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THE BASIS OF REASONABLE TIME.

The limits of reasonable time have generally to be determined because of want of certainty in contracts. The question may arise in other ways. A notice is to be given before a judicial order can be made; an act may have to be performed before another's obligation arises; the validity of a contract in restraint of trade may be tested by the extent of time involved. And while no definition of what is, and what is not, reasonable time can be given, there is a constant condition which indicates the principle applied in determining what is reasonable time. Take a familiar example. A manufacturer agrees to furnish an article for a certain price. If no time be stated it is assumed that he will be given a reasonable time so to do. Many elements will enter into the settling of the exact limits of such a time. But they are all worked out, not to demonstrate the manufacturer's good faith per se, but to show that he is in the position of having so performed his obligation, according to the contract, as to enable him to compel performance of the latter by the purchaser. The proof is idle except for that purpose. Hence it is really reasonable time principally from the standpoint of the obligee, but modified by the situation of the obligor and always having regard to the requirements of the contract. For, while it may be reasonable under all the circumstances of the one, it may not be so viewed from the situation of the other. Both sides must be considered, but it is obvious that the ultimate test is that which, subject to the expressed terms of the contract, satisfies the requirements of the person to be obligated, otherwise it must fail of proof.

To illustrate: Unprovided for and totally unexpected obstacles may beset the manufacturer, rendering him blameless if he occupy a year in fulfilling his contract. But that in itself will not be conclusive. The purchaser's situation must be taken account of, and knowledge of it will make unreasonable that which otherwise cannot be found fault with. Therefore it is fair to conclude that unless and until the evidence offered

reaches the point of rendering it proper and right to hold the other party bound, the Court will decide that the limit of reasonable time has been passed. The test, then, seems to be this. Should the obligation upon the promise be enforced, in view of the lapse of time? This appears clearly from the following cases.

In *Adamson* v. *Yeager*, 10 A.R. 477, the agreement placed the defendant's farm with the plaintiff for sale at a named price on commission. If the defendant sold it himself the plaintiff was to have one-half of the commission. It was held that, in law, this meant that the defendant was bound to leave it with the plaintiff for a reasonable time, and not forever. Now, from the plaintiff's point of view it was quite fair that his contract should last as long as he was willing to try and sell the farm. But it was obviously unfair to the defendant that he should remain for all time subject to an obligation to pay one-half the commission. And so, in order to raise a liability against the defendant, the time within which the plaintiff was to do his portion of the agreement had to be reasonable from the defendant's side.

In *Bulmer* v. *Brumwell*, 13 A.R. 41, reasonable time was ascertained by the test as to whether it was right under the circumstances to make the defendant liable when the plaintiff had not done his part.

The case of *Dolan* v. *Baker* (Divisional Court, Feb. 26, not yet reported), shews that the cancellation of a binding agreement may be affected by the application of the same test.

The most striking illustrations of the theory that it is the fastening or loosening of an obligation which is aimed at, are found in two cases, *Jackson* v. *Union Marine Insurance Company*, L.R. 8 C.P. 585 and *Carvill* v. *Schofield*, 9 S.C.R. 370.

In the former case the ship was to arrive for cargo in a reasonable time at Newport from Liverpool. The ship was stranded on the way to Newport, on January 4th, and returned to Liverpool and never prosecuted her voyage. The charterers on the 15th February hired another ship, and sued the ship owners for loss of the chartered freight. The shipowner's contract excepted dangers and accidents of navigation. The Court (Brett and Keating, LL.J.; Bovill, C.J., dissenting) held that the question was whether (in case the delay was so great as to prevent the arrival

of the ship within a reasonable time, having regard to the business of the charterer) the contract was not at an end in the sense that neither party to it could enforce any obligation under it against the other. And they determined that the contract was, under the circumstances, and notwithstanding the exception of sea perils, no longer enforceable.

In the Canadian case the ship "Venice" was to arrive, and did arrive at Shelburne, at a particular time, and was then to proceed to St. John, N.B., for cargo. The Court held that she was only bound to arrive in St. John from Shelburne in a reasonable time. The ship got on the rocks between Shelburne and St. John, and, owing to the time necessary to repair her, did not arrive in St. John for four months. The Court, having in view the exception of perils of the sea, decided that she had arrived in a reasonable time, i.e., that the exception obliterated the delay caused by the accident and repair. But they pointed out that, even so, had the delay been such as would have frustrated the whole object of the voyage in a commercial sense, the arrival within a time otherwise reasonable, in view of the terms of the contract, would not have bound the charterer. It is clear that the ratio decidendi, was that the performance should be such that not only must it be reasonable in view of the situation of the shipowner, protected as he was by this contract, but it must further have been reasonable having regard to the object of the voyage as contemplated by both parties.

It is obvious that in the latter case the standard for determining whether or not time is reasonable was the contract itself as expounded with regard to the circumstances surrounding its making and performance. If the shipowner's default did not go to the root of the contract, then the ship's arrival at St. John was within a reasonable time. But if the non-arrival entirely defeated the contract, then she did not arrive within a reasonable time.

In *Midland* v. *Dominion*, 34 S.C.R. 578, Mr. Justice Killam, in endeavoring to solve the question of reasonable time, was compelled to refer it to a standard, which has never yet been adopted, namely, that reasonable time must be determined with respect to the situation of the obligee, without regard to that of the obligor. It is obvious from the facts of that case that the vessel ar-

rived at Fort William in reasonable time from the standpoint of the obligor, and (except for circumstances with which the obligor had nothing to do) also from that of the obligee. The vessel could easily have been loaded in time had not other vessels occupied the elevator berths. The error in his conclusion is seen by assuming that the contract had mentioned a specific date for arrival which had been complied with. If, at that time, prior arrivals had occupied the elevator berths and spouts, the loading could not have been accomplished in time, yet the charterer would have been liable. In such a case reasonable time, as such, was not really an element, for the proper question is, "Did the vessel owner, by his act or default, prevent or disable the charterer from performing his part of the contract?"

It was at one time thought that the actual or supposed circumstances present to the minds of the contracting parties were those which must alone be considered in determining whether the time occupied was reasonable, i.e., reasonable under those particular circumstances. That meant the exclusion of those actually arising, but not contemplated. This led to strange results, enabling one party to hold the other by reason of fictitious and not actual occurrences, and reasonable time became therefore easily calculable (see this attempted, arguendo, in *Hulthen* v. *Stewart* (1903) A.C. 389). But as the actual conditions either enable or defeat performance, it is clearly impossible to hold the obligee liable upon any theoretic performance of the contract. Time was, in fact, unreasonable as to him. As put by Brett, J., in *Jackson* v. *Union Marine Ins. Co.*, L.R. 8 C.P. 581: "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made."

The modern view is that the actual conditions of the moment, and the real difficulties to be then encountered, are the real factors for consideration.

It took, however, considerable time to evolve this definite conclusion. Earle, C.J., in *Taylor* v. *Great Northern Railway* (1866) L.R. 1 C.P., at p. 387, said that reasonable time meant a time

within which the carrier could deliver, using all reasonable exertions. This is ambiguous. In *Hanson* v. *Royden* (1867) L.R. 3 C.P., at p. 50, it was said that the provisions of a maritime contract generally included and governed only cases of usual occurrence and not unusual events. In *Ford* v. *Cotesworth* (1868) L.R. 4 Q.B., at p. 135, the construction was upheld that the implied contract was to use reasonable diligence, and that only such reasonable time could be taken as was required under ordinary circumstances; but that delay caused by matters arising without fault on either side discharged the defendant. This view was sustained in appeal, (1870) L.R. 5 Q.B., p. 548.

In *Wright* v. *New Zealand* (1879) L.R. 4 Ex. D. 165, the Court of Appeal decided that reasonable time meant reasonable under ordinary circumstances, and that no allowance was to be made on account of fortuitous or unforeseen impediments, e.g., the lighters being all employed at the time fixed for loading.

In *Postlethwaite* v. *Freeland* (1880) L.R. 5 A.C., p. 621, Lord Blackburn explains *Taylor* v. *Great Northern Railway Co.* (ante), as deciding that reasonable time means reasonable time under all the circumstances of the case. Lord Watson, in *Dahl* v. *Nelson* (1880) 6 A.C., at p. 59, strikes a similar note when he says that when possibilities which are not present to the minds of the parties at the time of making the contract become actual facts, the meaning of the contract must be taken to be that which the parties would presumably have agreed upon if they had made express provision regarding such possible occurrences.

The case which settles the point in favor of the more modern view is *Hick* v. *Rodocanachi* (1891) 2 Q.B. 626, where all the cases are dealt with. Lord Lindley (at p. 638) says: "Where no time for unloading is fixed by the contract, the merchant's obligation is, in my opinion, to use all reasonable diligence under the circumstances which exist at the time of unloading." Fry, L.J., deals with the cases which have only regarded ordinary circumstances and those which have taken account of what he calls the "actual emergent events," and concludes (p. 646) that reasonable time must be determined by reference to the actual events which occur.

This decision of the Court of Appeal was affirmed in the House of Lords in *Hick* v. *Raymond* (1893) A.C. 22, where it is

laid down that an obligation to discharge within a reasonable time is performed if the shipowner discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him. This principle has also received further reinforcement by the decision of the House in *Hulthen* v. *Stewart* (1903) A.C. 389.

