Canada Law Journal.

VOL. XXXVII. NOVEMBER 1, 1901. NO. 20.

Mr. John R. Dos Passos, a member of the New York Bar and author of a well-known work on the law affecting stock-brokers, desires that Congress of the United States should call an international conference to consider the suppression of Anarchism. This idea is not a new one, nor capable of doing much to supply a prompt remedy for the evil. It will be remembered that some three years ago such a conference was convened in Rome, a great deal of interest was evoked by it, much discussion took place and resolutions were adopted for the mutual surrender of criminal anarchists. But since this conference the anarchists have offered the cruellest sort of testimony to their disregard for its deliberations—they have boldly assassinated the King of Italy and President McKinley. Perhaps the most effective way of dealing with this cancerous growth in the body-politic is for each member of the family of nations to make it a legal offence to attempt to promote the aims and interests of anarchism by word or deed within its borders. This done, there would be no need for international concert beyond some provisions for the extradition of this class of offenders.

Having done this, the powers should agree upon a suitable island and transport thither all persons convicted of any such offence; provide them plentifully with the usual weapons used by anarchist assassins, appropriate implements for agriculture and fishing, etc., and such supply of food, clothing and household effects as might be necessary to start them in business. After that let them work for their own living, and live or starve as they might elect. As people of this class consider that all governments are objectionable, give them none, but merely provide a gun boat to see that they are not taken away from the island, and leave them to work out their destiny according to their own will and pleasure. They might perhaps in the course of a short time realize something of the desirability of law and order, and probably find out that all men are not born equal. If the result should prove to be the same as happened to the Kilkenny cats, the world would be none the worse for the legacy of their tails, and a wholesome lesson would have been taught to kindred spirits still at large.

We notice that many of the best newspapers in the United States are calling upon their readers to insist upon the re-election of those judges of the High Courts who have received the approval of the people in the discharge of their important duties. The tenor of their remarks, as given by a legal contemporary, is that there is "an almost imperative demand that the community shall not be deprived of the services of wise, learned and experienced judges who have not yet approached the age at which retirement is made compulsory by the constitution of the State." This demand for re-election of such men without opposition is a step in the right direction, and is doubtless intended, as far as possible, to minimize the evils of the elective system by bringing to bear upon voters the pressure of a wise and intelligent public opinion. The subject of appointments to the Bench is a very important one. Even in this Dominion, where the elective system does *not* prevail, the decline of the personel of our own Bench is an evil which should at once be grappled with. It is bad for any country when the Bench has ceased to be an object of ambition to the best men at the Bar. The country rather than the profession are the losers; those therefore who are responsible in this matter are derelict in their duty if they do not take this matter to heart and apply some remedy before irreparable injury is done. If things go on as they are it will be a question whether we are not as badly off as those who have the elective system. Under present conditions the election of judges, if the voting power were in the hands of the profession alone, would be a distinct advantage.

The *Central Law Journal* remarks that one of the most unfortunate aspects of the work of the Supreme Court of the United States during the last few years has been the more than ordinary lack of harmony and concurrence between the different members of the Court upon many important questions of law. It would be interesting to know what the writer would say on this subject as to the Supreme Court of the Dominion of Canada. We should gather from his views on the subject that the remarks would be anything but complimentary to our highest Court of Appeal were he to turn his attention in that direction.

Nothing is more common in these days than to hear from members of the profession complaints as to the decrease of legal business; and certainly the volume of litigation is much less than it used to be. Surprise is sometimes expressed at this decrease; but it is well known that lawyers are not busy in proportion to the growth and development of the general business of a country. On the contrary there is much more law in proportion in a young country than in an older one. The over-stocking of the profession, moreover, makes this more acutely felt. In addition to this it is also true that legal business is gradually changing its character. This change, and the present condition of things from the lawyer's standpoint, as well as a partial remedy for the evil is aptly referred to in the following remarks of a well-known corporation lawyer in the United States. He says: "The great bulk of the work of the profession has been turned into industrial creation and adjustment, and very often the counsel is as good a business man as his clients. A knowledge of law has, therefore, within the last thirty years, become the side arms of certain classes of the captains of industry. Every good business man knows a good deal of law. Specialism has split it up into a half dozen or more divisions, and a lawyer who is now able to master more than one sort of practice is a genius. The profession has lost nearly all of its old, æsthetic, ostentatious attractions. The civil law pays a practitioner so much more than the criminal law does, that it attracts the ablest men. Juries and courts no longer care for eloquence. Yes, law is business, and if the young man wants to practice it, the sooner he makes up his mind to do so with an eye single to some particular branch of it, the better lawyer will he become."

The case of *Hurley* v. *Eddenfield*, 69 N.E. 1058 (U.S. Rep.), discusses the liability of a physician who arbitrarily refused to attend a sick man, who, as an apparent result of the want of such attention, died shortly after. It appeared that the man becoming suddenly ill, the family doctor was sent for. To ensure his attendance the usual fee was tendered by the messenger, who also stated that it was impossible to obtain the services of another physician. It was also in evidence that the doctor could have gone had he been willing so to do, but he refused and gave no reason. The sick man having died, an action was brought against

the physician. The Court held that doctors do not come in the same category as common carriers, inn-keepers, etc., and do not, by reason of their holding themselves out as practicing their profession, enter into any implied contract with those who may require their services.

We are glad to notice that Mr. Tremeear, author of "Canadian Criminal Cases," has in course of preparation, to be issued shortly, a treatise on the Criminal law of Canada. From his work in the past we have reason to expect that he will not follow the practice too common amongst editors of annotated Statutes (at least in this country) of "skipping hard places." The honest attempt to throw light on an obscure section, even though the author might arrive at a wrong conclusion, would be much more satisfactory than ignoring the difficulty altogether. We trust also that in the forthcoming book more attention will be paid to criminal evidence and to the practice in the criminal courts than has been attempted by any of those who have hitherto annotated the Criminal Code. In none of them is there any adequate attempt to collect the authorities that are helpful in these matters. There are especially a number of Ontario cases that should find a place in such a book.

The opinion is frequently expressed by the older portion of the Bar that votaries of the "New Learning" which term we understand is to be taken to indicate the Law School, or "Scientific," system of professional training, display an unseemly and splenetic interest in belittling the claim levied upon the veneration of posterity by those giants of the common law, Coke and Blackstone. The profane hand of the latter-day vandal, they say, is busy with destruction in our legal Pantheon majestic ivory and bronze are being demolished to make room for cheap and tawdry foreign clay! All this is to forget that the belittlement of Coke and Blackstone was not begun by the pupils of John Austin, nor by the adherents of Jeremy Bentham, for that matter. Bacon, his contemporary, impugned Coke's authority. Willes, C.J., Willes, 341) in discrediting one of his legal propositions, says: "Some of them when they come to be thoroughly examined by those who are nullius addicti jurare in verba magistri, will be found not to be right." Buller, J. (3 T.R. 348) says of 4 Inst. 135: "I think that that part of Lord Coke's work has always been received

with great caution, and frequently contradicted." Heath, J. (Bos. P. 131) remarks: "In every part of his conduct, his passions influenced his judgment Vir acer et vehemens. His law was continually warped by the different situations in which he found himself." As to Blackstone, we cannot forget the strictures of Fox upon the value of his constitutional views. Mackintosh styles him "a feeble reasoner and a confused thinker." (Eth. Phil. sec. 6) Lord Redesdale (1 Sch. & Lef. 327) once observed :—"I am always sorry to hear Mr. Justice Blackstone's Commentaries cited as an authority. He would have been sorry himself to hear the book so cited. He did not consider it such." Now this list of adverse criticisms might be very appreciably augmented in respect of both authors without straying into the domain of the "New Learning," but it is not to our purpose to do so. That purpose is effected by collating the above opinions merely, which, we submit, clearly exonerate modern preceptors of the law from the charge of initiating iconoclasm at the expense of old and unimpeachable authority. The pity is that in jurisprudence there should be any attempt at apotheosis of authority ; for when we look abroad at the other sciences we find that there are no names that stand for perpetual infallibility, but that sooner or later the time comes when the whilom brighest reputation can do no more than feebly and fitfully beacon to posterity over the chill waters of oblivion.

We recently published some anecdotes in which that brilliant man and learned Chief Justice, Hon. W. H. Draper, is referred to. A correspondent sends us another : The Chief was on one occasion presiding at the Whitby assizes, and had delivered his sentence upon a prisoner, when the Clerk of the Court, the late Mr. John Vandal Ham, who was also Clerk of the Peace, audibly remarked that he (Mr. Ham) entirely agreed with the sentence which had been pronounced; upon which the learned judge leaning over, asked him what *he* had to do with the matter, and was somewhat non-plussed when Mr. Ham promptly remarked that he was an associate justice by virtue of his office. There was no more to be said ; but later in the day Mr. Ham proceeded to refresh his inner man in court with a lunch which he had brought with him, spreading it on his desk, whereupon the Chief Justice remarked that he would be glad if the associate judge would kindly have those groceries removed.

CRIMINAL APPEALS BY WAY OF STATED CASE.

Some confusion exists as to the right of appeal by way of stated case from decisions of justices of the peace which it might be well shortly to refer to. This question recently came before the Supreme Court of Nova Scotia in *The Queen* v. *Hawes* (ante, p. 36), wherein it was held that a magistrate trying a charge of theft of goods of the value of less than $10 under the summary trials procedure (Code ss. 783 and 786) with the consent of the accused, is not a "court or judge having jurisdiction in criminal cases" within Code s. 742 allowing an appeal by way of case reserved; and that the proper mode of review of any question of law involved on such a trial is by way of "stated case" under s. 900 of the Code.

It will be noticed that this section makes provision for the review by way of "stated case" of a justice's decision in respect of error of law or excess of jurisdiction, and by its own terms is limited to the questioning of "a conviction, order, determination or other proceeding of a justice *under this part*," i.e., under Part LVIII. of the Code, which part deals with the subject of "summary convictions." Then by the last section of Part LV., relating to "summary trials," it is enacted that the provisions of Part LVIII. shall not apply to any proceedings under Part. LV. This indicates that the procedure by "stated case" does not apply to a conviction made under the "summary trials" procedure of Part LV., notwithstanding the dictum of the court in the *Hawes Case*.

