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The *Canada Gazette* of July 5th publishes the following appointments: Hon. H. G. Carroll, Solicitor General of Canada, and Mr. E. R. Cameron, Registrar of the Supreme Court to be of His Majesty's Counsel learned in the law.

A COMPARISON.

As the Province of Ontario increases in wealth and population it might be thought that there would be a corresponding increase in litigation. It will be found however that although the increase of wealth and population is undeniable, the increase of litigation is very far from being a fact. Taking the reports of the Inspector of Legal Offices for the years 1891 and 1901 as a guide we see that the total amount of costs in litigated cases earned by the profession was very considerably more in 1891 than it was in 1901.

The reports of the Inspector, it is true, are defective in not including the statistics of the High Court Offices at Toronto, and therefore do not furnish full details of all the business done in the Province, still enough appears to make it clear that 1901 must have been a pretty lean year as far as litigation in Ontario is concerned. From these reports we gather the following figures: The total number of actions in the High Court (exclusive of the County of York) in 1891 was 5,140, whereas in 1901 they only amounted to 2,664. In the County Courts (including York) in 1891 the total number of actions was 3,432, and in 1901 they only amounted to 1,868. In 1891 the total damages recovered in the High Court (exclusive of York) was $1,906,372.17, and $97.727.21 for costs, the disbursements taxed being $42,358.61, which left a net apparent profit of $55,568.60 for solicitors. In 1901 the total amount of damages recovered in the High Court (exclusive of York) was only $1,541,483.88. The total amount of costs taxed was $61,605.75, and the disbursements being deducted, $25,636.01, left only $35,969.74 apparent profit for solicitors. Thus for every $35 solicitors have earned in 1901 by litigation, they have had to

disburse about $25. This falling off in litigation is at least probably in part due to the abounding prosperity of the Province, and if this be so we trust the profession is finding in other classes of business some compensation for the drop in litigious business.

MAY A WOMAN SIT IN PARLIAMENT?

The acceptance of her nomination by the returning officer, and the going before the electors of Miss Haile, as candidate of the Socalist League in North Toronto directs public attention to an interesting question. With the view sanctioned by judicial decision in England, when Mrs. Darwin was proposed by the same organization that she could not qualify, the electorate had some reason to anticipate his declining to allow her candidature. Had he chosen, as he certainly had sufficient warrant for doing, to nip the young lady's ambition in the bud, his action would have evoked no general complaint; for, if none of her opponents had been returned by a majority greater than the number of votes given for her, the trouble of a controverted election would have been entailed on the constituency.

In communities where the British scheme of representation prevails, authority distinctly pronounces against the eligibility in the absence of statutory enactment of women for membership in deliberative bodies, which have cognizance of matters of state as out of harmony with the genius of our institutions.

From the time of Selden, jurisconsults, tracing the origin and examining the constitution of the mother of parliaments, express the like opinion, showing that, for a considerable period before the order of three estates in the realm was introduced, no woman could exert a direct influence upon the politics—interfere in any way to shape the destinies—of the kingdom. She, as we learn from Kemble's Saxons in Parliaments, might, however, though unable to vote, assist in conferences of the Witenagemot by watching the course of proceedings and tendering advice. How this latter was to be realized in practice is, unfortunately, not made known. One cannot easily imagine a channel other than that of debate, in which, of course, she was not allowed to participate, through which the counsel might pass. It is a little surprising that Sir Thomas Erskine May, in his comprehensive work on Parliamentary usage,

is quite silent upon the subject. This may be due to the fact of the traditions having in our day become so firmly rooted as to require no further dwelling upon.

The decision which has been already spoken of, is *Chorlton* v. *Lings*, 4 C.P. 374 — the case of an appeal from the refusal of a revising barrister to register a woman as a voter. Here Mr. Justice Wills, relying in part on the judgment of constitutional writers, and, in part, governed by independent reasoning, holds emphatically that she does not possess the right, deriving, as a corollary, her incompetence to vote.

Much of his language is worthy of being repeated. At page 391 he says, "take the case of a peeress in her own right, who, if the other sex, would have a seat and vote in the House of Lords, can she appear and take her seat there? No; it is unquestionable that she can neither sit herself nor vote by proxy. She has most of the other privileges of her peerage; but what is her case with regard to being represented in Parliament? It appears to have been supposed at one time that she could appoint a proxy; but this soon died out; and until still later time it was thought that if married she could be represented by her husband, who should be a peer in her right. Both in this country, and also in France, it was once thought that there could have been such a right of representation, yet to use Mr. Butler's expression (Co. Litt.) the right must now be considered as extinct, or perhaps, inasmuch as in our system there is no negative prescription against a law, it may be more correct to say that the right never existed. Can there be any difference in the case of women, whose right to take part in the public councils, if it ever existed, would in modern times, of necessity have taken the form of choosing some one to represent them there? Can there be any more reason why a woman not a peeress should have a right to choose her representative in the House of Commons than why a peeress should have a right to be represented in the other House, where the power of voting by proxy might even suggest a favorable distinction? It is clear that a woman has no such right in either case."

Mr. Justice Byles, at page 394, remarks: "Women for centuries have always been considered legally incapable of voting for members of Parliament; as much so as of being themselves elected to serve as members." It is mentioned by one of the judges that Selden, treating of the matter of this exclusion of women from

judicial and like public functions, gives preference to the reason that their exemption was founded upon motives of decorum and was a privilege of the sex. Now-a-days, in view of the aggressive posture, the clamorous pleas for equality of the new woman, this explanation of her sex's denial of a part in the management of the country's affairs would hardly be satisfactory to all parties. She, at all events, would not hesitate to replace the word "privilege" by "penalty." Our own province is not left wholly without aid to the settlement of the problem. In the *South Renfrew Election Case*, 1 H.E.C. 705, Mr. Justice Adam Wilson says: "I am of opinion that the returning officer is both a ministerial and a judicial officer. He has not now, as formerly, to hold an inquisition into the capacity or qualification of a candidate or voter; but I feel assured that if a person appeared and was nominated, and such candidate were a woman or mere child that the returning officer could decline to receive such a nomination."

There is in our statute no prohibition against a woman's aspiring to, or enjoying, a seat in Parliament. Even during the period of union of the two Provinces (the writer did not believe that investigation could be pursued with advantage beyond that point) exclusion was brought about only by reason of her inability to satisfy the property qualification then hampering competitors. It is singular, too,—the questions of suffrage and title to share in the councils of the nation being placed on the same footing—that the legislature should have been so unusually careful to debar women from taking any step toward choosing a representative, and yet have said nothing as to their capacity for attaining the office itself. Long before the departure from venerated custom, when liberty was given unmarried women and widows in possession of landed estate to exercise the franchise at municipal contests, they were not satisfied to confine themselves to the bestowal of the gift affirmatively on males. The very first statute dealing with elections passed after Confederation, 32 Vict., c. 21, provides by sec. 4 that "no woman shall be entitled to vote at any election." And the intimation of her disability is carried through each consolidation of the laws up to the present time.

It has been noticed in one of the old books that the sole instance of a woman's filling a public office in the earlier history of Great Britain was that of Ann, Countess of Pembroke, who was sheriff of Westmoreland, a post falling to her by descent. There

is, at least, one example in Ontario of a woman occupying an official position, the special examinership of Miss Kathleen Sadlier, in Hamilton.

J. G. McKENZIE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MORTGAGE OF SHARES – IMPLIED POWER OF SALE.

In *Deverges* v. *Sandeman* (1902) 1 Ch. 579, the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) have affirmed the judgment of Farwell, J. (1901) 1 Ch. 70 (noted ante vol. 37, p. 188) to the effect that upon a mortgage of shares in a company, although there be no express power of sale, there is nevertheless an implied power to sell in case of default, and that this power may be exercised without notice, and without giving any specified time to redeem before its exercise, where a time is appointed for payment by the mortgage and where no time is thereby appointed, then on giving a reasonable notice to redeem, and that a month's notice or even less would be a reasonable notice. Williams, L.J. dissented, being of opinion that the power could not be exercised in any case until a proper notice had been given requiring payment of the mortgage debt on a day certain and default had happened.

VENDOR AND PURCHASER—DOUBTFUL TITLE—UNWILLING PURCHASER—PURCHASER FOR VALUE WITHOUT NOTICE.

In re Handman and Wilcox (1902) 1 Ch. 599, was an application under the Vendors and Purchasers Act. The subject of sale was a lease made by the lessor under the provisions of the Settled Land Act, 1882, which requires that leases made thereunder shall be at the best rent that can reasonably be obtained. The lease in question had been made at a less rent than could reasonably be obtained, in consideration of the lessee agreeing to waive a claim for damages against the lessor, and the lessee covenanted to lay out a certain sum in building. The lease was subsequently sold

at auction to the vendor Handman. The purchaser objected that the lease was void, and Buckley, J. so held, and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) came to the conclusion, that even if the lease were only voidable, the title was such as ought not to be forced on an unwilling purchaser, because it depended on the fact whether the vendor Handman had purchased without notice of the defect in title.

PRINCIPAL AND AGENT — IMPLIED WARRANTY OF AUTHORITY — ATTORNEY INNOCENTLY ACTING UNDER FORGED POWER — LIABILITY OF AGENT TO THIRD PARTY—TRANSFER OF STOCK UNDER FORGED POWER—FORGERY.