A consideration of all the foregoing decisions enables us to appreciate the standard which differentiates time which is of the essence of the contract from that which is not. Whether time is fixed or left to be determined by the Court, it is only one element in the contract. It may or may not be essential. If it is not vital, then the limit of reasonable time, when fixed by the Court, is as if it had been mentioned in set terms in the contract. At law default in point of time was fatal to the offending party—but now the provisions of the Judicature Act apply, and limitations of time are, if possible, treated as not necessarily of commanding importance. When, however, from the nature of the subject matter (see *Prendergast* v. *Turton*, 1 Y. & C. Ch. 98; *Tilley* v. *Thomas*, L.R. 3 Ch. 61; *Crossfield* v. *Gould*, 9 A.R. 218), or the surrounding circumstances (see *Oldfield* v. *Dickson*, 18 O.R. 188), or the commercial object of the undertaking (see *Nickell* v. *Ashton* (1900) 2 Q.B. 298; *Reuter* v. *Sala*, L.R. 1 C.P.D. 239), the Court determines that the time of performance must necessarily be of supreme importance, it either holds the parties explicitly to the time as named in the contract, or in defining unspecified time adopts the strict standard which requires a high regard for the prompt and business-like performance of the obligation.

This is what is meant by time being of the essence of the agreement.

FRANK E. HODGINS.

We copy, as a matter of record, the opinion of Mr. Christopher Robinson, K.C., as published in the daily papers, on some of the constitutional questions which have come before the House of Commons for discussion on the Bills providing for the formation of the new Provinces in the North-West. That great lawyer and recognized authority speaks as follows:—

"The right of the Dominion Parliament to impose restrictions upon the Provinces about to be formed in dealing with the subject of education and Separate schools is, I think, not beyond question. This would require more consideration than I have been able yet to give to it, and must ultimately be settled by judicial decision. I am asked, however, whether Parliament is constitutionally bound to impose any such restriction, or whether it exists otherwise, and I am of opinion in the negative. It must be borne in mind that I am concerned only with the question of legal obligation. What the Parliament ought to do or should do in the exercise of any power which they possess is not within the province of counsel. Such a restriction I apprehend must exist or may be imposed, if at all, under the provisions of s. 93 of the British North America Act, 1867, and on the ground of their application to the Provinces now to be formed. If that section applies it would seem to require no enactment of our Parliament to give it effect, and, if not, no such enactment, so far as I am aware, is otherwise made necessary. Upon the whole, I am of opinion that s. 93 does not apply to the Provinces now about to be established. Its provisions would appear to me to be intended for, and confined to, the then Province and to the union formed in 1867. There is not in any part of the North-West Territories, as a Province, any right or privilege with respect to denominational schools possessed by any class of persons, created by the Province, or existing at such union, and a right subsequently established by the Dominion in the part now about to be made a Province does not appear to me to come within the enactment."

The *Central Law Journal*, in a note to the case of *Kaiser* v. *St. Louis Transit Company*, decided in the St. Louis Court of Appeals, discusses the question whether, and to what extent, in an action for personal injuries, services rendered by members

of the family in nursing their injured relative are recoverable by him against the tort feasor. In the case referred to, it was held that an injured person might recover the reasonable value of nursing given him by a widowed daughter who lived with him, although there was no express contract between him and his daughter that she should be compensated. There is of course no difficulty where services are rendered by persons who are not members of the family, but there is where they are. In the United States Courts the weight of authority appears to be in favour of the view that a plaintiff can recover as expenses incurred the value of services rendered by members of his family in nursing him in the absence of any express agreement on his part to pay therefor. This rule goes so far as to include the services of the wife. The trial judge in *Crose* v. *Railroad*, 102 Wis. 196, said:—"The defendant is not entitled to the services of a man's wife, and her services belong to her husband (the plaintiff). If she has been compelled to nurse him in consequence of the injury, I see no reason why it is not a proper charge." The Supreme Court of the State sustained this ruling, saying that "the defendant should not be allowed to profit by reason of the loving care of the wife."

We are glad to see that the legal profession in New Brunswick has awakened, and apparently with some purpose, to the disadvantages arising from the antiquated legal procedure still prevailing in that Province. One is only surprised that the reforms which have taken place in England and the other English speaking Provinces of the Dominion have not as yet touched New Brunswick. Mr. H. A. Powell, K.C., recently discussed the subject before the Barrister's Society in a somewhat exhaustive address, urging the adoption of a Judicature Act similar to that prevailing in other places. The benefit of uniformity in procedure is so apparent that it is unnecessary to dilate upon it. As both Bench and Bar seem to be in favour of the modern system, there can be no doubt but that the change will soon be made.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

ASSESSMENT — ELECTRIC CARS NOT "REAL ESTATE" WITHIN THE ASSESSMENT ACT — RES JUDICATA — COURT OF REVISION—R.S.O. c. 224, s. 39 (2).

Toronto Ry. Co. v *City of Toronto* (1904) A.C. 809. We have already published a full report of the case so that we need not now recapitulate. (See vol. 40, p. 753).

It may perhaps be admitted as a general proposition that any judicial decision which purports to give anything a nature or character which obviously it does not possess is a departure from true principle, but whether the Courts in Canada or in England are right in this particular instance may be a question. It has, however, been at last settled by this judgment that a street railway car is really not "real estate" or "land" within the meaning of the Assessment Act. The language of Lord Justice Davey, who wrote the judgment, has been discussed on a previous occasion. (See vol. 40, p. 763).

MONEY HAD AND RECEIVED—INTEREST AS DAMAGES—COSTS IN ACTION TO WHICH THE CROWN A PARTY.

Johnson v. *The King* (1904) A.C. 817 was an action on the part of the Crown to recover from a public officer a sum of money which he had obtained from the Crown by false pretences. The defendant paid the money into Court with one shilling damages. The Crown claimed interest on the money, and the Court in Sierra Leone gave judgment therefor. From this decision as to interest the defendant appealed. The statement of claim alleged that the money had been obtained by fraud, or, in the alternative, by mistake, and also set up a claim for damages occasioned by the prosecution of the defendant in respect of the alleged fraud. The defendant paid a sum into Court, denied fraud, and set up that the payments had been obtained by mistake. The plaintiff accepted the money paid in, but denied that it was sufficient. The case went to trial and no evidence was offered except the defence,

and the defendant's examination, in which he admitted that he had been convicted and sentenced. At the trial counsel for the defendant pointed out that fraud had not been proved in the action, but the judge held that was not necessary as the defendant admitted receiving money by mistake, or overpayment, from which he thought the law would imply a promise by defendant to pay back the money, and he gave judgment for the interest by way of damages. The Judicial Committee (Lords Macnaghten, Davey, Robertson and Lindley) under these circumstances came to the conclusion that the Crown must be taken to have practically abandoned its claim on the ground of fraud, and rested it on mistake, and although clearly of opinion that money obtained and retained by fraud, may be recovered with interest, yet, in a case of money obtained by mistake, interest is not payable, and they therefore reversed the decision as to interest. On the question of costs they announced that hereafter the Judicial Committee intended to follow the practice in the House of Lords, and in cases where the Crown and a subject are interested the rule will be that the Crown neither pays nor receives costs, unless the case is governed by a local statute, or there are exceptional circumstances justifying a departure from that rule.

LIEN — CHATTEL — HIRE-PURCHASE AGREEMENT — LIABILITY TO REPAIR HIRED CHATTEL — LIEN ON CHATTEL FOR REPAIRS — OWNERS.

In *Keene* v. *Thomas* (1905) 1 K.B. 136 the plaintiff sought to recover possession of a dog-cart which he had let to one Robertson under a hire-purchase agreement under which Robertson agreed to "keep and preserve the dog-cart from injury." The vehicle having got out of order, Robertson sent it to the defendant to repair, and the defendant claimed a lien thereon for the expense of the repairs. Default having been made by Robertson in payment of the instalments of his purchase money, the plaintiff claimed to be entitled to possession of the dog-cart free from the defendant's alleged lien, but the Divisional Court (Lord Alverstone, C.J., and Kennedy, and Ridley, JJ.) held that as, by the terms of the agreement, Robertson was bound to keep the dog-cart from injury, he had a right to send it to the defendant for repair, and it thus being rightfully in the defendant's possession he was entitled to the lien which he claimed both against Robertson and the plaintiff.

COSTS—ACTION FOR RECOVERY OF LAND—LANDLORD AND TENANT — FORFEITURE FOR BREACH OF COVENANT — UNNECESSARY DEFENDANTS — UNNECESSARY ACTIONS — DISALLOWANCE OF COSTS UNNECESSARILY INCURRED—RULE 1002 (20) —(ONT. RULE 1154).