In *R.* v. *Egan*, 1 Can. Cr. Cas. 112 (Man.), it was held by Killam, J., that a person convicted under s. 783 (*a*) on a similar charge had no right of *appeal*, as the effect of s. 808 is to prevent the application of any of the provisions of Part LVIII. in which are found the sections as to appeals from summary convictions, to convictions under Part LV. The decision of Wurtele, J., in *R.* v. *Racine*, 3 Can. Cr. Cas. 446 (Que.), is to the same effect. The sections as to stating a case being likewise within Part LVIII., the same result would follow. If, however, the summary trial takes place before *two justices* sitting together a right of appeal is given by s. 782 (*a*) as amended by 58 & 59 Vict., c. 40, "in the same manner as from summary convictions under Part LVIII.," and ss. 879 et seq. are by it expressly made applicable in that event. This was held in the Ontario case of *R.* v. *Nixon* (1895), 35 C.L.J

636, per Ferguson, J., to be an additional reason for holding that there is no right of appeal in other cases of summary trial.

It is to be observed that, although there is no appeal where the proceedings are taken under s. 783, an appeal by way of reserved case may be had when the magistrate's jurisdiction is dependent upon s. 785, which now applies to police magistrates of cities and towns in all the provinces (amendment of 1900), but was formerly limited to Ontario.

INDIVIDUAL SUING IN ASSUMED TRADE NAME.

Several recent unreported decisions illustrate a change in the court's attitude towards the rather frequent mistake of suing in the trade name on behalf of one carrying on business in a name other than his own.

Mason v. *Mogridge*, 8 Times L.R. 805, has long been referred to as shewing that the rules must be strictly complied with, and the improperly constituted action dismissed with costs. The practice as thus laid down was followed last year in *British Columbia Furniture Co.* v. *Tugwell*, 7 B.C.R. 361. In that action, on an application under Brit. Col. Rule 104, similar to Ont. C.R. 603, and English Order XIV., the defendant's counsel objected that one Jacob Sehl was really the plaintiff and was suing in the firm name when he was the only member of the firm. The objection was upheld, and the plaintiff was refused an adjournment to enable him to amend the proceedings. But in view of *Hirschfeld* v. *Elton* (*a*), where the English Court of Appeal lately refused to set aside a judgment obtained by a plaintiff suing in a firm name, it seems very improbable that *Mason* v. *Mogridge* would henceforth be followed.

The Ontario decisions, while long recognizing the authority of the leading English case on the point, have shewn a strong disinclination to deprive the plaintiff of the relief sought by technically refusing leave to amend. Thus, when in *Lang* v. *Thompson*, 16 P.R. 516, a Division Court judge, sustained on appeal by a judge of the County Court, dismissed the action at the trial on the

(*a*) See Muir Mackenzie's Yearly Practice (1901), 445.

ground that it was brought in the name of "J. W. Lang & Co." as plaintiffs, not being the name of an existing firm or partnership, but simply the name in which J. W. Lang carried on business, Osler, J.A., set aside their judgments with costs. *Mason* v. *Mogridge* was distinguished, not only on the ground that it dealt with an application for summary judgment, but also because the real name of the plaintiff did not appear in the style of cause. The words "& Co.," following the plaintiff's name in the style of cause, were regarded as mere surplusage; but, even if not, the case was thought to be clearly one for amendment on proper terms, that is, on payment of costs if anyone was shewn to be prejudiced by the amendment. On the latest recurrence of the mistake made in *Lang* v. *Thompson* (*b*), the defendant's counsel consented to the issue of an order for amendment, nunc pro tunc.

Narrowed as was the scope of such precedents as *Mason* v. *Mogridge* when read in the light of *Lang* v. *Thompson*, our courts have gone further; and, in the Division Court case of *Fairles Milling Co.* v. *Dempster* (*c*), upheld the right to amend in an action where a plaintiff, suing in a trade name other than her own, sought judgment for a debt.

These Division Court actions furnish apt illustrations of the High Court Practice, for although the Division Courts Act contains no provision similar to Consolidated Rule 231, enabling a person who carries on business under a partnership style to be sued under that style, there is no provision in the procedure of either court for suing in the firm name on behalf of one carrying on business in a name other than his own.

It appeared at the hearing of *Fairles Milling Co.* v. *Dempster* that the name in which the action was brought was the trade name of Margaret Fairles. When leave to amend was asked, it was objected fo the defence that as there was no plaintiff entitled to sue, the court could not make an order for amendment commencing the action in the name of a plaintiff entitled to sue, and thus institute a new action by order instead of by summons. The Division Court judge allowed the amendment, and judgment was

(*b*) *Percival* v. *Mumm* (unreported).

(*c*) Tenth Division Court (York), 1901.

granted in the action as properly constituted. The same arguments were advanced on the subsequent motion for prohibition. In the course of an oral judgment (*d*) dismissing the motion with costs, Meredith, C.J., stated that although there was no doubt that defendant's counsel was right in contending that a firm is not, technically, a person, still that must be dealt with reasonably. "There was a real plaintiff in this case, and that was, from the beginning, Margaret Fairles, but she mistakenly, it appears,—the rule not being wide enough to cover the case of such a trade name —called herself the Fairles Milling Co. There was, therefore, jurisdiction, and I think there was jurisdiction to make the amendment and to make the suit what it really and in fact was, the suit of Margaret Fairles. The King's Bench Divisional Court were of the same opinion (*e*).

The decision in the later case of *Metropolitan Manufacturing Co.* v. *Flanagan* (*f*) conforms to the practice as defined in *Fairles* v. *Dempster*. On an application by the defendant to dismiss the action with costs, on the ground that it was improperly constituted, G. M. Ryerson being the sole proprietor of the Metropolitan Manufacturing Co., an order was made directing that the proceedings might be amended, and G. M. Ryerson made plaintiff upon his consent being filed.

It appears from the cases above mentioned that it is no longer the practice of our courts, at least, to dismiss an action brought in the trade name on behalf of one carrying on business in a name other than his own, but that an amendment of the proceedings will be allowed in all cases, on proper terms.

(*d*) Delivered March 1st, 1901 (unreported).

(*e*) Judgment dated March 7th, 1901 (unreported).

(*f*) Order dated 16th September, 1901 (unreported).

Toronto. ALEXANDER MACGREGOR.

UNION LABOUR AND STRIKES.

The strike situation in the United States has involved numerous appeals to the courts, and many interesting and important decisions as to the rights of union labour and the relations between employer and employee have been rendered. At no time have these relations been so strained as at the present. The subject recently came before the courts in a California case, which is worth referring to. Application was made to the Superior Court of San Francisco by the owner of a restaurant for an injunction restraining the Cooks' and Waiters' Unions and defendant labour organizations from interfering with the conduct of his business. From the complaint filed, it appeared that the plaintiff was the owner of two restaurants in San Francisco, and that the defendants were labour unions and others, officers of or persons in sympathy with such unions. One of the defendant unions was composed of cooks, waiters and bartenders. It was alleged that the defendants entered into a conspiracy to coerce plaintiff into the subjection of his business to the control of the defendants: that the defendants had requested the plaintiff to sign an agreement with the Cooks' and Waiters' Alliance, one of the defendants, which was to provide that plaintiff should employ only union help, and fixing a certain scale of wages and certain hours per day and days per week as the maximum work to be required of any employee: that unless he signed this agreement and complied with the rules of said Alliance a boycott would be declared against him, and all cooks and waiters in his employ called out and no others permitted to work for him. The plaintiff refused, and the defendants did as they had threatened, and requested patrons of plaintiff not to deal with him, "falsely and unlawfully declaring that plaintiff was an enemy to labour, was unfair, and kept unfair places of business." Men were picketed in front of plaintiff's restaurants, and, marching up and down, called forth in loud and threatening tones not to patronize plaintiff, that he was unfair and kept an unfair house. Men bearing transparencies and sandwich-men with placards inscribed "Don't patronize Johnson's creamerie. It is a non-union house. Six days a week is long enough for any restaurant employee to work. Help us with our fight for a day's rest and shorter work-day by patronizing houses with a union card." Members of defendant unions were forbidden, under penalty of

fine or expulsion, to patronise the plaintiff. These acts were alleged to have been done pursuant to and in furtherance of the conspiracy referred to. Damages amounting to $2,500 resulted; the defendants were financially irresponsible, and plaintiff was without any speedy or adequate remedy at law.

The court being asked to restrain the defendants from the further commission of such acts, Judge Sloss granted an injunction pendente lite, "restraining defendants, their servants, agents and employees from persuading or inducing persons in the employ of the plaintiff to leave his employ; from intimidating by threats, express or implied, of violence or physical harm to body or property any person or persons from entering into the employ of the plaintiff or from dealing with or patronizing him; from preventing or attempting to prevent by use of the word 'unfair' or any other false or defamatory words or statements, oral or written, any person from entering into the employ of the plaintiff or from dealing with or patronizing him." In opposing the injunction it was contended that the injuries complained of were not irreparable and that some of the alleged acts were criminal offences.

