACMAHON, J., reversed.

Masten, for executors. *W. Bell*, for legatees.

Boyd, C., Street, J., Meredith, J.] [Oct. 22.

IN RE RITZ AND VILLAGE OF NEW HAMBURG.

Municipal corporations—Application to quash by-law—Countermand—Substitution of another ratepayer.

A summary application to quash a municipal by-law was made at the instance and upon the behalf of nine interested ratepayers, who combined to make the necessary deposit and put forward R., one of their number, as applicant. R. duly launched the application, but afterwards gave the

respondents notice of discontinuing it. After the three months allowed by the Municipal Act for making such an application had expired, the application of R. not, however, having been dismissed, one of the remaining ratepayers applied to be added or substituted as an applicant.

Held, that he should be allowed to continue the proceeding in R.'s name on the usual terms of indemnifying him against costs.

Du Vernet, for applicant. *Aylesworth*, K.C., for village corporation.

Boyd, C., Street, J., Meredith, J.] [Oct. 22.

PEOPLE'S BUILDING AND LOAN ASSOCIATION *v.* STANLEY.

Execution—Judge's order for costs—Direction for set off—Service of allocatur—Issue of execution—Production of order.

Where a judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the judge makes an oral direction that costs previously awarded to the defendant should be set off pro tanto, the deduction should be made before execution issues on the judge's order.

It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable.

When execution is issued upon a judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient unless such officer is the one who has official custody of the book in which the order is entered.

D. W. Saunders, for plaintiffs. *W. H. Bartram*, for defendant.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Oct. 27.

ABBOTT *v.* ATLANTIC REFINING CO.

Contract—By husband for wife—Guarantee—Breach—Evidence of husband's agency—Party a privy to contract.

A husband who was superintending the erection of a building for his wife on her property after correspondence with contractors in which the building was referred to by them as "your building" and by him as "my building," took a guarantee from them that "your roof . . . will remain water proof." The wife was not mentioned. The roof proved defective. In an action by the husband and wife for damages,

Held, that the expressions employed did not necessarily imply that the husband was the owner of the roof of the building, but were used as conveniently descriptive of the matter under discussion and that it was competent for the wife to shew that he was her agent and to recover damages for its breach.

Held, also, that the husband not being either a party or privy to the contract could not recover for its breach.

Lucas v. *De la Cour* (1813) 1 M. & S. 249, and *Humble* v. *Hunter* (1848) 12 Q.B. 310, referred to and distinguished.

Judgment of the County Court of Simcoe varied.

W. M. Boultbee, for the appeal. *Brokovski*, contra.

ASSESSMENT CASES.

IN RE TORONTO RAILWAY COMPANY, CONSUMERS' GAS COMPANY, BELL TELEPHONE COMPANY, TORONTO ELECTRIC LIGHT COMPANY, AND INCANDESCENT LIGHT COMPANY ASSESSMENT APPEALS.

Assessment—Traction and transmission companies—2 Edw. VII., c. 31—Plant and appliances — Machinery — Exemption — Construction of statute.

Held, that the words "Plant and Appliances" in sub-s. 4 of 2 Ed. VII. c. 31, are confined to any plant and appliances upon the streets and other public places in the municipality, and refer only to the "rolling stock" of a street railway company, and that therefore the machinery of electric companies is not exempt.

[TORONTO, Oct. 23.

This was an appeal from the Court of Revision of the City of Toronto to a Board of County Judges. The Court of Revision had held that the words "plant and appliances" in 2 Edw. VII., c. 31, s. 1, sub-s. 18 (4), were ejusdem generis with "rolling stock," and did not apply to the plant or appliances not connected with rolling stock, and that therefore the contention of the appellant companies that their machinery, plant and appliances situate elsewhere than on the streets and public places of the municipality were exempt could not be admitted. The Board consisted of their Honors McDougall, McGibbon, and McCrimmon, Co. JJ.

James Bicknell, K.C., for Toronto Railway Company; *Lee*, for Gas Company; *Ambrose*, for Bell Telephone Company; *H. O'Brien*, K.C., and *J. S. Lundy*, for the Electric Light Companies.

Fullerton, K.C., and *Chisholm*, for the City of Toronto.