In *Oliver* v. *The Bank of England* (1902) 1 Ch. 610, the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) have affirmed the decision of Kekewich, J. (1901) 1 Ch. 652 (noted ante vol. 37, p. 453). The contest, it may be remembered, was one between two innocent parties as to which was to bear the loss occasioned by the forgery of a third party. The Bank of England had in pursuance of a power of attorney purported to be given by two persons in favour of one Starkey, transferred certain consols standing in the name of the persons named as donors of the power. It turned out afterwards that one of the donors had forged the other's name, and the bank were compelled to replace the stock. The forgery was unknown to Starkey, who acted in good faith; but it was held that he must be taken to have warranted the genuineness of the power under which he assumed to act, and was therefore bound to indemnify the bank against the loss. The moral of the case therefore is, that where a person undertakes to act under a power of attorney, he should first take steps to assure himself of the genuineness of the power, or he may run the consequence of his neglect to do so.

COPYRIGHT—INFRINGEMENT—"PRINT OR CAUSE TO BE PRINTED"—COPYRIGHT ACT, 1842 (5 & 6 VICT., C. 45), S. 15.

Kelly's Directories v. *Gavin* (1902) 1 Ch. 631. This was an action to restrain the infringement of a copyright. The part of the work containing the infringement was actually printed for the defendant Garrie by a third person, but the whole work purported on the title page to be printed by the defendants, the Lloyds. Byrne, J. held that the Lloyds were not liable, (1901) 1 Ch. 374 (noted ante vol. 37, p. 300), and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) have now affirmed his decision.

INHERITANCE—ROOT OF DESCENT—"PURCHASER"—DEVISE TO TESTATOR'S HEIRS—JOINT TENANCY—COPARCENARY—INHERITANCE ACT 1833 (3 & 4 W. 4, C. 106) S. 3—(R.S.O. C. 127, S. 26).

In *Owen* v. *Gibbons* (1902) 1 Ch. 636, Farewell, J. and the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) had occasion to consider the effect of the Inheritance Act 1833, s. 3, (R.S.O. c. 127, s. 26), and came to the conclusion that where land is devised by a testator to his heir, or heirs, or right heirs, the persons who take under the devise take as purchasers, and that where two or more coheiressess take under such a devise they do not take in coparcenary as they would if taking by descent, but as joint tenants. Under R.S.O. c. 119, s. 11, they would, in Ontario, take under such circumstances not as joint tenants, but as tenants in common.

DONATIO MORTIS CAUSA—BUILDING SOCIETY SHARE CERTIFICATE — POST OFFICE SAVINGS BANK DEPOSIT BOOK.

In re Weston, Bartholomew v. *Menzies* (1902) 1 Ch. 680, was an attempt to establish a donatio mortis causâ of shares in a building society, and a deposit in the post office savings bank. In order to establish the gifts it was proved that the deceased in contemplation of, but two months before, his death and while ill in a hospital, told the defendant to whom he was engaged to be married to get the certificate of the shares and his savings bank deposit book and gave her the key of the drawer in which he kept them. She got and brought them to him and offered them to him, but he told her to keep them, and on several occasions afterwards he repeated his wish to the defendant that all his property should belong to her in the case of his death. Byrne, J. held that this was a good donatio mortis causâ if the shares and deposit could be the subject matter of a gift of that kind, but he held that the shares could not be so given by the handing over of the certificate, and that as to them the gift failed: but he held that as the deposit book contained not merely a voucher for the money deposited, but also the contract upon which the money was received and to be repaid, and as the production of the book was necessary for obtaining payment of the money, its delivery to the donee was a valid gift of the deposit.

INFANT—WARD OF COURT — TESTAMENTARY GUARDIAN — GUARDIAN'S CHANGE OF RELIGION—REMOVAL OF GUARDIAN.

In *F.* v. *F.* (1902) 1 Ch. 688, an application was made by a female ward of court by her next friend for the removal of her testamentary guardian and the appointment of another. Both parents of the infant were dead, and by the will of her deceased father, who died in 1896, his sister had been appointed her guardian. The father was a Protestant of evangelical views and the testamentary guardian had previously to 1900 also been a Protestant. In 1900 she became a Roman Catholic. The infant was 17 years of age and was personally opposed to continuing under her charge on the ground of the change in her religion. Under the circumstances Farwell, J., was of opinion that it was for the benefit of the infant that the testamentary guardian should be removed, but the parties agreeing to an arrangement suggested on behalf of the applicant for the appointment of a joint guardian with certain provisions as to residence, teaching, etc., it was approved and so ordered by the Court.

TRUSTEE—DISCHARGE OF TRUSTEE WITHOUT APPOINTING NEW TRUSTEE—JURISDICTION—TRUSTEE ACT, 1893 (56 & 57 VICT., C. 53), S. 25—(R.S.O. C. 336, S. 21).

In re Chetwynd, Scarisbrick v. *Nevinson* (1902) 1 Ch. 692, was an application by originating summons by one of four trustees of a settlement asking to be discharged from his trusteeship. It originally asked for an order under The Trustee Act 1893, (56 & 57 Vict., c. 53) s. 25 (R.S.O. c. 336, s. 21) but Farwell, J., held that there was no jurisdiction under that Act to remove a trustee without at the same time appointing a new trustee, and it is not the practice to reappoint continuing trustees in the place of themselves and a retiring trustee, so the summons was amended by adding all parties interested and asking an administration of the trusts. The applicant had acted for ten years, was over 60, and in ill health, and desired to retire from the trusts; and the learned Judge held that in an action to administer a trust the Court has inherent jurisdiction to remove a trustee without appointing another in his stead, and made the order asked.

COMPANY—DIRECTORS—REMUNERATION TO DIRECTORS—DIRECTORS APPOINTED RECEIVERS AND MANAGERS—REMUNERATION OF RECEIVERS—RIGHT TO REMUNERATION IN TWO CAPACITIES.

In re South Western of Venezuela Ry. Co. (1902) 1 Ch. 701, directors of a company who were entitled to remuneration as directors, were appointed receivers and managers of a company in a debenture holders action against the company; subsequently the company went into voluntary winding-up. The question was raised whether the directors were entitled, during the time they acted and were remunerated as receivers and managers, also to remuneration in their capacity of directors; Buckley, J., held that they were.

COMPANY—SHARES—SUBSCRIPTION TO SHARES OBTAINED BY MISREPRESENTATION OF PROMOTER—COMPANY NOT LIABLE FOR ACTS OF PROMOTER.

In re Metal Constituents (1902) 1 Ch. 707, was a winding-up proceeding, in which a person placed on the list of contributories in respect of 250 shares for which he had signed the memorandum of association before the incorporation of the company, and which had been duly allotted to him, sought to escape liability on the ground that he had been induced to subscribe for the shares by misrepresentation made to him by the promoter of the company. Buckley, J., however, held that he was liable notwithstanding the alleged misrepresentations, because the company before its incorporation could not appoint an agent and was therefore not liable for the acts of the promoter; and that by signing the memorandum of association on the registration of the company he became bound not only to the company but also as between himself and the other persons who had thereby become members of the company.

WILL—CONSTRUCTION—GIFT OF "FURNITURE AND OTHER PERSONAL EFFECTS"—FIXTURES AND TRADE FURNITURE.

In re Seton-Smith, Burnand v. *Waite* (1902) 1 Ch. 717. A testator who was carrying on business as an innkeeper at the time of his death, by his will bequeathed "all the furniture and other personal effects" in a certain hotel where he carried on his business. The question was what property passed thereunder. Buckley, J., held that it covered all furniture, linen, plate, glass, china and other effects at the hotel whether used for domestic purposes or in the hotel business; but not trade or tenant's fixtures.

WILL—LEGATEE—DISAPPEARANCE OF LEGATEE IN LIFETIME OF TESTATOR—EVIDENCE—DEATH—PRESUMPTION OF DEATH.

In re Benjamin, Neville v. *Benjamin* (1902) 1 Ch. 723. In this matter a legatee named in the will of a testator who died in 1893, the will being dated in 1891, disappeared under a cloud in September, 1892, and his whereabouts were unknown and he had never since been heard of, although searching inquiries had been made and advertisements published in all the English colonies, and other parts of the world. The share this legatee would have been entitled to, had he survived the testator, was £30,000. Letters of administration had been granted to his estate, leave having been obtained from the Probate Division to swear his death on or since 1 September, 1892. The trustees of the will having applied for directions as to the manner in which the £30,000 was to be dealt with, further inquiries by the Master were ordered who certified he was unable to state whether the absent legatee was living or dead, or if dead, when he died. He certified that he was not married when he disappeared, and no one claiming to be his wife or child had come in in answer to the advertisements which had been issued; and the trustees now applied for authority to distribute the £30,000 as if the legatee had predeceased the testator. Joyce, J., without making any declaration that the legatee was dead, or to be presumed to be dead, made an order authorizing a distribution of the fund as if he had predeceased the testator; the order stating on its face that it was made in the absence of any evidence shewing that he had survived the testator—he holding that the onus was on those claiming under the legatee to prove that he had survived the testator.

LEASE—COVENANT NOT TO ASSIGN—ASSIGNMENT OF PART.

Grove v. *Portal* (1902) 1 K.B. 727, is one of those cases which lawyers may point to as shewing the necessity of the circumlocution in legal documents which is so often the food for ridicule by the unlearned in the law. In the present case a lease of an exclusive right of fishing contained a covenant by the lessee not to assign "the said premises," the covenant did not contain the words "or any part thereof." The lessee granted a licence to another person to fish in part of the river in question limited to two rods for the residue of the term: and it was held by Joyce, J., that this partial assignment was no breach of the covenant, following a dictum of Lord Eldon in *Church* v. *Brown*, 15 Ves. 258, 265.

PRINCIPAL SURETY— BOND TO SECURE FIDELITY OF EMPLOYEE — DEATH OF SURETY — DETERMINATION OF LIABILITY — NOTICE — RIGHT OF SURETY TO TERMINATE LIABILITY.