The learned Judge who heard the case, after referring to the authorities, held it to be clear that an employee might withdraw from his employment whenever dissatisfied, and that a combination of employees to so withdraw was equally permissible: *Arthur* v. *Oakes*, 63 Fed. Rep. 310; *Allen* v. *Flood* (1898), App. Cas. 1-129. He considered that the use of means that are "per se" unlawful for the accomplishment of any purpose that results in damages to one gives him a cause of action against the person committing the unlawful act, and should be enjoined. The Civil Code of California "forbids . . . the abduction or enticement of . . . or of a servant from his master," and acts which are clearly unlawful in themselves or which entice the plaintiff's servants to leave him, violate his legal rights and must be restrained. Statements that the plaintiff is "unfair" and keeps an "unfair house" tended directly to injure him in his business, imputing dishonesty and unfair treatment of patrons. In justification of the use of these words, defendants said that the plaintiff paid his employees less and worked them longer than the defendants thought proper. The regulation of wages and conditions of labour, however, are matters of contract. It is no more "unfair"

for an employer to seek to hire labour as cheaply as he can than it is for the employee to seek to sell his labour as dearly as he can. In the absence of legislation, the courts could not, in his opinion, undertake to regulate contracts of employment by finding any terms the parties might agree upon "unfair." The use of this word should therefore be enjoined Where a man has a right to do an act to the damage of another, the fact that he was actuated by malice or other improper motive cannot convert the lawful act into an unlawful one: *Boyson* v. *Thorn*, 98 Cal. 578; *Allen* v. *Flood*, ante. It was contended by plaintiff that the addition of the element of conspiracy raises a different question. That the combination of a number of men to injure plaintiff is an unlawful conspiracy, and acts done in pursuance of that conspiracy are unlawful: *Vegelahn* v. *Guntner*, 167 Mass. 92, 107. The purpose of the combination, however, was not an unlawful one. The right of traders to combine for the purpose of limiting trade in a given branch to themselves, although rival traders are thereby damaged, is well recognized: *Mogul S. S. Co.* v. *McGregor* (1892), App. Cas. 25; *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223; *Delz* v. *Winfree*, Tex. 25 S.W. 50; *Continental Ins. Co.* v. *Board of Fire Underwriters*, 67 Fed. Rep. 310. How does such case differ from a combination of working men for the purpose of limiting employment in a certain business to themselves? "The struggle going on between plaintiff and defendant is an economic one, which in my view the courts should not undertake to settle unless one side or other resorts to acts which are unlawful. In that event those acts, and those only, should be stopped." Holmes, J., in his dissenting opinion in *Vegelahn* v. *Guntner*, cited above, says: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart if the battle is to be carried on in a fair and equal way."

It is not to be denied that there is a strong line of authorities reaching a different conclusion on the questions here discussed, but in many of these the strike was accompanied by circumstances of violence and intimidation: *Consolidated S. & W. Co.* v. *Murray*, 80 Fed. Rep. 811; *U. S.* v. *Sweeney*, 95 Fed. Rep. 434; *In re Debs*,

158 U.S. 564. Concerning these cases and some others cited by plaintiff, the Judge held that they were not reconcilable on principle with the *Mogul S.S. Case* and others of like character which he considered to have been rightly decided. See also *Cumberland Glass Mfg. Co.* v. *Glass Blowers Association* (*N.J.*), 46 Atl. Rep. 258; *Sinshenner* v. *U. G. W. of A.*, 28 N.Y.S. 321; *Davis* v. *Engineers*, 51 N.Y.S. 180; *Tallman* v. *Gaillard*, 57 N.Y.S. 419; *National P. Association* v. *Cumming*, 65 N.Y.S. 946. In this view the Judge refused an injunction, except to restrain the acts which have been hereinbefore designated as unlawful. The above decision has received the favourable comment and general approval of the Bar here.

R. MASSON SMITH.

San Francisco.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PASSING OFF GOODS .. THOSE OF THIRD PARTY—DECEIT—FUNCTIONS OF JUDGE AND WITNESS.

Payton v. *Snelling* (1901) A.C. 308, is reported apparently for the sake of certain observations of Lord Macnaghten on the respective functions of a judge and witness in actions of deceit for passing off goods by the defendant as those of the plaintiff. His Lordship condemned the practice of asking witnesses in such cases leading questions as to whether a person going into a shop as a customer would be likely to be deceived, and maintains that is not a matter for the opinion of the witness but for the judge, who, looking at the exhibits before him and paying due attention to the evidence adduced, is not to surrender his own independent judgment to that of any witness.

CONTRACT—CONSTRUCTION—AGENCY—VENDOR AND PURCHASER.

Livingstone v. *Ross* (1901) A.C. 327, is a decision of the Judicial Committee of the Privy Council (Lords Hobhouse, Robertson, and Lindley, and Sir Ford North) affirming a judgment of the Court of Queen's Bench of Quebec. The action was for specific

performance of an alleged contract for the sale of land and other property. The plaintiff was a broker, and the defendant wrote to him offering to sell, without naming any purchaser, the property in question at a certain price, and on certain terms, and naming the commission to be paid to the plaintiff. The plaintiff wrote back accepting the offer, to which the defendant replied that he could not recognize his acceptance as binding, as he had named no principal on whom defendant could have any hold, and that plaintiff was simply a broker. Their Lordships were clear that the defendant had made no offer to sell to the defendant individually, and they regarded the commission agreed to be paid to him as conclusive of the fact that he was intended to be merely an agent for sale.

RAILWAY COMPANY, LIABILITY OF—LOSS OF LIFE FROM EXPLOSIVES IN A RAILWAY CARRIAGE—NEGLIGENCE—ONUS PROBANDI.

East Indian Railway Co. v. *Kalidas* (1901) A.C. 396, is an Indian appeal. The respondent sued to recover damages for the loss of his son, who died from burns received in a fire which took place in a railway carriage in which the deceased was travelling. The fire was caused by an explosion, while the train was en route, of certain bombs and other fireworks, illegally introduced by a fellow-passenger into the carriage in which the deceased was travelling. There was no evidence whether the defendants' servants had or had not notice of the fireworks before they exploded; nor any evidence how they were carried into the train. It was contrary to the provisions of a statute for any person to take any dangerous goods with him upon any railway without giving notice of their nature; and the servants of the company were authorized to refuse to carry such goods, and might open packages believed to contain such goods. The Courts below held that the onus was on the defendants to shew that they had taken due precautions to prevent the introduction of the explosives into the carriage, and that, in the absence of such evidence, the respondent was entitled to judgment. The Judicial Committee (Lord Halsbury, L.C., and Lords Macnaghten, Davey, Robertson, and Lindley), on the other hand, held that the onus of shewing negligence was on the plaintiff. Their Lordships deny that it is the law that railway companies are common carriers of passengers, and as such, bound to carry them safely; which, as they point out, would be tantamount to saying that they would be responsible for

the safety of passengers independent of the question whether there was negligence or not. Their Lordships are of the opinion that there is no such obligation imposed on railway companies.

ORDER IMPROPERLY MADE—APPEAL—ACTING UNDER IMPROPER ORDER NOT APPEALED FROM—PROHIBITION.

In *Dierken* v. *Philpot* (1901) 2 K.B. 380, an order had been improperly made remitting a High Court case for trial in a County Court. The defendant did not appeal from the order, but on the trial in the County Court he took the objection that the order to try the case in the County Court had been improperly made. The Judge of the County Court refused to entertain the objection, and proceeded to try the case and gave judgment for the plaintiff. The defendant then applied for a prohibition. Day, J., granted the application, but a Divisional Court (Lord Alverstone, C.J., and Lawrance, J.,) reversed the order, holding that under such circumstances a prohibition ought not to be granted.

PARENT AND CHILD—ILLEGITIMATE CHILD—CONTRACT BY MOTHER TO GIVE UP CUSTODY OF CHILD—CONTRACT TO RELIEVE MOTHER OF RESPONSIBILITY TO MAINTAIN ILLEGITIMATE CHILD.

Humphrys v. *Polak* (1901) 2 K.B. 385, was an action brought by the mother of an illegitimate child to recover damages for breach of a contract by the defendants to assume the custody of the child and relieve the plaintiff from responsibility for its maintenance. On an application in Chambers, the statement of claim was struck out by the master, whose order was affirmed by Day, J., as shewing no cause of action. The Court of Appeal (Williams and Stirling, L.JJ.,) upheld the order, holding that an agreement by the mother of an illegitimate child to give up the custody of the child is no consideration for a contract to support the child, and that such a contract cannot be enforced at law. The reasoning of the Court does not seem altogether convincing, and it seems strange that such a contract, though inoperative to divest the mother of her legal liability to maintain the child, might not nevertheless be enforced by her. The legal theory of consideration, on which the late Sir Geo. Jessel once made some amusing remarks, seems to have been considered the obstacle to the plaintiff's right to recover; and because the plaintiff did not, besides the custody of the child, give also to the defendants a tom-tit or a canary, her case failed. But for this decision, we should have thought that the transfer of the custody of the child was a good legal consideration.

INSURANCE (MARINE)—CAPTURE—PROPERTY OF ALIEN ENEMY—INTENTION TO WAGE WAR — SEIZURE BY BELLIGERENT STATE OF PROPERTY OF ITS OWN SUBJECTS.

Driefontein Gold Mines v. *Janson* (1901) 2 Q.B. 419, was an appeal from the decision of Mathew, J. (1900), 2 Q.B. 339 (noted ante vol. 36, p. 661), and the Court of Appeal (Smith, M.R., Williams and Romer, L.JJ.,) have unanimously affirmed his decision. The action was brought to recover on a policy of insurance on gold lost on its transit from Johannesburg to England. The loss occurred in this way: the South African Republic not then being at war with England, but war being imminent, "commandeered" the gold, the property of the plaintiffs, a Transvaal corporation. The defendants resisted payment because they contended that, on grounds of public policy, a contract of insurance against such a loss as was incurred in this case is invalid; but the Court of Appeal came to the conclusion that, although the case was not covered by authority, there was nothing against public policy in insuring against such loss. The Master of the Rolls goes so far as to characterize that contention as absurd.

DEFAMATION — SLANDER — WORDS NOT ACTIONABLE PER SE — IMPUTATION OF INSOLVENCY TO SOLICITOR.

Dauncey v. *Holloway* (1901) 2 K.B. 441, was an action brought by a solicitor to recover damages for slander, the words being: "they tell me he (meaning the plaintiff) has gone for thousands instead of hundreds this time;" and, on another occasion: "It seems to be a worse job than the other was. Miss Allen told me Mr. Donnelly had lost thousands." Wright, J., who tried the action, held that the words were not actionable per se, and that, in the absence of proof of special damage, the plaintiff could not recover, and his judgment was affirmed by the Court of Appeal (Smith, M.R., and Williams and Romer, L.JJ.).

TRUSTEE AND CESTUI QUE TRUST — BREACH OF TRUST — SOLICITOR — TRUSTEE — FRAUD — APPROPRIATION OF SECURITIES — ENTRIES IN BOOKS — LEGAL ESTATE—NOTICE—EQUITABLE TITLE.