Geen v. *Herring* (1905) 1 K.B. 152 was an appeal from a taxation. The plaintiff was the owner of the reversion in four leases, comprising a number of houses sub-let to weekly tenants. The leases had all been assigned to Herring. The leases having become forfeited by reason of the breach of covenants to repair, the plaintiff commenced four actions to recover possession, and joined all the sub-tenants as defendants with Herring. Herring, having effected the required repairs, applied for relief against the forfeiture which was granted on condition of his paying the plaintiff's costs of the actions between solicitor and client. On the taxation of these costs the master allowed in each action copies and service of the writs on all the sub-tenants. From this Herring appealed, Bruce, J., dismissed the appeal, but the Divisional Court (Stirling, and Mathew, L.JJ.) were of opinion that as the real object of the actions, namely, to compel the execution of the repairs, might have been effectually attained by one action against Herring alone, the costs of joining and serving the sub-tenants was an unnecessary expense, the costs of which should not be allowed; but as the terms on which relief had been granted to Herring were the payment of the costs of the four actions, the Court could not now limit the plaintiff to the costs of one.

BANKRUPTCY — SECURED CREDITOR — VALUING SECURITY — SUBSEQUENT INCREASE IN VALUE OF SECURITY — APPLICATION OF CREDITOR TO RE-VALUE SECURITY — (R.S.O. c. 147, s. 20 (4)).

In re Fanshawe (1905) 1 K.B. 170, although a bankruptcy case, seems deserving of attention as bearing on R.S.O. c. 147, s. 20 (4). In this case a secured creditor filed his proof in bankruptcy valuing his security at half the amount of his debt. In consequence of this claim, a scheme of composition at 10s. in the pound based on the supposition that this creditor was fully secured fell through, and the bankrupt's estate only paid 1s. in the pound. Eight years afterwards, the security having greatly risen in value, the creditor applied for leave to amend his proof, by revaluing his security on the footing that he was fully secured, and it was held by Bigham, J., that he was entitled to do so.

BAILMENT — MASTER AND SERVANT — THEFT BY SERVANT — SCOPE OF EMPLOYMENT.

Cheshire v. *Bailey* (1905) 1 K.B. 237 is one of those cases which must puzzle the mind of the "man in the street," if he ever should pry into the mysteries of the law. In this case the plaintiff, a wholesale silversmith, hired from defendant a carriage and coachman for the purpose of conveying one of plaintiff's travellers about London with samples of the plaintiff's wares to be shewn to customers. It was known to the defendant that these samples would sometimes have to be left in charge of the coachman while the traveller left the carriage. On one of such occasions the coachman during the absence of the traveller drove the carriage to a place where, in pursuance of an arrangement with confederates, the samples were stolen. The plaintiff claimed to recover their value from the defendant. Walton, J., who tried the case, thought it was governed by the decision of the Court of Appeal in *Abraham* v. *Bullock*, 86 L.T. 796, where the carriage owner had been held liable to make good a loss occasioned to the hirer, by reason of the coachman having, during the hirer's absence, left the carriage unguarded, in consequence of which it had been driven off by some unknown person, and the property of the hirer stolen therefrom; but the Court of Appeal (Collins, M. R., and Stirling, and Mathew, L. JJ.) held that he was wrong in that conclusion, and that though the master may be liable for damages occasioned by his servant's negligence, he is not liable for damages occasioned by his criminal act, because, in committing such an act, the servant is not acting within the scope or course of his employment: while therefore the carriage owner is responsible if a third person steal the hirer's property from the carriage owing to the driver's negligence, he is not responsible if the driver himself steals it. As *Abraham* v. *Bullock* never got into the regular reports, perhaps the editor may have had his doubts, and the case having now been through the process of being "distinguished" may shortly arrive at the later stage of being "doubted'" as a preliminary to being finally overruled: for one would not be surprised to find that the same reasons which have exonerated the owner of a carriage from liability for the driver's dishonesty, may ultimately be found to apply equally to losses of property occasioned by the driver's negligence unless it be in the very act of driving. If a person wishes to convey valuable property in a hired carriage it would seem not unreasonable to say that the hirer and not the carriage owner, should provide for the protection of the property from theft, whether by

the driver, or any third person, and that the letting of a carriage does not in any case constitute the carriage owner the insurer of the goods to be conveyed in it, except it be expressly so agreed.

NEGLIGENCE—CONTRACT WITH OWNERS TO REPAIR VAN—NEGLIGENT REPAIR — INJURY TO THIRD PERSON OWING TO DEFECTIVE REPAIR OF VEHICLE—LIABILITY OF CONTRACTOR.

In *Earl* v. *Lubbock* (1905) 1 K.B. 253 the Court of Appeal (Collins, M.R., and Stirling, and Mathew, L.JJ.) have followed *Winterbottom* v. *Wright*, 10 M. & W. 109, recently referred to in these columns, and affirmed the decision of the Divisional Court (91 L.T. 73). The defendant had contracted with a firm to keep a number of their vans in repair. The plaintiff was a driver in the employment of the firm, and while he was driving one of the vans a wheel came off and he was injured. The van had been in the defendant's hands for repair shortly before the accident, and the action was based on the negligence of the defendant's workmen in omitting to discover the defect. Under these circumstances it was held that the defendant owed no duty to the plaintiff and was not liable to him.

WEIGHTS AND MEASURES — FRAUDULENT USE OF WEIGHING MACHINE — WEIGHING ARTICLES WITH PAPER WRAPPER — WEIGHTS AND MEASURES ACT 1873 (41 & 42 VICT. C. 49) S. 26—(R.S.C. C. 104, S. 25).

Stone v. *Tyler* (1905) 1 K.B. 290 was a prosecution for fraudulently using a weighing machine contrary to the Weights and Measures Act s. 26 (see R.S.C. c. 104, s. 25). The offence charged being that the defendant had been requested to sell to the prosecutor a pound of sugar, and had delivered to her a package of sugar, the combined weight of which and the paper in which it was wrapped was a pound, but the weight of the paper was three-quarters of an ounce. The sugar was weighed on the defendant's scales, which were accurate. The pecuniary value of three-quarters of an ounce of sugar was shewn to be greater than the value of the paper bag, which was shewn to be unnecessarily heavy for the purpose of wrapping sugar. The sugar was not weighed in the presence of the purchaser. The justices convicted the defendant, but on a case stated the conviction was quashed by the Divisional Court (Lord Alverstone, C.J., and Kennedy, and Ridley, JJ.) on the ground that there had been no fraudulent using or manipulation of the scales in the act of weighing.

COMPENSATION FOR INJURY TO PROPERTY—ASSIGNMENT OF CHOSE IN ACTION ARISING FROM TORT—RIGHT OF ASSIGNEE OF CHOSE IN ACTION TO SUE IN HIS OWN NAME—JUD. ACT 1873 (36 & 37 VICT. c. 66) s. 25—(ONT. JUD. ACT s. 58 (5)).

In *Dawson* v. *Great Northern Ry. Co.* (1905) 1 K.B. 260, the Court of Appeal (Collins, M.R., and Stirling, and Mathew, L.JJ.) have reversed the judgment of Wright, J. (1904), 1 K.B. 277 (noted ante, vol. 40, p. 259). The plaintiff was assignee of a claim against the defendants for compensation which the owners of certain houses were entitled to recover, owing to a subsidence caused by the defendants having under their statutory powers erected a tunnel. Wright, J., held that the claim was not one that could be assigned, so as to entitle the assignee to sue in his own name, but the Court of Appeal have now held that he erred, and that the claim was a chose in action within the provisions of the Judicature Act. (See Ont. Jud. Act s. 58 (5)).

PARTNERSHIP—SALE OF PARTNER'S SHARE TO CO-PARTNER—DUTY OF PURCHASING PARTNER—CONCEALMENT OF FACTS—RATIFICATION—COMPROMISE.

Law v. *Law* (1905) 1 Ch. 140 was an action to set aside a sale of a share in a partnership to a co-partner, on the ground that the purchasing partner had special knowledge as to the value of the share which he concealed from the vendor. After the sale the vendor discovered that certain facts had been concealed from him, and, though believing that there had been a concealment of other material facts, he then compromised an action which he had brought to set aside the sale, by accepting a further sum. Subsequently to the date of this compromise he made a further discovery of a large amount of assets of the firm which had not been disclosed, and he then commenced this action claiming that the former compromise was not binding on him, because it had been made without a full disclosure of all material facts. Kekewich, J., who tried the case, gave judgment dismissing the action, and with this conclusion the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) agreed. While it was conceded that the plaintiff's original cause of action was well founded, yet the Court of Appeal held that as he had chosen to elect to confirm the sale, without a full investigation as it was competent for him to do, he could not afterwards repudiate it.

PRINCIPAL AND AGENT—SECRET PROFIT RECEIVED BY AGENT WITHOUT FRAUD—COMMISSION.

Hippisley v. *Knee* (1905) 1 K.B. 1 was an action by principals against their agents to recover from the agents certain secret profits received by the agents in the shape of discounts on printing and advertising charges incurred for the principals, and also the commission paid to the agents, on the ground that it had been forfeited by reason of the agents' acceptance of the secret profit. The agents had been employed by the plaintiffs to sell certain pictures for a specified commission, and their expenses out of pocket. Among the expenses out of pocket were certain charges for printing and advertising, for which the agents had been allowed a discount from the ordinary retail charges, which discount would not, however, have been allowed to the plaintiffs had they themselves incurred the expense, but was allowed by a custom of the trade to the defendants as auctioneers. The defendants had charged the plaintiffs the gross amount of these charges without allowing any rebate, and on the plaintiffs subsequently discovering that the defendants had been allowed a discount, the action was brought not only to recover the amount of the discount, but also the commission, which they claimed the defendants had forfeited. *Andrews* v. *Ramsay* (1903) 2 K.B. 635 (noted ante, vol. 40, p. 111) was relied on by the plaintiffs, but the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.) considered that case distinguishable, and though the plaintiffs were entitled to the secret profit, they could not recover the commission also, on the ground that in this case the secret profit had been received by the agents without fraud, and under a mistaken notion as to their rights, and the profit in question not being connected with the contract which the agents were employed to make, or the duty they were called on to perform.

