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THE AUTHORITY OF A SOLICITOR TO RECEIVE MONEY IN CONVEYANCING BUSINESS.

VINEY v. CHAPLIN.

The question of a solicitor's authority to receive his client's money in conveyancing and other non-litigious business, is not one on which there has been much discussion in the Courts of this province. The reason for this, doubtless, is that matters of fact, rather than matters of law, are involved in what one of the judges has called "the long list of cases in which one of two innocent parties must suffer owing to the fraudulent conduct of the solicitor employed to transact their business." It may be remarked in passing that it is somewhat surprising that the list is not longer than it is, when one considers the immense amount of business transacted by solicitors which involves the receipt and application of clients' money; and the profession as a whole may justifiably be proud that the confidence so generously reposed in its members has so seldom been abused. It is well, however, that there should be no mistake as to the principles which govern such matters in our Courts, and which are laid down in such cases as *Gillen* v. *R. C. Episcopal Corporation*, 7 O.R. 146, *McMullen* v. *Polley*, 13 O.R. 299, and *In re Tracy*, 21 A.R. 454. These principles are very clearly and concisely stated in a recent case from another province (*Foreman* v. *Seeley*, 2 N.B. Equity 341).

The following quotation from the judgment of Barker, J., in that case, is undoubtedly good law in Ontario, as well as in New Brunswick:—"In the absence of legal proceedings taken for the purpose of enforcing a mortgage security, there is nothing in the mere relation of solicitor and client which carries with it any authority to the solicitor to receive payment of either interest or principal due his client on a mortgage. The question is one sim-

ply of agency, and in order to discharge the paying mortgagor from further liability, there must either be an express authority from the mortgagee to receive the money, or else an authority for that purpose necessarily implied from the course of dealing between the parties; and the onus of establishing this is always upon the mortgagor." It is also clearly settled by the cases above referred to that an authority to receive the interest confers no authority to receive the principal, and also that, in the words of Boyd, C., "The custody of a mortgage upon land gives no right to the custodian, be he solicitor of the mortgagee or not, to receive any part of the principal or interest secured."

The dictum just quoted suggests one of the most interesting and important features of these cases, viz., the effect of the possession by the solicitor of the security in respect of which payment is made. In the case of *In re Tracy*, above cited, it is suggested in the judgment of Osler, J., that if the solicitor in possession of the mortgage, who had received payment of the principal and interest, had been entrusted also with the discharge of the mortgage, "the case would have presented a very different aspect." It is very doubtful, however, whether that learned judge would have seen any reason to alter his decision even had the defaulting solicitor been in possession of the discharge, as well as of the mortgage, although so far as we are aware there is no express Canadian authority on the point. If the question should arise it would probably be decided on the authority of the old case of *Viney* v. *Chaplin*, 2 De G. & J. 468 That case, which was decided in 1858, and which is of special interest to conveyancers, though now no longer an authority in England for a reason which will be noted presently, lays down what Brett, L.J., in a subsequent case, called a "most wholesome" rule, viz., that the mere fact that a solicitor has in his possession a deed executed by his client does not give him authority to receive for his client the consideration for the deed. That rule, whether "wholesome" or not, is still binding in Ontario, although in the tribunals from which it emanated it has been abrogated by the 56th section of the Conveyancing and Law of Property Act, 1881. So many provisions of that important Act were adopted in their entirety

by our provincial legislators in the Act bearing the same name, passed in 1886, that it seems hard to understand why this particular section was left so severely alone. The reasons which induced the Imperial Parliament, after more than twenty years' experience of the working of the rule in *Vincy* v. *Chaplin*, so completely to set it aside, in spite of the commendations lavished upon it by some of the judges and text-writers, are not far to seek, and have the same force and cogency here as they have in the mother country. Here, as well as there, great delay and inconvenience have often been occasioned by a purchaser insisting upon the payment of the purchase-money to the vendor in person; as, for instance, in the case of several vendors dispersed in various parts of this and other countries, and it is surely not unreasonable to assume that a vendor or mortgagee who has sufficient confidence in his solicitor to entrust him with a deed, discharge or other document, duly executed and attested, so as to pass the title to the property therein comprised to the purchaser, or mortgagor, and containing a proper receipt for the consideration, should be held by so doing to have given the solicitor authority to receive the consideration. We all know in how many cases this is done as a matter of courtesy, and for the purpose of facilitating business which might otherwise be intolerably long drawn out, but it does not seem right that the purchaser's solicitor should be put under pressure, as he often is, to pay over money in a manner which is unauthorized by law, and so possibly involve himself or his client in most serious loss. We therefore feel that we need make no apology for quoting in full the section of the English Act to which reference has been made, and suggesting to the Hon. Attorney-General for Ontario the propriety of including this useful provision in the next statute for the amendment of the law.

The section is as follows (Imp. Act, 44 & 45 Vict. c. 41, s. 56):—

"Where a solicitor produces a deed, having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for

that consideration, the deed shall be sufficient authority for the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf, from the person who executed or signed the deed or receipt."

If our legislative fathers should see fit to adopt this suggestion, it would be well for their draftsman to avoid some of those snares which beset the interpretation of the most skilfully drawn statutory enactment, and go far to justify the boast made, if we mistake not, by the famous O'Connell, that "he could drive a coach and four through any Act of Parliament ever devised." There are certain pitfalls for the unwary lurking in this apparently plain and definite section, the discovery of which has no doubt been productive of much discomfort to some of the parties concerned.

The most important of these is disclosed in the case of *In re Bellamy and Metropolitan Board of Works*, 24 Ch. Div. 387, in which it was held that this section did not protect a purchaser who paid purchase-money to the solicitor of trustees. It required two more Acts of Parliament to set this little matter right; now, however, it is provided by the Trustee Act, 1893 (52 & 53 Vict. c. 53 (Imp.)), that trustees may appoint a solicitor to receive "any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of and to produce a deed containing any such receipt as is referred to in" the section above quoted. This, too, seems a reasonable provision in itself, and might properly be adopted as a sort of corollary to the original section.

Another interesting point which has been raised in the English Courts is as to the meaning of the expression "a solicitor" in the first line of section 56. It has been held in the case of *Day* v. *Woolwich*, 40 Ch. Div. 491, that the solicitor must be acting for the person to whom the money is expressed to be paid. Some doubt, however, seems to be thrown on this dictum by the case of *King* v. *Smith* (1900) 2 Ch. 425, in which that acute judge, Farwell, J., makes some observations which seem exceedingly pertinent. He says that "there is a good deal to be said in favour of

the proposition that a 'solicitor' who produces a deed means what the section says, ' a solicitor'; if this is not so, it is difficult to see the object of passing an Act rendering it necessary for a purchaser to see the evidence of the retainer of the solicitor instead of his authority to receive the money. It looks rather like a trap for the unwary public." It does, indeed, and we trust that it will be removed from the public's pathway by the expert draftsman who will no doubt be employed by the provincial government, in case they should see fit to introduce a short bill on the lines of the Imperial Act, which has proved its usefulness to the public and profession for a quarter of a century.

In the meantime, of course, it must not be forgotten that until such an Act is passed, the conveyancer who wishes to be absolutely safe must observe the rule in *Viney v. Chaplin*, a case which is well worth perusal, not only for this reason, but also because it affords a most striking object lesson of that line of conduct which it behoves a vendor's solicitor with all diligence to avoid.

It was well observed by the Lord Chancellor in his judgment in that case that "sales and purchases are generally conducted with mutual confidence, each party is anxious for the completion of the transaction, and unwilling, therefore, to interpose any unnecessary obstacles, and in general no necessity exists for any unusual precautions." In this case, the purchaser's solicitor insisted, apparently not altogether without reason, on precautions which the vendor's solicitor thought not merely unreasonable, but unjustifiable by the law and custom of conveyancing. Hence arose a very pretty solicitor's quarrel, interchange of letters growing hotter and hotter, at last resulting in vendor's solicitor bringing an action at law for payment of purchase-money, an aggressive move, which was promptly met by the purchaser's suit in equity for an injunction and specific performance. In the general result, the parties came to a substantial agreement, except as to the costs of these actions, the burden of which, after learned and elaborate argument, was cast upon the unfortunate vendor. One is glad to see that his solicitor gave the Court an assurance that he did not intend to make any demand for costs

upon his client, but it seems a pity that he, like so many others before and after his time, forgot the maxim of the wise Latin poet—quidquid delirant reges, plectuntur Achivi—or, as it may, ad hoc, be freely translated:—

"Whene'er the lawyer's temper gets too hot
His client's case is apt to go to pot."

GOODWIN GIBSON.

APPEALS IN CRIMINAL CASES.

The Criminal Law Appeal Bill, introduced by the Lord Chancellor of England has naturally evoked much discussion. Primâ facie, there would seem to be at least as much reason for appeals in criminal cases as in civil actions. In the latter as stated by the introducer of the Bill "the consequences are expressed in damages; in a criminal trial they are expressed in punishment, either of death or imprisonment, and yet there is no opportunity allowed to review the verdict. Such law is not a humane law, and was not what the law ought to be in a civilized country."