Taylor v. *London and County Banking Co.* (1901) 2 Ch. 231, is an action arising out of the fraud of a solicitor, in which it was held that the entry by the solicitor in his books of a statement purporting to appropriate a certain mortgage security to a particular trust estate which he had defrauded, was a sufficient

equitable declaration of trust of such mortgage to entitle the cestui que trust to the benefit thereof, but that a subsequent purchaser of such mortgage, who acquired the legal estate without notice of the prior appropriation, acquired a better title. Various other questions are discussed, *e.g.*, the effect of a legal mortgagee making an advance without notice of a prior equitable title; of an equitable mortgagee making an advance without notice of a prior equitable title, and subsequently getting in the legal title with, or without notice (as the case may be), of the prior equity; and of an equitable mortgagee who allows his mortgagor to retain the title deeds, which ultimately got into the hands of a subsequent equitable incumbrancer; and of the right of a purchaser for value of an equitable title, without notice, to call for the legal estate; which, in view of the registry system prevailing in this Province, it seems unnecessary to dwell upon here, where they do not often arise.

COMPANY—SURRENDER OF SHARES—ULTRA VIRES—TRANSACTION AMOUNTING TO SALE AND PURCHASE OF SHARES—RELEASE OF LIABILITY ON SHARES—RESTORATION OF SHARES SURRENDERED.

Bellerby v. *Rowland & M. S. Co.* (1801) 2 Ch. 265, was tried before Kekewick, J., aad was brought to rectify the register of a joint stock company, so as in effect to cancel a surrender of certain shares which had been made to the company, and to declare the surrenderers still entitled thereto. The shares in question were for £11 each, of which only £10 had been paid, and the company's articles empowered the directors to accept a surrender of any members' shares upon such terms as should be agreed on, and in pursuance of this provision certain of the directors surrendered certain shares held by them in order to make good to the company a loss which had been incurred. The company had since become prosperous, and the directors were desirious of being restored the shares which they had surrendered, and it was stated that the rest of the shareholders agreed to this. Kekewich, J., though of opinion that the surrender was in effect a purchase by the company of its own shares and as such was bad, as partly paid shares cannot on the authority of *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409, be validly surrendered so as to relieve the shareholders from the liability to calls, nevertheless held that the "justice of the case" did not require the rectification of the register after the lapse of seven years, and he therefore dismissed the action.

CONTRACT—VALIDITY—RESTRAINT OF TRADE—SALE TO WHOLESALE DEALER ON TERMS REQUIRING HIM TO RESELL ON SPECIFIED TERMS.

In *Elliman* v. *Carrington* (1901) 2 Ch. 275, it was held by Kekewich, J., that a contract made by manufacturers of goods to sell their goods to a wholesale dealer whereby the purchaser bound himself not to sell the goods for less than certain specified prices, and if he sold to the trade, to procure a similar signed agreement from every retail trader whom he supplied, was valid in law, and not obnoxious to the objection that it was in restraint of trade; and where the purchaser had sold to retail dealers without procuring from them such agreement as provided by the contract, he was liable in damages for the breach.

EASEMENT—IMPLIED RESERVATION OF EASEMENT—RIGHT TO SUPPORT.

In *Union Lighterage Co.* v. *London G. D. Co.* (1901) 2 Ch. 300, the defendants claimed an easement of support under the following circumstances: One Green, being the owner of two parcels of land X and Y, X being let to tenants, and Y in his own possession, erected a graving dock on Y, and, with the consent of the tenants of X, had placed supports for such dock fifteen feet within the boundary of X but under the surface. In 1877 Green's successors in title conveyed X to the plaintiffs by a deed in common form containing no express reservation of any right of support. In 1900 the plaintiffs in excavating on the property first discovered the existence of the supports. There was nothing visible on the surface to indicate that the graving dock was in any way supported by these underground supports. Cozens-Hardy, J., held that there was no implied reservation of the right to support when X was conveyed to the plaintiff; and secondly, that the support had been enjoyed without the plaintiffs' knowledge, and not in such a way that their attention ought reasonably to have been drawn to it, although there had been nothing surreptitious or actively concealed, and therefore that no easement had been acquired by prescription; and thirdly, that the plaintiffs were entitled to remove the supports though the effect would be to cause a collapse of the dock.

COMPANY—MEMORANDUM OF ASSOCIATION—PREFERENCE SHARES—ALTERATION OF HOLDER'S RIGHTS.

In *Underwood* v. *London Music Hall* (1901) 2 Ch. 309, the articles of association of defendants, a limited company which divided its capital into preference and ordinary shares, and provided: "Such preference shares shall confer a right to a fixed cumulative preferential dividend at the rate of £7 per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed, or have any special privilege or advantage, or may be deferred, and may be issued on such special conditions as to priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally in such terms as the company may from time to time determine." Preference shares had been issued, and thereafter the company proposed to increase its capital by the issue of new preference shares to rank pari passu with those previously issued, and Cozens-Hardy, J., held that under the articles the company was entitled so to do.

COMPANY—SHARES—EQUITABLE MORTGAGE OF SHARES—PLEDGE.

In *Harold* v. *Plenty* (1901) 2 Ch. 314, an equitable mortgagee of shares by deposit of the certificate sought to enforce his security by foreclosure, and the question was raised whether he was entitled only to an order for sale as in the case of a pledge. Cozens-Hardy, J., held that he was entitled to an order for transfer and foreclosure, as the security was in the nature of an equitable mortgage and not a pledge.

VENDOR AND PURCHASER—CONTRACT—ENJOYMENT OF LIGHT—DEED OF ACKNOWLEDGEMENT, NON-DISCLOSURE OF, BY VENDOR—SPECIFIC PERFORMANCE—COMPENSATION—COSTS.

Grenhalgh v. *Brindley* (1901) 2 Ch. 324, was a vendor's action for specific performance of a contract for the sale of land. The property consisted of dwelling houses having windows overlooking the land of a third person. The purchaser claimed that there was an implied representation or warranty that the windows were entitled to access of light over the land of the third person; but that the vendor had given a deed acknowledging that he had no such right, which deed he had failed to disclose, and he claimed, if specific performance were decreed, that he was entitled to compensation. Farwell, J., held that there was no implied representation

or warranty as claimed by the defendant, and that the non-disclosure of the deed was no ground for refusing specific performance, or allowing the purchaser compensation, but he considered it a ground for refusing the plaintiff costs.

WILL—CONSTRUCTION—GIFT TO A CLASS—GIFT OVER ON DEATH "LEAVING ISSUE."

In re Schnadhorst, Sandkuhl v. *Schnadhorst* (1901) 2 Ch. 338, is a decision of Joyce, J., on the construction of a will whereby the testator gave his residuary estate in trust for his widow for life, or, on her death, to apply the income in the maintenance and education of his children, until the youngest who should be living, being a son, should attain 21, or, being a daughter, attain that age or marry. And subject thereto he directed that the trust fund and income thereof, and any accumulation not vested or applied under his will, should be held in trust for all his children who, being sons, should attain 21, or, being daughters, should attain that age or marry, in equal shares. And he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common. The question was whether this latter contingency of dying "leaving issue" referred to merely a death in the lifetime of the widow, or whether it meant death at any time. Joyce, J., held that there was nothing in the will to limit the operation of the words, and that the gift over took effect in case of the death at any time of any of the children leaving issue.

WILL—LEGACY—ADEMPTION PRO TANTO—SUBSEQUENT SETTLEMENT ON DIFFERENT TRUSTS.

In re Furness, Furness v. *Stalkartt* (1901) 2 Ch. 346. In this case a testator by his will made in 1885 gave to his daughter on attaining 25 or marriage £20,000, and directed that £15,000, part thereof, should be settled upon her and her children. In 1893 the daughter married, and the testator then settled on her and her children by deed £7,300 upon trusts differing from those declared by the will respecting the £15,000. The testator died in 1900. It was not denied that there was an ademption pro tanto of the legacy, but the question at issue was whether the £7,300 was an ademption pro tanto of the £15,000 part of the legacy given by the will. Joyce, J., held that notwithstanding the difference in the trusts upon which the £7,300 had been settled, it was an ademption pro tanto of that part of the legacy.

EASEMENT—WAY—UNITY OF POSSESSION—INTERRUPTION—PRESCRIPTION ACT 1832 (2 & 3 WM. 4 C. 71) SS. 2, 4—(R.S.O. C. 133, SS. 34, 35).

In *Damper* v. *Bassett* (1901) 2 Ch. 350, the plaintiff sued the defendant, the owner and occupier of an adjoining farm, for trespass to land, in driving a horse and cart from his own farm across certain fields belonging to the plaintiff. The defendant set up that he had acquired a right of way over the land in question under the Prescription Act 1832 (2 & 3 Wm. IV. c. 71), (R.S.O. c. 133, ss. 34, 35), and alleged an uninterrupted user of the way for 40 years. It, however, appeared that one Ashby had been tenant of both the plaintiff's land and that of the defendant from 1877 to 1898, and under these circumstances Joyce, J., held, following *Onely* v. *Gardiner* (1838) 4 M. & W. 496, and *Battishill* v. *Reed* (1856) 18 C.B. 696, that the unity of possession during the greater part of the 40 years was fatal to the defendant's claim under the Act.

STOCK EXCHANGE—CLOSING OF CUSTOMER'S ACCOUNT BY BROKER—SALE, AND REPURCHASE OF SHARES, BY BROKER—BROKER—PROFIT ON REPURCHASE.