LIFE INSURANCE—POLICY — WARRANTY AGAINST SUICIDE—CONDITION PRECEDENT—POLICY FOR BENEFIT OF THIRD PARTY.

In *Ellinger* v. *Mutual Life Ins. Co.* (1905) 1 K.B. 31 the plaintiffs appealed from the judgment of Bigham, J., (1904) 1 K.B. 832 (noted ante, vol. 40, p. 454). The action was on a policy of insurance taken out by the insured for the benefit of a third person as security for a debt: the application stated that it was the basis and a part of the contract that the insured would not commit suicide whether sane or insane, and the policy stated that it was made in pursuance of the application which was thereby made a part of the contract. The applicant committed suicide whilst insane. The plaintiffs contended that the term in

regard to suicide was merely a warranty or collateral promise, but not a condition, the breach of which would avoid the contract, but this contention was overruled by the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.), they agreeing with Bigham, J., that it was a condition, the non-observance of which rendered the policy null.

PARTNERSHIP—PLAINTIFF SUING IN FIRM NAME—DEMAND OF NAMES OF PARTNERS — DISCLOSURE OF NAMES OF PARTNERS —AFFIDAVIT—ISSUE WHETHER PARTICULAR PERSON WAS A PARTNER—JURISDICTION TO DIRECT ISSUE—RULES 648A (1), (2)—(ONT. RULES 144, 222).

In *Abrahams* v. *Dunlop* (1905) 1 K.B. 46 the plaintiff sued in the name of a firm, and the defendants having served a demand for the names of the several persons composing the plaintiff firm, the plaintiffs' solicitor delivered an answer specifying W. E. Abrahams as being the sole partner. An order was then made on the application of the defendants that the plaintiff should furnish on oath the names and addresses of all persons who were partners in the plaintiff firm when the cause of action arose, and of those on whose behalf the action was brought. In answer to this, the affidavit of Louisa Abrahams was filed, which stated that the partners in the firm were herself and W. E. Abrahams, temporarily resident in Australia. She gave her own address, but not that of W. E. Abrahams. An order was then obtained by the defendants requiring her to attend and be cross-examined on her affidavit, which she did; and then, on an application to set aside the writ and service, a Judge in Chambers ordered an issue to be tried as to whether Louisa Abrahams was at the time of the accruing of the cause of action a partner in the plaintiff firm. The plaintiffs appealed, and the Court of Appeal (Stirling and Mathew, L.JJ.) set aside the order, on the ground that on the filing of the affidavit of Louisa Abrahams, it was not competent to direct an issue to be tried apart from the ordinary issues in the action, and that the plaintiffs would be bound by the affidavit as shewing that the action was one by W. E. Abrahams and Louisa Abrahams, and that the statement of claim when delivered must be read as containing that allegation and as being a part of the plaintiffs' case, which the plaintiffs would have to establish. Stirling, J., comments on the apparent difficulty of reconciling Rules 648A (1), and 648A (2) (Ont. Rules 144, 122), the former appearing to require an affidavit and the latter a simple statement of the plaintiffs' solicitor.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Street, J.] CROWDER *v.* SULLIVAN. [Nov. 14, 1904.

Marriage—Contract in restraint of—Agreement to continue as housekeeper.

Plaintiff, who for several years had been housekeeper for a widower with a young daughter, and being about to be married, he promised her, if she would continue in his service as housekeeper so long as he needed her and abandon her contemplated marriage, he would either pay her $1,000 in cash, give her a promissory note for $1,500 or remember her in his will. The plaintiff thereupon abandoned the marriage and continued her service until her employer's death, which occurred four years afterwards, he, in the meantime having given her a note for $1,500. In an action against his administrator on the note—

Held, that the primary object of the agreement was the continuing in the intestate's service, the restraint of marriage being merely an incident thereto, and that, under all the circumstances, the restraint was not such an unreasonable one as could be said to be contrary to the policy of the law, and that the plaintiff was therefore entitled to recover on the note.

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

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

COULTER *v.* EQUITY FIRE INS. CO.

Fire insurance — Parol contract — Interim receipt limiting duration of contract — Incumbrance — Omission to notify company—Absence of written application—Materiality.

The plaintiffs on Nov. 7, 1901, applied through an agent of the defendants to their general manager for an insurance of $2,800 on certain machinery and stock in trade which he accepted, and the usual interim receipt was issued by its terms

limiting the insurance to thirty days, but of such limitation no notice in writing was given to the plaintiffs. On Nov. 30, the plaintiffs, in the belief that the insurance was for a year, paid the annual premium to the agent, who according to his usual course paid it over to the defendants on Jan. 20 following, when it was duly accepted by the defendants. No policy, however, was issued, and a fire subsequently occurring some ten months after whereby the goods were destroyed, the defendants repudiated the liability on the ground that the insurance was for thirty days only.

Held, 1. There was a valid parol contract for insurance for a year, and that nothing subsequently took place to modify or impair it, the interim receipt under the circumstances not having such effect.

2. Under the parol contract an implication was raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as were just and reasonable, and that was substantially the effect of the interim receipt, and which, though ineffective to restrict the duration of the contract, must be looked at as part of the evidence surrounding it.

Under the first statutory condition the applicant for insurance is not to misrepresent or omit to communicate any circumstances material to be made known to the company to enable it to judge of the risk, while a variation thereof on the company's policies required the applicant to communicate the existence of any mortgage or other incumbrance and the amount thereof, and it was objected that the applicant had omitted to communicate the existence of a mortgage on the insured property whereby the insurance was vitiated.

Held, that whether the first statutory condition was alone considered or the variation thereof, which in effect was the same, the object was to obtain information as to the risk before accepting it, which information is usually obtained by questions and answers in a written application, and as there was no such application here and no question put at all either written or verbal, there was no duty imposed on the insured to communicate the fact of the existence of the mortgage; and semble, the existence of the mortgage was not, in the circumstances of the case, a fact material to be made known to the company.

Judgment of MEREDITH, C.J.C.P., 7 O.L.R. 180, affirmed.

Watson, K.C., for appellants. *Riddell*, K.C., and *S. B. Woods*, for respondents.

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

LANGLEY *v.* KAHNERT.

Sale of goods—Property passing—Consignor and consignee—R.S.O. 1897, c. 148, s. 41—"Transfer."

A quantity of furs were consigned by a manufacturer to a company, at its risk as to burglary, fire, etc., with the right to the company to sell the same for such price and on such terms of credit or otherwise as it chose, but was to pay the manufacturer within twenty-four hours after the sale of any article according to a price list furnished with the goods, and it might become the owner of any article on payment of the price according to such list, with the right to the manufacturers and the company respectively to withdraw or return any of the goods, and which right, from time to time, had been duly exercised.

Held, that the relationship between the parties was not that of vendor and purchaser, but of consignor and consignee, the property in the goods continuing in the consignor.

Held, also, that s. 41 of the Bills of Sale, R.S.O. 1897, c. 148, did not apply, there not having been any sale of the goods, the word "transfer" also contained in the section being used in a limited sense, namely, to a transaction in the nature of a sale.

W. R. Smyth, for appellants. *Douglas*, K.C., for respondents.

From Falconbridge, C.J.K.B.] [March 7.

SMART *v.* DANA.

Bond for performance of condition in appointment to office—Resignation of office—Acceptance of—Subsequent breaches—Liability for.

Plaintiff resigned his office of sheriff which he had held for many years and defendant was appointed in his place under a commission containing a condition that he should pay plaintiff "out of the revenues of the said office" a certain sum for his life. Finding that the "revenues" were not sufficient to pay the amount he resigned his office on March 18th, and on April 24th following was re-appointed under a commission without any such condition. Action was brought on a bond given for the due fulfilment of the condition and judgment given for the amount of the penal sum and damages assessed for the breaches up to the time of his resignation and paid. A petition was sub-

sequently presented to the Court asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages, it was

Held, that want of good faith is not to be imputed to the Crown, who undoubtedly had the right to permit, and did permit, the resignation, and by accepting it made it effectual: that the re-appointment as an act of grace discharged the condition and all further liability on the bond; that the condition was attached to the first commission and the annuity was payable only during the occupancy of the office thereunder, and when the commission was gone there ceased to be any contract to pay it; that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him; that the question was not res judicata by the principal judgment; and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment.

Quaere, Whether under any circumstances an action would have lain against the defendant for procuring or inducing the Crown to cancel the commission.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

Aylesworth, K.C., for appeal. *Shepley,* K.C., and *J. A. Ritchie,* contra.

HIGH COURT OF JUSTICE.