We have already referred to the view taken on this subject by the leading English journals (ante, page 414); but by far the best analysis of the Bill and the best statement of the situation which is said to require improvement, and of the dangers and difficulties which would result from the passage of the proposed measure are to be found in the speech of Lord Alverstone, the Lord Chief Justice of England, delivered in the House of Lords last May. The subject is not at the present time a burning question in this country, but a perusal of his remarks will tend to settle the question very largely in the minds of those who may be halting between two opinions, and perhaps convince others who have taken a different view. His speech is a lucid and statesmanlike presentation of the subject and is well worth being on record for easy reference in the future. Hansard thus reports him:—

"I am in no way opposed to the constitution of a Court of Criminal Appeal within certain limits, and, to clear the air, I will state at once that which I think would be a desirable amendment of the law in connection with criminal appeals. There should, I think, be a Court of Criminal Appeal, to which persons convicted should have free access upon the question whether there was any evidence to go to the jury, upon all questions of misdirection, upon all questions of non-reception or misreception of evidence, upon any question of law raised at the trial, and upon any question as to the illegality of the sentence. I postpone for the moment the question of appeal with regard to the severity of the sentence, because that raises different and subordinate considerations. Whether or not proceedings in error should be abolished is a matter not of great importance. I should have no objection to a Court of Appeal dealing with those. I pass it by only with this word of notice, in order that there may not be any idea that I wish in any way to fetter the jurisdiction of the new Court of Criminal Appeal, if established, in matters of law. The main objection I raise to this Bill is that it contemplates a right of appeal on fact in all cases of conviction on indictment. That is a momentous change, and it will, in my judgment, so defeat the object of those who promote this Bill that it is absolutely necessary that I should make my meaning perfectly clear.

The main argument used in support of this Bill by the noble and learned Lord on the Woolsack, in moving it, was the analogy of appeals in civil cases. It was suggested, quite truly, that in certain cases in the High Court, however small might be the matter at stake, and even if it be only a question of change of venue and of procedure, there is an appeal to the Court of Appeal, and ultimately to your Lordship's House. I do not dispute that. In ninety-nine out of every hundred cases in which amounts under £100 are involved, there is, however, no appeal on the question of fact. But I am not going to base my argument on any comparison for the moment. I say, and I say it advisedly, that the whole system of our criminal procedure is contrary to any such proposal as is made in this Bill for an

appeal on fact, and I hope to satisfy your Lordships that, instead of being an advantage to innocent persons, it would create a danger for them which no Court of Appeal could protect them against.

I would remind your Lordships what the essential difference is. In civil disputes you have two parties. One party does not know the details of the evidence to be given by the other party, sometimes not even the substance. That is entirely absent from the administration of criminal law. There are no two parties. It is the duty of the prosecution to make out their case to the satisfaction of the tribunal on fact, and that distinction affects the whole of our criminal procedure. Not only is there preliminary inquiry before magistrates and grand juries, but, if the prosecution propose to call any fresh evidence, they have to give notice to the person charged of what that fresh evidence is; and it is only in the very rare instance of some point being developed in the course of the trial by the defence that any evidence is heard of which intimation has not previously been given. So that in a criminal trial the accused goes into Court with full knowledge of the details of the evidence to be given against him.

What is the chief objection to the proposed change? It is my distinct conviction that such a procedure as is contemplated will undermine altogether the responsibility of juries, and will make them feel that it is not with them that the decision on the facts is ultimately to rest. They will feel that they have got behind them this Court of Appeal, so that they will be able to say, "We think the man is guilty. We are not quite sure on the evidence, but if we are wrong the Court of Appeal will set us right." That is a direct and serious danger as regards an innocent man. What is it that we now say—I have to say it a great many times a year—to juries when we are dealing with these matters? We have to tell them that theirs is the responsibility on matters of fact. We have to tell them that there is, in this respect, no appeal from their decision, and we have to tell them that unless they are as satisfied as they would be in any important event of their lives they ought to give the accused the bene-

fit of the doubt and return a verdict of acquittal. The whole of that observation would be cut away from us.

I know, and there are many here who know perfectly well, what has been the effect of men of far greater learning and far greater experience than jurymen of the knowledge that there is an appeal. It has at times led judges of the highest position short of your Lordship's House to approach their duties without the same feeling of responsibility as they otherwise would, and it has in times past been pointed out that cases have been allowed to be conducted rather slackly because they were going to the Court of Appeal. If this Bill becomes law in its present shape, I am satisfied that juries will know and feel that the responsibility is no longer theirs, and that it will make them less careful how they deal with questions of innocence and guilt. At present juries do err; they err on the side of acquittal. There are many cases in which people are acquitted by juries who, if justice were done, ought to have been convicted. The tendency, if this Bill passes, must be for juries to feel their responsibility much less.

Will your Lordships for a moment consider what is the danger to an innocent man? What is the position when the verdict goes before the tribunal of three or five judges? Are your Lordships to be satisfied with the standard which now prevails in every case where the jury have decided the question of fact? The only circumstances under which the Court of Appeal may now order a new trial when there has been a verdict of a jury, is when the Court have come to the conclusion that the verdict was one which no jury could reasonably have found. In criminal cases not only will there have been previous investigation, but in ninety-cases out of 100 no judge will allow a case to go to a jury unless there is substantial evidence against the prisoner. What will be the position of the Court of Appeal? They will have before them the verdict of a jury who have seen the witnesses; they will have before them the verdict of a jury presumably on a proper direction, because if there is misdirection there ought to be an appeal.

But I ask your Lordships to consider the peril of an inno-

cent man who may have had a verdict of guilty against him, the jury feeling less responsibility in their verdict. When he gets to the Court of Appeal it will be urged that that verdict was given in sight of the witnesses and under the proper direction of the judge. If that were the only difficulty, if I were to stop at this objection, I would submit that this Bill, giving a general right of appeal crea , a danger which threatens those we are most anxious to protect—the innocent. What is this appeal? The appeal which is now suggested does not exist in any other tribunal, civil or criminal. It is absolutely new. The Memorandum on the Bill points out what is perfectly true, that there is an appeal to quarter sessions in cases of summary conviction: but that appeal to quarter sessions is a rehearing. The witnesses are recalled, and the Court has the same opportunity of judging of their demeanour as the Court of first instance had. This Court of Appeal is to have no such opportunity which, in my humble judgment, is absolutely necessary in order to come to a correct conclusion as to whether or not people are telling the truth in a criminal matter.

On what evidence is the Court of Appeal to act? Is it to act on the depositions? They are admirable as a primâ facie case, but over and over again most important points in favour of the prisoner or of the case for the prosecution are not brought out until the witness is examined and cross-examined at the trial. The judge's note, though it may be quite sufficient and well adapted to enable the judge to direct the jury who have heard the witnesses, would be wholly insufficient for the Court of Appeal. Are they, then, to act on a shorthand note? I enter my emphatic protest against the guilt or innocence of any man being determined by a tribunal which has not the witnesses before it. It is suggested in this Bill that some report is to be given by the judge who has presided at the trial. How is that to work? How are reports to be obtained after quarter sessions have separated? That is a very important matter. When it falls to my painful lot to preside at a trial for murder the report I send to the Home Office is prepared with care, and the note I take is one which will be of some assistance to the Court; but the system

of appeal contemplated by this Bill, of remitting to three or five judges the determination of questions of fact, is a complete innovation. It is tried for the first time in criminal law, and in my judgment it is fraught with the greatest danger to innocent persons. It astounds me that it should be thought that a Court of Appeal in a criminal case should hear the case in the absence of the prisoner. I do not know why his presence is to be unnecessary.

Further, it is generally recognized, and in support of this statement I might cite passages from the Report of the important Commission presided over in 1879 by Lord Blackburn, that if there is to be an appeal in criminal cases there must be a new trial, and it is because this is an innovation in, and a fundamental departure from, our criminal procedure that I think it right to enter my protest against it. I do not for a moment refer to the probable number of appeals. If this Bill were passed in its present shape there would be many hundreds of appeals, but I am not going to argue the question from that point of view. If it is right, it ought to be passed whatever may be the burden put on the country. But, as this Bill is framed, it gives an appeal to the rich which the poor cannot avail themselves of. This is no claptrap argument; it is the fact. If these appeals are to be of any use, there must be counsel, and solicitors, and all the documents and other matter must be put properly before the Court. Such a costly appeal may be for the benefit of the company promoter with any amount of money who has been charged with fraudulent conspiracy, but it will not benefit the poor man in the event of there having been some miscarriage of justice. The procedure is wholly insufficient to meet that difficulty. Moreover, the difficulties in the way of the practical working of this scheme are almost insuperable as the Bill is now framed.