The judgment of the Board was delivered by

MCDOUGALL, Co.J.:—The question to be determined in these appeals is as to the effect of the Amending Act of last session, c. 31, s. 1, whether the exception or exemption stated in sub-s. 4 extends to the rolling stock of street railways, and in the case of all companies named in sub-s. 2 to all the plant and appliances belonging to such companies save those existing on or situate upon the street, roads, highways, lanes and other public places of the municipality. Under sub-s. 9 of s. 2 of the Assessment Act machinery or other things so fixed to any building as to form in law part of the realty is to be deemed land for the purpose of assessment. Does sub-s. 4 of s. 1 of the Act of last session exempt machinery and buildings on the land of water, heat, light and power companies, telephone, telegraph, street railway and electric railway companies from assess-

ment or taxation? Are these to be favoured companies, and are they to be relieved from the burden cast upon all other corporate bodies using machinery in their business?

The Act of 1902 repeals s. 18 of the Assessment Act, and ss. 18a and 18b of the Act of 1901, and substitutes this new s. 18, divided into six sub-sections. The first sub-section deals with the land of persons other than the companies named in the sub-s. 2, and directs that such land shall be assessed in the municipality where it lies, and in cities in the ward in which it lies. Sub-s. 2 deals with heat, light and power companies, telegraph, telephone companies, and companies operating street railways and electric railways. The land of such companies is directed to be assessed in cities in the ward in which the company has its head office, or if they have not their head office in the municipality, then all the land possessed by these companies wherever situate within the municipal boundaries, may be assessed in any ward of the city. Sub-s. 3 declares (what the courts have already held) that rails, ties, poles, wires, gas pipes, mains, conduits, sub-structures and superstructures upon the streets, roads, highways, lanes and other public places in the municipality shall be land, and then proceeds to define upon what principle their value for assessment purposes shall be determined. The plant, poles and wires used exclusively by a steam railway in running trains, and not for commercial purposes, is declared to be exempt from taxation.

Sub-section 4 reads: "(4) Save as aforesaid rolling stock, plant and appliances of companies mentioned in sub-section 2 hereof shall not be land within the meaning of the Assessment Act, and shall not be assessable." Sub-section 3 limits the liability to assessment under the new basis of valuation to certain enumerated portions of the plant and appliances and fixtures of these particular companies situate or placed upon the streets, highways, etc. Sub-section 3, therefore, deals with the assessment liability of what may be broadly stated as the outdoor portion of the companies' plant and appliances, and as to these a new method and basis of valuation is laid down. The sub-section does not deal with anything but the plant and appliances located on the streets, lanes or public places.

The contention which has arisen relates to the meaning and force of sub-s. 4, which in form is a saving clause purporting to except and exempt certain articles or things from assessment or taxation. The appellants contend that the meaning of sub-s. 4 is that save as to the enumerated parts of their plant and appliances situate on the public streets, all other plant and appliances of the companies, wherever situate, is now exempted from assessment and taxation. In other words that the Legislature has expressly relieved them from the liability to assessment heretofore existing by force of sub-s. 9 of s. 2 of the Assessment Act. As to all other companies sub-s. 9 of s. 2 still applies, and the machinery, plant and appliances of all other companies continue liable to assessment and taxation.

It is, however, urged that as to the companies named in the Act under consideration sub-s. 9 of s. 2 has been repealed by implication. Such a construction of sub-s. 4 would be so unjust and inequitable and so contrary to the principles underlying the Assessment Act that it requires for its support the clearest authority, and the most cogent reasons. The Legislature has expressed its mind clearly in sub-s. 9 of s. 2 of the Assessment Act that land, real property and real estate respectively shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty.

Further by s. 7 of the Assessment Act it is said, that all property in this province shall be liable to assessment. The Act also defines the word property as including both real and personal property, as defined in sub-ss. 9 and 10 of s. 2 of the Act. The language of every subsequent enactment affecting assessment must, therefore, be construed as far as possible giving due effect to the language of the foregoing sections, unless the language of such latter enactments in express terms modifies or repeals them.