Teetzel, J.] HARRIS *v.* GREENWOOD. [Sept. 1, 1904.

Limitation of action—Promissory note—Part payment made by husband out of wife's money—Evidence.

A husband who had general authority from his wife to collect certain rents belonging to her and to apply the same as he saw fit, either for his own or her benefit, made payments on the joint promissory note of the husband and wife, such payments to bind the wife must be shewn to have been made out of the wife's moneys with her knowledge and consent, or that the husband was acting as her husband in making them, and where the evidence failed to establish this no effect could be given to them as creating a bar to the Statute of Limitations set up by the wife.

DuVernet, and *Ingersoll,* for plaintiffs. *Armour,* K.C., and *Marquis,* for defendant.

Anglin, J.] ARMSTRONG *v.* ARMSTRONG. [Nov. 2, 1904.

Discontinuing action—Costs—Good cause for depriving defendant of—Con. Rule 430 (4)—Corresponding English Rule.

Plaintiff claiming that she was entitled to $1,500, part of the moneys secured by two policies of $500 and $2,000 on her deceased husband's life, such amount having been made over to her by her husband's dying declaration, her solicitor wrote to a brother of the deceased, the supposed holder of the policies, notifying him of the plaintiff's claim, whereupon a solicitor replied that his instructions were that the two policies were "originally and always payable" to the deceased's mother and so formed no part of the deceased's estate. The plaintiff's solicitor then wrote to the mother to which the same solicitor replied that he could not understand the grounds of the plaintiff's claim, but if she desired to commence an action they would accept service. The plaintiff thereupon commenced an action which was defended by the said solicitor, but on the plaintiff subsequently discovering that the brother who had been first written to actually did hold the policies under the assignment from the mother, he wrote to the solicitor for his consent to discontinue the action without costs, and on this being refused a motion therefor was made under the said rule 430 (4).

Held, that an order could properly be made for the discontinuance on the terms asked for.

Construction of Rule 430 (4) and difference in the corresponding English Rule pointed out.

Order of the Master in Chambers affirmed.

J. H. Spence, for plaintiff. *Shirley Denison*, for defendant.

Anglin, J.] [Nov. 10, 1904.

CITY OF TORONTO *v.* TORONTO RAILWAY CO.

Street railways—Extension of railway — Time tables — Open cars—Heating—Night cars—Specific performance.

Under the agreement between the City of Toronto and the Toronto Railway Company, which is set out in 53 Vict. c. 99 (8) the right to determine what new lines should be established and laid down is vested in the city, and applies as well to the streets within the city as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it; and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others.

The right, under such agreement, to settle the time tables, and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the City Engineer, subject to the approval of the City Council; but that the city have no power to compel the company to continue to run, after midnight, any car, which, having started before midnight, cannot in due course finish its route by that time.

Specific performance of the provisions of the agreement found in the city's favor will not be granted against the company at the suit of the city.

Kingston v. *Kingston R.W. Co.* (1898) 25 A.R. 462 followed.

Mayor, etc., of Wolverton v. *Emmons* (1901) 1 K.B. 515 considered.

Robinson, K.C., and *Fullerton*, K.C., for the city. *W. Cassels*, K.C., and *Bicknell*, K.C., for the Toronto Railway Co.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.]

[Nov. 11, 1904.

REX *v.* PIERCE.

Construction of statute — Company — Contract—Registration of company—Provincial legislature.

On an appeal from a conviction by a police magistrate for an offence under R.S.O. c. 205, s. 117, as amended by 63 Viet. c. 27, s. 12 (O.) and 4 Edw. VII. c. 17, s. 4.

Held, 1. The contract referred to in clause (b) of 4 Edw. VII. c. 17, s. 4, is not restricted to such contracts as are mentioned in sub-s. 5 of s. 2 of R.S.O. c. 205, 1897.

2. As the effect of clause (b) is to prohibit the making of such contracts as are dealt with by that clause under the penalty therein mentioned the enactment is intra vires the Provincial Legislature.

Johnston, K.C., and *Godfrey*, for the appeal. *Cartwright*, K.C., D.A.G., and *Currie*, K.C., contra.

Divisional Court.] HOPEWELL *v.* KENNEDY. [Nov. 26, 1904.

Defamation—Privilege—Privileged statements made at public meeting.

Statements made at a public meeting by an alderman of a city, in his capacity as a member of a public library committee,

reflecting on the manner in which the defendant, a contractor for the stone and mason work of a public library, was performing his contract, are privileged; and such privilege is not taken away by reason of there being present, to plaintiff's knowledge, at the meeting newspaper reporters, who, without request from the plaintiff, published in their newspapers a report of what had taken place at the meeting, including the plaintiff's statements, and therefore did not constitute any justification for a letter written by defendant to such newspapers vindicating his character and in which a defamatory attack was made on the plaintiff.

Mowat, K.C., for defendant. No one contra.

Meredith, C.J.C.P.] PIRUNG *v.* DAWSON. [Dec. 17, 1904.

Settlement of action—O. J. Act—Jurisdiction.

Since the passing of the O. J. Act the compromise of an action will be enforced by an order of the Court, and where the motion in such case is for judgment and analogous thereto for judgment on the pleading, the proper practice is by motion to a judge in court.

Clute, for appellant. *Heyd*, K.C., for respondent.

Meredith, C.J.C.P.] [Jan. 7.

RE ATLAS LOAN CO.—ELGIN LOAN CLAIM.

Company—Winding up—Creditor—Validity of claim—Right to rank on assets.

W. was president of the A. loan company, and also a member of a firm of stock brokers interested in a block of the common stock of a coal company, which it was desired to place in the hands of permanent investors. Another loan company the E. company, had a large savings bank account with the A. company, and, as the E. company contended, to enable the former company, which was empowered to invest in stocks, which the E. company was not, to purchase a number of these shares, it was arranged through W. that the E. company should lend the A. company $55,000 the amount required for the purchase, on the security of a debenture for the amount to be issued by the A. company; the E. company also to hold the stock purchased as collateral security, and to be paid five per cent. interest, or, at their option, to have the dividends on the stock, and to receive one-half of any profit that might be realized on the stock when sold.

Held, on the evidence fully set out in the case, that the transaction was a bona fide one, and not merely a device to enable the E. company to invest in the stock, and that the E. company were therefore entitled, in winding up proceedings against the A. company to rank as creditors on the assets of that company. Finding of the Master-in-Ordinary reversed.

W. K. Cameron (of St. Thomas), and *Shirley Denison*, for E. company.

W. H. Hunter, for liquidator of A. company.

Meredith, C.J.C.P.] [Jan. 7.

MERCHANTS FIRE INS. CO. *v.* EQUITY FIRE INS. CO.

Fire insurance—Goods in existence at the time of fire—Termination of insurance—Notice of—Variation.

Where by a policy of insurance against fire an insurance was effected by the owners thereof, wholesale dealers in coffee, etc., on "120 sacks of green coffee," stored in a specified warehouse, and which policy was a renewal of a similar insurance in force for some years, such insurance was not limited to the particular 120 sacks on hand when the insurance was effected, but covered similar stock in hand to the specified number of sacks at the time of a fire which subsequently occurred.

About a week before the fire occurred the insured wrote to the company's local agent that they decided to cancel the existing policy and to have a new one issued for a reduced amount, but this was never communicated to the head office, or any action taken upon it, until after the fire had occurred.

Held, that this was not such written notice terminating the insurance as was required by 19 A. of the Statutory Conditions, being merely an intimation of the insured to have the existing policy cancelled when a new one was substituted for it, but which was never carried out.

Levesconte, for plaintiffs. *Morton Jones*, for defendants.

Boyd, C., Meredith, J., Magee, J.] [Jan. 7.

REX *v.* SPEGELMAN.

Gaming—Municipal by-law—Gambling in private house—Conviction quashed.

A Municipal by-law provided that no person should permit any game of chance or hazard with dice, cards, or other device, to be played for money, liquor, or other thing, within any house, room, or place, the by-law purporting to be founded upon s. 549

(4) of the Municipal Act empowering municipalities to pass by-laws "for suppressing gambling houses." On an information under this by-law, the evidence shewed that the defendant's friends used to come to visit him in his private house on Sundays, and there sometimes play poker for money, and that they did so on the occasion in question; but there was no evidence that the house was of the character of a "gambling house."

Held, that this section of the Municipal Act is pointed at houses where gaming or gambling is practised, and the house is kept for such purpose; and the by-law far transcended its terms, and was therefore ultra vires, and the conviction of the defendant under it must be quashed.

Godfrey, for defendant. *Cartwright*, K.C., for the Crown. *Fullerton*, K.C., for City of Toronto.

Boyd, C.] RE CORNELL. [Jan. 12.

Settled Estates Act—Leave to sell land—Trust for sale at named period—"By way of succession"—R.S.O. 1879, c. 71, s. 2 (1).

Under a will land was to be rented by the executors until the youngest son of the testator came of age. When the youngest child was twenty-one the property was directed to be valued and certain options to purchase given to the children. And lastly power of sale was given to the executors for the purpose of distribution as mentioned in the will.

Held, that the case was within the scope of the Settled Estates Act and that the trust to rent the land until the youngest son came of age and then to sell was a limitation "by way of succession" within the meaning of s. 2 (1) of the Settled Estates Act, R.S.O. 1897, c. 71, and the Court had power to direct the sale forthwith.

