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BARGAINS WITH HEIRS AND EXPECTANTS.

Probably few lawyers will be disposed to controvert the statement that our Legislature in introducing changes in the law has displayed a disposition to adopt very generally, and commonly ipisissimis verbis, legislation which has been passed by Great Britain, and which has met with approval there. Examples of this are too numerous and too well-known to require enumeration.

No one will be inclined to cavil at this practice. On the contrary, all who realize the wisdom of the English legislation, and the vast amount of the best trained thought of which it is the outcome, will rejoice that our legislators have had the good judgment to pursue the course indicated, and thus make part of our own law the many admirable enactments that have had their birth in the older land.

That being the case, it is refreshing to find evidences that our legislators, while pursuing this general course, have not confined themselves simply to a slavish acceptance of the legislative changes that have been made in the common law by their English confreres, but have themselves applied intelligent and discriminating consideration to the English Acts before adopting them as the law of our Province. Possibly no better example of this is afforded than the legislation, English and Ontarian, upon the subject which forms the heading of this article.

All lawyers remember the doctrine and practice of the Court of Equity, prior to the special legislation upon the subject, with respect to dealings with reversioners, remaindermen, heirs and expectants, and persons entitled to future interests.

Such dealings were treated as falling under a distinct heading, as one of the well-recognized branches of the somewhat large subject constructive fraud, and the doctrine and practice of the Courts with regard thereto may be generally stated as follows:—

Bargains with heirs, reversioners and expectants during the life of their parents or ancestors were invariably relieved against unless the purchasers could shew that a fair price was paid, fraud in such cases being always presumed from inadequacy of price (*Peacock* v. *Evans,* 16 Ves. 512; *Hincksman* v. *Smith,* 3 Russ. 433; *Aylesford* v. *Morris,* L.R. 8 Ch. 484); and the onus in such cases lay upon the person dealing with the reversioner or expectant to shew that the transaction was reasonable and bonâ fide (*Gowland* v. *De Faria,* 17 Ves. 20; *Lord* v. *Jeffkins,* 35 Beav. 79). The principles on which the relief in these cases was based are set out by Lord Hardwicke in *Chesterfield* v. *Janssen* (1750) 2 Ves. Sen. 125.

That being the well-recognized doctrine of the Court of Chancery upon the subject the English Parliament in 1867 proceeded to deal with the matter by passing an Act (31 Vict. c. 4) in the following terms: "No purchase made bonâ fide and without fraud or unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue."

No one will be inclined to find fault with the propriety of varying the old doctrine by legislation. So many cases of harshness and injustice had arisen and been exemplified in the Courts of Great Britain by reason of this doctrine that it was imperative that some remedy should be applied, but the peculiar terms in which the English Parliament purported to apply the remedy are noteworthy.

The dominant idea in the minds of the legislators evidently was that the single circumstance of inadequacy of price should not of itself be deemed sufficient to avoid the transaction, but that some circumstance of want of bona fides, or actual fraud, must be superadded to warrant that result. That being the case it certainly seems to indicate a most unfortunate oversight or lack of judgment that the words "unfair dealing" were included in the statute.

One would be inclined to say that the mere fact itself that there was inadequacy of price would seem ipso facto to import that there could hardly be absolutely fair dealing, and that being so it would seem to result that the whole object of the Act

would, by reason of this peculiar wording, be rendered well-nigh nugatory. At all events the vexing question would always be left open, where the sale of a future interest was mooted, whether the price proposed would be deemed by the Court to be an adequate consideration or not, and so transactions of the kind be greatly hampered. Accordingly we need not be surprised to find the English Courts holding that, notwithstanding the expression of the Act, the onus had not been thereby shifted, and fastening upon the words "unfair dealing" to warrant them in adhering to the old rule of decision.

If it were the case that all transactions of the nature of those in question were necessarily of an evil nature and reprehensible no great harm would be done by this view. But that is by no means the case.

As very aptly pointed out in the case of *Brenchley* v. *Higgins*, 83 L.R.N.S. (1901) 751, extremely meritorious instances of transactions of the kind frequently occur in families, and the rule in question has been found to operate very harshly in such cases. In the case of *Tyler* v. *Yates*, 11 Eq. 265; 6 Ch. 665, Lord Hatherley expresses his view of the English Act, and its raison d'être as follows:—"The legislature has not repealed the doctrine of this Court by which protection is thrown around unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities. I conceive the reason why the law as to sale of reversions was altered to be that the doctrine of this Court had been carried to an extravagant length on that subject." See also *Aylesford* v. *Morris*, supra.

The latest English case in which this subject has been extensively dealt with is *Brenchley* v. *Higgins*, above referred to. The matter had been discussed at some length by Lord Selborne, L.C., in the earlier case of *Earl of Aylesford* v. *Morris*, 28 L.T. Rep. 541, L.R. 8 Ch. App. 484. In *Brenchley* v. *Higgins* the plaintiff, a man of thirty years of age, had sold £1,000 of a certain reversionary interest expectant on the death of his mother, a lady of seventy-two years of age, for £300. The case came before the Court of Appeal (Rigby, Williams, and Romer, L.JJ.,) on appeal from the Chancery Division and the judgments of the learned justices throw such a flood of light on the view taken by

the English Courts of the Act in question that they are worth quoting somewhat extensively.

Mr. Justice Rigby begins his judgment by declaring that the appeal depends principally if not altogether on the construction of the Sales of Reversions Act, 1867, and after citing the Act (as quoted above) proceeds: "Now to come within the meaning of the Act such a purchase must be made bonâ fide and without fraud or unfair dealing. We have to consider what the law was at the time the Act was passed, and whether, or how far, it has been altered by the Act. As I understand it, the law was that in dealing with expectant heirs (and the plaintiff in this case comes within that description) all persons—whether they were money-lenders or not—were bound to shew, and had the onus thrown upon them of proving, the absence of fraud or unfair dealing. I do not consider that this Act of Parliament in the least alters that. It is incumbent now upon a person who has purchased a reversion to prove substantively that there was no fraud, and that there was no unfair dealing, and then, if he once establishes that, the purchase comes within the Act and the sale is not to be set aside merely for undervalue. Now, that rule has always been the rule of the Court of Chancery and has not been in any way interfered with by this Act, but it did operate very hardly in certain cases. I will not attempt to go through all those cases, but this may be said to be a type of them. Where, for instance, a father purchased a reversion from his son, and there was the most evident fair dealing; for instance, where the reversion had been carefully or in fact valued, where the fair dealing was undoubted, and the father may have been perfectly unwilling to purchase it, but bought it for the benefit of his son; if it turned out as a matter of fact that the reversion was undervalued—I do not mean by a mere nominal sum, but to such an amount that the Court looked upon it as material—all the fair dealing in the world was of no use, and the sale of the reversion was set aside; and I think I may say that in some cases the difference between a substantial and a really unsubstantial sum in the valuation was lost sight of, and there were hard cases where, because by accident or even by the fault entirely of the purchaser the full, fair, and adequate value had not been given, the sale

might be set aside. It was, I think, to meet those cases that this Act was passed. It is possible it might include other cases, but in all cases it is incumbent upon the purchaser, resisting an action to set aside the sale to shew first of all that there was no fraud and no unfair dealing. I rely upon those words "unfair dealing." Now, first of all, I consider that the very fact of an unfair, inadequate price having been given—not of a trifling inadequacy, but of a very substantial inadequacy—necessarily had to be considered on the question, was the transaction without unfair dealing? I do not say you could always decide upon that fact that there was unfair dealing so as to take it out of the Act altogether, but certainly it is a very material consideration. The Courts always treated, and until a plain Act of Parliament is passed reversing the rule they always must treat, the seller of a reversion as being fettered and bound, so it is very difficult to establish that a transaction with him is quite fair."

Then after commenting at some length upon various circumstances of unfair dealing connected with the case the learned judge proceeds: "I do not see how it can be otherwise than unfair, and, if so, the transaction does not come within the Act—the Act has no reference at all to such a case."