In re Crace, Balfour v. *Crace* (1902) 1 Ch. 733, turns on whether a bond given to secure the fidelity of a servant, is terminated by the death of the surety or by notice to the principal of his death. This question Joyce, J., answered in the negative, he being of opinion that the surety's death, or notice of his death to the principal, does not, in the absence of an express stipulation to that effect, terminate the liability of the surety or his estate.

CONFLICT OF LAWS — MARRIAGE—DOMICILE—PROHIBITED DEGREES—MARRIAGE WITH DECEASED HUSBAND'S BROTHER—ITALIAN MARRIAGE.

In re Bozzelli, Husey-Hunt v. *Bozzelli* (1902) 1 Ch. 751, is an interesting case on the subject of marriage, in which we note in passing that the 28 Hen. 8, c. 7, s. 11, was cited by counsel as governing the English law of prohibited degrees. The marriage in question was one in which the parties were both domiciled in Italy, the wife being an English woman, when the marriage was solemnized, the husband being the wife's deceased husband's brother, the necessary ecclesiastical dispensation had been obtained, and the marriage was valid according to Italian law. Eady, J., held that the marriage being valid according to the law of the domicile of the parties, and not being one which by the general consent of Christendom is regarded as incestuous, it was therefore valid in England; although if contracted between domiciled English persons it would have been invalid.

PRINCIPAL AND AGENT—COMPANY—SECRETARY OF COMPANY—FALSE REPRESENTATION BY SECRETARY—CERTIFICATION OF TRANSFER—ESTOPPEL.

Whitechurch v. *Cavanagh* (1902) A.C. 117, is an important decision of the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James, Davey, Robertson and Brampton) as to the liability of a company for a false certificate given by its secretary. In the present case the secretary had fraudulently certified a transfer of certain shares in the company without the certificate of the shares purported to be transferred being produced, and the pretended transferror in fact not owning any such shares. The managing director on being informed of the certificate, but being in ignorance of the circumstances under which it had been given, had said it would be all right if the secretary's signature was

genuine, and that it would be necessary to send the certificates to London to get new certificates in favour of the transferee. It was contended by the plaintiff that he had altered his position on the faith of the certificate, and that the company was bound by the act of its agent as done in the ordinary course of business, and was estopped by the statement of the managing director from disputing the certificate, and was bound to register the plaintiff as transferee of the shares in question in accordance with the certificate. Bingham, J., and the Court of Appeal (Smith, M.R., and Collins and Romer, L.JJ.,) gave effect to this contention ; the House of Lords, however, have unanimously reversed that decision, and hold that a company is not precluded by such a certificate from shewing the true state of facts, and is not bound by the fraudulent representation of its secretary, and that the company was not estopped by the statement of the managing director.

MORTGAGE — COVENANT — JUDGMENT ON COVENANT — MERGER — RATE OF INTEREST — INTEREST SECURED BY MORTGAGE NOT COVERED BY JUDGMENT.

Economic Life Ass. Soc'y. v. *Usborne* (1902) A.C. 147, was an appeal from the Irish Court of Appeal. The question involved was a simple one. The appellants were holders of a mortgage securing principal money and interest thereon at 5 per cent., with a covenant that in case of default the mortgagor would pay interest at 5 per cent. on so much of the principal as should remain unpaid. The appellants recovered judgment on the covenant in the mortgage for the principal money and interest in arrear. Subsequently another mortgagee, on behalf of himself and other mortgagees, brought an action for the appointment of a receiver and applied for payment of rents and tolls received to the respective mortgagees according to their priorities. It was contended that the appellants were only entitled to recover interest subsequent to their judgment at the rate of four per cent. on the ground that the covenant was merged in the judgment, and the Irish Court of Appeal so held. The House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey, and Brampton) came to the conclusion that though under the judgment the right of action on the covenant was merged, yet that, nevertheless, the appellants were entitled to retain their security until paid the full amount of principal and interest thereon at 5 per cent. The general effect of the decision may

perhaps be gathered from the following passage from the judgment of Lord Davey: "In the ordinary form of a mortgage to secure a principal sum and interest it is wholly immaterial whether the covenant is gone or not, or whether any right of action subsists on the covenant or not; and indeed it is wholly immaterial in my judgment in any action of foreclosure or redemption whether there is any covenant for payment of subsequent interest or not. Once come to the conclusion that the mortgage is in such a form that the property mortgaged cannot be taken out of the hands of the mortgagee without payment of the principal and full interest, then the covenant has no more to do with it than if it related to another subject matter altogether." But where a mortgage is expressly made to secure what may be due under a note, bond, or covenant, and a judgment is secured on the note, bond, or covenant, the case would be different, and as the judgment would operate as a merger of the security for payment of which the mortgage was held, the mortgage would be redeemable on payment of the amount of the judgment and no more.

FIXTURES—TAPESTRIES AFFIXED TO WALLS—REMOVAL OF FIXTURES—TENANT FOR LIFE—REMAINDERMAN.

Leigh v. *Taylor* (1902) A.C. 157, is a case which was known in the previous stage of its existence as *In re De Falbe*, *Ward* v. *Taylor* (1901) 1 Ch. 523 (noted ante vol. 37, p. 343). The case was a contest between the representatives of a deceased tenant for life and the remainderman of a mansion as to the right to certain valuable tapestries affixed by the tenant for life to the walls of the mansion. The remainderman claimed that by their being affixed to the walls they had become part of the freehold and could not be removed, the Court of Appeal decided against him, and the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Brampton, Robertson, and Lindley) has affirmed the decision on the ground that the tapestries could be removed without any structural injury to the house. It is virtually conceded that this particular branch of law has been undergoing of late years a process of judicial modification or development.

MUNICIPAL CORPORATION—STATUTORY POWERS OF CORPORATION—ULTRA VIRES—ATTORNEY GENERAL.

London County Council v. *The Attorney General* (1902) A.C. 165, is an interesting decision on a branch of municipal law. The

appellants, a municipal body created by statute, were by statute empowered to carry on a tramway business, or as we call it a street car business, as ancillary to this they also carried on an omnibus running in connection with the tramway. The present action was instituted by the Attorney-General on the relation of certain omnibus proprietors to restrain the appellants from carrying on the omnibus business as being ultra vires. It was contended that the Attorney-General ought not to have commenced the proceedings. Their Lordships, in affirming the decision of the Court below that the appellants' powers were strictly limited by the statute to running tramways which did not extend to or include the right to run omnibuses in connection therewith, took also occasion to lay it down that the discretion of the Attorney-General to institute proceedings where there is an excess of power by a public body which affects the public, is absolute and not subject to review by the Courts, although it may be the subject of comment in Parliament, when such right is harshly or oppressively or unnecessarily exercised.

ACTION—WRONG COMMITTED OUT OF JURISDICTION—LEX LOCI—LEX FORI.

Carr v. *Fracis* (1902) A.C. 176, was an action brought to recover damages for the alleged wrongful seizure of the plaintiff's goods by an officer of the Royal Navy in the territorial waters of Muscat. The seizure was made under the authority of the Sultan, the sovereign ruler of Muscat. The Court of Appeal overruling Grantham, J., had given judgment in favour of the plaintiffs but the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) reversed the Court of Appeal and restored the judgment of Grantham, J., dismissing the action, on the ground—that the act in question was a lawful act in Muscat where it was committed and that therefore no action would lie in England therefor. Lord Macnaghten says that in order to maintain an action in England for a wrong committed abroad two conditions must be fulfilled. "In the first place the wrong must be of such a character that it would have been actionable if committed in England; and secondly the action must not have been justifiable by the law of the place where it was committed."

LEASE—CONDITION FOR RE-ENTRY ON LIQUIDATION—VOLUNTARY LIQUIDATION BY LESSEE—FORFEITURE.

Fryer v. *Ewart* (1902) A.C. 187, may be briefly referred to. The action was to enforce a forfeiture of a lease made to a limited company, which was subject to a condition of re-entry in case the lessees went into compulsory or voluntary liquidation. The lessees being solvent, but being desirous of reorganizing, went into voluntary liquidation, and the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey, Brampton, Robertson and Lindley) affirmed the decisions of the Courts below that this was a breach of the condition and operated as a forfeiture of the lease, and the receipt of rent after the liquidation proceedings had been advertised in the Gazette but without any actual notice by the lessors thereof was no waiver.

TRUST — PURCHASE OF CESTUI QUE TRUST'S INTEREST BY TRUSTEE—NON-DISCLOSURE OF VALUATION BY TRUSTEE.

Dougan v. *Macpherson* (1902) A.C. 197, although a Scotch appeal deserves notice. The point in controversy was whether a sale of the interest of a cestui que trust in the trust estate to the trustee, could be maintained where the trustee had procured a valuation of the interest (shewing it to be worth £800 more than the price given) but had failed to disclose it to the vendor. The House of Lords (Lord Halsbury, L.C., and Lords Ashbourne, Macnaghten, Shand, Brampton and Lindley) agreed with the Court of Sessions that the sale could not stand; Lord Brampton characterising the appeal as a frivolous and vexatious one.

MUNICIPAL CORPORATION—EXERCISE OF STATUTORY POWER BY PUBLIC BODY —COMPENSATION—INJURY CAUSED BY EXERCISE OF STATUTORY POWERS.