The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. *Kutner* v. *Phillips* (1891) 2 Q.B. 267, per A. L. Smith, J. It is said in Maxwell, 3rd edition, 277, that a sense of the possible injustice of an interpretation ought not to induce judges to do violence to well settled rules of construction, but it may properly lead to the selection of one rather than the other of two possible interpretations whenever the language of the Legislature admits of two constructions, and if construed in one way would lead to obvious injustice, the courts will act upon the view that such a result could not have been intended unless the intention had been manifested in express words.

Now, it is quite clear that sub-s. 4 refers to its immediate antecedent clause, sub-s. 3. Sub-s. 3 enumerates certain specified portions of plant and appliances used or placed on the public streets; all the plant and appliances used or placed on the street are not enumerated. "Rolling stock," for instance, which is part of the plant and appliances on the street, is not included in the enumerated articles. The exception reads, "Save as aforesaid rolling stock, etc., etc., shall not be land within the meaning of the Assessment Act." Here clearly the first exception or exemption relates to the class of property on the street declared to be liable to assessment as land, but express words are used for greater precision, and to indicate clearly that the omission was advisedly made, and that "rolling stock" is intended to be freed from assessment or taxation, the particular words "rolling stock" are followed by general words "plant and appliances." It is in accordance with a well known principle of law that general words following particular words will not include anything of a class superior to that to which the particular words belong (Hardcastle 3rd ed. 192). General words which follow particular words and specific words of the same nature as itself take their meaning from them, and are presumed to be restricted

to the same genus as those words, or in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there be something to shew a wider sense was intended (Maxwell, 3rd ed. 469). In *Seward* v. *Vera Cruz*, L.R. 10 A.C. 69, Earl Selburne uses the following language: "Now, if anything is certain it is this, that where there are general words in a later Act capable of a reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so." And again, "It cannot be contended that a subsequent Act of Parliament will not control the provision of a prior statute if it were intended to have that operation, but there are several cases in the books to shew that when the intention of the Legislature was apparent that the subsequent Act should not have that operation, even though the words of such statute taken strictly and grammatically would repeal a former Act, the courts of law judging for the benefit of the subject have held that they ought not to receive such a construction."

Now, the object of the legislation in question here was to put an end to what was known as the scrap iron method of valuing plant and appliances of certain companies occupying the public streets of the municipality. One of the grounds assigned by the Court of Appeal for deciding that the so called scrap iron basis of valuation was correct in principle was that the assessment of the outside plant of certain companies was directed by the Assessment Act to be made separately in each ward, and that, therefore, the plant could not be valued as a whole. The legislation of 1901 abolished separate assessment in wards, and made the whole plant on the streets assessable as if the entire system was in one ward only. This amendment, it was held, did not have the effect of abolishing the scrap iron basis of valuation. In the Act of 1902 all difficulties of assessing the plant of the named companies situate on the streets was done away with. This portion of the plant was taken out of the operation of s. 28 of the Assessment Act as to the method of its valuation; a new basis was established in which it was directed that certain enumerated portions of this plant should be assessed "at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises in and from the municipality." Now, the whole scope and object of the Act of 1902 was to clear away the separate assessments in wards, and also to end the scrap iron theory. No one was complaining or had ever complained of the assessment against the companies of the portion of their machinery, plant and appliances fixed or situate in the companies' buildings on land not forming a part of the public street or highway. No exemption, no special scrap iron theory, had ever been sought to be applied to such portions of the plant and appliances. The contest had been over the street portion of their property. Can it be