I feel my responsibility so gravely in this matter that I do not hesitate to ask your Lordships to hear me on another part of the question. If I am right in saying that there has not been thought in past times necessity for this reform, has anything happened in the last few years to call for this particular amend-

ment of the law? As was to be expected, reference was made in the course of the debate on the Second Reading of this Bill to the *Beck Case*. I wish noble Lords who may have to deal with this matter would do what I have to do—namely, very carefully study the Beck Report. I assert without fear of contradiction that an appeal on fact would have been no good whatever in the *Beck Case*. No Court of Appeal on a question of fact could possibly have reversed that finding. The miscarriage of justice in the *Beck Case* was due to a misdirection on the part of the learned judge, a misdirection so grave that now that attention has been called to it one wonders how it ever could have taken place. But it was a misdirection which would have been set right by the Court of Appeal on the matter of law. Therefore, I say the only case that has been mentioned in order to suggest the pressing necessity for appeals on matters of fact is one which would have been met by an appeal on matters of law, by an appeal on the question of misdirection, and which in no way calls for this provision for appeal on questions of fact. It was from that point of view that I had the honour of assisting my noble and learned friend, Lord Halsbury, in preparing the Bill which passed your Lordships' House last year, to increase the facilities for appeals in matters of law.

There is a matter which is not sufficiently recognized in this House or in the country, to which attention has recently been called by a very great lawyer, and which I have for a long time determined that I would bring to the notice of your Lordships when I had an opportunity. I refer to the enormously improved condition of the innocent man, due to the fact that he can now give evidence on his own behalf. For many years I pressed that measure on the House of Commons. My noble and learned friend, Lord Halsbury—it will for ever live to his honour—took the matter up, and the present Act was passed under his auspices. I have watched the practice of that Act most carefully, inasmuch as it bears directly on the point I am endeavouring to argue, the necessity for an appeal on fact, and I have found that in many cases a verdict of acquittal has been given on the evidence of the accused person alone; and I go so far as to say that if an accused

man will tell the truth at the early stages before the magistrate, so as to give time for inquiry, his ultimate conviction, if he is innocent, is almost an impossibility. I will not say an impossibility, because I do not wish to exaggerate. I have never pretended in all my advocacy of the Prisoners' Evidence Act that it was any protection to the guilty. Your Lordships do not wish to pass an Act of Parliament for the protection of the guilty, but this particular Act has been a great protection to the innocent.

I will give your Lordships three of many cases. I tried at Ipswich an indictment against three men for grievously assaulting a poor sailor. On the evidence of the prosecution, all three assaulted him, and he did not know which one injured him. From the evidence of the prosecution there was not the slightest possibility of distinguishing between the three men. One of them, an ex-soldier, asked to give evidence. He gave his evidence extremely well. He admitted he had been there. He said he joined the other two men, but after a few minutes became ashamed of himself and asked the other men to desist, but as they would not he left them. That may or may not have been the true fact, but my point is that the defence could not possibly have been put before the jury except by the prisoner being allowed to give evidence.

To give more recent cases I will quote two that I tried at the Cardiff Assizes two weeks ago. One was a charge of murder and the other of manslaughter. The former case was one in which a wife had been killed in a particularly brutal manner. Evidence of the circumstances under which the injury was done to the deceased woman was given by the prisoner himself in a way which commended it to the jury, who reduced the crime from murder to manslaughter; and nothing but the prisoner's evidence could have done it. At the same Assizes a man was indicted for manslaughter, for stabbing another man in the eye with an umbrella, which led to his death. Upon the evidence of those who saw the affray and of the doctors called for the prosecution no other verdict but one of manslaughter could be given. That man went into the witness box and described that the deceased,

who was a friend of his, was drunk at the time and that in a slight quarrel he stumbled on to the point of the umbrella, which went through his eye to his brain and killed him. That man was acquitted, and, in my opinion, rightly acquitted, by the jury. It may be contended that cases of acquittal such as this may be wrong, but that does not touch my point; they demonstrate the absolute necessity of allowing the accused to give evidence.

I must now say a word or two upon the other part of the Bill to which I take exception; but I am free to admit that this is not so much a matter of principle with me as is the topic on which I have addressed your Lordships. I refer to the tribunal for the consideration of the severity of sentences. I am aware that in the year 1892 a resolution was passed by the then judges of the Queens' Bench in favour of there being such a tribunal. The circumstances were very peculiar. At that time there were certain excessive sentences which very much troubled the Home Secretary. That is all that need be said about them; but it must be remembered that every one who has had the courage to propose this has always given a free hand to the tribunal as to how the sentence was to be dealt with, and I think it would be a lamentable thing that men should be allowed to appeal on the ground of severity of sentence without the possibility of the Court of Appeal increasing the sentence. Again the position has been changed. The judges of the High Court now work upon a memorandum to which we are all agreed, and during the last eight or ten years no one can say that High Court sentences have erred on the side of severity. I have a very strong feeling that, if there is to be reduction in the severity of a sentence, which is, after all, part of the prerogative of mercy, it would be better that it should be brought about by an administrative act of the Home Secretary than by a Court of Appeal. The Court of Appeal can only deal with the case. The Home Secretary may properly have on such a matter put before him statements having no direct relevance to the particular case. But that is not all. I would take your Lordships' minds back to what happens in a Court of assize. On a person being convicted the judge asks the police to give

the fullest information with respect to the prisoner, his antecedents, and his recent mode of life. I believe it to be quite impossible to reproduce in a Court of Appeal what I may call the atmosphere of that Court. If it should be thought desirable, let the Home Secretary have increased facilities for consulting the judges of the K: .g's Bench Division. I shall not say one single word against that, but I do seriously say that this is a matter which scarcely merits or renders necessary the proposed amendment of the law.

The case must be made out for these changes. I am sure that my noble and learned friend on the Woolsack will not suggest that your Lordships ought to make this great change in the law merely on his ipse dixit or on the statement that it is the Bill of His Majesty's Government. It is on - a compliment to my noble and learned friend to say that his lot has fallen in pleasanter places than in the criminal Courts, but I support myself by what I know to be the opinion of my noble and learned friend Lord Halsbury, than whom there is no one in this country whose opinion on a matter of criminal law is entitled to greater weight. The views I have expressed are entertained by all my brethren in the King's Bench, who daily throughout the whole course of the year administer the criminal law, and your Lordships know from the public press that they are the views largely shared by recorders, who have a very large share in the administration of the criminal law and are very learned and experienced men, and also by chairmen of quarter sessions, many of whom have had long practical experience of this question.

The certainty, the expedition, and, above all, the justice of our criminal procedure has been the admiration of jurists of all civilized nations; but the bedrock and foundation of that system is the recognized duty of the prosecutor to make out his case upon the facts so as to satisfy a jury, and that from the verdict of that jury there is no appeal on questions of fact. This Bill undermines that principle. In my opinion it will lead juries in cases of doubt to shelter themselves under the authority of a Court of Appeal, and that will involve the greatest danger to an innocent person which no safeguard in the Bill can diminish. I

feel as certain as I stand here that it will create a very great danger to him, against which no Court of Appeal that does not have the witnesses before it can protect him. I have endeavoured, feebly I know, but still from conviction, to put this view before your Lordships. I speak with some experience of the administration of the criminal law and with six years' experience as Chief Justice, and I say, make this change if you will, but make it only with full knowledge of the issues involved; and I hope it will not be made unless the arguments I have put before your Lordships are answered to your Lordships' satisfaction."

We gladly record the well chosen words of Chief Justice Falconbridge in reference to the late Mr. Justice Street at the opening of his Court after vacation. The Bar of Ontario will re-echo all that has been so well said of this lamented judge.

"Since I last had the honour of sitting as President of this Division, a grievous loss has been sustained by the Court and by the country. We have been bereft of one of the ornaments of the Bench, in the person of my late lamented brother, Street. I use the phrase advisedly, because he had by nature and by cultivation all the qualities necessary to make a good judge. In the first place he was very much in earnest in anything he undertook, whether it was work or play. Then he was patient and courteous, and he never made up his mind until he had heard the whole case. When one adds to this a fine knowledge of law, a good insight into human nature, and both an intense love of abstract right and great capacity for recognizing it, the combination was as rare as it is felicitous. Such and so great was he as judge! But when I come to speak of his characteristics as man and citizen, what shall I say? No one is better able to speak than I, who for more than eighteen years sat beside him on the bench and lived with him in daily affectionate intercourse within and without the walls of this building. He was always the same. He seemed to have no moods. He had not, as some men are said to have, one face and one temper on one day and another face and another temper on the next day. Always he was the same amiable, gentle,

peace-loving, sincere and truthful man; always the same loyal and active citizen of the State. Like Duncan he 'bore his faculties so meek,' he was 'so clear in his great office,' that his virtues speak for themselves and need no gloss from the mere eloquence

"Cui pudor et justitiæ soror,
"Cui pudor et justitiae soror,
Incorrupta fides nudaque veritas,
Quando ullum inveniet parem."