Macoun v. *Erskine* (1901) 2 K.B. 493, was an action by the customer of a firm of stockbrokers for wrongfully selling shares, in contravention of an alleged agreement by the defendants to keep the account open. The jury found that the agreement to keep the account open was conditional on the plaintiff supplying the necessary funds, and that he had neglected so to do. The defendants counterclaimed for the difference between the price at which the shares were bought and that which had been realized for them; and it appeared in evidence that, the plaintiff having failed to supply funds for keeping the account, the defendants got a stock jobber to make a price for the sale of the shares, and the jobber named a fair market price, and the defendants then sold the shares to him at the price named, and at the same time arranged for the repurchase of the shares from him at the next account. Mathew, J., the judge at the trial, dismissed the plaintiff's action, and gave judgment for the defendants for the amount claimed by their counterclaim. On appeal the plaintiff contended that the account had not been validly closed; that the sale of the shares to the jobber was a mere form, and that the defendants could not validly buy the shares themselves, acting as they did in a fiduciary capacity. The Court of Appeal (Smith, M.R., and Williams and Romer, L.JJ.), however, sustained the judgment of Mathew, J. Smith, M.R., and Romer, L.J., thought the case was governed by *Walter* v. *King*, 13 Times

L.R. 270, and that the sale was valid, and a proper proceeding by the defendants to minimise the loss and indemnify themselves. Williams, L.J., dissented from this view; but Williams and Romer, L.JJ., thought that the plaintiff at the trial had treated the sale as valid, and it was not open to him on an appeal to argue that it was an invalid way of closing the account. Williams, L.J., however, states that he considers it an objectionable proceeding for the broker to sell, and at the same time make a bargain to repurchase, in such a case.

Erskine v. *Sachs* (1901) 2 K.B. 504, which follows, shews that where under such circumstances a sale and repurchase of shares is made by brokers, and they derive any profit from such repurchase, they are bound to account to their principal therefor.

MORTGAGE—CLOG ON REDEMPTION—MORTGAGE OF SHARES—STIPULATION BY MORTGAGEE FOR COLLATERAL ADVANTAGE—VALIDITY OF CONTRACT.

Carritt v. *Bradley* (1901) 2 K.B. 550, seems to be a clear invasion of the rule laid down in *Jennings* v. *Ward* (1705) 2 Vern. 520, that "a man shall not have interest on his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement," and if it is carried to a higher court we should not be surprised to find it reversed. It is true the principle cited from *Jennings* v. *Ward* has of late been held to be too wide, but the present case shews the danger of beginning to tamper with well settled principles. The rule that when a mortgagor pays off his debt he is entitled to get back all he has given as security therefor, is founded not only in equity but common sense. In the present case a mortgagee of shares of a joint stock, stipulated with his mortgagor that he should "always hereafter" use his influence to have the mortgagee employed as a broker for the company, and that if any other broker should be employed he, the mortgagor, would pay to the mortgagee the profit he would have earned had he been employed. The mortgage debt was paid off, and the quondam mortgagee in the present action sued his quondan mortgagor for damages for breach of this agreement and the Court of Appeal (Smith, M.R., and Williams and Stirling, L.JJ.) held that he is entitled to recover. But for this decision one would have thought that the mortgagor on paying his debt was entitled to a release or reassignment of this, as of every other security, held for the debt. Certainly the case opens out a beautiful vista for grasping money lenders.

REPRESENTATION AS TO CREDIT OF THIRD PERSON- SIGNATURE OF PARTY TO BE CHARGED—CORPORATION—SIGNATURE BY AGENT OF CORPORATION—9 GEO. 4, C. 14, S. 6—(R.S.O. C. 146, S. 7.).

In *Hirst* v. *West Riding Union Banking Co.* (1901) 2 K.B. 560, the Court of Appeal (Smith, M.R., and Williams, and Stirling, L.JJ.), following *Swift* v. *Jewsbury*, L.R. 9 Q.B. 301, have held that where it is sought to charge a corporation upon any representation as to the credit, character, or conduct, of any person, the writing in which such representation is made must be under the corporate seal, and that the signature of its agent, though made in the usual course of business, is not sufficient under 9 Geo. 4, c. 14, s. 6. (R.S.O. c. 146, s. 7) to impose any liability on the corporation. The representation in the present case was signed by the defendant's manager.

PRACTICE—PARTICULARS—DIRECTORS' LIABILITY—REASONABLE GROUNDS OF BELIEF.

Alman v. *Oppert* (1901) 2 K.B. 576, was an action against the directors of a company for damages sustained by reason of misstatements contained in a prospectus of the company. The defendants in their defence set up that they had reasonable grounds to believe the statements to be true. The plaintiff applied for particulars of the grounds of such belief, and the Court of Appeal (Collins and Stirling, L.JJ.), overruling Day, J., held that the defendants should be ordered to deliver the particulars.

MERCHANTS' SHIPPING ACT, 1894—PERSUADING SEAMEN TO DESERT.

Poll v. *Dambe* (1901) 2 K.B. 579, deserves a brief notice. By s. 326 (1) of the Merchants' Shipping Act, 1894, which is in force in Canada, it is made an offence "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice . . . to desert from his ship." Upon a case stated by a magistrate the Divisional Court (Lord Alverstone, C.J., and Lawrance and Phillimore, JJ.) held that this provision only applies to British ships.

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—SERVANT OF ONE PERSON LENT TO ANOTHER—CONTROL OF SERVANT.

Waldock v. *Winfield* (1901) 2 K.B. 596, presents some points of similarity to *Saunders* v. *Toronto*, 26 Ont. App. 265. The facts were briefly as follows. A manufacturing company entered into

a written contract with the defendant for the hire from him of a van, horse and driver, for the purpose of delivering goods to their customers. The contract provided that the defendant was to supply a capable man to take charge of the van and horse, and all charges in reference to the van, horse and man, were to be paid by the defendant, and that the company was only to be responsible for the hire, at a certain sum per annum, payable by monthly instalments. The driver of the van supplied by the defendant to the company was guilty of negligence when delivering goods of the company to a customer, whereby a servant of the customer was injured. There was no evidence that any one representing the company exercised any control over the driver in respect of the delivery of the goods of the company. On this state of facts the jury found that the defendant had parted with the control of his servant the driver of the van, and on this finding Darling, J. dismissed the action. The jury, however, provisionally assessed the plaintiff's damages at £150. The Court of Appeal (Smith, M.R., and Williams and Stirling, L.JJ.) held the finding of the jury to be unwarranted by the evidence and set it aside, and gave judgment for the plaintiff for the damages assessed, on the ground that the terms of the agreement shewed that the driver was not to be the servant of the company, or under its control, but was to remain the servant of the defendant, which differentiated the case from such cases as *Rourke* v. *White Moss Colliery Co.*, 2 C.P.D. 205.

DEBENTURE HOLDERS' ACTION—DEFICIENT ESTATE—COSTS OF PLAINTIFF—COSTS AS BETWEEN SOLICITOR AND CLIENT.

In re New Zealand Midland Ry., Smith v. *Lubbock* (1901) 2 Ch. 357, Kekewich, J., complained that he was placed in a difficulty by reason of the point submitted not having been argued. The action was a debenture holders' action and the assets were deficient, and the question was whether the plaintiff was entitled to his costs as between solicitor and client out of the fund, or only costs as between party and party. He came to the conclusion that it was like a mortgage action, and therefore only party and party costs should be allowed; but the Court of Appeal (Collins and Stirling, L.JJ.) came to a different conclusion, and held that, on the principle adopted in administration suits, the plaintiff should be allowed costs as between solicitor and client. The rule about paying the

plaintiff's costs as between solicitor and client out of the fund where it is deficient, but giving him only party and party costs where it is sufficient, rests on a principle which is not very clear; indeed, the whole question is based on the anomaly that there is any difference at all between party and party, and solicitor and client, costs.

ADMINISTRATION OF ASSETS—INSUFFICIENCY OF GENERAL ASSETS—RESIDUARY ESTATE—TRUST DECLARED BY SEPARATE INSTRUMENT AFFECTING RESIDUE.

In re Maddock, Llewelyn v. *Washington* (1901) 2 Ch. 372, the only point necessary to be noticed is the point decided touching the order in which certain assets were directed to be administered. The testatrix, by her will, had devised her residuary estate to her executor, and by a separate paper which the executor acknowledged to be a valid declaration of trust, she had directed a portion of the residue to be held in trust for certain persons. The general estate was sufficient, and the question was whether the part of the residue as to which the trust had been declared was to be deemed a specific or residuary bequest. Kekewick, J., held that as the trust was declared by an instrument dehors the will, it did not affect the character of the residue under the will, and that consequently the debts were payable rateably out of the portion affected by the trust, and the portion not so affected.

COSTS—DEBENTURE HOLDERS' ACTION—TRUSTEES' COSTS—SAME SOLICITOR APPEARING FOR TWO PARTIES, ONE ENTITLED, AND THE OTHER NOT ENTITLED, TO COSTS.

Mortgage Insurance Co. v. *Canadian Agricultural C. & C. Co.* (1901) 2 Ch. 377, is another case on the question of costs. This also was a debenture holders' action, the debentures being secured by a trust deed. The trustees of the deed were made defendants, and appeared by the same solicitor who represented the defendant company. The company was held not to be entitled to costs out of the fund, but the trustees were held entitled to costs, and the question was, what costs under the circumstances they ought to get. Kekewich, J., held that they should get a full set of costs, but not any of those incurred on behalf of the company.

VENDOR AND PURCHASER—TRUST FOR SALE—EXECUTION OF TRUST—UNDERLEASE—VENDORS AND PURCHASERS ACT, 1874 (37 & 38 VICT., C. 78, S. 9)—(R.S.O. C. 134, S. 4)—RESCISSION OF CONTRACT—RETURN OF DEPOSIT.

In re Walker and Oakshott (1901) 2 Ch. 383, Kekewich, J., holds that under a power to sell a leasehold estate, it is not competent for the trustee to underlease it, even though but one day be reserved. In this case the leasehold consisted of several tenements which were offered for sale by the trustee en bloc, but, failing to meet with a purchaser, they were then offered separately at an underlease for the whole term, reserving one day. The purchaser objected to the title, and on an application under the Vendors and Purchasers Act his objection was sustained and the contract ordered to be rescinded and the deposit returned to him, following, on the latter point, *In re Higgins and Percival*, 59 L.T. 213.

LANDLORD AND TENANT—REMOVAL OF FIXTURES—FRUIT TREES—RIGHT OF TENANT TO REMOVE FIXTURES.