Mr. Justice Williams, in agreeing with the judgment of Rigby, L.J. (which was that the transaction be set aside), expresses himself as follows: "Then this Act of Parliament was passed, s. 1 of which says: 'No purchase made bonâ fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall be opened or set aside merely on the ground of undervalue;' and we have to consider what is the law as it is constituted since the passing of that Act of Parliament. The matter was much discussed in the case of *Earl of Aylesford* v. *Morris* (ubi, sup.) in which case Lord Selborne delivered the judgment of the Court. Lord Selborne, in speaking of the effect of the statute, says that 31 Vict. c. 4, 'is carefully limited to purchases made bonâ fide and without fraud or unfair dealing,' and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the onus probandi in those cases which, according to the language

of Lord Hardwicke, raise 'from the circumstances or the conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud.' Now, that being the state of things, the onus, as I understand that judgment, is still thrown upon the person dealing with the heir expectant to rebut the presumption arising from the circumstances and conditions of the parties contracting, but it is no longer true that the mere proof of inadequacy of price will render it impossible for him to rebut that presumption, and the statute seems to me to shew what he must do in order to rebut the presumption. He must shew that the purchase was made bonâ fide and without fraud and without unfair dealing. Now, so far as actual fraud in fact is concerned, I do not think that the learned judge found that it existed here. But he found that the price was inadequate, and grossly inadequate. Although the mere fact of the price being grossly inadequate is undoubtedly a material element to take into consideration when dealing with the question whether the onus on the person dealing with the heir expectant has been satisfied—that is, the presumption of fraud has been rebutted—I doubt whether you can, merely upon the ground of inadequacy of price since the statute, say that the party has failed in the onus which has been cast upon him. But it is not necessary in this case to go that length. Although it may be that in this case there is no proof of fraud, that there is no proof of what Lord Selborne in *Earl of Aylesford* v. *Morris* (ubi sup.) refers to as a deceit or circumvention, yet the circumstances quite apart from the inadequate price, considered alone, do shew that there was unfair dealing. Now, what is there that you have to add to the grossly inadequate price here, because, following the ruling of Lord Selborne, I take into consideration the grossly inadequate price, and I look to see whether there is anything else going to shew that there was unfair dealing, by which I understand taking an unfair advantage of the weakness of the heir expectant, or his desire to avoid publicity or anything of that sort. Under those circumstances, without deciding that the inadequacy of price, although gross, if it had stood alone would have been sufficient since the statute, it seems to me that, if you take the inadequacy

of price plus these other matters connected with the transaction, it is impossible to say that this was a purchase bonâ fide made without fraud and without unfair dealing."

And Romer, L.J., puts the matter as follows: "I agree. The learned counsel for the appellant tried to persuade us to consider a purely academic question, whether since the Act 31 Vict. c. 4, inadequacy of price, even though gross, would be sufficient in itself to upset the purchase of a reversion, apart from all other considerations. It appears to me useless to argue such a point. You must of necessity consider some other circumstances of the purchase to some extent. For instance, it may well be that even gross inadequacy of price may not be sufficient in itself to upset the sale of a reversionary interest under some special and peculiar circumstances that one could imagine. Suppose, for example, a father having a reversion, wishing to give a son an advantage, sells it to the son for, say, half its real value, the father well knowing the value of the reversion and the son being perfectly innocent in the matter and not unduly persuading his father. Of course, in such a case as that you could not lay hold of the gross inadequacy of price and say that in itself is sufficient to enable the father to upset the sale as against the son. To see whether gross inadequacy of price would be sufficient to set aside a sale you must, of course, look at the general circumstances of the sale—between whom it was made, and how it was brought about. Undoubtedly, under many ordinary circumstances of the sales of reversions, gross inadequacy of price might in itself be sufficient to enable the Courts to conclude that the purchase was an unfair one as against the purchaser. In such a case the purchaser could not avail himself of the benefit of the Act, for the Act does not apply at all to purchases unless they were made bonâ fide and without fraud or unfair dealing, and in that case the purchaser could not avail himself of the protection of the Act, and the case would have to be dealt with by the Courts upon the ordinary principles of equity applicable to it."*

*Further reference upon the subject may be made to *Miller* v. *Cook*, 10 Eq. 641; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; *Baldwin* v. *Rochford*, 2 Ves. Sr. p. 517.

It will be observed on consideration of these judgments that the opinion of the learned judges was unanimous, that the Act had not, in the slightest degree, shifted the onus which theretofore lay on the party dealing with the expectant heir to prove the absence of fraud or unfair dealing.

The effect of the Act would seem to be that subsequent to its passage the inadequacy of consideration must be so gross as to amount to evidence of fraud.

Speaking of the decision in *Brenchley* v. *Higgins*, Mr. Walter Ashburner in his recent work on Equity says (p. 411): "The decision, therefore, might be supported on the grounds stated above, but the Court of Appeal while professing to follow Lord Selborne speak as though an expectant heir still stood in a privileged position, and lay down that the onus lies on a purchaser from him of shewing that the transaction was bonâ fide, without fraud, or unfair dealing. Where the price is grossly inadequate that onus, if the language of the Court is pressed—will be almost impossible to sustain."

It may be added that there has been no precise rule either before or since the Act as to what difference between the real value and the price paid constitutes inadequacy. Under the Roman law anything in excess of half the real value was deemed sufficient to uphold the transaction; but under the rules of English equity the Court decides each case on its own circumstances.

One cannot fail to be struck on reading the above quoted judgments, with the avidity with which the learned judges seized upon the term "unfair dealing" as their warrant for declining to consider that the English Act had made any change either in the onus probandi or in the general attitude of the Courts toward cases of the nature of those dealt with in this article.

Owing to the difference in conditions of the two countries, the number of persons in Ontario occupying the position of heirs and reversioners is comparatively restricted, and the cases in our own courts are accordingly not numerous.

The law upon the subject was, however, considered in the case of *Moricy* v. *Totten*, 6 Gr. 176, and it was there held that the same rule applies in Ontario as in England.

It is extremely interesting, therefore, to note that our Ontario Act R.S.O. c. 119, ss. 33-35 dealing with the same subject, while following almost verbatim in other respects the English Act, contains the significant variation that the words "unfair dealing" are entirely omitted.

The exact differences between the two enactments are indicated by the brackets in the following extract from the Imperial Act: "No purchase made bonâ fide and without fraud [or unfair dealing], of any reversionary interest in real or personal estate shall [hereafter] be opened or set aside [merely] on the ground of undervalue." The bracketed words are omitted in the Canadian Act. The latter also contains a provision not found in the English Act that in cases arising out of transactions prior to 4th March, 1868, the onus of proving undervalue shall be upon the person attacking the bargain.

One would certainly be inclined to say, having in view the purpose sought to be effected by the Act that the inclusion of the words "unfair dealing" could scarcely fail to be a source of embarrassment in transactions aimed at by the Act, and our Ontario legislators are entitled to full credit for their astuteness in foreseeing (and avoiding by omission of the dubious words) the very difficulty which was subsequently pronounced upon by the English judges, as above indicated, to render to a large extent nugatory the English special legislation.

Perhaps it is scarcely possible to bestow the same commendation on the other change in our Ontario Act, viz., the omission of the word "merely."

F. P. BETTS.

THE BENCH AND BAR OF TO-DAY.

BY A LAYMAN.

The changes which have taken place during the last fifty years in the economical, social, and political conditions of this country—the increase of wealth, and its distribution—the growth of population, and the many new elements introduced—the rise of great corporations, rich and correspondingly influential—the larger national issues occupying the public mind—have not failed to produce a change in the position which the legal profession now occupies as compared to that which it held in our early history. Then it gave, almost, the only road to social eminence, and political advancement—now it has competition in every direction. Men engaged in trade and commerce—managers of great corporations—captains of great industries—occupy a larger space in the public view than was possible when the great developments of late years had not begun. Higher education is more widely diffused, and not, as formerly, confined to members of the learned professions.

Besides these there are many reasons for the apparent relative decline in the importance and influence of the judges of our Courts. It is no disparagement to those who now sit on the Bench to say that among their predecessors were men who had taken a great part in the public events of those early days of our struggle for existence, and that their names are associated with that part of our history in which we take most pride. And in making any comparison between the past and present it must be remembered that then there were not the facilities for earning large incomes outside of the profession which now exist—that the salaries of the judges were more in proportion to the cost of living, and to the incomes earned at the Bar, than has been the case for many years. From every point of view a seat on the Bench was then a prize worth accepting for its own sake—not as now thought of as beneath the consideration of men of eminence in the profession, or only to be regarded as a dernier resort, or as a position useful for some temporary purpose to be put aside when anything better presented itself. Then the position

of a judge, being both lucrative and honourable, and attracting men of distinction, those who held it were looked upon with the respect which its actual status demanded, and the prestige attaching to it from old association freely accorded. When the advantages of the position, either relative or positive, became less, and no longer attracted the highest class of those qualified to fill it, then both positively and relatively the Bench declined in public estimation.