East Freemantle v. *Annois* (1902) A.C. 213, an appeal from the Supreme Court of Western Australia, deserves attention as laying down a principle of general application. Under a Provincial Statute a municipal corporation was empowered to make alterations in a street level and in so doing lowered the street six or eight feet where it passed in front of the plaintiff's house. The statute made no provision for compensation to persons whose property should be injuriously affected by the exercise of the statutory powers; the plaintiff nevertheless brought his action, the Colonial Court held he was entitled to recover but the Judicial

Committee (The Lord Chancellor, Lords Macnaghten, Shand, Davey, Robertson and Lindley) reversed the decision and held that the plaintiff was without redress.

ACTS DONE UNDER STATUTORY AUTHORITY — DOMINION RAILWAY ACT, SS. 92, 288 — RAILWAY COMPANY — INJURY CAUSED BY LOCOMOTIVE — SPECIAL LEAVE TO APPEAL — COSTS.

Canadian Pacific Ry. v. *Roy* (1902) A.C. 220, is an appeal from the King's Bench of Quebec, and is a case on the same lines as the preceding. The appellants were sued for loss sustained by a fire caused by sparks from a locomotive on their railway. There was no evidence that the locomotive was negligently constructed or that the fire was due to any negligence of the appellants or their servants. The Provincial Court held the Railway Company liable, as under Articles 356, 1053 and 1054 of the Code, corporations are liable in the same way as individuals for damages occasioned by the acts of themselves, or their servants in the performance of the work for which they are employed. This attempt to make the Code override the Dominion Act was unsuccessful; and following the principle of the last case, the Judicial Committee (The Lord Chancellor and Lords Macnaghten, Shand, Davey, Robertson and Lindley, and Sir F. North) held that as the appellants were exercising a statutory power and no proof of positive negligence on their part was given, they were not liable for the injuries sustained by the plaintiff. The Lord Chancellor points out that the fallacy of the judgments in the Courts below consisted in their assuming that the immunity of the appellants from liability was claimed merely because they were a corporation, whereas the immunity rested on the ground of their statutory power to do the act from which the injuries had resulted. As only $300 was at stake special leave to appeal was given, but only on the terms of the appellants though successful paying the respondent's costs.

CANADA — POWERS OF PROVINCIAL LEGISLATURE — BY-LAW.

In *Hull Electric Co.* v. *Ottawa Electric Co.* (1902) A.C. 237, the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson, and Lindley and Sir F. North) affirmed a judgment of the King's Bench of Quebec. Under a city by-law subsequently confirmed by an Act of the Provincial Legislature

the appellants obtained an exclusive right of establishing an electric lighting system for a certain term of years in the said city. The city had previously granted the defendants a license to erect poles to carry on an electric lighting business in the city. The action was brought to restrain them from so doing, on the ground that the effect of the by-law and Act confirming it was to revoke, or give the plaintiff's the right to revoke the prior license in favour of the defendants. The Court of first instance proceeded on the ground that the sale of electric light was a matter of trade and commerce and within the exclusive control of the Dominion Parliament and that the Act of the Quebec Legislature was therefore ultra vires and on that ground the action failed. The King's Bench on the other hand went on the ground that the by-law in giving a monopoly to the plaintiffs was beyond the powers of the city and that the confirmatory act was also ultra vires. The Judicial Committee held that the act was within the exclusive competence of the Local Legislature as being passed in favour of a purely local undertaking, and none the less so because it excluded for a limited time the competition of rival traders. But it was also held that the by-law in question, upon a proper construction, neither revoked the license to the respondents nor gave the plaintiffs any right to revoke it. The appeal was therefore dismissed. In the view of the Committee the effect of the by-law was this—that the city merely bound itself during the period named not to grant to any other person similar rights to those thereby granted to the plaintiffs, but at the same time they virtually said "you must remember that we have granted permission to the Ottawa Company to establish a system of electric lighting in the City of Hull and that system is now in operation—we bind ourselves not to convert that permission into a right, but we do not bind ourselves to revoke that permission at your bidding. We keep the power of revocation in our own hands." This view was strengthened by the fact that the by-law in question imposed no obligation on the plaintiffs to furnish electricity nor did it in any way control the charges the plaintiffs were to make.

GUARANTEE—INDEMNITY—ORAL "PROMISE TO ANSWER FOR THE DEBT OF ANOTHER"—STATUTES OF FRAUDS (29 CAR. 2, C. 3) S. 4—(R.S.O. C. 338, S. 5).

In *Harburg India Rubber Co.* v. *Martin* (1902) 1 K.B. 778, that well known fount of litigation, the Statute of Frauds, s. 4 (R.S.O. c. 338, s. 5) receives further exposition. The defendant in the action was a director of and had a large interest as a shareholder in a joint stock company and orally promised the plaintiffs, who were execution creditors of the company, that he would indorse bills for the amount of the plaintiffs' debt against the company. On the faith of this promise the plaintiffs' withdrew their execution. The defendant relied on the Statute of Frauds, s. 4, as a defence because the promise was not in writing. At the trial Mathew, J., gave judgment for the plaintiffs, holding that s. 4 did not apply. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), however, reversed his decision, and held that the statute did apply, and that the contract was not one of indemnity. That Court also was of opinion that the case would not be deemed to be excepted from s. 4 on the ground that the defendant, as a shareholder and otherwise, had an interest in freeing the company's goods from execution, he having no legal interest in, or charge upon, the goods.

COMPROMISE—ORDER—COUNSEL'S AUTHORITY TO COMPROMISE—COUNSEL EXCEEDING AUTHORITY—LIMITATION OF COUNSEL'S AUTHORITY UNKNOWN TO OPPOSITE PARTY—INTERLOCUTORY ORDER—ABSENCE OF MISTAKE.

Neale v. *Gordon Lennox* (1902) 1 K.B. 838, is a case to which reference has already been made in these columns. (See ante pp. 355, 394). The action was for slander and libel, and the plaintiff authorized her counsel to agree to a reference of the action, but only on condition that the defendant made a statement disclaiming all imputations on the plaintiff's character. The plaintiff's counsel, however, the limitation of his authority being unknown to the defendant or her counsel, agreed to a reference of the action but without any statement by the defendant disclaiming imputations against the plaintiff's character, and an order of reference was accordingly made. The plaintiff's counsel was acting under no mistake or misapprehension as to the extent of his authority. On being apprised of the order, the plaintiff at once repudiated it. Lord Alverstone, C.J., who made the order, having been applied to to rescind it, granted the application, being of opinion that as the

order was merely interlocutory it was subject to review, before the order was drawn up, and did not stand on the same footing as a compromise of the action. The Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.) took a different view of the matter, and held that the compromise order having been agreed to, without any mistake or misapprehension on the part of counsel, it was binding on the plaintiff, notwithstanding her counsel had exceeded his authority, such excess being unknown to the opposite party, and they also held that an interlocutory order agreed to by way of compromise, can no more be reviewed in the absence of mistake, than a judgment for the final settlement of an action. It must be admitted that the decision if well founded puts an enormous power in the hands of counsel when they are enabled to bind their clients to compromises to which they themselves have expressly refused to agree. In this particular case the stipulation which the plaintiff proposed as a condition of agreeing to a reference appears to have been tantamount to an admission on the part of the defendant that she was in the wrong, and it is hardly to be wondered at, if there was to be a reference, that the defendant would not agree to make any such statement.

PRACTICE—WRIT FOR SERVICE OUT OF JURISDICTION——BREACH OF CONTRACT WHETHER WITHIN OR WITHOUT JURISDICTION—WRONGFUL DISMISSAL—LETTER OF DISMISSAL WRITTEN AND POSTED ABROAD—RULE 64 (*e*)—(ONT. RULE 162 (*e*)).

Holland v. *Bennett* (1902) 1 K.B. 867, was an action by a servant for wrongful dismissal. The defendant was the proprietor of the New York Herald and resided in France. He employed the plaintiff in England as the London correspondent for the European edition of the New York Herald. The dismissal had taken place by letter written and posted by the defendant in France and received by the plaintiff in England. The plaintiff obtained leave to issue a writ and notice of it had been served on the defendant in France. The defendant having entered a conditional appearance, applied to set the writ aside on the ground that the case did not come within Rule 64 (*e*), (Ont. Rule 162 (*e*)), on the ground that according to *Cherry* v. *Thompson* (1872) L.R. 7 Q.B. 573, the breach of the alleged contract must be taken to have taken place out of the jurisdiction where the letter was written. The application was granted and the writ set aside, and the Court of Appeal (Williams and Mathew, L.JJ.) affirmed the order.

PRACTICE—DISCOVERY—DEFAMATION—PRIVILEGE—INQUIRY AS TO DEFENDANT'S GROUNDS FOR BELIEVING THE TRUTH OF WORDS SPOKEN—INQUIRY AS TO STEPS TAKEN BY DEFENDANT TO ASCERTAIN THE TRUTH OF DEFAMATORY WORDS.

In *Elliott* v. *Garrett* (1902) 1 K.B. 870, which was an action for defamatory words, in which the defendant pleaded that the occasion was privileged, the plaintiff by way of discovery sought to examine the defendant as to what information he had which induced him to believe that the words in question were true, and also as to the steps taken by him to ascertain their truth. Bucknill, J., refused to allow the questions. On appeal the Court of Appeal (Williams, Romer and Mathew, L.JJ.) decided that the plaintiff was entitled to the discovery sought, and reversed the order of Bucknill, J.

CRIMINAL LAW—EVIDENCE—PRISONERS JOINTLY INDICTED—CRIMINAL EVIDENCE ACT 1898, (61 & 62 VICT. C. 36) S. 1 (*f*) (*iii*)—(56 VICT. C. 31, D.).

