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With extreme regret we record the sudden death of His Honor Joseph Easton McDougall, Senior Judge of the County Court of York, Ontario, on the 29th ult. He had at last consented to take a rest from work, but all too late. The country has lost the services of a most conscientious, efficient and learned judge. Had he been less devoted to the faithful discharge of his arduous duties, his life might, humanly speaking, have been prolonged for many years. His loss will be sincerely deplored by a large circle of friends.

The Canada Gazette of Jan. 10th announces the resignation of Chief Justice McGuire of the North-West Territories, and that Arthur Lewis Sifton, K.C., of Regina, Commissioner of Public Works in the Government of the North-West Territories, and brother of the Minister of the Interior, has been appointed in his place. As Mr. Sifton has never occupied a prominent position at the Bar, and has for many years been out of practice, it is difficult to judge of his fitness for the position. The success of such an appointment must therefore of necessity be somewhat speculative; and speculation in matters of this sort seems hardly necessary when there is so much good material to choose from as there is in the North-West Territories, where the Bar is a strong and able body. Chief Justice McGuire is still young and vigorous, so that some surprise has been expressed at his early resignation.

One of our American exchanges, in speaking of the popular election of judges, asserts that there is strong indication that electors in the United States are beginning to choose their judges without much regard to politics, and claims that there is abundant reason for trusting the people in this respect. This may be so in some States, though certainly not in all. The writer then proceeds to lay the following indictment against judicial appointments in England, under the British system, which we in this country have always thought *ought* to be the best one: "It is safe to say that

there has been no such dissatisfaction with the results of judicial elections in recent years as there has been in England over what the leading journals of that country have denounced as judicial scandals in the appointments to the bench of purely political barristers and the relatives of Cabinet Ministers or political partizans, without regard to their legal experience or judicial qualifications." As free a discussion of judicial appointments in this Dominion as one might wish is scarcely as possible in this country as in England, for reasons which will be obvious to our readers; but, possibly, if the writer of the above were a resident of this country he might have included Canada in his remarks. Quite apart from any question as to which system is the best, it is quite clear that ours is on its trial, and those who desire its continuance and are responsible for appointments have need to take note of the trend of public opinion.

The loss of the services of three judges at Osgoode Hall still continues to cause public inconvenience, and we regret to know that, so far as Mr. Justice Lount is concerned, his absence may be lengthened by the unfortunate accident that recently occurred to him. This diminution of judicial power necessarily throws additional work on the remaining judges and tends to delay business by giving them more to do than they are able to perform. It was supposed that Mr. Justice Robertson was going to retire, but his name appeared on the list for the Divisional Court on the 12th ult., though he did not attend the sittings. This left only two judges to do the work. Oddly enough this was called the Chancery Divisional Court; but, owing to the absence on leave of Justices Ferguson and Robertson and of the Chancellor at the Hamilton Assizes, the Court was composed of Street, J. and Britton, J., both of whom are judges of the King's Bench Division. The King's Bench Divisional Court, which began its sittings on Jan. 19th, was to have been composed of its proper Chief Justice, with Meredith, C.J., and MacMahon, J., from the Common Pleas Division. MacMahon, J., however, did not put in an appearance. There is of course no objection to judges sitting indiscriminately in the different Divisional Courts, but it is not only contrary to the intention of the statute, but is for other reasons most objectionable to leave only two judges sitting in a Divisional Court. It has already happened

on three or four occasions under such circumstances that the Court has been divided, necessitating re-argument, with attendant delay and expense. Necessary delays and expenses are quite sufficient without this additional burden being thrown upon litigants by the defective constitution of the Courts. The judges in the present condition of things are not responsible for this.

Mr. M. D. Chalmers, in his recent interesting address on the codification of mercantile law to the American Bar Association, said some good things; inter alia he remarked:

"A judge deciding a disputed question of law always reminds me of a great surgeon performing an operation. The surgeon proceeds calmly with the use of his knife, and pays no attention to the blood which spurts from every vein of the patient on the operating table. So, too, the judge calmly proceeds to apply his precedents to the case before him, regardless of the costs which spurt from every pocket of the unfortunate litigants." In dealing with objections to codification on the ground of its want of elasticity, he said: "It seems to be assumed that when a judge is called upon to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency, whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter. . . . The truth is the expression 'elasticity' is altogether misused when applied to English law. The great characteristic of the law of this country is that it is extremely detailed and explicit and leaves hardly any discretion to the judges. This may be shown by comparing it with the law of France. . . . The English law of negotiable instruments took 150 years to develop. Its main principles were worked out by about 2,000 decisions, and, taking a moderate estimate, the taxed costs of this litigation must have cost the parties two million dollars. Judge-made law has great merits, but certainly cheapness is not one of them."

THE BENCH AND THE BAR.

From very early times it has been held without question that the Bench should have power, by summary process, to maintain its dignity, and punish any attempt to interfere with the proper discharge of its functions. This power it has frequently exercised

without respect of persons, as in the case, some centuries ago, when a chief justice of England committed for contempt the heir apparent of the throne; as well as in the numerous instances in which it has since found it necessary to discipline the Bar for abuse of their privileges, as well as to punish the public for misconduct in Court. But judges are, after all, but men; and men invested, however reasonably, with arbitrary power, are liable to misuse it, sometimes from ill-temper, and more often from an exaggerated idea of the importance attaching to their positions, and of the value of their opinions. This power is evidently one which, in the interest of the public, as well as of the profession, should be exercised sparingly, or it will fall into contempt—upon very sure grounds, or it will not be respected—with good temper, or it will only be resented. To the lay mind, accustomed to feel the highest respect for the Court, nothing is more unseemingly than a wrangle between the Bench and the Bar, and it is indeed to the credit of both that such exhibitions are of rare occurrence.

We have been led to refer to this subject by the recent action of the County Court Judge of Hamilton in refusing to hear a counsel who had been reported in a newspaper as commenting adversely upon a judgment given by the said judge in a case previously decided. Three questions here present themselves: Had the judge the power to inflict such, or any, penalty upon counsel for something said or done out of Court? Could, under any circumstances, adverse comment by counsel upon the judgment of any Court be treated as contempt? If the action to which exception was taken was such as to bring it within the power of the judge to inflict a penalty, was he justified in so dealing with it? To all these questions we must give a decided negative. If, as we understand it, the judgment criticised was from the Division Court, that Court, not being a Court of Record, has not inherent power to commit for contempt; the Division Court Act simply gives to the judge of that Court the power to maintain order during the sitting of the Court. If the judgment proceeded from a County Court in England, *The Queen* v. *Lefroy*, L. R. 8 Q.B. 134, decides that the jurisdiction of judges of the County Courts (the same as our Division Courts) is confined to contempt committed in Court, but does not extend to contempts committed out of Court.

Again, if adverse criticism of a judgment by counsel, whether

verbal or reported in a newspaper, is contempt of Court how few would escape this penalty. The proposition is untenable upon the face of it. What judgment ever met with universal approval, or was not criticized from some point or other, and often in very strong language? What would become of our boasted freedom of speech? What indeed would become of our law if discussion upon points raised by the pronouncements of judges were to be stifled through fear of a commitment for contempt. The judge must be very thin-skinned, or have very little confidence in his own decisions, who pays attention to remarks such as are complained of in this instance, especially when coming through the version of a newspaper report.

But if judges are to be cautious in dealing with such matters it is the part of counsel to be careful how they indulge in criticisms, heedlessly or offensively. The judge cannot with proper regard to the dignity of his position defend himself; his hands are tied. Practitioners should be as anxious as the judges to maintain the dignity of the Bench and the reputation of the Court, and, above all, should not allow personal feeling to influence them in giving utterance to their opinions. And, lastly, all members of the profession, whether judges or practitioners, should remember what sometimes they are apt to forget, that their profession, like all other professions, was made for the public, and not the public for them. It is the interest of the public, that is of the country at large, which is really at stake in everything that concerns the purity of the Bench and the integrity af the Bar.

If the occurrence above referred to was, as it is said to have been, only one of others of an unpleasant character shewing strained relations between the barrister and the judge one cannot be altogether surprised at what took place, though we may deplore this. It is certainly most unfortunate that such matters should become public property; and here we may remark that the less the lay press is brought into the discussion of such matters the better. There are unfortunately some men in the profession who are only too willing to be interviewed by reporters who are anxious for personal items and careless of the evil that may result from their publication. Any attempt to remedy grievances between Bench and Bar in that way generally does more harm than good.

TITLE TO MONEYS DERIVED FROM A VOID POLICY.

The case of *Bain* v. *Copp* which was recently before Mr. Justice Osler on an application for leave to appeal was an interpleader issue with regard to moneys paid into Court by the Star Life Insurance Co.