Another cause acting in the same direction is the general falling off of litigation, and especially in country districts. In former days the assizes were among the great events of the year —the judges were met with a certain degree of state—the great lawyers who came to take part in the trials were looked upon with interest—the cases entered for trial were numerous and important—in some of them the whole country-side would be concerned and opposing factions arrayed to support the parties to the suit. In the trials themselves the greatest interest would be felt—the evidence, the deportment of the witnesses—the arguments of counsel keenly criticised—the faces of the jury closely watched for tokens of sympathy with one side or the other—the judge's charge listened to with the respect due to the words of one so highly exalted—and lastly the finding of the jury waited for with anxiety. All this glory has now departed. In the country the spirit of litigation is dead, or the occasions for it no longer arise. The sittings of the Courts pass unnoticed—judges come and go with no more pomp than commercial travellers—lawyers are few, there being no occasion for their services. Of the cases tried many are withdrawn from the jury, and, therefore, attract no attention. Thus everything conspires to diminish in public estimation the importance of the Court and its officers. Its proceedings no longer excite interest. The counsel at the close of a long-contested case, in which every emotion has been excited, every faculty exerted, from the passionate appeal to the jury to the calm, dispassionate summing up of the judge, is no longer the foremost figure in the sight of a wondering and admiring multitude, and his fame held in renown from one Court to another.

But if it is true, as here contended, that the changed conditions of the times has altered the relative position of both Bench and Bar, how much more necessary is it for those who are professionally concerned, and for those outside of the profession who regard its dignity and integrity, and especially the dignity and integrity of the Bench as most important for the well-being of the country, to do everything that can be done to uphold them, and to oppose everything that may tend to degrade them.

As regards the former the raising of the salaries of the judges was a step in the right direction, but too small to be of any use in the premises. It is, however, in the nature of the appointments made that the most effective work can be done. Political service need not be overlooked, but other qualifications are more essential, and in no respect can a government so easily secure the good-will of the reflective portion of the community as by wise selection of men for offices of state, and especially for positions on the Bench. Needless to say that when appointed the judges have the reputation of the Bench in their own hands. None are so much interested in upholding it, and none can do so much to accomplish that object. No man should accept the office of a judge in any of our Courts who does not feel himself competent to discharge its duties, and who does not feel the great responsibilities which attach to it.

A step in the direction of lowering the dignity, and perilling the reputation of the Bench, was taken when men in high position upon it left their seats to re-engage in political life, and, of course, in political strife. It is much to be regretted that men of the eminence of Sir Oliver Mowat and Sir John Thompson should have set such an example, the blame for which reflects not only upon themselves, but also upon the political leaders in whose interest they acted. No party exigency should have influenced any statesman to take such a course—least of all those by whom it was taken. It is earnestly to be hoped that there will be no repetition of this abuse, for abuse it certainly is. No judges will be held in respect if they are supposed, while having one eye upon the pleadings before them, to have the other upon affairs of party or politics, watching for a favourable opportunity of leaving the Bench for the hustings, or the courts of law for the court of Parliament. It has long been the boast of our system of juris-

prudence that our judges were entirely removed from, and above, political influences of every kind. Such can not be the case if a man may be a judge to-day and a party leader to-morrow. The two positions are entirely different, and no man can properly fill the one if he has in contemplation the prospect of the other.

Having been brought up with a feeling of deep respect for the dignity, importance, and responsibility of the Bench, the layman looks upon elevation to it as the most honourable position to which any of his fellow subjects can attain. The idea, therefore, that one who has been called to such a place of honour and usefulness, can be willing to desert it for the sake of political advancement, or personal gain, at once creates a feeling that after all the Bench in not entitled to the respect with which it has hitherto been regarded and of which it will be no longer the object.

The legal profession is no doubt able to take care of itself; yet, being a close corporation and a strict monopoly, it may be as well for it, in these iconoclastic days, to take heed to its ways, and be wise. It is otherwise with the Bench. In it the interest of the profession is secondary to that of the public whose welfare it so largely controls, and who, therefore, have the largest concern in seeing that its dignity, its independence, and its integrity are maintained.

SIR WILLIAM MULOCK.

The Exchequer Division of the High Court of Justice for Ontario has at last been vouchsafed a Chief Justice; the late Postmaster-General, Sir William Mulock, K.C., LL.D., having been appointed to fill the vacancy.

One so well-known in political circles and a leading and forceful member of the Dominion Cabinet had doubtless a claim to any position of honour in the gift of his party. Whether the selection will prove to have been a good one remains to be seen, for the new Chief Justice has not occupied that prominent position at the Bar, which, as a rule, should mark a man as fitted for the responsible position of a judge; and, moreover, other pursuits than law have for many years occupied his attention. In this

connection the appointment has been, and not unnaturally so, adversely criticised. But here it may be observed that many of the best judges both here and in England were not prominent at the Bar.

With most men the fact that they had been for a long time divorced from professional study and experience, and necessarily with much to learn, would be a much more serious matter than we believe it will be with a man of the indomitable perseverance and phenomenal industry of Sir William Mulock. If we may judge of his future on the Bench from the success which has attended him in other positions in the past, we may well venture to think that he will, notwithstanding the difficulties above referred to, in a comparatively short time, make a most useful and successful judge. It is at least quite certain that no judgment will be given by him until both the law and the facts have been thoroughly mastered; and no time, labour or research will be spared on his part to arrive at a just conclusion on all cases which may come before him for adjudication. A large fund of common sense, a wide business experience and an extended knowledge of men and things will contribute to his usefulness on the Bench.

Essentially a self-made man he has fought his way to the front —the artificer of his own fortunes—with honour and credit. In this the sympathy and good wishes of all true men go out to him and gives us good ground for congratulating him, as we heartily do, on gaining the high position he now occupies on the Bench of his native province.

Sir William was a gold medalist at the University of Toronto, and became its Vice-Chancellor in 1881. He was called to the Bar with honours in 1868, being first in the honour classes both for certificate of fitness as solicitor and for call to the Bar. He was subsequently appointed one of the Lecturers and Examiners of the Law Society. In 1882 he entered Parliament, and in 1896 became a member of the Laurier Government as Postmaster-General.

FROM BENCH TO BAR.

The Benchers of the Law Society of Upper Canada recently adopted a report of their Discipline Committee, dated June 16th last (see post, p. 806), concerning the retirement of judges to resume private practice. This, it may be remarked in passing, was long before Mr. Justice Nesbitt left the Supreme Court Bench. That event, however, has again called attention to a subject which has on previous occasions come up for discussion in legal circles. We also publish in another place a communication on the same subject (see post, p. 778), from a layman, which probably represents in a large measure the thought of the lay mind.

Several years ago we expressed our view on this question, and have nothing much to add to what was then said, except this, that if the public want the best men at the Bar as judges, and desire that they should stay there until they retire on a pension they must provide such salaries as will make the Bench a prize, even to the leaders of the Bar, and enable retiring judges to live comfortably without having to add to their income by again going into business. Such a proper and necessary provision is made in England (though even there and in several of the colonies there are instances of judges leaving the Bench and going back to practice), but is not adequately made in this country. It is, therefore, idle to expect the same results when the conditions are so entirely different, and it must be remembered that that which was a reasonable salary half a century ago, when the Bench occupied relatively a much higher position than it does now, is ridiculously inadequate in these days. These are times when one's social position is (grievous pity though it may be) largely dependent on wealth; and, if a judge of any Superior Court is to occupy the position of honour he should, it is necessary he should be paid a salary sufficient to keep up the dignity of that position.

As to the voluntary retirement of judges it is easy to imagine a variety of circumstances which would disarm criticism as to any individual in that regard; and so, whilst we regret the retirement of the learned judge referred to (now plain Mr. Nesbitt, K.C.), both on account of the principle involved as well as because it is a loss to the Bench, we have no doubt there were

good and sufficient reasons for his action. There have been in the past, and will be in the future, occasional awkwardnesses and unpleasantnesses, and possibly unkind comments by litigants, owing to the change of position, but these cannot be avoided, and must be endured and lived down.

The general principles covered by the resolution and the views of our correspondent are doubtless sound, but they must be considered in the light of attendant circumstances; and, after all, we are glad to think the discussion is academic rather than practical.

The sentence pronounced by Mr. Justice Street in the Gow case, where the prisoner was found guilty of manslaughter "with a strong recommendation to mercy," has been the occasion of much adverse criticism in some of the daily papers; and, to the casual observer, this criticism does not seem altogether out of place. The adequate sentencing of criminals, however, is a much more difficult question than most people are aware of, and has been for centuries the occasion of much doubt and discussion. It not only involves problems complex in themselves, but necessitates a very accurate knowledge of the circumstances of each particular case—such knowledge of all the facts, circumstances, springs of action and the character and environment of the prisoner as can only be possessed, or at least must be best possessed, by the judge who tries the case. We have, therefore, on this occasion no criticism to offer, inasmuch as we are not in a position to do so. At present, we can only say, and feel bound to say, that no judge on the Bench is better fitted to form a fair, calm and dispassionate opinion of what was best under the circumstances of that unhappy event than Mr. Justice Street. He enjoys the confidence of the Bar to a very marked extent, and they will refuse to believe, without much better reason than has been given, that he has not on this occasion acted with the same general judicial soundness that has characterized his rulings up to the present time.