We are all more or less familiar with the strained relations in religious matters in England between the established church and the non conformists as to denominational education. If a recent decision is upheld by the House of Lords the fire will die out for want of fuel. The subject is thus referred to in a recent issue of the *Law Times*:—

Rarely, we suppose, has a decision of the Court of Appeal had such a surprising and far-reaching effect as that given recently in *Rex* v. *County Council of West Riding of Yorkshire*, by which the majority of that Court, consisting of the Master of the Rolls and Lord Justice Farwell, Lord Justice Moulton dissenting, overruled the decision of the Divisional Court (94 L.T. Rep. 674), and held that the county council, as local education authority, is not bound to pay for denominational religious education in non-provided schools under the Act of 1902. It will thus be seen that the greatest, if not the whole, objection to that statute, which became crystallized in the movement called "passive resistance," if this decision holds good, practically falls to the ground, and the present Bill, recently passed by the House of Commons, that is designed to remove these grievances, will be, to a large extent, superfluous. The position is a curious one, because there is no doubt that the late Government and their opponents, and every education authority throughout the country, and, in fact, everybody except the County Council of the West Riding of Yorkshire, were of opinion that the statute had brought about a state of affairs which the judgment of the Court of Appeal has now declared not to exist.

REVIEW OF CURRENT ENGLISH CASES.

MOTOR CAR—DRIVING AT DANGEROUS SPEED—"HAVING REGARD TO ALL THE CIRCUMSTANCES OF THE CASE"—EVIDENCE—MOTOR CAR ACT, 1903 (3 EDW. VII. c. 36), s. 1, SUB-S. 1.

Elwes v. *Hopkins* (1906) 2 K.B. 1 was a prosecution under the Motor Car Act, 1903, for driving a motor vehicle at a speed dangerous to the public, "having regard to all the circumstances of the case," and the only point in question was whether evidence was admissible on behalf of the defendant as to the traffic which might reasonably be expected on the highway in question, it being objected to by the prosecutor as being merely hypothetical. Lord Alverstone, C.J., and Rigby and Darling, JJ., agreed that the evidence was admissible.

LANDLORD AND TENANT—LEASE OF LICENSED PREMISES—COVENANT BY LESSEE TO CONDUCT PREMISES IN A REGULAR AND PROPER MANNER—UNDERLEASE—OFFENCE BY UNDER LESSEE AGAINST LICENSING LAWS—REFUSAL TO RENEW LICENSE—LIABILITY OF LESSEE FOR ACT OF UNDERLESSEE.

Palethorpe v. *Home Brewery Co.* (1906) 2 K.B. 5 was an action for damages for breach of covenant contained in a lease of licensed premises. The defendants, the lessees, had covenanted with the plaintiff that they would at all times during the term keep and conduct the premises in a regular and proper manner, and would not knowingly or willingly do or suffer any act whereby the license should be forfeited or the renewal thereof refused. The defendants had sublet the premises and the sublessee had committed offences against the licensing laws by reason whereof a renewal of the license was refused. Farwell, J., who tried the action gave judgment for the plaintiff, and on appeal his judgment was affirmed by the Court of Appeal (Williams, Stirling, and Moulton, L.JJ.). *Bryant* v. *Hancock* (1899) A.C. 442 was distinguished on the ground that in the present case there was a distinct and positive covenant by the lessees that they would at all times during the said term conduct the premises in a regular and proper manner in all respects.

LANDLORD AND TENANT—LICENSE TO ASSIGN—COVENANT BY PROPOSED ASSIGNEE TO PAY RENT—"FINE OR SUM OF MONEY IN THE NATURE OF A FINE"—(R.S.O. c. 71, s. 42).

Waite v. *Jennings* (1906) 2 K.B. 11, although a decision under the English Conveyancing Act, 1892, incidentally furnishes light on the meaning of the Settled Estates Act, R.S.O. c. 71, s. 42. The facts were simple; a lease contained a condition that the lessee should not assign without license. The lessee applied to the lessor for leave to assign, and the lessor stipulated as a condition of granting the license that the proposed assignee should covenant to pay the rent and perform the covenants of the lease during the residue of the term. The license was accordingly granted by deed to which the proposed assignee was a party and entered into the required covenant. He afterwards assigned with the license of the lessor. The second assignee having neglected to pay the rent the present action was brought by the lessor against the first assignee on his covenant. The Conveyancing Act, 1892, s. 3, provides that in the absence of any stipulation to the contrary in a lease, no fine is to be payable for a license to assign; and by s. 9, a fine is declared to include any payment, consideration or benefit in the nature of a fine; and it was contended on the part of the defendant that the stipulation imposed that the first assignee should enter into a covenant was in the nature of a fine and therefore illegal. Darling, J., at the trial gave judgment for the plaintiff, and the Court of Appeal (Williams, Stirling, and Moulton, L.JJ.) held that even if the covenant was in the nature of a fine, the statute did not make it illegal, and therefore the statute afforded no defence; but Williams and Stirling, JJ., were of opinion that a covenant which secures no sum of money to the lessor beyond the rent to which he is entitled under the lease cannot be deemed "a fine" within the meaning of the Act, but from this Moulton, L.J., dissented.

LANDLORD AND TENANT—COVENANT TO PAY "OUTGOINGS AND IMPOSITIONS"—FACTORY ACT, 1901 (1 EDW. VII. c. 22), s. 101—STRUCTURAL ALTERATIONS REQUIRED BY MUNICIPAL AUTHORITY.

Stuckey v. *Hooke* (1906) 2 K.B. 20 was also a case of landlord against tenant. In this case the action was brought on a covenant by the lessee and his assigns to pay and discharge all "outgoings and impositions." The premises were used as a bakery and the

municipal authority under the Factory Act, 1901, refused to allow the premises to be used as a bakery except on the performance of certain structural alterations. The Act provides that where such alterations are required to be made and a lessee claims that a portion of the expense should be borne by his lessor, an applictaion may be made to a magistrate to apportion the expense between the lessor and lessee. An application was made and the expense apportioned, and the alterations carried out. The landlords now claimed under the covenant to recover the whole expense from the assignee of the lessee. Warrington, J., who tried the action gave judgment for the plaintiff's, but the Court of Appeal (Williams, Stirling, and Moulton, L.JJ.) determined that the decision of the magistrate as to the apportionment of the expenses was conclusive and that there was no jurisdiction to entertain the action.

PRACTICE—GARNISHEE ORDER—ORDER TO PAY OVER—DISCRETION OF COURT—GARNISHEE LIABLE TO PAY A SECOND TIME.

In *Martin* v. *Nadel* (1906), 2 K.B. 26, the Court of Appeal (Williams, Stirling, and Moulton, L.JJ.), overruling Sutton, J., hold that where payment under a garnishee order would not operate as a discharge of the garnishee's liability to the judgment debtor, the order to pay, in the exercise of judicial discretion, ought not to be made. The garnishee in the present case was a foreign bank which had an agency in England. The debt sought to be attached was a balance due by the garnishee to the debtor in respect of a sum of money paid by him into the garnishee's bank in Germany. The Court of Appeal held that payment under a garnishee in England would not discharge the garnishee from liability to an action for the money in Germany, and therefore the order to pay over ought not to be made.

CRIMINAL LAW—ATTEMPT TO DISCHARGE LOADED PISTOL—EVIDENCE FOR THE JURY—OFFENCES AGAINST THE PERSON—(CR. CODE, SS. 64, 232).

King v. *Linneker* (1906) 2 K.B. 99 was a prosecution for presenting a loaded pistol at the prosecutor with intent to do him grievous bodily harm. Evidence was given that during an interview between the prosecutor and the prisoner, the prisoner drew a loaded revolver from his pocket, that the prosecutor immediately seized the prisoner and prevented him from raising

his arm, that a struggle ensued in which the prisoner nearly succeeded in freeing his arm, and that during the struggle he said several times to the prosecutor, "You've got to die." The prosecutor eventually overpowered the prisoner and he was taken into custody. On a case stated by the judge at the trial the Court for Crown Cases reserved (Lord Alverstone, C.J., Kennedy, Ridley, Darling, and Watson, JJ.), held that this constituted evidence of an attempt to commit an offence on which the prisoner might properly be convicted.

JURISDICTION—ARBITRATION CLAUSE IN STATUTE—APPEAL.

In *Norwich* v. *Norwich Electric Tramways Co* (1906) 2 K.B. 119 the Court of Appeal (Williams, Stirling, and Moulton, L.JJ.) held that where a statute provided that arbitration is to be resorted to for the purpose of settling any question in dispute, that that excludes the jurisdiction of the High Court, and that the objection to the want of jurisdiction may be successfully taken for the first time on an appeal to the Court of Appeal.

RAILWAY COMPANY—CONTRACT TO BUILD STATION—ULTRA VIRES—SPECIFIC PERFORMANCE—DAMAGES—STATUTORY OBLIGATION—SUBSEQUENT CONTRACT IN DEROGATION OF SAME.