The matter arose in this way:—The defendants made a mortgage to the Star Life Insurance Co., and by a covenant therein was required to insure one or more lives to the extent of £2,500 sterling, during the continuance of the mortgage, and keep the premiums paid. The defendants endeavored to insure the life of Alfred Copp, a son of the defendant W. Copp, but he failed to pass the medical examination. The plaintiff's son, a medical student, made application for insurance on his life for £2,500 sterling, and was accepted by the company, and a policy issued to him. When he signed the application he was about a month under age, but reached his majority before the policy was issued. He assigned the policy to the defendants after its issue, and they paid the premiums on it until his death in 1902. The plaintiff was his administrator and claimed the amount due on the policy. The company applied, and was given leave to pay the money into Court, and the interpleader issue was to try the question as to who was entitled to the money. Mr. Justice MacMahon, who tried the case, gave judgment for the defendants, the assignees of the policy, they having paid and satisfied the mortgage to the company. This judgment was affirmed by a Divisional Court, and leave to appeal to the Court of Appeal was refused by Mr. Justice Osler.

The decision is perhaps, as a matter of morals, perfectly correct, but it proceeds upon a legal ground upon which it may have little right to stand. It was upon the authority of *Worthington* v. *Curtis*, 1 C. D., 419; and there certainly is a similarity between the two cases up to a certain point. In both cases the policies were void under the Wagering Act. In both case, too, the companies refused to set that act up as a defence and paid over the money. But here the similarity ends.

In the *Worthington case* the company paid the money strictly in accordance with the terms of the policy, but the payment was voluntarily made by them. In the case in hand the company issued the policy in favor of the plaintiff's son, who assigned it to

the defendants, and the company, instead of electing to pay the money voluntarily to the person they thought entitled to it, attempted to discharge themselves by paying the money into Court. It is this which makes the difference between the two cases.

The Wagering Act makes every insurance which offends against it "null and void to all intents and purposes whatsoever." If the company choose, notwithstanding the statute, to part with their money, they act, as Mr. Justice Osler says, as a respectable company usually does, but it is none the less a voluntary payment on their part. They may regard the terms of the policy as between themselves and the assured or beneficiary and may elect to pay it to any person whom they think entitled, but when they ask leave to pay it into Court, their right depends, not upon what they think proper to do, but upon the legal status they possess, as trustees or debtors. In either capacity they are entitled to pay into Court, and the Trustee Act provides them with a discharge from liability. If there is no liability, and this comes to the notice of the Court, an order for payment into Court and for the discharge of the insurance company ought not to be made.

In re Bajus, 24 O.R. 397, the question as to whether an insurance company is a trustee of the insurance money or merely a debtor in respect of it, was not finally settled, but the Divisional Court applied the provisions of the Judicature Act (R.S.O. 1897, c. 51, s. 58, sub-s. 6) in their favour upon the ground that they occupied either one position or the other. In *Worthington* v. *Curtis* the money having been paid over to the father as administrator of the son, the Court was of opinion that no one could utilize the statute as a defence except the company itself, and that the question as to the person entitled to the money must be determined as if the statute did not exist. If that was not so, then the Court could give no relief because of the illegality of the transaction, and the party who had got the money could keep it. The decision of the Court was based on a consideration of the circumstances under which the father had effected the policy: whether in fact he had done so for his own benefit, and with his own money, or whether he had so constituted himself a trustee for his son that the latter, or his estate, were really entitled to the money as against the father. And this was decided without reference to the liability of the insurance company upon the policy but upon the antecedent circumstances arising from the dealings of the father, which, it was

contended, had created an enforceable trust governing moneys flowing from the original transaction.

In other words, the father having got possession of the money, it became necessary to decide whether some one with a better title by virtue of the father's acts could dispossess him of it, as it was alleged that he was trustee for the son, and his title to retain the money was determined really without any reference to the policy or to its terms.

But in the case of *Bain* v. *Copp*, the company, in applying for leave to pay the money into Court, based their application upon the fact that they were liable upon the policy to the plaintiff or to some one else. But the policy was confessedly a void policy, and when that fact is brought to the attention of the Court, then, in the words of Mr. Justice Kennedy in *Gedge* v. *Royal Exchange Insurance Corporation* (1900) 2 Q.B. 214, "The Court cannot properly ignore the illegality and give effect to the claim." The money, therefore, finds its way into Court because the illegality of the policy was not brought to its attention. If, upon the application for payment in, the Court were apprised of the state of facts, it would seem that the duty of the Court would be to refuse leave to pay it in, permitting the company to do as was done in the Worthington case, and pay it to whomsoever they thought entitled.

If, however, that fact is not disclosed, but becomes evident afterwards, how can the Court determine the title of parties to money which has been paid voluntarily by an insurance company into Court, without an election to treat anyone as beneficially entitled to it, where the rights of the claimants arise upon the assumption that the company is liable to one or other either by virtue of the insurance contract or its assignment?

When the Court comes to look at the title of the claimants to the insurance money, is it not open to anyone to shew that the policy was a void policy and that the payment into Court was, therefore, a voluntary payment, and that no rights had arisen which the Court could enforce? It would not seem to be an injustice in that case to direct the money to be paid out to the company, and throw upon it the responsibility of paying it to any person it might think entitled to it, having in view all the circumstances.

The line of division is clear. Where the company has paid the money into the hands of someone whom it has chosen to con-

sider entitled to it, the Court has jurisdiction to determine whether that person can retain the money or is under some obligation to pay it to someone else. It is then a question of the title to the money itself. But where the company make a voluntary payment into Court under a void policy there is no jurisdiction in the Court to adjudicate with regard to the rights of any one to the money so paid, if those rights arise solely out of the insurance contract or by reason of dealings based upon its validity, nor foundation for such determination. There are no rights arising out of the void policy and the money has not found its way into the hands of anyone nor can it do so until the Court determines the legal rights of the parties.

The course suggested, of payment out to the insurance company, was apparently followed in *Merchants' Bank* v. *Monteith, ex parte Standard Life Insurance Co.*, 10 Prac. R., page 588, where Mr. Justice Proudfoot directed that the money paid into Court should be paid out again to the insurance company, leaving them to deal with it as they might be advised, there being in his view no right to pay in.

Under the Insurance Act and in view of the decision in *Re Berryman*, 17 Prac. R., 573, it is evident that payment in accordance with that Act into Court or to a trustee or guardian, as the case may be, is a good discharge to the insurance company. But all the provisions of the Insurance Act are based upon the fact that there is a valid liability upon the policy, and that the insurance company is really paying the money by virtue of a contract. It is very questionable whether, in case of a void policy on which there is no liability, the discharge provided by that Act or by the Trustee Relief Act or the Judicature Act can be taken advantage of.

Mr. Justice Osler in the case of *Bain* v. *Copp*, when refusing leave to appeal, states this as the conclusion to which he arrived. "The Court will look no further than the title which the claimants may be able to establish between themselves." But this title cannot be established as flowing from a policy which, if void to all intents and purposes whatsoever, cannot be relied upon by any claimant to afford him a status. Money is not paid out of Court unless a title is established; and there is danger in applying the decision of *Worthington* v. *Curtis* to cases in which the

company are not willing to discharge themselves by making an election and paying the money to the person they think entitled.

FRANK E. HODGINS.

MEASURE OF DAMAGES—SALE OF ARTICLE HAVING NO MARKET VALUE.

A difficult question occasionally arises in practice as to the standard of damages for breach of contract when the article sold has no market value. This subject recently came up for consideration in the United States in the case of *Huyett-Smith Manufacturing Co. v. Gray*, 129 N.C. 438. An exhaustive note on the judgment in this case appears in 57 L.R.A. 198. The writer there comes to the following conclusions which will be of interest to our readers: "While damages for breach of a contract of sale or purchase are to be measured with reference to the market value of the thing sold whenever that is possible, the absence of a market in which it can be procured or sold does not defeat a recovery for the breach. The party injured is nevertheless entitled to reimbursement for the injury sustained, but the damages are to be measured by some other method. This method depends upon the character of the thing purchased, the situation of the parties, and the purpose of the purchase, and is affected by all the varying circumstances of the cases in which the question arises. As a general rule, the total absence of any market in which the article in question could be either bought or sold warrants a recovery for breach of the contract of sale of the difference between the contract price and what it would cost the purchaser to obtain it, though the reasonable value of the article is sometimes adopted as the measure when the cost of production cannot be accurately ascertained. If there is an available neighboring market, however, or if there was a market at some other not too remote time, that is to be resorted to, making allowance for cost of transportation or delay, in determining the measure of damages. Where the article is purchased for a special purpose known to the vendor, that purpose will generally control, a purchaser for the purpose of reselling being entitled, on breach by the vendor, to the difference between the contract price and the price to be obtained on the resale; and a purchaser for the purpose of using the article purchased being entitled to the difference between the contract price and what it would cost him to obtain it, or, if he could not

obtain it, to the amount of loss suffered by him on the product of such intended use through failure to obtain it. The vendee, however, must do all he can to avoid or reduce injury by way of trying to procure the thing purchased elsewhere, or to otherwise occupy himself or his machinery, or to procure an available substitute for that which he was to have; and while he is entitled to recover the necessary expense of so doing, he can only recover, in addition thereto, the difference between what he would have made had the article contracted for been supplied and what he was enabled to make without it. When the breach is by the vendee, the vendor is generally entitled to recover the difference between the contract price and the cost of manufacture or production, where the breach occurred before the preparation of the article; if it occurred afterwards, he is entitled, on surrender of the article, or when it is useless in his hands, to the full contract price. But he, too, must reduce damages as much as he can; and if a market at a place other than the place of delivery is available, or if he can otherwise dispose of the article sold, he can only recover the difference between the amount for which he could dispose of it and the contract price, together with the cost of transportation. It would seem that to constitute an absence of market for an article within the meaning of the above rules there must have been an absence of any substantial market where such articles were bought and sold generally. A mere nominal market furnishes no basis for an estimate of damages for a breach of contract."