The suggested reduction in the representation of Ireland in the British Parliament is being discussed in some of the English legal journals in view of the jealousy with which lawyers view any attempt to tamper with contracts and treaty rights. The Union Act of 1800, we are told, included provisions which were intended to be permanent and inviolate, but the *Law Times* comments upon the results necessarily flowing from that union as follows:—"Just, however, as individuals can with mutual consent modify their own engagements, so also can these congeries of units whose personalities are merged in representative bodies. Consider what in these cases those bodies were. They were originally two Legislatures which, for certain reasons, good or bad, agreed to unite. They had each inherent powers of growth and self-evolution which were, as it were, merged in the united Legislature for their common advantage." After referring to the process of change and growth found in legislative bodies endowed with vitality, and citing appropriate illustrations, the writer continues:—"The same united Legislature which carried this change can, with equal facility, make other modifications after an expression of consent declared in the way ordinarily adopted by such bodies. It is, of course, within the knowledge of all that proposals were at one time before the country, not merely to modify the Act of Union, but to abolish it. The right of any Parliament to modify the actions of its predecessors is absolute and indestructible, and essential to the well-being of a progressive State. It would be subversive of the very foundations of modern government to accept any idea akin to the law of the Medes and Persians which altereth not. The notion is also illogical and impossible, for it would at once do away with the doctrine of legislative supremacy if it were hampered with such restrictions and immutabilities. It is, in law, perfectly clear that the united Parliament can make what modifications it pleases in these compacts; such alterations have been made in the past with the concurrence of the majority of its members, and can again be made in the future. Whether or not such changes are good or bad, it is no business of ours to inquire."

REVIEW OF CURRENT ENGLISH CASES.

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PETITION OF RIGHT—INTERNATIONAL LAW—ANNEXATION OF ENEMY'S TERRITORY—CREDITORS' RIGHTS AGAINST CONQUEROR —ACT OF STATE—MUNICIPAL COURTS.

West Rand Mining Co. v. *The King* (1905) 2 K.B. 391 is a case arising out of the late South African war: the suppliants filed a petit⸱n of right in which they alleged that gold, the produce of their mine situate in the late South African Republic, had been taken possession of by the Government of the Republic, and that by the laws of the Republic the Government was liable to return the gold, or its value to the suppliants: and they claimed that by reason of the annexation of the territories of the late Republic the obligation of the Republic towards the suppliants was now binding on His Majesty the King; but on the King's behalf the point of law was raised by demurrer that no such right could be enforced in any municipal Court, and the Divisional Court (Lord Alverstone, C.J., and Wills, and Kennedy, JJ.,) held that it could not. In the judgment of the Court delivered by Lord Alverstone, is to be found an interesting discussion of the limitations of international law; and the distinction is pointed out between mere private rights of property in conquered territory, and the contractual obligations of the Government of the conquered territory; and while it is conceded that the former may be given effect to, so far as computible with the rights of the conqueror, it is shewn that no contractual obligation of the conquered Government can be enforced against the conqueror, in any municipal Court, except such as he expressly elects to assume: and that in taking possession of a conquered territory, there is no implied agreement on the part of the conqueror to assume any of the contractual obligations of the Government he has overthrown.

MORTGAGE—ENTRY OF MORTGAGEE—RELATION BACK OF RIGHT OF POSSESSION—TRESPASS ANTECEDENT TO ENTRY BY MORTGAGEE —RIGHT OF ACTION.

The Ocean Accident Co. v. *Ilford Gas Co.* (1905) 2 K.B. 493 was an action for trespass to land, and the only point in question was whether the plaintiffs were entitled to maintain the action. The damage was caused in June, 1903. The plain-

tiffs were at the time of the trespass equitable mortgagees of the land, under a deed which provided that they might at any-time take possession. At the time of the trespass the mortgagor was in possession, but in September, 1903, the plaintiffs took possession. It was contended that the doctrine of relation back only applied where the legal title at the time of the trespass was in the person who subsequently took possession, but the Court of Appeal (Collins, M.R., and Mathew, and Cozens-Hardy, L.JJ.,) overruled this contention, and held that it applied to the case of a person having only an equitable title to possession.

LANDLORD AND TENANT—GOODS OF LODGER—ILLEGAL DISTRESS—LIABILITY OF BAILIFF TO AN ACTION—LODGERS' GOODS PROTECTION ACT 1871 (34, 35 VICT. c. 79), s. 2—(R.S.O. c. 170, ss. 39, 40).

In *Lowe* v. *Dorling* (1905) 2 K.B. 501, the landlord of premises having put in a distress for rent, and seized thereunder the piano of a lodger, the latter served the bailiff with a declaration under the Lodgers' Protection Act (see R.S.O. c. 170, ss. 39, 40) setting forth that the piano was his property. Notwithstanding such declaration the bailiff sold the piano, and the present action was accordingly brought against him by the lodger for illegal distress. On behalf of the defendant it was contended that no action lay against him, but that the plaintiff's remedy was against the landlord, and a decision of Darling, J., *Page* v. *Wallis*, 19 Times 393, was relied on; but the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.,) held that that case had been wrongly decided, and gave judgment in favour of the plaintiff.

DATE OF JUDGMENT—ACTION FOR UNLIQUIDATED DAMAGES—JUDGMENT FOR DEFENDANT IN COURT OF FIRST INSTANCE—RENEWAL OF JUDGMENT IN APPEAL—INTEREST ON AMOUNT RECOVERED—ANTE-DATING JUDGMENT—RULE 571—(ONT. RULE 629).

Borthwick v. *Elderslie SS. Co.* (1905) 2 K.B. 516 was an action to recover unliquidated damages. In the Court of first instance the action was dismissed, but this judgment was subsequently reversed by the Court of Appeal, and judgment given for the plaintiff for an amount to be ascertained. The amount of the damages was subsequently agreed to between the parties, but a dispute arose as to the date from which interest should be payable thereon, the plaintiff claiming interest on the damages

from the date of the original judgment dismissing the action, the defendants on the other hand claiming that they only bore interest from the time they were awarded by the judgment in appeal. The Court of Appeal (Collins, M.R., and Romer, L.J,) held, that nuder the Rules interest only runs from the date a judgment is given (see Ont. Jud. Act s. 116) unless the Court in exercise of its power under Rule 571 (Ont. Rule 629), expressly directs the judgment to be dated some other day than that on which it is pronounced. And this power to antedate the Court considered ought only to be exercised on good ground shewn, and where the delay has been that of the Court, and in no way attributable to the parties against whom a judgment is recovered, the fact of such delay is not a sufficient ground for ordering a judgment to be antedated.

DISCOVERY—LIBEL—INFORMATION ON WHICH DEFAMATORY STATEMENT FOUNDED—NAME OF INFORMANT.

Edmondson v. *Birch* (1905) 2 K.B. 523. Action for libel. The plaintiff sought to examine the defendants as to what information they had received which induced them to make the alleged defamatory statement, and from whom they received it: but the Court of Appeal (Romer and Mathew, L.JJ.,) being of opinion, from correspondence which had passed between the parties, that the information sought was not bonâ fide required for the purposes of the action, but really to enable the plaintiff to bring an action against the person from whom the information was derived, held that the interrogatory as to the person from whom the information was derived must be disallowed.

RAILWAY COMPANY—CARRIER—OWNER'S RISK NOTE—INJURY TO GOODS—NOTICE TO COMPANY—WILFUL MISCONDUCT.

In *Forder* v. *Great Western Ry.* (1905) 2 K.B. 532 the Divisional Court arrived at a conclusion which appears eminently unsatisfactory. The plaintiff shipped certain sheepskins to be carried by the defendants. On their arrival at their destination it was found that they were injured from having been carried on a car covered with wood chips. The plaintiff then notified the defendants' servant of the injury he had sustained, and informed him that more skins were to be shipped, and that the defendants' servants at the place of shipment should be notified to prevent a recurrence of the injury. Afterwards further skins were shipped on the terms of "an owner's risk" note, whereby the defendants were relieved from liability for injury to the goods in transit except such as might be occasioned by the wilful misconduct of

their servants. The County Court judge decided that the railway company's servants had been guilty of "wilful misconduct" in packing the second consignment with wood chips, but the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.,) held that they had not, because it did not appear that those who actually placed the goods on the cars knew that what they were doing was injurious to the goods; and mere negligence on the part of the defendants' servant, who had been warned of the injury to the first lot in not giving notice to the servants employed in actually shipping the second consignment, was not "wilful misconduct" within the meaning of the contract.

HUSBAND AND WIFE—MARRIED WOMAN—SEPARATE PROPERTY—ACTION BY WIFE AGAINST HUSBAND FOR DETENTION OF SEPARATE PROPERTY—MARRIED WOMEN'S PROPERTY ACT 1882 (45-46 VICT. c. 75), ss. 12-17—(R.S.O. c. 163, ss. 15, 19).