The King v. *Hadwen* (1902) 1 K.B. 882, was a criminal prosecution of two persons jointly for offences under the Debtors Act. At the trial one of the prisoners gave evidence and in so doing incriminated the other, whose counsel claimed the right to cross examine him. Ridley, J., refused to permit the cross examination, and both prisoners were convicted. Upon a case stated by Ridley, J., the Court for Crown Cases (Lord Alverstone, C.J., and Lawrance, Wright, Bruce and Kennedy, JJ.) unanimously held that Ridley, J. was wrong in refusing to permit the cross examination, and quashed the convictions.

PROBATE ACTION—ACTION TO REVOKE PROBATE GRANTED UPON PROOF IN SOLEMN FORM—RES JUDICATA—FRAUD CHARGED AGAINST PERSON NOT PARTY—STAYING PROCEEDINGS.

In *Birch* v. *Birch* (1902) P. 130, the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) after giving the plaintiff leave to adduce further evidence, reversed the judgment of Barnes, J. (1902) P. 62 (noted ante p. 342). The question at issue in the former action when the will in question was proved in solemn form was wheiher it was signed by the testator, and the present action was to set aside that judgment on the ground that it was obtained by the fraud of a person not a party to the action. The will in question was in the handwriting of one Sanders, who had sworn on the trial of the former action in June, 1900, that it had

been duly executed by the testator. Sanders had gone abroad and the plaintiff filed an affidavit verifying a letter dated Sept. 10, 1900, from a Mrs. Smith, of San Francisco, addressed to the authorities at Scotland Yard, inclosing what purported to be a confession by Sanders that he had forged the will at the suggestion and with the help of one of the defendants to the present action, but who was no party to the former probate action. It was contended that there was nothing to shew that the alleged confession was genuine and no proof of the discovery of any new evidence which would render it probable that tbe plaintiff could succeed in the present action. The Court of Appeal under these circumstances was of opinion that no case had been made which could lead the Court to think that there was any chance that the plaintiff could succeed, and that, therefore, the action must be stayed as frivolous and vexatious.

SOLICITOR AND CLIENT—SOLICITOR OF PURCHASER RECEIVING COMMISSION FROM VENDOR—TAXATION—RIGHT OF CLIENT TO CREDIT FOR COMMISSION RECEIVED BY HIS SOLICITOR.

In re Haslam (1902) 1 Ch. 765, the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) affirmed a decision of Kekewick, J. The application was by a client to review a taxation of his solicitors' bill under the following circumstances. The costs in question were incurred in reference to the purchase of a patent; the solicitors had previously obtained from the vendor a note promising them a commission in the event of their effecting a sale; this note was shewn by the solicitors to their client and he had it in his possession some days previously to the contract of sale being entered into. He made no objection, and the commission, amounting to £210, was, with the client's knowledge, received by the solicitors from the vendor. The client died and the solicitors delivered their bill to his executors who applied for a taxation thereof, and on the taxation claimed credit for the £210: the taxing master allowed their claim, but Kekewich, J., reversed the Master's ruling, and the Court of Appeal agreed with Kekewich, J., at the same time animadverting on the conduct of the solicitors in making such a bargain which rendered it impossible for them properly to fulfil the duties which they had undertaken to both vendor and purchaser. Stirling, J., intimates that the client's remedy, if any, would be to set aside the sale.

CHARITY—VOLUNTARY ASSOCIATION—FAILURE OF OBJECT.

In *Smith* v. *Kerr* (1902) 1 Ch. 774, which was an action to test the question of the ownership of one of the old Inns of Court known as "Clifford's Inn," which had ceased to be used for the purpose originally intended, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have affirmed the decision of Cozens-Hardy, J. (1900) 2 Ch. 511 (noted ante vol. 37, p. 66) to the effect that the property was not the private property of the members of the society to be dealt with as they pleased, but was subject to a dedication for public or charitable purposes. Romer, L.J. points out that the trusts were clearly within the Statute of Elizabeth (R.S.O. c. 333, s. 6), viz., for the maintenance of a school of learning, in this case, the learning of the law.

TRUSTEE—IMPROPER INVESTMENT—PUISNE DERIVATIVE MORTGAGE—RELIEF OF TRUSTEES' ACT (59 & 60 VICT. C. 35) S. 3—(62 VICT. (2) C. 15, O.).

Chapman v. *Browne* (1902) 1 Ch. 785, was an action against trustees of a marriage settlement for breach of trust in making an improper investment of the trust funds. The defendants claimed the benefit of the Relief of Trustees Act (59 & 60 Vict. c. 35), from which the Ontario Act, 62 Vict. (2) c. 15 is derived. The trustees were empowered by the settlement, with the consent of the cestuis que trust, to vary investments, and to invest the trust funds inter alia in freehold securities in Ireland. The trustees, without the consent of the cestuis que trust, sold out India stock in which part of the trust funds were invested and invested £5,000 upon a derivative mortgage of lands in Ireland. The original mortgage was a third mortgage, and the derivative mortgage on which the moneys was lent was subject to two prior derivative mortgages. The Court of Appeal (Collins, M.R. and Romer and Matthew, L.JJ.) agreed with Cozens-Hardy, J. that the defendants had been guilty of a breach of trust and though they had acted "honestly" yet they could not be held to have acted "reasonably," and were, therefore, not entitled to the benefit of the Act.

HEIRLOOMS—BEQUEST OF CHATTELS TO DESCEND WITH TITLE—PERIOD OF ABSOLUTE VESTING.

In re Hill, Hill v. *Hill* (1902) 1 Ch. 807 a testatrix by her will dated in 1891 bequeathed diamonds to her son the third Viscount Hill (who survived her) "until he shall die, and after his death to

each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds shall descend as heirlooms as far as the rules of law and equity will permit." The third viscount died in 1895 and was succeeded by the fourth viscount, who was born in 1863 and was the plaintiff in the action. He was married but had no issue The plaintiff applied on an originating summons to have it determined whether he was entitled to the diamonds absolutely or for life only. The defendant was the heir presumptive of the title and was born in 1866. It was argued on his behalf that the bequest was a good limitation in favour of all persons living at the time of the testatrix's death who might thereafter at any time succeed to the title, the words "as far as the rules of law and equity permit" preventing any violation of the rule against perpetuities. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), however, considered the case concluded by the decision of the House of Lords in *Tollemache v. Coventry*, 1 Cl. & F. 611 ; and held that the plaintiff was absolutely entitled, affirming the decision of Eady, J.

Our valued contemporary, the English *Law Times*, in referring to the views expressed by Mr. Barton, the Australian Prime Minister, as to an ultimate Court of Appeal for the Empire, remarks upon "the unfortunate rule that permits only one judgment to be given in the Judicial Committee." We entirely disagree with the writer of the above sentence. It is, we think, most fortunate and a very helpful and healty arrangement that the judgment of a final Court of Appeal should be given as a unanimous one. It is most undesirable that by means of a dissenting judgment, or in any other way, doubt should be thrown upon the law as it might be laid down by a Court of last resort. Finality is the important matter in the mind of business men and in the interest of the public.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Street, J.] MOORE *v.* THE J. D. MOORE CO. [April 11.

Workmen's Compensation for Injuries Act—Master and servant—Injury to servant—Negligence—Dangerous machinery—Want of guard—Factories Act, R.S.O. 1897, c. 206, s. 20—Liability.

The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up around a machine—called a dovetailing machine consisting of rapidly revolving knives—carrying pieces of board therefor, and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine and was going for another load when he was directed by the operator to straighten them out. On his proceeding to do so, and, not observing that the machine was in motion, he put out his hand to remove some dust on it when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time had actual charge of it, the operator having left it and was standing some fifteen feet away looking out of a window. The jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff.

Held, that the defendants were liable. Judgment of STREET, J., at the trial reversed.

Idington, K.C., and *J. S. Robertson*, for plaintiff. *Mabee*, K.C., and *Harding*, for defendants.

From Boyd, C.] [April 11.

FOWLEY *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Insurance—Accident—Proofs of loss—Sufficiency of—Waiver—Death by accident—Finding of jury—Vagueness of.

Proofs of loss were furnished within the time limited by an accident policy without any objection being then taken to their sufficiency, or further proofs asked for, the refusal to pay being based on the contention that the circumstances surrounding the death of the insured brought it within a clause of the policy providing against liability where the death was by

suicide, duelling, etc., or from natural causes; objection to the sufficiency of the proofs having been taken for the first time in the statement of defence delivered a couple of years afterwards.

Held, that the proofs as furnished were sufficient; but in any event objection to their sufficiency, or the right to call for further proofs was waived.

By the policy the death was required to be by accidental bodily injury caused by violent external means; while by s. 152 of the Insurance Act, R.S.O. c. 203, which is to be read with the policy, "accident" is defined as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The finding of the jury was, that there was no evidence to satisfy them that the deceased came to his death by his own hand, but he came to his death by external injury unknown to them.

Held, that the finding was too vague to be constructed as a finding of accidental death; and a new trial was directed.

Hamilton Cassels, and *R. S. Cassels*, for appellants. *G. Lynch-Staunton*, K.C., for respondents.

From Boyd, C.] FISHER *v.* BRADSHAW [April 11.

Bills of sale and chattel mortgages—Valid agreement to give mortgage—Mortgage subsequently given—Right to rely on agreement—R.S.O. c. 148, s. 11.

Where an agreement to give a chattel mortgage was duly made and registered under R.S.O. c. 148, s. 11, and subsequently a mortgage was made and registered, the giving of such mortgage whereby the legal estate became vested in the mortgagee did not revest in the debtor the equitable title, which the mortgagee had by virtue of the agreement, but it continued to exist as before, and the mortgagee is unable to rely on it where the legal mortgage is ineffectual for any purpose. Judgment of BOYD, C., affirmed.