J. L. Jones, for petitioner. *Boland*, for beneficiary. *F. W. Harcourt*, for infants. *Holman*, K.C., for prospective purchaser.

Boyd, C., Meredith, J., Magee, J.] [Jan. 12.

GARLAND *v.* CLARKSON.

Discovery—Examination of person for whose immediate benefit action defended—Action against assignees for creditors—Examination of assignor—Reference for trial—Power of referee to order examination.

This action being at issue all matters were referred to be tried before a referee pursuant to s. 29 of the Arbitration Act, R.S.O. 1897, c. 62.

Held, Meredith, J., dissenting, that the reference being before trial and the cause being referred for the purpose of trial, the referee had power to direct one who was a party or one for whose immediate benefit the action was prosecuted or defended to be examined for discovery.

The provision that a referee in such a case shall have the same power as a judge with respect to discovery and production of documents is, by reasonable implication, to be treated as embodied in his power to examine the parties and investigate the matters in difference referred to him.

The action was one brought against an assignee for the benefit of creditors to establish the right of plaintiff to rank upon the estate, which was as a fact insolvent.

Held, notwithstanding, Meredith, J., dissenting, that the assignor was a person for whose benefit the action was defended within the meaning of Rules 440 and 466, and was to be regarded as a party for the purpose of examination and for the purpose of discovery.

Masten, for defendant. *Douglas*, K.C., for plaintiff.

Boyd, C.] [Jan. 14.

CANADIAN RADIATOR CO. *v.* CUTHBERTSON.

Writ of summons—Service out of jurisdiction—Cause of action, where arising—Contract—Conditional appearance.

This was an appeal for an order of the Master in Chambers refusing to set aside an order for the issue of a writ of summons for service of the jurisdiction under Rule 1246. The plaintiff applied for the order in question on affidavits setting forth that the contract on which the action was brought and which was made in Manitoba was to be performed by payment in Ontario. The defendants by affidavit denied this and said that the contract was made and to be performed in Manitoba.

Held, that this issue was not to be determined in a summary way on affidavits, but the defendant's proper course was to enter a conditional appearance under Con. Rule 173, and then raise the question of the want of jurisdiction in his pleading.

Holman, K.C., for defendants. *C. A. Moss*, for plaintiff.

Meredith, C.J.C.P., Teetzel, J.] [Feb. 2.

IN RE WENTWORTH ELECTION (DOMINION).

Parliament—Election of members—Ballots numbered by deputy returning officer.

The prohibition contained in sub-s. 2 of s. 80 of the Dominion Elections Act, 1900, against the counting of ballot papers "upon

which there is any writing or mark by which the voter could be identified" applies to ballot papers upon which a deputy returning officer has placed (not in the cases specially provided for in the Act) numbers corresponding respectively with the numbers opposite the names of the respective voters in the poll book, and such ballot papers must be rejected.

Where, in consequence of this irregularity, ballot papers sufficient in number to alter the result of the election had to be rejected, it was held, applying the principle of *Woodward* v. *Sarsons* (1875) L.R. 10 C.P. 733, that there must be a new election.

This was an appeal from the judgment of SNIDER, Co.J., reported in full, ante, p. 36.

Aylesworth, K.C., and *R. A. Grant*, for petitioner. *Lynch Staunton*, K.C., *Duff*, and *Gwyn*, for respondent.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Feb. 10.

HATELEY v. ELLIOTT.

Contract—Illegality—Unduly lessening competition—Trade association—Criminal Code, s. 520(d)—Cheque—Conditional payment.

All the importers of coal in a certain town combined themselves into an Association, and all became bound not to sell below the prices fixed by the Association, and that any member who did so should become liable to the Association for $1 for every ton of coal so sold.

Held, that the Association was an illegal one, being a combination conspiracy, or agreement, "to unduly prevent or lessen competition in the . . . . purchase, barter, sale, or supply of an article or commodity which might be the subject of trade or commerce," within the meaning of s. 520(d) of the Criminal Code; and the plaintiff, acting as agent of the Association, could not recover on a cheque given by a member of the Association in pursuance of one of the articles of the Association.

The cheque in question was marked "cheque conditional deposit"; being intended, as the drawer, a member of the Association, explained, to be conditional on his obtaining a certain contract.

Held, that it was not an unconditional order to pay within the requirements of ss. 3 and 72 of the Bills of Exchange Act.

Brewster, for appellant. *Sweet*, for respondent.

Meredith, C.J.C.P., Idington, J., Magee, J.] [Feb. 11.

BOUCHER *v.* CAPITAL BREWING CO.

Intoxicating liquors—Recovery of payment for liquor illegally sold—Holding license as trustee—Liquor License Act—R.S.O. 1897, c. 245, ss. 64 (1), 126.

The defendants, having become possessed of the good-will of a liquor business theretofore carried on by an insolvent, who was indebted to them, and of the chattel property and the premises whereon the said business had been carried on, sold them to the plaintiff for $1,200, it being agreed that the license should be taken out in the name of the defendants' manager, as was in fact done, to be held and controlled by him for the purpose of securing the said purchase money. The defendants also obtained a lease of the premises, and supplied the plaintiff with liquor for his business, debiting him with the rent.

Held, that the plaintiff was entitled to recover monies paid by him to the defendants for liquor to be supplied under s. 126 of the Liquor License Act, R.S.O. 1897, c. 245, as furnished in contravention of that Act, and especially of s. 64 (1) prohibiting such sales to unlicensed persons for the purpose of the latter re-selling.

The granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another who is the true owner of the business, and the occupant of the premises, is not a thing permissible under the Act.

Middleton, for plaintiff. *McDougall,* for defendants.

Meredith, C.J.C.P., Idington, J., Magee, J.] [Feb. 11.

DAVIDSON v. WATERLOO MUTUAL FIRE INSURANCE CO.

Fire insurance—Oral application—Ownership—Lessees—Notice to agents—Policy differing from application—Statutory conditions, 2, 10.

The plaintiffs had an insurable interest as lessees of certain machinery, and applied to the defendants' agents for insurance. The state of the title, the name of the owners, and the nature of the plaintiffs' interests in the machines, were communicated to the agents. The agents had authority to accept the risk, receive the premium and issue an interim receipt on behalf of the defendants, which they did.

The agents also filled up an application form, and signed it in the name of the plaintiffs, but this was done without the knowledge, consent or authority of the plaintiffs. A policy was issued and sent to the plaintiffs, which contained the statement that "the property is being held by the assured as owners." Statutory condition 10 provides that the company is not liable for loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy.

Held, that the plaintiffs were not precluded by this condition from recovery under the policy. The defendants had notice through their agents of the real interest of the plaintiffs in the property insured, and it was their duty to have endorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the above condition to defeat the plaintiffs' claim.

Semble, also, that the plaintiffs might invoke the second statutory condition, under which, after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application. There is no reason for confining the operation of this condition to a written application, and its effect is to secure to the applicant for insurance the very contract for which he has applied, though the policy sent to him is a different one, unless the notice for which it provides is given by the insured.

R. McKay, for defendants (appellants). *J. L. McDougall*, for plaintiffs (respondents).

Street, J.] AMES *v.* SUTHERLAND. [Feb. 20.

Stock brokers—Carrying stocks on margin—Pledges of stock—Sale without notice—Damages.

Action by stock brokers to recover from defendant balance alleged to be due to them upon an account of dealings between them and the defendant in respect to certain shares of the Dominion Coal Co., which defendant had bought and had been carrying on margin. The defendant set up that the plaintiffs bought the stock as his brokers, and held the same as a pledge or security for certain monies which they had during the course of the dealing advanced to him, and that they had nevertheless sold the stock without notice to him, and were liable in damages. It appeared that the sales were notified to the defendant by the plaintiffs in or about June 19, 1903, the sales having

been made in the latter part of May and beginning of June, and that no objection was taken by the defendant until the present action was brought in December, 1903.

Held, that considering the fluctuating nature of the stock in question, this was an unreasonable time to delay objecting, and that the defendant had disentitled himself from recovery, and must be treated as having adopted and ratified the sales.

Held, however, that as pledgees the plaintiffs were not entitled to sell the shares without notice, as in fact they admitted, and the defendant would have been entitled to damages had it not been for his non-objection.

The contract of the plaintiffs with the defendant was one which did not oblige them to carry the stock to a particular day, nor did it oblige the defendant to pay for it at a particular day, although it did not permit the plaintiffs to sell without notice.

Semble, that the proper measure of damages in such a case is the price of the stock at the day of the wrongful sale or the price at the day of trial, at the option of the owner of the stock wrongfully sold; but that as damages are not assessed as a penalty upon a person who has improperly dealt with property of another, but only for the purpose of making good the loss which they have sustained by the improper action taken, and inasmuch as the defendant here admitted that if the stock had not been sold, he would have continued to hold it up to the time of the trial, and as the market value of the stock at the trial was less than it had been sold for by the plaintiffs, the defendant had clearly shewn that the plaintiffs' action had been a benefit to him instead of an injury, and that he was not entitled to recover damages.