In *Larner* v. *Larner* (1905) 2 K.B. 539 the plaintiff, a married woman, sued her husband for the return of her separate property detained by him. For the defendant it was contended that a married woman could not sue her husband in detinue, that the right to sue her husband conferred by the Married Women's Property Act 1882, s. 12 (R.S.O. c. 163, s. 15), only enabled her to take proceedings "for the protection and security" of her separate property, which did not include the right to bring such an action as detinue. That the plaintiffs' proper remedy was by a summary application under s. 17 (R.S.O. c. 163, s. 19). The Divisional Court (Lord Alverstone, C.J., and Phillimore and Jelf, JJ.,) however, overruled these contentions and determined that under s. 12 the plaintiff was entitled to bring the action, and that s. 17 did not limit the right of the plaintiff under s. 12.

SALE OF GOODS—CONTRACT FOR DELIVERY IN INSTALMENTS—REPUDIATION OF CONTRACT BEFORE TENDER OF GOODS—WAIVER BY BUYER OF PERFORMANCE OF CONDITIONS PRECEDENT—INFERIORITY OF PART OF GOODS TENDERED.

Braithwaite v. *Foreign Hardwood Co.* (1905) 2 K.B. 543 was an action to recover damages for breach of contract for the sale of rosewood. The wood was to be delivered in instalments and cash was payable against each of bill of lading. Before the first instalment was tendered the defendants repudiated the whole contract, on the ground that the plaintiffs had violated an alleged collateral agreement not to sell rosewood to any other firm than the defendants'. This agreement, the judge at the

trial found, did not exist, and the defendants did not, on the appeal, dispute that finding. It was proved that part of the first instalment of wood was not of the quality stipulated for, and the judge had given judgment for the difference between the contract price and the sum realized by its subsequent sale by the plaintiffs, less the reduction in respect of the inferiority in quality of part of the first instalment. On the appeal the defendants contended that the inferiority part of the first instalment disentitled the plaintiff to any damages at all in respect of that instalment; but the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) held that the entire repudiation of the whole contract before tender of that instalment prevented the plaintiff from setting up the non-performance of conditions precedent on the plaintiffs' part, and the appeal was therefore dismissed.

COSTS—TAXATION—SOLICITOR AND CLIENT—THIRD PARTY—UNUSUAL COSTS—SOLICITORS ACT 1843 (6 & 7 VICT. c. 73), s. 38—(R.S.O. c. 174, s. 45).

In re Cohen (1905) 2 Ch. 137 the Court of Appeal (Williams, Romer and Stirling, L.JJ.,) have affirmed the decision of Eady, J., (1905) 1 Ch. 345. In this case an action was brought by a Mrs. Cotton which was compromised, one Edwards agreeing to pay Mrs. Cotton's costs as between solicitor and client. Edwards applied for a taxation of these costs, and on the taxation it appeared that certain extra costs were included in the bill, which the solicitors could only recover against their client by proving a special agreement therefor, and the question was whether Edwards was bound to pay these extra costs. The Court of Appeal held that the agreement of compromise was not to be construed as an agreement to indemnify Mrs. Cotton against all costs which her solicitor could call upon her to pay, but only her reasonable and proper costs, and that the fact of Edwards obtaining an order for taxation did not enlarge his liability so as to make him liable to pay the extra costs.

COMPANY — SHARES — SHARE CERTIFICATE — REGISTRATION OF TRANSFER WITHOUT PRODUCTION OF SHARE CERTIFICATE—NOTE ON CERTIFICATE—FALSE DECLARATION—NOTICE TO COMPANY'S AGENTS.

In *Rainford* v. *Keith* (1905) 2 Ch. 147 the Court of Appeal (Williams, Romer and Stirling, L.JJ.,) have reversed the decision of Farwell, J., (1905) 1 Ch. 296 (noted ante, p. 438), but on a branch of the case not dealt with in that report. By a refer-

ence to our previous note it will be seen that the point in that report was simply whether a company is liable in damages to the holder of a certificate of shares as security for a loan, for registering a transfer of such shares without requiring the production of the certificate, which bore on its face a note that no registration of the shares referred to therein would be made by the company without production of the certificate. But another branch of the plaintiff's case was, that the plaintiff claimed to be entitled to recover from the company £90 which it had received for the proceeds of the shares in question, and on this branch the Court of Appeal held that the plaintiff was entitled to succeed. The facts connected with this branch of the case were that Casmey, the holder of the shares, had, after depositing the share certificate with the plaintiff as security for a loan, applied to one of the directors of the company, in whose service he was, for an advance to relieve him from financial difficulties. He signed a declaration that the share certificate was in the hands of a friend, but not as a security for any loan; but he at the same time gave another memorandum to one of the agents of the company, sent to negotiate with him about the proposed advance, that the certificate was held by the friend as security for a loan. This latter information was withheld from the board of directors, who sanctioned the proposed advance of £180 to Casmey to be repaid by a sale of the shares in question for £90, and the balance by deductions from Casmey's salary. The sale of the shares was accordingly effected, and the proceeds, £90, paid over to the company. This the Court of Appeal now hold the plaintiff was entitled to recover from the company, on the ground that the facts established that the company was affected with notice of the plaintiff's charge on the shares. It was contended on behalf of the company that the loan to Casmey was ultra vires of the company; but the articles of the company empowered the directors "to lend money" and generally to undertake such other financial operations as might in their opinion be useful to the general business of the company, and this was held to justify the loan to Casmey, who was regarded as a faithful and confidential servant of the company. It thus became unnecessary for the Court of Appeal to deal with the important question as to the legal effect of the note on the share certificate, above referred to.

ANCIENT LIGHTS — SUBSTANTIAL OBSTRUCTION — DAMAGES — INJUNCTION.

In *Higgins* v. *Betts* (1905) 2 Ch. 210 the effect of the decision of the House of Lords in *Colls* v. *Home & Colonial Stores* (1904) A.C. 179 (noted ante, vol. 40, p. 502) was again under consideration, this time by Farwell, J. The action was brought to restrain

the interference with the plaintiff's ancient lights. The defendants defended the action, contending that sufficient light was left notwithstanding the interference for the ordinary purposes of user of the plaintiff's premises, and they claimed on the authority of the *Colls' case* that there could be no injunction, but merely a moderate sum for damages; but Farwell, J., came to the conclusion that the interference had caused a substantial injury to the plaintiff and he granted an injunction, and the case was ultimately compromised by payment of £600 damages.

SOLICITOR — SOLICITOR'S AGENT — LIEN OF AGENT — TAXATION — DOCUMENTS IN POSSESSION OF AGENT—PRODUCTION FOR PURPOSES OF TAXATION.

In re Jones (1905) 2 Ch. 219 a solicitor having become bankrupt his trustee in bankruptcy delivered a bill of costs to a former client of the solicitor, which the latter applied to have taxed. The application was made through the town agent of the solicitor, who had possession of documents relating to the business comprised in the bill on which the agent claimed a general lien. The trustee applied for an order for the agent to produce the documents for the purpose of the taxation, but Joyce, J., held that the agent could not be compelled to produce them until his lien was satisfied; and the fact that he had acted for the client in obtaining the order for taxation made no difference.

SIMPLE CONTRACT DEBT—PAYMENT ON ACCOUNT BY DEVISEE FOR LIFE OF DECEASED DEBTOR—STATUTE OF LIMITATIONS (21 JAC. 1, c. 16)—(R.S.O. c. 324, s. 38).

In re Chant, Bird v. *Godfrey* (1905) 2 Ch. 225 was an application by the plaintiff, claiming to be a simple contract creditor of a deceased person, for the administration of his estate. It was claimed by the defendants, who were devisees of part of the real estate that the plaintiff's claim was barred by the Statute of Limitations (21 Jac. 1, c. 16) (R.S.O. c. 324, s. 38; and see c. 133, s. 23). It appeared that within six years prior to the commencement of the action a payment on account had been made by the testator's widow, who was tenant for life of part of the testator's real estate. This payment Warrington, J., held gave the statute a new starting point, and, therefore, that the action was in time not only as against the land to which the tenant for life was entitled, but also as to the other real estate of the deceased.

STATUTE OF LIMITATIONS—REAL PROPERTY—INFANCY OF CLAIMANT—REAL PROPERTY LIMITATION ACT 1874 (37-38 VICT. C. 57) s. 1—(R.S.O. c. 133, s. 4).