Referring to an article by Mr. J. B. McKenzie in these columns (vol. 38, p. 749) we are authorized to state that immunity from punishment was not made a condition of its acceptance by the Crown of Herbert's testimony, nor was any promise made that he should receive a lighter sentence. Readers of this journal will scarcely need be reminded that the only sentence which can be passed in case of conviction for murder is that of death, though, of course, the Governor-General can commute this sentence where he deems expedient. The writer tells us that, at the moment of writing, he overlooked the fact, when speaking of a lighter sentence, that the offence charged was murder.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

EXPROPRIATION—LAND CLAUSES ACT 1845 (8 & 9 VICT. C. 18) S. 68—"LANDS INJURIOUSLY AFFECTED"—RESTRICTIVE COVENANT—COVENANTEE'S RIGHT TO COMPENSATION—"BUILDING."

In *The Long Eaton Recreation Grounds Co.* v. *The Midland Ry.* (1902) 2 K.B. 574, Lawrance, J., decides two points, first, that a railway embankment is "a building" within the meaning of a restrictive covenant against erecting a building of any kind other than private houses; and secondly, that where lands are expropriated for the purposes of a railway undertaking, the adjoining land, whose owner is entitled to the benefit of a restrictive covenant by the owners of the land expropriated against building thereon any building other than private houses, is "injuriously affected" within the meaning of the Land Clauses Consolidation Act 1845, s. 68, by the erection by the expropriators of a railway embankment on the land bound by the restrictive covenant, and the covenantee is entitled to compensation under the Act in respect of the breach of such covenant against the railway company.

COMPANY—DIRECTOR—QUALIFICATION SHARES—RAILWAY DIRECTOR'S QUALIFICATION—ALLOTMENT OF SHARES TO DIRECTOR TO QUALIFY—DIRECTOR EXERCISING OFFICE—VACATION OF OFFICE BY DIRECTOR.

Molineaux v. *London and Birmingham & M. Insce. Co.* (1902) 2 K.B. 589. This was an appeal from the decision of Phillimore, J., upon a counterclaim of the defendants for £50, being the amount of a call upon 200 shares standing in the plaintiff's name in the defendant company's books. The plaintiff denied that he was the holder of the shares. It appeared by the evidence that the plaintiff was a director of the defendant company and held the necessary qualification under the articles of association, viz., 50 shares. By a resolution passed at a general meeting of the shareholders the qualification for a director was raised to 250 shares. The plaintiff was present both at the meeting of the directors at which the proposed increase in qualification was discussed, and also at the meeting of the shareholders at which it was confirmed

on April 19th. On April 20th the secretary of the company without the plaintiff's knowledge entered the plaintiff's name on the register for 200 shares, the number necessary to make up his qualification, and the secretary's act was subsequently, on May 8th, ratified by the directors other than the plaintiff. On April 22nd the plaintiff signed a copy of the share prospectus. On May 16th the plaintiff sent in his resignation as a director. Under these circumstances Phillimore, J., held that the plaintiff was liable for the call on the 200 shares, and the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.,) affirmed his decision. Cozens-Hardy, L.J., who delivered the judgment of the Court, said: "On principle and apart from authority, it seems to us that a person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, and acts as director, must be held to have contracted with the company that he will, within a reasonable time, obtain the requisite shares, either by transfer from existing shareholders, or directly from the company. If he has not obtained the shares within a reasonable time from the public, the company are authorized to put him on the register in respect of the shares, . . . as a general rule the qualification ought to be obtained before acting. Applying that principle to the case in hand the plaintiff ought, and must be deemed, to have acquired the shares before signing the prospectus, which was a solemn assertion that he was a duly qualified director. The subsequent resignation of the plaintiff, therefore, could not relieve him from liability."

SHIP—BILL OF LADING—BREACH OF SHIPOWNERS OBLIGATION TO SHIPPER—CARRIAGE OF GOODS DESTINED FOR ENEMY—SEIZURE OF SHIP—DELAY IN DELIVERY OF SHIPPER'S GOODS—DAMAGES—LOSS OF MARKET.

Dunn v. *Bucknall* (1902) 2 K.B. 614 is a case arising out of the late South African war. The action was brought by the shipper of goods on board the defendants' ship to recover damages for delay in delivering the goods. The delay was occasioned by reason of the ship having been seized for carrying goods intended for the Boers, which were by the judgment of a prize court confiscated, and the owners were ordered to pay the costs. Mathew, J., held that the carriage of goods for an enemy, which rendered the ship liable to capture and detention, was a breach of duty to the plaintiff, and that the defendants were liable in damages for the delay

thus occasioned in the delivery of the plaintiff's goods, and that there is no rule of law that prevents the plaintiff under such circumstances from recovering damages for loss of market. The Court of Appeal (Collins, M.R., Stirling, and Cozens-Hardy, L.JJ.,) affirmed the judgment of Mathew, J.

GRANT—EXCEPTION—UNCERTAINTY—STATUTE OF USES (27 HEN. 8, C. 10) S. 1—(R.S.O. C. 331 S. 1)—LIMITATION OF ESTATE OF FREEHOLD TO COMMENCE IN FUTURO—PERPETUITY.

Savill v. *Bethell* (1902) 2 Ch. 523 deals with a nice point of conveyancing. In 1896 a parcel of land was granted to one Times in fee simple "save and except and reserving to the vendors a piece of land not less than 40 feet in width commencing at the level crossing over the railway at the point marked A on the said plan, and *terminating at the nearest road to be made* by the purchaser or his assignee on the estate so as to give access to such road from the lands of the vendors lying on the east side of the Tottenham and Forest Gate Railway shewn on the said plan." It will be seen that the part intended to be excepted could only be identified by a road thereafter to be made by the grantees or their assigns. An assignee of the grantees subsequently laid out roads, and upon a plan of the property prepared by him was delineated a strip of land as the site of an intended road 40 feet wide commencing at the level crossing at the point A above referred to and terminating at one of the roads so laid out. A road was commenced to be made on the 40 foot strip in 1897 but was thereafter discontinued and it was never completed. The original grantors assumed to convey to the defendant the 40 foot strip shewn on the lastly mentioned plan, and she proposed to erect a public house on the premises. The plaintiffs, who were entitled to the benefit of a restrictive covenant against such an erection on the lands conveyed to Times, brought the present action to restrain such erection. The question therefore was whether or not the strip of 40 feet had been effectually excepted by the conveyance made to Times. Buckley, J., who tried the case, came to the conclusion that the exception was void for uncertainty, and that the covenant bound the land. On appeal to the Court of Appeal (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.,) his judgment was affirmed, the Court holding that as the deed took effect at common law it was in effect, as regarded the exception, the limitation of a freehold estate to commence in futuro and therefore void; and also, that even if the deed had

operated under the Statute of Uses (27 Hen. 8, c. 10) (R.S.O. c. 331, s. 1) it was equally void as offending against the rule against perpetuities, as no time was limited within which the excepted parcel was to be defined by the construction of "the nearest road" therein referred to. The judgment of the Court of Appeal concludes with these words: "We do not thereby decide that effect cannot in some other way be given to the intention, which is plain on the face of the deed, that the vendors should be entitled to access from the lands on the east side of the railway to the roads which the purchaser proposed to make on the west side." What that "other way" may be is not indicated. The case is noteworthy also for the fact that the Court of Appeal negative the suggestion in Preston's edition of Shephard's Touchstone to the effect that in a grant of a freehold estate an uncertain exception may be made certain by election. As to this the Court of Appeal points out that it is settled law that in a feoffment an uncertainty as to the land conveyed cannot be made good by election of the grantee, and that the statute enabling freeholds to be conveyed by grant "in no way alters the rules of law with respect to the creation of estates."

WILL—CONSTRUCTION—BEQUEST TO ILLEGITIMATE CHILDREN—ILLEGITIMATE CHILDREN ACKNOWLEDGED AS CHILDREN OF TESTATOR—GIFT TO ILLEGITIMATE CHILDREN—NOMINATION—GIFT TO NEXT-OF-KIN OF CHILDREN UNDER STATUTE OF DISTRIBUTION.