Thomson, K.C., and *Tilley*, for plaintiffs. *Biggs*, K.C., for defendant.

Trial—Street, J.] [Feb. 22.

LOUNT *v.* LONDON MUTUAL INSURANCE CO.

Fire insurance—Variations to statutory conditions—Just and reasonable—Material to the risk.

By way of variation of Statutory Condition 1 an insurance policy provided that any encumbrace by way of mortgage should be deemed material to be known to the company within the meaning of the Statutory Condition.

Held, that this variation was too wide to be treated as a just and reasonable one and the Court had to determine whether the nondisclosure of the mortgage was a material fact, the onus being upon the defendants who asserted its materiality.

By another variation of the Statutory Conditions it was provided that the words "or its local agent" in the 3rd Statutory Condition were struck out, and that wherever the words "agent" or "authorized agent" occurred elsewhere in the Statutory Conditions, such "agent" or "authorized agent" should be held to mean the company's secretary only.

Held, that this was a just and reasonable variation, and that it was not unjust or unreasonable to stipulate that notice of important changes in the character of the risk should be communicated to the head office of the defendants.

Creswicke, for plaintiffs. *Judd*, and *W. R. Meredith*, for defendants.

Boyd, C., Meredith, J., Magee, J.] [Feb. 24.

ELGIN LOAN & SAVINGS CO. *v.* LONDON ACCIDENT CO.

Guarantee—Application—False statements—Basis of contract—Insurance Act—R.S.O. 1897, c. 203, s. 144 (1) (2).

A guarantee agreement issued upon the application of an employee, accompanied by the answers of the plaintiff company, the employers, touching the duties of the applicant, which answers it was agreed were to be taken as the basis of the contract between the employers and the guarantee company,—recited on its face that "Whereas the employee has delivered to the company certain statements and a declaration setting forth among other things the duties and renumeration of the employee, the moneys to be entrusted to him, and the checks to be kept upon his accounts, and has consented that such declaration and each and every the statements therein referred to or contained shall form the basis of the contract hereinafter expressed to be made,—but this stipulation is hereby limited to such of the said statements as are material to this contract."

Held, that this had the effect of embodying the material facts of the preliminary application and declaration, whether by the employee or employers, into the face of the contract, and satisfied the requirements of s. 144 (1) of the Insurance Act, R.S.O. 1897, c. 203, that "the terms and conditions of the contract shall be set out in full on the face or back of the contract." It is enough to unite by express reference the basis of the contract, and the actual contract resting thereon.

Held, however, that the case fell rather under s. 144 (2) which provides that any term or condition avoiding the contract on account of false or erroneous statements in the application or inducing the entering into of the contract, must be limited to

cases in which such statement is material to the contract,—but does not require that such term or condition shall be contained in or endorsed upon the contract "in full." It is enough if the contract "be made subject" to such stipulation.

Held, also, that the statements here made by the plaintiffs' president, when seeking the insurance, that "all withdrawals from the savings bank require the joint cheque of the president and manager," and that "a thorough and systematic audit is made by the company's auditors," whereas in fact the cheques were signed in blank by the president in batches, and so given to the manager, and no attempt was made to rectify the savings bank accounts,—were unquestionably material, and affected the risk.

W. K. Cameron, for plaintiffs. *J. B. Clarke*, K.C., for defendants.

Street, J.] INNES v. HUTCHEON. [Feb. 27.

Replevin—Application order to sell—Con. Rules 1097, 1098.

Under an order for replevin in this action there were delivered to the plaintiffs six horses of considerable value. To obtain the order the plaintiffs paid into Court $2,000, and were paying over $5 a day to keep the horses at livery. No trial could be expected before the autumn. The plaintiff applied under Con. Rules 1097 and 1098, for an order for sale for the horses in question.

Held, that there was no power under the above rules or otherwise to grant the order, although if there had been it would have been a proper case for so doing.

G. Larratt Smith, for plaintiff. *W. A. Lamport*, for defendant.

Teetzel, J.] RE BOWER TRUSTS. [March 1.

Settlement—By deed—Remainder to appointee under will—Or in default to "right heirs"—Death of settlor—Failure to appoint—Equitable estate in settlor—Vesting in administratrix—Devolution of Estate Act.

The owner in fee simple of certain land, by deed granted it to trustees to lease, and after payment of expenses, to pay the rent to him for life, and after his death to convey it to such persons as he by his will should appoint, and in case of his death without a will, "To hold the same in trust for the right heirs of (himself) according to the law of descent in Ontario in

fee simple," and in the event of the rents not being sufficient for his maintenance, with his consent to sell it and apply the proceeds to his maintenance, etc., and died without making a will and without the land having been sold in his lifetime:—

Held, that the settlor was possessed of an equitable estate in fee simple in the land, which on his death vested in his administratrix under the Devolution of Estates Act.

McBrayne, for trustees and administratrix.

Divisional Court.] CAMPBELL *v.* BAKER. [March 2.

Costs—Taxation—Appeal from local taxing officer—Reference to Toronto.

As a foundation for an appeal from a taxation of costs between party and party, objections must be filed with the officer taxing, and these objections must be directed to specific items; or, semble, at the least if a general objection is relied on, it must be expressly stated to be directed to each and every item in the bill. A general objection that the bill is exorbitant is not sufficient.

Upon a mere general objection of this kind, or even upon specific objections to specific items, the Judge before whom an appeal from the taxation of a bill by a local taxing officer comes for hearing, has no right to refer the bill to one of the taxing officers at Toronto for revision or retaxation. He may ask the opinion of one or both of these officers as to any question arising, but he must himself decide the points involved.

Quay v. *Quay* (1886) 11 P.R. 258, explained.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

Middleton, for appellant. *Grayson Smith*, for respondents.

Divisional Court.] DELAMATTER *v.* BROWN. [March 13.

Landlord and tenant—Lease—Short Forms Act—Covenant to repair—Variation from statutory form.

An indenture of lease, bearing date June 29, 1891, expressed to be made in pursuance of the Act then in force respecting Short Forms of Leases (R.S.O. 1887, c. 106), contained a covenant by the lessees that they would "leave the premises in good repair, *ordinary wear and tear only excepted*," the words in italics not being in the statutory short form, and the extended statutory equivalent of the statutory short form having in it

the exception "reasonable wear and tear and damage by fire only excepted:"—

Held, MAGEE, J., dissenting, that the added words were not an exception to or qualification of the short form within the meaning of the Act; that the words had to be construed as they stood without the aid of the extended form; and therefore that the exception as to damage by fire did not apply.

Judgment of BOYD, C., affirmed.

Armour, K.C., for appellants. *German*, K.C., for respondents.

Divisional Court.] [March 17.

SASKATCHEWAN LAND CO. v. LEADLEY.

Venue—Con. Rule 529 (b)—Parties in county where cause of action arose.

Held, that the equity of Con. Rule 529 (b) that where the cause of action arose, and the parties reside in the same county, the place to be named as the place of trial shall be the county town of that county—should be held to govern the case in which the cause of action has arisen in the county in which all the parties to it who are within the jurisdiction reside, although there are other parties who are outside the jurisdiction, as was the case here; and venue changed accordingly.

Snow, for defendant, J. T. Moore. *St. John*, for defendant, the Leadleys. *McLennan*, for plaintiffs.

From MacMahon, J.] [March 17.

IN RE CANADA WOOLLEN MILLS.

Company — Winding-up — Inspector — Purchase of assets — Liquidator—Sale of assets—Approval of Court.

An inspector appointed in liquidation proceedings under the Dominion Winding-up Act, R.S.C. 1886, c. 129, is in a fiduciary position as regards the disposal of the assets, and cannot, without the consent of all persons interested, become the purchaser thereof.

In such liquidation proceedings the power to sell the assets is by the Act vested in the liquidator, not in the Court, though the liquidator must obtain the approval of the Court as a condition of exercising the power of sale.

Judgment of MACMAHON, J., 8 O.L.R. 581, 40 C.L.J. 858, affirmed.

Hellmuth, K.C., and *Crerar*, K.C., for appellant. *W. H. Blake*, K.C., for respondents. *H. Cassels*, K.C., for liquidator.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] CARMAN *v.* SMITH. [Sept. 20, 1904.

Deed—Mistake—Rectification.

The plaintiff intending to sell the whole of a piece of land sold it under a verbal contract describing it as the D. lot. The deed to the purchaser followed the description in the vendor's deed. After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified on the ground that it contained more land than that known as the D. lot. The evidence did not shew that the D. lot did not embrace the whole of the land conveyed.

Held, that the bill should be dismissed.

Stockton, K.C., for plaintiff. *McLean,* K.C., for defendant.

BOYNE *v.* ROBINSON. [Oct. 7, 1904.

Practice — Payment into court — Surplus of mortgage sale — Claimants to fund—Costs.

A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage.

Held, that on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit.

Teed, K.C., for the motion. *Skinner,* K.C., for plaintiff. *A. A. Wilson,* K.C., and *Kaye,* for defendants.

BUCHANAN *v.* HARVIE (No. 2). [Oct. 18, 1904.

Mortgage—Redemption.