Gibbons, K.C., *Russel Snow*, and *L. E. Stephens*, for appellants. *W. A. J. Bell*, for respondents.

From MacMahon, J.] FALLIS *v.* GARTSHORE. [May 8.

Negligence—Dangerous premises—Want of screen or guard.

While a teamster was delivering a load of coke on the defendants' premises, an iron foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard; or, in the absence of a screen or guard, by the workman stopping work during the delivery of the coke.

Held, that the defendants were liable for the injuries sustained.

Crerar, K.C., for appellants. *J. W. Nesbitt*, K.C., for respondents.

From McMahon, J.] DOIDGE *v.* ROYAL TEMPLARS. [June 28.

Insurance—Benevolent Certificate—Alteration of Constitution—Internal appeals—Retroactivity.

Appeal by defendants from judgment of MCMAHON, J. Action on a beneficiary certificate dated Oct. 19, 1896, issued by the defendants, who were incorporated under the Benevolent Societies Act, R.S.O. 1877, c. 167, to the plaintiff, conditioned, inter alia, that he complied with the Constitution, rules or orders governing, "or that might thereafter be enacted by the defendants to govern the Order and its Benefit Funds," and by which the defendants agreed that, on the plaintiff attaining the age of 70, which he had done, they would pay out of the Total Disability Fund," "in accordance with the laws governing such Fund," sums not exceeding a certain amount.

Held, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896 when the plaintiff's certificate was issued in such a way as to diminish the amount the plaintiff was entitled to; he was nevertheless bound by the alteration, and could only recover in accordance with it.

Held, also, that the plaintiff was not bound before action to exhaust the intricate series of appeals within the Society provided for by the rules, for under R.S.O. 1897, c. 203, s. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proofs of loss, and any rules, conditions or stipulation to the contrary shall, as against the assured, be void.

Watson, K.C., and *Gallagher*, for defendants. *Washington*, K.C., for plaintiff.

From Divisional Court.] [June 28.

TORONTO PUBLIC SCHOOL BOARD *v.* CITY OF TORONTO.

Public schools—Annual estimate—Duty of municipality.

Under the proper construction of ss. 65 (9) and 71 (1) of The Public Schools Act, 1 Edw. VII., c. 39, which provides that the Public School Trustees are to submit to the municipal council an estimate of the expenses of the schools under their charge for the current year, and that the council shall levy and collect upon the taxable property of the municipality such sums as may be required by the trustees, and shall pay the same to the treasurer of the public school board; the right of the school board in preparing their estimate, is to include therein everything that in their best judgment may be needed to meet legitimate expenditure, that is, expenditure upon objects or for purposes within their lawful authority, and their duty to the council is to prepare it in such a manner as to shew generally

what these purposes are, and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes intra vires of the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this the council cannot go. The council has no voice in the control or management of the affairs which are committed by law to the school board: its duty is to levy and collect and pay out from time to time as required, the moneys shewn by the estimate to be necessary for lawful school purpose.

F. Hodgins, K.C., for the School Board. *Fullerton*, K.C., for the City of Toronto.

From Ferguson, J.] McGARR *v.* TOWN OF PRESCOTT. [June 30.

Municipal corporations—Accident—Defective sidewalk—Notice of defect.

Where a sidewalk on one of the principal streets of a town and on which there was considerable traffic, and which had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them, its condition is such as to impose on the corporation a constant care and supervision over it; so that when one of the boards is proved to have beem missing for a week, leaving a hole some six or eight inches deep into which a person falls, and is injured, notice to the corporation of such defect in the sidewalk must be assumed and liability for the damage occasioned by the accident imposed on them.

The damages assessed at the trial $1500, were reduced to $900, the court being of opinion that the latter was the more reasonable amount, for the damages sustained, a sprained ankle and affection of the sciatic nerve for which recovery might be expected at no distant date.

Clark, K.C., for appellants. *Hutchinson*, for respondents.

HIGH COURT OF JUSTICE.

Divisional Court.] BAILEY *v.* GILLIES. [May 8.

Verbal contract—Contract to drive logs—Statute of Frauds.

M. who had agreed with the defendants, and a number of other lumber manufacturers, to drive down their logs for them, the defendant's contract being a verbal one, arranged with the plaintiff to act for him, the obligation to drive the defendant's logs to continue to a named date for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be

paid a specified sum per day for himself and those employed by him. M. did not arrive and the drive was continued by the plaintiff. Subsequently M. having some difficulty in paying his men, a verbal agreement was entered into between M. and the defendants whereby in consideration of M. assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms.

Held, by ROBERTSON J., that there was a new contract founded on new and substantial consideration so that the Statute of Frauds did not apply.

On appeal to the Court of Appeal the judgment was affirmed, but on the grounds (1) of novation, or (2) even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout and the plaintiff having continued the drive on such terms there was a binding obligation to pay him, and that in either view the Statute of Frauds did not apply.

Douglas, K.C., for appellant. *Aylesworth*, K.C., for respondent.

Division Court.] [May 10.

TRUSTEES OF SCHOOL SECTION 5, CARTWRIGHT *v.* TOWNSHIP OF CARTWRIGHT.

Public schools—Selection of school site—Award conditions precedent—Mandamus.

The words "selection of a site for a new school house," contained in s. 31 of the Public School Act, 59 Vict., c. 70 (o), refer to a selection of a site in a newly established school section, and probably also to the selection of a site for an additional school house, while the words the "change of site of an existing school house," also contained in such section refer to the case where a site has been chosen and a school house provided, but which it is deemed desirable to abandon and to choose a new site, the section not applying to the case where the site selected is an existing site: but in any event before arbitration proceedings can be taken and an award made under the said section, the trustees must first select a site which the ratepayers decline to approve of on the matter being submitted to them.

An award made without such prerequisites having been complied with is unauthorized and nugatory.

The fact that such an award is valid on its face is no answer to an application for a mandamus to compel a township municipality to pass a by-law to raise the amount required for the purchase of a site and erection

of a school house under steps subsequently taken therefor under the section, where all the requisites thereof were duly complied with.

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

On motion therefor leave to appeal to the Court of Appeal was granted.

Riddell, K.C., for applicants. *H. J. Hunter*, contra.

MacMahon, J.] REX EX REL. IVISON *v.* IRWIN. [May 12.

Municipal election—Quo warranto—Tampering with ballots—Breach as to immediate delivery of ballot box to Town Clerk—Setting aside election—Supporting affidavits by viva voce evidence—Admissibility of evidence as to how voters voted—Cross-examining on affidavits after commencement of trial.

Where in a quo warranto proceeding under the Municipal Act, R.S.O. c. 223, before a county judge, to set aside the election of a town counsellor, it was found by the judge upon a scrutiny of the ballot papers, having regard to the character of the evidence both viva voce and by affidavit, that such ballot papers had been tampered with, and there was also a breach of the Act in the deputy returning officer taking the ballot box to his own house instead of directly to the town clerk, and it was impossible to say that the result of the election was not affected thereby, an order of the judge setting aside the election was affirmed.

Affidavit evidence may be supported at the trial by viva voce evidence, although not mentioned in notice of motion. *Reg. ex rel. Mangan v. Fleming* (1892) 14 P. R. 458, referred to.

The provisions of s. 200 of the Act that "No person who has voted at an election shall in any legal proceeding to question the election or return, be required to state for whom he voted" must be construed in furtherance of the object of the Act, as absolutely excluding such testimony.

After the trial of such proceeding has commenced it is discretionary with the judge as to allowing a person who has made an affidavit to be cross-examined though before the commencement of the trial cross-examination may properly be had.

Aylesworth, K.C., for appellant. *Rodd*, for the relator, respondent.

Divisional Court.] REX *v.* MCGREGOR. [May 13.

Conviction—By-law—Prohibition against keeping certain quantities of coal oil, etc. — Constitutional law — Provincial legislation — Dominion legislation—Petroleum Inspection Act.

The defendant was convicted for a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or

other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naptha, benzole, benzine, or "other combustible or dangerous materials" should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under sub-s. 17 of s. 542 of the Municipal Act R.S.O. c. 223, such section being headed "Storing and transportation of gun powder," and provided "for regulating the keeping and storing of gun powder and other combustible or dangerous materials" and was one of a group of sections under div. VI of the Act headed "Protection of life and property," sub-div. 3 of said division, which included s. 542, being under the heading "Prevention of fires."

Held, that the said sub-s. 17 authorized the passing of the by-law, and that the conviction could be supported thereunder, for that the words "other combustible or dangerous materials" were not limited by the ejusdem generis rule to gun powder or other similar substances, but would include the substances set out in the by-law; and that such legislation was not superseded by Dominion legislation for that the Petroleum Inspection Act 1899, 62 & 63 Vict., c. 27 (D.), dealing with the subject, which was expressly made conformable thereto.

Shepley, K.C., for applicant. *Cartwright*, K.C., for Attorney-General. *Douglas*, K.C., for prosecutor.

Divisional Court.] REX. *v.* BENNETT. [May 14.

Conviction—Motion to quash—Costs.

In a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under Provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate.

Douglas, K.C., for applicant. *Denton*, K.C., for prosecutor. *Middleton*, for magistrate.

Meredith, C.J.C.P.] [June 27.

PEOPLES' BUILDING AND LOAN ASSOCIATION *v.* STANLEY.

Court of Appeal—Leave to appeal—Dismissal with costs—Validity of Order—Execution issued out of High Court—Authority to issue.

An application to a judge of the Court of Appeal for leave to appeal from an order of a Divisional Court, having been dismissed with costs, the same were taxed and a certificate thereof issued, which, with the order of dismissal, was filed in the High Court, and a fi. fa. to levy the amount of such costs placed in the sheriff's hands for execution.