In *Re Wood, Wood* v. *Wood* (1902) 2 Ch. 542, the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) have reversed the decision of Kekewich, J., (1901) 2 Ch. 578 (noted ante vol. 38, p. 69). It may be remembered that a testator had bequeathed legacies to each of his seven children by name (three of them being in fact illegitimate) and directed in the events which happened that in case of any such child dying without children, that then the legacy of such child was to go to the persons who would have been entitled to such share under the Statute of Distribution (22 & 23 Car. 2, c. 10)—(R.S.O. c. 335)—in case the deceased child had died possessed thereof without being married. Kekewich, J., thought that the gift over was not to be interpreted as in favour of persons who would have been the next-of-kin of a deceased illegitimate child if she had been legitimate; the Court of Appeal on the other hand held that it must be so interpreted, Williams, L.J., admitting that in doing so it was necessary to do violence to the

actual words of the will. The other members of the Court, however, think that the manifest intention of the testator was to treat his children as if they were all legitimate.

VENDOR AND PURCHASER'S ACT—(R.S.O. c. 134)—COSTS OF VENDOR'S SOLICITOR.

In re Webster and Jones (1902) 2 Ch. 551 was an application under the Vendor and Purchaser's Act (R.S.O. c. 134). The question in dispute was as to the amount of the vendor's costs payable by the purchaser under the contract. Romer, L.J., intimated that that was not a proper question to raise under the Act, because the solicitor is not a party to the proceedings and consequently not bound by the decision, and he suggested that it should be raised on taxation, but it may be remarked that even on a taxation between vendor and purchaser, the solicitor is still not a party nor bound by the decision, unless in some way he is brought in. As all parties desired it, however, the Court disposed of the point in dispute.

EASEMENT—OF NECESSITY—RIGHT OF SUPPORT—IMPLIED RESERVATION—SEVERENCE OF TENEMENTS—PRESCRIPTION—ENJOYMENT OF EASEMENT CLAM.

In *Union Lighterage Co.* v. *London Graving Dock Co.* (1902) 2 Ch. 557, the Court of Appeal (Williams, Stirling, and Romer, L.JJ.,) have affirmed the decision of Cozens-Hardy, J. (1901) 2 Ch. 300 (noted ante vol. 37, p. 774). The facts of the case are simple. One Green, being owner of two parcels of land, erected a graving dock on one, and for its support placed a number of tie-rods fifteen feet within the boundary of the other parcel, but under the surface so that they could not be seen. This latter parcel was subsequently in 1877 sold to the plaintiff in title without any express reservation of any easement of support for the dock erected on the other parcel. The owners of the dock continued to enjoy the benefit of the supports until 1900, when, in excavating on his property, the plaintiff discovered the existence of the supports. Cozens-Hardy, J., held that there was no implied reservation of the right of support when the property was conveyed to the plaintiff, and the enjoyment of the easement since his conveyance having been clam, no right by prescription had been acquired thereto, with which conclusions the majority of the Court of Appeal (Romer and Stirling, L.JJ.,) agreed, but Williams, L.J., dissented.

SOLICITOR—COSTS—DISBURSEMENTS—DEPOSIT MADE BY SOLICITOR FOR CLIENT AS SECURITY FOR COSTS.

In re Buckwell (1902) 2 Ch. 596, deserves a brief notice, though perhaps not now of so much importance in Ontario as it would have been formerly. The short point decided by the Court of Appeal (reversing Kekewich, J.,) was that where a solicitor deposits a sum in court for his client by way of security for costs, that sum is not properly chargeable in the solicitor's bill of costs as a disbursement, but should form an item in his cash account with his client.

ADMINISTRATION—INTESTACY—DEATH OF SOLE LEGATEE AND EXECUTRIX BEFORE TESTATOR—ADVANCEMENTS—HOTCHPOT—STATUTE OF DISTRIBUTION (22 & 23 CAR. 2, C. 10) S. 5—(R.S.O. C. 335, S. 1.)

In re Ford, Ford v. *Ford* (1902) 2 Ch. 605. The Court of Appeal (Williams, Romer, and Mathew, L.JJ.,) have affirmed the decision of Buckley, J., (1902) 1 Ch. 218 (noted ante vol. 38, p. 298) to the effect that the hotchpot provisions of the Statute of Distribution (R.S.O. c. 335, s. 1) apply to an intestacy occasioned by a sole legatee and executrix predeceasing the testator as well as to the case of an intestacy due to there being no will at all.

VENDOR AND PURCHASER—SALE BY TRUSTEES—REPURCHASE BY TRUSTEE FROM THE VENDEE BEFORE CONVEYANCE—EXECUTORY CONTRACT—SPECIFIC PERFORMANCE—DAMAGES—BREACH OF TRUST.

Delves v. *Gray* (1902) 2 Ch. 606, is an instance of the jealous care with which by English law the rights of cestuis que trust are guarded. The action was one for the specific performance of a contract for the sale of land. The plaintiffs in the action, Delves and Catchpole, were trustees and as such had offered the property for sale and the defendant Gray had become the purchaser. After the contract was concluded he repented his bargain and one of the plaintiffs, Delves, agreed to buy the property from him, whereupon Gray notified the plaintiffs to make the conveyance to Delves. Delves however subsequently came to the conclusion that it was not competent for him as a trustee to buy, and he declined to allow his name to be inserted in the conveyance. Hence the present action, in which the defendant counter-claimed for the performance of his contract with Delves. Bryne, J., who tried the action, held that so long as the contract with the plaintiff and Gray remained executory it was not competent for the plaintiffs or

either of them to repurchase from Gray except for the benefit of their cestui que trustent, and therefore the contract between Gray and Delves was void and could not be enforced.

COMPANY—DIRECTOR — PROSPECTUS — NON-DISCLOSURE IN PROSPECTUS OF MATERIAL CONTRACT—COMPANIES ACT 1867 (30 & 31 VICT. C. 131) S. 38—(2 EDW. 7, C. 15 (D.))—WAIVER CLAUSE.

Watts v. *Bucknall* (1902) 2 Ch. 628, was an action brought against a director of a joint stock company to recover damages for the omission to disclose in the prospectus of the company material contracts entered into by or on behalf of the company prior to the issue of the prospectus, as required by s. 38 of the Companies Act 1867, (see 2 Edw. 7, c. 15, s. 34 (D.)). The defendant denied knowledge of the contracts omitted and also relied on a waiver clause in the prospectus whereby it was stipulated that intending shareholders should waive all claims for the prospectus not more fully complying with s. 38. Bryne, J., who tried the action, held that a plea of ignorance on the part of the defendant could only be successfully maintained if the facts established that the prospectus was a document for which he was not responsible; and that his omission to make enquiry as to the truth of statements contained in it, and relying on others, was no ground for relieving him from liability on that ground. He was also of opinion that the waiver clause was inoperative because it did not fairly disclose what was the nature of the rights which intending shareholders were thereby required to waive.

Angus McGillivray, of Antigonish, Nova Scotia, Barrister-at-law, has been appointed Judge of the County Court of District No. 6, in the said Province of Nova Scotia, in the room of His Honour Angus McIsaac, deceased; and Robert Hill Myers, of Minnedosa, Manitoba, Barrister-at-law, has been appointed Judge of the County Court for the Eastern Judicial District, Manitoba, in the room of Hon. Jas. S. P. Prendergast, appointed a Judge of the Supreme Court of the North-West Territories.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [March 12, 1902.

CHALLONER *v.* TOWNSHIP OF LOBO.

Drainage—Qualification of petitioner—"Last revised assessment roll"—R.S.O. (1897) c. 226—Costs of non-appealing party.

Judgment appealed from (1 Ont. L.R. 156, 292) affirmed. Appeal dismissed with costs to respondent the Township of Lobo, but without costs to respondent Oliver.

Aylesworth, K.C., for appellant. *Shepley*, K.C., and *Macbeth*, for Township of Lobo. *Burbidge*, for Oliver.

Que.] WARD *v.* TOWNSHIP OF GRENVILLE. [June 9, 1902.

Negligence — Vis major—Driving timber — Servitude — Watercourse—Floatable rivers—Statutory duty—Riparian rights.

The Rouge river, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down saw-logs to booms in which the logs are collected at the mouth of the river and distributed among the owners. The plaintiff constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive, and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The River Rouge is subject to sudden freshets during heavy rains, and, on the occurrance of one of these freshets, the waters were penned back by the jam and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally.

Held, affirming the judgment appealed from, the Chief Justice and Sedgewick, J., dissenting, that, irrespectively of any duty imposed by

statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused.

Held, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses.

Atwater, K.C., and *Campbell*, K.C., for appellant. *Lafleur*, K.C., and *DeLaronde*, for respondent.

Ont.] WESTERN BANK *v.* MCGILL. [Oct. 7, 1902.

Promissory note—Duress—Verdict of jury.

In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager.

Held, that the jury having believed the defendant's account and given him a verdict which the evidence justified such verdict ought to stand.

W. Cassels, K.C., and *C. A. Jones*, for appellant. *Holman*, K.C., and *Drayton*, for respondent.

Exch. Court] ROSS *v.* THE KING. Oct. 10, 1902.

Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption as to good faith—Arts. 1047, 1049 C.C.