In *Corbett* v. *South-Eastern, etc., Ry.* (1906) 2 Ch. 12, the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.) have reversed the decision of Farwell, J., (1905) 2 Ch. 280 (noted ante, vol. 41, p. 834). The action was for specific performance of a contract made by a railway company in the following circumstances. In 1887 the Bexley Heath Ry. Co. obtained a special act of incorporation which for the protection of one Barron required the company to build and maintain a station for passengers and goods at Well Hall, close to Barron's property, and the station was duly erected. In 1900 the Bexley Heath Ry. undertaking was by Act of Parliament vested in the defendant company which in ignorance of the Act of 1887 entered into the contract in question whereby they agreed with the plaintiff to pull down the Well Hall station and erect another in lieu thereof near the plaintiff's property. The consent of Barron to this could not be maintained and Farwell, J., held that the contract could not be specifically enforced, but that it was intra vires and the plaintiff was entitled to damages. The Court of Appeal, on the other hand, hold that a contract in

derogation of the statutory obligation of the company to maintain a station as Well Hall was ultra vires and therefore that the action failed, and that it made no difference that the statutory obligation was imposed for the protection of a private owner and not for the benefit of the general public. Romer, L.J., however, dissented and agreed with Farwell, J.

DAMAGES—SUBSIDENCE—MEASURE OF DAMAGES—RISK OF FUTURE SUBSIDENCE—REMOTENESS.

Tunnicliffe v. *West Leigh Colliery Co.* (1906) 2 Ch. 22 was an action to recover damages by the surface owner for subsidence owing to the working of minerals under an adjoining property, in which the question arose whether in assessing the damages anything should be allowed on account of the depreciation in the value of the property owing to the risk of future subsidence. Eady, J., who tried the action decided that point in the negative (1905) 2 Ch. 390 (noted ante, p. 101), but the Court of Appeal (Collins, M.R., Romer, and Cozens-Hardy, L.JJ.) have held that he was wrong and that such damages may be allowed, but Romer, L.J., dissented. *Rust* v. *Victoria Graving Dock* (1887) 36 Ch. 113, on which the defendants relied, was distinguished by the majority of the Court on the ground that the possible depreciation there apprehended was not due to the injury complained of; but Romer, L.J., thought that the principle on which that case was decided applied to the present case.

EXPROPRIATION OF LAND—RIGHT OF VENDORS TO REQUIRE EXPROPRIATORS TO TAKE A CONVEYANCE.

In re Cary-Elives (1906) 2 Ch. 143. A public body had in pursuance of statutory powers given notice to treat for the purpose of expropriating certain land and certain easements over other lands which were subject to a settlement. The purchase money had been fixed and paid into Court by the expropriators who took possession of the land, but refused to take a conveyance on the ground of expense. An application was made under the Vendors & Purchasers Act to compel them to do so. And Eady, J., held that both under the ordinary law of specific performance and under the Finance Act, 1895, s. 12, the expropriators were bound to take a conveyance which in case of difference must be settled by the Court.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [April 23.

WALLACE *v.* TAMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION.

Contract—Supply of railway material—Payment—Certificate of railway commissioner's engineer—Condition precedent—Interference by commission with engineer—Fraud—Hindering performance of condition—Monthly estimates—Finality.

The plaintiff supplied the defendants with railway ties under a written contract, which provided that 90 per cent. of the value of the ties delivered and accepted was to be paid monthly on the written certificate of the engineer, which was to be a condition precedent to the right of the plaintiff to be paid the 90 per cent., or any part thereof; the remaining 10 per cent. to be retained until the final completion of the whole work to the satisfaction of the engineer, whereupon the engineer was to give the final certificate accordingly, and such 10 per cent., or the balance payable under the contract, was to be paid within 40 days after the granting of such final certificate, which was also to be a condition precedent to the right of the plaintiff to be paid the 10 per cent., or any part thereof; and it was declared that the word "engineer" should mean the chief engineer for the time being appointed by the defendants having control of the work of construction of the defendants' line of railway.

Held, that under this contract the certificate was in the nature of a condition precedent, and, while the plaintiff might be said to have agreed to the risk of the natural bias created by the situation, he was entitled to have at the hands of the engineer, the defendants' servant, good faith, and the expression of his own honest opinion. The employer has the right to direct the attention of the certifying official, before he certifies, to alleged defects of performance, and to ask for care and diligence in the discharge of his duty, but he has no right to dictate or impose his own opinion; and any attempt by the employer to do so, espe-

cially if yielded to by the servant, is in the nature of a fraud, or is at all events evidence of fraud which will, if established, relieve the plaintiff from the necessity of obtaining the certificate—no one can take advantage of the non-fulfilment of a condition the performance of which he has himself hindered.

And *held*, in the circumstances of this case, that there was evidence for the jury that the defendants had prevented their engineer from certifying; and a nonsuit was set aside and a new trial directed.

Semble, that the monthly estimates certified to by the engineer under the contract were final as to the quantities mentioned in them.

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

Hellmuth, K.C., and *Geary*, for plaintiff, appellant. *Tilley*, for defendants, respondents.

Full Court.] [April 23.

RE PAKENHAM PORK PACKING CO.

GALLOWAY'S CASE.

RODMAN'S CASE.

HIGGINBOTHAM'S CASE.

Company—Winding-up — Contributories — Preference shares—Common shares—By-law—Directors—Allotment of shares—Delegation—Terms—Ratification—Acceptance—Estoppel.

The shareholders of the company passed a resolution in favour of the creation of preference stock, with a direction to the directors to pass a by-law, which the directors failed to do.

Held, that s. 22 of the Ontario Companies Act not having been complied with, there was no valid creation of preference stock, and G, a person who had signed an application for 16 shares of preference stock, could not be held liable as a contributory in respect of these shares, there being no acquiescence, delay, or conduct on his part to estop him from alleging and shewing that, at the time when he made his application and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied.

G. also applied in writing for 8 shares of the common stock, and undertook to accept the same or any less amount, paying therefor $60 per share according to the terms named in the prospectus. But, in lieu of those terms, it was arranged between G.

and an agent of the company that he should give a promissory note at twelve months for the whole amount, which was done. The application was never brought before or dealt with by the directors, but the secretary notified G. that the directors had allotted him the shares in accordance with his application. They had not, however, passed a by-law or otherwise ordained, as required by s. 26; they had merely passed a resolution that "the secretary be instructed to allot all stock as applications are passed in."

Held, that the directors could not delegate their duty to a subordinate officer, and there never was any valid acceptance of G's application, and he was, therefore, not liable as a contributory in respect of the 8 shares.

Held, also, upon the evidence, that, at the time of G's application, the company held no shares of the common stock which they could validly allot to him.

In the case of R, another person charged as a contributory,

Held, that it was covered by the decision in G's case, the additional circumstances set out in the report making no difference.

In the case of H, another person charged as a contributory, the allotment of shares was professed to be made by the secretary, and the notice thereof was given in the same manner and under the same circumstances and authority as in the other cases. But at the time of H's application there were shares of the common stock which could have been allotted. H gave his promissory note for the price of the shares for which he applied, and afterwards made payments thereon, and he attended meetings of shareholders and moved resolutions thereat. He had no notice, however, until after the liquidation, of any irregularities in the creation of the preference stock, and was not aware of the irregularities in connection with the allotment of shares.

Held, that as there was no contract in fact, both by reason of there being no preferred stock in existence and the want of allotment, making payments in ignorance of these facts was not a conclusive act, and the attendance and conduct at the meetings was not such an active participation in the affairs and business as to debar any question as to the status of an alleged shareholder. If there was any holding of himself out as a shareholder by H, it was not under circumstances which could affect creditors or create any change of position to their prejudice.

Orders of Anglin, J., affirmed.

Douglas, K.C., and *McWhinney*, for liquidator, appellant. *McLaughlin*, K.C., and *Moorhead*, for respondents.

Full Court.] REX *v.* WILKES. [May 20.

Criminal law—Necessaries for wife—Omission of husband to provide—Same provided by others—Injury to health.

Under s. 210, sub-s. (2) of Criminal Code which deals with the non-support of a wife by a husband when a legal duty exists on the husband's part to provide necessaries for his wife, the criminal responsibility for the omission to do so only arises when it is proved either that her death has been caused or her life endangered, or her health is permanently injured or likely to be by such omission.

where therefore the husband was convicted on the charge of having unlawfully omitted, without lawful excuse, to supply his wife and child with the necessaries of life, whereby the health of each of them became and was and is likely to become permanently injured, and the evidence shewed that the wife and child were living with the wife's mother, who supplied all her needs,

Held, that the charge was not sustained, and the conviction was quashed.

Counsell, for prisoner. *G. S. Kerr,* for private prosecutor.

Full Court.] [June 29.

CLARKE *v.* LONDON STREET RAILWAY CO.