assumed that the Legislature ever contemplated for a moment putting the named companies upon a better footing than other companies in reference to their assessment liability? On the contrary the effort was to get legislation that would subject their street plant and appliances to assessment upon the same basis as their other plant, and the Act of 1902 was intended to accomplish this. With reference to the rolling stock part of their plant and appliances different considerations prevailed. Street cars were first assessed in 1901; the rolling stock of no other railway company save electric railways had ever been assessed or sought to be made liable; their cars were always considered personal property and like the personal property of all such companies were not liable to assessment or taxation. The rolling stock of steam railways was not liable to assessment, and it was felt that electric railways should fairly be put upon the same basis; hence the exemption in sub-s. 4. Therefore, looking to the whole history of the legislation it is reasonably plain that with the exception as to rolling stock it was intended to make the outside plant of the companies named liable to assessment at its cash value, and to remove the alleged injustice of the scrap iron method of valuation. If the saving clause has the meaning argued for it by the appellants, $1,176,000 (as appears by the figures on the assessment rolls) will be added to the assessment on the one hand, while by the same Act $1,385,000, the value of the plant heretofore assessed, will become exempt—this effect of the legislation thus shewing a net decrease to the municipality of $209,000 of assessment value. If the scrap iron basis of value had not been disturbed at all the municipality would have been the gainer to the extent of $209,000 in assessment value. It would require distinct and unmistakeable language to warrant such a conclusion. To my mind the meaning of the clause is to be arrived at by considering the language of sub-s. 3, which is its antecedent. That sub-s. deals with street equipment only. It must also be read in the light of its initial word "rolling stock," a portion of the plant solely used on the public streets, and the words following, "plant and appliances" would upon this view be restricted to "plant and appliances" on the street, that is to say, rolling stock and all other plant and appliances upon the streets and not enumerated in sub-s. 3 are not to be considered land or liable to assessment or taxation. This is the only reasonable view of its meaning consistent with the chief object that the Legislature had in view, namely, to remove the alleged scrap iron grievance, a grievance existing only in regard to street plant and appliances. To apply the construction contended for by the appellants would produce a result and discrimination so unjust and inequitable as to shock the conscience of every ratepayer. The words "rolling stock, plant and appliances" construed as above indicated, are given an intelligent meaning, consistent with what I believe was the true intention of the Legislature. "A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant; the law does not allow an exposition to revoke or alter by construction of

general words any particular statute where the words may have their proper operation without it. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language." (Maxwell, 3rd ed. 243-4.) "Acts which establish monopolies or confer exceptional exemptions, privileges, correlatively trenching on general rights, are subject to the same principle of strict construction." (Maxwell, 3rd ed. 411.) A case which clearly supports this principle that large general words will frequently be cut down and given a very restricted meaning is found in *Ashbury Railway Co.* v. *Riche*, 7 H.L. 653. There the term "general contractors" following the term "mechanical engineers" in the memorandum of association was held to have a limited meaning. The words of the articles of association, after enumerating a number of special things the company could do, concluded with the words, "To carry on the business of mechanical engineers and general contractors." Lord Cairns, Lord Chancellor, stated: "It appears to me upon all principles of construction these words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works, first, to make and sell or lend on hire railway carriages and waggons and all kinds of railway plant, fitting, machinery and rolling stock, that is, an object sui generis and complete in the specification which I have read. The second is, to carry on the business of mechanical engineers and general contractors; that again is the specification of an object complete in itself, and according to the principle of construction the term "general contractor" would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers, such contracts as mechanical engineers are in the habit of making and are in their business required or find it convenient to make for the carrying on of their business."

The conclusion of the matter then is, that the words "plant and appliances" used in sub-s. 4 must be confined to any plant and appliances located upon the streets, roads and highways and other public places in the municipality, such words taking this limited meaning because they must be referred to the words "rolling stock" which immediately precede them in the same sub-section, and because it was manifestly the intention of the Legislature in enacting a new s. 18 of the Assessment Act to deal only with the method of assessing so much of the property of the companies named in sub-s. 2 as was situate upon the public streets of the municipality.

ELECTION CASES.

Osler, J.A.] IN RE LENNOX PROVINCIAL ELECTION. [Nov. 10.

PERRY *v.* CARSCALLEN.

Parliamentary elections—Controverted election petition—Affidavit of petitioner's bona fides—Commissioner—Qualification—Agent for solicitor.

The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of bona fides and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioners' solicitors, the petition was presented.

Held, that the commissioner was not disqualified.

C. A. Masten, for respondent. *R. A. Grant*, for petitioners.

Province of Nova Scotia.

SUPREME COURT.

McDonald, C.J.] [June 6.

BARTLETT *v.* NOVA SCOTIA STEEL CO.

Stay of proceedings.

Security was given and allowed on an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of Nova Scotia granting a new trial. On an application by defendants to stay execution and all proceedings the plaintiff objected to a stay as to the trial and other proceedings, but did not object to the stay of execution.