The proviso for redemption in a mortgage dated Aug. 30, 1902, to secure an advance of £3,500 was the payment on Nov. 11 of £6,000 and a transfer of £5,000 in shares in a company to

be promoted by the mortgagor. The principal money advanced was applied in the purchase of the mortgaged premises, which contained salt springs of speculative value and which the company were to develop and work. In a foreclosure suit—

Held, that the proviso for redemption was not unreasonable and should not be relieved against.

W. H. Trueman, for plaintiff. *Kaye*, for defendant.

ROBERTSON *v.* MILLER. [Dec. 20, 1904.

Restitution—Reversal of decree.

Where goods were sold under an execution upon a decree reversed on appeal for error it was held that restitution should be of the amount of the sale and not of the real value of the goods.

F. G. Taylor, for defendant. *Teed*, K.C., for plaintiff.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] MCARTHUR *v.* MCARTHUR. [Jan. 12.

Alimony—Interim alimony—From what time ordered—Where motion for may be made—Inquiry into merits.

Action for alimony. The statement of claim contained no demand of a specific sum by way of interim alimony. On the filing of the defence the plaintiff amended her statement of claim and on the same day moved for interim alimony. The Referee made an order providing for payment of interim alimony from the commencement of the action. Defendant appealed.

Held, 1. The motion was not premature and that, under Rule 433 of "The King's Bench Act," plaintiff was not bound to wait until the time for delivering the defence to the amended statement of claim had elapsed.

2. If plaintiff had in the statement of claim demanded a specific time as contemplated by Rule 601, plaintiff might, on the defendant's failure to take advantage of the provisions of that Rule, have obtained an order for payment of interim alimony from the commencement of the action; but, as she had

not, the payment should only be from the date of the order. *Peterson* v. *Peterson*, 6 P.R. 150.

3. The Court will not go into the merits of the plaintiff's claim or of the defence on a motion for interim alimony. *Foden* v. *Foden* (1894), P. 307; *Campbell* v. *Campbell*, 6 P.R. 128; *Keith* v. *Keith*, 7 R.P. 41, followed.

Ferguson, for plaintiff. *Mathers*, for defendant.

Richards, J.] [March 1.

DREGER v. CANADIAN NORTHERN RY. CO.

Railway—Obligation to fence right of way.

Appeal from a County Court. Plaintiff's claim was for the loss of his cow killed by one of the defendants' trains. The cow had got on to the right of way from the plaintiff's land through a defective fence between such land and the right of way. The plaintiff's land was cultivated next to the right of way and settled on but not enclosed.

Defendants disputed liability under the Railway Act, 1903, s. 199, claiming that under sub-s. 3 of that section they were not required to fence their right of way opposite the plaintiff's land. That sub-section provides that the obligation to fence shall not exist in respect of adjacent lands "not improved or settled, and enclosed."

The trial Judge had held that the quoted words meant the same as "not improved and not enclosed or not settled and not enclosed," and gave his verdict for the plaintiff.

Held, that either the words meant this, or they might be read with the comma put after the word "improved" instead of after the word "settled;" thus "not improved, or settled and enclosed;" and, either way, the obligation to fence existed as to the land in question.

Appeal dismissed with costs.

Daly, K.C., for plaintiff. *Laird*, for defendants.

Book Reviews.

The Law of Banking, by SIR JOHN R. PAGET, Bart., K.C., Gilbart Lecturer on Banking. London: Butterworth & Co., 12 Bell Yard, Law Publishers, 1904.

This book was issued in February, 1904, but was re-printed in September following for the purpose of introducing some further important cases. The reputation of the writer as an authority on banking has not been lessened by this admirable

treatise. It has been received with much acceptance by the profession in England. It is a long way removed from the mere collection of cases which is the "make up" of so many law books, however useful such collections often are. The learned author apologizes "for the argumentative character of portions of this book and for some prominence of personal views." This largely disarms criticism; and, may we say, is unnecessary in this case, for that is just what is wanted when a book is written by one thoroughly familiar with his subject and who has the gift of clearly expressing the result of his learning and research. We notice a few references to United State cases, but none to those in this country. As our law as to bills and notes and banking has so much in common with that of England some of our decisions might helpfully be referred to. Some of these have gone to England on appeal, and the final decisions therein are important additions to the subjects dealt with.

Dictionary of legal quotations, with explanatory notes and references by J. W. NORTON-KYSHE, of Lincoln Inn, Barrister-at-law, late Registrar of the Supreme Court of Hong Kong. London: Sweet & Maxwell, Limited, 3 Chancery Lane, W.C., 1904. 344 pages.

This most interesting book gives selected dicta of English Chancellors and Judges from the earliest periods to the present time, extracted mainly from reported decisions and embracing many epigrams and quaint sayings. A few quotations are also given from some Irish and Scotch judges.

Although this volume must have given the compiler great labour there is but little original matter in its pages; its contents thereby exemplifying the following quotation under the title "Text books:" "Brother Viner is not an authority. Cite the cases that Viner quotes—that you may do." And again, "I must treat with reverence everything which Lord Kenyon has said, but not everything which text writers have represented him to have said which he did not say."

In this connection it cannot be laid to the charge of our author that "most of the disputes in the world arise from words." (Lord Mansfield, *Morgan* v. *Jones* 1773, Lofft. 177) for there are no words of his own except some explanatory notes given as connecting links.

As Mr. Norton-Kyshe properly says, "The dicta of our Chancellors and Judges are so numerous and so good that regret has often been expressed that a record in accessible form

has not been made of them." This is true, though necessarily to a limited extent, of our own Judges, and perhaps some day some industrious member of our profession who can discreetly choose out the gems will do a similar work in this country.

We have nothing but praise for this most interesting collection. It is good reading, and every page is luminous with words of wisdom and practical common sense on subjects interesting not merely to the lawyer, but to any one who claims a liberal education. We can well recommend our readers to expend the small sum that is necessary in that respect.

The Yearly Digest of reported cases decided in the Supreme and other Courts in England, by G. R. HILL, M.A. London: Butterworth & Co., 12 Bell Yard, Law Publishers, 1904.

This collection of cases taken from a variety of sources includes a copious selection of those decided in the Irish and Scotch Courts, together with lists of cases overruled, considered, etc., and of statutes, orders, rules, etc., referred to. The plan of the volume is the same as in former years.

A Concordance of the Railway Act, 1903, compiled by J. E. W. CURRIER, of the Department of Railways and Canals, Ottawa, 1904.

A useful help to those who may have business before the Railway Commission as well as the many others who are brought in contract with railway litigation and legislation.

Bench and Bar. A portrait gallery of members of the Ontario profession. Toronto: C. W. Benedict, 43 Scott St., 1905.

The publisher is producing a very interesting volume of portraits comprising all the past and present judges of the Province of Ontario with many of the Bar of to-day; numbering in all over 500. The "copper process" engravings used in the work give results of the best quality. Each engraving occupies a full page. The album contains the names of the representatives under the engravings, but no biographical notice is given. It is bound in full leather. This collection will be of great historical value in the future, as well as of present interest to the profession and their friends.

May we venture to congratulate the public on the highly creditable appearance of these members of the long-robed profession. They ought to be proud of them, and only too glad to pay their moderate and well earned fees. We certainly congratulate the publisher in the excellent work he is doing in reproducing these worthies.

UNITED STATES DECISIONS.

RAILWAY LAW.—Statutory permission to a railway company to lease its property is held, in *Chicago & G.T.R.* v. *Hart* (Ill.) 66 L.R.A. 75, not to absolve it from liability for injuries to employees of the lessee because of defects in the rolling stock, although they are due solely to the lessee's negligence, unless the statute so provides.

SCHOOL LAW.—A public school teacher, who repeats the Lord's Prayer and the Twenty-Third Psalm as a morning exercise, without comment or remark, in which none of the pupils are required to participate, is held, in *Billard* v. *Topeka Board of Education* (Kan.), 66 L.R.A. 166, not to be conducting a form of religious worship, or teaching sectarian or religious doctrine.

RIGHT OF WAY.—Continued use of a right of way which originated in necessity after the necessity has ceased is held, in *Ann Arbor Fruit & V. Co.* v. *Ann Arbor R. Co.* (Mich.) 66 L.R.A. 431, not to become adverse until notice of the adverse claim is brought home to the owner of the servient estate.

INSURANCE—CONDITION IN POLICY—"USE" OF INTOXICATING LIQUOR.—The following is a note of the judgment in *Pacific Life Ins. Co.* v. *Terry* (Court of Appeals of Texas, Insurance L.J. 281):

The application, which was a warranty, stated that insured did not "use" intoxicating liquors, and had never used them to excess. *Held*, that the answers to the questions in the application were not false because the applicant had occasionally drank liquor. The questions referred to his habit or practice. Where there was conflicting evidence as to the temperate habits of insured, the verdict will not be disturbed. It is not error of the Court to fail to define the term "use" to the jury when not requested to so define.

NOT HIS FAULT.—Guiles Jackson, the celebrated negro lawyer of Richmond, in defending one of his clients in the police court, began to read from the code, says the *Virginia Law Register*. The police justice seemed to suspect that Mr. Jackson was reading something which was not there, and interrupted the lawyer, saying: "Mr. Jackson, I never heard of any such law as that." "Well, said the lawyer, "is you gwine to hold my client responsible for the ignorance of this court?"