Damages—Negligence—Married woman—Personal injury to—Damages awarded husband—Excessive amount.

The female plaintiff, 62 years of age, wife of the male plaintiff, who was 70 years of age, in attempting to alight from one of the defendants' cars, was, through the defendants' negligence thrown to the ground, and seriously injured, her right arm being broken, etc. She suffered great pain and was in the doctor's hands for several months, while her arm and hand were not likely to be as useful to her as before the accident. The jury awarded the wife $1,000, and the husband $1,200. On appeal to the Court of Appeal,

Held, that the amount awarded the wife could not be deemed to be unreasonable, and was therefore affirmed, but, as regarded the husband, after the due allowance for the medical expenses and for nursing and attendance and considering the age of the parties, the amount awarded him was excessive, and there would have to be a new assessment, unless he agreed the damages should be reduced to $400.

Hellmuth, K.C., for appellants. *Faulds,* for respondents.

HIGH COURT OF JUSTICE.

Divisional Court, Ex.] [April 2.

MORRISON *v.* CITY OF TORONTO.

Way—Non-repair—Hole in sidewalk—Negligence of municipal corporation—Notice of accident—Omission to give—Reasonable excuse—Absence of prejudice.

On one of the streets of a city there was a hole in the sidewalk about twenty feet long, caused by the stone flags having fallen in, the bottom being covered with broken stones, iron and other debris, while along the side of the curb, bricks to the height of eight feet had been piled, at one end of which a lamp had been placed; but the place where the cavity was, was in total darkness. The plaintiff, who was not very familiar with the city was walking along the street when he fell into the hole and was so seriously injured that he had to be taken to the hospital, where he remained for over three weeks, two of which he was obliged to remain in bed, and was not in a fit state to give to the city the notice of the accident within the seven days prescribed by the Municipal Act; but it appeared that the city was not prejudiced thereby.

Held, that the street was out of repair, so as to render the city liable to the plaintiff; and, that, under the circumstances, the plaintiff was relieved from the necessity of giving the notice.

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

Anglin, J.] CONNOLLY *v.* CONNOR. [June 18.

Evidence—Master's office—Reference to take partnership accounts—Defendant out of jurisdiction—Preliminary examination of—Discretion of master—Commission—Appointment of Master as commissioner.

The discretion vested in the Master by Con. Rules 668-669 as to preliminary examinations in taking accounts is very wide, and where, in the proper exercise of his discretion an examination of a party is directed it will not be interfered with; but he has no power to require the attendance within the jurisdiction of a defendant residing thereout, or to issue a commission naming himself as commissioner; but as it appeared in this case that it

would be in the interests of justice that the examination should be held before the Master personally, the Court directed a commission to issue for such examination, naming him as the commissioner to take the examination.

Beament, for defendant. *Glyn Osler*, for plaintiff.

Magee, J.] RE MANUEL ESTATE. [June 18.

Will—Construction—Bequest to widow—"Dower of one-third of my estate"—Meaning of.

A testator after directing payment of his debts, funeral and testamentary expenses, directed the executors to sell the whole of his real and personal estate (excepting certain household goods reversed for his wife) turning the same into money, and after the payment of his said debts, etc., and "My wife receives her dower of one-third of my estate," he gave to his wife the whole of the interest of his estate as long as she lived "that is the interest on the balance of my estate after she receives her dower;" and upon his wife's decease he gave two thirds of the balance of his estate to his sons, and the remaining one-third of the balance to his two brothers and a sister to be equally divided among them.

Held, that the word "dower" was not used in its technical sense of a life interest in one-third of the testator's realty; but meant one-third absolutely of his whole estate; so the wife took such one-third absolutely, and a life interest in the remainder.

S. Alfred Jones, Slaght, K.C., and *DuVernet*, for various parties.

Divisional Court.] REX *v.* LAFORGE. [June 21.

Municipal law—Hawkers and peddlers—By-law—Prohibitory effect—Conviction—Amendment.

A conviction made for the infraction of a by-law passed by a town council under sub-s. 14 of s. 583 of the Consol. Mun. Act. 1893, 3 Edw. VII. c. 19(O.), relating to hawkers and peddlers, etc., the violation charged being "by going from place to place with an animal bearing or drawing or otherwise carrying goods, wares or merchandise for sale without a license therefor," it not stating that he did so as a hawker, etc., and also did not negative

the exceptions that the sale was to a retail trader, or of goods manufactured in this province by the defendant or his employer, but as the evidence to negative the exemption, it was disclosed such to be the case, the conviction was amended by supplying these defects, and a motion to quash the conviction by reason of the said omissions was dismissed. The conviction was also objected to on the ground that the by-law though professedly passed for licensing and regulating, was in reality passed at the instance of the retail merchants of the town, who had the license fees made so high as to be in fact prohibitive.

Held, that as the Court were not trying the defendant, or hearing an appeal from the conviction, and this not being a motion to quash the by-law, and there being evidence, though slight, upon which the magistrate might find against there being any such prohibition, a motion to quash the conviction on this ground was also dismissed.

Section 376 of the by-law fixed the license fees at $20, $5 and $4, contingent respectively on the use of a horse or cart by the hawker, etc., or his travelling on foot, with or without a push cart, etc. This by-law was amended by by-law 779, which struck out the words $20, $5 and $4, and substituted therefor $75, $50 and $50. This last named by-law was repealed by by-law 821, and the first named by-law amended by striking out the words $20, $5 and $4, and substituting therefor $75, $50 and $50. Then by by-law 855 this last named by-law was amended; but not in so far as regarded the last named amendment, and in other respects was confirmed. It was objected that no penalty was provided in the by-law 821, which repealed by-law 779, as did not in its terms restore to s. 376 the words $20, $5 and $4; but merely directed the substitution of the words $75, $50 and $50 for such words as if they had been restored.

Held, that the objection must be over-ruled, for that the rule, under sub-s. 46 of s. 8 of the Interpretation Act, which restricts the effect of repeal of a repealing act, had no application to by-laws and therefore the repeal of the said by-law 779 restored s. 374 to its original condition, and by by-law 821 the purpose intended was effected.

Proudfoot, K.C., for defendant. *J. E. Jones*, for informant.

Mabee, J.] RIDEAU CLUB AND OTTAWA. [June 22.

Assessment—Business assessment—Club.

Section 10 of 4 Edw. VII. c. 23(O), provides that, irrespec-

tive of any assessment of land under the Act, every person using or occupying land in the municipality for the purpose of any business mentioned or described in this section should be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by him as follows:—Sub-s. F. "Every person carrying on the business of what is known as a club, in which meals or spirituous or fermented liquors are sold or furnished for a sum equal to fifty per cent. of the assessed value. The Rideau Club was incorporated by 59 Vict. c. 129(O), for social purposes, the persons therein named together with such others as should thereafter become members being made a body corporate and politic, with power to purchase real estate for the purposes of the club, and to make rules, etc. There was no capital stock, nor anything to declare dividends upon, and it was stated that none had ever been paid, nor was it intended that there should be any division of the earnings. No member had a proprietory interest in the club that he could sell or assign, while in the event of death nothing passed to his representatives. The club was maintained by the entrance fees and annual subscriptions. Meals and liquors were furnished to members and their guests, there being an annual loss in connection with the dining-room, while the price charged for liquors was only intended to cover cost and breakage.

Held, that the club was properly assessed for business tax under s. 10 of the Assessment Act.

Travers Lewis, for plaintiffs. *Taylor McVeity*, for defendants.

Mabee, J.] CORBETT *v.* CORBETT. [June 22.

Improvements—Made after demand of possession—Mistake of title—Delay in bringing action—Lien—Reference.

The defendant and a life tenant of certain lands lived together thereon, the defendant bona fide believing that the land was, or would be hers on the life tenant's death. After the life tenant's death, the defendant continued living on the land and made improvements thereon. About a year and a half after the life tenant's death the defendant was served with a notice demanding possession, such notice stating that unless such possession was given within a reasonable time a writ would be issued; but no action was taken upon it, and the defendant, who was an illiterate woman, remained in possession, and, under such be-

lief of title continued to make improvements; and it was not until some seven years afterwards, when another notice had been served in her, that an action was brought to recover possession, the bulk of the improvements having been made during the period between the two notices.

Held, that the defendant was entitled to the value of her improvements and a reference was directed.

Gorman, K.C., and *Russier*, for plaintiff. *G. F. Henderson*, for defendant.

Teetzel, J.] [June 22.

RE HENDERSON AND CANADIAN ORDER OF FORESTERS.

Life insurance—Wife sole beneficiary—Death of wife during insured's lifetime—Absence of further designation—Right of children to insurance money in equal shares.

Where the sole beneficiary designated in a policy, died during the insured's lifetime, and no further designation of the said insurance moneys was made by the insured, the insured's children are, under R.S.O. c. 230, as amended by 4 Edw. VII. c. 15, s. 7 (O), entitled to the insurance moneys in equal shares.