Order made staying the trial and all proceedings pending the appeal and held that the judge of the Court appealed from had jurisdiction to order the stay.

J. A. Chisholm, for plaintiff. *Henry*, for defendants.

Weatherbe, J.] CROCKETT *v.* ACADEMY OF MUSIC. [July 2.

Company—Application of earnings.

The defendants being an incorporated company issued some preferential stock, which was declared to be a first charge upon its property and bore interest. At the trial of the action it appeared that for several years the earnings did not warrant a payment of any interest. Subsequently the

earnings increased and there was money applicable to interest or dividends. The question was how this money should be applied.

Held, that the earnings applicable to interest must be paid first on the preferential stock for all the back years; and that then when these payments were satisfied the balance was applicable on the common stock.

Borden, K.C., for plaintiffs. *Drysdale*, K.C., for defendants.

Province of Manitoba.

KING'S BENCH.

Richards, J.] LAW *v.* ACTION. [Oct. 4.

Will—Revocation of legacy—Statute of Mortmain—Bequest "to the three oldest and poorest people" in the municipality.

This was an action for the construction of the codicil to the testator's will. The will gave two thousand dollars to his son William McMurray, and no other person named William was mentioned in it. The codicil was as follows: "This is a codicil to my last will and testament. I am sorry, my dear William, to make this alteration. I cut you off my will and leave you two hundred dollars. You know how you have used me to make me do this. I leave five hundred dollars to Acton School, five hundred dollars to Eden Presbyterian Church, five hundred dollars to Winnipeg Hospital, and three hundred dollars to the three oldest and poorest people in Rosedale municipality. . . . ."

Held, 1. The bequest of two thousand dollars to the son William was revoked by the codicil and that a new bequest of two hundred dollars was made to him.

2. The Statute of Mortmain, 9 Geo. 2, c. 36, is in force in Manitoba and prevents the bequest to the school district of Acton from being valid except for such proportion of it as the pure personality of the estate bears to the whole estate.

Re Stæbler, 21 Q.A. 266, and Theobald on Wills, 15th ed., p. 342, followed; *Brook* v. *Badley*, 3 Ch. App. 672, and *Re Watts*, 29 Ch. D. 947, distinguished.

In the absence of legislation there is nothing to prevent a school corporation from receiving a bequest not declared void by the Statute of 9 Geo. 2, c. 36.

3. The Eden Presbyterian Church and the Winnipeg General Hospital having been empowered by legislation to receive such bequests, they are valid.

4. The gift of three hundred dollars to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out.

Theobald on Wills, 5th ed., p. 322, and cases there cited.

Haggart, K.C., for executors. *Colin Campbell*, K.C., A.-G., and *Crawford*, K.C., for Presbyterian Church.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] CREWE *v.* MOTTERSHAW. [June 2.

Trespass—Adjoining owners—Escape of fire—Maintaining dangerous thing—Liability for—Negligence immaterial.

Action for damages. Plaintiff and defendant were adjoining land owners and a fire started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's land.

Held, applying the principle of *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, that the defendant maintained the fire at his own risk and was responsible for the damage caused by it. Judgment for plaintiff for $300.

Costs on County Court scale allowed, as action should have been brought there.

J. H. Simpson, for plaintiff. *F. McB. Young*, for defendant.

Full Court.] IN RE OKELL MORRIS CO. [June 26.

Winding-up—Right of creditor to ex debito justitiæ—No available assets—Examination of officers.

Appeal from an order of HUNTER, C.J., dismissing a winding-up petition.

Held, the Court has a discretion to grant or withhold a winding-up order under s. 9 of R.S.C., 1886, c. 129.

Re Maple Leaf Diary Co. (1901) 2 O.L.R. 590, followed.

A company will not be compulsorily wound-up at the instance of unsecured creditors where it is shewn that nothing can be gained by a winding-up, as for example, where there would not be any assets to pay liquidation expenses.

On the hearing of a winding-up petition which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the company.

Held, on appeal, that it was too late then to grant an inquiry.

Peters, K.C., for appellant. *Duff*, K.C., and *F. Higgins*, for respondents.