Held, that the order directing payment of costs was properly made under ss. 77 and 119 of the O.J. Act; and that execution was properly issued out of the High Court under rule 3, by analogy to the procedure under rule 818.

Bartram, for defendant. *Dromgole*, for plaintiff.

Street, J.] GILLETT *v.* LUMSDEN. [July 9.

Trade mark—"Cream yeast"—Protection—Acquisition of right by user—Abandonment—Injunction.

The words "cream yeast" are not the proper subject of a trade mark, being common words of description. *Partlo* v. *Toad*, 14 A.R. 444, and *Provident Chemical Works* v. *Canada Chemical Co.*, 2 O.L.R 182, followed.

But the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have the defendants restrained from so using it.

The fact that the plaintiff had not for some years before action sold many boxes of the article did not shew an abandonment of the right to use the name in connection with the goods, the plaintiff having always been ready to furnish the article when it was asked for.

Masten, and *Spence*, for plaintiff. *F. C. Cooke*, for defendants.

Street, J.] NEELY *v.* PETER. [July 11.

Water and watercourses—Injury to land by flooding—Claim for damages—Summary procedure—Costs of action—Erection and maintenance of dam—Liability of owners—Tolls—Liability of lumbermen using dam.

Action by the owner of land upon a river against the original defendants for flooding such land by a dam. At the trial it appeared that the dam was the property of an improvement company incorporated under the Timber Slide Companies Act, R.S.O. c. 194, and that the original defendants had used it for the purpose only of floating logs down the river; and the improvement company were added as defendants.

Held, 1. Although a plaintiff is not bound to proceed summarily upon a claim such as this, under R.S.O. c. 85, but has a right to bring an action in the ordinary way, yet in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of doing so.

2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.

3. Nor were the defendants assisted by ss. 15 and 16 of R.S.O. c. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.

4. But s. 1 of R.S.O. c. 142, places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by s. 15 of R.S.O. c. 194.

The action was dismissed as against the original defendants; and judgment was given for the plaintiff against the added defendants for $142, but without costs, the defendants having paid that amount into Court.

O. M. Arnold, for plaintiff. *W. L. Haight*, for defendants.

Falconbridge, C.J. K.B., Street, J., Britton J.] [July 12.

MCINTYRE *v.* TOWN OF LINDSAY.

Negligence—Liability for non-repair of highway.

Appeal by plaintiff from judgment of County Court of Victoria dismissing the action as against the town corporation with costs. Action against the town corporation and the Lindsay Gas Co. to recover damages for injuries sustained by plaintiff by stepping into a trench dug by the defendant company along the streets of the town, under the authority of a special by-law of the defendant corporation. The defendant company had agreed to indemnify the corporation for all damages which might arise therefrom, and to warn the public of the danger by lights, etc. The corporation were repairing their sidewalk at the point in question at the same time, and, in passing at night, the plaintiff, in going round the barrier constructed by the defendant corporation around their repairs, fell into the trench and was injured. There were no lights put up by either defendant to warn the public of the danger.

Held, that the action was properly brought against both defendants, who were both negligent and both liable to the plaintiff, the defendant corporation, under R.S.O., c. 223, s. 606, for non-repair of the highway, and the defendant company, under their special contract with the corporation, while their liability to the public is declared under R.S.O., c. 199, s. 26. Appeal allowed.

Steers, for plaintiff. *H. L. Drayton*, for defendants.

Falconbridge, C.J. K.B., Street, J., Britton, J.] [July 7.

WILDER *v.* WOLF.

Sale of goods—Fraudulent second sale after payment by first purchaser—Cheque—Stoppage of—Money in Court.

Wolf sold Wilder a car load of junk, and in part payment therefor, received three cheques for $50 each. Instead of delivering the car load to Wilder, he sold it to Mehr, who bought in good faith, giving to Wolf his cheque for $205 in payment. This cheque was drawn on the Bank of Ottawa in Toronto, but was cashed at the Bank of Commerce in Orangeville, on payment being guaranteed by Taylor who endorsed the cheque. Later on, on Mehr's being served with garnishee proceedings by Wilder, and on his discovering the position of affairs, he immediately stopped payment of the cheque, and paid the amount into court. The Bank of Commerce now looked to Taylor, who had guaranteed payment of the cheque, and he paid the amount, and then claimed the money in court to recoup himself

Held, that, he was entitled to it, for having paid the amount to the Bank of Commerce, he was now in the position of the holder of the cheque. If the money in court were to be paid out to Wilder, then Mehr, who paid it in, would be liable to pay it over again to Taylor, whereas the cheque in the hands of Taylor would be satisfied by the payment out of court to him of the money which Mehr paid in.

DuVernet, for Wilder. *McBrady*, K.C., for Mehr. *Hughson*, for Taylor.

Osler, J.A.] IN RE CENTRE BRUCE. [July 14.

Parliamentary Elections—Petition—Copy—Service.

In the printed copy of the petition served upon the respondent the concluding prayer, had, by mistake of a clerk, a pen stroke drawn through it:—

Held, that though the copy was not strictly a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given.

Bristol, and *E. Bayly*, for respondent. *Aylesworth*, K.C., for petitioner.

THIRD DIVISION COURT COUNTY OF ELGIN.

MEEHAN *v.* BERRY.

Division Courts—Amendment—Statute of Limitations.

Amendment allowed at the trial giving defendant leave to set up Statute of Limitations.

Consideration of the propriety of allowing an amendment to set up such defence.

[ST. THOMAS, May 21.—HUGHES, Co. J.

Action to recover an account for goods alleged to have been sold in 1895. The dates given in the particulars of claim stated that the goods were sold in 1896. The suit was brought within six years of the latter date, but the books of the plaintiff shewed that the entries were all made in 1895 (over six years before the entry of the suit). The defendant had merely denied the account in his dispute note, and did not give notice of an intention to set up the Statute of Limitations as a defence.

Crothers, for the defendant, asked leave at the trial to plead the Statute of Limitations, in addition to the denial of liability, on the ground that the particulars furnished were misleading.

HUGHES, Co. J.—For obvious reasons it is the policy of the law, and has been so for over one hundred years, in order to put a stop to or prevent litigation upon stale claims for damages, and old demands for debt, beyond certain and reasonable periods of time—in fact, to presume that all such have been satisfied, paid and settled for: for instance, after the lapse of six years from the arising of a cause of action, in matters of debt, like the present claim of these plaintiffs. It is known that memories fail, documents become lost or mislaid, or worn out, or torn, or defaced, or destroyed; that witnesses die or forget facts, or they become scattered, or their minds become engaged or burdened, during intervening years, about other things, so that inaccuracy and forgetfulness become probable.

In this case the transactions sought to be brought in question occurred more than six years before the suit was commenced. The very purpose of the statute, concerning claims for debt, so long unsettled, from the time of incurring the alleged liability, without any acknowledgement of their existence, on the part of the alleged debtor, was to shut off the claim and to treat it as paid, and thereby bar the remedy. It was one of the main purposes to avoid and prevent what was presented on the trial of this case, i.e., contradiction in evidence. Two witnesses on either side contradicted each other under oath, whereby it is impossible to say which is correct or whom to believe.

The defendant did not set up or give notice of a defence under the statute, possibly not knowing the provision of the law in the regular proceedings of the court as a matter of practice. At the trial his counsel asked for leave to give the notice as an amendment of the nature of his defence.

He had only put in a dispute notice and omitted the notice required for this particular defence. Looking at the amendment asked for as a matter of discretion—which it undoubtedly is—I have no hesitation in saying that had I been fully persuaded that there was really an unpaid debt due and owing from the defendant to these plaintiffs, I should have hesitated to allow the defendant to amend, because it would be using discretion in the aid of dishonesty, when there might have been no idea of setting up such a defence in the first instance; but, where the evidence is so evenly balanced as I consider to have been the case here, I think it my duty to allow the amendment and admit the defence set up at the trial, that there was no debt due the plaintiffs by the defendant within six years of the bringing of this suit.

The purpose of an amendment is that every action shall be disposed of after hearing and considering all the allegations on either side, which are or which can be properly advanced, by either party, according to the nature and justice of the case; and what belongs to equity and good conscience, so that no one is to be barred upon a mere slip or omission or technicality.

By R.S.O. 1897, c. 60, s. 312, it is provided that in any case not provided for by the Act or by existing rules, the judge may in his discretion adopt and apply the general principles of practice in the High Court to actions and proceedings in the Division Courts.

It was held by ARMOUR, C.J., in *White* v. *Galbraith*, 12 Prac. R. 513, that the section of the Division Court Act to which I have referred affords ample authority for a judge to permit a plaintiff to amend his claims in a Division Court suit.

The setting up a plea of the Statute of Limitations has been held by the higher courts to be a meritorious defence, and amendment of a plea involving such a defence is allowed to be set up at any time. See *Hamelyn* v. *Whyte*, 9 C.L.J.N.S. 363; 6 P.R. 120; *Seaton* v. *Fenwick*, 7 P.R. 146; *Maddox* v. *Holmes*, 1 B. & P. 228; *Rucker* v. *Hanning*, 3 T.R. 124; *Bridgman* v. *Smith*, 3 Chan. Ch. R. 318. In the case of *Longbottom* v. *Toronto* (1896) 27 O.R. 198, the want of notice of action was not raised until after the evidence had closed; a motion for a non-suit was refused. There was no preliminary objection raised to the statement of claim, and no observation was made as to want of notice till the close of the evidence, and it was just before the case went to the jury, the Chancellor, who tried the case, refused an amendment, saying he was unwilling to turn the plaintiff round on that point, taken at the very close of the contest. The exercise of judicial discretion, in that instance, was in every point of view reasonable; but it was peculiar in its circumstances, and unlike the facts and circumstances of this case. *Maddocks* v. *Holmes*, 1 B. & P. 230, is an authority in favour of the amendment asked for here. In that instance a judgment by default of a plea had been signed against the defendant, and a plea of the Statute of Limitations upon application to set aside the judgment was

allowed as a meritorious defence. *McIntyre* v *Canada Company*, 18 Chy. 367, is another decision in our own courts in the same line.