The Crown is not liable, under the provisions of arts. 1047 and 1049 C.C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. *Wilson* v. *City of Montreal*, 24 L.C. Jur. 222, approved, Strong, C. J., dubitante.

Per STRONG, C.J. The error of law mentioned in arts. 1047 and 1049 C.C. is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles.

Toronto Railway Co. v. *The Queen*, 4 Ex. C.R. 262; 25 S.C.R. 24; (1896) A.C. 551, discussed. *Algoma Railway Co.* v. *The King*, 7 Ex. C.R. 239, referred to.

Judgment appealed from: 38 C.L.J. 196; 7 Ex. C.R. 287, affirmed. Appeal dismissed with costs.

Campbell, K.C., and *Hellmuth*, K.C., for appellants. *Attorney General of Canada* and *Newcombe*, K.C., for respondent.

Yukon Terr.] HARTLEY *v.* MATSON. [Nov. 6, 1902.

Appeal—Jurisdiction—Yukon Territorial Court—Decisions of Gold Commissioner—Special appellate tribunal—Finality of judgment—Legislative jurisdiction of Governor in Council—62 & 63 Vict., c. 11, s. 13; 1 Edw. VII, O. in C. p. LXII;—2 Edw. VII, c. 35—Mining lands.

The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of Appeal constituted by the Ordinance of the Governor in Council of the eighteenth of March, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor in Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 Vict. c. 11 (D).

Latchford, K.C., for motion. *Peters*, K.C., contra.

Que.] QUEBEC BRIDGE CO. *v.* ROY. [Nov. 6, 1902.

Railways—Construction of statute—Tramway for transportation of materials—Expropriation—51 Vict., c. 29, s. 114 (D)—2 Edw. VII, c. 29 (D).

The place where materials are found referred to in s. 114 of the Railway Act means the spot where the stone, gravel, earth, sand or water required for the construction or maintenance of railways are naturally situated and not any other place to which they may have been subsequently transported.

Per TASCHEREAU AND GIROUARD, JJ.—The provisions of s. 114 of the Railway Act confer upon railway companies a servitude consisting merely in the right of passage and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction. Appeal dismissed with costs.

Alexandre Taschereau, for appellants. *Pelletier*, K.C., for respondents.

Ont.] TRUSTS AND GUARANTEE CO. *v.* HART. [Nov. 8, 1902.

Gift—Confidential relations—Evidence—Parent and child—Public policy —Principal and agent.

The principle that where confidential relations exist between donor and donee the gift is, on grounds of public policy presumed to be the effect of those relations, which presumption can only be rebutted by showing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for the benefit of the latter's children, when said son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favor of the son, by renewing it six years later and by voluntarily paying it before he died, such presumption does not arise.

Judgment of the Court of Appeal, 2 O.L.R. 251, reversing that of the Divisional Court, 31 O.R. 414, affirmed, SEDGEWICK and DAVIES, JJ., dissenting. Appeal dismissed with costs.

Wallace Nesbitt, K.C., and *Young*, for appellants. *Aylesworth*, K.C., and *Davidson*, for respondents.

Yukon Terr.] KING *v.* CHAPPELLE. [Nov. 18, 1902.

Mining law—Royalties—Dominion Lands Act—Publication of regulations —Renewal of license—Payment of royalties—Voluntary payment— R.S.C. c. 54, ss. 90, 91.

The Dominion Government, by regulations made under The Dominion Lands Act, may validly reserve a royalty on gold produced by placer mining in the Yukon, though the miner, by his license, has the exclusive right to all the gold mined. TASCHEREAU and SEDGEWICK, JJ., dissenting.

The "exclusive right" given by the license is exclusive only against quartz or hydraulic licenses or owners of surface rights and not against the Crown. TASCHEREAU and SEDGEWICK, JJ., dissenting.

The provision in s. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the Canada Gazette means that the regulations do not come into force on publication in the last of the four successive weeks of the Gazette, but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of September 4th, they were not in force until the 11th and did not affect a license granted on Sept. 9th.

Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.

One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year."

Held, reversing the judgment of the Exchequer Court, 7 Ex. C R. 414, SEDGEWICK, J., dissenting, that the new entry and receipts did not entitle the holder to mine on the terms and conditions in his original grant only, but he was subject to the terms of any regulations made since such grant was issued.

The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.

Regulations in force when a license issued were shortly after cancelled by new regulations imposing a smaller royalty.

Held, that the new regulations were substituted for the others and applied to said license.

Attorney General for Canada, and *H. S. Osler*, for appellant. *Armour*, K.C., and *J. Travers Lewis*, for respondents.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] McDERMOTT *v.* HICKLING. [Nov. 24, 1902.

Mistake—Recovery of money paid under mistake of fact—Mortgage—Account—Acknowledgment—Estoppel—Appeal—Cross appeal—Leave—Parties—Costs.

The judgment of ROBERTSON, J., 38 C.L.J. 85, reversed on appeal.

Held, that there could be no recovery against the executors because their testator was not the person who received the erroneous overpayments sought to be recovered back. He omitted to give credit in his books or on the plaintiff's mortgage for two sums paid to him; but the plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors subsequently assigned the mortgage to the defendant, G. W. L. H., in part satisfaction of the legacy bequeathed to him by their testator, there was a considerable balance due thereon. The time when these payments should have been taken into con-

sideration was when the mortgage was being paid off to G.W.L.H. There was nothing to create an estoppel as between him and the plaintiff so as to have prevented the latter from then claiming credit for these payments. G.W.L.H., and not the testator, was the person who received too much, and it was the payment to him which was erroneous. The executors, upon their appeal from the judgment against them, were entitled to be relieved and to costs of the action. And the plaintiff, although he had omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. H., should be permitted to do so, nunc pro tunc, and judgment should be entered for the plaintiff against G. W. L. H. with costs down to the trial and settlement of the judgment as if G. W. L. H. had been the original and only defendant. No costs of the appeal to any of the parties.

Douglas, K.C., and *W. A. Boys*, for defendants. *Strathy*, K.C., and *Plaxton*, for plaintiff.

Falconbridge, C. J., K.C.] BEAUDRY *v.* GALLIEN. [Dec. 6, 1902.

Agreement of counsel as to proceedings in Master's office—Misunderstanding—Reference back.

In a proceeding before a Master in mechanics' lien matter an understanding was arrived at between the counsel for the plaintiff and defendant verbally communicated to the Master. When the time arrived to act on the understanding counsel disagreed in their recollection of what the understanding was.

Held, that the judgment given by the Master whose recollection of the understanding was the same as that of the plaintiff's counsel in favour of the plaintiff, must be reopened and the matter referred back as the parties were not ad idem.

Wilding v. *Sanderson* (1897) 2 Ch. 334, referred back. *Geo. F. Henderson*, for the appeal. *J. A. Ritchie*, contra.

Moss, C.J.O.] SMITH *v.* HUNT. Dec. 8, 1902.

Appeal to Supreme Court—Extension of time—Intention to appeal—Suspension of proceedings—Merits.

Upon application to extend the time for appealing from the Court of Appeal to the Supreme Court the applicant must shew a bona fide intention to appeal, held while the right to appeal existed and a suspension of further proceedings by reason of some special circumstances in consequence of which they were held in abeyance. No such case having been made out, and the Court not being impressed with the merits of the defence, leave to extend the time was refused to two defendants. *In re Manchester Economic Building Society* (1883) 24 Ch. D. 488, followed.

D. L. McCarthy, for the motion. *F. A. Anglin*, K.C., contra.

Maclennan, J.A.] McLAUGHLIN *v.* MAYHEW. [Jan. 5.

Appeal—Court of Appeal—Late entry—Refusal of consent—Confirmation—Responsibility for delay—Costs.

The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on 22nd April and gave security on 22nd May. Reasons of appeal were not served till 10th Sept., and reasons against appeal not till 13th Oct. The next sittings of the Court of Appeal was set for 10th Nov. The appeal case was not prepared in time to enter the case on 6th Nov., and the plaintiff's solicitor refused to consent to its being entered on the 10th for the sittings beginning on that day. The case was entered without consent on the 17th Nov., and a motion was made to confirm the entry.

Held, that the plaintiff's solicitor should have consented to the proposed entry on 10th Nov., and the subsequent entry should be confirmed; and, as both parties were nearly equally blameable for delay, there should be no costs.

F. E. Hodgins, K.C., for defendants. *O. M. Arnold*, for plaintiff.

HIGH COURT OF JUSTICE.

Street, J., Britton, J.] [Nov. 15, 1902.

BIRNIE *v.* TORONTO MILK CO.

Company—Appointment of manager by directors—Want of by-law and seal—Services rendered—Salary—Compensation—R.S.O. c. 191, ss. 47, 48.

Plaintiff was appointed by the Board of Provisional Directors of a Company to be a director and was also appointed manager at a salary before the Company was organized. In an action for salary or compensation for services rendered, in which it was shewn that the services rendered had not resulted in any benefit to the Company and that the Company had never gone into operation,

Held, that as he was not appointed by by-law approved of by the shareholders and had no contract under seal he could not recover. *In re Ontario Express and Transportation Company* (1894) 25 O.R. 587 commented on.