In *Garner* v. *Wingrove* (1905) 2 Ch. 233 Buckley, J., affirms what we believe is the well-settled principle that where a Statute of Limitations once begins to run it is not stopped by any subsequently arising disability of an owner even if the legal title is in trustees. In this case the facts were, that Joseph Meek being the owner, verbally granted the land in question to the defendant as tenant at will in 1884, and the defendant remained in possession until 1904, when the present action was commenced. Meek died in 1888, having by his will devised the land to trustees with power to sell. In 1891 the trustees conveyed the land to Frederick Garner, who died in 1892, having devised the land to trustees in trust to divide the same between his two sons, who at the time of his death were both infants. The action was brought by the trustees of Frederick Garner and the two sons, one of whom was still an infant. Buckley, J., held that it was too late and that the plaintiffs were barred.

WILLS—MUTUAL WILLS—REVOCATION OF WILL MADE IN PURSUANCE OF AGREEMENT TO MAKE MUTUAL WILLS.

In *Stone* v. *Hoskins* (1905) P. 194 an interesting question is discussed. Two persons agreed to make mutual wills in each other's favour. One of them who died first, altered her mind, and made a new will revoking the will made in pursuance of the agreement. An application for probate of the latter will being made, it was resisted by the defendant on the ground that the will made in pursuance of the agreement could not be thus revoked, or at all events that the first will was binding on the executors. Barnes, P.P.D., however, held that mutual wills made in pursuance of such an agreement, do not become irrevocable until one of the parties dies having acted on the compact, in that case the other cannot depart from the bargain, and his will made in pursuance of the agreement then becomes irrevocable; but if the one who first dies alters his will to the knowledge of the survivor, the latter is at liberty to alter his own will, but he cannot in that case insist on the mutual will of the deceased person being enforced.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] WENTWORTH ELECTION CASE. [Oct. 3.

SEALEY *v.* SMITH.

Controverted election—Secrecy of ballot—Act of deputy returning officer—Numbering ballot.

This was an appeal from the judgment of Meredith, C.J.C.P., and Teetzel, J., reported ante, p. 330, and in 9 O.L.R. 204. Under the Dominion Elections Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified whether made by him or not. Hence, when a deputy returning officer at a polling place placed on each ballot the number corresponding to that opposite the elector's name on the voters' list the ballots were properly rejected. Judgment appealed from, affirmed, Sedgewick and Idington, JJ., dissenting.

Aylesworth, K.C., for appellant. *Lynch-Staunton*, K.C., and *Duff*, for respondent.

N. S.] KING'S ELECTION CASE. [Oct. 3.

PARKER *v.* BORDEN.

Controverted election—Service of petition—Service on agent.

The appointment of an agent by the candidate returned at an election for the House of Commons is only for the purpose of proceedings subsequent to the service of the election petition against such return and service of the petition on such agent is a nullity.

An election petition cannot be served out of Canada. Idington, J., dissenting.

Appeal dismissed with costs.

Lovett and *R. V. Sinclair*, for appellant. *Roscoe*, K.C., for respondent.

N. S.] QUEEN'S AND SHELBURNE ELECTION CASE. [Oct. 3.
COWIE *v.* FIELDING.

Controverted election—Practice—Service of petition—Second service.

An election petition cannot be served outside of Canada. Where the petition was served on the respondent abroad, and, subsequently, service was made on him in Ottawa (see ante, p. 489),

Held, that the first irregular service did not invalidate that properly made afterwards.

Appeal allowed with costs.

Roscoe, K.C., and *Mellish,* K.C., for appellant. *Lovett* and *R. V. Sinclair,* for respondent.

N. S.] CUMBERLAND ELECTION CASE. [Oct. 3.
PICTOU ELECTION CASE.
NORTH CAPE BRETON AND VICTORIA ELECTION CASE.

Controverted election—Preliminary objection—Status of petitioner—Corrupt acts—Evidence.

Section 113 of the Dominion Elections Act, 1900, provides that any person hiring a conveyance for a candidate at an election, or his agent, for the purpose of conveying any voter to or from a polling place shall, ipso facto, be disqualified from voting at such election.

Held, 1. The right of an elector to present a petition against the return of a candidate at an election may be questioned by preliminary objection on the ground that he is disqualified under the said section, and that on the hearing of the preliminary objection evidence may be given of the corrupt acts which caused such disqualification. *Beauharnois Election Case,* 31 S.C.R. 447, distinguished.

2. Unless the commission of the corrupt acts charged is admitted, it must be judicially established. Such admission or judicial determination does not take effect merely from the time at which it is made, but relates back to the commission of the acts.

Appeal allowed with costs.

Roscoe, K.C., and *Mellish,* K.C., for appellant. *Lovett* and *R. V. Sinclair,* for respondent.

N. B.] IN RE CUSHING SULPHITE FIBRE CO. [Sept. 27.

Appeal per saltum—Winding-up Act.

The Supreme Court Act does not authorize a judge of the Court to grant leave to appeal per saltum in a case under the Dominion Winding-up Act. Application for leave refused with costs.

Teed, K.C., for applicant. *Pugsley*, K.C., contra.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [June 29.

DELAHANTY *v.* MICHIGAN CENTRAL RY. CO.

Railway—Disorderly passenger—Duty to eject or restrain—Negligence—Damages—Remoteness.

A passenger travelling from Detroit to Buffalo on defendant's train who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly acts, and molested two fellow passengers, a gentleman and a lady, who were in their sleeping berths. He was put off the train at Bridgeburg, a station near the end of the International Railway Bridge crossing the Niagara River. He followed the train on foot, and after a scuffle with the watchman on the bridge jumped off, or fell off the bridge into the river, and was drowned. In an action under Lord Campbell's Act by the widow and infant child of deceased,

Held, 1. Under the circumstances defendants were justified in putting deceased off the train at Bridgeburg, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of someone at Bridgeburg.

2. On the evidence it was impossible to say whether deceased fell off the bridge accidentally or threw himself off: and that it was impossible to say that his death was the natural or probable result of his being removed from the train.

3. There was no evidence of any negligence on the part of the defendants, fit to be submitted to a jury, and that plaintiff should have been nonsuited.

Hellmuth, K.C., and *Saunders*, for the appeal. *Shepley*, K.C., and *Pettit*, contra.

Full Court.] [June 2.

HOCKLEY *v.* GRAND TRUNK RY. CO.

Damages—Reduction—Consent—New trial—Rule 786—Quantum of damages.

The Court of Appeal pronounced judgment April 4, 1905, dismissing the defendants' appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction. The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and, acting under Rule 786, directed a new trial confined to the question of the amount of damages.

Held, following *Watt* v. *Watt* (1905) A.C. 115, that the Court has no jurisdiction, without the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

Riddell, K.C., for defendants. *McCullough,* for plaintiff.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton, J., Anglin, J.] [May 11.

RE DILLON AND VILLAGE OF CARDINAL.

Municipal corporations—By-law—Local option—Voting on by-law—Irregularities—Saving clause of statute.

Upon an application to quash a local option by-law of a village approved by the electors by a vote of 124 to 117, it was alleged that in taking the vote the requirements of the Municipal Act had not been complied with, in that: (1) no newspaper was designated by the council wherein the by-law should be published; (2) one person was not appointed to attend the polling on behalf of those interested on each side; (3) persons were allowed to vote who were not so entitled; (4) no compartment was provided wherein a voter could mark his ballot, screened from observation; (5) other persons were present in the compartment with the voter; (6) other persons were allowed to be in a position to see how the voter marked his ballot; (7) persons were allowed to be in the polling place who were not entitled to be there; (8) the returning officer did not perform various duties required of him at and after the close of the poll. Some of the allegations were disproved in fact. As to matters which were proved:—

Held, that they were irregularities which did not affect the result, the voting having been conducted in accordance with the principles laid down in the Act, within the meaning of s. 204; and the motion was refused.

Decision of MAGEE, J., affirmed.

Watson, K.C., and *Halpin*, for applicants. *Middleton*, for corporation.

Meredith, C.J.C.P., Teetzel, J., Clute, J.] [May 27.

DOULL *v.* DOELLE.

Married woman—Judgment against separate estate—Proceeds of life insurance policy—Separate estate—Garnishment.

The plaintiff was a judgment creditor of the defendants by virtue of a judgment against her separate estate recovered on bills of exchange accepted by the defendant, a married woman engaged in trade, for her trade debts. On the death of her husband she became entitled to the proceeds of a policy of insurance on his life which he had made payable to her as beneficiary.

Held, that the effect of s. 159 of c. 203 R.S.O. 1897, is to create a statutory trust of the money payable under the policy in favour of the wife without restraint on anticipation; that on the death of her husband the absolute right to the money became vested in her: that her original interest in the trust was separate property within the contemplation of the Married Woman's Property Act, R.S.O. c. 163, 1897, and that the fruits of the trust were separate property, and as such liable to satisfy the plaintiff's judgment.

Roche, for plaintiff. *Middleton*, for defendant.

Cartwright—Master.] [June 6.

MUIR *v.* GUINANE.

Dismissal of action—Default of plaintiff—Application for relief—Service on defendant's solicitor—Duration of retainer—Jurisdiction of Master in Chambers—Solicitor's slip—Statute of Limitations.

Wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358, and so long

as that Rule can be invoked the action is still pending, and the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The Master in Chambers has jurisdiction under Rule 358 to set aside an order dismissing the action for default of compliance with an order for security for costs.

Where owing to the neglect or forgetfulness of the plaintiff's solicitor, security for costs was not furnished within the time allowed, and the defendant obtained an ex parte order dismissing the action, the plaintiffs were allowed, upon terms, to give security and proceed with the action, it appearing that the Statute of Limitations would be a bar to a new action.

Chute, for plaintiff. *S. B. Woods*, for defendant.

Boyd, C.] McNiroy *v.* Town of Bracebridge. [June 8.

Way—Non-repair of highway—Injury to pedestrian—Sidewalk—Negligence—Supervision—Notice.

In an action for damages for injuries sustained by the plaintiff from a fall upon a sidewalk in a town, it appeared that the defect in the sidewalk was slight in character—not conspicuous or notorious—on a street comparatively little frequented, over which there was weekly supervision, and that the defect had not existed for more than six days before the plaintiff was hurt, was not actually noticed by any officer of the municipality, and that no complaint was lodged:

Held, that notice of the condition of the sidewalk was not to be attributed to the municipality.

Arnold, for plaintiff. *Godson*, for defendants.

Anglin, J.] Re Gilhula. [June 16.
Re Cain.

Constitutional law—Deportation of aliens—Ultra vires.

Section 6 of 60 & 61 Vict. c. 11 (D) (amended by 1 Edw. VII. c. 13, s. 3), providing for the return of certain immigrants to the country whence they came, is beyond the powers of the Dominion Parliament; and detention of an immigrant for the illegal purpose of return is unwarranted.

J. A. Robinson, for Gilhula. *J. B. MacKenzie*, for Cain. *Shepley*, K.C., for the Attorney-General for Canada.

Boyd, C.] PLENDEPLEITH *v.* PARSONS. [Sept. 23.

Practice—Mortgage reference—Right to cross-examine on mortgagee's affidavit—Con. Rules 490, 668-9.

Con. Rule 490, providing for cross-examination on affidavits, has no application to proceedings in the master's office; and there is no right under it to cross-examine a mortgagee on his affidavit of debt on a mortgage reference. The master himself, however, may direct the examination of parties or witnesses under Rules 668 and 669 as he may deem expedient.

Hislop, for plaintiff. No one, contra.

Falconbridge, C.J.K.B.] [Sept. 26.

RE MCEACHREN.

Intestacy—Children of father's sister, and grandchildren of mother's brothers and sisters.

The word "prospectively" contained in s. 37 of the Devolution of Estates Act, R.S.O. 1897, c. 129, does not exclude the operation of the Statute of Distributions 22 & 23 Car. II. c. 10, R.S.O. 1897, vol. 3, c. 335, by making ss. 38 to 55 of the Devolution of Estates Act applicable to descents subsequent to 1886, such word having reference prospectively to the period from 1852 to 1886.

Where, therefore, an intestate's father and mother were both dead, the intestate's estate consisting of real and personal property coming from neither of them, and the intestate's nearest relatives were children of the father's sister, and grandchildren of the mother's brothers and sisters, the children of the said deceased sister were held to be entitled to the exclusion of the said grandchildren.

Foster, *Wardrope*, and *W. B. Raymond*, for the various parties.

Cartwright—Master.] [Sept. 26.

THEAKSTONE *v.* THEAKSTONE.

Alimony—Interim—Husband's offer to pay for necessaries.

It is not a sufficient answer to a motion for interim alimony that the husband should shew that he has offered to allow the

wife to get whatever is necessary for the house, in which both were living, but not on friendly terms, and to pay for all such goods. *Snider* v. *Snider* (1885) 11 P.R. 140 distinguished.

Phelan, for the motion. *Hassard*, contra.

Cartwright—Master.] [Oct. 7.

RE SOLICITOR.

Solicitor—Reference as to, and taxation of bill of costs—Change.

A deputy registrar to whom a reference had been made in respect to a solicitor's bill of costs fell sick after the evidence and arguments were all in, but before judgment was given and had not been able at attend to his duties for nearly a year. On application by the client to change the reference to one of the taxing officers at Toronto which was opposed by the solicitor, it was

Held, 1. The proper course was to refer the matter to the deputy registrar.

2. In answer to the objection on behalf of the solicitor, there was no medical evidence that the deputy registrar would not soon recover, and, that, if such evidence was attainable, it should properly come from the other side.

3. The deputy clerk should not be ordered to use the evidence already taken.

Martin Malone, for the motion. *Bicknell*, K.C., contra.

Province of Manitoba.

KING'S BENCH.

Richards, J.] DAY *v.* CROWN GRAIN CO. [Sept. 11.

Mechanics' Lien Act—Time for filing lien of contractor on sub-contractor—Completion of contract.

The plaintiff in this case did work and supplied materials as a sub-contractor under the defendant Cleveland, who had contracted with the Crown Grain Co. for the erection and equipment of an elevator. The substantial defence was that the plaintiff had not registered his claim for a lien within thirty days after the completion of his contract, as required by s. 20 of R.S.M. 1902, c. 110. The findings of fact were that the plaintiff

had never wholly completed his work, but that it was understood between him and Cleveland that the work was not finished and that, when the rest of the elevator should be so far finished as to allow the machinery put in by plaintiff to be tested, his workmen would have to go back and test and complete it, and that, when plaintiff's workmen did return, less than thirty days before the filing of the lien, and attempt to complete, they were prevented by the company from so doing.

Held, that the lien was registered in time and should be enforced.

Campbell K.C., A.G., and *Hoskin*, for plaintiff. *Knott*, *Taylor*, and *Ferguson*, for other lienholders. *Phippen* and *Minty*, for defendants.

Richards, J.] NOBLE *v.* TURTLE MOUNTAIN. [Sept. 11.

Municipal law—Repairs to highway—Bridge carried away by flood—Municipal Act, R.S.M. 1902, c. 116, s. 667—Damages, from what date—Continuing cause of action—King's Bench Act, Rule 566—Mandamus—Remedy by indictment—Costs.

Action for a mandamus to compel the defendants to rebuild a bridge over a stream which crosses the road allowance along the north side of the plaintiff's farm and runs diagonally through the farm dividing it into two parts, and for damages suffered by plaintiff by reason of defendant's refusal to rebuild or repair the bridge which had been carried away in the spring of 1902 by the high water. The banks of the stream were so steep that the plaintiff could only get from one part of his farm to the other by making use of the bridge on the road allowance, and after it was carried away he had to drive several miles further than before to get across the stream.

The defendants had prior to 1902 at various times done work on the bridge and on adjoining portions of the highway of which it formed part.

Held, (1) That, under s. 667 of the Municipal Act, R.S.M. 1902, c. 116, the defendants were liable to the plaintiff for the special damages suffered by him by reason of their non-repair of the highway in question. *Iveson* v. *Moore*, 1 Ld. Raymond 495, 12 Mod. 262, followed.

(2) The mandamus asked for should not be granted, as there was another adequate remedy, viz., to proceed by indictment, but the refusal of the mandamus is to be without prejudice to plaintiff's right to so proceed.

(3) Under sub-s. (*b*) of above section the plaintiff's claim for damages should be limited to such as he had suffered since one month prior to the service of his notice of action on the municipality.

(4) The cause of action being a continuing one, the damages should, under Rule 566 of the King's Bench Act, be assessed up to the date of the delivery of the judgment.

(5) It was proper to bring the action in this Court even if the damages allowed had been within the jurisdiction of the County Court, and the plaintiff should have full costs.

Howell, K.C., and *D. A. Macdonald*, for plaintiff. *Aikins*, K.C., and *Robson*, for defendants.

Book Reviews.

Canadian Railway Law, by ANGUS MACMURCHY and SHIRLEY DENISON, Barristers-at-law. Toronto: Canada Law Book Company. 730 pp. Half calf $7.50.

Nothing is more noteworthy in the history of the Dominion than the expansion of railway enterprise. No branch of our law is, therefore, at present of more importance than that relating to railways. This work by the joint authors of the Canadian Railway Cases comes most opportunely, following as it does The Dominion Act of 1903 by which the railway law of Canada was amended and consolidated and important changes introduced, particularly the establishment of the Board of Railway Commissioners in lieu of the Railway Committee of the Privy Council. The authors have collected all the Canadian cases, and have also made a judicious selection from the great mass of English and American decisions relating to railways.

Among the subjects which appear to us to be particularly well treated we notice the following: The incorporation and organization of a railway company; the powers of a railway company; liability for negligence in operating the railway; discrimination in rates, and amalgamation and traffic agreements.