Mears v. *Callender* (1901) 2 Ch. 388, although turning to some extent on the effect of an English statute, of which we have no counterpart in Ontario, deals also with a tenant's common law rights as to fixtures, etc., and should therefore be noted. There were two classes of things which a tenant, whose term had expired, claimed the right to remove, or to get compensation for under the Act in question. First, certain glass houses which he had placed on the demised premises for the purposes of his trade as a market gardener. These houses consisted of ten glass frames—one had concrete sides, and its glass span roof substantially rested on the sides, and could be removed without damaging the walls. The glass roofs of the other houses were supported by, and nailed to, wide sills, which in turn were nailed to, and supported by, wooden piles driven into the ground. All of these houses Cozens-Hardy, J., held the tenant had a common law right to remove. The other class of things which the tenant claimed the right to remove consisted of 1,200 fruit trees which had been planted by him for the purposes of his business, but as to these the learned judge held that the tenant had no right at common law either to cut down, or remove them.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

Martin, Dep. Loc. J.] [April 19.

SMITH *v.* THE EMPRESS OF JAPAN.

Maritime law—Collision—"Overtaken vessel."

A collision occurred between a sailing vessel and a steamship in the open sea at night. At the time of the collision the sailing vessel was close-hauled on the starboard tack, and was proceeding within six to seven points of the wind, the direction of the wind being north-east true. The course of the steamship when the ships first sighted each other was north 72 degrees west true, and her speed about 14 knots. The weather was comparatively clear, with the moon nearly full, but obscured by passing clouds. The sailing vessel was shewing her regulation side lights, but no stern light.

Held, following *Inchmaree Steamship Company* v. *The Astrid*, 6 Ex. C.R. 178, 218, that the steamship was an overtaking ship within the meaning of Art. 24 of the rules for preventing collisions at sea, and as such was obliged to keep clear of the overtaken vessel. *The Main*, 11 P.D. 130, distinguished.

W. J. Taylor, K.C., for plaintiffs. *Helmcken*, K.C., *E. P. Davis*, K.C., and *A. P. Luxton*, for defendant ship.

NOVA SCOTIA ADMIRALTY DISTRICT.

McDonald, C.J., Loc. J.] [May 2.

CONWELL *v.* THE RELIANCE.

Admiralty law—Collision—Fishing vessels—Sufficiency of anchor—Careless navigation.

The C.E.S., a fishing schooner, while lying at anchor at Banque Quero, was run into and sunk by another fishing vessel, the R., which was changing her berth in the night time. The weather was fine and the sea smooth. The C. E. S. was displaying a light in order to comply with the regulations, but it was claimed by the crew of the R. that they did not see

the light until it was too late to avoid a collision. It was shewn that the R. had been fishing in a berth four or five miles distant from the C. E. S., that her crew knew that there were a number of vessels fishing in their vicinity, and that the master of the R. took no extra precautions in sailing at night over the closely crowded fishing grounds, but on the contrary went below himself, leaving the ship under full sail to the charge of those on deck.

Held, that the R. was solely to blame for the collision.

W. B. A. Ritchie, K.C., for plaintiffs. *R. E. Harris*, K.C., for defendant.

Burbidge, J.] [July 13.

HAMBURG AMERICAN PACKET COMPANY *v.* THE KING.

Accident on a public work—Non-repair—Money voted by Parliament—Discretion of Minister — Jurisdiction of Court — Improvement of navigation.

Petition of right—There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failing to use in the repair of any public work money voted by Parliament for the purposes of such public work.

In such a case, whether the repair should be made or the money expended is within the discretion of the Governor-General in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

Semble, although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of s. 7 of the Public Works Act (R.S.C. c. 36), it does not follow that once the Minister has expended public money for such a purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages.

C. Robinson, K.C., and *L. McCarthy*, for suppliants. *The Solicitor-General of Canada*, *Dr. Trenholme*, K.C., and *J. J. O'Meara*, for respondents.

Burbidge, J.] [Sept. 21.

BOSTON RUBBER SHOE COMPANY *v.* BOSTON RUBBER CO., OF MONTREAL.

Trade-mark — Infringement—Corporate name—Use of when conflicting with trade-mark—Fraud—Intent to deceive.

In the absence of fraud or bad faith a body corporate may use its own name on goods of its own manufacture although such use may tend to con-

fuse its goods with goods of the same kind bearing the trade-mark of another manufacturer.

Where the defendants, a corporate body, had obtained its name before a trade-mark with which such name was said to conflict had been registered in Canada by the plaintiffs, a foreign corporation, and it was not shewn that the defendants had adopted such name with intent to deceive the public, nor to sell its goods as those of the plaintiff, the court refused to restrain the defendants from using their corporate name upon goods manufactured by them.

R. V. Sinclair, for plaintiff. *A. McGoun*, K.C., for defendant.

Province of Ontario.

COURT OF APPEAL.

Practice.] BEAM *v.* BEATTY. [Oct. 16.

Arrest—Application for discharge—Onus—Intent to defraud—Former absconding—Insolvency—Bond—Restoration.

The expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for an order of arrest, but it is a question of fact, and the judge may infer it from the facts and circumstances shewn by the affidavits. The decision of the judge who grants such an order is subject to review, but the onus of shewing that he was wrong rests upon the party who complains of it. Under the circumstances of this case the order was rightly made. The former conduct of the defendant in respect to the same debt was a fact or circumstance to be taken into consideration on the question of intent. The impecunious or insolvent condition of the defendant does not, of itself, minimize or rebut the fraudulent intent. Decision of a Divisional Court, 19 P.R. 207; 36 C.L.J. 423, reversed.

Held, also, that the order of the Court below directing that the bond given by the defendant should be delivered up and the surety therein released was erroneous; the bond ought to have remained upon the files of the Court, being a record thereof; and the order ought only to have directed that an exoneretur be entered thereon; therefore the bond should be restored.

A. C. McMaster, for plaintiff. *C. A. Masten*, for defendant.

HIGH COURT OF JUSTICE.

Street, J.] REX *v.* MORGAN. [Oct. 12.

Criminal law—Procedure—Summary trial—Powers of magistrate—Theft—Attempt to commit—Conviction—Description of offence—Warrant of commitment—Absence of—Order for further detention.

It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (*a*) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in sub-sec. (*b*).

The offence of theft from the person is sufficiently described in popular language as picking the pocket of a person.

To authorize the detention of a person under a conviction there should be a warrant of commitment; but where there was none, and the conviction itself was lodged with the gaoler as his authority for the detention, there being an offence proved and a proper conviction for the offence, and no merits on the part of the prisoner the judge before whom the prisoner was brought upon habeas corpus exercised the power conferred by sec. 752 of the Code, and directed that the prisoner should be further detained and that the convicting magistrate should issue and lodge with the gaoler a proper warrant.

Du Vernet, for prisoner. *Cartwright*, K.C., for Crown.

Ferguson, J., Meredith, J.] [Oct. 14.

SCOTTISH AMERICAN INVESTMENT CO. *v.* BREWER.

Mortgage—Foreclosure—Opening up—Subsequent incumbrancer.

Mortgagees obtained the usual judgment against the mortgagor and his wife for redemption or foreclosure on the 5th April, 1900. The Master added as defendants a subsequent mortgagee and creditors of the mortgagor having a fi-fa lands in the hands of the sheriff, and by his report, dated the 16th of May, 1900, certified that the execution creditors had not proved any claim, and appointed the 17th of November, 1900, for payment by the subsequent mortgagee. Payment not having been made, a final order of foreclosure as to the added defendants was issued on the 21st of November, 1900. The Master thereupon made a subsequent report appointing the 29th December, 1900, as the day for payment by the original defendants; and payment not having been made by them, a final order of foreclosure was issued against them on the 29th of January, 1901. On the 3rd of April, 1901, the execution creditors served a notice of motion to open the foreclosure. On the same day the mortgagees had written to the mortgagor offering to give them, as of grace, a part of any surplus over their claim which they should realize by a sale of the mortgaged premises, upon the mortgagor agreeing not to move to open the foreclosure.

Held, that the execution creditors, having moved with reasonable promptness, and being in a position to give the mortgagees immediate payment, were, under the circumstances detailed in the evidence, entitled to have the foreclosure set aside, and to be let in to redeem upon the usual terms. *Thornhill* v. *Manning*, 1 Sim. N.S. 451, followed.

Lockhart Gordon, for plaintiffs. *H. C. Fowler*, for original defendants. *S. H. Blake*, K.C., and *A. H. F. Lefroy*, for execution creditors.

Lount, J.] OTTAWA GAS CO. *v.* CITY OF OTTAWA. [Oct. 17.

Contract—Offer in writing—Acceptance—Concluded agreement—Proviso as to formal contract.

The defendants in April, 1898, by advertisement, invited tenders for lighting the city buildings for a period of five years; tenders to be in by the 12th May. The plaintiffs on the 12th May tendered as follows: "We agree to supply the necessary light for the civic buildings as mentioned in your letter for the sum of $945 per annum, and will supply fifty lamps. All to become the property of the city at the expiration of the five years' contract." On the 16th of May the city council by resolution accepted the plaintiffs' tender, and the city clerk on the 18th May wrote to the plaintiffs, "I beg to notify you that your tender for lighting city buildings as per specifications for a period of five years for the sum of $945 per annum was accepted by the city council at its meeting on Monday last. The necessary contract will be prepared as soon as possible." No formal contract was ever signed by the parties. The plaintiffs supplied the defendants with gas, and sent in quarterly accounts for $236.25, which were paid by the defendants. The plaintiff's president made inquiries about the formal contract from time to time from the city clerk and the chairman of the finance committee, and this state of things continued until the 2nd February, 1900, when the plaintiffs wrote to the defendants submitting that there was no existing contract, because the formal contract had never been executed, and also making certain complaints. They also claimed payment on the basis of a quantum meruit, contending that there was no binding contract.

Held, that by the offer of the plaintiffs and the acceptance of the defendants there was a concluded agreement; that the words at the end of the acceptance did not qualify the acceptance or leave it conditional on the execution of a contract. The conduct of the plaintiffs shewed that they did not so construe it, for they immediately after the acceptance entered upon and performed their part of the agreement without first requiring any formal contract, sent in their accounts for eighteen months on the basis of the contract being in existence, and were paid accordingly.