Judgment of LOUNT, J., reversed.

J. B. O'Brian, for the appeal. *Godfrey*, contra.

Boyd, C., Meredith, J.] [Dec. 2, 1902.

DAWDY *v.* HAMILTON, GRIMSBY AND BEAMSVILLE R. W. CO.

Jury—Functions of—Scope of authority—Of servant—Evidence.

Plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down but did not stop, and

as it was passing the conductor seized her hand, and while attempting to help her on board signalled the car to go on again, which it did, and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car and that he acted negligently.

Held, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it is slowing up; that the scope of the conductor's authority is one of evidence; that there was evidence to go to the jury and that the effect of it was for them to consider, and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority.

Judgment of STREET, J., reversed.

German, K.C., for the appeal. *Du Vernet*, contra.

Boyd, C., Meredith, J.] [Dec. 3, 1902.

STANDARD TRADING CO. *v.* SEYBOLD.

Costs—Security for—Præcipe order—Increase in amount—Discretion.

Under Rule 1208, the fact of the defendant having obtained a præcipe order for security for costs by which a definite amount of security is provided for, will not prevent him for maintaining an application for additional security when it becomes apparent that the costs to be incurred will be greatly in excess of the amount provided for, and there is no element of vexation on the part of the applicant. *Bell* v. *Langdon*, 9 P.R. 100, distinguished.

Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, $200 paid into Court in compliance with a præcipe order, was ordered by a Judge (on appeal from a Master's order refusing an increase) to be increased by a bond for $600 or payment into Court of an additional sum of $300; and the order was affirmed by a Divisional Court as a reasonable exercise of discretion.

Decision of MACMAHON, J., 38 C.L.J. 765, affirmed.

J. H. Moss, for plaintiffs. *D. L. McCarthy*, for defendants.

Boyd, C., Meredith, J.] [Dec. 3, 1902.

MCDONALD *v.* SULLIVAN.

Garnishment of rent—Payable under lease to administratrix for benefit of others.

Five plaintiffs claiming as heirs-at-law of their father and owners of a lot of land brought an action for specific performance which was dismissed with costs, subsequently taxed at $209.49. After the trial one of the plain-

tiffs, G. R., died and probate of his will was granted to a sister and co-plaintiff, M. S., and the action was revived in the names of the remaining plaintiffs and M. S. as his executrix, and an appeal had against the judgment was also dismissed with costs.

It appeared G. R. owned one-half of the lot and the father the other half, and that the lot had been leased to a tenant by M. O'R., one of the plaintiffs as administratrix of the father, who died in or before 1896, and M. S. as administratrix of G. R. No caution was registered under the Devolution of Estates Act.

Held, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs.

Macaulay v. *Rumball* (1869) 19 C.P. 284, commented on.

Judgment of STREET, J., reversed and judgment of the Master in Chambers restored.

Proudfoot, K.C., for judgment creditors. *McBrady*, K.C., for judgment debtors.

Boyd, C.] LEDUC *v.* BOOTH. [Dec. 9, 1902.

Will—Devisee—Use of house and allowance—Care in institution in the alternative—Exercise of judgment—Reasonableness.

A testator by his will gave the defendant all his estate on condition that he pay (the plaintiff) $50 a month and that she have the use of his house and furniture for her life, and by a codicil provided that if "in his own absolute judgment he is of opinion" that it would be best for her to be cared for in some institution, he should have the right and authority to place her there (with her consent in a specially mentioned case) and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance. Defendant chose an institution where she would be a paying inmate and be cared for (not the specially mentioned case), but the plaintiff refused to leave the house and the defendant ceased paying the monthly allowance and plaintiff brought action for the arrears of the allowance and further construction of the will.

Held, that the will executed in 1896 indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to her that it would be for her welfare to give up housekeeping and take the benefit left to be brought into effect by his absolute judgment, that he had the right and authority to place her in a sufficiently adequate home (other than the specially mentioned case) without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house and to cease paying the monthly allowance.

J. E. Jones, for plaintiff. *A. Hoskin*, K.C., for defendant.

Boyd, C.] REX *v.* HAYWARD. [Dec. 12, 1902.

Criminal law—Theft—Offender over 17 years of age—Commitment for two years to reformatory—Transfer to central prison on two years' sentence—Petty offence—Six months' sentence—Crim. Code, ss. 752, 783, 785, 787, 955—R.S.C. 1886, c. 183, ss. 19, 25.

The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing a small sum of money out of the contribution box of a church. The magistrate's return shewed that he pleaded guilty, and was committed for two years to the Provincial Reformatory. He was taken to the Reformatory and sent on to the Central Prison and kept there in custody under the warrant of commitment to the Reformatory. On a motion for his discharge on the return of a habeas corpus, it was

Held, 1. There had been a miscarriage of legal directions in sending a lad of over 17 years of age to the Reformatory, and in sending him on sentence of two years to the Central Prison.

2. Sec. 785 of the Code is intended to comprehend summary trial "in certain other cases" than those enumerated in s. 783, and that when the offence is charged and in reality falls under s. 783 (a) it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months under s. 787.

3. Under the circumstances that this was not a case for further detention, or the direction of further proceedings under s. 752, and an order for the defendant's discharge was granted.

Du Vernet, and *G. J. Smith*, for the action. *Ford*, for the Attorney-General, contra.

Divisional Court.] HOLMES *v.* TOWN OF GODERICH. [Dec. 15, 1902.

Municipal corporations—Borrowing powers—"Ordinary expenditure"—School purposes—Costs.

The power conferred upon a municipality by the Municipal Act, R.S.O. 1897, c. 223, s. 435, of borrowing money to meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality apart from the expenditure for school purposes.

Where this limit had been exceeded, but before the action was tried, the money had been repaid, the plaintiff who sued on behalf of himself and all other ratepayers, was held entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality.

Judgment of ROBERTSON, J., reversed.

Proudfoot, K.C., for appellant. *E. L. Dickenson*, for respondents.

Boyd, C.] RE NORRIS AND RE DROPE. [Dec. 18, 1902.

Administration—Of estate moneys in Court—Care of—Lunatics' estates—Committee's duty as to—Scheme for maintenance—Taxation of costs.

The rule has for many years been that when the Court intervenes in respect to the property of persons not sui juris the money shall not be left to private investment but shall be paid into Court and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed.

The general rule to be observed by local officers when it is advisable that the estate should be realized and turned into money is that the fund so realized shall be paid into Court, and when part of the estate is converted and part kept for the abode of a lunatic or otherwise the scheme for dealing with the whole shall be reported to the Court that proper directions may be given.

In two cases where Local Masters had reported schemes for the maintenance of lunatics and made provision for the moneys of the estates being collected by the respective committees and thereafter for their investment by the committees on securities of different kinds at their discretion and in one case had taxed the costs and inserted the amount in the report.

Held, that it is imperative that the costs in lunacy matters be taxed by the proper officer in Toronto, as the Local Master has no authority to tax them.

And *held*, that the moneys in the hands of the Committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court.

Swabey, for the committee in Norris case. *W. E. Kerr*, Cobourg, for the committee in Drope case.

Britton, J.] MAJOR *v.* MCGREGOR. [Dec. 24, 1902.

Libel on postal card—Words of abuse—Natural signification—Innuendo.

The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes was told by him that J. S. should pay them. He subsequently wrote and mailed to the plaintiff a postal card stating "I saw J. S. this morning, he said make the S. B. pay it."

In an action for libel in which plaintiff claimed that "S. B." applied to him and meant "son of a bitch,"

Held, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff; they are words of abuse but are, as often used, absolutely meaningless; they do not impute anything against the character of the mother and are not a statement of a fact of something obviously untrue; and in their natural signification are not actionable and that the plaintiff had failed to prove his innuendo.

Gogo, for plaintiff. *Maclennan*, K.C., for defendant.

Divisional Court.] McLURE *v.* TOWNSHIP OF BROOKE. [Dec. 24, 1902.
BRYCE *v.* TOWNSHIP OF BROOKE.

Drainage referee—Official referee—Reference—Statutes.

The drainage referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee.

Provisions of the Judicature, Arbitration and Drainage Acts, discussed.

Decision of a Divisional Court, 4 O.L.R. 97, reversed.

J. H. Moss, for appellants. *Watson*, K.C., and *N. Sinclair*, for respondents.

Meredith, C.J.] ANTHONY *v.* BLAIN. [Dec. 29, 1902.

Pleading—Amended statement of claim—Delivery of—Irregularity—Time—Validating order—Terms—Costs—Stay of proceedings—Appeal—Waiver—Compliance with terms.

After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim.

Held, that the delivery of the amended statement of claim was irregular under Rule 300.

An order was made, upon the defendant's application to set aside the amended statement for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or if such costs should not be paid within one month after taxation that the amendment should be struck out.

Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order.

Arlidge v. *Proctorious*, 20 Q.B.D., 764, *Hewson* v. *Macdonald*, 32 C.P. 407, and *Duffy* v. *Donovan*, 14 P.R. 159, followed.