An interesting feature of the work is the introduction, in which is traced the history of previous railway legislation in Canada. The rules of practice and forms of the Board of Railway Commissioners are included. The printing, indexing and binding are excellent.

Colonial Administration, by PAUL S. REINSCH, Professor of Political Science in the University of Wisconsin. New York: The MacMillan Company; London: MacMillan & Co., Limited, 1905. Morang & Co., 90 Wellington Street, Toronto, agents for Canada. 442 pp.

This is one of the volumes of the "Citizens' Library" published by the MacMillan Company, and it follows on from the previous books of Prof. Reinsch, "World's Politics," and "Colonial Government." In this book the author gives a comparative study of the methods of colonial administration. He admits that the time is not yet ripe for a complete and conclusive statement of the principles involved; and says that "the entire policy of governing distant and alien dependencies is still on trial." This is largely so in all nations except England, but the statement is, we think, rather broad, if the great colonizing Empire to which we belong is included. In almost every other nation the trial has ended more or less in failure.

THE LAW QUARTERLY REVIEW (July).—The following are some of the leading articles:

The paradox of the land law—Restraint on anticipation under the Married Woman's Property Acts—Magna charta—Future interests in lands—Notes on Maine's Ancient Law—The South African railway case and international law.

(October).—Certification of shares—The personality of a corporation and the State—Turkish capitulation and status of British and other subjects residing in Turkey—The Constitutional history of Hungary.

LAW MAGAZINE AND REVIEW (August).—The Bible in law—The Home Office and criminal appeals—Definitions of accidents, accidental and accidentally—Some evils of the Judicature Act.

AMERICAN LAW REVIEW (Sept.-Oct.).—The evolution of International law—Law reports as memorials of history and biography—The doctrine of judicial precedents—Light sentences and pardons.

THE LIVING AGE (Boston) contains a number of selected articles from the leading magazines and reviews such as: Revolutionary ethics of marriage and divorce—The Hungarian crisis—The alliance between England and Japan—The picturesque side of Trafalgar, etc.

Correspondence.

COUNTY COURT SITTINGS.

To the Editor,

CANADA LAW JOURNAL.

Dear Sir,—The Ontario Act amending the Jurors Act, 2 Edw. VII. (1902) c. 14, has given rise to embarrassing trouble in various counties in the Province, and it is respectfully submitted that it shews the unwisdom of "local option" in respect to methods of legal procedure in connection with the administration of justice.

The power given to the selectors of jurors by that Act to determine that the General Sessions of the Peace and Jury Sittings of the County Court should be held immediately after the High Court Assizes, was exercised in some counties and not in others, and now (to still further complicate the matter) some counties who adopted it have rescinded their action. The profession do not expect to find their legal practice with regard to setting down actions for trial in an amendment to the Jurors Act. Nevertheless sub-s. 3 of s. 3 of the Act referred to above requires actions to be entered six clear days before the first day of the Sittings. This provision, lurking in an unsuspected place and passing unnoticed, wrought havoc at many county seats, but as though there were no limit to this exceptional Act of exceptions, the last section provides that it shall not apply to any county in which is situate a city. The ordinary practitioner would probably in time have become acquainted with what was thus laid down as the law—applicable to his particular municipality, but s. 19, of c. 10, 4 Edw. VII., amended this final section again by adding after "city" the words: "Of 20,000 or over." so that the Act, as re-enacted, applied for instance to the County of Hastings and Belleville, but is of doubtful applicability to the County of Frontenac and Kingston.

The Hastings selectors of jurors, having in view a possible municipal economy, passed the resolution authorized by 2 Edw. VII., but have not found the experiment successful. The County of Hastings Law Association unanimously adopted a resolution, expressing the view of the Association as to the position (see post p. 806), and a deputation of the officers of the Association, Messrs. W. N. Ponton, E. G. Porter, E. J. Butler, J. P. Thomas and George Denmark, attended before the selectors of jurors and had the obnoxious resolution rescinded.

But now a new legal entanglement presents itself for solution in the County of Hastings. Does the rescinding resolution take

effect until 1906; or does it take effect immediately? If immediately, there can be no County Court Sittings after the present Assizes, and the Sittings should be held in December. If not immediately, then the County Court Sessions should immediately follow the Assizes, and for them the jury has been summoned and no provision has been made for a December County Court Sitting. Having regard to the uncertainty, it is probable that no County Court of competent jurisdiction for the trial of jury actions can be absolutely relied upon till June, 1906. So much for tampering with uniformity of procedure and practice!

Belleville. W. N. P.

Courts and Practice.

County Court Jury Sittings.

At the meeting of the County of Hastings Law Association held at Belleville on the 26th day of August, 1905, it was resolved that this Association, representing the opinion and expressing the views of the members of the Bar of the County of Hastings, desire to point out that the trial of jury cases in the County Court at the end of the High Court Assizes (always of varying and uncertain length), and before juries who have already done duty at the said Assizes, has proved prejudicial to the interests both of suitors, witnesses and the general public; and this Association earnestly urge the reconsideration of this important matter by the judicial and municipal authorities so that the enactment passed last year in this county may be rescinded, and the large loss, inconvenience and delay which resulted during the early part of this year in this country from the attempted holding, together or in succession, of these Courts of different jurisdictions, may be avoided in the future.

Bench and Bar.

JUDGES RETURNING TO PRACTICE.

The following in the report of the Discipline Committee of the Law Society of Upper Canada referred to ante, p.—:—

"A barrister upon his elevation to the Bench is withdrawn from the arena of practice, and all that is incident to the position of counsel and the profession. The public look upon the

office with esteem and regard its occupants with feelings of respect, and nothing should be permitted whereby a retired judge could have the opportunity to be engaged in professional business, the mere fact tending to lower the dignity of the high office formerly held, and so react upon the Bench at the time existing —the resumption of practice has a tendency to impair and lower that dignity which should be upheld, as well off, as on the Bench. Again, it appears to the committee that a retired judge resuming practice is an act of injustice to the members of the profession—especially is it so in the case of judges of the County Courts, where it may readily be supposed that the prestige, experience, influence, and social position the judge has acquired in his county will have weight with the public to his own advantage and to the corresponding disadvantage of other and younger members of the profession. (The committee reported the cases of two judges of County Courts who resigned their judgeships, and resumed practice after receiving pensions by way of annuities, but was not aware of any Superior Court judge having done so.) The committee is prepared to advise that the retired judge by the acceptance of office as judge lost the office of attorney and solicitor, and therefore cannot return to practice as such. The committee recommend that the Attorney-General of Ontario do introduce legislation to repeal every statutory duty assumed to be assigned to a retired judge."

Flotsam and Jetsam.

The *Albany Law Journal* tells us: "Connecticut law makers have a hard problem to solve: If thirty-five State Senators require 650 jack-knives and 278 fountain pens in a six months' session of the Legislature, and 255 representatives use 2,000 knives and 700 pens in the same time, how long will it be before a really effective 'corrupt practices' Act is passed at Hartford?" We commend this item to the various members of Parliament soon to assemble throughout the Dominion. We fear our legislators are neglecting their opportunities in the above matter."

Obituary.

Although in no way connected with the profession we make no apology in copying from "Punch" the following lines, which speak of the work of one of the great benefactors of humanity and one of the greatest of the many philanthropists granted to the Anglo-Saxon race. It has been well said that the work of such men as Dr. Barnardo among the submerged tenth has been

as efficient as a police factor as the repressive agency of the law. This was eminently so of the one whose life's work the great London weekly goes out of its way to commemorate:—

IN MEMORIAM.

Thomas John Barnardo, F.R.C.S., Born 1845,
Died Sept. 19, 1905.

"Suffer the children unto Me to come,
The little children," said the voice of Christ,
And for his law whose lips to-day are dumb
The Master's word sufficed.

"Suffer the little children——" so He spake,
And in His steps that true disciple trod,
Lifting the helpless ones, for love's pure sake,
Up to the arms of God.

Naked, he clothed them; hungry, gave them food;
Homeless and sick, a hearth and healing care;
Led them from haunts where vice and squalor brood
To gardens clean and fair.

By birthright pledged to misery, crime and shame,
Jetson of London's streets, her "waifs and strays,"
Whom she, the mother, bore without a name,
And left, and went her ways—

He stooped to save them, set them by his side,
Breathed conscious life into the still-born soul,
Taught truth and honor, love and loyal pride,
Courage and self-control.

Till of her manhood, here and overseas,
On whose supporting strength her state is throned,
None better serves the Motherland than these
Her sons, the once disowned.

To-day in what far lands, their eyes are dim,
Children again, with tears they well may shed,
Orphaned a second time who mourn in him
A foster-father dead.

But he, who had their love for sole reward,
In that far home to which his feet have won—
He hears at last the greeting of his Lord:
"Servant of Mine, well done!"

O. S.