In *Rucker* v. *Hanning*, 3 T.R. 124, the Court of King's Bench in England (so long ago as 1789) allowed the plea of the statute in a case where a defendant had obtained an order for time to plead, on the terms of pleading issuably, and pleaded the general issue and the Statute of Limitations. Lord Kenyon said the court was of opinion that the defendant was not precluded from pleading the statute after an order for time to plead; that the Court of Common Pleas had always so considered, and that in many cases it was a very fair plea.

As a matter of fact and in view of the requirements of the Division Court Act, the particulars of the plaintiff's claim here required to be amended, because s. 98 of the Act forbids any evidence being given of any cause of action except such as is contained in the particulars furnished to the clerk. It is always my custom in the matter of dates to allow such amendments. The year in this case was of importance, as it turned out, and I allowed the plaintiffs to proceed with their evidence, as if such amendment had been made, so I feel I was justified in allowing the defendant to amend.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] BANK OF MONTREAL *v.* DUNLOP. [July 22.

Interest—Mortgage—Construction.

The promise for payment in a mortgage to secure an indebtedness provided for the payment of "said overdrawn account and all promissory notes on bills of exchange (and interest upon the same) then due and payable."

Held, that the overdrawn account was made chargeable with interest.

Chandler, K.C., for plaintiffs. *Allen*, K.C., for defendant.

Barker, J.] AYER *v.* ESTABROOKS. [July 22.

Will—Construction—Subject of gift "Farm on which I reside."

Testator by his will devised to his daughter "the homestead farm on which I reside," and the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as lot A and upon which he resided at the time of his death. By

s. 19 of c. 77, S.C.N.B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Held, that lot A was not included in the devise to the daughter.

Teed, K.C., for plaintiff. *Powell*, K.C., for defendants.

Province of Manitoba.

KING'S BENCH.

Richards, J.] SPARLING *v.* HOULIHAN. [June 24

Vendor and purchaser—Secret profit paid by vendor to purchaser's agent—Rescission of contract on account of collusion between vendor and agent of purchaser.

The facts in this case were very similar to those in *Murray* v. *Smith*, noted ante, p. 474, the same official, Tomlin, having, under pretence of acting in the best interests of defendant, induced him to enter into an agreement of purchase of a quarter section of land from the plaintiffs at a price $200 greater than they had informed Tomlin they wanted for it, and after the defendant signed the agreement and paid $200 on account the plaintiffs paid Tomlin $100 for making the sale. There was in this case also a question raised as to misrepresentation of the area of the cultivated portion of the land, but the judge found that this was not proved.

The defendant had been in possession of the land for about sixteen months and had raised crops on it. He had also cleared the scrub and underbrush from about 70 acres of the parcel but not under any provisions in the agreement of sale. The plaintiffs' action was for cancellation of the agreement of sale for non-performance of the defendant's covenants, and to have the deposit declared forfeited in accordance with a provision in the agreement.

Held, that the defendant was entitled to have the agreement cancelled, his deposit repaid with interest, and to be paid for clearing the land and to a lien on and right of retaining possession of the land until payment of these sums and the costs of the action, less the sum of $75.00 for use and occupation of the land.

Bradshaw and *Wilkes*, for plaintiffs. *Munson*, K.C., and *Hudson*, for defendant.

Full Court.] BLACKWOOD *v.* PERCIVAL. [July 5.

Principal and surety—Release of surety by giving time to principal debtor—King's Bench Act, 58 and 59 Vict., c. 6, s. 39, sub-s. 14.

Appeal from decision of BAIN, J., noted ante, p. 475, dismissed with costs.

Wilson and *Elliot*, for plaintiff. *Howell*, K.C., for defendant.

Richards, J.] [June 13.
Full Court.] [July 5

NORTHERN ELEVATOR CO. *v.* MCLENNAN.

Arbitration—Agreement to refer disputes to arbitration—Application to stay proceedings in action—Time when application must be made in Manitoba.

The plaintiff's action was in respect of matters arising under the provisions of an instrument in writing which contained an agreement that differences arising under it should be referred to arbitration. After filing a statement of defence to the plaintiff's statement of claim, defendant applied, under section 11 of the C.L.P. Act, 1854, for an order staying all proceedings in the action on the ground that the partners had agreed to refer all such matters to arbitration. That statute required that such an application should be made "after appearance and before plea or answer."

Under King's Bench Act, 58 & 59 Vict., c. 6, the writ of summons and appearance were done away with.

Held, that, under the practice now in force in Manitoba, such an application must be made before the filing of a statement of defence.

Application dismissed with costs.

An appeal to the Full Court against this decision was subsequently dismissed with costs.

Ewart, K.C., for plaintiff. *Aikins*, K.C., and *Taylor*, for defendant.

UNITED STATES DECISIONS.

Solicitor and client:—The liability of attorneys to clients for mistake is denied in *Hill* v. *Mynatt* (Tenn.), 52 L.R.A. 883, where the mistake consists of an error of judgment on a question of law as to which eminent attorneys might well be in doubt. With this case there is a note reviewing the authorities on the liability of attorney to client for mistake.

Electrical uses. — An employee of a telephone company, who attempts to string wires over those of an electric-light company, is held, in *Mitchell* v. *Raleigh Electric Co.* (N. C.) 55 L. R. A. 398, to have a right to presume that the latter company has complied with an ordinance requiring its wires to be insulated, and to be bound to look for patent defects only.

Parent and Child.—The *Central Law Journal* of July 18th contains an article, which may be read with profit, on the liability of a parent at common law for manslaughter for negligently omitting to furnish medical attendance to a child from a religious standpoint, because of disbelief in the efficacy of medicine. Amongst the cases discussed are several published in this Journal and in the Canadian Criminal Cases.

Negligence.—A boy twelve years old who is injured by collision with a slowly moving team in a public street is held, in *Gleason* v. *Smith* (Mass.) 55 L. R. A. 622, to have no right to recover, where, without care or precaution to avoid collision with vehicles, he is using the street as a playground, and comes in contact with the team in attempting to catch another boy, although the driver is negligent in having his attention diverted from his horses to a vehicle behind him.

Embezzlement by Attorney having lien. — A peculiar question was raised in behalf of an attorney charged with embezzlement by a contention that, as the funds which he was charged with embezzling were subject to a lien for compensation, he could not be prosecuted for embezzlement of the funds so long as his compensation remained unpaid. The case was one in which an attorney received by check the sum of $20,500, which it was claimed by the prosecuting witness he was to use first for the payment of about $12,000 of the client's debts, and the balance was to belong to the attorney upon his conveyance of certain mining interests. The prosecution was for embezzlement of these funds by converting them to his own use without complying with the conditions on which the funds were received. There was a claim on the part of the defence that the attorney was entitled to the sum of $2,000 for services as attorney, and that he had a lien on these funds therefor, which must be satisfied before he could be charged with embezzling the funds. This raised an unusual question, but the court did not discuss or refer to it, but by implication held that it was not well taken, as the conviction was affirmed. The case is that of *State* v. *Hoshor* (Wash.) 67 Pac. 386.—*Case and Comment.*

Negligence—Elevators:—Negligence on the part of the owner of a passenger elevator is held, in *Griffen* v. *Manice* (N.Y.), 52 L.R.A. 922, to be presumed from the falling from their frame of the counterbalance weights, followed by the fall of the elevator and the crashing of the weights through its roof, resulting in injury to a person who is a passenger thereon by the implied invitation of the owner.

The involuntary starting of an elevator by the conductor, who instinctively grasps the mechanism to save himself from falling as he attempts to sit down and finds the chair gone, is held in *Gibson* v. *International Trust Company* (Mass.), 52 L.R.A. 928, not to constitute negligence which wil create a liability to a passenger who is injured by the starting of the car as he is stepping out of it.

The operators on passenger elevators are held in *Springer* v. *Ford* (Ill.), 52 L.R.A. 930, to be required upon grounds of public policy to exercise the highest degree of care and diligence in and about the operation of such elevators to prevent injury to passengers being carried thereon.

An employer whose servant is injured by the fall of an elevator furnished for his use is held, in *Spees* v. *Boggs* (P.A.), 52 L.R.A. 933, not to be bound to explain the cause of the accident in order to relieve himself from liability.

Flotsam and Jetsam.

When the ante mortem epitaph composed for Lord Westbury by Mr. Wickens, which has been so often referred to, appeared in print, it naturally enough excited much attention among members of the bar, by whom Lord Westbury was respected for his learning, but not loved for his courtesy. The story goes that when James (always and only known as "fat James," for his bodily proportions were something more than ample) sailed majestically into Wood's Court, and with difficulty squeezed himself into his accustomed seat in the front row beside the sparse form of Mr. W. M. Gifford, Q.C., the first question of James to Gifford was, "Have you read the epitaph?"

"Yes, I have: it is inimitable. You must get Wickens to write yours for you, James?"

"I wonder what he would have to say about me, Gifford."

"For my part, James, I have long ago thought of the most appropriate epitaph for you. Shall I tell you what I think it should be? 'Let my latter end be like his.'"