Middleton, Harcourt, and *McKay*, for various parties.

Province of Manitoba.

KING'S BENCH.

Full Court.] GREY v. STEPHENS. [June 25.

Contract—Delay in completion of—Liquidated damages—Provision for written notice of claim for extra time allowance—Effect of ordering extra work after expiration of time for completion.

The plaintiffs' contract required him to complete the carpenter work on a building for defendant by 15th September, 1903, and provided for payment of a penalty of $20 per week for every week that the work remained uncompleted after that date, provided that no just cause prevented such completion.

There was a further stipulation that, if the plaintiff should be obstructed or delayed "in the prosecution or completion" by the act, neglect, delay of default of the owner or the architect, or of any other contractor on the house, the term fixed for completion should be extended for a period equal to the time lost from such cause, provided that "no such allowance shall be made unless a claim therefor is presented in writing to the architect within 36 hours of the occurrence of such delay."

Held, (1) that plaintiff was bound by this last proviso, and was liable for the stipulated penalty, although the delay in completion was entirely owing to causes beyond his control, and a large part of it took place before he commenced his work at all, as he had failed to give any notice in writing to the architect of any claim for extra time allowance. *Jones* v. *St. John's College*, L.R. 6 Q.B.D. 115, followed.

(2) As the trial judge found that, as a matter of fact, the defendant was not responsible for any part of the time lost, and had suffered from the delay damage to the extent of $20 per week, the case did not come within sub-s. (c) of s. 38 of "The King's Bench Act," giving the Court power to relieve against agreements for liquidated damages.

(3) The allowance of $20 per week should be made only from the time named in the contract for completion up to the 19th January, 1904, and not up to the date of the actual completion, because defendant ordered some extra work to be done which was only commenced on the 19th January, and that estopped him from claiming damages for delay beyond that date.

Holme v. *Guppy*, 3 M. & W. 387; *Westwood* v. *Secy. of State for India*, 7 L.T. 736, and *Dodd* v. *Churtan* (1897), 1 Q.B. 562, followed.

Hoskin, for plaintiff. *Minty*, for defendant.

Full Court.] MYERS *v.* MUNRO. [June 25.

Solicitor and client—Taxation—Special agreement as to costs—Stay of proceedings pending taxation—Terms.

The defendants, a firm of solicitors, collected for the plaintiff the amount of his claim and the taxed party and party costs. In settling with the plaintiff the defendants deducted a sum of $115.50 for extra costs as between solicitor and client, of which they sent plaintiff a bill. The plaintiff objected to such deduc-

tion, alleging that the defendants had agreed to charge only the amount of the costs that had been taxed against Green, and sued for payment of the amount so retained by defendants. Defendants then applied to the referee and obtained an order giving them leave to deliver an amended bill of costs as against the plaintiff and referring the same for taxation, directing the taxing officer to tax the costs of the reference and certify what should be found due to or from either party in respect of such amended bill and of the costs of the reference, to be paid according to the event of the taxation, and that all proceedings should be stayed. An appeal by the plaintiff from this order was dismissed by the Chief Justice. The plaintiff then appealed to the Full Court.

Held, that the plaintiff was entitled to have the question as to the existence of the alleged agreement determined by a trial in the ordinary way and that the order was wrong in directing a stay of proceedings. Under Rules 965-967 of the King's Bench Act, and 6 & 7 Vict. c. 73 (Imp.), which is still in force in Manitoba, an order for taxation of a solicitor's bill, obtained on the application of the solicitor, should not contain a clause directing the client to pay the amount found due: *Re Debenhaus and Walker* (1895) 2 Ch. D. 430.

Quære, whether there should have been any order for taxation of defendant's bill before the other questions raised had been decided at the trial: *Re Beale,* 11 Beav. 600. However, as counsel for plaintiff, upon the argument, stated that he was willing to have the quantum of the defendant's bill ascertained by a taxation if the stay of proceedings were removed, it was not deemed necessary to decide that question.

O'Connor, for plaintiff. *C. P. Wilson,* for defendants.

Full Court.] VALENTINUZZI v. LENARDUZZI. [June 25.

Attachment—King's Bench Act, Rule 852—Imp. Stat., 23 & 24 Vict. c. 127, s. 28—Solicitor's right to charge on proceeds of attachment for his costs.

The plaintiff began an action of debt and procured an order for attachment under which a quantity of chattel property was seized and sold by the sheriff who realized therefrom the sum of $350.65 after payment of his fees and expenses. Several parties claimed the chattels or portions of them, but in inter-

pleader proceedings the plainti. got them all barred. The plaintiff got judgment for $2,683 and issued execution. MacArthur, another of the defendant's creditors, also got judgment for $1,858 and issued execution. This was an application by the plaintiff's solicitor for an order declaring him to be entitled to a first charge on the money in the sheriff's hands for the amount of his taxed costs, charges and expenses in the action, and of the interpleader proceedings, as between solicitor and client.

Held, that, under s. 28 of the Solicitor's Act, 23 & 24 Viet. (Imp.), c. 127, the plaintiff's solicitor was entitled to the order applied for, notwithstanding the wording of Rule 852 of the King's Bench Act which provides that "the proceeds of the property and effects attached in the sheriff's hands shall be rateably distributed among such plaintiffs as shall in due course obtain judgment and execution . . . , in proportion to the sums actually due upon each execution."

The two enactments must be read together, and the latter should be so construed as not to deprive a solicitor of the protection given by the former in cases where property has been recovered or preserved through his expenditure of time, labour and money: *Darling* v. *Smith*, 10 P.R. 360, followed.

Held, also, that it was quite immaterial that MacArthur was not a party to the action, as the fund in question had been recovered or preserved for his benefit as well as that of the plaintiff: *Greer* v. *Young*, 24 Ch. D., at p. 549; *Leacock* v. *McLaren*, 9 M.R. 599, and *Emden* v. *Carte*, 19 Ch. D. 311, followed.

RICHARDS, J., dissented, holding that Rule 852 of the King's Bench Act prevents the allowance of any such priority for the plaintiff's costs of the action, but agreeing that the solicitor should have a charge for the costs of the interpleader proceedings which were not included in plaintiff's judgment and were truly salvage costs within the meaning of s. 28 of the Solicitor's Act.

G. A. Elliott, for the applicant. *J. F. Fisher*, for MacArthur.

Full Court.] GORDON *v.* HANDFORD. [June 25.

Statute of Frauds—Oral evidence to establish express trust—Appeal from findings of fact.

Action for a declaration that certain lands standing in defendant's name were held by him in trust for plaintiff and

for an order for a conveyance of the land to the plaintiff. Plaintiff alleged that he had bought and paid for the lands and taken deeds in defendant's name with his knowledge and consent. Defendant positively denied this and claimed that he had himself bought and paid for the lands. The trial judge held that the plaintiff had not satisfied the onus that lay on him to establish a clear case upon the evidence and gave judgment for defendant.

Held, 1. The plaintiff's case was clearly made out, especially in view of the letters written by defendant to plaintiff and upon undisputed facts and circumstances.

2. Notwithstanding s. 7 of the Statute of Frauds, an express verbal trust of land may be proved by oral testimony, whenever a strict reading of the statute would enable the trustee to commit a fraud: *Re Duke of Marlborough* (1894) 2 Ch. 141, and *Rochefoucault* v. *Boustead* (1897) 1 Ch. 196, followed.

3. When the trial judge's decision does not depend upon the credit to be given to conflicting testimony, but rather upon inferences drawn from the document, any evidence and the surrounding facts and circumstances, a Court of Appeal is free to reverse his decision upon questions of fact as well as of law: *McKercher* v. *Sanderson*, 15 S.C.R., at p. 301, and *Creighton* v. *Pacific Coast Lumber Co.*, 12 M.R. 546, followed.

Appeal allowed with costs.

Wilson and *Laird*, for plaintiff. *Aikins*, K.C., and *Robson*, for defendant.

Full Court.] BARLOW v. WILLIAMS. [June 25.

Specific performance—Laches—Time to be the essence of the contract—Possession as excuse for delaying suit—Damages in lieu of specific performance.

By agreement dated July 2, 1897, the plaintiff agreed to purchase from the defendant the lot of land in question in this action for $125, payable $50 Sept. 1, 1897, and the balance June 1, 1898. There was a clause in the agreement stating that time was to be considered of the essence of it and that, unless the payments were punctually made, the vendor should be at liberty to re-sell the land. On 15th September, 1897, the plaintiff paid $125 on account and, about 30th October following, an arrangement was made between the parties whereby the defendant conveyed to the plaintiff the north half of the lot, receiving at the

time a further payment of $50. The plaintiff built and occupied a house on the north half and had and continued to have the use and occupation of the south half. She made default in the payment due June 1st, 1898, but in May or June, 1899, through her solicitor, she offered to pay the balance due if defendant would convey the south half, which he refused to do. In October, 1902, without any notice to the plaintiff, the defendant sold and conveyed the south half to a Mrs. Washington.