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

Britton, J.] GROSSMAN *v.* CANADA CYCLE CO. [Dec. 29, 1902.

Copyright—Infringement—Newspaper—"First publication."

A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers

both in that country and England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act, 5 & 6 Vict., c. 45, requiring first publication in the United Kingdom to entitle the publishers to British copyright.

C. D. Scott, for plaintiffs. *Ryckman*, and *C. W. Kerr*, for defendants.

Meredith, C.J.] [Dec. 30, 1902.

QUA *v.* CANADIAN ORDER OF WOODMEN.

Pleading—Leave to deliver reply—Time—Jury notice—Discretion—Notice of trial—Close of pleadings.

Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice, and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without jury.

The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue, and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand.

Rules 257, 258, 262, considered.

Beaumont, for plaintiff. *J. H. Moss*, for defendants.

Meredith, C.J.] IN RE HOLDEN. [Jan. 7.

Will—Speaking from death—Stock in trade—"Now"—Household furniture—Books.

A testator provided in his will as follows: "I give, devise, bequeath all my real and personal estate of which I may die possessed of or interested in in the manner following: That is to say, first, I give to my sister Eliza Jane Isaac the house and land with all household furniture and all the stock and trade now in house and out of house with all book accounts now due me wherever found for her own use and benefit forever, and out of this she shall pay to my brother Benjamin Farnsworth Holden one hundred dollars, also she shall pay one hundred dollars to my brother William Jones Holden." At his death, and when he made the will, the testator was

the keeper of a country village shop, and his possessions consisted of a house and lot where he carried on his business and lived. The capital employed in his business included his stock of goods and what was owing to him by his customers and his household and other effects consisting of furniture, books, horses, harness, carriages and sleighs. Shortly after he made his will he sold his house and lot and business and afterwards repurchased them.

Held, 1. Although the gifts of the household furniture, the stock in trade and the book debts were specific bequests, nevertheless being specific gifts of that which is generic,—of that which may be increased or diminished, the will carried the household furniture, the stock in trade and the book, debts as they existed at the time of the testator's death; and the use of the word "now" did not limit the gift to them as they existed as the date of his will. This was confirmed by the words of general bequest at the commencement, as also by certain other features of the will.

2. In the gift of the "stock and trade" the money of the testator on deposit in the bank and cash in hand and a quantity of cordwood for use in the shop and dwelling house, two horses, harness and vehicles were embraced in the gift.

3. A number of books belonging to the testator passed as part of the household furniture.

W. T. Allan, for administratrix. *Birnie*, K.C., for F. Holden. *Bruce* for W. J. Holden.

Boyd, C.] IN RE DENNIS. [Jan. 10.

Will—Construction—Devise—Vested estate, subject to be divested—Rents—Expenditure for improvements.

Testator devised a farm to his grandson "when he arrived at twenty-one years of age, the said farm to be kept in repair by my executors, . . to expend at least $50 each year in improvements," with a devise over in case of death "before receiving the share," and a residuary devise to a son and daughter.

Held, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than $50 each year, but more if necessity should, in the opinion of the executors, arise.

T. Brown, for executors. *G. G. Duncan*, for residuary devisees. *Harcourt*, for infant.

ELECTION CASES.

Garrow, J. A.] IN RE VOTERS' LISTS OF HUNGERFORD. [Jan. 2.

Parliamentary elections—Voters' lists—Notice of appeal—Leaving at clerk's residence.

The language of R.S.O. 1897, c. 7, s. 17, sub-s. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute.

And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling house, by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient.

W. B. Northrup, K.C., for persons opposing the service.

Street, J., Britton, J.] [Jan. 22.

IN RE SOUTH OXFORD PROVINCIAL ELECTION.
MCKAY *v.* SUTHERLAND.

Parliamentary elections—Controverted election—Appeal—Settlement of case.

No machinery has been provided by the Ontario Controverted Elections Act or by the rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court.

Semble, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal.

Watson, K.C., for petitioner. *S. H. Blake*, K.C., and *E. N. Armour*, for respondent.

FOURTH DIVISION COURT COUNTY OF RENFREW.

Burritt, Dep. Co. J.] ARNPRIOR *v.* BRADLEY. [Sept. 22, 1902.
Deacon, Co. J.] MICHIGAN LAND & LUMBER CO. [Nov. 7, 1902.

Public Health Act—Solicitors' lien.

Action by municipality to recover expenses incurred in providing medical attendance and necessaries for a smallpox patient from such

patient, and a claim by solicitors to lien for costs on the money paid into Court by the Garnishees.

Held, 1. The municipality had the right to recover under s. 93 of the Public Health Act.

2. Solicitors have no lien for their costs in Division Court proceedings.

Province of Manitoba.

KING'S BENCH.

Richards, J.] FOX *v.* ALLAN. [Nov. 19, 1902.

Weight and Measures Act—Burden of proof of illegality — Voluntary payment—Appropriation of payments.

County Court appeal. The chief part of the plaintiff's claim was for the price of threshing oats and wheat for defendant, and the defence was that the quantities had been ascertained in a manner prohibited by s. 21 of the Weights and Measures Act, R.S.C. c. 104, and that therefore the plaintiff could not recover. It appeared from the evidence that the oats threshed had been measured by the bag, but it also appeared from a statement rendered to plaintiff by defendant that he had credited plaintiff with the amount of his account for threshing the oats, and charged him with certain items, dated prior to any other credit to plaintiff, and amounting to about the same as the price of threshing the oats.

Held, following the rule in *Clayton's case*, that defendant had appropriated the amount of his said charges in settlement of the price of threshing the oats and, following *Hughes* v. *Chambers*, 14 M.R. 163, that he could not now set off such amount against the price of threshing the wheat.

As to the threshing of the wheat, the bargain was that defendant was to pay 5¼ cents per bushel by car measurement if it was clean, if not, then by bag measurement, neither of which mode would be legal under the statute. The defendant offered no evidence, and there was no express testimony as to how the wheat had been measured, but the trial Judge held that the proper inference was that the measurement had been by the bag. Defendant in the statement rendered to plaintiff had credited him with the threshing of 4,597.20 bushels of wheat at 5¼ cents per bushel.

Held, following *Hanbury* v. *Chambers*, 10 M.R. 167, that the trial Judge was not bound to draw such inference in a case where it would enable defendant to evade payment of an honest claim; that, as there was no conflict of testimony, the appellate Judge was free to follow his own views as to the conclusions to be drawn from the evidence; that the

defence raised should not prevail without strict proof of a violation of the Act, and that there was no such proof in this case.

Appeal allowed with costs.

Mathers, for plaintiff. *Aikins*, K.C., and *Robson*, for defendant.

Bain, J.] SIMPSON *v.* OAKES. [Nov. 27, 1902.

Threshers' Lien Act, 57 Vict. (M), c. 36—Lien on grain sold to bona fide purchaser—Seizure of excessive quantity—Notice of claim of lien.

County Court appeal. Plaintiff had, on September 28, threshed for one Riter 100 bushels of wheat, on October 8, 9, 960 bushels, and on November 7, 88 bushels of wheat and 400 bushels of wheat and barley. He did not shew that the first threshing had not been paid for. On October 28, in conversation with Riter, he claimed a lien on 60½ bushels of wheat then in Riter's granary, for the cost of the threshing on the 8th and 9th of that month, but it appeared that the 60½ bushels referred to were part of what had been threshed on September 28.

Held, that a thresher cannot, under the Threshers' Lien Act, 57 Vict. (M), c. 36, maintain a lien on grain for the threshing of which he had been paid to recover the price of a subsequent unpaid threshing.

The Act allows a period of thirty days for the assertion of a right of lien, and the plaintiff took no other steps in that direction until the 21st of November, when he posted a notice on the door of the granary on Riter's farm saying, "that all grain herein is seized by me for cost of threshing under the 'Threshers' Lien Act,'" This was some days after Riter had given possession of the grain to the defendant, a bona-fide purchaser thereof for value. There were then in the granary the 60½ bushels of wheat above referred to, and 195 bushels of barley, of the total value of $86, whilst plaintiff's claim for the threshing of November 7 was only about $26, and this was the only threshing for which he could on November 21 have claimed any right of retention. The notice did not mention the amount for which the lien was claimed on the date of the threshing and did not specify any particular quantity of grain as being seized. The statute (s. 2) only allows the retention of a sufficient quantity of grain computed at the fair market value thereof, less the cost of marketing, to pay for the price of any threshing done within thirty days prior to the date of asserting the right.

Held, that the quantity of grain which the plaintiff attempted to retain was unreasonably large for the amount owing, and that he had thereby forfeited his right of retention of any of it. Appeal allowed with costs.

Hudson, for plaintiff. *Wilson*, for defendant.

Full Court.] [Dec. 20, 1902.

DAVIDSON *v.* MANITOBA AND NORTH-WEST LAND CORPORATION.

Principal and agent—Commission—Secret bargain between purchaser and agent of vendor.