Bonnewell v. *Jenkins*, 8 Ch. D. 70, *Bolton* v. *Lambert*, 41 Ch. D. 305, *Lewis* v. *Brass*, 3 Q.B.D. 667, and *Brogden* v. *Metropolitan R. W. Co.*, 2 App. Cas. 666, referred to.

R. G. Code, for plaintiffs. *Taylor McVeity*, for defendants.

Moss, J. A.] WARD *v.* BENSON. [Oct. 17.

Security for costs—Defendant out of jurisdiction—Surrogate Court proceedings—Real actor.

The plaintiff applied to the Surrogate Court for grant to him of letters probate as the executor named in a will. The defendant having filed a caveat and entered an appearance, the plaintiff delivered a statement of claim praying the Court to decree probate of the will in solemn form, and the defendant delivered a statement of defence disputing the factum of the will. The plaintiff then obtained an order for the removal of the proceedings into the High Court.

Held, that, according to the practice and procedure of the High Court, which was applicable, the plaintiff was not entitled to security for costs from the defendant, who was out of the jurisdiction.

W. J. Elliott, for plaintiff. *H. A. E. Kent*, for defendant.

Street, J.] HOLDEN *v.* GRAND TRUNK R. W. Co. [Oct. 17.

Practice—Third party procedure—Indemnity—Directions—Order allowing notice—Appeal.

In an action to recover damages for the death of an employee of the defendants, who was killed at a crossing of the defendants' railway with another railway, the defendants obtained an ex parte order allowing them to serve a third party notice upon the other railway company, claiming indemnity under an agreement whereby the latter company were allowed to put in the crossing at the point where the accident happened upon their indemnifying the defendants against any claim for damages arising during the progress of the work. The defendants asserted and the other company denied that the accident in question happened during the progress of the work.

Held, that it was desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, although all the matters in dispute between the defendants and the third parties could not be determined in the action.

Baxter v. *France* (No. 2), (1895) 1 Q.B. 591, distinguished.

Form of order giving directions as to trial and questions of costs in such a case, settled.

Semble, referring to *Baxter* v. *France*, (1895) 1 Q.B. 455, 458, that it was the duties of the third parties, if they objected to being added, to appeal within due time against the order allowing the notice to be served upon them.

Lynch-Staunton, K.C., for plaintiff. *Wallace Nesbitt*, K.C., for defendants. *D'Arcy Tate*, for third parties.

Moss, J.A.] SMITH *v.* SMITH. [Oct. 17.

Pleading—Reply—Regularity—Title to land—Assignment of mortgage—Attacking.

The statement of claim, in an action for a declaration that the plaintiff was entitled to a share in certain lands and to recover possession, alleged that the defendant society were in possession of the whole of the lands and in receipt of the rents and profits, under a mortgage of a share or interest therein made by two of the remaining defendants, who derived their title from the plaintiff's father or some of his heirs. The defendant society sought to defend their possession and to hold the rents and profits by setting up in their statement of defence the assignment to them of a mortgage made by the plaintiff's father. The plaintiff replied that there was no consideration for the assignment of such mortgage, and that the alleged assignor was at the time of making it of unsound mind, to the knowledge of the defendant society.

Held, that the reply raised an issue which the plaintiff was entitled to have tried, and it was not irregular or improper to raise it at that stage.

H. W. Mickle, for plaintiff. *J. H. Moss*, for The Hamilton Provident and Loan Society defendants. *F. W. Harcourt*, for infant defendants.

Ferguson, J.] ATTORNEY-GENERAL FOR ONTARIO *v.* STUART. [Oct. 18.

Revenue—Succession duties—Double duty—Power of appointment.

The testator died in England Feb. 25, 1901, possessed of and entitled to lands in Ontario. He left a will and four codicils by which his sister was named as sole executrix and trustee, and was bequeathed the income of his whole estate for life and given a general power of appointment by will in respect of the whole estate. The sister died March 2, 1901, without having proved the will and codicils, and without having taken upon herself any of the burdens thereof. By her will, made in 1873, she gave all her estate to the defendant, who obtained from the High Court of Justice in England letters of administration to the estates of the testator and his sister with the wills annexed. He then applied to the Surrogate Court of Ontario for ancillary letters of administration to both estates and for legal authority to deal with the lands in Ontario.

Held, that, having regard to the provisions of clause (g) of s. 4 of the Succession Duty Act, R.S.O. 1897, c. 24 (inserted by s. 11 of 62 Vict. c. 9), the lands in Ontario were subject to two duties, as having devolved under both wills.

Held, also, that the provisions of sub.-s. 2 of s. 6 of 1 Edw. VII., c. 8, were not declaratory of the previous law nor retroactive, and, having become law since the two deaths, did not apply to this case. *Attorney-General* v. *Theobald*, 24 Q.B.D. 557, distinguished.

Shepley, K.C., and *F. C. Jones*, for plaintiff. *G. T. Copeland*, and *J. D. Falconbridge*, for defendant.

COUNTY COURT.

COUNTIES OF STORMONT, DUNDAS AND GLENGARRY.

Liddell, Co. J.] [July 25.

RE BELL TELEPHONE COMPANY AND TOWNSHIP OF WINCHESTER.

Assessment—Notice of appeal too late--Waiver—Assessment of poles, wires, etc.—Effect of 1 Edw. VII., c. 29, s. 2.

Appeal to the County Judge from the Court of Revision of the Township of Winchester. A preliminary objection was taken that the notice of appeal to the Court of Revision was not given within the time prescribed by the Assessment Act. It appeared, however, that the court heard both parties, no objection being taken at the time. The learned judge held that it was now too late to object to the action of the Court of Revision, that the question was now properly before him on appeal from such court and that any informality had been waived.

As to the mode to be adopted in assessing the company's poles, wires, etc., the learned judge said: "The only change made by 1 Edw. VII., c. 29, s. 2, sub-s. (*a*), in the mode of assessing property in a township such as the one in question, is that the property shall be valued as a whole or as an integral part of the whole. The basis of valuing the whole is not, as it seems to me, in any way affected by the amending Act. Regard must still be had to sub-s. 1 of sec. 28 of the Assessment Act, which requires that such property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor. It may be that in cases (if such there be) where the real property of a person or an incorporated company—that is the whole system—is situate within the limits of a city, town or township a different principle of assessment would be applicable to such property than would be applicable to property not wholly situate within the municipality. In the former case the assessment would be very much higher, as the entire system could be operated within the limits of the municipality. In the latter case the property would be of but little value, and a purchaser at a tax sale if the taxes had to be realized by a sale of the assessed property would give no more than the material would bring taken down and sold as loose property."

S. S. Reveler (Winchester), for appellants.

W. B. Lawson (Chesterville), for respondents.

COUNTY COURT.

COUNTY OF KENT.

RE TOWNSHIP OF CHATHAM AND CANADIAN PACIFIC R.W. CO.

Assessment—Railway—Value of land—Right of way—Station ground.

Held, that the land of a railway company, consisting of its right of way, station-houses and yards should be assessed at the average value of lands in that locality, without taking into account the value of the grading, rails, and general superstructure.

[Chatham, Sept. 28.—BELL, Co. J

This was an appeal by the Canadian Pacific R.W. Co. from a decision of the Court of Revision for the township of Chatham pronounced on June 9, 1901, raising the assessment upon the company's lands in that township from $2,800 to $7,323.10. The appeal came on before His Honour Judge Bell, Senior Judge of the County Court of the County of Kent, at Chatham, Sept. 28, 1901.

It was proved that the railway company owned 115 acres in the township, consisting solely of its right of way, and two small station-houses and yards.

Shirley Denison for the Railway Company: Under sec. 26 of R.S.O. c. 223 the appellant's assessment should be no higher than the average value of lands in the locality.

J. S. Fraser for the Township: In arriving at the value at which the right of any way should be assessed, the assessor should take into account the value of the grading, rails, poles, fences, and general superstructure.

The following cases were cited: *Rouse* v. *G. W. R. Co.*, 15 U.C.R. 168; *Re Midland and Uxbridge*, 19 C.L.J. 331; *Re Midland and North Gwillimbury*, 19 C.L.J. 331; *Re C.P.R. Co.* v. *Harriston*, 21 C.L.J. 334, and *Re G.T.R. and Port Perry*, 34 C.L.J. 239.

BELL, Co. J.—In order to ascertain the value of the railway property, a fair test in the case was to take the average value per acre of the tier of lots through which the railway ran, and after making a deduction from that for the value of buildings and improvements on the farm, to value the railway lands at the same value per acre as the lots through which they passed. Applying this rule, and taking the value of each lot adjoining, it appears that (including the buildings upon them) the lots were assessed at an average value of $45 per acre. The railway company's lands valued at that figure would be worth $5,175, from which a deduction of $397, being 7½ per cent., should be made on account of the average difference in the value of buildings on the adjoining farms. Subtracting this amount from $5,175 there is left a balance of $4,788, which will be the assessment of the railway company's lands. *Rouse* v. *G. W. R. Co.*, 15 U.C.R. 168 followed.

Province of Manitoba.

KING'S BENCH.

Killam, C.J.] PRESTON *v.* NUGENT. [Sept. 21.

Attorney and client—Agreement respecting costs—Mis-statement of fact inducing client to sign agreement—R.S.M. c. 83, s. 68.