This action was commenced in Sept., 1901, for specific performance of the agreement or for damages in lieu thereof, and the trial judge gave the plaintiff a verdict for $300 damages.

Held, 1. The variation of the original agreement by the subsequent transfer of the north half of the lot could not operate as a rescission of the agreement as to the south half.

2. The stipulation that time was to her of the essence of the contract was, under the circumstances, only in the nature of a penalty which a Court of Equity should relieve against, and everything went to shew that it was not the real intention of the parties to carry it out strictly: *In re Dagenham Dock Co.*, L.R. 8 Ch. 1022; *Lowther* v. *Heaver*, 41 Ch. D. 248, and *Hipwell* v. *Knight*, 1 Y. & C. 401, followed.

3. The plaintiff, though she delayed over six years before taking proceedings, yet, being all the time in possession, was not guilty of such laches as to bar the rights: Fry on Specific Performance, s. 1110.

Appeal dismissed with costs.

C. P. Wilson and *J. F. Fisher*, for plaintiff. *Aikins*, K.C., and *A. C. Ferguson*, for defendant.

Full Court.] BLACK *v.* WIEBE. [July 14.

Stay of proceedings—Vexatious proceeding—Abuse of the process of the Court.

This was an action under "The Mechanics' and Wage Earners' Lien Act," to realize the claims of the plaintiff company and other lien holders out of a property owned by the defendant Hirbert. It had proceeded so far that the land was about to be sold unless she paid the sum of $750, found due to the lien holders, of which the plaintiff company's share was $589.

Pending these proceedings, Mrs. Hirbert brought an action against Alexander Black, the president of the plaintiff company, for the redemption of a mortgage on the same property held in trust for the company. The Full Court had held, that she was entitled to redeem, but Black appealed to the Supreme Court of Canada. That appeal was pending at the time this application was made for a stay of proceedings in the mechanics' lien suit, until the result of the appeal should be known.

Mrs. Hirbert was in this position that, if she paid the amount required to discharge the liens and the Supreme Court afterwards denied her right to redeem the mortgage, she would have nothing for the $750 paid out. She was not personally liable for this debt, but her land was charged with it.

Held, on appeal from Perdue, J., who dismissed the application, that Mrs. Hirbert was entitled to the stay of proceedings applied for on the terms fixed as stated below.

The Black Company was in effect a party to both actions and, if the stay was not granted, might get the redemption money in this action, and afterwards the land in the other in case the appeal to the Supreme Court should be successful.

Another reason for granting the stay was that, if the sale proceedings go on, a purchaser could only get a title contingent on the result of the appeal to the Supreme Court, and a sale under such circumstances would either be abortive or be made at much less than the value of the property. The enforcement of a sale in the lien action before the result of the appeal would be a vexatious proceeding, and the Court has inherent power to stay any vexatious proceedings to prevent abuse of its process: *Haggard* v. *Pelicier* (1892) A.C. at p. 67, and *Metropolitan* v. *Pooley*, 10 A.C. 214.

As the other lien holders were not parties to the application, the stay of proceedings was only granted on the terms that counsel for Mrs. Hirbert should undertake to pay the amount fixed for their claims into Court within a month, that they should have a right to take the money out as soon as paid in, and that Mrs. Hirbert should get credit for that amount if she afterwards decided to redeem in the lien action, in which case she should be entitled to deduct her costs of this appeal from the $598, coming to the plaintiff company. Costs of the application to Perdue, J., not allowed.

Coyne, for plaintiff. *Elliott*, for Mrs. Hirbert.

Full Court.] BOYCE *v.* SOAMES. [July 14.

Accord and satisfaction—Return of article purchased—Promise to buy back if purchaser's circumstances should change.

Appeal from verdict of County Court judge in favour of plaintiff in action to recover price of a Tilbury cart manufactured for and delivered to defendant.

After defendant had used the cart for a short time, he went to plaintiff and told him that he was unable to pay his debts, (as was apparently the fact), and offered to return the cart. The plaintiff agreed to this and took the cart. He kept it and repeatedly tried to sell it without referring to the defendant. He continued to so act for about four years without making any claim on defendant for payment.

Plaintiff swore that at the time of returning the cart, defendant said he would re-imburse him when he was able to do so, but on cross-examination he admitted that what defendant promised might have been only to the effect that if, in the future, his circumstances should become such as to justify his keeping horses, he would buy back the cart if still in the plaintiff's hands.

Held, that there was nothing in such promise to remove the presumption of an accord and satisfaction arising out of what had taken place when the cart was taken back, and that the appeal should be allowed with costs.

T. R. Ferguson, for plaintiff. *E. L. Howell*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] [July 31.

GREEN *v.* BRITISH COLUMBIA ELECTRIC RY. CO. AND COOK.

Limitation of action—Private and public Acts, construction of—B.C. Stat. 1896, c. 55, s. 60—R.S.B.C. 1897, c. 58—Public Authorities Protection Act, 1893 (Imperial).

Deceased, a workman employed by defendant Cook on a contract work for the defendant company, was instantly killed by coming in contact with a live wire. The accident occurred Au-

gust 6, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued July 15, 1905. Defendant company set up, as a bar to the action as against them, section 60 of their Act of incorporation, which limits the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway or works or operations of the company.

Held, on appeal (affirming the decision of Morrison, J.), that Lord Campbell's Act is a special Act; creating a special cause of action, and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act passed for the benefit of a private corporation.

Effect of the Public Authorities Protection Act, 1893 (Imperial), considered.

L. G. McPhillips, K.C., and *Martin*, K.C., for defendants (appellants). *Macdonell* and *McHarg*, for plaintiffs (respondents).

United States Decisions.

The right of a bonâ fide holder of a promissory note to fill in a blank left for an amount with the sum stated in the margin is sustained in *Chestnut* v. *Chestnut* (Va.) 2 L.R.A. (N.S.) 879, unless the blank was left by mistake.

Members of a combination to prevent the sale of a manufacturer's product are held, in *Purington* v. *Hinchliff* (Ill.) 2 L.R.A. (N.S.) 824, to be liable in damages.

A presumption of negligence on the part of a street car company is held, in *Chicago Union Traction Co.* v. *Mee* (Ill.) 2 L.R.A. (N.S.) 725, not to arise from injury to a person through collision of the car with a waggon on the street.

A provision in a railroad ticket that, in case of dispute between passenger and conductor, the passenger must pay his fare and apply to the company for redress, is held, in *Cherry* v. *Chicago & A. R. Co.* (Mo.) 2 L.R.A. (N.S.) 695, to be unreasonable, and not binding on the passenger.

Mental distress and bereavement of the father are held, in *Kelley* v. *Ohio River R. Co.* (W. Va.) 2 L.R.A. (N.S.) 898, to be an element of damages in an action in his behalf for the death of his son.

A passenger's relation to the carrier is held, in *Glenn* v. *Lake Erie & W. R. Co.* (Ind.) 2 L.R.A. (N.S.) 872, to have terminated, where, upon reaching his destination, he voluntarily loitered in the station house in quest of pleasure.

A note to this case reviews the other authorities on termination of passenger's relation as such upon reaching destination.

One maintaining a passenger elevator for use of tenants and their customers is held, in *Edwards* v. *Manufacturer's Building Co.* (R.I.) 2 L.R.A. (N.S.) 744, not to be a common carrier, but only bound to exercise reasonable care. The question of liability for injury to elevator passenger is considered in a note to this case.

The legal obligation of a father to support his minor children is held, in *Spencer* v. *Spencer* (Minn.) 2 L.R.A. (N.S.) 851, not to be impaired by a decree of divorce giving the custody of the children to the mother.

One furnishing a messenger for hire is held, in *Haskell* v. *Boston Dist. Messenger Co.* (Mass.) 2 L.R.A. (N.S.) 1091, not to be liable, in the absence of negligence, for loss, through dishonesty of the messenger, of property intrusted to him by a patron.

JUDICIAL APPOINTMENTS—QUEBEC.

OTTAWA, 31st August, 1906.

LOUIS PHILIPPE DEMERS, of the City of Montreal, in the Province of Quebec, Esquire: to be a Puisné Judge of the Superior Court for the Province of Quebec, in the room and stead of the Honourable Mr. Justice Lemieux, transferred to the Judicial District of Quebec.

The Honourable JOHN CHARLES MCCORKILL, of Sweetsburg, in the Province of Quebec, advocate: to be a Puisné Judge of the Superior Court for the Province of Quebec, in the room and stead of the late Honourable Mr. Justice Andrews, deceased.

PIERRE EUGÈNE LAFONTAINE, of the City of Montreal, in the Province of Quebec, Esquire: to be a Pusiné Judge of the Superior Court for the Province of Quebec, in the room and stead of the Honourable Mr. Justice Lavergne, who has been appointed a Puisné Judge of the Court of King's Bench for the said Province.