Judgment of KILLAM, C.J., noted vol. 38, p. 600, affirmed with costs on appeal to the Full Court.

Daly, K.C., and *Elliott*, for plaintiff. *Ewart*, K.C., and *Bradshaw*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] MARINO *v.* SPROAT. [April 29, 1902.

Appeal—Introducing fresh evidence on appeal—Practice.

Motions by appellants to admit in the Full Court further evidence on the hearing of appeal from a judgment at the trial.

Held, that an application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant, indicating the evidence desired to be used and setting forth when and how the appellant came to be aware of its existence, what efforts, if any, he made to have it adduced at the trial, and that he is advised and believes, that if it had been so adduced, the result would probably have been different.

Davis, K.C., and *Taylor*, K.C., for the motions. *Duff*, K.C., and *John Elliot*, contra.

Full Court.] SAUNDERS *v.* RUSSELL. [June 18, 1902.

Mortgage by infant—Voidable contract—Repudiation of—What amounts to—Infants' Contracts Act.

Appeal from judgment of IRVING, J., dismissing a foreclosure action.

Held, that a mortgage executed by an infant before the passing of the Infants' Contracts Act is not void but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age.

R., in 1896, being then an infant, executed a mortgage in favor of plaintiff. R. came of age on Jan. 27, 1900, and at that time on account of default having been made in the payment of the loan, S. was proceeding

to sell under power of sale in the mortgage. R.'s solicitors on Feb. 13, 1900, wrote S. saying that no valid mortgage had ever been executed by R. and threatening proceeding to protect their client's interests, and on 2nd March they issued a writ on behalf of R. against S., claiming a declaration that the mortgage was null and void and an injunction restraining sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction he said in substance that the reason he did not pay was because he could not and that he had never repudiated his contract, and in Oct., 1900, he discontinued his action. On Nov. 2, 1900, S. commenced his foreclosure action and in defence R. pleaded infancy:

Held, that the solicitor's letter and the writ in *Russel* v. *Saunders* did not constitute a repudiation as they were qualified by R.'s statement that he did not intend to repudiate.

Judgment of IRVING, J., dismissing the action, reversed.

Duff, K.C., for appellant. *Harold Robertson*, for respondent.

Full Court.] CANE *v.* MACDONALD. [Oct. 7, 1902.

Dominion official—Salary – Receiver— Appointment— Partnership in— Right to share in salary ceases on dissolution.

Appeal from judgment of MARTIN, J., refusing to appoint a receiver. While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution and asked that a receiver be appointed of it and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:

Held, that no receiver of the salary could be appointed; that although the amount of the book debts was small there should be a receiver in respect to them. Judgment varied by appointing receiver of partnership assets other than the salary. Costs of motion below and of appeal reserved for trial Judge.

Per HUNTER, C.J., at the trial: Even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the salary after the dissolution of the firm, unless there was a special agreement to that effect.

Davis, K.C., for appellant. *Duff*, K.C., for respondent.

Full Court.] RENDELL *v.* MCLELLAN. [Nov. 17, 1902.

Appeal—Amending judge's notes of evidence—Practice.

On the hearing of an appeal from a County Judge, counsel for appellant applied to introduce further evidence alleged to have been omitted from the Judge's notes of evidence taken at the trial.

The Court refused the application holding that where a party desires to introduce on an appeal, evidence alleged to have been omitted from the Judge's notes of evidence, he should first apply to the Judge appealed from to amend his notes.

Clement, for appellant. *Davis*, K.C., for respondent.

Full Court.] [Nov. 17, 1902.

CENTRE STAR *v.* ROSSLAND MINERS' UNION.

Practice—Amending pleadings—Exceeding terms of order allowing—Waiver of right to object.

Two weeks after the receipt of an amended statement of claim defendants' solicitors wrote plaintiff's solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out amended statement of claim on the ground that it exceeded the terms of the order authorizing amendment.

Held, reversing FORIN, Lo. Co. J., that the defendants had waived their right to object.

A. C. Galt, for appellant. *Taylor*, K.C., for respondents.

Full Court.] IN RE SMITH. [Nov. 25, 1902.

Rivers and Streams Act, sec. 12—Appeal—Right to—Party interested.

Appeal from an order of SPINKS, Co. J., ordering that one S. C. Smith be at liberty to charge tolls for boomage, rafting, etc., of logs, etc., on the Spillimacheen River. The appeal was brought by one Ryan who claimed to be a lessee from the Dominion Government of timber berths adjoining the said river, but who was not a party to the proceedings before the County Judge.

Sec. 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County Judge he may appeal to the Supreme Court:

Held, that "party interested" means one who was a party to the proceedings before the Judge appealed from. Appeal dismissed with costs, IRVING, J., dissenting.

Fulton, K.C., for appellant. *Davis*, K.C., for respondent.

Book Reviews.

Essay on the Devolution of Land upon the Personal Representative, by Edward Douglas Armour, K.C., LL.D.: Canada Law Book Company, Toronto, 1903.

We wonder that this book was not written long ago. No statute made such radical changes in the law relating to the devolution of real property as The Devolution of Estates Act, and at the same time no enactment in our statute books is so inconsistent in its amendments, and so complicated in its original sections. Those members of the profession whose practice has led them to attempt to interpret the many obscure provisions of that Act will accept this latest work of Mr. Armour's pen with the appreciation and interest that such a book deserves.

It is not a mere theoretical treatise on academic subjects, but a series of thoughtful essays on questions of everyday practice and importance, and cannot fail to find a ready place in the library of every progressive lawyer. The author has treated the subject exhaustively and at the same time concisely with his characteristic incisive analysis. What interests are, and are not within the Act are first ascertained, and then the land is followed, so to speak, from the death of the owner, through the executor or administrator in course of administration down to distribution. The various questions that arise in the devolution of real estate, are discussed and elucidated as far as possible, with authorities. Particularly useful will be found the chapters on Title under the Act, Cautions, Curtesy, Dower and Election, Powers under the Trustee Act. The book is complete with an appendix of statutes and a good index.

No practitioner, who hopes to succeed as a real property lawyer, can afford to be without this work, which not only reviews and consolidates various decisions that arise in the course of administration, but which also puts forward many convincing and excellent arguments on those questions upon which no judicial pronouncement has yet been given.

Flotsam and Jetsam.

I knew Baron Huddlestone, who always referred to himself as "The Last of the Barons." He told me many interesting things, notably about a curious case tried at Limerick. A man was charged with robbery with violence, at that time a capital offence. While the trial was proceeding, a stranger called at a neighboring inn, apparently holiday-making. He inquired of the landlord if there were any interesting places to be visited in the neighborhood and the landlord, after considering, said there was the Assize Court handy, and, if his customer desired it, he, the landlord, would,

through a friend of his, an usher, obtain him admission to the Court. This offer the traveller accepted, and he was duly admitted to the court, which he entered just at the moment when the judge was asking the prisoner if he had anything further to urge in his defence. The prisoner, in response, further asserted his innocence, and declared he was miles away from the scene of the assault at the time it occurred. "But," argued the judge, "you have no proof of it." Then suddenly the prisoner pointed to the new-comer and exclaimed, "Yes, he can prove it! I was with him on the day, and helped to carry his portmanteau on to a vessel at Dover. The portmanteau came open and a toothbrush fell out, which I put back, after he'd wiped it. Ask him—he can prove it!" The judge questioned the stranger, who said he could not remember, but that he kept a very exhaustive diary, which was at the inn where he was staying, and which no doubt would help them. Accordingly, an officer of the court was dispatched to the inn, and brought back the diary, wherein, on the date mentioned, that of the assault, was an entry containing all the particulars as given by the prisoner. Upon this the latter was acquitted. Subsequently both men were hanged for sheep-stealing. It was a put-up job, and the stranger was a confederate.—*Walter Frith.*

Another good story which Huddlestone told me also concerned a charge of robbery with violence. The case for the prosecution rested mainly on the discovery of a "bowler" hat on the scene of the assault, which fitted the prisoner, and which the prosecution asserted belonged to him and proved the crime. But the defence argued that the hat was one in general use and might belong to any number of men, and that such evidence was too unreliable on which to commit a man of so serious an offence. The jury felt over-burdened with their responsibility and acquitted the prisoner. As the latter was leaving the dock he turned to the judge and said: "My lord, can I 'ave my 'at?"—*Walter Frith.*

UNITED STATES DECISIONS.

HUSBAND AND WIFE.—Property purchased by a man in the name of his wife, with proceeds from a business which he is conducting as her agent, the success of which is due largely, if not wholly, to his supervision and industry, is held in *Blackburn* v. *Thompson W. & Co.* (Ky.) 56 L.R.A. 938, to be subject to his debts.

MASTER AND SERVANT.—An engineer operating a blowoff cock designed to clean the boiler, for the purpose of frightening children, is held, in *Alsever* v. *Minneapolis & St. L. R. Co.* (Iowa) 56 L.R.A. 748, not to depart from his employment so as to relieve his employer from liability for injuries caused by his act.