Action by a client against his solicitor to set aside an agreement dated March 5, 1897, as to the costs of certain suits, which had been entered into under the following circumstances: The defendant had been for over ten years acting as solicitor for the plaintiff and others, in a series of protracted and expensive law suits, carried on with the object of realizing certain large amounts upon certain judgments recovered by him for the plaintiff and others, for amounts due for construction work upon certain railways, which were in the hands of receivers, and, owing to the inability of his clients to furnish funds to carry on the suits, had expended large sums of his own money in disbursements and otherwise, and had devoted a large part of his time for years in the work. He had also in order to provide funds to carry on the litigation been obliged to borrow and pay interest upon large sums of money, and to allow a good deal of his real estate to be sold for taxes, some of which land was thus lost to him, and the rest cost him considerable sums to redeem. One of the judgments had in 1893 been assigned to the solicitor upon certain trusts, and in 1896 and 1897 the prospects of final collection being still somewhat remote, he claimed the right, in the event of his clients not furnishing him with necessary funds, of selling this judgment on the best terms he could, representing to them, as the fact was, that he was in great danger of being financially ruined unless some settlement of the claims could soon be made, and on Dec. 24, 1896, defendant wrote to the plaintiff a letter containing these sentences: "As I told you, however, in a former letter, I am resolved to end the matter at the earliest possible opportunity by selling the judgments as soon as a convenient opportunity presents itself. * * * Then you have nearly a seventh interest in the Charlebois judgment in which I have paid out between twelve and fourteen thousand dollars, and yet all you have contributed is about $185." In Feb., 1897, the plaintiff came to Winnipeg and had several interviews with defendant, which eventually resulted in the agreement of 5th March, 1897. By this agreement, authority was expressly given to defendant to either prosecute further the proceedings under one of the judgments, or to sell or assign it for such sum and on such terms as he should be able to obtain or to otherwise settle the judgment, and to apply the moneys realized upon certain trusts, one of which would have the effect of allowing him to keep certain bulk sums in

lieu of his proper taxable costs and charges, the amount of which had not been ascertained in any way. A few days before the date of this agreement, the defendant had written another letter to the plaintiff, urging the making of some arrangement. He said, in part: "Something must be done at once. I must either be recouped my past cash outlays and be provided with means to carry through the litigation, or some agreement must be arrived at so that I may be free to negotiate for a settlement on the best terms I am able to obtain, so that I may be paid my costs and at the same time get what I can beyond this for my clients' benefit." It was admitted that the defendant's statement in his letter of 24th December, 1896, that he had paid out over $12,000 in connection with the Charlebois judgment was untrue, and that his disbursements in connection with that judgment fell far short of any such sum. The defendant explained that in making that estimate he had included his losses through having to pay interest on moneys borrowed, redeeming property sold for taxes, or otherwise losing property or money for want of the moneys disbursed, and the judge did not impute to him an intentional mis-statement of the amount of his disbursements for the purpose of procuring such an agreement as the one in question.

Held, nevertheless, that the mis-statement was material and calculated, with the other circumstances, to influence the minds of the clients in the negotiations leading up to the agreement, and that consequently it must be set aside.

The clients were so interested in the Charlebois judgment that the statement of the amount disbursed in connection with it was very material. The defendant's letters and verbal statements to the clients were directly calculated to make them feel that they must satisfy him in order to secure a continuance of his cordial efforts on their behalf. He was not merely the solicitor, but also a trustee who held the judgment and in whose power the clients must have felt themselves peculiarly. He had such a knowledge of the position as it would be difficult for another solicitor to acquire, at any rate without a delay which might be ruinous, and it was hardly possible that he and his clients should be equally in a position to estimate the value of the judgment. It might well be that the defendant did not intend to hold out the prospect of the loss of the claims as a threat for the purpose of securing an undue advantage, but the whole position and his strong representation of it must have contributed, even more than the confidential relations between him and his clients to render the clients incapable of acting freely and independently as they had no independent advice.

Held, further, that s. 68 of The Law Society Act, R.S.M. c. 83, making it legal for a solicitor to make such a bargain with a client as the one in question, does not preclude the Court from exercising the ordinary jurisdiction of a Court of Equity to determine its validity upon equitable principles; although it contains no express provisions as the corresponding Ontario statute does, for inquiring into the fairness or reasonableness of

such an agreement, and for setting it aside if found unfair or unreasonable. The action also attacked an agreement made in May, 1893, which had been entered into between the solicitor and his clients by which the former was to retain for himself the sum of $13,350 and interest at eight per cent. per annum out of the judgment when collected in lieu of his taxable costs and charges. This was attacked on the alleged grounds that it had been made at the request of and under pressure from the defendant while he was the plaintiff's solicitor and without his clients having independent advice and without consideration as to the charge of interest and upon false representations as to the right to interest and without intention on the part of the client to enlarge the defendant's rights, but the judge found that misrepresentation was not proved.

Held, that the circumstances were such that it could not be said that this agreement was not fair and reasonable, and that the forbearance to sue was a sufficient consideration for the promise to pay interest, although there was no legal right to it.

Judgment avoiding the contract of 1897, affirming that of 1893, and directing an account. Defendant to pay the costs of the action up to the trial. Further directions and subsequent costs reserved.

Elliott and *Minty*, for plaintiff. *Howell*, K.C., and *Ewart*, K.C., for defendant.

Killam, C.J.] TURRIFF *v.* MCDONALD. [Oct. 3.

Solicitor—Right of solicitor trustee to costs as against trust estate—R.S.M. c. 146, s. 40—Lien of solicitor under Imp. Act, 23 and 24 Vict., c. 127.

Appeal from the decision of the taxing master that the defendant, Nugent, a solicitor, was entitled to have taxed and allowed to him profit costs out of a certain fund of which he was trustee for himself, his co-defendants, McDonald & Schiller, and their creditors, in respect of his services as solicitor in the defence of a certain suit in Ontario affecting the trust fund, which services had been rendered by the trustee as a solicitor of the Ontario Court.

Held, that, notwithstanding the provision in s. 40 of The Manitoba Trustee Act, R.S.M. c. 146, the rule of English law that a sole trustee who is a solicitor cannot charge against the trust estate profit costs for acting as solicitor for the estate still prevails to the extent that he is not entitled as of right to have such costs taxed to him as a solicitor.

The Trustee Act gives him a legal right to "such remuneration for his care, pains and trouble, and his time expended in and about the trust estate" as the court, judge or master may think fair and proper, but a separate application for such allowance would have to be made. *Meighen* v. *Bull*, 24 Gr. 503, followed; *Cradock* v. *Piper*, 1 Mac. & G. 664 distinguished.

Held, also, that neither the Imp. Act, 23 & 24 Vict., c. 129, nor the Ontario Rule 1129 founded upon it, gives a solicitor an absolute right to a lien for his costs upon property recovered or preserved through litigation, but only a discretionary power in the court to charge the property.

Appeal allowed with costs, and declaration made that the trustee has no right to profit costs as against any of the beneficiaries except his co-defendants, but without prejudice to any claim against the latter for costs, or to any application for remuneration as trustee under The Manitoba Trustee Act, or under any law of the Province of Ontario.

Phippen, for creditors, appellants. *Ewart*, K.C., for solicitor trustee.

Flotsam and Local Items.

CONSTRUCTION OF STATUTES. — The *Central Law Journal* says: "One of the most insidious temptations of courts or judges in arriving at the meaning of statute is to resort to intrinsic or contemporaneous construction whenever the words taken in their ordinary meaning do not appeal to their preconceived opinion as to what the law ought to be or what they think the Legislature had in mind. The intention of the Legislature or the evils they intended to remedy are absolutely immaterial where the words they have used, when taken in their ordinary usage, admit only of one interpretation." The writer refers to the following authorities as sustaining this position: *Southern R. W. Co.* v. *Local Union*, decided October 5, 1901, U.S. District Court, Memphis; *Lake County* v. *Rollins*, 130 U.S. 662; *St. Paul, etc., Railway* v. *Phelps*, 137 U.S. 528; *Hamilton* v. *Rathbone*, 175 U.S. 414, 419; *Dewey* v. *United States*, 178 U.S. 510, 521. It may seem unnecessary to refer to the matter here, but the temptation to deviate from the above wholesome rule is so great that the judicial mind seems sometimes to be unconsciously swayed from the straight line.

UNITED STATES DECISION.

THE piling of railroad cross-ties in a street is held, in *Kramer* v. *Southern R. Co.* (N.C.), 52 L. R. A. 359, not to make a railroad company liable for the death of a child on whom the ties fell while trying to climb upon them, where the company did not know that children were in the habit of resorting there to play. The turntable cases are held inapplicable.

DICTATION of a libelous letter to a confidential stenographer is held, in *Gambrill* v. *Schooley* (Md.), 52 L. R. A. 87, to be sufficient to constitute a publication of the libel.

THE owner of a steam roller is held, in *Stewart* v. *California Imp. Co.* (Cal.), 52 L. R. A. 205, to be liable for injuries caused by the engineer's neglect to warn travellers of the danger of escaping steam, where he hires and has power to discharge the engineer, and pays his wages, although the roller has been hired by the day to a municipality for use upon its streets, and its officers direct where the roller shall be used.

THE act of a brakeman in throwing rocks and clods to drive a trespasser, who is stealing a ride, from rods under a box car, is held, in *Dorsey* v. *Kansas City P. & G. R. Co.* (La.), 52 L.R. A. 92, to be within the scope of his employment, rendering the company liable for the death of the trespasser by falling under the wheels in escaping. This is in accord with some of the cases found in a note in 27 L. R. A. 161.

A LANDLORD'S promise to a tenant to protect an unguarded cistern, on the faith of which the tenant enters, is held, in *Stillwell* v. *South Louisville Land Co.* (Ky.), 52 L. R. A. 325, to relieve the latter from contributory negligence in taking possession with his family, where a child falls into the cistern before the landlord has guarded it.

THE rule that oral evidence is admissible in respect to the consideration of a deed, on which the authorities are fully reviewed in a note in 20 L. R. A. 101, is applied in the case of *Johnson* v. *Elmen* (Tex.), 52 L. R. A. 162, admitting oral evidence that a grantee in a deed with covenant against encumbrances agreed to assume the payment of certain liens.

A RIGHT of action by a wife for alienation of her husband's affections is held, in *Wolf* v. *Frank* (Md.), 52 L. R. A. 102, to exist at common law, and, even if its enforcement were suspended by her inability to sue without joining him, she is given such right by a statute authorizing married women to sue for torts committed against them as if unmarried.

A POLICY on a man's life for the benefit of his wife, and, in case of her death, payable to his children, is held, in *Millard* v. *Brayton* (Mass.), 52 L. R. A. 117, to be a contract with the wife, and to give the children, in case of her death during his lifetime, a vested interest which will inure to their estates if they die while the father is living.